

BRB Nos. 96-1093  
and 96-1093A

ESTHER SCHMULIAN )  
(Widow of HERBERT SCHMULIAN) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 MARINSHIP CORPORATION ) DATE ISSUED:  
 )  
 and )  
 )  
 CHUBB PACIFIC INDEMNITY COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 Cross-Respondents )  
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 )  
 STATE COMPENSATION INSURANCE )  
 FUND )  
 )  
 Employer/Carrier- )  
 Respondents )  
 Cross-Petitioners ) DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits of Alfred Lindeman,  
Administrative Law Judge, United States Department of Labor.

Anne Michelle Burr (Kazan, McClain, Edises, Simon & Abrams), Oakland,  
California, for claimant.

Bill Parrish, San Francisco, California, for employer and Chubb Pacific  
Indemnity Company.

Michael Mowrey, San Francisco, California, for employer and State  
Compensation Insurance Fund.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals  
Judges.

PER CURIAM:

Chubb Pacific Indemnity Company (Chubb Pacific) appeals, and State Compensation Insurance Fund (SCIF) cross-appeals, the Decision and Order-Awarding Benefits (95-LHC-1659) of Administrative Law Judge Alfred Lindeman 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).

Decedent was employed by Marinship Corporation from 1943 to 1945, where he was exposed to asbestos. In October 1989, decedent was diagnosed with mesothelioma caused by this asbestos exposure and was told that there was no effective therapy for his disease. He had several thoracenteses performed in order to drain fluid that was accumulating in his lungs. By November 22, 1989, decedent's life expectancy was a few months and probably more like a few weeks. He had two more thoracenteses performed, the last on November 27, 1989. During this procedure, decedent's physician had trouble withdrawing fluid and concluded that the tumor was probably encasing his lung. The prognosis given at that time was "days or weeks." On November 29, 1989, decedent drove to a neighbor's house, and shot and wounded himself with a newly purchased gun. As decedent had previously initiated a "no code" order, the doctors at the hospital to which he was taken did not perform any life saving measures and he died several hours later in the emergency room.

In his decision, the administrative law judge found that decedent was totally disabled due to mesothelioma, which was causally related to his last asbestos exposure while employed by employer in 1945, from the time of diagnosis, in early October, to his death on November 28, 1989, and that Chubb Pacific is responsible for these permanent total disability benefits. In addition, the administrative law judge found that the decedent's death was not occasioned solely by the willful intent of decedent to kill himself, and thus the death benefits claim is not barred by Section 3(c) of the Act, 33 U.S.C. §903(c). Alternatively, the administrative law judge found that the claim was not barred by Section 3(c) as he credited Dr. Stanford's opinion that the decedent's constant and worsening respiratory difficulties caused him such distress and discomfort that "he was unable to resist his impulse to resolve his misery in this manner." Thus, Chubb Pacific also was held liable for death benefits to decedent's widow. The administrative law judge found that Chubb Pacific is entitled to a credit pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j), for voluntary payments made to claimant by SCIF, and that Chubb Pacific must reimburse SCIF for the previous payments made to claimant.

On appeal, Chubb Pacific contends that in order for a claim not to be barred by Section 3(c) of the Act, the work-related injury must cause a mental disease or defect, and that as there was no diagnosed mental aberration in the instant case, the administrative law judge erred in finding that the claim was not barred by Section 3(c). In addition, Chubb Pacific contends that the administrative law judge's finding that decedent was not suffering

from any diagnosable mental disorder but lacked the will to resist his suicidal impulse is not supported by substantial evidence. Chubb Pacific also contends on appeal that the administrative law judge erred in ordering it to reimburse SCIF for payments it made before Chubb Pacific was identified as the responsible carrier. Claimant responds in support of the administrative law judge 's decision.

On cross-appeal, SCIF adopts Chubb Pacific's arguments regarding the administrative law judge's alleged error in finding that Section 3(c) does not bar the claim for death benefits. In addition, SCIF contends that the administrative law judge properly ordered Chubb Pacific to reimburse SCIF, but requests that the Board clarify the administrative law judge's order or remand the case for the administrative law judge to set a specific sum to be repaid by Chubb.

On appeal, Chubb Pacific contends that the administrative law judge erred in finding that the claim was not barred by Section 3(c) as there was no diagnosed mental aberration in the instant case. Section 3(c) of the Act provides that no compensation is payable if the injury is caused "solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c). Pursuant to Section 20(d) of the Act, 33 U.S.C. §920(d), there is a presumption that the death was not occasioned by the willful intent of the employee to kill himself. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

The administrative law judge found that decedent's death was not occasioned solely by the willful intent of decedent to injure or kill himself because he found that the suicide would not have occurred but for the effects of the work injury. Decision and Order at 6-7. In this regard, he stated that it is irrelevant as to whether decedent's suicide was the result of an "irresistible impulse" or a diagnosed psychological condition as long as the suicide would not have occurred but for the effects of a work injury, providing that the suicide did not occur when it did in an effort to create a claim that would not have existed otherwise. The administrative law judge found based on Dr. Stanford's opinion that the suicide was caused by decedent's worsening physical condition. Further, he noted that as decedent's mesothelioma was indisputably work-related and that the claim for death benefits would have matured shortly had the suicide not occurred. Therefore he found that the death benefits claim is not barred by Section 3(c) of the Act because it was not solely due to decedent's willful intent to kill himself.

The administrative law judge found in the alternative that decedent lacked the requisite "willful intent to commit suicide" within the meaning of Section 3(c) of the Act. In making this finding, the administrative law judge credited Dr. Stanford's opinion that decedent's constant and worsening respiratory difficulties resulting in daily emergency room procedures to drain his lungs caused him such distress and discomfort that he was "unable to resist his impulse to resolve his misery in this manner." CX 25 at 239-241; Decision and Order at 7. He found that Dr. Stanford's opinion was based on a full review of the record and was corroborated by claimant's testimony and by the contents of the suicide

note.<sup>1</sup> The administrative law judge concluded that notwithstanding the absence of any diagnosed mental condition, decedent's mental state impaired his ability to resist the impulse to take his own life. Decision and Order at 7.

We affirm the administrative law judge's award of death benefits in this case. Although the word "solely" as it appears in Section 3(c) applies only to the intoxication clause and not to the willful intent to injure or kill himself or another clause, see *Green v. Atlantic & Gulf Stevedore, Inc.*, 18 BRBS 116 (1986), the administrative law judge properly considered whether the work injury played a role in decedent's suicide, see *Maddon*, 25 BRBS at 55; see also 1A Larson, *Workmen's Compensation Law*, §36.40 (1997), and whether he willfully intended to kill himself.<sup>2</sup> Contrary to Chubb Pacific's contention, the administrative law judge did not find that decedent did not suffer from a *diagnosable* mental condition, only that he had not been so diagnosed. Further, the case law does not premise an award of death benefits in suicide cases on a pre-death diagnosis of depression or other mental disorder. On the contrary, the decedent in *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994), had not been diagnosed or treated for depression prior to his suicide. See *Id.* at 60. The Board held in *Konno* that where an employee's death is not due to a "willful intent" to commit suicide but results from an irresistible suicidal impulse resulting from a work-related condition, Section 3(c) does not bar the compensation claim. See also *Director, OWCP v. PEPCO [Brannon]*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979); see also *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *rev'd on other grounds sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). The Board affirmed the administrative law judge's determination that the decedent's suicide was not due to his willful intent to kill himself as it was supported by substantial evidence and employer failed to raise any reversible error made by the administrative law judge in evaluating the medical evidence and making credibility determinations. *Konno*, 28 BRBS at 63. Similarly, in *Maddon*, 23 BRBS at 55, the Board affirmed an award of death benefits based on the administrative law judge's crediting of a physician's opinion that the decedent's rapidly deteriorating asbestos-related pulmonary conditions caused a mental condition that prevented him from forming a rational intent to kill himself.

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<sup>1</sup>The note stated, *inter alia*, "I cannot endure the pain and torture of the short life that faces me now and so I will try to end this travail as soon as possible." CX 31.

<sup>2</sup>Chubb Pacific states that it does not dispute that decedent's suicide was motivated by his mesothelioma, but avers that decedent did not suffer a severe mental impairment and that therefore he willfully intended to kill himself.

In the present case, the administrative law judge thoroughly reviewed the evidence of record and concluded that Dr. Stanford's opinion, following a review of the medical and other evidence, was not outweighed by the contrary opinion of Dr. Brodsky, also following a review of the evidence, that decedent had no serious psychiatric problems. Dr. Stanford noted that because decedent did not communicate his feelings to others in detail and did not engage in psychiatric treatment, it is difficult to be precise about his possible psychiatric diagnoses at the time of his suicide. However, Dr. Stanford concluded that, based on decedent's own words in the suicide note and on the observations of others, decedent developed an Adjustment Disorder with Mixed Features and that he was anxious and depressed about his rapid deterioration as his inevitable death approached. Dr. Stanford further stated that decedent's state of mind involved "desperation." CX 25 at 239-241. As it is the administrative law judge's role to weigh the evidence, and there is substantial evidence to support the administrative law judge's finding that decedent did not willfully intend to kill himself within the meaning of the Act, we affirm the administrative law judge's finding that the claim for death benefits is not barred by Section 3(c) of the Act. See *Terminal Shipping Co. v. Traynor*, 243 F.Supp. 915 (D.Md. 1965) (suicide that is intentional is not "willful" if mental disease or defect impaired ability to resist impulse to take one's own life).

Chubb Pacific also contends on appeal that the administrative law judge erred in ordering it to reimburse SCIF for payments it made to claimant before the discovery that Chubb Pacific was the responsible carrier. The administrative law judge has the power to hear and resolve insurance disputes which are necessary to the resolution of the claim under the Act. *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). Chubb Pacific contends that there is no basis in the Act for an order of reimbursement between carriers. Although there is no specific provision providing for reimbursement to a party who erroneously paid benefits, such a right has been recognized in the case law. See *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993) (Ninth Circuit holds that where a state has paid claimant benefits for which an employer is found to be liable, employer must pay claimant an amount equal to the state payments and claimant must then repay the state); *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990) (employer is entitled to reimbursement from the Special Fund for its voluntary payments which were in excess of its liability due to the operation of Section 8(f)).

In the present case, the administrative law judge acknowledged the merits of Chubb's equitable arguments, such as that SCIF grossly mishandled the claim by paying benefits when it had information in its possession that it was not the liable carrier, and that Chubb Pacific was denied the right to subrogation from potentially liable third-parties due to the SCIF's negligence. He nevertheless concluded that these considerations were outweighed by the principles of insurance law to the effect that an insurer who acts in good faith to discharge a disputed obligation does not become a mere volunteer even if it is ultimately determined that its policy did not apply. See generally *Sullivan v. Young Brothers*

*& Co., Inc.*, 91 F.3d 242, 252 n.5 (1st Cir. 1996). Decision and Order at 10. As Chubb Pacific has raised no reversible error in the administrative law judge's consideration of this issue, we affirm the administrative law judge's finding that SCIF is entitled to reimbursement by Chubb Pacific for payments made to claimant which were ultimately found to be the responsibility of Chubb Pacific.

In regard to SCIF's request on cross-appeal that the Board clarify the administrative law judge's order or remand the case for the administrative law judge to set a specific sum to be paid by Chubb Pacific, we reject SCIF's request as the administrative law judge ordered that all computations called for by his decision be performed by the district director.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge