BRB No. 99-1087

MARILEE JUSTICE (Widow of JAMES E. JUSTICE)	)	
Claimant-Respondent	)	DATE ISSUED: July 19, 2000
v.	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Motion for Reconsideration (98-LHC-2467) of Administrative Law Judge Daniel A. Sarno, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The parties entered into the following relevant stipulations, which the administrative law judge accepted:

> 1. James Justice (decedent) worked for employer from June 15, 1942 to April 29, 1944, June 18, 1946 to September 5, 1946, and August 21, 1947 to January 13, 1949.
>
> 2. Decedent was exposed to airborne asbestos dust and fibers while working for employer in sufficient quantities and for sufficient duration to cause asbestos related lung disease, including mesothelioma.
>
> 3. Decedent's mesothelioma was caused, at least in part, by his exposure to asbestos during his employment with employer.

Following his employment with employer, decedent worked for the National Aeronautics and Space Administration (NASA) as a sheet metal mechanic and engineer technician from 1949 until 1985. Relevant to the responsible employer issue, the parties attempted to stipulate that decedent was exposed to airborne asbestos dust and fibers during and in the course of his employment for NASA in sufficient quantities and of sufficient duration to cause asbestos related lung disease, including mesothelioma, and that his mesothelioma was caused, at least in part, by this exposure with NASA. The administrative law judge rejected this stipulation, finding that the parties cannot bind an entity which is not a party to the action. The administrative law judge awarded decedent permanent partial disability benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for a stipulated 75 percent impairment from September 23, 1997 until the date of death, January 5, 1998, and his widow (claimant) death benefits thereafter, 33 U.S.C. §909, payable by employer as the last employer covered by the Act. Employer's application for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), was denied.

Employer filed a motion for reconsideration, stating that the purpose of the stipulation was not to bind NASA, but so that the court of appeals could have a "complete record" before it on the inevitable appeal following Board review.[1] In lieu of the stipulation, employer sought to introduce into the record the October 1997 affidavit of the decedent describing his exposure to asbestos with NASA. The administrative law judge denied employer's motion to reopen the record for receipt of this affidavit, stating that he is not

[1]*See Green v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 562 (1981), *vacated mem.*, 688 F.2d 833 (4th Cir. 1982), wherein the Fourth Circuit declined to reach the legal issue concerning the validity of the "last covered employer rule" as there were no facts in the record to show subsequent injurious exposure.

required to accept evidence in lieu of a rejected stipulation in this instance as admission of the evidence would not change the outcome, as exposure at NASA cannot alter employer's liability under the Act.

On appeal, employer contends that the administrative law judge erred in rejecting the parties' stipulation regarding decedent's exposure to asbestos at NASA. Employer contends alternatively that the administrative law judge's refusal to admit its evidence on reconsideration in place of the stipulation is erroneous. Employer finally avers that the "last covered employer" rule is an invalid extension of the last employer rule, and that the rule violates its rights to equal protection and due process under the Constitution. Employer contends that claimant would not be harmed by the rejection of the "last covered employer" rule, as claimant has a remedy under the Federal Employees' Compensation Act (FECA) as decedent was a federal employee, or under the Virginia workers' compensation scheme, if he was not. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer first contends the administrative law judge erred in rejecting the parties' stipulation regarding decedent's exposure to asbestos at NASA, and, alternatively, that he erred in rejecting the evidence offered in lieu of the stipulation. Generally, an administrative law judge may not reject a stipulation without giving the parties notice that he will not accept it and an opportunity to present evidence in support of their positions on the issue in question. *See, e.g., Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). The basis for the administrative law judge's rejection of the stipulation regarding injurious exposure is that NASA is not a party to the claim and the parties have no right to bind NASA through their stipulations.

We reverse the administrative law judge's rejection of the parties' stipulation concerning decedent's exposure to injurious asbestos at NASA. As employer contends, had the administrative law judge accepted the stipulation, it would not be binding on NASA in any subsequent proceedings simply because NASA was not a party to the stipulation. *See generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Rice v. Glad Hands, Inc.*, 750 F.2d 434 (5th Cir. 1985). Furthermore, the stipulation could not be given collateral estoppel effect in any subsequent proceedings, as NASA was not a party to the proceedings under the Act and as the issue was not actually litigated. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). Moreover, the stipulation provides employer with an element of its defense to the claim that it is the responsible employer. It arguably needs this evidence to establish that subsequent exposure to asbestos could have caused decedent's disability and death. *See* n.1, *supra*. Thus, acceptance of the stipulation could only have the effect of absolving employer of liability under the Act, had the administrative law judge accepted employer's legal contention regarding the responsible employer, and as claimant agreed to this stipulation, the administrative law judge should have accepted it.

The attempted stipulation in this case is in contrast to that presented in a case where the private parties attempt to bind the Special Fund to their stipulations without the agreement of the Director, Office of Workers' Compensation Programs. The Board has held that the private parties may not bind the Special Fund by stipulations to which the Director has not agreed. *See Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985). The stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *See McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in pert. part sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). In the case where the private parties attempt to bind the Special Fund by stipulation, acceptance of the stipulation without question could affect the liability under the Act of a non-party to the stipulation. In the present case, however, the non-party's liability is not at issue, as NASA cannot be held liable under the Act. As the stipulation is relevant to employer's defense of the claim, and as no harm can accrue to NASA from its acceptance, we reverse the administrative law judge's rejection of the stipulation.[2]

[2]Thus, we need not address employer's alternative contention regarding the administrative law judge's refusal to admit decedent's affidavit into evidence upon employer's motion for reconsideration.

Nevertheless, we affirm the administrative law judge's conclusion that employer is liable for the benefits awarded as the last employer covered by the Act to expose decedent to injurious stimuli. We note employer's concession that current law virtually compels this result, but we will nonetheless address employer's specific contentions, as they challenge the reasoning underlying this precedent. Under the "last covered employer rule," liability for the entire disabling condition or the death is imposed on the last employer covered under the Longshore Act to expose the employee to injurious stimuli in sufficient quantities to have the potential to cause the employee's occupational disease. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

In affirming the Board's holding to this effect in *Black*, the United States Court of Appeals for the Ninth Circuit first discussed the rule of allocating liability between and among covered employers as set forth in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955),[3] and as discussed by the Ninth Circuit in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The *Black* court restated the principle that the *Cardillo* rule "apportions liability in a fundamentally equitable manner because 'all employers will be the last employer a proportionate share of the time.'" *Black*, 717 F.2d at 1285, 16 BRBS at 16(CRT), *quoting Cordero*, 580 F.2d at 1336, 8 BRBS at 747. In *Black*, Todd Shipyards exposed the claimant to injurious asbestos in the 1940's, and the claimant subsequently was exposed to asbestos in non-covered employment with Boeing. In extending full liability to the last employer covered by the Act, the Ninth Circuit stated:

> Congress did not intend that a company covered by the LHWCA should escape its legal responsibilities because a subsequent employer not covered by the Act also contributed to the occupational disease. On the contrary, the LHWCA and similar workmen's compensation statutes have been clearly and consistently interpreted to impose liability on the *last employer covered* by the applicable statute. To accept Todd's position would be to deny LHWCA compensation to many workers who were subjected to injurious stimuli but later worked at other non-covered jobs. Such a result would be contrary to the express purposes of the Act.

Black, 717 F.2d at 1285, 16 BRBS at 16-17(CRT) (emphasis in original). In this regard, the court found the decision of the United States Court of Appeals for the Fifth Circuit in *Fulks*

[3]The last employer rule imposes full liability on the last employer to expose the employee to injurious stimuli prior to the employee's awareness that he is suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

v. Avondale Shipyards, Inc., 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981), *cert. denied*, 454 U.S. 1080 (1981), illustrative, as it establishes that later exposure during non-covered work does not absolve the covered employer of liability. In *Fulks*, claimant was exposed to injurious sandblasting over the course of 16 years of employment at Avondale, only two months of which was on navigable waters and thus covered under the Act. Nonetheless, the court held that the Longshore Act applied and Avondale was liable for benefits under it. Rejecting employer's attempt to distinguish *Fulks* because claimant worked for only one employer, the *Black* court held that the key to the Fifth Circuit's decision is that employer was liable even though the employee's prolonged and final exposure was in non-covered work, finding this reasoning also applies in cases involving two employers where the first is covered and a subsequent employer is not.

The *Black* court further noted that the last covered employer rule was endorsed in state proceedings where the last employer is located in a different state. The court also stated that the case before it did not present the situation where the claimant's injury resulted solely from the subsequent exposure at Boeing, and that therefore Todd Shipyards was liable as it exposed the claimant to sufficient quantities of asbestos to cause his disease. *Black*, 717 F.2d at 1286, 16 BRBS at 17(CRT). Finally, in a footnote, the court rejected the contention that Todd Shipyards should not be liable because the claimant might have a remedy against Boeing under state law. The court stated that "[t]his argument ignores the fact that the LHWCA establishes a discrete compensation system independent of similar state programs," and moreover, that the claimant is not guaranteed a recovery under state law. Accepting the employer's view, the court stated, could result in the claimant's not receiving benefits under either law. *Id.*, 717 F.2d at 1286 n.5, 16 BRBS at 17 n.5(CRT). The Board recently applied *Black* in *Stilley v. Newport New Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), to affirm summarily a finding that the employer was fully liable to the claimant as the last covered employer notwithstanding the claimant's subsequent exposure to asbestos with a non-covered employer (also NASA).[4]

Employer's first argument against the "last covered employer" rule is that the reasons for allocating full liability to the last employer, *i.e.*, that each employer will be the last a

[4]We note the recent opinion of the United States Court of Appeals for the First Circuit in *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999), wherein the court, in *dicta*, was not unsympathetic to the position espoused by employer in the instant case. The court, however, decided the case on other grounds, and we note, moreover, that the court did not discuss the Ninth Circuit's decision in *Black*, but merely noted its contrary holding. The court did discuss *Fulks*, and found its reasoning sound, as in both *Fulks*, and the case before the court, the claimant worked for the same employer, but in both covered and uncovered employment.

relatively equal number of times, is not present because the maritime industry as a whole will bear a disproportionate burden in relation to all industries. This contention is without merit for the reasons discussed by the Ninth Circuit in *Black*, as set forth above. *Black*, 717 F.2d at 1285, 16 BRBS at 16(CRT).

Secondly, employer contends that this type of liability allocation has been rejected for traumatic injuries. Employer states that in *Marsala v. Triple A South*, 14 BRBS 39 (1981), the Board recognized, in the context of a subsequent traumatic injury, that an employer cannot be held liable for the "negligent or intentional conduct of a third party," for "[t]o hold otherwise would be to require employers to compensate employees for injuries over which the employer had no control ...." 14 BRBS at 42, 43. Employer contends that this reasoning should apply in the instant case, because otherwise it is being held liable for a non-covered employer's "behavior." This contention is a red herring. Employer is ignoring the fact, in this case, that it stipulated to exposure to asbestos in sufficient quantities to cause decedent's mesothelioma, and that the mesothelioma was caused at least in part by the exposure with employer. Thus, even if decedent had not been exposed at NASA, the exposure at employer, alone, would be sufficient to establish its liability. As in *Black*, this case does not present the facts wherein the decedent's disease and death resulted *solely* from exposure at a non-covered employer.

Employer next contends that claimant will not endure hardship if employer is absolved of liability because claimant has other remedies, namely the FECA, as decedent was a federal employee at NASA, or under the Virginia workers' compensation law if he were not. Again, this is answered by *Black*, as discussed above. The court stated there is no guarantee of an adequate recovery, or of any recovery, under another compensation scheme, and Congress could not have intended the result that injured persons within the Act's coverage go uncompensated . *Black*, 717 F.2d at 1286 n.5, 16 BRBS at 17 n.5(CRT).

Finally, employer contends that the last covered employer rule violates its Constitutional rights to equal protection and due process of law. Employer's argument is that the government has no rational basis for "discriminating" against maritime employers vis-a-vis non-maritime employers by assigning all liability to the last covered employer. The Fifth Amendment of the Constitution forbids discrimination that is "'so unjustifiable as to be violative of due process.'" *Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63, 67 n.1 (CRT) (2^{d} Cir. 1987), *quoting Schneider v. Rusk*, 377 U.S. 163 (1964). The Ninth Circuit in *Cordero*, 580 F.2d at 1331, 8 BRBS at 744, rejected the Fifth Amendment challenge to the last employer rule (as among various covered employers), holding that due process and equal protection are not offended when the last employer is fully liable so long as the exposure with the last employer bears a rational connection to the disability. *See also National Independent Coal Operator's Ass'n v. Brennan*, 372 F.Supp. 16 (D.D.C. 1974), *aff'd*, 419 U.S. 955 (1974) (similar holding under Black Lung Act). Moreover, the

interpretation of the Act challenged here furthers the purpose behind the Longshore Act, which is to ensure a remedy to those who are injured while within its coverage. Employer in this case is not treated differently than other covered employers, and there exists a rational basis for treating covered employers differently than non-covered employers. *See generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Korineck*, 835 F.2d at 42, 20 BRBS at 63(CRT); *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985). Thus, employer's argument that maritime employers are situated similarly to non-maritime employers is without merit, and its equal protection argument must fail.

Similarly, employer's argument that its property is being taken without just compensation in violation of its due process rights is without merit. A regulatory statute does not violate the "Taking Clause" merely because the statute "creates burdens for some that directly benefits others" or "requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), *citing Usery*, 428 U.S. at 15-16. For example, in *Liberty Mutual Ins. Co. v. Whitehouse,* 868 F.Supp. 425 (D.R.I. 1994), the district court upheld the constitutionality of a provision of the Rhode Island workers' compensation statute requiring cost-of-living adjustments (COLA) to workers who were totally disabled for more than 52 weeks, based on relevant factors enunciated by the Supreme Court in *Connolly*. The COLA amendment did not result in any appropriation of the carrier's assets for the state's own use, but from a public program to promote the common good. This rationale applies to the instant case. Another *Connolly* factor relates to the economic impact on the employer. In the Rhode Island case, the court found the impact mitigated by the fact that only totally disabled workers were entitled to COLAs, by other amendments beneficial to employers, and by carriers' ability to recoup the cost through the rate making process. In *Connolly*, a payment required by an employer under the statute in question was found mitigated by a number of provisions in that statute that reduce any one employer's liability. Likewise, in this case, the rationale behind the general responsible employer rule, that all employers will be the last a proportionate number of times, mitigates any one employer's liability under the last covered employer rule.

In sum, we find no merit to employer's contentions. Employer attempts to turn the responsible employer rule from a rule involving the assessment of liability among employers into one governing claimant's entitlement under the Act. This approach was rejected long ago, *see Fulks,* 637 F.2d at 1012, 12 BRBS at 978, and employer offers no persuasive argument to depart from this precedent. The administrative law judge's finding that employer is liable for the benefits awarded as the last employer covered by the Act to expose decedent to injurious stimuli is thus affirmed, as it is fully supported by law. *Black,* 717 F.2d at 1284-1287, 16 BRBS at 16-18(CRT); *Stilley,* 33 BRBS at 225-226; *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Accordingly, the administrative law judge's rejection of the parties' stipulation regarding decedent's exposure to asbestos at NASA is reversed. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge