

BRB No. 92-1676

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| MADELYN R. WETHERBEE |) | |
| (Widow of LEONARD F. WETHERBEE) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| BATH IRON WORKS CORPORATION |) | |
| |) | DATE ISSUED: |
| and |) | |
| |) | |
| AMERICAN MUTUAL INSURANCE |) | |
| COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Stephen D. Bither (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (91-LHC-1852) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Leonard F. Wetherbee (decedent) was exposed to asbestos while working as an electrician at employer's shipyard between 1933 and 1952. On May 9, 1983, decedent was diagnosed with malignant mesothelioma which was determined to be a significant condition contributing to his death on June 27, 1983. Shortly thereafter, decedent's widow (claimant), as well as claimant and decedent's daughter allegedly contacted employer by telephone to inform employer of decedent's death due to mesothelioma. The parties stipulated that claimant gave employer written notice of her husband's death on or about May 3, 1990, and that claimant filed a claim for death benefits on or about May 30, 1990.

The administrative law judge initially determined that decedent's malignant mesothelioma resulted from his exposure to and inhalation of asbestos dust and fibers while working at employer's shipyard from 1933 to 1952. The administrative law judge, however, found that claimant's failure to give timely written notice of decedent's death was not excused pursuant to Section 12(d)(1), (d)(2) or (d)(3)(ii) of the Act, 33 U.S.C. §912(d)(1), (2), (3)(ii)(1988). Additionally, the administrative law judge found that claimant became aware of the relationship between decedent's malignant mesothelioma, his death and his employment on June 27, 1983. As claimant did not file a claim for benefits within two years of this date, the administrative law judge concluded that the claim is barred pursuant to Section 13(b) of the Act, 33 U.S.C. §913(b)(1988). The administrative law judge determined that the statute of limitations was not tolled pursuant to Section 30(f), 33 U.S.C. §930(f), inasmuch as employer did not acquire knowledge of decedent's death sufficient to require it to file a Section 30(a) report until on or around July 9, 1990. 33 U.S.C. §930(a). Consequently, the administrative law judge denied the claim for benefits.

On appeal, claimant contends that the administrative law judge erred in finding that her failure to give timely written notice pursuant to Section 12(a) is excused pursuant to Section 12(d). Employer responds, urging affirmance. The scope of the Board's review authority necessarily requires a party challenging the decision below to address the decision and demonstrate why substantial evidence does not support the result reached. *Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988). We note that claimant's Petition for Review and brief fails to either address or identify any error committed by the administrative law judge in determining that the claim for death benefits is untimely under Section 13. Inasmuch as claimant has not demonstrated that substantial evidence does not support the administrative law judge's finding that the claim is barred under Section 13, we must affirm that determination. *See generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990). In view of our disposition of this issue, we need not address claimant's arguments relating to Section 12.¹

¹We note that claimant's argument made with respect to Section 12(d)(1), that the testimony of claimant and her daughter, Cheryl Maisch, clearly demonstrates that employer had actual knowledge of decedent's work-related death in a timely fashion, may be relevant to the administrative law judge's determination under Section 13, through the application of Section 30(f). If, as claimant contends, employer had knowledge of decedent's work-related death in 1983, the two-year limitation for filing imposed by Section 13(b)(2) would have been tolled under Section 30(f) until on or about July 23, 1990, when employer filed its first report of injury. *See generally Keatts v. Horne Bros.*,

Inc., 14 BRBS 605 (1982). The administrative law judge, however, permissibly rejected the testimony of claimant and her daughter regarding these alleged telephone calls. Specifically, the administrative law judge found that claimant's testimony regarding her telephone call was not credible because her statements were self-serving and uncorroborated by any contemporaneous documentation. Additionally, the administrative law judge determined that the testimony of Mrs. Maisch was unacceptable as a basis for imputing knowledge to employer because that conversation was actually "a general conversation" about class action asbestos litigation, and thus, failed to provide employer sufficient knowledge of the decedent's death due to a work-related occupational disease. *Noack v. Zidell Explorations*, 17 BRBS 36 (1985). Inasmuch as an administrative law judge may accept or reject all or any part of any testimony according to his judgment, and the administrative law judge's credibility determinations in the instant case are not inherently incredible or patently unreasonable, we affirm the administrative law judge's finding that employer did not have knowledge of decedent's work-related death prior to the time employer received written notice of the death in May 1990. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge