

BRB No. 98-0123

FRANCES B. POTTS )  
(Widow of DAVID S. POTTS) )  
 )  
Claimant-Respondent ) DATE ISSUED: \_\_\_\_\_  
 )  
v. )  
 )  
PENNSYLVANIA SHIPBUILDING )  
COMPANY )  
 )  
Self-Insured )  
Employer-Petitioner )  
 )  
and )  
 )  
SUN SHIPBUILDING AND DRY )  
DOCK COMPANY )  
 )  
Self-Insured )  
Employer-Respondent )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )  
 )  
Respondent ) DECISION and ORDER

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

Neil Kitrosser (Brookman, Rosenberg, Brown & Sandler), Philadelphia, Pennsylvania, for claimant.

John E. Kawczynski (Weber Goldstein Greenberg & Gallagher), Philadelphia, Pennsylvania, for Pennsylvania Shipbuilding Company.  
Stephen J. Harlen and Barbara D. Huntoon (Swartz, Campbell &

Detweiler), Philadelphia, Pennsylvania, for Sun Shipbuilding and Dry Dock Company.

LuAnn B. Kressley (Marvin Krislov, Deputy Solicitor for National Operations; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Pennsylvania Shipbuilding Company (Penn Ship) appeals the Decision and Order (97-LHC-0950) 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, the employee's widow, sought death benefits as a result of her husband's death due to lung cancer on May 21, 1994, which she alleged was caused by his occupational asbestos exposure. The employee had worked for the shipyard employers as a forklift operator from 1965-1990. The shipyard was owned by Sun Shipbuilding and Dry Dock Company (Sun Ship) from 1965-1982 when ownership of the shipyard was transferred to Penn Ship. The administrative law judge awarded claimant death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, upon finding the employee's death work-related. The administrative law judge found that Penn Ship is the responsible employer, and he denied Penn Ship relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, Penn Ship challenges the administrative law judge's award of death benefits and his denial of Section 8(f) relief. Claimant filed a response brief in support of the administrative law judge's award. Sun Ship responds in support of the administrative law judge's award against Penn Ship, but asserts that the administrative law judge erred in denying Penn Ship Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds in support of the

administrative law judge ' s denial of Section 8(f) relief.

Initially, we note that Penn Ship confuses the legal issues of causation and responsible employer on appeal. In its brief, Penn Ship characterizes this case as a causation case in that it contends that the administrative law judge erred in finding that claimant made her *prima facie* case as it alleges claimant did not establish that the employee was exposed to asbestos at Penn Ship. However, the question of causation in the instant case deals solely with the cause of the employee's lung cancer and death, *i.e.*, whether his illness was related to his occupational asbestos exposure or to some other cause. Once it is determined that claimant's employment exposures as a whole are causally linked to his illness, then the responsible employer analysis is applied, involving whether a specific employer exposed claimant to injurious stimuli. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In this case, as claimant established that the employee was exposed to asbestos while working at the shipyard, the administrative law judge properly invoked the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT) (9th Cir. 1998). Although the administrative law judge found that employer rebutted this presumption, he weighed the evidence as a whole and credited the opinion of claimant's doctor, Dr. Epstein, that the employee's cancer and death were work-related over the contrary opinions of employers' doctors, Drs. Rodman and Schwamm. Decision and Order at 6-7. The administrative law judge's award of death benefit thus is supported by substantial evidence and is affirmed. As Penn Ship is trying to escape liability on appeal by asserting that the decedent was not exposed to asbestos after it acquired the shipyard in 1982 as the use of asbestos had been eliminated by this time, Penn Ship's argument challenges the administrative law judge's finding that Penn Ship is the responsible employer, and we will now review this finding.

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case, as is this 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 Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). Penn Ship bears the burden of establishing that it is not the responsible 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 [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); *Susoeff*, 19 BRBS at 149. In order to establish that it is not the responsible employer, Penn Ship was required to establish either that the employee was not exposed to asbestos while he worked for Penn Ship in sufficient quantities to have the potential to cause his lung cancer or that the employee was

exposed to asbestos while working for a subsequent covered employer.<sup>1</sup> See *Todd Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 24 BRBS 36 (CRT)(9th Cir. 1990); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989); *Black*, 717 F.2d at 1280, 16 BRBS at 13 (CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In finding that Penn Ship is the responsible employer, the administrative law judge characterized Penn Ship's evidence that asbestos was eliminated from the shipyard by the time of its acquisition in 1982, consisting of abatement procedures, its knowledge of the dangers of asbestos, its substitution of non-asbestos materials and its marking off of asbestos areas, as "equivocal at best, and non-probative, at worst." Decision and Order at 7. Penn Ship introduced the testimony of Walter Smith, Penn Ship's facilities' director who also worked at Sun Ship from 1964 on, that in the mid 1970s, the shipyard became aware of the hazards of asbestos and that an extensive study was done to find out what in-house products the shipyard had that contained asbestos. Tr. at 27, 30. Substitutes were then identified to be used in their place within a year's time frame. Tr. at 30. In addition to controlling the inventory that came into the shipyard, Mr. Smith testified that they also had a subcontractor who did insulation work aboard the vessels and was hired to redo all the steam lines that contained any asbestos flagging on them. *Id.* Mr. Smith recalled that in the mid 1970s, many of the vessels were examined by the shipyard's chemists to ascertain whether there was any potential asbestos aboard the vessel. Tr. at 32. If the vessel came into the yard and the asbestos had not been removed, the vessel would be cordoned off so one could not enter the vessel. Only the asbestos removal people could go aboard the vessel and the vessel could only be boarded after the chemists were satisfied that it was clean. Mr. Smith acknowledged, however, that the shipyard had no records to show that the environment was asbestos-free, no records to establish that all asbestos lining was removed from the various vehicles that were used by the shipyard, no records to show that any ceiling or floor tiles that had asbestos in them were removed, and no records to show that any asbestos bricks or bricks containing asbestos materials were removed. Tr. at 44-45. Mr. Smith also acknowledged that forklift operators, like the decedent, did not wear masks or respirators during the Penn Ship years and that, while Penn Ship did its own maintenance of vehicles in a garage, no precautions were taken there with regard to asbestos. Tr. at 45-46. As the administrative law judge fully considered the relevant evidence, Decision and Order

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<sup>1</sup>There is no allegation in this case that the employee had subsequent covered employment.

at 5, 7-8, and his finding that Penn Ship's evidence does not establish that the employee was not exposed to asbestos while he worked for Penn Ship is rational and within his discretion as fact-finder, we affirm the administrative law judge's finding that Penn Ship is the responsible employer. See *Black*, 717 F.2d at 1280, 16 BRBS at 13 (CRT); *Cardillo*, 225 F.2d at 137; *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

Penn Ship also appeals the administrative law judge's denial of relief from continuing compensation liability pursuant to Section 8(f). Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908, 944. Generally, an employer may be granted Special Fund relief if it establishes that the deceased employee had a manifest pre-existing permanent partial disability and that his death was not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); see *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). The pre-existing permanent partial disability must be manifest to employer; that is, employer must have actual knowledge of the pre-existing condition or there must be medical records in existence from which the condition was objectively determinable prior to the subsequent injury. *Director, OWCP v. Universal Terminal & Stevedoring Corp. [DeNichilo]*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978).

We affirm the administrative law judge's denial of Section 8(f) relief. The administrative law judge properly found that employer failed to establish that decedent's chronic obstructive pulmonary disease was manifest, as it was not diagnosed until February 21, 1994, simultaneous with the first diagnosis of lung cancer which caused the decedent's death. See *Director, OWCP v. Sun Ship, Inc. [Ehrentraut]*, 150 F.3d 288 (3d Cir. 1998); *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997); Decision and Order at 8. Moreover, that both Sun Ship (from 1979-81 medical records) and Penn Ship (from a February 12, 1982 pre-employment application) knew that claimant smoked cigarettes and/or was exposed to dust and fumes while working is insufficient to establish a pre-existing permanent partial disability since these exposures did not result in medically cognizable symptoms that physically impaired the employee. *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 14 BRBS 862 (1st Cir. 1982); *Brogden v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 259 (1984); SX-2; PX-4. Consequently, the administrative law judge's denial of Section 8(f) relief is affirmed.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge