

BRB No. 01-0838

GERTRUDE L. KNIGHT	)	
(Widow of WILLIAM R. KNIGHT)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: <u>July 17, 2002</u>
	)	
and	)	
	)	
COMMERCIAL UNION	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

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

G. William Higbee (McTeague, Higbee, Case, Cohen, Whitney & Toker,  
P.A.), Topsham, Maine, for claimant.

Richard F. van Antwerp and Thomas R. Kelly (Robinson, Kriger &  
McCallum), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2000-LHC-1833) of  
Administrative Law Judge David W. Di Nardi 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).

William R. Knight<sup>1</sup> (decedent) was exposed to asbestos dust and fibers over the course

of his employment for employer where he worked primarily as a pipe coverer and pipe fitter from September 22, 1941, until his voluntary retirement on January 31, 1986. In May 1996, decedent became ill and was diagnosed with metastatic adenocarcinoma of the liver with abdominal carcinoma ptosis. A laparoscopy was performed on May 31, 1996, and the pathology report revealed a poorly differentiated malignant tumor, likely carcinomatosis, but to be considered also as anaplastic mesothelioma. Decedent died on August 15, 1996. The death certificate listed the immediate cause of death as “adenocarcinoma, primary unknown” of “three months duration.” Claimant’s Exhibit (CX) 4.

Claimant testified that she knew her husband died of cancer but that no doctor had informed her or any family member as to the cause of the cancer. Hearing Transcript (HT) at 23. Claimant allegedly first became aware of the relationship between her husband’s death and his occupational exposure to asbestos after reading Dr. Pohl’s report dated August 27, 1999. In that report, Dr. Pohl opined, based upon a review of decedent’s medical records, that “[decedent’s] long-term occupational asbestos exposure was the specific cause of [his] malignant peritoneal mesothelioma.” CX 13. Claimant thereafter filed her claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, on September 20, 1999. Employer controverted, on the ground that the claim for death benefits was not timely filed pursuant to the statute of limitations set out in Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2).

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer could not establish rebuttal. Accordingly, the administrative law judge concluded that claimant established that her husband’s death resulted from his exposure to asbestos dust and fibers during the course of his work for employer. He then determined that claimant provided timely notice of decedent’s death to employer under Section 12(a) of the Act, 33 U.S.C. §912(a), and that her claim was timely filed pursuant to Section 13(b)(2) of the Act. Accordingly, the administrative law judge determined that claimant is entitled to an award of death benefits commencing on August 15, 1996, based on the National Average Weekly Wage of \$391.22, and continuing for as long as she remains eligible therefor. Additionally, the administrative law judge awarded funeral expenses totaling \$3,000 and all medical expenses related to the treatment of decedent’s work-related cancer between March 15, 1996, and his death on August 15, 1996. Lastly, the administrative law judge determined that as decedent was last exposed to asbestos in 1979 or 1980 at the latest, Commercial Union Insurance Company, as carrier on the risk until February 28, 1981, is responsible for the payment of all of the benefits awarded.

On appeal, employer challenges the administrative law judge’s conclusion that claimant filed her notice of injury and claim in a timely manner. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred in concluding that claimant provided timely notice of injury and filed a timely claim in 1999 as the record establishes that

claimant should have known in 1996 of the relationship between her husband's disease, death, and his work for employer, and therefore it was not reasonable for her to wait until three years after his death to investigate a claim for benefits. Moreover, employer argues that the administrative law judge failed to measure the evidence against the "should have known" standard.<sup>2</sup>

Sections 12 and 13 provide that in the case of an occupational disease which does not immediately result in death or disability, as here, written notice of injury must be given within one year, and the claim for benefits filed within two years, after 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 resulting death or disability. 33 U.S.C. §§912(a), 913(b)(2); *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993). Pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), it is presumed that claimant's notice of injury and claim for benefits were timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

The administrative law judge found that employer did not meet its burden of proving that claimant gained awareness of a relationship between the employment, the disease, and the death of her husband prior to August 1999. Thus, he found that claimant's notice of injury and claim for compensation were timely filed on September 20, 1999. Specifically, the administrative law judge found, based on claimant's credible testimony, that she first gained an awareness of the relationship between her husband's employment, his disease, and his death after reading Dr. Pohl's August 27, 1999, report establishing the cause of decedent's death as mesothelioma and linking that "relatively rare cancer" to her husband's occupational exposure to asbestos.

The administrative law judge found that while claimant was informed in May 1996 that her husband was suffering from cancer of the abdomen, she credibly testified that she was not told as to what form of cancer her husband was suffering from and that she did not learn of the nature of the cancer that ultimately took decedent's life until she was made aware of the contents of Dr. Pohl's report. The administrative law judge concluded that without knowing that decedent's cancer was a mesothelioma, claimant had no reason to believe, much less suspect, that there existed a relationship between her husband's disease, his death and his employment.

The administrative law judge also rejected employer's specific contentions that claimant was or should have been aware of the requisite relationship between decedent's disease, death, and employment at an earlier point in time. Specifically, he rejected employer's contention that claimant should have been aware because she had knowledge of

asbestos-related claims brought by decedent's co-workers and their spouses, and that her husband had worked with asbestos at employer's facility, since there was no evidence that claimant was aware of the specific nature of the health risks posed by asbestos in general or that asbestos caused mesothelioma.<sup>3</sup> As such, the administrative law judge concluded that there is no basis for finding, based on claimant's generalized knowledge concerning asbestos and potential health risks, that she "should have been aware" that her husband's death was the result of his exposure to asbestos at employer's shipyard.<sup>4</sup> The administrative law judge likewise rejected employer's contention that claimant certainly should have gained the requisite knowledge based on a phone call made by Dr. Worthing to claimant's daughter-in-law in which the pathology reports, which included a diagnosis of anaplastic mesothelioma, were discussed, because there is no evidence that claimant's daughter-in-law ever conveyed to claimant the fact that a differential diagnosis existed based on the pathology reports. In this regard, the administrative law judge found that claimant credibly testified that she did not recall having any discussions with her daughter-in-law concerning Dr. Worthing's telephone call. Decision and Order at 16; Hearing Transcript at 32. Moreover, the administrative law judge found that even if the daughter-in-law had spoken the words "anaplastic mesothelioma" to claimant, there is no evidence that those words would have meant anything to claimant in terms of the relationship between her husband's disease, death, and maritime employment. In any event, the administrative law judge found that while claimant admitted that she was aware of the health risks associated with working with asbestos, there was no evidence that she knew that one of those health risks was the development of mesothelioma.

It is well-established that the administrative law judge is entitled to weigh the medical evidence of record and to draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). In the instant case, the administrative law judge thoroughly weighed the evidence of record, and rationally relied on claimant's credible testimony, in finding that she did not become aware of the relationship between her husband's disease, death, and employment, until 1999, and thus, in concluding that she provided timely notice of injury under Section 12 and timely filed her claim under Section 13(b)(2).<sup>5</sup> As it is supported by substantial evidence, we affirm the administrative law judge's finding that neither Section 12 nor Section 13 bars claimant's entitlement to death benefits in this case, and thus, the consequent award of benefits. *See generally Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge