BRB No. 09-0318

S.W. (putative widow of D.W.) Claimant-Petitioner v. ALLIED SIGNAL/HONEYWELL INTERNATIONAL and TRAVELERS PROPERTY CASUALITY COMPANY OF AMERICA Employer/Carrier-Respondents	)	DATE ISSUED: 10/16/2009 DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision and the Order Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

S.W., San Diego, California, *pro se*.

Michael W. Thomas and Shana L. Prechtl (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation by counsel, appeals the Order Granting Motion for Summary Decision and the Order Denying Motion for Reconsideration (2008-LHC-01507) of Administrative Law Judge Jennifer Gee 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). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are

rational, and are in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 8, 2007, claimant filed a claim for death benefits under the Act on her own behalf and on behalf of her four children. 33 U.S.C. §909. Claimant alleged that she is the widow of the deceased employee, D.W., and that he contracted Crohn's disease, sarcodosis and hypertension during the course of his employment for employer from January 1980 to March 1994, which contributed to his fatal heart attack on March 27, 1994. Employer controverted the claim.

Employer filed a Motion for Summary Decision and supporting exhibits on November 13, 2008. Employer asserted that: 1) claimant is not a "widow" under Section 2(16) of the Act, 33 U.S.C. §902(16); 2) the claims of claimant and her children were not timely filed under Section 13 of the Act, 33 U.S.C. §913; 3) claimant's son T.W. was not a minor at the date of decedent's death; 4) claimant lacks standing to seek benefits on behalf of her now-adult children; and 5) decedent's alleged injuries did not occur on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). Claimant responded to the motion, to which employer filed a reply.

In her order granting employer's motion, the administrative law judge found that a February 1982 divorce decree between claimant and the decedent and the absence of any evidence that claimant was married to decedent at the date of his death establish that claimant is not a "widow" under the Act. *See* 33 U.S.C. §902(16). The administrative law judge further found that the claims of claimant and her children filed on November 8, 2007, are time-barred under Section 13. Accordingly, the administrative law judge did not address employer's other grounds for summary decision; she granted employer's motion and dismissed the claims of claimant and her children. Claimant's motion for reconsideration was summarily denied.

Claimant appeals the administrative law judge's decision. Employer responds, urging affirmance of the dismissal of the claims.[1]

We cannot affirm the administrative law judge's finding that the claims of claimant and her children are barred under Section 13. Section 13(a) provides that in a case involving a traumatic injury, a claim must be filed within one year of the date the

[1] In its motion for summary decision, employer stated that Honeywell International is the successor corporation to Allied Signal. Employer's Motion for Summary Decision at 2. The decedent was employed by Allied Signal. *See* Employer's Motion at Exs. 1-4.

claimant was aware, or in the exercise of reasonable diligence, should have been aware, of the relationship between the employment and the death. 33 U.S.C. §913(a). The statute of limitations in the case of an occupational disease that does not immediately result in death is two years after the date of awareness or the date claimant should have been aware of the relationship between the employment and the death. 33 U.S.C. §913(b)(2). Section 20(b), 33 U.S.C. §920(b), contains a presumption that the claim was timely filed.[2] Thus, the burden is on employer to produce substantial evidence that the claim was untimely filed. *Bath Iron Works Corp. v. U. S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). In this case, employer relied solely on the fact that the claims were filed 13 years after decedent's death to establish that the claims are time-barred. *See* Employer's Motion for Summary Decision at 6-7. In her decision, the administrative law judge found, "[B]ecause the Claimant has failed to put forth any evidence which demonstrates causation or her knowledge regarding causation, and construing the facts in a light most favorable to her, I will assume for purposes of this Order that she became aware of the alleged industrial-related nature of the Decedent's death on March 24, 1994 (the date of death)." Order at 6.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40(c), 18.41(a). The administrative law judge's assumption, in the absence of any relevant evidence, that claimant's awareness occurred on the date of death does not look at the facts most favorably to the non-moving party. *See Morgan*, 40 BRBS at 11. Moreover, in view of the Section 20(b) presumption, employer is not entitled to summary decision as a matter of law. The administrative law judge did not give claimant the benefit of the Section 20(b) presumption that the claims were timely filed, and employer did not produce substantial evidence regarding when claimant became aware,

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[2] Section 20(b) provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary--
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> * * *
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> (b) That sufficient notice of such claim has been given.

33 U.S.C. §920(b).

or by exercise of reasonable diligence should have become aware, of a relationship between decedent's death and his employment for employer. Where, as here, the record does not contain evidence that claimant and her children were aware, or should have been aware, that the decedent's death was related to his employment at a date which would make the claim untimely, there is not substantial evidence to rebut the Section 20(b) presumption. *E.M. v. Dyncorp Int'l*, 42 BRBS 73, 75 (2008). Accordingly, as employer did not rebut the Section 20(b) presumption, the claim is presumed timely, and the administrative law judge's grant of summary judgment on the basis that the claims of claimant and her children are barred under Section 13 must be vacated.

Nonetheless, we affirm the denial of benefits on other grounds.[3] Initially, we affirm the administrative law judge's denial of the claim of S.W on the basis that she is not decedent's widow. Section 2(16) states:

> The terms "widow or widower" includes [sic] only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

33 U.S.C. §902(16). State law must be applied to determine whether claimant was the "wife" of decedent at the time of death. *See Jordan v. Virginia Int'l Terminals*, 32 BRBS 32 (1998); *see also Albina Engine & Machine Works v. O'Leary*, 328 F. 2d 877 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964). The administrative law judge credited the divorce decree between S.W. and decedent that employer submitted with its motion for summary decision, and the lack of any evidence provided by claimant that she and decedent remarried prior to the date of death, to find that claimant is not decedent's widow. The administrative law judge found insufficient claimant's statement in her response to employer's motion that no "dissolution (nor settlement) had taken place." Claimant's Response at 3. Claimant's petition for divorce based on "irreconcilable differences" was filed in California on February 10, 1981, and granted on February 3, 1982. Employer's Motion for Summary Decision at Ex. 6. The administrative law judge found that under California law, Cal. Fam. Code §2300 (2008), the divorce decree restores the parties to the state of unmarried persons. Accordingly, the administrative law judge concluded that claimant was not the decedent's wife at the date of death, and, therefore, she is not entitled to death benefits under the Act as his widow. Order at 4-5.

[3] Any claims based on events that do not involve injuries decedent allegedly sustained while working for employer are not within the jurisdiction of the Department of Labor.

Claimant has the burden to show that she is a widow, as defined by the Act. *Meister v. Ranch Restaurant*, 8 BRBS 185 (1978), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979) (table). Where, as here, the evidence of record shows that claimant and decedent were legally divorced, claimant must establish that they subsequently established a marriage under state law in order to be decedent's "widow,"[4] or that, notwithstanding the evidence of record, there was no valid divorce. *New Valley Corp. v. Gilliam*, 192 F.3d 150, 33 BRBS 179(CRT) (D.C. Cir. 1999); *Jordan*, 32 BRBS 32. In this case, claimant did not submit any evidence that despite the decree of divorce in the record, she and decedent were married at the time of his death. Thus, the administrative law judge properly found that claimant was not the decedent's "wife" at the date of death and therefore is not entitled to death benefits under the Act as a "widow" under Section 2(16).

Regarding the claims of claimant's children, we hold that employer is entitled to summary decision on the grounds that the decedent was not injured on a situs covered under the Act.[5] For a claim to be covered by the Act, decedent's injury must have occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a). Moreover, decedent's work must have been maritime in nature pursuant to Section 2(3) and not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Id.*; *see also Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996).

Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable

[4] The Act permits a "wife" to live apart from her husband for justifiable cause or by reason of desertion, 33 U.S.C. §902(16), but once the parties are divorced this provision is inapplicable unless a subsequent marriage occurs.

[5] Employer raised this issue in its motion for summary decision but the administrative law judge did not address it. Remand is not necessary as this issue may be resolved as a matter of law based on the uncontroverted evidence.

> waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). Thus, to be covered under the Act, a site must be an enumerated situs adjoining navigable water (pier, wharf, dry dock, *etc*.), or an "other adjoining area" customarily used for a maritime purpose. In general, an area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991); *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

Claimant alleged that the injuries that contributed to decedent's death arose, in part, at employer's facility in Trumball, Connecticut. Employer's Motion at Exs. 2, 8.[6] Employer submitted evidence with its motion for summary decision establishing that its Trumball facility is approximately eight miles from any navigable water. *Id*. at ex 9. Claimant submitted no evidence in response refuting employer's contention that its Trumball facility is not a covered situs. To defeat a motion for summary decision, the party opposing the motion must establish the existence of an issue of fact that is both material and genuine; in this regard, the party must produce at least some "significant probative evidence tending to support" her claim. *Morgan*, 40 BRBS at 11, *quoting First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968); *see also Buck*, 37 BRBS 53. In this case, claimant did not submit any evidence or argument which could show that the Trumball facility has the necessary geographic and functional connection with any navigable water. In the absence of claimant's submitting contrary information raising a genuine issue of material fact, the evidence submitted by employer is sufficient to establish that the Trumball facility is not an "adjoining" site under Section 3(a).[7] 33

[6] Claimant also alleged that decedent sustained injuries in 1975 during a Navy tour of duty on board the USS Permit. Military service-related injuries are not covered under the Act.

[7] In *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom., Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), the employer's container refurbishment site was 12 miles from the Oakland terminal, 750 feet from a waterway and a ½ mile from a deep water port. The Board held there was a functional nexus between the Oakland terminal and the refurbishment site, but that, applying *Herron*, 568 F.2d 137, 7 BRBS 409, the remaining factors were insufficient to support a situs finding. Specifically, the Board held that the site was not particularly suited for maritime purposes, its choice was governed by economic factors, and the adjoining businesses were not primarily maritime. Moreover, the Board held that the proximity to the deep

U.S.C. §903(a); *see Triguero*, 932 F.2d 95; *Herron*, 568 F.2d 137, 7 BRBS 409. Accordingly, as a matter of law, any illness and/or death the decedent sustained during the course of his employment with employer is not covered by the Act.[8] Therefore, we affirm on other grounds the administrative law judge's summary dismissal of these claims.

Accordingly, the administrative law judge's Order Granting Motion for Summary Decision and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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water port was merely fortuitous, as employer had no relationship with that facility. *See also Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42 (CRT) (1st Cir. 2004). The Ninth Circuit summarily affirmed the Board's decision as consistent with *Herron*.

[8] In addition, in order for decedent's death to be compensable under the Act, it must be work-related. In order to demonstrate a work-related death, claimant must establish the existence of working conditions that could have caused the decedent's illness or death. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). We note that claimant did not submit any evidence of working conditions at employer's Trumball facility that could have caused or contributed to decedent's death.