

BRB No. 01-0436

BERTHA HURST)
(Widow of LEONARD G. HURST))

Claimant)

v.)

NEWPORT NEWS SHIPBUILDING)
AND DRY DOCK COMPANY)

DATE ISSUED: Jan. 31, 2002

Self-Insured)

Employer-Respondent)

HORNE BROTHERS,)
INCORPORATED)

and)

LIBERTY MUTUAL INSURANCE)
COMPANY)

Employer/Carrier-)

Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)

UNITED STATES DEPARTMENT)
OF LABOR)

Respondent)

DECISION and ORDER

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

Gary R. West (Patten, Wornom, Hatten & Diamonstein), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for Newport News Shipbuilding and Dry Dock Company.

Jennifer G. Tatum (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for Horne Brothers, Incorporated and Liberty Mutual Insurance Company.

Andrew D. Auerbach (Eugene Scalia, Solicitor of Labor, Carol DeDeo, Associate Solicitor; Joshua T. Gillelan II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Horne Brothers, Incorporated (Horne) appeals the Decision and Order (98-LHC-1731) of Administrative Law Judge Richard E. Huddleston awarding benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Leonard G. Hurst (decedent) was engaged in longshore employment as a joiner and sheet metal worker for Newport News Shipbuilding & Dry Dock Company (NNS) from August 1951 through November 1973, and for Horne from 1974 until 1982. Decedent was exposed to asbestos dust and fibers during his employment with NNS, and alleged that asbestos exposure continued during his employment with Horne. NNS Exhibit 2. Decedent was diagnosed with asbestosis by Dr. Scutero on February 12, 1998, and subsequently died on July 29, 1999, from bone cancer with asbestosis listed as a contributing cause of his death.

Decedent filed claims for disability caused by his work-related exposure to asbestos against both NNS and Horne, and upon his death claimant filed a claim for death benefits. In response, NNS asserted that it is not the responsible employer and Horne, in turn, argued that decedent's employment-related exposure to asbestos while in its employ, if any, was too minimal to subject it to liability. Alternatively, Horne filed an application for Section 8(f) relief, 33 U.S.C. §908(f), alleging that decedent suffered from pre-existing permanent partial disabilities as a result of various heart problems and chronic obstructive pulmonary disease (COPD).

In his decision, the administrative law judge initially ruled on the admissibility of decedent's affidavit (Claimant's Exhibit (CX) 1) and decedent's deposition (CX 10). Specifically, he determined that the affidavit was admissible against both employers but that the deposition was admissible only against NNS. He next found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that Horne, as the last employer to expose decedent to asbestos, did not establish rebuttal of this presumption. Accordingly, the administrative law judge ordered Horne to pay decedent permanent partial disability compensation for a 90 percent impairment from February 12, 1998, until his death on July 29, 1999, *see* 33 U.S.C. §908(c)(23), and thereafter pay continuing death benefits to claimant. *See* 33 U.S.C. §909. Lastly, the

administrative law judge determined that Horne is not entitled to Section 8(f) relief.

On appeal, Horne challenges the administrative law judge's decision to admit into evidence decedent's affidavit, and his findings that claimant is entitled to death benefits, that it is the employer liable for benefits in this case, and that it is not entitled to Section 8(f) relief. Claimant and NNS respond, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of Section 8(f) relief.

Admission of Affidavit

Horne argues that the administrative law judge's admission of decedent's affidavit of March 16, 1998, into the record is in violation of its due process rights since it was not afforded the opportunity to cross-examine decedent regarding the statements made in that document. Horne specifically asserts that the Board's decision in *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997), is controlling on this issue, and thus that the administrative law judge erred in admitting decedent's affidavit.

Pursuant to 20 C.F.R. §702.338, an administrative law judge has a duty to inquire fully into the matters at issue and to receive into evidence any documents or testimony relevant to such matter. An administrative law judge is not bound by the formal rules of evidence. *See* 33 U.S.C. §923(a); 20 C.F.R. §702.339; *Powell v. Nacirema Operating Co.*, 19 BRBS 124 (1986). Moreover, it is well-established that an administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

In *Ion*, 31 BRBS 75, the administrative law judge found that employer established suitable alternate employment but, as there was no written vocational report and employer did not inform claimant of the available positions prior to the hearing, the administrative law judge permitted claimant to conduct a post-hearing employment search; claimant thereafter filed an affidavit stating that he diligently contacted employers but was unsuccessful in obtaining employment. The Board affirmed the administrative law judge's decision to allow claimant the opportunity to rebut employer's showing of suitable alternate employment, but remanded the case to provide employer with the opportunity to cross-examine claimant or to respond to the post-hearing affidavit. *Ion*, 31 BRBS at 79. Specifically, the Board held the administrative law judge violated employer's right to due process of law by failing to provide employer with an opportunity to cross-examine claimant or to respond to his post-hearing affidavit regarding the job search. *Id.*

In the instant case, the administrative law judge determined that decedent's affidavit is

admissible against Horne. Specifically, the administrative law judge found that Horne had ample opportunity to depose decedent regarding the issues raised in the affidavit dated March 16, 1998,¹ as the claim against it was filed on February 26, 1998, but Horne elected to do nothing about the claim until October 1998, when it retained counsel, at which point decedent was too ill to be deposed. Thus, the administrative law judge concluded that as Horne had almost seven months to respond to the affidavit or to question decedent, its due process rights were not violated. Thus, in contrast to the situation in *Ion*, Horne had an opportunity to cross-examine decedent and/or to respond to his affidavit prior to the administrative law judge's admission of the affidavit into evidence, thereby safeguarding Horne's due process rights. We therefore affirm the administrative law judge's admission of the affidavit in the claim against Horne as it is relevant and material evidence, 20 C.F.R. §702.338, and Horne has not shown that the administrative law judge's decision to admit it is arbitrary, capricious, or an abuse of discretion. *Ezell*, 33 BRBS 19.

Section 20(a) and Responsible Employer

Horne next argues that the administrative law judge erred by invoking the Section 20(a) presumption, as claimant did not prove the requisite elements to establish her *prima facie* case. Specifically, Horne asserts that claimant did not prove that while in its employ, decedent was exposed to asbestos which could have caused his asbestosis. Moreover, Horne avers that without decedent's affidavit, the only evidence of asbestos exposure while working for Horne consists of Dr. Scutero's medical report which essentially represents the

¹The decedent's affidavit contains eight statements regarding his work history, asbestos exposure and personal background. In particular, Horne objects to the admission of this evidence because of the following three statements :

1. That I worked at [NNS] as a joiner and sheetmetal worker from August 1951 to November 1973 and at [Horne] as a joiner and sheetmetal worker from 1973 to 1982.
2. During my shipyard employment, I routinely and regularly worked aboard ships in close proximity to individuals who were installing asbestos insulation on pipes, boilers, ventilation ducts, machinery and equipment.
3. That as part of such work, I have been exposed to asbestos-containing insulation materials and have breathed air containing particles of dust arising from such materials.

CX 1.

uncorroborated testimony of the decedent.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving that decedent sustained an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). In presenting her case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused decedent's harm; rather, claimant must show that working conditions existed which could have caused his harm. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, the administrative law judge determined that the Section 20(a) presumption is applicable as the parties stipulated to decedent's injury, *i.e.*, that he had asbestosis which was disabling and was a contributing cause of his death, and the record contains evidence, *i.e.*, Dr. Scutero's report, decedent's affidavit, and the answer to NNS's interrogatory, showing that decedent was exposed to asbestos during his employment with both NNS and Horne which could have caused his asbestosis. In particular, the administrative law judge found that while Dr. Scutero stated that decedent's exposure to asbestos was "markedly decreased" during his work with Horne, the exposure was not eliminated.² In addition, the administrative law judge observed that Dr. Scutero opined that his diagnosis of asbestosis was based on decedent's entire history of exposure, and thus, the administrative law judge concluded that decedent's occupational exposure to asbestos with both NNS and Horne could have caused his asbestosis.³ Moreover, the administrative law

²Dr. Scutero reported that decedent's work at NNS "entailed moving asbestos insulation material frequently," and that it was "an extremely dusty job" which exposed decedent to asbestos "on a daily basis." CX 3. With regard to decedent's work at Horne, Dr. Scutero stated that decedent "was a supervisor doing approximately the same work he had done at NNS." *Id.* Horne avers that as there is no evidence that decedent ever worked as a supervisor for NNS, there was a dramatic difference in his work for the two employers, such that it cannot be said with certainty that decedent was exposed to the same levels of asbestos when he worked for Horne. However, Dr. Scutero also stated that decedent used protective equipment at Horne which dramatically reduced his exposure to asbestos. As the administrative law judge properly found, a reduction in exposure is not tantamount to a statement that decedent had no exposure to asbestos during his employment with Horne.

³We reject Horne's assertion that decedent's statements to Dr. Scutero are insufficient,

judge relied on decedent's affidavit, wherein decedent stated that during his "shipyard employment," which presumably covered both his work for NNS and Horne, he routinely and regularly worked in close proximity to individuals who were installing asbestos and thus was exposed to asbestos containing insulation materials and had breathed air containing particles of dust arising from such materials, and decedent's response to NNS's interrogatory No. 2 (Identify all jobs you performed since leaving NNS . . . and whether you were, to your knowledge, exposed to asbestos in such jobs), wherein decedent stated that he worked for Horne from approximately 1974 until 1982 and that he believed he "was exposed to asbestos in that job." NNS Exhibit 2.

As the administrative law judge weighed the evidence of record, and substantial evidence supports the finding that claimant established that working conditions existed both at NNS and Horne that could have caused decedent's injury and subsequent death, the administrative law judge's finding that claimant established her *prima facie* case is affirmed. *See generally Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Moreover, it is uncontested that Horne presented no evidence stating that decedent's disability and death were not due, at least in part, to his asbestos exposure at work. Thus, there is no evidence that rebuts the Section 20(a) presumption, and decedent's disability and death, therefore, are work-related as a matter of law. *See, e.g., American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000).

The next issue presented by Horne concerns the identity of the employer responsible for the payment of compensation under the Act. *See Norfolk Shipbuilding & Drydock Corp.*

without corroboration, to establish the requisite working conditions, since these statements are, in part, supported by decedent's statements in his affidavit and answers to NNS's interrogatories. *See generally Sistrunk v. Ingalls Shipbuilding Inc.*, BRBS (Nov. 26, 2001)(Under Section 23(a), 33 U.S.C. §923(a), declarations made by a decedent, if corroborated by other evidence of record, are sufficient to establish the injury, and thus an element of a *prima facie* case under Section 20(a)).

v. Faulk, 228 F.3d 378, 34 BRBS 71(CRT)(4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *see also Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Once it is determined that the employee's employment exposures as a whole are causally linked to his disease, the compensability of the claim (*i.e.*, whether the employee had a work-related injury) has been established. In order to determine employer liability in occupational disease cases involving successive employers, the courts and the Board have uniformly applied the last employer rule enunciated in *Travelers Insurance Co v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *See, e.g., Faulk*, 228 F.3d 378, 34 BRBS 71(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT)(11th Cir. 1988); *Suseoff*, 19 BRBS 149. Pursuant to the last employer rule, the last covered employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for any compensation owed under the Act. A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; rather exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001); *Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either that the employee's exposure while working for employer was not injurious or that the employee was exposed to injurious stimuli while working for a subsequent employer covered under the Act. *See Faulk*, 228 F.3d at 384, 34 BRBS at 75(CRT); *Cuevas*, 977 F.2d at 190, 26 BRBS at 113(CRT); *see also General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). An injurious exposure is one which had the potential to cause the disease or harm at issue. *See Faulk*, 228 F.3d at 385, 34 BRBS at 75(CRT); *Cuevas*, 977 F.2d at 190, 26 BRBS at 113(CRT); *see also Ibos*, 35 BRBS at 53.

In the instant case, as decedent had no employer subsequent to Horne, the only way in which Horne could establish that it is not the responsible employer is to demonstrate that decedent's exposure to asbestos while working for Horne did not have the potential to cause his disease. *Id.* In this regard, Horne argues that minimal exposure to asbestos is not enough to hold it liable for benefits. However, as the administrative law judge properly noted, there is no *de minimis* exposure standard in order to hold an employer liable under the Act.⁴ *Faulk*,

⁴Thus, the administrative law judge properly determined that the fact that decedent might have been exposed to greater amounts of asbestos at NNS is not relevant, since all that is needed under the last employer rule is exposure which had the potential to cause the disease. *Faulk*, 228 F.3d at 387-388, 34 BRBS at 78(CRT); *see generally Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). In so finding, the administrative law judge properly rejected Horne's argument that the Ninth Circuit's decision in *Todd Pacific Shipyards Corp.*

228 F.3d at 387-388, 34 BRBS at 78(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Stille*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Ibos*, 35 BRBS at 52. The administrative law judge found, based on Dr. Scutero's report, that although decedent's exposure to asbestos while working for Horne was less than it was with NNS, it was not eliminated, and the administrative law judge further observed that Horne put forth no evidence regarding the steps it took to protect decedent from asbestos exposure. We therefore affirm the administrative law judge's finding that Horne is liable for benefits in this case as his determination that decedent's exposure to asbestos at Horne was injurious, since it had the potential to cause his asbestosis, is supported by substantial evidence. *Faulk*, 228 F.3d at 384, 34 BRBS at 75(CRT); *see also Ibos*, 35 BRBS at 53.

Section 8(f)

v. Director, OWCP [Picinich], 914 F.2d 1317, 1320, 24 BRBS 36, 39(CRT)(9th Cir. 1990), supports its argument that minimal exposure is not sufficient to hold an employer liable. Specifically, the administrative law judge determined that *Picinich* is factually distinguishable from the instant case since the administrative law judge therein made a specific finding that the claimant's exposure was non-injurious, which was supported by uncontradicted evidence that employer had performed a complete asbestos removal in the area in which the claimant worked and that asbestos levels were below those prescribed by the government. Moreover, the administrative law judge observed that the Fourth Circuit, within whose jurisdiction the instant case arises, explicitly declined to adopt a rule that the exposure to injurious stimuli should be more than *de minimis*. *Faulk*, 228 F.3d at 384, 34 BRBS at 75(CRT); *see also Ibos*, 35 BRBS at 53.

Section 8(f) limits employer's liability for compensation to the first 104 weeks of permanent disability or of death benefits; additional compensation is paid from the Special Fund. See 33 U.S.C. §944; *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001). Where employer claims Section 8(f) relief and the case involves two separate claims, as in this case which presents a claim for partial disability, 33 U.S.C. §908(c)(23), and a claim for death benefits, 33 U.S.C. §909, employer's entitlement to relief must be separately evaluated with regard to each claim. *Stilley*, 243 F.3d 179, 35 BRBS 12(CRT). To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, employer must affirmatively establish: 1) that decedent had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury;⁵ and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT)(4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995). Similarly, employer is entitled to Section 8(f) relief in a death claim if the employee's death is not due solely to the work injury, a standard which can be met if employer establishes the existence of a pre-existing disability which hastened the employee's death. See *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT)(4th Cir. 1998).

Horne argues that the administrative law judge's finding that it is not entitled to Section 8(f) relief must be reversed, as it contends that the death certificate, autopsy report, and medical opinions of Drs. Reid and Donlan sufficiently establish that decedent had pre-existing permanent partial disabilities in the form of his COPD and coronary artery disease which materially and substantially contributed to his permanent partial disability and subsequent death.

⁵The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifestation requirement in cases such as the case at bar where the worker suffered from a post-retirement occupational disease. See *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 248, 24 BRBS 190(CRT)(4th Cir. 1990).

The administrative law judge found that employer did not establish that at the time of his death decedent suffered from COPD, much less disabling COPD, or that decedent's pre-existing heart condition contributed to his death. The administrative law judge found that Horne did not establish that decedent died from any pulmonary condition other than asbestosis. Specifically, he found that the death certificate, signed by Dr. Halverson, listed metastatic bone cancer of unknown origin as the cause of death with COPD and asbestosis listed as other significant contributing conditions.⁶ The administrative law judge however concluded that Horne did not establish that decedent suffered from pre-existing COPD since the report of Dr. Reid, which contains the only diagnosis of COPD, was completely unsupported by any medical records including the notes of Dr. Donlan, wherein he stated that decedent's pulmonary function tests of July 28, 1998, showed no obstructive impairment.⁷ Moreover, the administrative law judge credited the opinions of Drs. Scutero, Kaufman and Donlan, that decedent did not have an obstructive impairment over the unsupported, unexplained assertion in the death certificate. Consequently, the administrative law judge rejected Horne's claim for Section 8(f) relief based on COPD, as it failed to establish that decedent had any pre-existing permanent partial disability due to COPD. As the administrative law judge's finding that Horne did not establish that decedent had serious lasting COPD, is rational and supported by substantial evidence, we affirm the denial of Section 8(f) relief on this basis. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *see Carmines*, 138 F.3d 134, 32 BRBS 48(CRT).

⁶The death certificate, signed by Dr. Halverson, described the cause of death as "metastatic bone cancer unknown primary," with the conditions of "COPD [and] asbestosis" listed as "other significant conditions contributing to the death." CX 8. The cancer diagnosis did not pre-date the asbestosis diagnosis.

⁷Similarly, Dr. Scutero, who reviewed a pulmonary function test dated February 12, 1998, and Dr. Kaufman, who reviewed the pulmonary function test dated July 28, 1998, both found only a restrictive impairment without any obstructive component. CXs 3, 4.

The administrative law judge further found that the autopsy report of Dr. Greeley is insufficient to establish that decedent's pre-existing heart condition contributed in any way to his death. Although the autopsy report states that decedent had severe coronary artery arteriosclerosis,⁸ the report does not state that it caused, contributed to, or hastened decedent's death. Consequently, we affirm the administrative law judge's determination that Horne did not establish its entitlement to Section 8(f) relief on the basis of any pre-existing coronary condition. *See Stillely*, 33 BRBS 224; *Sain*, 162 F.3d 813, 32 BRBS 205(CRT). As we affirm the denial of Section 8(f) relief on the death claim, we need not address any contentions regarding Horne's entitlement to Section 8(f) on the permanent partial disability claim because the award for permanent partial disability was for fewer than 104 weeks. 33 U.S.C. §908(f); *see generally Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁸The autopsy report indicates that decedent had pulmonary asbestosis, grade 4C, with focal metaplastic ossification of fibrotic tissue, multiple fibrous pleural plaques, poorly differentiated adenocarcinoma of the left upper lobe of the lung with metastasises to presternal area and supraclavicular lymph nodes, patchy bronchopneumonia of all lung lobes, and severe coronary artery arteriosclerosis. In addition the report stated that decedent's past medical history was significant for severe coronary artery atherosclerosis and that his status was post carotid artery atherosclerosis and post CABG in 1992 and post carotid endoarterectomy in 1995. CX 7.

