BRB No. 97-420

ROBERT E. THURSTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Joel F. Gardiner, Administrative Law Judge, United States Department of Labor.

G. William Higbee (McTeague, Higbee, MacAdam, Case, Watson & Cohen), Topsham, Maine, for claimant.

Joseph M. Hochadel (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for self-insured employer.

Kevin M. Gillis (Troubh, Heisler & Piampiano, P.A.), Portland, Maine, for carrier.

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

PER CURIUM:

Carrier, Commercial Union Insurance Companies, appeals the Decision and Order-Awarding Benefits (87-LHC-1155) of Administrative Law Judge Joel F. Gardiner 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).[1] We must affirm the

[1]Self-insured employer (herein "employer") was at risk of loss from 1951 until

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).

This case is before the Board for a third time. To recapitulate the procedural history, claimant worked at both employer's main shipyard and its Hardings facility for various periods between 1952 and 1956. In January 1957, claimant transferred to the Hardings facility. Claimant testified that he worked some nights and weekends during the 1970's in the paint shop and aboard ships at the main shipyard. He began experiencing breathing difficulties in 1985, and he underwent a decortication of the left lung, performed by Drs. Golden and Katz, in January 1986. Claimant filed a claim for compensation under the Act on March 4, 1986.[2] Cl. Ex. 2. Upon his return to work, claimant was restricted to lighter-duty work and could not work overtime; in May 1987, Dr. Golden restricted claimant to four hours of work per day. Claimant quit working in June 1990, when he suffered a heart attack, and he formally retired in 1992. *See* Tr. 3 at 28-29.

In the first Decision and Order in this case, Administrative Law Judge Dolan found that claimant's employment at the Hardings facility was on situs covered under Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order Awarding Benefits at 9. In addition, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption in addressing causation, found that employer failed to rebut the presumption, and awarded claimant disability benefits. Finally, the administrative law judge determined that claimant was last exposed to harmful stimuli in the 1970's and thus he held Commercial Union liable as the carrier responsible for claimant's benefits. *Id.* at 13.

December 1962. Petitioner, Commercial Union Insurance Companies (herein "carrier"), served as the carrier for Bath Iron Works Corporation from January 1, 1963 until February 28, 1981. *See* Tr. 1 at 14.

[2]The claim for compensation alleged occupational exposure to "asbestos and other deleterious substances." Cl. Ex. 2.

Commercial Union appealed Judge Dolan's decision. Based on its decision in *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989), the Board reversed the finding that the Hardings facility is a covered situs and thus the administrative law judge's finding that Commercial Union is the carrier responsible for claimant's benefits. Self-insured employer was held liable for "any compensable disability claimant may have." *Thurston v. Bath Iron Works Corp.*, BRB No. 88-3231 (September 30, 1991)(unpublished). The Board remanded the case for further consideration of the cause of claimant's respiratory condition pursuant to Section 20(a). [3] *Id*., slip op. at 4-5.

On remand, Judge Dolan invoked the Section 20(a) presumption, found that employer failed to rebut the presumption, and thus held that claimant's disability is work-related. Decision and Order Awarding Benefits upon Remand at 2-4. In accordance with the Board's decision, Judge Dolan held employer liable for claimant's compensation.[4] *Id*. at

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[3]The Board also awarded claimant's counsel a fee in the amount of $1,274 representing 11.10 hours of legal services at the hourly rates of $120, $100 and $90, plus an additional $24 in expenses, to be paid by employer in the event of a successful prosecution of the claim. *Thurston v. Bath Iron Works Corp.*, BRB No. 88-3231 (April 9, 1993)(order).

[4]Prior to Judge Dolan's decision on remand, claimant filed a motion for modification alleging his condition had become permanent. Judge DiNardi denied the motion, concluding that the principal claim must remain with Judge Dolan. After Judge Dolan's decision on remand, Commercial Union filed a motion for modification to amend the decision to reflect its entitlement to a credit for benefits paid, and employer filed motions for reconsideration and to supplement record with evidence from the hearing before Judge Di

5.

Employer, in its self-insured capacity, appealed Judge Dolan's decision on remand. The Board held that by virtue of the modification proceedings, evidence had come to light with regard to claimant's exposure to injurious stimuli which may result in the assessment of benefits against a carrier other than the self-insurer, and thus the law of the case doctrine does not apply. *Thurston v. Bath Iron Works Corp.*, BRB No. 92-2191 (May 23, 1994). The Board vacated the administrative law judge's finding that self-insured employer is liable for claimant's disability compensation and remanded the case to the administrative law judge for further consideration of the responsible carrier issue and for an appropriate Section 20(a) analysis should he determine that claimant was exposed to injurious stimuli while working at employer's main shipyard in the 1970's.[5] *Id*. at 6-8.

On remand, a new hearing was held before Administrative Law Judge Gardiner. In his Decision and Order, the administrative law judge found that claimant was last exposed to injurious stimuli, including asbestos, dust, paint, oil, and grease, at employer's main shipyard during the late 1970's, and thus held Commercial Union responsible for claimant's disability benefits, if any. Decision and Order-Awarding Benefits at 6-7. In addition, the administrative law judge concluded that as claimant suffered a harm, and was exposed to injurious substances during his covered employment in the 1970's, the Section 20(a) presumption linking claimant's respiratory impairment to his employment is invoked. *Id*. at 7-9. Further, the administrative law judge found that as claimant was exposed to a number of different irritants during his last covered employment, Dr. Golden's opinion that claimant's pulmonary condition was not caused by asbestos does not rebut the presumption. *Id*.; *but see* n.6, *infra*. Finally, the administrative law judge found that claimant reached maximum medical improvement on January 22, 1992, that claimant is not able to perform his former duties, and that employer did not establish evidence of suitable alternate employment. *Id*. at 11. Thus, the administrative law judge awarded claimant permanent total disability benefits under the Act.

Nardi. Judge Dolan granted Commercial Union's motion and amended his decision accordingly, but he denied both of employer's motions. Supp. Decision and Order on Remand at 1-2; Decision and Order on Recon. at 1.

[5]The Board denied the motion for reconsideration of the Director, Office of Workers' Compensation Programs. *See Thurston v. Bath Iron Works Corp.*, BRB No. 92-2191 (April 5, 1995)(decision on recon.)

On appeal, carrier contends that the administrative law judge erred in finding that the evidence establishes invocation of the Section 20(a) presumption as claimant did not establish working conditions that could have caused his pulmonary impairment. In addition, carrier contends that claimant's brief work at the main shipyard in the 1970's should not be considered covered employment under the Act, given that his primary employment was at Hardings. Lastly, carrier contends that the Board erred in reopening the responsible carrier issue in its second decision, contrary to the law of the case doctrine. Employer, in its self-insured capacity, responds, agreeing that the administrative law judge erred in finding that claimant is entitled to the Section 20(a) presumption, but urging affirmance of the administrative law judge's findings on the responsible carrier issue. Claimant responds, urging affirmance of the administrative law judge's findings on causation.

Initially, carrier contends that the administrative law judge erred in finding the evidence sufficient to invoke the Section 20(a) presumption. Carrier contends that while it is uncontested that claimant has suffered a harm, there is no evidence that claimant was exposed to any specific substance in the workplace which could have caused the condition from which he suffers. We disagree. In determining whether a disability is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes that he sustained a harm or pain and that working conditions existed or an accident occurred at the employer's facility which could have caused that harm or pain. 33 U.S.C. §920(a); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In order to invoke Section 20(a), claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm; rather, claimant need only show the existence of working conditions which could conceivably cause the harm alleged. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

In the present case, claimant alleged exposure to "asbestos and other deleterious substances." Cl. Ex. 2. Claimant's treating physician, Dr. Golden, opined that claimant suffers from an occupationally-related pleural disease and has severe pleural restriction.[6] Cl. Ex. 8. Dr. Golden testified in a deposition dated July 30, 1987, that he based his conclusion that claimant's condition is occupationally-related on the bilaterality and diffuseness of the process which implies the inhalation route as the etiology agent, the fact that several chemicals and occupational agents can cause a granulomatous response, and because of the fine particles which seem to be foreign substances that were seen on the macrobiotic specimen of claimant's lung. Emp. Ex. 32 at 39-40. Therefore, as the evidence credited states that claimant suffers from a pulmonary condition that could have been caused by the exposure to irritants in the workplace, and claimant's unrefuted testimony establishes that he was exposed to irritants during his covered employment in the 1970's at employer's main shipyard, we affirm the administrative law judge's finding that claimant has established invocation of the Section 20(a) presumption.

Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *Peterson v. General Dynamics Corp.,* 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Inasmuch as carrier has not submitted any evidence that severs the causal relation between claimant's pulmonary condition and his occupational exposure to irritants, nor does it contend that it has such evidence, we affirm the administrative law judge's finding that carrier has not rebutted the Section 20(a) presumption, and that claimant's pulmonary condition is work-related.

Carrier also contends that any injurious exposure occurring during claimant's employment at the shipyard in the late 1970's "should not be covered under the Act given the land-based nature of his employment in general." Carrier's brief at 8. A claimant is covered under the Act if he spends "at least some of his time engaged in indisputably covered activities." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 69, 6 BRBS 150 (1977); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). The administrative law judge in the instant case found that the evidence establishes that claimant worked on weekends and some weekday nights at the main shipyard during the 1970's in the paint shop and on ships, Tr. at 36-40; Emp Ex. 1, 2, and carrier does not contend on appeal that

[6]Contrary to carrier's contention, Dr. Golden did not "rule out" asbestos as a potentially causative factor of claimant's lung condition. While Dr. Golden agreed that claimant's condition was not typical for asbestosis, he continued to treat claimant for his "fibrothorax and presumed asbestos-related lung disease." Cl. Ex. 8

claimant's duties at the main shipyard do not meet the status requirement, 33 U.S.C. §902(3). Moreover, carrier does not contend that the main shipyard is not a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). Therefore, as claimant worked at least a portion of the time in the 1970's at employer's main shipyard in covered employment, we reject carrier's contention that the administrative law judge and Board erred in stating that any of claimant's employment at the shipyard after 1957 was covered under the Act. *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *McGoey*, 30 BRBS at 240. That claimant may have incurred a greater portion of his exposure at the Hardings facility is immaterial given the finding that claimant was exposed to injurious stimuli at the main shipyard while carrier was on the risk. *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981).

We also reject carrier's contention that the Board erred by reopening the responsible carrier issue, contrary to the doctrine of law of the case. The law of the case doctrine is not a rule of law but only a discretionary rule used to promote finality in the judicial process. The Board has the power to reconsider its earlier decision, *see generally Messenger v. Anderson*, 225 U.S. 436, 444 (1912), and may choose to do so on a second appeal if there has been a change in the underlying factual situation. *United States v. Rivera-Maritinez,* 931 F.2d 148, 151 (1st Cir. 1991), *citing White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967). In the instant case, the Board held that evidence arose at the modification hearing before Judge Di Nardi which was admissible pursuant to Section 22 of the Act and which was fundamental to the responsible carrier issue. Thus, the Board held that as this evidence may result in the assessment of benefits against a carrier other than the self-insurer, and Judge Dolan did not consider this evidence in rendering his opinion, the Board need not adhere to the law of the case doctrine. *See Thurston v. Bath Iron Works Corp.*, BRB No. 92-2191, slip op. at 6. As carrier has not raised any reversible error in this regard, we reject the contention that the Board erred in reopening the responsible carrier issue in its previous decision. *See generally Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the second appeal (BRB No. 92-2191) from September 18, 1990 through January 5, 1995, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $696 for 5.20 hours of legal services at the hourly rates of $165, $125, $100 and $60.[7] Inasmuch as we affirm the administrative law judge's finding that claimant's condition is work-related, and thus affirm the award of benefits, claimant's attorney was successful in defending claimant's award of benefits. Therefore, in addition to the amount of $1,298 previously awarded for work on the first appeal, *see Thurston*, BRB No. 88-3231 (April 4, 1993), the Board hereby approves a fee in the amount of $696 representing 2.3 hours of legal services at the rate of $165, .8 hours at the rate of $100, 1.7 hours at the rate of $125,

[7]Liberty Mutual Insurance Company, the carrier on the risk from March 1, 1981 through September 1986, responded to the attorney's fee request, noting that it was not held to be the responsible carrier in this case, and thus not liable for claimant's counsel's fee.

and .4 hours at the rate of $60, for work performed between September 18, 1990 and January 5, 1995 to be paid directly to claimant's counsel by Commercial Union. 33 U.S.C. §928; 20 C.F.R. §802.203; *see Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed. In addition, claimant's counsel is awarded a fee in the amount of $696 for work performed before the Board in BRB No. 92-2191 between September 18, 1990 and January 5, 1995, to be paid directly to counsel by carrier.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge