

KATHRYN LAFAYETTE (Widow of)
 ARCHIE LAFAYETTE))
)
 Claimant)
)
 v.)
)
 GENERAL DYNAMICS)
 CORPORATION)
)
 Self-Insured)
 Employer-Petitioner)
)
 INA/CIGNA)
)
 Carrier-Respondent)

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for self-insured employer.

for Lucas D. Strunk (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, carrier-respondent.

Before: , and , Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration (94-LHC-2868, 94-LHC-2869) of Administrative Law Judge Clement J. Kichuk 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 administrative law judge's findings of fact and

conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, decedent's surviving spouse, filed a claim for death benefits alleging that her husband's death from lung cancer was related to asbestos exposure sustained during the course of his employment with General Dynamics Corporation (employer, General Dynamics).¹ In his decision, the administrative law judge found that decedent's terminal lung cancer was work-related, and thus concluded that claimant is entitled to death benefits, decedent's medical expenses between October 15, 1992, and March 9, 1993, and funeral expenses. In addition, the administrative law judge determined that decedent's last exposure to asbestos occurred subsequent to the date that General Dynamics became a self-insured employer, *i.e.*, April 1, 1973, and accordingly, found that it is the responsible employer. Employer's motion for reconsideration was summarily denied.

¹Specifically, the decedent was hired as a "testman" on January 28, 1965, and worked in that capacity until November 12, 1967, at which point he became a technical aide. The decedent was laid-off on October 2, 1973 and returned to his position as a technical aide on April 2, 1973, where he worked until his death on March 9, 1993.

On appeal,² employer challenges the administrative law judge's determination that it is the responsible employer in this case.

Employer contends that contrary to the administrative law judge's conclusion, it is not liable for benefits in this case as the evidence does not support a finding that the decedent was exposed to any injurious stimuli during the period of self-insurance, which commenced on April 1, 1973. Specifically, employer argues that the only evidence of asbestos exposure in the record is contained in the medical history taken by Dr. Deren, wherein decedent stated that he sustained heavy exposure to asbestos "during the mid-1960s," and thus, as there is no evidence to support a finding of exposure thereafter, INA/CIGNA, as the responsible carrier at that time, should be liable for the benefits awarded in this case.

²Employer filed its appeal on July 18, 1996. By Order dated June 6, 1997, the Board dismissed employer's appeal and remanded the case to the district director for reconstruction of the record, or alternatively, to the Office of Administrative Law Judges for a new hearing. By Order dated December 3, 1999, the Board, upon noting receipt of the reconstructed record on November 22, 1999, reinstated the appeal and stated that the one-year review period commenced from the date of receipt of the record.

Pursuant to the rule set forth in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible carrier or employer is the last carrier or employer during whose employment the decedent was exposed to injurious stimuli, prior to his awareness that he was suffering from an occupational disease.³ Employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that the decedent was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Maes v. Barrett & Hilp*, 27 BRBS 128, 131 (1993).

In the instant case, the administrative law judge determined that decedent was exposed to asbestos at employer's shipyard subsequent to April 1, 1973, according to the history report given to Dr. Deren by decedent on November 12, 1992. In his medical report dated November 21, 1992, Dr. Deren recited that decedent "worked at Electric Boat for 27 years and during the mid-60s had worked in test groups stripping ships of piping and had unprotected, heavy exposure to asbestos." Claimant's Exhibit (CX) 24. At his deposition, Dr. Deren stated that based on his years of treating patients who complained of lung problems and who worked for General Dynamics, it was likely that the decedent would have had some

³Dr. Deren testified that decedent became aware of his occupational disease sometime in 1973, however, there is no evidence that his awareness occurred prior to April 1, 1973.

exposure to asbestos in the 1970s and 1980s as well, and that these lesser exposures were nonetheless “injurious stimuli.” CX 38 at 21-22. Additionally, Dr. Cherniack stated in his report dated April 9, 1995, that the decedent “worked on the boats with probable daily exposure to asbestos for approximately 11 years,” CX 33, which given that the decedent began working for employer in 1965, would also indicate asbestos exposure subsequent to April 1, 1973. Moreover, employer’s witness, Mr. Turco, could not state with any certainty that decedent did not have any work-related asbestos exposure subsequent to April 1, 1973. Employer’s Exhibit (EX) 18. In fact, he stated that the decedent may have been exposed to asbestos covered pipes in the Robinson Research Building during the course of his employment sometime after April 26, 1973. EX 18. Moreover, as the decedent worked exclusively for employer from the time of his asbestos exposure up to the date of his death, employer cannot meet its burden of showing that the decedent received injurious exposure to asbestos while working for a subsequent covered employer. As the administrative law judge’s findings that decedent was exposed to asbestos after April 1, 1973, and thus, that employer is liable for benefits, are supported by the evidence of record, they are affirmed. *See generally Cardillo*, 225 F.2d at 137; *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev’d on other grounds Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114 (CRT)(2d Cir. 1999).

Accordingly, the administrative law judge's Decision and Order - Awarding

Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge