

CARL L. DELAURA)
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 Claimant-Respondent)
)
 v.)
) DATE ISSUED: 06/12/2006
 GENERAL DYNAMICS)
 CORPORATION/ELECTRIC BOAT)
 CORPORATION)
)
 and)
)
 ACE/USA)
)
 Employer/Carrier-)
 Petitioners)
)
 MORRISON KNUDSEN COMPANY)
)
 and)
)
 TRAVELERS CASUALTY & SURETY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order Granting in Part and Denying in Part Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Lucas D. Strunk (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for General Dynamics Corporation/Electric Boat Corporation and ACE/USA.

Mark S. Taylor (Waller & Associates), Metairie, Louisiana, for Morrison Knudsen Company and Travelers Casualty & Surety.

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

PER CURIAM:

General Dynamics Corporation/Electric Boat Corporation (Electric Boat) appeals the Decision and Order Awarding Benefits and the Decision and Order Granting in Part and Denying in Part Motion for Reconsideration (2004-LHC-00211) of Administrative Law Judge Daniel F. Sutton 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a pipefitter, was exposed to asbestos during his employment. He worked inside submarines for Electric Boat during 1965, where a large amount of asbestos dust was present. Claimant returned to this shipyard in 1976, where he was employed by Morrison Knudsen Company (Morrison Knudsen) for five months. Claimant did not work directly with asbestos products for Morrison Knudsen, but he walked through buildings in the shipyard where new submarines were under construction. Before and after his employment with Morrison Knudsen, claimant also worked for W. J. Barney Corporation (Barney) at a pharmaceutical plant on the Thames River operated by Pfizer, Incorporated (Pfizer), where he was exposed to asbestos while working on boilers and steam lines. Claimant assumed he was further exposed to asbestos at various non-maritime employers from 1976 to 1999. He was diagnosed in December 2002 with pulmonary disease related, in part, to asbestos exposure. Claimant was diagnosed in April 2004 with lung cancer, which was also related, in part, to asbestos exposure. Claimant sought compensation under the Act for his work-related lung cancer. *See* 33 U.S.C. §908(c)(23).

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his pulmonary disease and lung cancer to his work exposure to asbestos. The administrative law judge found that none of the respondent employers presented any evidence to rebut the presumption. Consequently, the administrative law judge found that claimant's pulmonary conditions are work-related and he awarded claimant compensation. 33 U.S.C. §908(c)(23). The administrative law judge found that Barney, claimant's last potentially maritime employer, is not the

responsible employer, inasmuch as the Pfizer plant was used for manufacturing and is not a maritime situs. *See* 33 U.S.C. §903(a). Moreover, the administrative law judge found that claimant was not engaged in maritime employment for Barney. *See* 33 U.S.C. §902(3). The administrative law judge found that Morrison Knudsen is not the responsible employer as there was no direct evidence that claimant was exposed to airborne asbestos during his employment with Morrison Knudsen at the Electric Boat facility in 1976. Accordingly, the administrative law judge concluded that Electric Boat is the responsible employer based on the uncontradicted opinion of Dr. Bigos linking claimant's lung disease to his employment in 1965 with Electric Boat.¹ *See* CX 1.

On Electric Boat's motion for reconsideration, the administrative law judge modified the award to reflect the commencement of permanent partial disability benefits as of April 22, 2004. The administrative law judge again found that Barney is not a maritime employer, that claimant was not exposed to airborne asbestos particles during the course of his employment for Morrison Knudsen, and that Electric Boat is, therefore, the responsible employer.

On appeal, Electric Boat challenges the administrative law judge's finding that claimant was not exposed to asbestos during the course of his employment for Morrison Knudsen.² Morrison Knudsen and claimant respond, urging affirmance.

Electric Boat contends that claimant's testimony is sufficient evidence of his asbestos exposure while he was employed at Morrison Knudsen to confer liability on Morrison Knudsen. Specifically, Electric Boat argues that claimant's testimony places him within 30 feet of a construction environment where asbestos products were present. Once, as here, claimant is found to have a work-related condition, the employers in the case must establish which of them is liable for payment of benefits. *See Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *modified in part on recon.*, 40 BRBS 1 (2005); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2^d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See, e.g., New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Argonaut Ins. Co. v.*

¹ Electric Boat does not challenge the finding that claimant was exposed to asbestos in 1965 when he worked inside submarines.

² Electric Boat does not appeal the administrative law judge's finding that Barney is not the responsible employer.

Patterson, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). Claimant does not bear the burden of proving the responsible employer; rather, each employer bears the burden of establishing it is not the responsible employer. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). In order to establish that it is not the responsible employer, an employer must demonstrate either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990).

The administrative law judge found there is no credible evidence that claimant was exposed to airborne asbestos particles during the course of his employment for Morrison Knudsen in 1976. Decision and Order at 10; Order on Reconsideration at 3. In his decision and on reconsideration, the administrative law judge credited claimant's testimony that he did not work directly with asbestos, although asbestos was present at the shipyard in 1976. CX 11 at 21-22, 67-68. The administrative law judge found that the mere possibility that claimant may have been exposed to asbestos while employed by Morrison Knudsen is insufficient to confer liability on it. Decision and Order at 10; Order on Reconsideration at 3.

We affirm the administrative law judge's responsible employer determination because his finding that Electric Boat did not establish that claimant was exposed to airborne asbestos while employed with Morrison Knudsen is supported by substantial evidence. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, claimant worked for Morrison Knudsen for approximately five months in 1976. Decision and Order at 6; Tr. at 61; CXs 5 at 57, 11 at 59-61. Claimant testified his job duties for Morrison Knudsen did not entail any work with or near asbestos. CX 11 at 21-22, 67-68. Claimant stated he "suspected" he was exposed to asbestos particles during approximately three weeks in which he obtained permission from Electric Boat to cut through the shipyard at the start and end of his shift with Morrison Knudsen. Tr. at 39-40; CXs 5 at 45, 11 at 20-21. Claimant testified that he walked through buildings where new submarines were being constructed, and that he believed he passed within 30 to 50 feet of asbestos insulation. Tr. at 39-40, 45-46; CX 11 at 20-21, 67. However, the administrative law judge found that claimant repeatedly was unable to testify with any degree of certainty that he actually was exposed to asbestos. *See Tr. at 40, 44-46; CX 11 at 21, 67.* Thus, the administrative law judge found that

Electric Boat did not establish that claimant was exposed to any injurious stimuli during his limited employment with Morrison Knudsen. As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the conclusion that Electric Boat did not establish that claimant was exposed to asbestos during the course of his employment for Morrison Knudsen and the resultant finding that Electric Boat is the employer responsible for benefits for claimant's work-related lung cancer.³ See *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154 (1996); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

Claimant's counsel has filed a petition for an attorney's fee of \$1,325 for services rendered before the Board, representing 4.25 hours of attorney time at \$250 per hour and 3.75 hours of paralegal work at \$70 per hour. Electric Boat has not responded to the attorney's fee petition. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeal. See *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 20 C.F.R. §802.203(b). We find the requested hourly rates of \$250 for attorney time and \$70 for paralegal work reasonable in this case. See 20 C.F.R. §802.203(d)(4); *McKnight v. Carolina Shipping Co.*, 32 BRBS 251, *aff'g on recon. en banc* 32 BRBS 165 (1998). We disallow one hour of attorney time and 2.25 hours of paralegal time for services rendered while the case was pending before the administrative law judge.⁴ See *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). We find the remaining number of hours requested to be reasonably commensurate with necessary work performed and we grant claimant a fee of \$917.50, payable by Electric Boat. 20 C.F.R. §802.203(e).

³ Thus, we need not address Electric Boat's contention concerning the degree of asbestos exposure necessary to shift liability to a subsequent employer.

⁴ Electric Boat filed its Notice of Appeal with the Board on July 11, 2005. We, therefore, disallow the time requested for work performed from May 13 to July 8, 2005.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Decision and Order Granting in Part and Denying in Part Motion for Reconsideration are affirmed. Claimant's counsel is awarded an attorney's fee of \$917.50 for work performed before the Board, payable directly to counsel by Electric Boat. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge