BRB No. 93-1600

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| GERTRUDE EHRENTRAUT<br>(widow of RAYMOND EHRENTRAUT)<br><br>Claimant<br><br>v.<br><br>SUN SHIP, INCORPORATED<br><br>Self-Insured<br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS,<br>UNITED STATES DEPARTMENT<br>OF LABOR<br><br>Petitioner | ) | DATE ISSUED:_____<br><br>DECISION and ORDER |

Appeal of the Summary Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John P. Dogum (Swartz, Campbell & Detweiler), Philadelphia, Pennsylvania, for self-insured employer.

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Summary Decision and Order (92-LHC-2044) of Administrative Law Judge Ralph A. Romano 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).

The facts of this case are not in dispute. Decedent worked as a shipfitter for employer from

1938 until his voluntary retirement in December 1981. During this time, he was exposed to asbestos. He underwent x-rays on May 29, 1990, and a CT Scan on May 31, 1990. The x-rays revealed extensive pleural thickening and a nodule in the right lower lobe, and the CT scan confirmed asbestosis as well as the mass in the lower part of decedent's right lung. Emp. Exs. I-J. On July 3, 1990, decedent underwent a CT biopsy which failed because calcified pleura prevented needle access to the lungs. Emp. Exs. P-R, U at 18. He died on July 15, 1990, from respiratory insufficiency, asbestosis, and a pulmonary malignancy. Emp. Ex. D. No autopsy was performed.

Claimant, decedent's widow, filed a claim for death benefits, and employer commenced payment on November 8, 1991. Employer then applied for Section 8(f), 33 U.S.C. §908(f), relief from the Special Fund. Employer argued that decedent's asbestosis developed by May 1990, prior to the discovery of a pulmonary malignancy, and that the asbestosis made it more difficult to diagnose and treat the malignancy.[1] Decision and Order at 2. The administrative law judge accepted the Director's concession that employer established the pre-existing permanent partial disability and contribution elements necessary for Section 8(f) relief. In accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), that the manifest element is unnecessary in post-retirement occupational disease cases, the administrative law judge concluded that employer is entitled to Section 8(f) relief. *Id.* at 3. The Director appeals this decision, and employer responds, urging affirmance.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. Generally, an employer may be granted Special Fund relief if it establishes that the deceased employee had a manifest pre-existing permanent partial disability and that his death was not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *see Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992). The Director contends the administrative law judge erred in applying the Fourth Circuit's decision in *Harris* to this case which arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit and in eliminating the manifest element as a requirement for Section 8(f) relief in post-retirement occupational disease cases. The Director also contends employer has not fulfilled the manifest requirement, and the award of Section 8(f) relief, therefore, should be reversed.[2] Employer

[1]In his recital of the facts, the administrative law judge stated that the pulmonary malignancy was diagnosed on June 15, 1990. Decision and Order at 2. This is incorrect. In a letter dated June 15, 1990, Dr. Rudnitzky stated that claimant underwent a bronchoscopy on June 7, 1990, to analyze the mass, but that the lesion could not be reached. Brushings from the area revealed no malignant cells, but asbestos bodies were noted. Dr. Rudnitzky then stated he did not have a diagnosis of the mass and recommended a needle biopsy. Emp. Ex. N.

[2]Although the disease of asbestosis may or may not be disabling, before the administrative law judge the Director conceded that decedent had a pre-existing permanent partial disability which contributed to his death. The parties considered asbestosis as the pre-existing disability and lung cancer as the second injury, and they agree both conditions contributed to decedent's death.

disagrees, arguing that the manifest requirement is not mandated by the statute and that the intentions of Congress are better met by eliminating it in post-retirement occupational disease cases.

In *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), *rev'd*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), the Board affirmed the administrative law judge's denial of Section 8(f) relief. The Board rejected the employer's arguments to eliminate or redefine the manifest element in those cases where the other elements of Section 8(f) have been met but the employee's pre-existing condition did not manifest itself during the employee's term of employment with employer. Due to long-standing judicial acceptance and application of this requirement, the Board declined to eliminate the manifest requirement. *Harris*, 23 BRBS at 117. The Board then noted that a primary purpose of Section 8(f) is to encourage the employment of handicapped workers. Consequently, it held that medical conditions which arise or become known after the employee's term of employment cannot be used to satisfy the manifest requirement, as to do so would contravene the purpose of the section. *Id.* at 118.

The Fourth Circuit reversed the Board's decision. While the court acknowledged the purpose behind Section 8(f) of preventing discrimination against disabled employees, it also asserted that the goal of providing protection to employers should not be overlooked.[3] *Harris*, 934 F.2d at 552, 24 BRBS at 198 (CRT). In this light, it concluded:

> When these goals are considered in concert, it is clear that Congress meant for the 1984 amendments to insure that those suffering from long-latency occupational diseases receive benefits adequate to their needs without greatly increasing the cost of these benefits to the immediate employer by spreading the risk throughout the industry and defraying the increased costs by contributions to the fund.

*Id.*, 934 F.2d at 552, 24 BRBS at 199 (CRT). Consequently, the Fourth Circuit determined that the manifest element serves no useful purpose in post-retirement occupational disease cases and will not be applied. *Id.*, 934 F.2d at 553, 24 BRBS at 200 (CRT).

The Director argues that the manifest requirement is viable in post-retirement occupational disease cases and that the Board should not follow the lead of the Fourth Circuit. He asserts that, unlike the Fourth Circuit, which has abandoned the manifest element in these situations, and the

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[3]The court stated:

> [The legislative history of the 1984 amendments] states that the amendments as a whole are "intended to reduce the cost of Longshore coverage for employers in the covered industries in a manner which will disturb, to the most limited extent possible, the rights and benefits which the Longshore Act provides." H.Rep. No. 570, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736.

*Harris*, 934 F.2d at 552, 24 BRBS at 198 (CRT).

United States Court of Appeals for the Sixth Circuit, which has partially rejected the manifest element,[4] all other circuits, including the Third, have embraced the requirement. *See Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978); *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976).[5]

The manifest element, as employer argues, is not mandated by the statute, but is a judicially created requirement of long standing. *See, e.g, American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). As stated by the United States Court of Appeals for the for the Second Circuit, the manifest requirement is "supported by sound reasoning as well as an overwhelming weight of authority." *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323, 28 BRBS 7, 9 (CRT) (2d Cir. 1993). Indeed, with the exception of the Fourth Circuit in *Harris*, and the Sixth Circuit's restatement of the rule in *American Ship Building Co.*, *see* n. 4, *supra*, all other circuits assent to the manifest requirement. *See, e.g., C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11th Cir. 1994); *Gasparic*, 7 F.3d at 321, 28 BRBS at 7 (CRT); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir.1992); *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); *Universal Terminal & Stevedoring*, 575 F.2d at 452, 8 BRBS at 498; *Duluth, Missabe & Iron Range Ry. Co. v. Department of Labor*, 553 F.2d 1144, 5 BRBS 756 (8th Cir. 1977). Consequently, in light of this long-standing precedent, we agree with the Director that the manifest element should be retained in cases arising outside the jurisdiction of the Fourth Circuit involving post-retirement occupational diseases. *See Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995). Therefore, we decline to apply the Fourth Circuit's decision in *Harris* to this case, and we vacate the administrative law judge's award of Section 8(f) relief.

As we conclude that the manifest element must be proved in post-retirement occupational disease cases, we must now address the Director's contention that employer has not satisfied the manifest requirement. Specifically, the Director argues that employer has not shown that decedent's

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[4]*American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). The Sixth Circuit determined that the purposes of the Act are best accomplished by enforcing the statute as written, *i.e.*, "free of an employer knowledge requirement[.]" Although the Sixth Circuit declined to require employer knowledge of the pre-existing disability, it stated that "the condition must have *manifested itself* to someone" and, thus, must have been "documented or otherwise shown to exist prior to the second injury." *Id.*, 865 F.2d at 732, 22 BRBS at 22-23 (CRT) (emphasis in original).

[5]In these cases, neither of which involved a post-retirement occupational disease, the Third Circuit took the position that a pre-existing disability must either be manifest (employer must have actual knowledge) or latent-manifest (the information must be "objectively determinable and objectively determined"). *Universal Terminal*, 575 F.2d at 456, 8 BRBS at 504. Thus, if a condition is readily discoverable from medical records, it is manifest and satisfies the requirement. *Id.*

asbestosis was manifest prior to the last day decedent was exposed to asbestos. In this respect, the Director disagrees with the Board's rationale in *Harris* and *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991), in which the Board held that the requisite period during which employer must have knowledge of the pre-existing condition is during the employee's period of employment. *Harris*, 23 BRBS at 117; *Dubar*, 25 BRBS at 8.[6] The Director contends that in cases such as this one, the pre-existing disability must have been manifest to employer prior to the date of last exposure to the injurious stimuli that caused the second injury. The Director contends that only in this manner can the purpose of preventing discrimination against a disabled employee be effectuated.

We reject the Director's position, as it lacks support in case precedent. Moreover, we refuse to narrow the scope of the manifest element so far as to make it insurmountable. Upon further reflection we hold that the Board's interpretation in *Harris* and *Dubar* also is too narrow in light of circuit precedent and the nature of post-retirement occupational diseases. Courts of appeals have stated that the pre-existing disability must be manifest to employer *prior to the work-related second injury*. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir.1992) (noting the Director's position that the employee's prior disability was not manifest to employer prior to the second injury); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 16 BRBS 137 (CRT) (*en banc*) (9th Cir. 1983); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982).

[6]In *Dubar*, the Board affirmed the administrative law judge's finding that claimant had no manifest disability prior to the time claimant left covered employment. The claimant left covered employment in 1971, but thereafter was employed by employer on a non-covered situs.

In *C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11th Cir. 1994), the United States Court of Appeals for the Eleventh Circuit stated that the claimant's pre-existing disability must be manifest "prior to the compensable injury." In its discursive opinion in *Cargill*, the United States Court of Appeals for the Ninth Circuit rejected the rule that the pre-existing disability must be manifest to the employer at the time of the employee's initial employment, as that rule would not protect those employees whose pre-existing disability becomes manifest during the course of their employment but before their final injury. *Cargill*, 709 F.2d at 619, 16 BRBS at 139 (CRT). Therefore, the court held that it is sufficient for an employer to show that the pre-existing permanent partial disability was manifest prior to the last injury. *Id.; see also FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989). In this way, the court protected both potential and current employees from discrimination due to their disabilities.

We note that the Ninth Circuit did not limit the period to "during the term of employment," although in a traumatic injury case such a period would have been sufficient, as the traumatic second injury must necessarily occur during the course of the employee's employment. Thus, in a traumatic injury cases, a pre-existing permanent partial disability manifest prior to the second injury is also manifest during employment. However, the Act as amended in 1984 also provides for compensation for occupational diseases, including those which become manifest only after an employee has retired. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2), (i). Inasmuch as the standard stated by the courts provides for manifestation of a prior permanent partial disability prior to the second injury, we will not impose an extra rule or special requirement in occupational disease cases. Requiring a pre-existing disability to be manifest prior to the last date of employment or the last date of exposure to harmful stimuli, would, in cases such as this, create a hurdle over which employers often could not bound, and we decline to erect such a barrier without compelling reasons. Only by providing that the pre-existing disability must be manifest prior to the compensable second injury can the dual goals of Section 8(f) be attained, namely both the prevention of discrimination against disabled employees *and* the protection of employers. *See* 20 C.F.R. §702.144.[7]

[7]Section 702.144 states in pertinent part:

> This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally.

Consequently, upon reconsideration, we hold that in order to be entitled to Section 8(f) relief an employer must establish that the pre-existing disability was manifest prior to the work-related second injury. To the extent that it differs, the law as espoused in *Dubar* is overruled. As the administrative law judge has not considered whether employer satisfied the manifest element, we remand the case for him to address this issue.[8]

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration.

SO ORDERED.

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[8]In light of our decision herein, we need not address the Director's remaining argument that the evidence in this case cannot satisfy the manifest requirement.