BRB No. 99-331

DONALD E. HUTCHINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

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

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

Stephen Hessert (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

Richard F. van Antwerp and Thomas R. Kelly (Robinson, Kriger & McCallum), Portland, Maine, for carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Self-Insured employer appeals the Decision and Order (97-LHC-942) 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a pipefitter for employer from 1964 until 1988 when he transferred to the planning office due to his lung condition. Tr. at 35, 41. During the course of his employment, claimant was exposed to asbestos while working on ships and to solvent fumes while working in the pipe shop. Tr. at 36, 40. Claimant has been diagnosed with emphysema and asbestosis, chronic obstructive pulmonary disease, reactive airways disease, and interstitial lung disease. Cl. Exs. 11-12, 14-15. When claimant became aware of his work-related lung disease, he filed a claim for medical benefits. He was awarded those benefits, and Birmingham Fire Insurance Company was found to be the responsible carrier. *Hutchins v. Bath Iron Works Corp.*, BRB Nos. 91-1713/A (May 25, 1994).

In March 1995, during the course of his employment in the planning office, claimant walked near the blueprint office and smelled an odor which he testified caused him to have shortness of breath and panic reaction, such that he nearly passed out, and he had to be treated with oxygen in the shipyard clinic. Following that incident, claimant was out of work for two weeks due to an exacerbation of his lung disease. Cl. Exs. 11, 14; Emp. Ex. 5; Tr. at 54-55. In May 1995, claimant was forced to retire due to the progression of his lung condition and his inability to continue working. He filed a Section 22, 33 U.S.C. §922, motion for modification of the previous decision, seeking permanent total disability benefits. The administrative law judge granted the motion and found that claimant was exposed to additional injurious stimuli after his transfer to the planning office which worsened his already weakened pulmonary condition. He found that this exposure included an acute exacerbation of claimant's condition in March 1995 which he considered to be a "new and discrete injury" and which culminated in claimant's acceptance of employer's early retirement offer because he could no longer perform his duties as a result of his pulmonary condition. Therefore, as employer became self-insured on September 1, 1988, the administrative law judge modified the prior decision to hold self-insured employer (employer) liable for claimant's permanent total disability benefits, finding that claimant established that he cannot return to his usual work and employer did not establish the availability of suitable alternate employment. Decision and Order at 24, 31-32, 35, 40-42, 47-49.

Employer appeals the decision, contending it should not be held liable for permanent total disability benefits because the administrative law judge exceeded the scope of a Section 22 modification proceeding and because there was no exposure to harmful airborne stimuli after September 1, 1988. Carrier responds, urging affirmance and arguing that the administrative law judge properly considered all factors, including the responsible carrier issue, in making his decision on the motion for modification. Claimant also responds, urging

affirmance of the award of permanent total disability benefits regardless of whether self-insured employer or carrier is held liable.[1]

Before we reach the merits of the appeal, we must discuss the timeliness of this decision. Initially, we acknowledge that, under the Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, appeals before the Board must be addressed within one year of the date of appeal or be considered administratively affirmed. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Donaldson v. Coastal Marine Contracting Corp.*, 116 F.3d 1449, 31 BRBS 70(CRT) (11th Cir. 1997); *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998). The appeal of the administrative law judge's decision in this case was filed on December 16, 1998. On September 15, 1999, however, the case was inadvertently dismissed from the Board's docket. After discovering the error, the Board reinstated the appeal on the docket on January 12, 2000. Under these circumstances, the one-year period was tolled during the time the case was dismissed. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 251, *aff'g on recon. en banc* 32 BRBS 165 (1998). Having now reviewed the appeal, we hereby affirm the administrative law judge's decision.[2]

With regard to the merits of the appeal, employer contends the administrative law judge exceeded his scope of authority in deciding this motion for modification. Specifically, employer argues that the administrative law judge erroneously considered issues other than whether there was a change in the nature and extent of claimant's disability, as those issues

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[1]Employer does not challenge the finding of permanent total disability.

[2]Alternatively, this case would be affirmed by operation of law on the one-year anniversary of the filing of the appeal, December 16, 1999. If the United States Court of Appeals for the First Circuit, wherein jurisdiction of this case resides, determines that the Board's error in dismissing the case from its docket does not toll the one-year period, the time for appealing this case to that court would expire on February 14, 2000, 60 days after December 16. 33 U.S.C. §921(c). Employer thus has sufficient time in which to appeal this decision.

were resolved in the previous claim and should be considered the law of the case or *res judicata*. Employer also argues that claimant's totally disabling condition is the result of the natural progression of the injury sustained while carrier was on the risk, rather than resulting from a new injury or aggravation. Thus, it asserts that carrier is liable for claimant's permanent total disability benefits. Carrier argues that the administrative law judge has broad discretion to address issues necessary to resolve the claim in a motion for modification and that he properly did so in this case.

Section 22 of the Act permits the modification of a final award if the party seeking modification demonstrates either a change in a claimant's condition or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Additionally, a motion for modification replaces the traditional notion of *res judicata*, and it gives the trier-of-fact broad discretion to reconsider the issues so as to best ascertain the rights of the parties. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988); 20 C.F.R. §§702.338-702.339, 702.373.

We reject employer's argument that the administrative law judge's decision altering the responsible carrier exceeded the scope of Section 22. The administrative law judge rejected employer's argument that *res judicata* applies, concluding, as stated above, that a Section 22 motion for modification removes "the traditional element of judicial finality" from this case. Decision and Order at 32-33, 49. His conclusion comports with law. Given the broad scope of modification proceedings, the administrative law judge made no error in considering all issues related to the cause, nature, and extent of claimant's disability, which claimant asserted was the result of a change in claimant's condition. His authority under Section 22 necessarily includes determining which entity should be held liable for claimant's disability. *Banks*, 390 U.S. at 459. *See also Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27 (1st Cir. 1999).

Next, employer asserts that it is not the liable carrier, asserting that claimant's disability is the result of the natural progression of his pre-existing lung condition. Claimant filed a motion for modification based on a change of his condition from having no loss in wage-earning capacity based on a suitable job in the planning office to permanent total disability based on his inability to continue performing this job. The administrative law judge considered the facts before him and credited claimant's testimony that he was exposed to harmful inhalants after being assigned to the planning office. In particular, the administrative law judge determined that the incident in March 1995 resulted in an "acute exacerbation" of claimant's lung condition and thus constituted a new injury. Decision and Order at 32; Emp. Ex. 5; Cl. Ex. 10 at 19-20; Tr. at 54-55, 70. He also credited claimant's contention that there was an incident in January 1995 in which "bad air" permeated the

office.[3] *Id.* at 31; Cl. Ex. 10 at 24-25. Medical reports between 1991 and 1995 indicated that claimant's condition was growing worse and that claimant was "bothered" by "environmental exposure to inhalants" and his condition was "exacerbated by conditions at work." Cl. Exs. 11-12. Specifically, the administrative law judge found the reports of Drs. Altman, Teel and McArdle probative, as they described the continuing worsening of claimant's condition and his ability to perform daily living functions. Both Drs. Altman and McArdle identified claimant's lung condition as being multifactorial, meaning it has both obstructive and restrictive components, and that this severely limits claimant's abilities, due to shortness of breath upon exertion and to increased symptomatology upon inhalation of injurious airborne stimuli because of his heightened sensitivity. *See* Decision and Order at 31-32; Cl. Exs. 11-13, 15-16; Tr. at 36, 40-43, 52-55, 70. Given claimant's testimony describing additional exposure and the medical evidence depicting a highly symptomatic condition affected by additional exposure, the administrative law judge stated that he "simply cannot accept" employer's assertion that claimant was not exposed to harmful stimuli after it became self-insured in 1988. He concluded that claimant's "exposure and inhalation of asbestos and other injurious pulmonary stimuli at the shipyard up to and including at least that acute exacerbation on March 15, 1995[,]" resulted in his economic disability commencing May 31, 1995. Decision and Order at 32.

[3]Claimant stated that, in January 1995, there was a problem with the ventilation at the "North Stores" building and that when trucks left their motors running, the fumes from the exhaust would permeate the building. Cl. Ex. 10 at 24-25.

Under the last exposure rule, the responsible carrier is the one which last insured the liable employer during the period in which the claimant was exposed to injurious stimuli prior to the date the claimant became disabled by his disease. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). Under the aggravation rule, if an employment injury aggravates, accelerates, or combines with a pre-existing condition, resulting in a disability, the entire resulting disability is compensable. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*). In this case, the administrative law judge found that claimant was exposed to harmful airborne stimuli which affected his pre-existing lung condition during the time which employer was self-insured. He also found that this exposure, particularly that which occurred in March 1995, was a new injury which exacerbated claimant's condition and was a factor in causing his inability to continue to work and his decision to take early retirement. The evidence of record supports these findings. *See Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, No. 82-4213 (2d Cir. April 26, 1983); *Haynes v. Washington Metropolitan Area Transit Authority*, 7 BRBS 891 (1978) (employment injury need not be sole cause or primary factor causing disability). Consequently, we reject employer's arguments to the contrary, and we hold that the administrative law judge properly determined that employer, in its self-insured capacity, is liable for claimant's disability benefits.[4] *Liberty Mutual*, 978 F.2d at 750, 26 BRBS at 85(CRT).

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

SO ORDERED.

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[4]We reject employer's allegation that claimant did not file a claim for compensation for this new injury. Claimant filed a motion for modification, a notice of injury, and a claim for compensation. Cl. Exs. 1-2. That his pleadings identified the wrong date of injury is irrelevant, as the totality of the case, including employer's first notice of injury and its notice of controversion, establishes the correct date. *See Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27 (1st Cir. 1999)*; Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850 (1980) (Miller, J., concurring and dissenting); Decision and Order at 33-35; Emp. Exs. 5-6.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge