BRB No. 91-1365

JAMES O. WOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTERN BRANCH DIESEL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Medical Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (O'Brien, Shafner, Bartinik, Stuart & Kelly, P.C.), Groton, Connecticut, for claimant.

Michael Ready (Morrison, Mahoney & Miller), Boston, Massachusetts, for employer/carrier.

Laura Stomski (Judith E. Kramer, Acting Solicitor of Labor; Carol 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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-693) of Administrative Law Judge David W. DiNardi 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 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 was exposed to asbestos from April 1966 to January 1967 while working as a mechanic's helper and diesel apprentice for employer. Claimant's testimony that he was not exposed to asbestos in his many subsequent jobs was uncontradicted. On January 1, 1986, claimant moved from Virginia to Massachusetts where he was licensed as a heating, air-conditioning and refrigeration mechanic. In 1987 he began to work for Johnson & Weston Sheet Metal, Inc., also known as Johnson Industrial Fabricators (Johnson), as a service technician. On November 7, 1988, Johnson sent claimant to investigate the dusty air at the A.T. Cross Company. Wearing a respirator, claimant entered that company's baghouse, a room containing bags which filtered polishing particles from the air and then recirculated it, where he discovered that one of the bags had collapsed. About 25 minutes after leaving the baghouse, claimant developed pleuritic chest pains on the right side, with severe shortness of breath. Claimant was hospitalized and later referred to Dr. Kern, an occupational health specialist, who continued to examine him periodically.

Dr. Kern performed a complete pulmonary examination on January 3, 1989, to determine the etiology of claimant's acute respiratory reaction. X-rays taken on November 10, 1988, were reported as suggestive of hypoventilation atelectasis. Cl. Ex. 2. Dr. Kern reported that the x-ray showed a prominence of lateral chest wall pleural markings, but that May 1988 films, taken prior to the baghouse incident, were not really different from the later films. Cl. Ex. 17. A CT scan showed "localized pleural thickening." Cl. Ex. 1. Dr. Kern concluded that Mr. Wood appeared to have suffered an acute inhalation injury following a mixed dust exposure. According to Dr. Kern, a subsequent analysis of the dust revealed nothing toxic enough to elicit a severe reaction. Dep. of Dr. Kern, Cl. Ex. 43 at 6.

Dr. Kern released claimant for work in February 1989. Claimant, however, only worked for three weeks due to pain and shortness of breath. Because claimant's pleuritic pain persisted, repeat x-rays were performed on March 7, 1989, and on March 10, 1989. These x-rays revealed findings consistent with the presence of a pleural effusion with likely associated infiltrate and/or atelectasis. Claimant's right-sided pain subsequently increased, and on March 13, 1989, he was again examined by Dr. Kern. Dr. Kern, having recently learned of claimant's prior occupational asbestos exposure during claimant's March 7, 1989 appointment, suspected the possibility of mesothelioma or metastatic carcinoma of the pleura and accordingly recommended bronchoscopy and repeat thoracentesis with pleural biopsy. A CT scan performed the following day revealed a significant increase in the right pleural effusion since a January 9, 1989 study. Dr. Kern referred claimant to Dr. Monicure for a possible thoracotomy. After performing exploratory surgery in April 1989, Dr.

Monicure indicated that his findings were most compatible with an organizing hemothorax with an associated finding of asbestosis. Cl. Ex. 23. Following his discharge from the hospital on April 11, 1989, claimant returned to work but was ultimately fired by employer on May 19, 1989. Claimant thereafter started his own heating, air conditioning and refrigeration business. Claimant filed a claim for disability compensation and medical benefits under the Act.

The administrative law judge determined that although claimant was entitled to reasonable and necessary medical benefits for his work-related asbestos disease, employer was not liable for any disability benefits owed claimant because the November 7, 1988 "baghouse incident" was an intervening cause of claimant's disability thereafter.

Claimant appeals the denial of disability benefits, arguing that the intervening cause doctrine is inapplicable in this case, because the baghouse incident occurred five months prior to the manifestation of his asbestos-related disease. In the alternative, claimant asserts that even if the intervening cause doctrine is applicable, the baghouse incident could not logically serve to relieve employer of liability in this case, as claimant was unaware of his occupational disease at the time this incident occurred and in any event exercised due care by wearing a respirator. Claimant also alleges various errors made by the administrative law judge with regard to his evaluation of the relevant medical evidence. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Program (the Director), responds, agreeing with claimant that the administrative law judge's finding of intervening cause should be reversed and the case remanded for resolution of the remaining issues.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, claimant must prove that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In the instant case, we affirm the administrative law judge's determination that the evidence was sufficient to invoke the Section 20(a) presumption. Claimant's exposure to asbestos while employed by employer is uncontested. Claimant also clearly sustained harm to his lungs, as the administrative law judge found that all doctors of record agree that claimant's chest x-rays, including films from May 1988, show pleural thickening, pleural markings and pleural fibrosis. Decision and Order at 13. As claimant established an injury and working conditions existed which could have caused that injury, we affirm the administrative law judge's determination in this regard. *See Cairns v. Matson Terminals Inc.*, 21 BRBS 252 (1988).

Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. If the presumption is rebutted, the administrative law judge must weigh all the evidence, pro and con, in reaching a decision. Where

there has been a subsequent injury, employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by the subsequent event. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983). However, where a subsequent injury occurs, employer remains liable for the entire disability if it is the natural or unavoidable result of the initial work injury. *See Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, No. 89-4803 (5th Cir. Apr. 19, 1990). Even if, however, a second accident is related to the work injury, employer can escape liability by establishing that the accident was the result of the negligence of claimant or a third party. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). Where employer establishes that claimant's disability is the result of an intervening cause, rather than due to a work injury, employer is relieved of liability for disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991); *Merrill*, 25 BRBS at 144; *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991) (*en banc*), *aff'd sub nom. Insurance Company of North America v. Director, OWCP*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1264 (1993).

Initially, we reject claimant's argument that the administrative law judge erred in finding that the baghouse incident was an intervening cause of claimant's disability because it occurred prior to the manifestation of his work-related asbestos condition. As claimant's occupational exposure to asbestos occurred prior to this incident, we conclude that the administrative law judge acted reasonably in considering whether the baghouse incident was an intervening cause of claimant's disability.

We also affirm the administrative law judge's finding that claimant had an asbestos-related lung condition, as it has not been appealed and is supported by substantial evidence. In this regard, after finding claimant had established a *prima facie* case, the administrative law judge found that claimant had an asbestos-related pulmonary disease. The administrative law judge found Dr. Kern's diagnosis of "asbestos pleural disease," as corroborated by several other medical opinions of record, more persuasive than Dr. Levine's opinion, which attributed claimant's very fine pleural thickening to obesity. Thus, the administrative law judge's determination that claimant had established an asbestos-related medical condition is supported by substantial evidence.

We agree with claimant and the Director, however, that the administrative law judge erred in evaluating the medical evidence relevant to the cause of claimant's disability. In reaching the conclusion that claimant's disability was due to the baghouse incident, the administrative law judge accepted Dr. Levine's December 1990 opinion (Cl. Ex. 42) attributing claimant's Class III impairment solely to the baghouse incident, despite having previously rejected this same opinion in finding that claimant sustained an injury to his lungs related to asbestos exposure. The administrative law judge rejected Dr. Levine's opinion in this regard due to his failure to consider the effect of claimant's prior asbestos exposure. Thus, the administrative law judge's decision is inconsistent in that in analyzing whether claimant's lung condition was related to asbestos exposure, the administrative law judge rationally credited Dr. Kern's opinion and rejected that of Dr. Levine. Decision and Order at 13-14. In discussing whether claimant's disabling lung condition was related

to asbestos or to the baghouse incident, however, the administrative law judge credited Dr. Levine without regard to his prior rejection of the doctor's opinion. Moreover, the question of whether claimant's disabling lung condition is due to the baghouse incident or asbestos exposure presents an issue of causation, to which Section 20(a) applies. *See James*, 22 BRBS at 271. This case must be remanded for the administrative law judge to reconsider the evidence as to the cause of claimant's continuing lung condition.

In this regard, the administrative law judge also mistakenly characterized Dr. Levine's opinion as uncontradicted in that portion of his decision on intervening cause, stating that this opinion was in accordance with Dr. Kern's June 1, 1989, opinion which he found to be most persuasive.[1] In finding Dr. Levine's opinion attributing claimant's disability solely to the baghouse incident uncontradicted, however, the administrative law judge overlooked Dr. Kern's November 10, 1989 report, the report he had previously relied upon in finding that claimant had asbestos-related pleural disease. In this report, Dr. Kern estimated that claimant had lost about 35 percent of his lung function, half of which was attributable to occupational exposure to asbestos, and categorized claimant as having a class 2 respiratory impairment with a 25 percent whole man impairment, half of which was attributable to asbestos exposure. Cl. Ex. 27. This evidence, which the administrative law judge previously found most credible, is sufficient to establish that the entire disability is compensable. *See, e.g., Strahan Shipping Co. v. Nash*, 782 F.2d 573, 18 BRBS 45 (CRT) (5th Cir. 1986). In light of these errors by the administrative law judge in weighing the relevant medical evidence, we vacate the administrative law judge's finding that the baghouse incident was an intervening cause of claimant's disability and remand for the administrative law judge to reconsider this issue and resolve the inconsistencies in his credibility determinations.[2] Even if the baghouse incident involved an aggravation subsequent to claimant's asbestos exposure, employer remains liable for all disability due to his asbestos-related injury. *See Leach v. Thompson's Dairy Inc.*, 13 BRBS 231 (1981).

[1]In this report, Dr. Kern indicated that claimant's acute respiratory failure probably occurred as a result of some exposure in the baghouse and that "it is equally difficult to speculate as to which workplace, if any, should be considered responsible for [claimant's] thoracotomy and resulting further decrement in lung function." Cl. Ex. 24. As the Director notes, rather than buttressing Dr. Levine's opinion, this statement could indicate that workplace exposure at employer played at least a contributing role in claimant's disability.

[2]We note that a second medical report from Dr. Levine dated January 15, 1991, attached to his deposition (RX 1), was apparently made a part of the record subsequent to the hearing immediately prior to the closing of the record on April 19, 1991. *See* Decision and Order at 2. In this report, Dr. Levine specifically considers claimant's prior asbestos exposure but nonetheless attributes claimant's entire disability to the baghouse incident. The administrative law judge did not discuss or evaluate this report in rendering his decision. As this evidence is relevant to the cause of claimant's disability, it should be considered by the administrative law judge in resolving this issue on remand.

We also agree with claimant that the administrative law judge erred in finding that employer was not liable for claimant's disability compensation based on his failure to exercise due care with regard to the baghouse incident. In *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954), the court enunciated the theory that a subsequent event which is due to the employee's own intention or carelessness cannot be the natural and unavoidable result of a work injury. In the present case, as claimant was unaware of his asbestos-related condition at the time the baghouse incident occurred,[3] he cannot reasonably be said to have failed to take adequate precautions with regard to his work-related condition. Moreover, as claimant was wearing a respirator at the time this incident occurred, he was not negligent in any event. *See Bailey*, 20 BRBS at 14. As the administrative law judge's finding of negligence is irrational and without evidentiary support in the record, we reverse this determination.

[3] Although the administrative law judge did not make a specific finding as to claimant's date of awareness, it is evident that claimant's awareness occurred sometime between March 7, 1989, when he filed his claim and first told Dr. Kern about his prior asbestos exposure, and April 19, 1989, the date of Dr. Monicure's letter to Dr. Kern diagnosing asbestosis following exploratory surgery.

Accordingly, the administrative law judge's finding that claimant sustained an asbestos-related injury during his tenure with employer is affirmed. The administrative law judge's finding that the baghouse incident was an intervening cause of claimant's present disability is vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge