

BRB No. 93-1948

EMMA SENICK)	
(Widow of CHARLES SENICK))	
)	
Claimant-Respondent)	
)	
v.)	
)	
NORTHERN CONTRACTING)	DATE ISSUED: _____
COMPANY)	
)	
and)	
)	
THE PENNSYLVANIA WORKERS')	
COMPENSATION SECURITY FUND)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Upon Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Brian R. Steiner (Steiner, Segal & Muller, P.C.), Philadelphia, Pennsylvania, for claimant.

Gordon Gelfond (Margolis, Edelstein and Scherlis), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Reconsideration (92-LHC-00259) of Administrative Law Judge Ralph A. Romano 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent worked for employer from 1948 to 1984. Tr. at 14, 18. Decedent's duties included working in a thaw shed, located on a pier, which was used to thaw coal in railroad cars. Decedent died on June 8, 1988, due to cardiopulmonary arrest, lung cancer, asbestos exposure, and cigarette smoking. CX 13. Claimant, decedent's widow, thereafter filed a claim for death benefits under the Act.

Decedent's former co-workers, Messrs. Stefanovicz, Giffear, and Bilbow, testified that the ceiling and walls of the thaw shed were lined with asbestos, that the air handles of the thaw shed's furnaces were covered with asbestos, and that they and decedent used asbestos cement to repair both the shed and its furnaces. Tr. at 45-50, 54, 62-65, 70-74; CX 20 at 5-11, 21-32. In contrast, employer's former master mechanic, William Kirschner, who was responsible for all repairs in the thaw shed and for ordering materials, testified that there was no asbestos in the thaw shed and that he never ordered any asbestos or asbestos-containing material. Tr. at 83-91.

Contractors for Conrail demolished the thaw shed in 1981 pursuant to a modernization project. Tr. at 104-105. Jeffrey May, the Conrail engineer who managed this project, testified that he was not aware of any asbestos or asbestos-containing material in the thaw shed, and that there was no asbestos-removal contractor involved in the shed's demolition. EX 7 at 7, 11, 24, 27, 53. Mr. May also testified that the walls of the thaw shed were not insulated and that there was no reason for insulation. *Id.* at 10, 30. Richard Geppert, whose company was hired to demolish the thaw shed, testified that there was no asbestos involved and that if there had been, he would have stopped the work and presented the problem to Conrail for their resolution. CX 19 at 6-7, 14-15, 17.

In a Decision and Order dated October 1, 1992, the administrative law judge found that the evidence of record, including the testimonies of claimant's witnesses, failed to establish the presence of asbestos in the thaw shed; thus, the administrative law judge concluded that claimant failed to prove any workplace exposure to asbestos by decedent. Next, the administrative law judge determined that, as claimant failed to establish that working conditions existed which could have caused decedent's lung cancer and death, the second element of claimant's *prima facie* case was not met and claimant was not entitled to invocation of the presumption provided at Section 20(a), 33 U.S.C. §920(a), of the Act. The administrative law judge further found that even if he had found invocation of the Section 20(a) presumption, he would find rebuttal established based on Dr. Swartz' medical opinion that there is inadequate evidence to support an asbestos exposure high enough to account for the decedent's fatal lung cancer. Lastly, the administrative law judge further found that the evidence as a whole failed to establish that Mr. Senick's death was caused by occupational exposure to asbestos. Accordingly, the administrative law judge denied the claim for death benefits.

Claimant requested reconsideration of the administrative law judge's decision, and sought to test the area where the thaw shed formerly stood for the presence of asbestos. Pursuant to the administrative law judge's ensuing order dated November 19, 1992, both parties conducted simultaneous inspections of the site. The results obtained by claimant's experts, TTI International Environmental, Inc., indicated the presence of asbestos in four soil samples and one solid debris sample. CX 21. The report submitted by employer's experts, BCM Engineers Inc., indicated trace

asbestos in three soil samples and no asbestos in any solid sample.¹ EX 4.

In his Decision and Order Upon Reconsideration, the administrative law judge found, based on the reports submitted by the parties which established the presence of asbestos in the soil at decedent's former workplace site, that claimant had established the existence of working conditions which could have caused decedent's death, and that claimant was thus entitled to invocation of the Section 20(a) presumption. Based on his previous crediting of Dr. Swartz' opinion that asbestos exposure was not a factor in decedent's death, the administrative law judge found rebuttal of the presumption. The administrative law judge next addressed the record as a whole and concluded that a preponderance of the evidence, including the opinions expressed by Dr. Giudice, CX 18, and by Dr. Lugano in the death certificate, CX 13, that decedent's fatal cancer was attributable to both asbestos exposure and smoking, established that decedent's death was due, in part, to asbestos exposure which occurred at the thaw shed. Accordingly, the administrative law judge awarded claimant death benefits.

On appeal, employer seeks reversal of the administrative law judge's Decision and Order Upon Reconsideration and reinstatement of the administrative law judge's initial decision denying benefits. Claimant responds, urging affirmance of the administrative law judge's decision on reconsideration.

Section 9 of the Act, as amended in 1984, provides that death benefits are awardable only where a work-related injury causes death.² 33 U.S.C. §909 (1988). Section 9 is applicable in the instant case where the decedent died after September 28, 1984. *See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. Law 98-426, §28(d), 98 Stat. 1639, 1647, 1655; see generally Close v. International Terminal Operations, 26 BRBS 21 (1992).* Section 20(a) of the Act provides claimant with a presumption that decedent's death was causally related to his employment. In order for Section 20(a) to be invoked, claimant must establish a *prima facie* case by proving that decedent suffered a harm and that working conditions existed or an accident occurred which could have caused the harm. *See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981).* Claimant has the burden of proof to establish her *prima facie* case. *Obert v. John T. Clark and Son of Maryland, 23 BRBS 157 (1990).* Once the presumption is invoked, the burden shifts to employer to establish that claimant's condition was not caused or aggravated by his employment. *See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).* If employer establishes rebuttal of the presumption, the issue of causation must be resolved on the whole body of proof. *See Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976).*

¹Both reports indicate that the Environmental Protection Agency defines Asbestos Containing Materials as those containing greater than one percent asbestos. TTI's report revealed soil sample asbestos findings as follows: one at 1-2%, two at <1%, and one at <1% at 0-1 feet and 1-2% at 5-6 feet; TTI's positive solid sample revealed asbestos at less than 1%. BCM's three soil samples indicative of asbestos each revealed trace amounts, *i.e.*, <1%.

²Employer does not contest the administrative law judge's determination that there was an asbestos exposure component to the cause of decedent's death.

In challenging the administrative law judge's decision on reconsideration, employer contends only that the administrative law judge erred in determining that decedent was exposed to asbestos while employed at employer's thaw shed, thus invoking the Section 20(a) presumption. Specifically, employer argues that both inspection reports submitted by the parties to the administrative law judge establish that there was no asbestos, under Environmental Protection Agency standards, in any solid debris sample, and it asserts that although soil samples were found to contain asbestos, claimant failed to establish the origin of the soil tested. In the instant case, the administrative law judge found that, in light of the newly submitted evidence which established the presence of asbestos at or about the site of employer's former thaw shed, claimant has established that working conditions existed which could have caused decedent's harm. It is well-established that, in arriving at a decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the administrative law judge acted within his discretion in crediting the inspection reports of both claimant's and employer's experts which show that soil samples taken from the area of the former site of the thaw shed contain asbestos; these expert opinions constitute substantial evidence in support of the administrative law judge's finding regarding the existence of working conditions which could have caused decedent's harm. Employer has failed to establish that the administrative law judge's credibility determinations in this regard are either inherently incredible or patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We, therefore, affirm the administrative law judge's conclusion on reconsideration that the evidence on the whole is sufficient to establish that decedent was exposed to asbestos while employed by employer, and, therefore, that claimant was entitled to invocation of the Section 20(a) presumption. *See Shaller*, 23 BRBS at 140. Accordingly, the administrative law judge's findings regarding causation are affirmed.

Accordingly, the administrative law judge's Decision and Order Upon Reconsideration is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge