BRB No. 97-0985

RAYMOND E. JONES	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

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

G. William Higbee (McTeague, Higbee, MacAdam, Case, Watson & Cohen), Topsham, Maine, for claimant.

Kevin M. Gillis (Troubh, Heisler & Piampiano, P.A.), Portland, Maine, for self-insured employer.

Stephen Hessert (Norman, Hanson & DeTroy), Portland, Maine, for carrier.

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

PER CURIAM:

Self-insured employer appeals the Decision and Order (92-LHC-2107) of Administrative Law Judge David W. Di Nardi 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).[1] 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 before the Board for a second time. Claimant worked for employer in various capacities where he was exposed to asbestos, and he developed asbestosis. In 1978, claimant's breathing problems required that he be transferred from work onboard ships to a shoreside shop where prefabricated pipe coverings were made. Claimant was off work from August 9 through November 1, 1978. When he returned to work, he continued to miss days periodically due to breathing problems. On January 16, 1981, claimant was awarded temporary total disability benefits for the period he was off work, and continuing permanent partial disability benefits for his chronic restrictive pulmonary disease at the stipulated average weekly wage as of August 9, 1978, of $256.80. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In late 1990, the pipe shop was moved to another area of the shipyard with less ventilation, no outdoor windows, and higher levels of dust than at claimant's prior work area. Claimant began to suffer increased breathing problems and difficulty performing his work. On November 9, 1990, claimant reported to the emergency room, complaining of shortness of breath. Thereafter, claimant requested that employer transfer him to a cleaner worksite, but his request was denied as employer was unable to provide such employment. On the advice of his pulmonologist, Dr. Killian, claimant left employment on February 15, 1991, alleging that dust and fumes in his new work area made it impossible for him to continue working. Employer subsequently filed a first report of injury and a notice of controversion. Claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking permanent total disability compensation, and to change his "time of injury" for purposes of average weekly wage. *See* Tr. at 15. In

[1]By Order dated March 12, 1998, the Board dismissed this appeal and remanded the case to the district director for reconstruction of the record. Upon receipt of the official record from the district director, the Board reinstated the appeal on its docket by Order dated June 5, 1998.

this respect, claimant alleged that the wages for his permanent total disability benefits should be calculated as of the time he left employment in February 1991.

In a Decision and Order dated May 3, 1993, the administrative law judge found that claimant was entitled to modification of the original permanent partial disability award to one for permanent total disability. The administrative law judge, however, denied modification with regard to the average weekly wage, finding that claimant did not allege or prove an aggravation of his condition so as to establish a new date of injury.

Claimant appealed this decision to the Board. The Board vacated the administrative law judge's decision, holding that there is evidence of record, which, if credited could establish an aggravation of claimant's pre-existing lung condition. The Board noted that if the administrative law judge found that claimant's condition was indeed aggravated by his continued employment, he is entitled to permanent total disability benefits based on his wages prior to the new injury. *Jones v. Bath Iron Works Corp.*, No. 93-1678 (Aug. 12, 1996).

On remand, the administrative law judge found that claimant's move to a new location within the shipyard caused him to be exposed to "heavy dust," fumes and other injurious pulmonary stimuli which aggravated his asbestosis to such an extent that he had to stop working. Decision and Order at 13. Thus, the administrative law judge found that claimant sustained a new and discrete injury and that he is entitled to permanent total disability benefits based on his average weekly wage at the time of the new injury, which was $516.80. The administrative law judge also found that claimant's motion for modification was, in effect, a claim for a new injury, and that the Board had held that the new claim was timely filed. The administrative law judge further found that inasmuch as employer previously was awarded Section 8(f) relief on claimant's award of permanent partial disability benefits, the Special Fund is liable for claimant's permanent total disability benefits from February 15, 1991. Self-insured employer, which was on the risk in 1991, was held liable for claimant's medical benefits.

Self-insured employer contends on appeal that the Board erred in remanding the case to the administrative law judge to consider whether the evidence establishes that claimant sustained a new injury in 1991 and that the administrative law judge erred in so finding, as it alleges that the evidence cannot support a finding that claimant's asbestosis was aggravated by his employment. Employer also contends that the Board erred in its prior decision in entertaining a claim for a new injury, when such a claim had never been filed by claimant in accordance with the Act. In this vein, employer notes that inasmuch as it was insured by different entities

in 1978 and in 1991, it was unable to mount a defense to claimant's new claim a timely manner.[2] Claimant and Commercial Union Insurance Companies (Commercial Union) respond, urging affirmance of the administrative law judge's decision on remand.

[2]Employer was insured by Commercial Union at the time of claimant's original injury and was self-insured in 1991.

Initially, we address employer's contention that the Board erred in construing claimant's petition for modification as a claim for a new injury occurring in 1991. Employer contends that claimant did not file a claim for a new injury against self-insured employer in accordance with Section 13 of the Act, 33 U.S.C. §913, and thus that the Board erred in remanding the case to the administrative law judge to consider whether claimant sustained an aggravation, or a new injury, in 1991.

We reject the contention that the Board raised a claim for a new injury occurring in 1991, which claimant himself did not assert. Claimant timely filed a petition for modification pursuant to Section 22 of the Act and, in April 1992, his pre-hearing statement raised as issues his entitlement to permanent total disability benefits at an increased average weekly wage. The only method by which claimant could obtain benefits based on a higher average weekly wage is if he sustained a new injury or an aggravation of his prior injury, which is considered a new injury under the Act. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Lopez v. Southern Stevedoring*, 23 BRBS 295 (1990). If, on the other hand, claimant's partial disability naturally deteriorated such that he was now totally disabled, his benefits would have to be based on his average weekly wage at the time of his original injury. *See generally Leathers v. Bath Iron Work Corp*., 135 F.3d 78 (1st Cir. 1998). Claimant's theory of recovery thus necessarily raised a claim of aggravation. Under these facts, claimant was not required to file another claim in order to comply with Section 13, as claimant's timely motion for modification placed employer on notice that claimant was seeking benefits for the effects of his employment in 1991.[3] *See generally I.T.O. Corp. v. Pettus*, 73 F.3d 523, 30 BRBS 6

[3]Pursuant to Section 13(b)(2) of the Act, a timely claim in an occupational disease case must be filed within two years of claimant's awareness of the relationship between his disease, employment and disability. Claimant's motion for modification and pre-hearing statement would, in any event, satisfy these

(CRT) (4th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996). Moreover, claimant was not required to file separate motions for modification against employer/Commercial Union and against employer in its self-insured capacity.[4] *See generally* 33 U.S.C. §935.

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requirements.

[4]As employer suggests, the Board was not aware at the time of its decision that employer was insured by different entities at the pertinent times. When the case was before the administrative law judge on remand, self-insured employer was notified of the issue before the administrative law judge, and it was given an opportunity to participate in a deposition of Dr. Killian and to file a brief. Thus, its due process rights were not violated.

Employer also contends that the administrative law judge erred on remand in finding that claimant's condition was aggravated by his continued employment. Employer alleges that the administrative law judge clearly felt constrained to find that an aggravation occurred based on the Board's remand order. Under the "aggravation rule," where an employment-related injury aggravates, accelerates, or combines with an underlying condition, the claimant is entitled to benefits for the totality of his disability. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). An aggravation or progression of the underlying disease is not necessary for there to be a compensable injury; an increase in symptoms resulting in disability is sufficient. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

We affirm the administrative law judge's finding that claimant's employment after the pipe shop was relocated, in which he was exposed to increased pulmonary irritants, aggravated his underlying pulmonary condition as is it supported by the uncontradicted medical evidence of record. The administrative law judge noted that as of May 17, 1990, Dr. Killian stated that claimant could perform his required work activities. CX 10 at 16. After claimant's job location was changed, however, and claimant was exposed to additional respiratory irritants, Dr. Killian stated claimant was having difficulty breathing at work and that his capacity to work was threatened. CX 11 at 1. Dr. Killian attempted to have alternate employment at the shipyard located for claimant, but this effort was unsuccessful. Thereafter, Dr. Killian stated that claimant could not continue to work in the environment that worsened the symptoms related to his underlying asbestosis, although he stated that claimant's asbestosis itself was not acutely worsened. *Id*. at 4; Dep. at 12-13, 16-17.

Contrary to employer's contention, the fact that Dr. Killian stated that claimant's ability to work was not changed by the exposure to increased irritants does not compel the result that claimant's disability is due to the natural progression of his underlying disease, as Dr. Killian expressly stated that claimant was doing the same job before and after the move of the pipe shop, but "in an environment that was less conducive to his health." Dep. at 12. That Dr. Killian stated that claimant's increased respiratory symptomatology prevented claimant from continuing to work is sufficient to bring this case within the ambit of the aggravation rule. *Gardner*, 640 F.2d at 1385, 13 BRBS at 101. Thus, we affirm the administrative law judge's finding that claimant sustained a new injury, and his consequent finding that claimant is entitled to permanent total disability benefits based on his average weekly wage at

the time of the new injury.[5] *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Lopez,* 23 BRBS at 295.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]Inasmuch as self-insured employer was on the risk at the time of claimant's last exposure to injurious stimuli, it is properly held liable as the responsible carrier in this case. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see also Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992).