BRB No. 99-326

ZELNA McLAIN (widow of CECIL McLAIN)	)	
Claimant-Respondent	)	
v.	)	
WATERMAN STEAMSHIP CORPORATION	)	DATE ISSUED: Dec. 15, 1999
Self-insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Gregory C. Buffalow and Thomas J. Woodford (Miller, Hamilton, Snider & Odom, L.L.C.), Mobile, Alabama, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1995-LHC-1073) of Administrative Law Judge Richard D. Mills 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).

In this case, decedent worked for employer between 1943 and 1945 as an electrician's helper. After 1945, decedent spent 20 years in the military and then approximately 23 years working on air conditioning and piping systems for Searcy mental hospital until he voluntarily retired in 1990. He was diagnosed with asbestosis in 1981. Decision and Order at 2-3; Emp. Brief at 3-4. In 1996, Administrative Law Judge Daniel A. Sarno awarded permanent partial disability benefits to decedent for his work-related asbestosis. On February 26, 1997, decedent died due to asbestosis and chronic obstructive pulmonary disease, and his

widow, claimant herein, filed a claim for benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. Claimant and employer stipulated to all issues of the claim except average weekly wage, and employer's liability for a penalty, interest and an attorney's fee. The administrative law judge found that claimant is entitled to death benefits based on the national average weekly wage in effect at the time of decedent's death in 1997 and that employer is liable for funeral expenses, interest and a fee. He also granted employer's application for Section 8(f), 33 U.S.C. §908(f), relief. Decision and Order at 5-7. Employer appeals the decision, challenging the administrative law judge's determination regarding average weekly wage.[1] Claimant has not responded to the appeal.

Employer contends the administrative law judge erred in using the national average weekly wage in effect at the time of decedent's death to calculate claimant's death benefits. Specifically, employer argues that death benefits in this case should be based on decedent's average weekly wages as of the time of his last exposure to asbestos in approximately 1945, as that is the "time of injury," thereby treating asbestosis and hearing loss injuries consistently. According to employer, neither the date of death nor the date of awareness of disability are appropriate benchmarks. It contends there is no basis in the Act for using the date of death as the "time of injury" and that deeming the date of awareness of the disability as the "time of injury" constitutes an *ultra vires* extension of Congress' power under admiralty law which frustrates the purpose of Act by attempting to extend Section 3(a), 33 U.S.C. §903(a), coverage to a time and place when decedent was not at a covered situs. Moreover, it avers, such an interpretation of "time of injury" compensates claimant for the loss of decedent's future earnings at a time when decedent, a voluntary retiree, had no expectation of future earnings. The administrative law judge rejected each of these arguments, as do we.

Section 10(i) defines the "time of injury" for purposes of calculating average weekly wages in claims involving occupational diseases. It provides:

> For purposes of this section with respect to a *claim for compensation for death* or disability due to an occupational disease which does not immediately result in death or disability, *the time of injury shall be deemed to be the date on which the employee or claimant becomes aware*, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, *of the relationship between the employment, the disease, and the death* or

[1]We deny employer's motion for Oral Argument, incorporated within its brief, for failure to comply with 20 C.F.R. §802.219(b), which requires motions to be in separate documents. *See also* 20 C.F.R. §802.305.

disability.

33 U.S.C. §910(i) (emphasis added). As is readily apparent, the Act states that the "time of injury" is deemed to be the date on which the claimant became aware of the relationship between the employment, the disease and the death. Since a person who is terminally ill with disease may die from causes unrelated to the disease, *e.g.*, accident, other illness, suicide, murder, one cannot be aware of the relationship between death, disease and employment before death has occurred. Hence, in a claim for death benefits, the date of injury cannot precede the date of death. *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991); *Ponder v. Peter Kiewit Sons Co.*, 24 BRBS 46 (1990); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *Arganbright v. Marinship Corp.*, 18 BRBS 281 (1986). Section 10(d)(2)(B), 33 U.S.C. §910(d)(2)(B), provides that if the time of injury occurs more than one year after the retirement, as here, then the average weekly wage is deemed to be the national average weekly wage in effect at the time of injury – in this case, the death. Thus, as decedent left employer's employ in 1945, voluntarily retired from his employment with Searcy in May 1990, and claimant became aware of the relationship between decedent's employment, his disease and his death on February 26, 1997, the "time of injury" for calculating benefits for the death caused by the post-retirement occupational disease is properly determined by Section 10(d)(2), (i) of the Act. Consequently, the administrative law judge correctly found that claimant's death benefits are to be based on the national average weekly wage in effect at the time of decedent's death in 1997, and we affirm the award of benefits. *Bailey*, 24 BRBS at 229.

As the law on this matter is well-established, we need not fully discuss employer's remaining arguments; however, we shall briefly state our reasons for rejecting them. First, employer's argument that in a claim for death benefits the date of injury must precede the date of death rests on the false assumption that one who contracts a terminal disease inevitably dies from that disease. Furthermore, we disagree with employer's assertion that asbestosis should be treated in the same manner as hearing loss. The administrative law judge rejected Dr. Brody's opinion that asbestosis results in an instant injury as contrary to accepted medical and legal thinking, and there is no basis to overturn his decision. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993) (comparing instantaneous injury of hearing loss with long-latent injury of asbestosis). In any event, the statute applies to a disease "which does not immediately result in disability or death," and it is beyond question here that decedent's exposure to asbestos did not immediately result in death. Also unpersuasive is employer's contention that the award frustrates the Act and results in an *ultra vires* extension of Congressional power. *See generally INA v. United States Department of Labor (Peterson)*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) (applicable status and situs law is that which is in effect at the time of death or disability); *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989) (voluntary retiree provisions in 1984 Amendments do not violate the Due Process Clause of the Fifth Amendment of the Constitution). Finally, by virtue of the 1984 Amendments to the

Act, Congress specifically overruled case law denying disability and death benefits because a retired employee did not have a wage-earning capacity. *See* 130 Cong. Rec. 25902, 26296 (1984). Therefore, employer's argument is invalid, and the administrative law judge's award stands.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge