

BRB No. 97-1521

FROUWKE K. BLANDING)
(Widow of WILLIAM G. BLANDING))
)
 Claimant-Respondent)
)
 v.)
)
 OLDAM SHIPPING COMPANY) DATE ISSUED:
)
 and)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 CALTEX PETROLEUM)
)
 and)
)
 TRAVELERS INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand of David W. Di Nardi,
Administrative Law Judge, United States Department of Labor.

Matthew Shafner (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.),
Groton, Connecticut, for claimant.

Scott E. Richardson (Curtin, Murphy & O'Reilly, P.C.), Boston,
Massachusetts, for Oldam Shipping Company and Commercial Union
Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH and

BROWN, Administrative Appeals Judges.

PER CURIAM:

Oldam Shipping Company (Oldam) and its carrier, Commercial Union Insurance Company (Commercial Union), appeal the Decision and Order on Remand (92-LHC-2418, 92-LHC-2419, 94-LHC-2749) of Administrative Law Judge David W. Di Nardi rendered on claims 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).

This case is on appeal to the Board for the second time. The decedent, a marine engineer and naval architect, was diagnosed with mesothelioma in May 1986 and subsequently died from this disease on May 3, 1987. From June 1964 through December 1967, the decedent worked for Oldam as a manager in charge of new ship construction and second-hand tankers where he, *inter alia*, supervised ship repairs where asbestos was disturbed. For at least part of his employment with Oldam, the decedent worked in Bermuda. Previously, the decedent worked for Caltex Petroleum (Caltex) from June 1957 through August 1962 as a marine engineer in The Netherlands, where it was probable that he was exposed to asbestos during the construction of ships.

In his original Decision and Order, the administrative law judge initially found that both the decedent's *inter vivos* claim for disability benefits and claimant's claim for death benefits were timely filed.¹ The administrative law judge also found that claimant established that the situs and status requirements of the Act were met as to decedent's employment with Oldam and Caltex. 33 U.S.C. §§902(3), 903(a). The administrative law judge further found that Oldam is the responsible employer and ordered Oldam and its carrier, Commercial Union, to pay to claimant decedent's permanent total disability benefits from December 25, 1986 through May 3, 1987, death benefits to claimant from May 4, 1987 and continuing, death benefits to

¹Claimant is the decedent's widow, Frouwke K. Blanding, who sought death benefits for herself and her dependent daughter, Rosella C. Blanding, in addition to disability and medical benefits on the decedent's claim.

decedent's dependent daughter from May 4, 1987 through May 20, 1992, and funeral expenses, interest, and medical benefits. 33 U.S.C. §§907, 908(a), 909.

On appeal, Oldam challenged the administrative law judge's findings that the situs requirement of the Act was met as to Oldam, and that Oldam is the responsible employer. Oldam further contended that the death benefits claim was not timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913. Caltex and claimant responded in support of the administrative law judge's awards of benefits on both the disability and death claims.

In *Blanding v. Oldam Shipping Co.*, BRB No. 96-0595 (Jan. 31, 1997)(unpub.), the Board vacated the administrative law judge's finding regarding situs and remanded the case to the administrative law judge for further consideration, as the evidence relied upon by the administrative law judge did not support his situs finding, but other evidence, which the administrative law judge did not consider, was supportive of his finding that the situs requirement had been met as to Oldam. With regard to the administrative law judge's Section 13 finding on the death benefits claim, the Board vacated it and remanded the case to the administrative law judge for reconsideration. On remand, the administrative law judge was instructed to determine the date of claimant's awareness of the relationship between decedent's death, disease, and employment, noting that the earliest date of awareness in a death benefits case is the date of death, as well as to consider the interplay of Section 13 with Section 20(b) of the Act, 33 U.S.C. §920(b), and Section 30(a), (f) of the Act, 33 U.S.C. §930(a), (f). The Board affirmed the administrative law judge's finding that Oldam is the responsible employer.

In the Decision and Order on Remand, the administrative law judge again found that the situs requirement was met as to Oldam and that the death benefits claim was timely filed. He further addressed for the first time the issue of whether Commercial Union provided coverage to Oldam during decedent's entire employment with Oldam, and he held Commercial Union liable as the responsible carrier.

In the current appeal, Oldam and Commercial Union appeal the administrative law judge's award of disability and death benefits. Oldam and Commercial Union challenge the administrative law judge's findings regarding situs, responsible employer and carrier, and contend that claimant's death benefits claim is time-barred. Claimant responds in support of the administrative law judge's award of benefits on remand. Caltex has not responded to this appeal.

Situs

Oldam contends that the administrative law judge erred in finding claimant's testimony credible and sufficient to establish that the situs requirement was met as to decedent's employment with Oldam, as it contends her testimony on this subject was inconsistent. Section 3(a) of the Act, 33 U.S.C. §903(a), provides coverage for disability or

death resulting from

an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1994). A shipyard is a covered situs under the Act. See *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1995), *aff'd sub nom. Ins. Co. of North America v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990) (coverage provisions in effect at the time of manifestation apply to coverage issues). A dry dock is a site covered by virtue of the plain language of Section 3(a).

The administrative law judge relied on claimant's testimony that the decedent was exposed to asbestos while supervising ship repairs for Oldam at Maryland Dry Dock specifically, and dry docks generally, to establish that the situs test was met as to Oldam. Decision and Order on Remand at 18. He found claimant's testimony credible, concluding that any apparent inconsistencies in her testimony arose from her nervousness testifying before him or the manner in which certain questions were asked of her by employers' counsel. Decision and Order on Remand at 11, 14. At the 1993 hearing, claimant stated she did not know why she inconsistently testified in her 1992 deposition that she had never had a conversation with her husband regarding where he worked while employed at Oldam and at her 1993 hearing that the decedent had told her that he was exposed to asbestos while working in the dry dock in Maryland for Oldam. CX 42 at 11, 13, 14, 23; CX 43 at 61, 65. Employer correctly points out that the administrative law judge's conclusion that claimant's inconsistencies were due to the fact that she was nervous testifying before him and the manner in which questions were asked of claimant by employers' counsel is suspect, as claimant did not testify relevant to the situs issue at the 1995 hearing at which this administrative law judge presided,² and as the administrative law judge was not present at claimant's 1992 deposition where only one employer's counsel asked claimant questions.

²Administrative Law Judge Mollie W. Neal presided over the first hearing on February 3, 1993, and remanded the case to the district director for an investigation as to whether a subsequent employer, Manta Marine, should be named as a responsible employer. CX 45 at 69-70. Administrative Law Judge David W. Di Nardi presided over the second hearing on February 27, 1995, after Manta Marine had been joined as a party. Tr. at 16-17.

Based on substantial evidence of record, however, we affirm the administrative law judge's finding that the situs requirement is met with respect to the decedent's employment with Oldam. Although claimant's testimony may not be consistent as to whether she had a conversation with her husband regarding his asbestos exposure at Maryland Dry Dock, her testimony is consistent in stating that she was present when her husband discussed his employment history with his doctors to determine where he was exposed to asbestos. CX 42 at 22; CX 43 at 46-49. Moreover, the claim forms filed against Oldam in 1987 by the decedent support claimant's testimony that the decedent worked at Maryland Dry Dock while working for Oldam as they specifically reference his exposure to asbestos on various ships at "Todd Shipyard, Erie Basin, Brooklyn, N.Y. & Maryland Dry Dock, Baltimore, MD." CX 29, 30, 38-2, 39-2, 40-2. The evidence presented by claimant that the decedent worked at Maryland Dry Dock while employed by Oldam and was exposed to asbestos while working has not been contradicted or refuted by Oldam in any respect. As the administrative law judge's finding that claimant established situs as to Oldam is supported by the relevant evidence of record, it is affirmed.

Responsible Carrier

Commercial Union contends that it is not the responsible carrier as it last insured Oldam on March 31, 1967, and the decedent's employment with Oldam did not end until the second quarter of 1967 as indicated in the Social Security Administration records.³ Pursuant to the rule set forth in *Travelers Ins. Co. v.*

³We decline to address Oldam's contention that it is not the responsible employer, as the Board's prior decision on this issue constitutes the law of the case. See *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157, 159 (1991); *Blanding*, slip op. at 5. Although the decedent acknowledged that it was possible that he was exposed to asbestos while subsequently employed with Manta Marine, the administrative law judge found this comment highly speculative and not persuasive as by 1980 most

Cardillo, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible carrier or employer is the last carrier or employer during whose employment the decedent was exposed to injurious stimuli, prior to his awareness that he was suffering from an occupational disease.

asbestos use had been discontinued in the shipbuilding process. *Blanding*, slip op. at 5 n. 7. The Board affirmed the administrative law judge's finding that Oldam is the responsible employer in its prior decision as the administrative law judge acted within his discretion in accepting Dr. Daum's opinion that the decedent's exposure to asbestos at both Oldam and Caltex contributed to the initiation, development, and promotion of the malignant mesothelioma. *Id.* at 5.

Initially, we hold that the administrative law judge properly addressed the responsible carrier issue although Commercial Union first raised it before him on remand, as it is an issue which is fundamental to the administration of justice. *Cf. Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. Mar. 5, 1991)(Board will address issue not raised below where a refusal to do so would result in a miscarriage of justice). The administrative law judge concluded that Commercial Union is the responsible carrier under the *Cardillo* rule as the decedent was exposed to asbestos throughout his employment with Oldam and as Commercial Union provided coverage through March 31, 1967, a period encompassing most of the decedent's employment with Oldam.⁴ Decision and Order on Remand at 32.

Moreover, we affirm the administrative law judge's finding that Commercial Union is the responsible carrier. In the instant case, the responsible employer is Oldam. Oldam was covered by Commercial Union through March 31, 1967, while the decedent was exposed to asbestos while working for Oldam. As Commercial Union was on the risk during the decedent's period of exposure to asbestos, Commercial Union bore the burden of identifying a later carrier, if it wished to escape liability. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). However, Commercial Union has not provided any information as to which insurance company, if any, insured Oldam after March 31, 1967. Because the record does not clearly indicate which carrier was on the risk during the decedent's last injurious exposure, we hold that the purposes of the Act are best served by assigning liability against Commercial Union. *See General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 962, 25 BRBS 22, 25 (CRT)(9th Cir. 1991)(adopting the Director's position that when the evidence does not clearly indicate which of the covered employers who exposed him to injury the claimant last worked for, the purposes of the Act are best served by assigning liability to the employer who is claimed against). Consequently, we affirm the finding that Commercial Union is the responsible carrier.

⁴Alternatively, the administrative law judge ruled that in the event the Board should hold that Commercial Union is not the responsible carrier and as Oldam is out of business, the Special Fund may be responsible for the benefits awarded under 33 U.S.C. §918(b). Decision and Order on Remand at 32.

Timeliness of the Death Benefits Claim

Lastly, Oldam contends that the administrative law judge erred in finding that claimant's death benefits claim was timely filed on January 24, 1992.⁵ Oldam contends that claimant's date of awareness, the date claimant was aware or should have been aware of the relationship between the decedent's death, disease, and employment, occurred on the date of the decedent's death on May 3, 1987, after Dr. Selikoff had related the decedent's work-related asbestos exposure to his mesothelioma in 1986, and since claimant testified that both the decedent and she knew that mesothelioma was fatal. Since the date of awareness in a death benefits case can be no earlier than the date of death on May 3, 1987, Oldam contends that claimant's death benefits claim should have been filed by May 3, 1989, within two years of the decedent's death. Moreover, Oldam contends that its failure to file a first report of injury pursuant to Section 30(a) of the Act did not toll the statute of limitations in this case, as the limitations period expired before it received knowledge of the death.

Section 13(b)(2), 33 U.S.C. §913(b)(2), provides that in the case of a death due to an occupational disease, the claim for benefits must be 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 death. *See generally Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989)(emphasis added)(same standard under Section 10(i)). Under Section 20(b), 33 U.S.C. §920(b), there is a presumption that the claim for benefits was timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In order to rebut the Section 20(b) presumption, employer must establish that it complied with the requirements of Section 30(a) of the Act, 33 U.S.C. §930(a). *See Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992)(Dolder, J., dissenting). Claimant's formal claims against Oldam and Caltex were filed on January 24, 1992, more than four years after the decedent's death on May 3, 1987, caused by cardiorespiratory arrest due to mesothelioma, as stated on the death certificate. CX 21, 31, 41; RX 1.

The administrative law judge determined that claimant's claim for death benefits was timely filed on January 24, 1992, as she filed it before her date of awareness of the relationship between the death, disease, and the decedent's

⁵Claimant filed claims against both Oldam and Caltex on the same date, January 24, 1992. CX 31, 41; RX 1.

employment with Oldam, which the administrative law judge found occurred on June 30, 1995, the date claimant received Dr. Daum's report that the decedent died due to malignant mesothelioma due to his asbestos exposure while working for Oldam. Decision and Order on Remand at 25-27; EX 3. In determining claimant's date of awareness, however, the administrative law judge erroneously believed that the statute of limitations began to run when claimant became aware of the relationship between the specific covered employment with a particular employer and the occupational disease and death, citing *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986). However, these cases are distinguishable from the instant case in that in both *Smith* and *Osmundsen*, the claim was held timely filed against a second employer where an initial claim was timely filed against one employer, and then a later or earlier employer was held liable. Here, claimant filed against both Oldam and Caltex on one date, January 24, 1992. CX 31, 41; RX 1. Both *Smith* and *Osmundsen* require a timely filed claim against one employer before a claim may be considered timely filed against a subsequent or prior employer. Thus, these cases do not support the administrative law judge's tolling the statute of limitations until claimant is aware of the relationship of the death to a particular covered employment.

Moreover, the administrative law judge did not discuss whether claimant should have been aware of the relationship between the decedent's death, disease, and employment, prior to the issuance of Dr. Daum's report on June 30, 1995. We need not remand this case to the administrative law judge for further consideration of the issue, however, as the uncontradicted evidence establishes that claimant should have been aware of the relationship between the decedent's death, disease, and employment at the time of the decedent's death. Claimant stated that Dr. Selikoff diagnosed the decedent with mesothelioma related to asbestos exposure in 1986, that thereafter her husband researched the disease in the library and learned that it was not curable, and that he told claimant of this fact. CX 42 at 21-25. Moreover, claimant stated she knew that asbestos was used in ship repair and construction and that she was present on some occasions when the decedent discussed his work exposure to asbestos with his doctors. CX 42 at 22-23. The death certificate lists mesothelioma as the cause of death. CX 21. Based on this uncontradicted evidence of record, therefore, claimant was or should have been aware that her husband's death due to mesothelioma was related to asbestos exposure at work. This awareness was sufficient to commence the limitation period on the date of death. As claimant did not file her claim within two years of the date of death, we must reverse the administrative law judge's finding that claimant's death benefits claim was timely filed.

Moreover, although employer did not file a Section 30(a) report, its failure to do so cannot toll the statute of limitations if the claim is already time-barred by the time employer gained knowledge of the injury or death. Employer herein established that it did not have knowledge of decedent's work-related death before the claim was filed in 1992, well after the limitations period expired in May 1989. See *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (CRT)(D.C. Cir. 1987); *Speedy v. General Dynamics Corp.*, 15 BRBS 352, 354 n. 4 (1983)(Ramsey, C.J., concurring in result only)(Miller, J., dissenting); *Keatts v. Horne Bros., Inc.*, 14 BRBS 605, 607 (1982). Employer's lack of knowledge rebuts the Section 20(b) presumption as a matter of law. *Stark*, 833 F.2d at 1025, 20 BRBS at 40 (CRT). Consequently, we reverse the administrative law judge's award of death benefits to claimant and her dependent daughter as the death benefits claim was untimely filed.

Accordingly, the administrative law judge's Decision and Order on Remand is reversed as to the administrative law judge's finding that the death benefits claim was timely filed. Thus, claimant is not entitled to death benefits on behalf of herself or her dependent daughter. In all other respects, the Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge