BRB No. 92-0534

THOMAS A. MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THERMO REFRIGERATION	)	
	)	
and	)	DATE ISSUED:
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order Denying Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Thomas A. Miller, Martinez, California, *pro se*.

Michael L. Mowrey, San Francisco, California, for the employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order and Decision and Order Denying Motion for Reconsideration (88-LHC-689) of Administrative Law Judge Alfred Lindeman 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). As claimant is appearing without benefit of counsel, we will review the administrative law judge's Decision and Order under our general standard to determine whether his findings of fact and conclusions of law 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 for Thermo Refrigeration (Thermo) as a refrigeration machinist from 1962 through 1969, where he was exposed to asbestos. Claimant subsequently was employed as a refrigeration machinist by Commercial Air (Comm Air) from 1976 to 1979, where he also received asbestos exposure. Claimant was examined by Dr. Bristow in January 1980, who opined that claimant had mesothelioma in addition to severe pulmonary restrictive disease due to pleural and pulmonary asbestosis resulting primarily from his employment with Thermo. Claimant thereafter filed a claim for compensation against Comm Air which was eventually settled pursuant to Section 8(i), 33 U.S.C. §908(i), for a lump sum payment of $5000. The settlement, which was approved by Administrative Law Judge John V. Evans on March 19, 1981, provided that Thermo be joined as a party to the claim, and the case was subsequently remanded for that purpose. [1] Claimant thereafter proceeded to attempt to obtain permanent total disability compensation from Thermo, alleging that his pulmonary and respiratory conditions arose from that employment. The case proceeded to a formal hearing on October 24, 1988 and January 6, 1989.

In his Decision and Order, the administrative law judge found that because claimant's last period of injurious exposure to asbestos occurred during the course of his employment with Comm Air, subsequent to 1969, when claimant left Thermo, Comm Air was the responsible employer under the Act and that claimant accordingly was precluded from obtaining additional compensation from Thermo. Claimant filed a motion for reconsideration, which the administrative law judge summarily denied. Claimant, appearing without benefit of counsel, appeals the administrative law judge's denial of his claim against Thermo. Thermo responds, urging affirmance of the administrative law judge's denial of compensation based on application of the last employer rule.[2]

After careful consideration of the evidence, we affirm the administrative law judge's denial of claimant's claim against Thermo because his finding that claimant was last exposed to injurious stimuli while employed with Comm Air and that Comm Air is thus the responsible employer under the Act is rational and supported by the record. *See O'Keeffe*, 380 U.S. at 359. The standard for determining the responsible employer or carrier was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Pursuant to *Cardillo*, the last employer or carrier to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for any compensation owed under the Act. *Accord Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *see also Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir.

[1]The administrative law judge's Decision and Order Approving the Settlement was not appealed and thus became final 30 days after it was filed. 20 C.F.R. §802.205(a).

[2]We reject employer's contention that claimant's *pro se* appeal should be summarily dismissed because although claimant appealed the administrative law judge's Decision and Order Denying Reconsideration, he failed to file a separate appeal of the administrative law judge's underlying Decision and Order filed on February 7, 1989. Claimant's timely appeal of the administrative law judge's Decision and Order Denying Reconsideration also constitutes an appeal of the underlying Decision and Order. 20 C.F.R. §802.206.

1988). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Depart. of Labor,* 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). In *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed employer's burden of proof regarding causation and the determination of the responsible employer. The Board held that once an employee has established that he was exposed to injurious stimuli while engaged in covered employment, that employer could escape liability by showing that the employee's injury is not work-related or by establishing that he was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Id.* at 151. *Accord Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).[3]

In the present case, the administrative law judge concluded that claimant was last exposed to injurious stimuli while working for Comm Air and this exposure sufficiently affected any pulmonary asbestosis he may have. In so concluding, the administrative law judge noted that, contrary to his counsel's assertions, claimant's own hearing and deposition testimony indicated that he was exposed to refrigeration lagging, which contained asbestos, while working for Comm Air. The administrative law judge also noted that claimant's testimony was consistent with the history he provided to all the medical examiners of record. Finally, the administrative noted that both physicians rendering relevant opinions, Drs. Bristow and Shonfeld, recognized that at least some of claimant's disease process was attributable to his exposure to asbestos while working for Comm Air. Because the administrative law judge reasonably concluded based on this evidence that claimant's last injurious exposure to asbestos occurred while he was working for Comm Air subsequent to the time he left Thermo in 1969, his denial of claimant's claim against Thermos is consistent with *Cardillo* and is therefore affirmed. *See Lins,* 26 BRBS at 65; *see also Ricker v. Bath Iron Works.,* 24 BRBS 201 (1991).

[3]In the present case, although the administrative law judge erred in concluding that because claimant accepted a settlement from Comm Air, it was his burden to show that his exposure to asbestos during those years did not contribute or aggravate his injury, *see Suseoff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986), this error was harmless on the facts presented.

Accordingly, the Decision and Order and Decision and Order Denying Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge