

FROUWKE K. BLANDING	)	
(Widow of WILLIAM G. BLANDING)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLDAM SHIPPING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
CALTEX PETROLEUM	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

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

Matthew Shafner and Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Scott E. Richardson (Curtin, Murphy & O'Reilly, P.C.), Boston, Massachusetts, for Oldam Shipping Company and Commercial Union Insurance Company.

Victoria E. Manes (Manes & Manes), Millwood, New York, for Caltex Petroleum and Travelers Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,

Administrative Appeals Judges.

PER CURIAM:

Oldam Shipping Company (Oldam), appeals the Decision and Order (92-LHC-2418, 92-LHC-2419, 94-LHC-2749) of Administrative Law Judge David W. Di Nardi rendered on claims 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).

The decedent, a marine engineer and naval architect, was diagnosed with mesothelioma in May 1986 and subsequently died from this disease on May 3, 1987.<sup>1</sup> From June 1964 through December 1967, the decedent worked for Oldam as a manager in charge of new ship construction and second-hand tankers where he, *inter alia*, supervised ship repairs where asbestos was disturbed. For at least part of his employment with Oldam, the decedent worked in Bermuda. Previously, the decedent worked for Caltex Petroleum (Caltex) from June 1957 through August 1962 as a marine engineer in The Netherlands, where it was probable that he was exposed to asbestos during the construction of ships.

In his Decision and Order, the administrative law judge found that both the decedent's *inter vivos* claim for disability benefits and claimant's claim for death benefits were timely filed.<sup>2</sup> The administrative law judge also found that claimant established that the situs and status requirements of the Act are met as to Oldam and Caltex. 33 U.S.C. §§902(3), 903(a). The administrative law judge found that Oldam is the responsible employer as it was the last employer to expose decedent to asbestos, and he ordered Oldam to pay to claimant decedent's permanent total disability benefits from December 25, 1986 through May 3, 1987, death benefits to claimant from May 4, 1987 and continuing, death benefits to decedent's dependent daughter from May 4, 1987 through May 20, 1992, and funeral expenses, interest, and medical benefits. 33 U.S.C. §§907, 908(a), 909.

On appeal, Oldam challenges the administrative law judge's findings that the situs requirement of the Act is established as to Oldam, and that Oldam is the responsible employer. Oldam further contends that the death benefits claim was not timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913. Caltex and claimant respond in support of the administrative law judge's awards of benefits on both the disability and death claims.

Oldam initially contends that the administrative law judge erred in determining that the situs requirement of the Act is established as to Oldam. Oldam asserts that neither the decedent's

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<sup>1</sup>The only known cause of mesothelioma is asbestos exposure. EX 3.

<sup>2</sup>Claimant is the decedent's widow, Frouwke K. Blanding, who is seeking death benefits for her and her dependent daughter, Rosella C. Blanding, in addition to decedent's disability benefits.

employment history form found at Claimant's Exhibit 22, nor the decedent's affidavit regarding his exposure to asbestos found at Claimant's Exhibit 23, establishes where the decedent performed his duties while employed with Oldam. Oldam also asserts that claimant's testimony is insufficient to establish that the situs requirement is satisfied.

Section 3(a) of the Act, 33 U.S.C. §903(a), provides coverage for disability or death resulting from

an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1988). *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1995), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993)(coverage provisions in effect at the time of manifestation apply to coverage issues). Oldam's challenge to the administrative law judge's finding that the situs requirement is met as to Oldam requires that we remand this case for further consideration.<sup>3</sup> In his determination, the administrative law judge simply stated:

Decedent's work with [Oldam] also satisfies the status and situs tests of the Act as Decedent was exposed to asbestos at the Maryland Dry Dock and Shipyard, where he supervised inspection and maintenance and repairs. (CX 22). [Citations omitted.]

Decision and Order at 21. In addition to its brevity, the administrative law judge's finding does not explain how the decedent's employment history form supports his finding. Oldam correctly asserts that the decedent's employment history form does not establish that he worked on an enumerated situs or adjoining area while employed by Oldam.<sup>4</sup> Thus, the evidence cited by the administrative law judge does not support his conclusion that the situs requirement of the Act is met with respect to Oldam. We, therefore, vacate the administrative law judge's finding in this regard.

There is evidence in the record, however, which the administrative law judge did not discuss, that may be sufficient to establish that the situs requirement was met as to Oldam. Specifically, the

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<sup>3</sup>The administrative law judge concluded that decedent's employment satisfied the situs and status tests as to Caltex by virtue of his work during sea trials on the high seas. *See Cove Tankers Corp. v. United Ship Repair*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982); Decision and Order at 19-21.

<sup>4</sup>The decedent's employment history form identifies the names and addresses of his former employers, but does not specifically identify where the decedent worked when he was employed by them. *See CX 22*. Moreover, Oldam also correctly asserts on appeal that the decedent's affidavit regarding his exposure to asbestos does not establish where the decedent performed his duties while working for Oldam. *See CX 23*.

claim forms filed against Oldam by the decedent during his lifetime specifically reference his exposure to asbestos on various ships at "Todd Shipyard, Erie Basin, Brooklyn, N.Y. & Maryland Dry Dock." CX 29, 30, 38-2, 39-2, 40-2. Moreover, claimant testified in her 1992 deposition that in 1967 the decedent worked for Oldam in the shipping industry in Bermuda, and he also traveled to the ships to inspect them during repairs. The ships were not sent to one place for repairs, but were put in dry dock at various places around the world. RX 6 at 7-10. Claimant testified at the first hearing on February 3, 1993, that the decedent worked at the Maryland Dry Dock while employed by Oldam. RX 6 at 7-10; 7 at 47-49, 61, 64-65. Claimant also testified at the first hearing that the decedent told his doctors in her presence that he had been exposed to asbestos while working for Oldam at the Maryland Dry Dock. RX 7 at 47-49, 61. An entire shipyard is a covered situs under the Act, *see Peterson*, 25 BRBS at 76, and a dry dock is a site covered by virtue of the plain language of Section 3(a), 33 U.S.C. §903(a).

Inasmuch as the administrative law judge did not fully discuss the evidence relevant to the issue of whether the situs requirement is met as to Oldam, we must remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must determine whether the relevant evidence of record is sufficient to establish that the situs requirement of the Act is met as to Oldam, discussing Oldam's argument that claimant's testimony is inconsistent and therefore not credible.<sup>5</sup>

Oldam next challenges the administrative law judge's finding that it is the responsible employer.<sup>6</sup> Pursuant to the rule set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer is the last employer during whose employment the decedent was exposed to injurious stimuli, prior to his awareness that he was suffering from an occupational disease. The courts and the Board have held that there need not be an actual medical causal relationship between the decedent's exposure and the development of his occupational disease as long as there is exposure in sufficient quantity to potentially cause the disease. *See, e.g., Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986); *see also Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989); *Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988).

In determining that the asbestos exposures the decedent had with Oldam and Caltex were sufficient medically and/or legally to contribute to the development of the decedent's malignant

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<sup>5</sup>Oldam's attempt to assert on appeal that the decedent's work at the Maryland Dry Dock occurred while he worked for Granger & Company, which Oldam asserts is neither a predecessor nor a subsidiary of it, is disingenuous as Oldam raises this issue for the first time on appeal and is contrary to claimant's testimony, the decedent's employment history form, and the decedent's affidavit regarding asbestos exposure. Oldam's Brief at 12-13; RX 3, 7 at 47-49, 61; CX 22, 23.

<sup>6</sup>We address Oldam's arguments on appeal concerning causation in the context of the responsible employer issue.

mesothelioma, the administrative law judge accepted Dr. Daum's well-reasoned and well-documented opinion that the exposure to asbestos at both Oldam and Caltex contributed to the initiation, development, and promotion of the malignant mesothelioma. Decision and Order at 19, 33; EX 3; RX 15. The administrative law judge rejected Dr. Godar's conclusion, that he could see no good evidence that Oldam should have any liability as the decedent's post-1962 exposures were relatively trivial and non-contributory, since it required him to "rethink" the rule set forth in *Cardillo*, 225 F.2d at 137. Decision and Order at 33; RX 8, 9, 13. As Oldam last exposed the decedent to asbestos, the administrative law judge held it liable.<sup>7</sup>

We affirm the administrative law judge's finding that Oldam is the responsible employer as the administrative law judge acted within his discretion in accepting Dr. Daum's opinion over that of Dr. Godar. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). After noting that Dr. Godar stated that it would be impossible to render any decision as to one specific incident being causative of the ultimate diagnosis in this case, the administrative law judge properly rejected Dr. Godar's opinion. Oldam's arguments based on this opinion would require an actual causal link between the exposure and the disease in order to hold Oldam liable, which is contrary to law. *Cardillo*, 225 F.2d at 137; *Franklin*, 18 BRBS at 198; Decision and Order at 15; RX 9 at 30. Contrary to Oldam's argument, Dr. Daum's opinion is sufficient evidence to establish that any exposure the decedent had while employed with Oldam could have caused his asbestosis.

We reject Oldam's assertion that the holding in *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36 (CRT)(9th Cir. 1990) applies herein, as *Picinich* is distinguishable from the instant case. In *Picinich*, 914 F.2d at 1320, 24 BRBS at 39 (CRT), the Ninth Circuit held that an administrative law judge's finding of minimal exposure to injurious stimuli at a place of employment is insufficient to place responsibility on a covered employer in the absence of contrary evidence that exposure in such quantities had the potential to cause the disease. The administrative law judge in the instant case did not find that the decedent was only minimally exposed to asbestos while employed with Oldam and the administrative law judge accepted Dr. Daum's opinion that the decedent's asbestos exposure at Oldam had the potential to cause or contribute to the decedent's mesothelioma. Consequently, we affirm the administrative law judge's finding that Oldam is the responsible employer. See generally *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991).

Oldam lastly contends that the administrative law judge erred in finding that the death benefits claim was timely filed. Section 13(b)(2), 33 U.S.C. §913(b)(2), provides that in the case of a death due to an occupational disease, the claim for benefits must be filed within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice,

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<sup>7</sup>Although the decedent stated in his affidavit that he was possibly exposed to asbestos while working for Manta Marine Corporation after May 1980, the administrative law judge found that this comment was highly speculative and not persuasive as by that date most asbestos use had been discontinued in the shipbuilding process. Decision and Order at 32; CX 23. This finding is not challenged on appeal.

should have been aware of the relationship between the employment, the disease, and the death. *See generally Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989)(same standard under Section 10(i)); 33 U.S.C. §913 (1988). Under Section 20(b), 33 U.S.C. §920(b), there is a presumption that the claim for benefits was timely filed.<sup>8</sup> *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 145 (1989). Claimant's formal claims against Oldam and Caltex were filed on January 24, 1992, more than four years after the decedent's death on May 3, 1987.

In determining that claimant's claim for death benefits was timely filed, the administrative law judge summarily concluded that the claim for death benefits was timely for the reasons given in his Section 12, 33 U.S.C. §912, analysis. Decision and Order at 23. At Section 12, the administrative law judge found that the decedent's date of awareness was May 19, 1986, the date the doctors informed him that his mesothelioma was caused by asbestos exposure. Decision and Order at 22. The administrative law judge found that the decedent had satisfied the one year notice requirement of Section 12 as his claim was filed on February 27, 1987, within one year of his date of awareness on May 19, 1986. The administrative law judge noted that the record reflected that the decedent's disability claim was sent to Oldam at its last known address in New York City and that all notices sent to that address were returned by the postal service with the notation, "addressee unknown." CX 38 - 40-3. After discussing the decedent's difficulties in locating the employers, the administrative law judge concluded that Oldam was not prejudiced by the delay in claimant's giving notice of her death benefits claim as there was no way for her to establish contact with Oldam.

Although the administrative law judge could properly rely on the lack of prejudice under Section 12 to excuse claimant's giving untimely notice of decedent's death, the administrative law judge erred in relying on the lack of prejudice to Oldam to find that claimant's claim for death benefits was timely filed. Lack of prejudice to employer which excuses insufficient notice under Section 12 is inapplicable to Section 13; Section 12(d)(2), 33 U.S.C. §912(d)(2), expressly provides that failure to give timely notice will not bar a claim if employer was not prejudiced, but Section 13, concerning the time in which a claim must be filed, contains no similar provision. Moreover, although the administrative law judge found the decedent's date of awareness was May 19, 1986, when the doctors informed him that his mesothelioma was caused by asbestos exposure, the administrative law judge did not determine the date of *claimant's* awareness of the relationship between decedent's death, disease, and employment. In a death benefits case, the earliest date of awareness is the date of death. *Shaller*, 23 BRBS at 140. This case therefore must be remanded for findings concerning claimant's date of awareness.

We, therefore, vacate the administrative law judge's finding that claimant's death benefits claim was timely filed, and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must first determine the date of *claimant's* awareness of the relationship between the death, disease, and employment. In doing so, the administrative law judge should consider the merits of claimant's argument that she did not know of

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<sup>8</sup>Contrary to Oldam's argument, the administrative law judge invoked the presumption at Section 20(b). Decision and Order at 23.

the relationship between the decedent's death and employment with Oldam until June 1995, as opposed to his employment with Caltex.<sup>9</sup> *Cf. Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)(in a case where decedent was exposed to asbestos in covered and non-covered employment, "awareness" is determined from the time he obtained knowledge of the relationship between his occupational disease and covered employment). Although claimant filed her formal written death benefits claim on January 24, 1992, the administrative law judge also may discuss whether any other writing before that date discloses an intent to seek compensation. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Once the administrative law judge determines the date of *claimant's* awareness, he must then determine if her claim was filed within the two-year period. The administrative law judge also must determine whether Oldam rebutted the presumption at Section 20(b). In order to rebut the Section 20(b) presumption, Oldam must first establish that it complied with Section 30(a), 33 U.S.C. §930(a), if it had knowledge of the death, which, contrary to its contention, is applicable to a claim for death benefits.<sup>10</sup> The statute of limitations under Section 13 is tolled, pursuant to Section 30(f), until employer files a report pursuant to Section 30(a) if it had knowledge of the death within the statute of limitations period. *See generally Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (CRT)(D.C. Cir. 1987); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). Therefore, on remand, the administrative law judge should determine the applicability of Section 30(a), (f) in addressing the timeliness of the claim for death benefits.

Accordingly, the administrative law judge's Decision and Order is vacated as to the administrative law judge's findings that the situs element is met with respect to Oldam under Section 3(a) and that claimant timely filed her death benefits claim against Oldam under Section 13. The case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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<sup>9</sup>Claimant filed a formal claim against Oldam on January 24, 1992, because she stated she was not aware of the relationship between the decedent's death and his employment with Oldam until the date of Dr. Daum's report in June 1995. Claimant also filed a formal claim against Caltex on January 24, 1992. If claimant had filed an earlier claim against Caltex, based on a belief that this employer was responsible for the decedent's mesothelioma, her claim against Oldam would not be barred. *See Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981); *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986).

<sup>10</sup>Section 30(a) specifically states:

Within ten days from the date of any injury, which causes loss of one or more shifts of work, or *death* or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report . . . .

(emphasis added).

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge