U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 05 July 2006

Case No.: 2004-LHC-926

OWCP No. 10-39694

In the Matter of:

SHELT R. DECKER

Claimant

v.

JEFFBOAT/AMERICAN COMMERCIAL MARINE SERVICE

Employer

JEFFBOAT, INC.

Carrier

and

SHIVELY WELDING & BOILER REPAIR
Employer[1]

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARENCES:

Melissa Olson, Esq.
EMBRY & NEUSNER
Groton, CT
For the Claimant

[1] Shively Welding & Boiler Repair did not appear for the hearing.

Laurie Goetz Kemp, Esq.
WOODWARD, HOBSON, & FULTON
Louisville, KY
For the Employer

Karen L. Mansfield, Esq.
Office of the Solicitor, U.S. Department of Labor
Chicago, IL
For the Party-in-Interest

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (the Act). 33 U.S.C. § 901 *et. seq*. The case was referred to the Office of Administrative Law Judges on February 20, 2004. A hearing was held on October 13, 2005 in Louisville, Kentucky.[2]

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, the testimony, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been carefully reviewed and thoughtfully considered. References to "ALJX," "CX," "EX," "DX," and "JX" refer to Administrative Law Judge Exhibits, Claimant Exhibits, Employer Exhibits, Director Exhibits and Joint Exhibits respectively. The transcript of the hearing is cited "TR" and by page number.

At the hearing, counsel for the Claimant, the Employer, and the Director submitted an executed Stipulation Form. I have

[2] At the hearing, the record was held open until December 16, 2005 to permit the parties to submit post-hearing briefs. Claimant submitted a brief on December 13, 2005, the Director filed its brief on December 15, 2005, and Jeffboat filed its brief on December 16, 2005. Shively Welding did not file a brief. Since the deadline date has passed, the record is now closed.

reviewed the Stipulation Form and find it to be accurate, and therefore, the following factual findings are made in the case:

STIPULATIONS[3]

1. The Act applies to this claim.

2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.

3. The accident/injury arose out of and in the scope of employment.

4. The last exposure at Jeffboat/American Commercial Marine Service occurred in August 1945. The last exposure at Shively Welding and Boiler Repair occurred in 1969.

5. Employer was advised of or learned of the accident/injury on June 2, 2002. If an occupational disease, it became manifest to the Employer on June 2, 2002.

6. Timely notice of injury was given to the Employer.

7. Claimant filed a Claim for Compensation (Form LS-203) on May 7, 2002.

8. Claimant filed a timely notice of claim.

9. Employer filed a timely notice of Controversion (Form LS-207) on July 1, 2002.

10. Claimant returned to his usual employment on: retired 1986.

11. Claimant's "usual employment" consisting of his regular duties at the time of the injury as determined under Section 8(h) of the Act was as follows: retired[4].

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[3] *See* JX 1.

[4] The record establishes that Claimant was last exposed to asbestos in 1969. Thus, at the time Claimant became aware of his occupational lung disease, Mr. Decker had retired from his usual duties as a welder.

12. Claimant's average weekly wage at the time of the accident/injury was 466.91.

13. The date of maximum medical improvement from the Claimant's work-related injury was August 11, 2001.

14. Claimant has demonstrated a causal relationship between his alleged disability and his work accident. Therefore, he has invoked the presumption of causation contained in Section 20(a).

ISSUES[5]

1. Whether Shively Welding and Boiler Repair was a maritime employer;

2. Whether the work performed by the Claimant for Shively Welding and Boiler Repair qualifies as maritime employment;

3. Whether Jeffboat/American Commercial Marine Service or Shively Welding and Boiler Repair is the last employer responsible for payment of benefits;

4. Whether the Claimant is entitled to medical care and treatment under Section 7 of the Act; and

5. Whether Claimant is entitled to attorney fees and expenses.

FINDINGS OF FACT

Background / Testimony of Shelt Robert Decker

Claimant, Shelt Robert Decker (hereinafter "Decker"), was born January 5, 1924. (TR 15). At the time of the hearing, he was 81 years old and resided in Pleasure Ridge Park, Kentucky with no dependents. (TR 15-16). Jesse Falsteen Scott, Claimant's wife, passed away on January 28, 1994. (TR 16).

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[5] *See* JX 1; TR 8-9.

Decker has a fifth grade education and did not complete any college or vocational training. *Id.* He also did not serve in the military. *Id.*

Claimant was employed by Jeffboat/American Commercial Marine Service (hereinafter "Jeffboat"), which is located on the Ohio River, from September 3, 1943 until August 22 or 23, 1945. (TR 17). He was a welder throughout his employment with Jeffboat. (TR 18). He welded mild, stainless, and galvanized steel. *Id.* He worked on all parts of the hull including the inside. (TR 18-19). Welding on the inside of the hull was completed in confined spaces. *Id.* There was no ventilation in the confined spaces, and he did not wear a respirator or mask. (TR 20). The welding produced dust, smoke, and fumes which he inhaled while working. (TR 19-20).

While at Jeffboat, Claimant used an electric steamer welding machine. (TR 47). Welding rods were clamped to the steamer which was located in the handle. *Id.* When used in the steamer welding machine, the welding rods produce smoke and fumes. *Id.* Spent welding rods were discarded on the ground and walked on, producing dust. (TR 47-48). He sometimes cleaned up the discarded welding rods by sweeping them with a broom. (TR 48).

Claimant did not know whether the welding rods were insulated or coated with asbestos. (TR 20). When he worked for Jeffboat, Decker did not even know what asbestos was. (TR 20-22). In the past, boilers were insulated with asbestos. (TR 20). When he worked on or around the boilers at Jeffboat, the air around the boilers was smoky. (TR 22).

From June 5, 1956 to January 31, 1975, Claimant worked for Shively Welding & Boiler Repair (hereinafter "Shively" or "Shively Welding"). (TR 22-23). During his tenure at Shively Welding, he never wore any kind of breathing protection. (TR 54). Decker was exposed to dust, fumes, and asbestos while working for Shively. (TR 54-55). Throughout most of his work for Shively, he repaired, installed, and removed boilers. (TR 57-58). Primarily, he did not work on ships. (TR 58). He worked wherever there were boilers and traveled extensively in the course of his employment. (TR 42, 58-60).

Between 1962 and 1969, Claimant worked approximately 25 times on behalf of Shively on a boat called the Belle of Louisville. (TR 23-31). He checked the boilers to make sure that they were not leaking at the start of each boating season.

(TR 52). His inspections sometimes revealed that the boilers were working properly, but most of the time, he had to perform repairs after checking for and finding leaks. (TR 59). On some occasions, the boat was located at the dry dock at Jeffboat. (TR 24-25). He also worked on the boat while it was docked on the river. However, Decker never worked on the boat while it was moving on the river. (TR 24-25, 53).

Once during Claimant's employment with Shively Welding, new boilers were installed on the Belle of Louisville, but these boilers could not "carry the load." (TR 23-31). At the request of the City of Louisville and the Hartford Insurance Company, Decker checked the ship's boilers every evening—including weekends—for one month. *Id.* For the majority of his work during that one month time period, Decker worked alone in the boiler room. (TR 32). He performed welding work on mild steel using an electric welder. *Id.* The boiler room was a confined space, but one could open the doors to the room when the weather was fair to allow for air. *Id.* There was no respiration equipment on the Belle of Louisville, and consequently, he inhaled the smoke and fumes created by his welding work. (TR 32-33). He removed material, which he now thinks was asbestos, from the boilers on the Belle of Louisville by ripping it with his bare hands. (TR 33-34). He inhaled dust produced by tearing out the asbestos in this manner. (TR 34-35).

During his employment with Shively Welding, Claimant also worked once for about 8 hours on another boat, the Delta Queen, while it was docked on the Ohio River at Madison, Indiana. (TR 35, 60). Decker removed and replaced tubing in the Delta Queen's boiler but did not perform any welding while he worked on the Delta Queen. (TR 36). The boiler was 10-15 feet high and filled a 20 x 20 room. (TR 38). He assumes that there was asbestos in the Delta Queen's boiler but neither he nor his coworkers were required to remove or move the insulation. (TR 36-37). He used an acetylene torch to cut the tubes, which were made of mild steel, and inhaled the dust and fumes created by his work. *Id.*

While employed by Shively Welding, Claimant also worked on a "little boiler" at Jeffboat. (TR 49-50). He put tubes in the little boiler like he did in the boilers on the Belle of Louisville and Delta Queen. (TR 50). The little boiler was similar to the boilers on the Belle of Louisville and Delta Queen, but it was much smaller. *Id.* Like the boilers on the Belle of Louisville and the Delta Queen, Decker assumed that the little boiler had asbestos insulation. *Id.* The little boiler

was not on a ship or boat, but he worked on it in the shipyard on the west end of Jeffboat. (TR 50-51).

Claimant is a life-long non-smoker. (TR 48). He remembers undergoing chest x-rays and pulmonary testing at his union hall although he has never had any treatment from a doctor for breathing problems. (TR 48-49, 55). He has suffered two strokes and currently is prescribed three different medications to combat high blood pressure. (TR 56). According to Decker, his doctors told him that the medications decreased his breathing. *Id*. Before he began taking the medications, he never experienced breathing problems. (TR 57). He also never experienced any breathing problems before or while he worked at Jeffboat or Shively Welding. *Id*.

I find Mr. Decker to have been an entirely credible witness and conclude that his testimony regarding the work he performed at Shively Welding and Jeffboat and his current medical condition to be all credible.

Medical Evidence

The record contains a report from Dr. Richard B. Levine, who is a board-certified Radiologist and B-Reader. (CX 5). He interpreted Claimant's chest x-ray dated June 11, 2001 and issued a report on June 27, 2001. Dr. Levine observed "[pleural] thickening bilaterally consistent with previous asbestos exposure indicating asbestos-related pleural disease."

The record also contains an Asbestos Medical Evaluation performed by Dr. Joe E. Roman. (CX 4). On August 10, 2001, Dr. Roman examined Claimant, administered a pulmonary function test, reviewed Dr. Levine's June 2001 x-ray interpretation report, and issued a report on August 13, 2001. He diagnosed Claimant with asbestos-related pleural disease based on Claimant's exposure history and Dr. Levine's reading of the June 2001 x-ray. He also diagnosed Claimant with a mild obstructive lung disease and recommended that he seek treatment from his primary care physician. Dr. Roman is board-certified in Internal Medicine and Pulmonary Disease.

The record also contains two medical reports from Dr. Martin G. Cherniack. (CX 1, 2). On May 22, 2004, Dr. Cherniack reviewed the reports of Drs. Levine and Roman and issued a consultative report. (CX 1). He concurred with Dr. Levine that the Claimant's chest x-ray showed evidence of pleural plaque. Based on the Claimant's employment history, Dr. Cherniack

diagnosed Claimant with COPD and concluded that given Decker's lack of a smoking history, the inhalation of asbestos fiber is overwhelmingly the likeliest etiology. Dr. Cherniack is board certified in Internal and Occupational Medicine.

In a letter dated October 15, 2004, Dr. Cherniack noted that Claimant has a mild ventilatory impairment and "falls into Category 2 or Stage II impairment" which translates to a 10 to 15% impairment of the lung and whole person. (CX 2). Dr. Cherniack urges that 15% is the more appropriate percentage measure of Claimant's disability because of the presence of multiple abnormalities.

DISCUSSION AND APPLICABLE LAW[6]

Maritime Employer / Maritime Employment

In *Stowers v. Consolidated Rail Corp.*, the Sixth Circuit Court of Appeals wrote that the Longshoreman and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et seq.* provides coverage to claimants that satisfy the following four conditions:

1. [T]he injured person must be injured in the course of his employment, 33 U.S.C. § 902(2);

2. [H]is employer must have employees who are employed in maritime employment, § 902(4);

3. [T]he injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal,

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's injury occurred mostly in the Commonwealth of Kentucky. 33 U.S.C. § 921(c). This claim stems from injuries suffered by Claimant, in part, while working aboard the Belle of Louisville when it was docked on the Ohio River in Louisville, KY. (TR at 25). In addition, Claimant was also employed by Shively Welding. According to the Decker's Itemized Statement of Earnings from the Social Security Administration, Shively Welding was located in Louisville, KY. (CX 6). Claimant was also employed by Jeffboat, where he repaired the Belle of Louisville and other boats. According to the Itemized Statement of Earnings from the Social Security Administration, Jeffboat is located in Jeffersonville, IN. (CX 6). Additionally, as discussed below, I have found Shively Welding to be the Claimant's last maritime employer that is responsible for his disability compensation benefits. As such, I find that this claim is subject to the jurisdiction of the Court of Appeals for the Sixth Federal Circuit.

building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," § 903(a); and

4. [T]he employee who is injured within that area must be engaged in maritime employment, § 902(3).

985 F.2d 292, 293-294 (6th Cir. 1993), *citing Chesapeake & O. Ry. v. Schwalb*, 493 U.S. 40, 45 (1989).

The parties have stipulated that the injury arose out of and in the scope of the Claimant's employment. (JX 1). Consequently, the first prerequisite of LHWCA coverage as established by *Stowers* is satisfied as to both Shively Welding and Jeffboat.

Furthermore, I need not consider at length the second requirement—that the Claimant was employed by a statutory "employer"—because the second condition is little more than a tautological restatement of the fourth condition. *Hullinghorst Indus v. Carroll*, 650 F.2d 750, 758 (5th Cir. 1980). The term "employer" is defined in 33 U.S.C. § 902(4) as "an employer *any of whose employees are employed in maritime employment, in whole or in part*, upon the navigable waters of the United States . . ..." (emphasis added). Thus, the LHWCA defines "employer" not in terms of the types of entities that qualify but rather according to whether its employees are covered by the LHWCA. If the claimant is engaged in maritime employment within the meaning of 33 U.S.C. § 902(3), then a claimant's employer is an employer within the meaning of § 902(4) of the Act. *Blundo v. International Terminal Operating Co.*, 2 BRBS 376, 378 (1975), *aff'd sub nom. Pittson Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2nd Cir 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo.*, 432 U.S. 249 (1977); *Harris v. Maritime Terminals*, 1 BRBS 301, 304 (1975), *rev'd sub nom. I.T.O. Corp. of Baltimore v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *rev'd on rehearing en banc*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded sub nom. Atkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, *reinstated on remand*, 563 F.2s 646 (4th Cir. 1977); *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 997-98 (3rd Cir. 1983); *Hullinghorst*, 650 F.2d at 758; *Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984); *Perez v. Sea-Land Servs.*, 8 BRBS 130 (1978). "Indeed, there is some question as to the existence of a separate and independent "employer" status requirement, as a jurisdictional confine, at all." *Hullinghorst* 650 F.2d at 758, *citing Trotti & Thompson v. Crawford*, 631 F.2d

1214, 1216 n.5 (5th Cir. 1980). The Court of Appeals for the Fifth Circuit has explicitly stated that Section 902(4) requires that an employer need only have one employee engaged in maritime employment to qualify as a statutory employer. *Jacksonville Shipyards v. Perdue*, 539 F.2d 533, 538 n.9 (5th Cir. 1978), *aff'd on other grounds sub nom. P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). Thus, if Claimant establishes that he was engaged in maritime employment, he will have satisfied both the second and fourth conditions set forth in *Stowers*.

The record establishes that Claimant was injured upon the navigable waters of the United States. The Act does not define "navigable waters." The test that courts have employed for navigability under the Act was articulated in *The Daniel Ball*, 77 U.S. 557 (1871); *LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). In *The Daniel Ball* the Supreme Court of the United States held that rivers "constitute navigable waters of the United States within the meaning of the acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries . . .." *Id.* at 563; *Lepore*, 23 BRBS at 405. Moreover, the Act expressly applies to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 902(3).

Here, between 1943 and 1945, Decker repaired boat hulls at Jeffboat Shipyards, which is adjacent to the Ohio River. (TR 17). He worked without a mask or respirator and used an electric welding machine with welding rods that were insulated with asbestos. (TR 18, 20). The welding rods produced smoke and fumes which he inhaled. Sometimes, he worked in a confined space inside of a boat's hull where the ventilation was poor. (TR 18-20).

Additionally, between 1962 and 1969, while Decker was employed at Shively Welding, he worked on-board a boat named the Belle of Louisville (hereinafter "Belle") approximately 25 times. (TR 23-31). At the start of each boating season, he inspected the Belle's boilers for leaks and also made repairs. (TR 52, 59). Sometimes he worked on the Belle while it was docked on the Ohio River and at other times while it was docked at Jeffboat. (TR 24-25, 53). In addition, Decker worked on the Belle every evening for one month after new boilers were installed on the Belle. (TR 23-32). During this period, he

removed insulation from the ship's boilers that was likely composed of asbestos[7]. (TR 33-34). He tore out the boiler's insulation by hand, creating dust which he inhaled. (TR 34-35). He also performed welding work on the Belle and inhaled the smoke and fumes created by his work. (TR 32-33). Therefore, the third element of the *Stowers* test has been met as to both Jeffboat and Shively Welding.[8]

Deciding whether Claimant has satisfied the fourth element—whether he was engaged in maritime employment while working for Shively Welding—presents somewhat greater difficulty. The parties dispute whether Decker was engaged in "maritime employment" when he worked for Shively Welding. Decker and Jeffboat argue that he was engaged in maritime employment at Shively Welding. The Director, on the other hand, asserts that Claimant was not engaged in maritime employment at Shively Welding. Resolving the dispute requires resort to the legislative history of the Act, the amendments to the Act, and case law.

Before 1972, the LHWCA was consistently interpreted to supply coverage to "*any* worker injured upon navigable waters in the course of employment . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." *Director, OWCP. v. Perini N. River Assocs.*, 459 U.S. 297, 310 (1983) (emphasis in original). Relief under the pre-1972 version of the LHWCA extended coverage, though, only to those "classes of longshoreman and other maritime employees who were injured while on or over the navigable waters of the United States." *Stowers*, 985 F.2d at 294. As a result, "workers who performed some duties on maritime vessels and some on dry land, found themselves 'walking in and out of [LHWCA] coverage' depending on where they were working at the time of the injury." *Id*, *citing P.C. Pfeiffer v. Ford*, 444 U.S. 69, 76 (1979). In addition, use of conveyor belt systems and other technological advancements caused traditional landshoring activity, which the LHWCA was meant to cover, to move inland. *Id*. To address these problems, Congress, via amendments to LHWCA in 1972, broadened the scope of the covered situs to encompass navigable waterways

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[7] The Director did not dispute, at trial or on brief, that Claimant inhaled asbestos during the course of his work on the Belle while he was employed by Shively Welding.

[8] The record reveals that the Claimant also worked on one occasion for eight hours on a boat known as the Delta Queen while he was employed by Shively Welding. Although the Claimant worked in the boiler room, he did not remove any insulation from the Delta Queen's boilers and did not perform any welding work on the Delta Queen. (TR 35-37, 60).

and adjoining land. *Id.* At the same time, the 1972 Amendments reduced the scope of the coverage by adding the status requirement that injuries must be suffered while a claimant was engaged in "maritime employment." *Id*, *citing Schwalb*, 493 U.S at 46. "The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." *Caputo*, 249 U.S. at 264-65.

In *Perini*, the Supreme Court of the United States considered what effect the 1972 amendments to the LHWCA had on claims that would have satisfied the situs condition posed by the earlier version of the Act. The Court rejected Perini's contention that the amended LHWCA requires a claimant injured on a navigable waterway to prove his employment had a significant relationship to navigation or to commerce on navigable waters. *Id.* at 315-25. The *Perini* Court noted that the legislative history surrounding the amendments clearly indicated that the purpose of the changes was to extend the scope of the Act's coverage and not to exclude traditionally covered employees. *Id.* The Court stated the following:

> when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

Id. at 324. However, the Court refused to completely exempt those injured on a waterway from the status requirement established by the 1972 amendments by refusing to express an opinion on whether the LHWCA affords relief "to a worker injured while transiently or fortuitously upon actual navigable waters." *Id.* at 324 n.34. Similarly, in *Herb's Welding*, the Supreme Court noted that there was a significant difference between an employee who works on and off navigable waters and an employee who works on land and merely uses a boat as transportation to and from work. *Herb's Welding*, 470 U.S. at 427 n.13. Despite this distinction, the Court concluded that a land-based worker injured in transit over a navigable waterway might be covered by the Act. *Id.* Thus, *Perini* established a strong indication

that one injured on a navigable waterway while in the course of his employment was engaged in maritime employment within the meaning of the Act.

The Court of Appeals for the Fifth and Eleventh Circuits have read *Perini* and *Herb's Welding* as indicating that the Supreme Court would hold that the LHWCA does not extend coverage to an employee injured while transiently or fortuitously over a navigable waterway. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990). Relying on the "transiently or fortuitously upon actual navigable waters" language in *Perini,* the Eleventh Circuit Court of Appeals denied coverage to a claimant who worked on land and merely used a boat as transportation to and from work. *Brockington*, 903 F.2d at 1527-28. This case is distinguishable from *Brockington* in that the Claimant was actually repairing the Belle and not merely present on a navigable waterway for transportation purposes.

The Supreme Court has stated that coverage extends to claimants who "spend at least some of [their] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273. In *Herb's Welding*, the Supreme Court suggested that a claimant's presence on a covered situs must pass a *de minimis* threshold whereby spending only a small faction of time on a navigable waterway would not trigger coverage under the Act. *Herb's Welding*, 470 U.S. at 427 n. 13. Similarly, the *Bienvenu* Court explained further that there must "be greater than a modicum of activity in order to preclude coverage" and that a worker who performs a "not insubstantial amount of his work on navigable waters is neither transient nor fortuitous." *Bienvenu*, 164 F.3d at 908. Bienvenu worked aboard the Miss Jackie 8.3% of his time at work, and the Fifth Circuit Court of Appeals found that this was not an insubstantial amount of work. *Id.* Similarly, in *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980), an employee who drove a truck and spent two and one-half to five percent of his time loading and unloading without assistance and some additional time assisting in loading and unloading was held to have met the status test. In *Kilburn v. Colonial Sugars*, 32 BRBS 3, 5 (1998), the Benefits Review Board affirmed an Administrative Law Judge's finding that thirteen hours spent in longshoring activities during the year before the claimant's death was too tenuous of a link to confer coverage.

The record shows that most of Claimant's visits to the Belle were not full work days. Assuming that he worked on the Belle fifty-five times for an average of four hours each time

and that he worked forty hours per week for fifty weeks per year while at Shively Welding during 1962-1969, Decker spent a little less than 1.6% of his time working on the Belle. This percentage must be viewed as merely an estimate, though, since Claimant worked on the Belle over 35 years ago and his testimony was not supported by his employment records. Furthermore, such a computation might be misleading because Decker traveled extensively. When he did repair work in Columbus, Ohio, Claimant spent eight hours commuting in order to do two hours of work. (TR 60). Removing Decker's travel time from the denominator would yield a greater percentage of work time spent repairing the Belle. In any event, Decker worked less than the claimants in *Bienvenu* and *Boudloche* but more than the claimant in *Kilburn*.

Moreover, the periodic nature of Claimant's work on the Belle is also relevant to the determination of whether he was engaged in maritime employment when he worked for Shively. "Activities performed infrequently but as a regular part of he employee's overall job may confer coverage." *Kilburn*, 32 BRBS at 5, *citing Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). Decker testified that he inspected and, often times, made repairs to the Belle at the beginning of each boating season. (TR 52, 59).

The 1984 Amendments also impacted the fourth element of the *Stowers* test. The term "employee" is defined in 33 U.S.C. § 902(3) as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." In 1984, Congress excluded several specific types of employment from the definition of maritime employment.[9] 33 U.S.C. 902(3). Most of the exceptions apply only if the individuals described therein are subject to coverage under a State workers' compensation law. *Id.* Section 902(3)(D) excludes coverage under the Act to "individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this

[9] Since the 1984 amendments exclude from coverage certain employees who would have been covered under the original Act, the 1984 amendments may be construed as undercutting the rationale of *Perini* that the 1972 amendments merely extended the scope of prior coverage. *Bienvenu*, 164 F.3d at 913 (Moss, J. dissenting).

chapter." The Director argues that the Claimant meets the exception set forth in § 902(3)(D) because Shively Welding was a vendor or supplier, because Decker worked on the Belle and Delta Queen only temporarily and sporadically, and because Shively's employees did not normally perform shipboard work. (Director's Post-Hearing Brief at 5-6). In support of this proposition, the Director cites *Daul v. Petroleum Communications, Inc.*, 196 F.3d 611 (5th Cir. 1993), wherein a salesman, who was injured while assisting in the installation of cellular communications equipment, was excluded from coverage under the Act.

The Director's contention that the vendor exception to the Act's definition of employee applies to Claimant is dubious for several reasons. First, Decker was exposed to asbestos while he was engaged in repairing the Belle's boilers, and the Act expressly includes "ship repairmen" in the definition of employee. "Congress could have hardly made it clearer that it intended to afford complete coverage to employees engaged in the occupations enumerated in the Act so long as the location of the injury met the situs test." *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987). Second, Decker was not a supplier, transporter, or vendor as those terms are commonly understood. Rather, he was a repairman who inspected and repaired the ship's boilers. In contrast, the primary duties of the claimant in *Daul* were selling and transporting cellular communications equipment and maintaining customer relations. *Daul,* 196 F.3d at 612. Third, the exceptions (A)-(F) to the definition of maritime employment require a showing that the claimant is subject to coverage under a State workers' compensation law. 33 U.S.C. § 902(3). The Director failed to present any evidence that Decker might be covered by such a law. Fourth, the Director understands "employer" in Section 902(3)(D)(iii) as meaning the supplier, transporter, or vendor (in this case, Shively Welding) and consequently argues that Claimant meets the vendor exception to the definition of maritime employment because Shively Welding's employees did not normally perform shipboard work. However, the *Daul* Court interpreted the term as referring to the suppliee, transportee, or vendee, indicated in § 902(3)(D)(ii), on whose premises a claimant worked temporarily (in this case, the Belle of Louisville). Thus, the vendor exception requires proof that the Belle's employees did not normally perform boiler repair rather than proof that Shively Welding's employees did not normally work on navigable waters. Technically, the record does not support a finding of the final element of 33 U.S.C. 902(3)(D).

Based on the foregoing, I conclude that the Claimant was engaged in maritime employment when he worked for Shively Welding. Decker satisfies the situs test because he was exposed to asbestos on a navigable waterway. (TR 23-31). Decker satisfies the status requirement because he was engaged in ship repair. (TR 23-31). Moreover, Decker's exposure to asbestos was not the result of transient or fortuitous contact with the Belle since he repaired and/or inspected the Belle approximately fifty-five times. (TR 23-31). In addition, the fifty-five days he spent working on the Belle was not insubstantial. Furthermore, he regularly inspected the Belle at the beginning of each boating season. (TR 23-31).

It is also clear that Claimant was engaged in maritime employment at Jeffboat. Decker worked at the shipyards adjacent to the Ohio River repairing ship hulls and installing boilers while he was employed by Jeffboat. (TR 17-22). In their post-hearing briefs, Claimant and the Director agree that Decker engaged in maritime employment when he worked for Jeffboat. Similarly, Jeffboat does not explicitly argue that Claimant was not engaged in maritime employment during his tenure with the company. Instead, Jeffboat argues that Shively Welding is liable for the Claimant's compensation under the last maritime employer rule. (Jeffboat's Post-Hearing Brief at 3-7).

The Last Maritime Employer Rule

In general, where two or more LHWCA employers may be responsible for a work-related injury or disease, the last maritime employer rule operates to allocate liability for compensation benefits to the employer latest in time notwithstanding that work for prior employers contributed to the injury. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1971), *citing General Ship Service v. Director, OWCP*, 938 F.2d 960, 962 (9th Cir. 1961). It appears that there are two variations of the last maritime employer rule, application of which depends on whether the injury is characterized as an "occupational disease" or a "two-injury" case. *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). *See also Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 228-29 (1st Cir. 2001); *but see Bath Iron Works Corp. v. Director*, 193 F.3d 27 (1st Cir. 2000).

In *Travellers Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955), the Court of Appeals for the Second Circuit confronted the issue of who should bear the burden of providing compensation for an *occupational* injury that developed over the

course of the employee's lifetime or was caused and subsequently aggravated while the employee was exposed to injurious stimuli during more than one period of employment or insurance coverage. The *Cardillo* Court held that the responsible party should be "the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *Id*. at 145. *Bath Iron Works*, 244 F.3d 222; *Insurance Co. of North America v. U.S. Dep't Labor, OWCP*, 969 F.2d 1400 (2nd Cir. 1992); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008 (5th Cir. 1981); *Marinette Marine Corp. v. OWCP*, 431 F.3d 1032 (7th Cir. 2005); *Foundation Constructors*, 950 F.2d 621 (9th Cir. 1991); *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314 (11th Cir. 1988). That is to say, "[i]n a situation where two LHWCA employers may be responsible for a work-related injury or disease, the last employer liable is completely liable." *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1286 (9th Cir. 1983).

The rule for two injury cases is as follows:

> [I]f the disability . . . resulted from the natural progression of [a prior] injury and would have occurred notwithstanding the [subsequent] injury, then the [prior] injury is compensable and accordingly, [the prior employer] is . . . responsible . . .. If, on the other hand, the [subsequent] injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the [subsequent] injury is the compensable injury, and [the subsequent employer] is . . . responsible . . ..

Kelaita, 799 F.2d at 1311 *quoting Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646, 649-50 (1979) (citations omitted) *aff'd sub nom. Employers National Ins. Co. v. Equitable Shipyards*, 640 F.2d 383 (5th Cir. 1981).

Under this latter statement of the rule, an employer can escape liability by establishing by a preponderance of the evidence that there was a later work-related injury during subsequent employment that aggravated the employee's condition. *Buchanan v. International Transportation Services*, 31 BRBS 81, 85 (1997).

At least two cases already mentioned indicate that injury resulting from exposure to asbestos is an occupational disease. *See Foundation Constructors*, 950 F.2d at 624; *Bath Iron Works*, 244 F.3d at 227. In addition, in stipulations signed by counsel for the Director, this case has been characterized as an "occupational disease case." Moreover, the Director's Statement of Position asserts that the Claimant "seeks compensation for an occupational respiratory disease." (Director's Statement of Position at 1). Since the record indicates that Claimant was exposed to asbestos while he was employed by Shively Welding, the last maritime employer rule as detailed in *Cardillo* allocates liability for the Claimant's compensation benefits to Shively Welding. Furthermore, even if the more-exacting two-injury version of the last maritime employer rule is applied, Shively is still the responsible employer. The fact that Decker's pulmonary disability was not diagnosed until some 60 years after he worked at Jeffboat and 35 years after he worked on the Belle for Shively suggests that Claimant's exposure to asbestos while at Shively must have combined with or aggravated his previous exposure at Jeffboat. The Director has come to the same conclusion: "the Claimant's condition arose out of his employment at Jeffboat *and was aggravated by his employment at Shively*." (Director's Post Hearing Brief at 12 (emphasis added)). Therefore, I find that Shively Welding is the responsible party according to the last maritime employer rule.

Medical Care and Treatment

Pursuant to Section 7(a), an employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978); 33 U.S.C § 907(a). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). A claimant has established a *prima facie* case for compensable injury where a qualified physician indicates treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

Based on the Claimant's medical evidence, the parties have stipulated that Claimant's occupational lung disease arose out of his maritime employment and that he has a 15% impairment of the whole man as a result of his occupational exposures. (JX 1; TR 6). Therefore, Shively Welding is required to pay for all past medical bills and provide future medical services for Mr. Decker's work-related condition, pursuant to Section 7 of the Act.

Attorney's Fees

Claimant's counsel has fifteen days to submit an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. § 702.132. The application must be served on all parties, including the Claimant, and proof of service must be filed with the application. The parties are allowed fifteen days following service of the application to file objections to the application.

ENTITLEMENT

The evidence in the record supports the conclusion that Shelt R. Decker is entitled to permanent partial disability benefits from August 11, 2001 and continuing as a result of his work-related injury. Claimant's average weekly wage at the time of the injury was $466.91. Additionally, the parties have stipulated that the Claimant's benefits pursuant to Section 8(c)(23) is at the rate of $46.69 per week. Therefore, based on the above, Mr. Decker's compensation rate will be $46.69 per week due to his 15% impairment of the whole man as a result of his occupational lung disease.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. Shively Welding & Boiler Repair shall pay to Shelt R. Decker permanent partial disability compensation in the amount of $46.69 per week beginning August 11, 2001. This compensation rate is approximately 15% of 66 2/3 per centum of Claimant's average weekly wage of $466.91. 33 U.S.C. § 908(b).

2. Shively Welding & Boiler Repair shall pay all reasonable, appropriate, and necessary past and future medical expenses arising from Claimant's work-related injury and its residuals, pursuant to the provisions of Section 7 of the Act.

3. Shively Welding & Boiler Repair shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C § 1961; *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

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Rudolf L. Jansen
Administrative Law Judge