

BRB No. 04-0470

MARY R. GAZZOLA (widow of PAUL)
B. GAZZOLA))
)
Claimant-Petitioner)
)
v.)
)
ELECTRIC BOAT CORPORATION) DATE ISSUED: 12/23/04
)
and)
)
ACE USA)
)
Employer/Carrier-)
Respondents) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Michael J. McAuliffe (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-0473) of Administrative Law Judge Lee J. Romero, Jr., 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer as an outside electrician for a period of five weeks from March 27 through May 4, 1962. Cl. Ex. 1. In early 2000, decedent began having breathing problems, and in July 2000, he was diagnosed with a large left pleural effusion. Cl. Ex. 2. By September 2000, decedent's doctors confirmed he had mesothelioma. Cl. Ex. 6. Decedent died on November 14, 2000, with cirrhosis of the liver identified on the death certificate as the cause of death, and mesothelioma and pleural effusion listed as significant contributing factors. Cl. Ex. 18. Claimant, decedent's wife, brought this claim for death benefits. 33 U.S.C. §909.

The administrative law judge found, pursuant to the doctors' reports, that decedent died from complications of malignant mesothelioma. Decision and Order at 16. Nevertheless, he denied claimant's claim for benefits because he found that she failed to establish a *prima facie* case relating decedent's death to his employment with employer. Specifically, the administrative law judge found that claimant failed to establish that working conditions existed that could have caused decedent's mesothelioma. Decision and Order at 12-16. The administrative law judge relied on the following facts: a) claimant did not testify as to decedent's exposure to asbestos during his employment with employer; b) decedent, in his October 2000 deposition, did not mention employer as one of his former employers; c) depositions from other employees did not establish that decedent was exposed to asbestos during his employment with employer; and, d) none of the doctors' reports identified any particular source of asbestos exposure as the probable cause of decedent's disease. *Id.* Claimant appeals the denial of benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that she failed to establish working conditions that could have caused decedent's mesothelioma. In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that the decedent sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see, e.g., Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, there is no dispute that decedent sustained a harm: he died as a result of complications from mesothelioma. To establish the compensability of her claim, however, claimant must establish that working conditions existed which could have caused decedent's mesothelioma. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Bartelle v. McLean Trucking Co.*, 687 F.2d 34,

15 BRBS 1(CRT) (4th Cir. 1982); *Bolden*, 30 BRBS 71; *Jones v. J. F. Shea Co., Inc.*, 14 BRBS 207, 210-211 (1981). In order to meet her burden here, claimant must establish that decedent was exposed to asbestos during his 1962 employment with employer.

Substantial evidence supports the administrative law judge's findings that claimant did not meet this burden. Claimant did not testify about any exposure to asbestos decedent may have incurred while working for employer, Tr. at 18-19, and decedent did not identify employer as either a former employer or as a potential source of asbestos exposure in his October 2000 deposition, Emp. Ex. 1.¹ Claimant contends the administrative law judge erred by not accepting the deposition testimony of two of employer's former employees regarding their exposure to asbestos at employer's facility as evidence of decedent's working conditions.

Claimant presented the depositions of Mr. DeCosta, dated March 3, 2003, and Mr. Cullen, dated September 9, 1993,² as evidence of the working conditions faced by other outside electricians at employer's facility, and thus, she contends, the conditions under which decedent worked. Mr. DeCosta worked for employer as an outside electrician from January to July 1957, January 1965 to September 1967, and May 1971 to September 1998. Cl. Ex. 22 at 4. He testified that he worked on ships with other trades, that he was exposed to asbestos, and that sometimes he was covered with it so thoroughly that he needed to have it blown off of him. He also testified that the duties of an outside electrician and the procedures he followed were the same during all three of his tours of duty. Mr. DeCosta stated that he did not work for employer at the same time as decedent and that he did not know decedent or his family. Cl. Ex. 22 at 7-8, 10-14, 21-23. Mr. Cullen worked for employer as an outside electrician from 1956 to 1963. He testified that he worked near ladders and that he was exposed to asbestos at employer's facility. Cl. Ex. 21 at 9-11. Mr. Cullen worked for employer in other capacities until he retired in

¹Decedent's deposition was taken on October 10, 2000, to preserve evidence for his compensation claim against the state of Connecticut. Neither Electric Boat nor shipbuilding work was mentioned. Decedent testified that he worked as a cement finisher from 1960 to 1968, and that during this period he worked near ladders and was exposed to asbestos. From 1968 to 1997, decedent worked for the state of Connecticut: he worked as an inspector with the Department of Transportation for over 20 years, and he worked the remainder of the time as an inspector with the Department of Public Works. According to decedent, while he was with Public Works, he was exposed to asbestos. Four times he stated that he believed his primary exposure to asbestos occurred while he was with the Department of Public Works. Decision and Order at 3-4; Emp. Ex. 1.

²Mr. Cullen brought a claim against employer, and his deposition was taken during that case. Cl. Ex. 21.

1982, and he testified he was last exposed to asbestos at employer's facility when he worked as a line foreman between 1980 and 1982. Cl. Ex. 21 at 17, 40.

The administrative law judge acknowledged claimant's assertion that an inference could be drawn from both depositions that the working conditions decedent experienced in 1962 were the same as those described by Mr. Cullen and Mr. DeCosta, but he declined to draw such an inference. We reject claimant's contention that the administrative law judge erred in this regard. The administrative law judge rationally concluded that the testimony of these two employees did not establish that decedent was exposed to asbestos during his work for employer. The administrative law judge found that Mr. DeCosta did not work for employer at the same time as decedent, he did not know decedent or decedent's family, and he could not attest to decedent's specific working conditions. Decision and Order at 14-15. The administrative law judge rejected Mr. Cullen's testimony as proof of decedent's working conditions because, although his employment with employer was during the same time period as decedent's, there is no evidence of record to establish that decedent worked on or near submarines or in proximity with Mr. Cullen. Decision and Order at 13-14. These findings are rational and are supported by the evidence.

The administrative law judge has the authority to determine witness credibility, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and to weigh the evidence and draw inferences from it, *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Although he is permitted to infer a fact from indirect or circumstantial evidence, *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999), he need not do so. In this case, it was reasonable for the administrative law judge to find that there was no direct evidence of decedent's exposure to asbestos at employer's facility and to conclude that claimant failed to satisfy her burden of proof. As claimant did not establish working conditions at employer's facility that could have caused decedent's disease and death, an essential element of her claim, we affirm the administrative law judge's denial of benefits. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Bolden*, 30 BRBS 71; *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge