

LOIS M. LACKORE)
(Widow of ARLYN L. LACKORE))
)
Claimant) DATE ISSUED:
)
v.)
)
INTERSTATE ELECTRONICS,)
INCORPORATED)
)
and)
)
NORTHWESTERN NATIONAL)
INSURANCE/KEMPER INSURANCE)
)
Employer/Carrier-)
Petitioners)
)
TRAVELERS INSURANCE COMPANY)
)
Carrier-Respondent)
)
CIGNA INSURANCE COMPANY)
)
Carrier-Respondent)
)
AIG/GALLAGHER BASSETT)
INSURANCE SERVICES)
)
Carrier-Respondent) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris), Groton, Connecticut, for claimant.

Andrew James Hern (Gordon, Muir and Foley, LLP), Hartford,

Connecticut, for employer and Northwestern National Insurance/Kemper Insurance.

Elizabeth M. Waterfield (Morrison, Mahoney & Miller), Boston, Massachusetts, for Travelers Insurance Company.

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

PER CURIAM:

Employer and its carrier Kemper Insurance appeal the Decision and Order - Awarding Benefits (96-LHC-1638) of Administrative Law Judge David W. Di Nardi 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 which 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, employed as an electronics technician for Interstate Electronics, Incorporated (employer), worked at a number of different facilities over his career which spanned from July 27, 1962, until January 1990. Decedent spent the majority of his career installing, repairing and maintaining the electronic instrumentation of missiles on nuclear-powered submarines while working at the Electric Boat (EB) facility in Groton, Connecticut from 1963 to 1968, 1969 to 1972 and from sometime in 1974 or 1975 until 1986,¹ and at the Portsmouth Naval Shipyard, Kittery, Maine, from 1972 to sometime in 1974 or 1975, and from 1986 until he was laid-off in January 1990.

While working at EB's shipyard, decedent had intense asbestos exposure from 1963-1968 and allegedly some additional exposure sometime in 1978-79. In addition, decedent allegedly was exposed to asbestos during his employment at the

¹During his career with Interstate, decedent also had brief work stints at shipyards in Bremerton, Washington (1968), and Virginia Beach, Virginia (1969), and performed work on an experimental project in Cape Canaveral, Florida (1969).

Portsmouth Naval Shipyard from 1986-1990. Decedent began experiencing breathing problems in July 1994, and was diagnosed first with pneumonia by Drs. Brensilver and Bontempi. Decedent then was diagnosed with cancer by Drs. Buckley, Horten, Copertino and Jagathambal, and he passed away on September 10, 1994. Dr. Jagathambal certified as the immediate cause of death lung cancer due to or as a consequence of septic shock and respiratory failure. By letter dated February 14, 1997, Dr. Buckley stated that decedent's asbestos exposure was a significant contributing factor in his death. Dr. Cherniak similarly stated that decedent's death was due to lung cancer caused by two significant extrinsic risks, the major risk being his asbestos exposure and the minor risk being his earlier exposure to tobacco smoke. In contrast, Dr. Ashburn stated that decedent's lung cancer was caused solely by his cigarette smoking.

Claimant, the decedent's wife, filed a claim seeking permanent total disability benefits from July 1994, to September 10, 1994, and death benefits, including funeral expenses, thereafter under the Act. The parties stipulated that over the course of decedent's employment, employer was provided insurance coverage under the Act by various carriers. Specifically, Travelers Insurance Company (Travelers) provided coverage up to about July 1, 1977; Northwestern National Insurance Company/Kemper Insurance provided coverage from 1978 to 1982; CIGNA Insurance provided coverage from October 1, 1984, through October 1, 1988, and AIG/Gallagher Bassett Insurance Services provided coverage from October 1, 1988, through at least decedent's last day of work.

In his decision, the administrative law judge determined that decedent's lung cancer and death were due to his work-related asbestos exposure, and thus he awarded claimant permanent total disability benefits and medical benefits from July 1, 1994, until September 10, 1994. In addition, the administrative law judge awarded death benefits pursuant to Section 9(b), 33 U.S.C. §909(b), from September 11, 1994, and \$1,190 in funeral expenses pursuant to Section 9(a), 33 U.S.C. §909(a).² The administrative law judge further determined that as decedent's last covered exposure to asbestos occurred in 1978 or 1979, Kemper is the responsible carrier as it was on the risk at that time.

On appeal, Kemper challenges the administrative law judge's determination

²The administrative law judge also awarded Section 14(e) penalties, 33 U.S.C. §914(e), and attorney's fees.

that decedent was last exposed to asbestos in 1978 or 1979, and thus that it is the responsible carrier. Travelers responds, urging affirmance of the administrative law judge's decision.

Kemper argues that there is no evidence to support the administrative law judge's finding that claimant was last exposed to asbestos in 1978. Specifically, Kemper argues that the administrative law judge's determination that claimant's last asbestos exposure occurred in either 1978 or 1979 is based solely upon the personal opinion of Dr. Cherniak which was rendered without regard to any facts in the record. Additionally, employer argues that the testimony of the decedent's co-worker, Mr. Doubleday, is likewise insufficient to establish that decedent was exposed to asbestos in 1978 and/or 1979.³

The long-standing rule for allocating liability in an occupational disease case is that the responsible employer or carrier is the employer or carrier during the last covered employment where the employee was exposed to injurious stimuli prior to the date on which claimant was aware or should have been aware he was suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Employer/carrier bears the burden of demonstrating it is not the responsible employer/carrier, which it can do by establishing that the employee was not exposed to injurious stimuli in its employ or that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 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); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In resolving the responsible carrier issue, the administrative law judge considered the testimony of decedent's co-worker, Mr. Doubleday, as well as the testimony of Dr. Cherniak. The administrative law judge found that Mr. Doubleday credibly testified that he and the decedent first had intense exposure to asbestos

³Inasmuch as employer's contentions are premised on decedent's work-related asbestos exposure ceasing sometime prior to 1978, we decline to consider the impact, if any, on the responsible carrier issue, of decedent's alleged subsequent exposure to asbestos from 1986 through 1990.

from 1963-1968 while working at EB 's shipyard and that they endured additional exposure to asbestos at the EB shipyard in ||the second half of the 1970's,= from 1975 onward, as they worked on submarine overhauls. Hearing Transcript (HT) at 94-96. The administrative law judge also found that Mr. Doubleday testified that he saw no use of asbestos at EB from 1980 to 1986. *Id.* Thus, contrary to employer 's contention, Mr. Doubleday 's testimony does not establish that decedent 's last exposure to asbestos occurred in 1975. Additionally, the administrative law judge noted Dr. Cherniak 's testimony that it was his assumption that the primary use of asbestos ended in 1977 to 1978, but that there was exposure to asbestos during overhaul work up to 1979 and 1980. CX 25 at 40. Relying on this evidence, the administrative law judge inferred that the decedent was exposed to asbestos as a maritime employee until 1978 or 1979, and thus, concluded that Kemper, as the carrier on the risk from 1978 to 1982, is the responsible carrier in this case.⁴

⁴As the administrative law judge analyzed and discussed all of the relevant evidence of record, and has articulated the rationale for his findings of fact and conclusions of law, his decision comports with the requirements of the APA. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), and 33 U.S.C. §919(d).

In contrast, employer/carrier has offered no evidence to show that decedent was not exposed to asbestos during his employment at EB in 1978 and/or 1979, or that decedent's last exposure to asbestos occurred in covered employment prior to the time that Kemper became the carrier on the risk in this case in 1978.⁵ Consequently, the administrative law judge's finding that Kemper is liable as the carrier on the risk in 1978 and 1979, is affirmed, as Kemper has failed to provide any evidence that it is not the responsible carrier in this case. *General Ship Service*, 938 F.2d at 960, 25 BRBS at 22 (CRT); *Lewis*, 30 BRBS at 154; *Maes*, 27 BRBS at 131.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁵In arguing that Dr. Cherniak exceeded his authority as an expert witness by assessing the level of asbestos exposure at EB based in part on his own information, Kemper misses the mark, since the burden of proof on the responsible carrier issue falls on it rather than on claimant, and employer/carrier has failed to provide any evidence in support of its burden.