

BRB Nos. 02-0564
and 02-0652

SHARYL BUSKEY)
(Widow of CHARLES BUSKEY))
)
Claimant-Respondent)
)
v.)
)
INGALLS SHIPBUILDING,) DATE ISSUED: MAR 24, 2003
INCORPORATED)
)
Self-Insured)
Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Amended Order Directing Payment, and Supplemental Order Awarding Attorney's Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Scott O. Nelson (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Amended Order Directing Payment, and Supplemental Order Awarding Attorney's Fees (00-LHC-3217) of Administrative Law Judge Clement J. Kennington 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 a heater/straightener from September 1972 to November 1974, where he allegedly was exposed to asbestos. In August 1991, decedent participated in an asbestos injury screening and was diagnosed with pulmonary asbestosis. Thereafter, decedent and claimant executed settlement agreements with various producers and manufacturers of asbestos. Decedent was diagnosed with lung cancer in June 1994; this disease caused his death, at age 43, on June 26, 1995. CX 7. Subsequently, claimant filed a claim for death benefits under the Act on behalf of herself and her minor child, Jhory Buskey, 33 U.S.C. §909. After decedent's death, several third-party settlement checks for decedent's estate totaling \$8,298.78 in payment of the previously executed settlements were deposited in the trust account of claimant's attorneys, Maples & Lomax. None of the checks has been disbursed to decedent's estate or to claimant. Additionally, on April 25, 1997, Maples & Lomax submitted a proof of claim form in the bankruptcy action of Amatex allegedly without the knowledge or permission of claimant. On September 13, 1998, Amatex sent Maples & Lomax a check for \$107,280, representing the money from the Amatex settlement trust due all of the clients of Maples & Lomax. Maples & Lomax returned to Amatex a check for \$480 representing claimant's share of the settlement proceeds in order not to jeopardize claimant's Longshore Act claim. Pursuant to a bankruptcy order, on November 15, 2000, Amatex sent Maples & Lomax another settlement check to hold in trust for claimant.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption that decedent's death was related to his longshore employment. 33 U.S.C. §920(a). The administrative law judge credited the opinions of Drs. Jones and Cagle, which related decedent's lung cancer solely to his cigarette smoking and not to asbestos exposure, to find that employer produced substantial evidence to rebut the presumption. In weighing the evidence as a whole, the administrative law judge found that decedent's death was due in part to his exposure to asbestos.

The administrative law judge next determined that the releases claimant signed prior to decedent's death in relation to the third-party suits, for which sums were deposited in the trust account of Maples & Lomax after decedent's death, did not bar her claim pursuant to Section 33(g), 33 U.S.C. §933(g), as she was not a person entitled to compensation at the time she executed the releases. The administrative law judge also found that the filing of the claim in the bankruptcy action of Amatex, and the attorneys' acceptance and deposit of \$480 into its trust account does not constitute a settlement within the meaning of Section 33(g), and that claimant therefore is not barred from receiving compensation benefits under the Act. Finally, the administrative law judge determined that employer is not entitled

any credit under Section 33(f), 33 U.S.C. §933(f), for sums claimant received as a result of decedent's third-party litigation.¹

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of \$11,413.73, representing 63.75 hours of attorney time at \$175 per hour and costs of \$257.48. In his Supplemental Order Awarding Attorney's Fees, the administrative law judge addressed employer's objections to the fee petition, and awarded claimant's counsel a fee of \$10,973.50, representing 62.5 hours of attorney time at \$175 per hour, and costs of \$257.48.

On appeal, employer challenges the administrative law judge's finding that decedent's lung cancer and death were related to asbestos exposure during the course of his employment with employer. Employer also challenges the administrative law judge's finding that claimant's entitlement to compensation is not barred pursuant to Section 33(g). Finally, employer appeals the fee awarded by the administrative law judge.

Employer first contends the administrative law judge erred in finding that claimant established by a preponderance of the evidence that decedent suffered from a work-related disease and that his death was work-related. Employer argues that the administrative law judge awarded benefits based on his erroneous finding that the evidence established decedent's work exposure to asbestos, and it asserts the administrative law judge erred in crediting the medical evidence linking decedent's lung cancer to his employment. Claimant responds, arguing that substantial evidence supports the administrative law judge's decision.

¹In his Amended Order Directing Payment, the administrative law judge enumerated the compensation benefits owed by employer to claimant and her minor son pursuant to Section 9, ordered employer to pay/reimburse claimant funeral expenses up to \$3000, see 33 U.S.C. §909(a), awarded claimant and her son interest on unpaid compensation benefits, and afforded claimant's counsel 30 days to file a fee petition.

In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption. Section 20(a) of the Act presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that the decedent's employment injury did not cause, contribute to, or hasten his death. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991)(*en banc*), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2^d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). If employer produces substantial evidence severing the connection between the death and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge invoked the Section 20(a) presumption, and found that employer introduced substantial evidence that decedent's death was not work-related. In awarding claimant death benefits based on the record in its entirety, the administrative law judge found that decedent's exposure to asbestos at employer's facility contributed to his death. Decision and Order at 17. The administrative law judge first discounted Dr. Mitchell's 1991 diagnosis of asbestosis, as being undermined by the later x-rays and CT scans which established that the earlier x-ray interpretation was erroneous. The administrative law judge credited the opinion of Dr. Kradin that the medical community does not uniformly believe that a diagnosis of asbestosis is required before cancer can be linked to asbestos exposure.² CX 40. The administrative law judge also

² We reject employer's contention that the administrative law judge erred by admitting into evidence and crediting Dr. Kradin's report. *See* Tr. at 10-11. Dr. Kradin did not offer an opinion as to the cause of decedent's cancer and death. His opinion was offered by claimant to establish the proposition that there is a dispute in the medical community concerning whether a diagnosis of asbestosis is required before asbestos exposure can be said to have contributed to the development of cancer. His opinion was that such a diagnosis was not required. Employer has not established that the administrative law judge abused his discretion in finding this evidence relevant to the contested issue of whether decedent's death was related to asbestos exposure. *See generally Burley v. Tidewater Temps, Inc.*, 35 BRBS

credited that portion of Dr. Cagle's opinion that cigarette smokers without asbestosis who were exposed to at least "1000 asbestos bodies per gram of wet weight lung tissue on a digestion study or 25 fibers per cc-year in industrial hygiene terms," EX 6, have an increased risk of lung cancer, and that those with asbestosis have an increased risk of lung cancer if they also smoke.³ *Id.* The administrative law judge found "it more probable than not," based on decedent's affidavits and the testimony of his brother, that decedent was exposed to this minimum level of asbestos during the course of his employment with employer.⁴ The administrative law judge also credited the opinion of decedent's oncologist, Dr. Meshad, linking decedent's lung cancer to his asbestos exposure and cigarette smoking, and concluded that claimant established that decedent's death was due, in part, to his employment with employer. CX 36. The administrative law judge gave less weight to the opinion of Dr. Jones that, because decedent was not diagnosed with asbestosis, his death from lung cancer was not related to his employment. The administrative law judge reasoned that Dr. Jones did not fully consider whether lung cancer may be diagnosed without a finding of asbestosis, nor did Dr. Jones address the effect of tobacco use in combination with asbestos exposure. EX 8.

185 (2002); 20 C.F.R. §702.338.

³It was Dr. Cagle's opinion, however, that decedent's death was not in any way related to his asbestos exposure, as there was an absence of documentation that he was exposed to at least the minimum level of asbestos necessary to increase the risk of lung cancer. EX 6.

⁴Specifically, the administrative law judge reviewed the evidence of asbestos exposure and credited the testimony of decedent's brother, Sam Buskey, who worked for employer and who testified that he has been diagnosed with asbestosis, and decedent's pre-death affidavits, see 33 U.S.C. §923(a), to find that decedent was exposed to quantities of asbestos during the course of his employment for employer sufficient to cause asbestos-related lung cancer. Tr. at 69-81; CXs 14-19.

We affirm the administrative law judge's finding that claimant established the work-relatedness of decedent's death. The administrative law judge did not err in crediting the opinion of Dr. Kradin that a diagnosis of asbestosis is not a prerequisite to a finding that asbestos contributed to the development of cancer. CX 40; see generally *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). We further reject employer's contention that the administrative law judge erred in crediting Dr. Meshad's opinion that asbestos exposure was a causative factor in decedent's lung cancer, due to the absence of evidence that decedent was exposed to asbestos. CX 36. Contrary to employer's contention, the administrative law judge rationally credited decedent's affidavits and the testimony of his brother in finding that decedent was exposed to asbestos at employer's facility.⁵ 33 U.S.C. §923(a); Tr. at 69-81; CXs 14-19; *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); see generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). Furthermore, Dr. Meshad unequivocally stated that decedent's "asbestos exposure contributed to the development of his lung cancer as a co-carcinogen operating in concert with his tobacco exposure" of 20 pack years. CX 36. As substantial evidence supports the administrative law judge's finding that asbestos exposure contributed to decedent's fatal lung cancer, we affirm the award of death benefits. See generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); see also *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir.

⁵In light of our holding, any error in the administrative law judge's finding that decedent's affidavits and Sam Buskey's testimony establish that decedent was exposed to at least "1000 asbestos bodies per gram of wet weight lung tissue on a digestion study or 25 fibers per cc-year," which Dr. Cagle stated was necessary to implicate asbestos exposure as a cause of lung cancer absent a diagnosis of asbestosis, is harmless. EX 6. Similarly, we note that Dr. Cagle stated there was an increased risk of lung cancer in smokers with asbestosis; the administrative law judge erroneously stated that Dr. Cagle stated that the risk was increased in smokers who were exposed to asbestos. Compare EX 6 at 3 with Decision and Order at 10, 16.

2001); *Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993).

Employer next challenges the administrative law judge's finding that claimant is not barred from receiving death benefits pursuant to Section 33(g).⁶ Specifically, employer challenges the administrative law judge's finding that the proof of claim filed with Amatex by Maples & Lomax after decedent's death, and the firm's depositing of a check from Amatex for \$480 into its trust account does not constitute a settlement within the meaning of Section 33(g)(1).⁷ Alternatively, employer asserts that claimant is not entitled to death benefits under Section 33(g)(2) because claimant failed to provide employer with notice of the Amatex distribution until after Maples & Lomax received the check. See 33 U.S.C. §933(g)(2).

The relevant facts are as follows. On December 19, 1995, claimant completed a form expressly stating that she wished to file a claim under the Act and, therefore, she would not accept any third-party settlements unless she received permission

⁶Section 33(g)(1) states:

If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1).

⁷Employer does not challenge the administrative law judge's finding that Section 33(g) does not apply to the settlements entered into prior to decedent's death, see *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997), or his finding that claimant's post-death receipt of proceeds from pre-death settlements are not subject to Section 33(g). See *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000).

from the responsible employer; claimant authorized Maples & Lomax to act on her behalf. CX 26. On January 3, 1996, claimant filed a claim for widow's benefits, which was submitted by Maples & Lomax. CX 3. On April 25, 1997, Maples & Lomax submitted a proof of claim form in the bankruptcy action of Amatex, allegedly without the knowledge or permission of claimant. CX 23; Tr. at 59-60. Maples & Lomax received a letter dated September 23, 1998, from the Amatex Trust enclosing a check to the Maples & Lomax trust account for \$107,280, for all their claiming clients.⁸ CX 34. On December 13, 1999, Maples & Lomax issued a letter and a check to the Amatex Trust, stating that the Amatex bankruptcy distributions to their

⁸The letter specified the payout schedule and stated:

By cashing the Distribution Check your firm reaffirms its representation that it has authority to receive payment for your clients and the Distribution Check will be deposited in your firm's attorney escrow account.

Cashing the Distribution Check constitutes a release of all the claims on the list of Claims Paid, unless you return to the Amatex Settlement Trust the payment attributable to a particular client's proof of claim.

Your firm reaffirms its commitment to prompt delivery of the payments due to your clients.

EX 16.

clients pursuing claims under the Act were not being accepted so as not to jeopardize their claims and returning, *inter alia*, the \$480 representing claimant's portion of the Amatex payout. CXs 24, 25. On November 15, 2000, Amatex, pursuant to a bankruptcy order, sent Maples & Lomax another distribution check to hold in trust for its clients with claims under the Act. CXs 31, 32.

The administrative law judge applied the rationale in *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), that a judicial determination of recoverable damages is not akin to a settlement executed and negotiated by opposing parties, and the Board's decision in *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), which specifically addressed the applicability of Section 33(g)(1) to money received by Maples & Lomax pursuant to the Amatex bankruptcy distribution. Pursuant to these decisions, the administrative law judge found that filing a proof of claim, *post-mortem*, and collecting a bankruptcy distribution check does not constitute a settlement within the meaning of Section 33(g)(1). Decision and Order at 22. In *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), the Board stated:

The payments made in this case are similar to the judgment and remittitur in *Banks [v. Chicago Grain Trimmers Ass'n, Inc.]*, 390 U.S. 459 (1968), as the Trusts sent payments to claimant and other plaintiffs based on reorganization plans which had been deemed fair and approved by the bankruptcy court. See generally *In re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 151 (2^d Cir. 1994); *Kane [v. Johns-Manville Corp.]*, 843 F.2d 636 [(2^d Cir. 1988)]; [*In re*] *Amatex [Corp.]*, 755 F.2d 1034 [(3^d Cir. 1985)]; [*In re*] *Dow Corning [Corp.]*, 211 B.R. at 599 [(Bankr. E.D. Mich. 1997)]. Claimant either could accept the amounts offered and consider the cases resolved, or she could decline the amounts and be placed at the end of the lists of the Trusts' "creditors." Negotiation for a greater amount was not an option, as the amount has been determined by the court. The absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements support the conclusion that the Amatex . . . offers herein should not be considered settlements, but, rather, should be likened to "judgments." If they are considered "judgments," only notice to employer under Section 33(g)(2) is required.

Williams, 35 BRBS at 97. For the reasons stated in *Williams*, we affirm the administrative law judge's finding that the Amatex bankruptcy distribution held in trust by Maples & Lomax does not preclude claimant, pursuant to Section 33(g)(1), from receiving death benefits. Moreover, we reject employer's contention that

claimant failed to provide sufficient notice of the Amatex distribution, pursuant to Section 33(g)(2). Employer contested the death benefits claim, it became aware of the firm's receipt of the Amatex check prior to the formal hearing on January 15, 2002, and it did not pay claimant any compensation prior to issuance of the administrative law judge's decision. EXs 10, 11. Accordingly, employer was provided with sufficient notice pursuant to Section 33(g)(2).⁹ See *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). Therefore, we affirm the administrative law judge's finding that claimant's entitlement to death benefits is not barred by Section 33(g) and the award of death benefits to claimant and her son.

Employer's only contention on appeal regarding the fee award of the administrative law judge is that it should be vacated in the event the Board vacates the administrative law judge's award of benefits. Inasmuch as we have affirmed the award of benefits, we likewise affirm the fee award. 33 U.S.C. §928.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Amended Order Directing Payment, and Supplemental Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁹Employer does not challenge the administrative law judge's finding that it is not entitled to a set-off, pursuant to Section 33(f), for the amount of the Amatex distribution. The administrative law judge reasoned that claimant has not signed any releases nor authorized anyone to accept money on her behalf from third-party settlements. The administrative law judge noted that employer may be entitled to a Section 33(f) credit against compensation owed should claimant accept the Amatex distribution check held in trust by Maples & Lomax.

BETTY JEAN HALL
Administrative Appeals Judge