BRB No. 03-0417

RICKY L. MENSER	)	
Claimant	)	
v.	)	
BUCHANAN MARINE	)	
Self-Insured Employer-Petitioner	)	
GENERAL DYNAMICS/ ELECTRIC BOAT CORPORATION	)	DATE ISSUED: Feb. 25, 2004
Self-Insured Employer-Respondent	)	
PEQUOT RIVER SHIPWORKS	)	
and	)	
ESIS, INCORPORATED	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

David W. Schoolcraft, Glastonbury, Connecticut, for Buchanan Marine.

G. Brian Shontz, Norwell, Massachusetts, for Electric Boat Corporation.

Michael J. McAuliffe (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for Pequot River Shipworks and Esis, Incorporated.

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

PER CURIAM:

Buchanan Marine (Buchanan) appeals the Decision and Order (2001-LHC-3030, 3038, 3040) of Administrative Law Judge Richard D. Mills awarding benefits 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).

Claimant worked as a ship-fitter mechanic for Electric Boat Corporation (Electric Boat) from October 1981 until August 2, 1996, and for Pequot River Shipworks (Pequot) from January 2, 1997, until February 1999, when he began working as a "lead man" for Buchanan. Claimant stated that as a ship-fitter mechanic, he regularly worked with pneumatic grinders and that as a lead man he continued to do some grinding work, averaging five minutes a day, although this involved the use of an electric, rather than pneumatic, grinder. Claimant stated that about eight to ten years into his employment with Electric Boat, he gradually began to experience periodic numbness and tingling in his hands and aching in his forearms, and that these symptoms continued, but did not increase, throughout his employment with Pequot and Buchanan.

Claimant initially sought medical treatment for his hand/arm condition from Dr. Browning on March 16, 2000, who diagnosed hand-arm vibration syndrome (HAVS) possibly related to his ample history of using air tools. On October 30, 2001, Dr. Wainwright similarly concluded that claimant suffered from HAVS, as well as presumed vibratory white finger disease, due to his work at Electric Boat, and that his condition was materially and substantially worsened by his subsequent work with Pequot and Buchanan. Dr. Ashmead, on December 10, 2001, opined that claimant suffered from significant carpal tunnel syndrome with probable cubital tunnel syndrome attributable to his work-related exposure at Electric Boat and that his subsequent work for Pequot and Buchanan did not aggravate his underlying condition. Claimant stated that it was only after his first visit to Dr. Browning that he became aware that he had an injury related to his employment. Claimant thereafter filed a claim under the Act against all three of his employers, *i.e.*, Electric Boat, Pequot, and Buchanan.

In his decision, the administrative law judge determined that claimant sustained an occupational disease, *i.e.*, a vibration-related neurological condition in his hands/arms stemming from his employment with Electric Boat, Pequot and Buchanan, *see Carlisle v. Bunge Corp.,* 33 BRBS 133 (1999), *aff'd,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000), and that Buchanan, as the last employer to expose claimant to injurious stimuli, is the responsible employer. The administrative law judge, however, declined awarding disability

benefits either under the schedule, 33 U.S.C. §908(c)(1) – (20), as he found that claimant's condition had not yet reached permanency,[1] or pursuant to Section 8(e), 33 U.S.C. §908(e), since there was no allegation or evidence that claimant sustained any loss in wage-earning capacity as a result of his injury. The administrative law judge awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907.

On appeal, Buchanan challenges the administrative law judge's finding that it is the employer responsible for the payment of medical benefits in this case. Electric Boat and Pequot each respond, urging affirmance of the administrative law judge's decision.

Buchanan contends that the administrative law judge applied an incorrect legal standard in relying on the date of the first medical consultation, March 16, 2000, to establish the date of claimant's awareness of his occupational disease, in order to resolve the responsible employer issue. Buchanan maintains that it was inappropriate for the administrative law judge to focus on the date of medical diagnosis since the record establishes that claimant was aware of the causal connection between his condition and his longshore work prior to seeing Dr. Browning.

In support of his conclusion that Buchanan is responsible for the payment of claimant's benefits, the administrative law judge relied on the decision of the United States Court of Appeals for the Second Circuit in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In *Cardillo*, the court held that the responsible employer in cases involving the potential liability of multiple employers in occupational disease cases is the "employer during the last employment in which the claimant was exposed to the injurious stimuli prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *Id*. at 145. The courts and the Board have consistently followed the *Cardillo* rule in allocating full liability to the employer during the last employment in which the claimant was exposed to injurious stimuli prior to the date on which he was, or should have been, aware of the relationship between his disability, disease and employment. *See Bath Iron Works Corp. v. Director, OWCP [Hutchins],* 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992);[2] *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000); *see*

---

[1]Although Drs. Browning, Wainwright and Asmead each assigned a permanent impairment as a result of claimant's work-related injury, the administrative law judge determined that claimant's condition has not, as yet, reached permanency. Claimant does not appeal this finding.

[2]The United States Court of Appeals for the First Circuit stated that the date-of-disability standard is not necessarily applicable for medical benefit claims. *Liberty Mutual Ins Co.,* 978 F.2d 750, 26 BRBS 85(CRT).

also Stilley v. Newport News Shipbuilding & Dry Dock Co., 33 BRBS 224 (2000), *aff'd*, 243 F.3d 179, 35 BRBS 12(CRT)(4th Cir. 2001); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

Buchanan correctly states that a physician's diagnosis is not required for a finding of awareness. *See Wendler v. American National Red Cross*, 23 BRBS 408 (1990)(McGranery, J., dissenting); *Todd v. Todd Shipyards Corp*., 16 BRBS 163 (1984). Nonetheless, we hold that substantial evidence supports the administrative law judge's conclusion that claimant was not aware of the relationship between his hand/arm condition and employment until he was initially examined by Dr. Browning in 2000, at which time he was employed by Buchanan. Although claimant may have suffered symptoms during his employment with Electric Boat and Pequot, the administrative law judge found, based on claimant's credible testimony, that he was not sure that anything was actually wrong with him until his visit with Dr. Browning. Hearing Transcript (HT) at 26. Specifically, the administrative law judge relied on claimant's statement that he did not previously consult a doctor about his condition because he did not know what his condition was or the cause of his condition and he was uncertain as to whether it occurred merely as a result of old age or it was a part of his job given that he had worked for many years at the shipyard. HT at 29. Moreover, acting within his discretion as factfinder, the administrative law judge relied on Dr. Wainwright's opinion that claimant's use of an electric grinder at Buchanan materially and substantially worsened his hand/arm condition to conclude that claimant was exposed to injurious stimuli during his employment with Buchanan.[3] *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Thus, as claimant continued to be exposed to injurious working conditions, and his last exposure prior to awareness occurred while in Buchanan's employ, Buchanan is liable under *Cardillo*.[4] Consequently, we affirm the administrative law judge's finding that Buchanan is responsible for the payment of claimant's

---

[3]The administrative law judge also correctly observed that while Dr. Ashmead opined that claimant's work at Buchanan was not a contributory cause to his condition, the last employer rule under *Cardillo* does not require a showing of an actual medical causal relationship between claimant's exposure and his occupational disease. *New Orleans Stevedores v. Ibos,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied*, 124 S.Ct. 1038 (2004). Moreover, the administrative law judge found that Dr. Ashmead expected that claimant's use of an electric grinder at Buchanan would increase his symptomology, and further conceded that use of such tools can cause carpal tunnel syndrome.

[4]The evidence cited by Buchanan in support of its position, *i.e.,* the LS-203 forms addressed to Electric Boat and Pequot in November of 1999, misses the mark, as even assuming claimant became aware of his occupational disease in November 1999, he was already working for Buchanan by that time. *See generally Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997).

benefits as it is rational, supported by substantial evidence and in accordance with law. *Cardillo*, 225 F.2d 137; *see also Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

Accordingly, the administrative law judge=s Decision and Order is affirmed.

SO ORDERED.

____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

____
BETTY JEAN HALL
Administrative Appeals Judge

____
PETER A. GABAUER, Jr.
Administrative Appeals Judge