

Issue Date: 12 June 2012

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

CASE NO.: 2012-LHC-00554
OWCP NO.: 01-173118

In the Matter of:

JAMES W. KELLY (dec'd),
Claimant,

v.

ELECTRIC BOAT CORPORATION,
Employer/Self-Insured

and

ACE AMERICAN INSURANCE COMPANY
Carrier.

Before:

Jonathan C. Calianos, Administrative Law Judge

Appearances:

Stephen C. Embry, Esq. (Embry & Neusner), Groton, Connecticut, for the Claimant

Mark McKenney, Esq. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island,
for the Employer/Self-Insured

Michael J. McAuliffe, Esq. (Pomeranz, Drayton & Stabnick, LLC), Glastonbury, Connecticut,
for the Carrier

DECISION AND ORDER GRANTING SUMMARY
DECISION FOR THE CLAIMANT AND CANCELLING HEARING

The matter before me involves a claim for compensation under the Longshore and Harbor
Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, ("the Act") that was transferred to the

Office of Administrative Law Judges for a formal evidentiary hearing. *See* 33 U.S.C. § 919(d). The formal hearing is scheduled for July 24, 2012, in New London, Connecticut. On January 27, 2012, the Claimant filed a motion for an expedited hearing citing the declining health of Mr. Kelly and the desire to ensure that the case be heard prior to Mr. Kelly's condition worsening to the point where he cannot participate in the proceedings. On January 31, 2012, I held a telephonic hearing regarding the motion, during which the Respondents indicated there was no opposition to the motion. On February 7, 2012, I issued an Order granting the motion and setting an expedited hearing for March 20, 2012 in New London, Connecticut. On March 5, 2012, the Employer filed a motion to revert to the original hearing date because the Claimant had passed away and the need for an expedited hearing was now diminished. With no objections from the Carrier or Claimant, I issued an order on March 14, 2012 rescheduling the hearing for July 24, 2012 in New London, Connecticut.

On April 26, 2012, the Claimant filed a motion for summary decision seeking an award of benefits to the Claimant's estate for a permanent partial impairment from October 4, 2011 through the date of the Claimant's death on February 9, 2012. On May 7, 2012, the Employer filed an objections to the Motion, and on that same day, it filed a cross motion for summary decision arguing that it should not be liable for payment to the Claimant because after it became self-insured in April of 1973, the Claimant was not engaged in maritime employment nor was he exposed to asbestos at any maritime situs. On May 17, 2012, the Carrier filed a motion for summary decision seeking dismissal from the case because the Claimant's exposure continued beyond April 1973 when the Employer became self-insured and the Carrier no longer insured the risk. On May 25, 2012, the Employer filed an objection to the Carrier's motion, and on May 31,

2012, the Claimant filed a response to both the Employer and Carrier's motions for summary decision. On June 5, 2012, I held telephonic hearing on-the-record on the pending motions.

During the June 5, 2012 telephonic hearing, the parties confirmed that there were no factual issues in dispute that would preclude summary decision, and all relevant documentary evidence was appended to the filing made by the various parties. Subsequently, I rendered a Bench decision on the record finding that Ace American Insurance Company was the last responsible carrier in this matter and granted the Claimant's Motion for Summary Decision, in part.

Based upon the record in this proceeding, including the documentary evidence and the statements made during the June 5, 2012 telephonic hearing, which are adopted and incorporated herein by reference, I make the following factual findings:

1. The Act applies to the instant case;
2. James Kelly was an employee of the Electric Boat Corporation ("EBC") at its Groton, Connecticut shipyard located on the navigable waters of the Thames River and adjoining land areas customarily used by the shipyard for ship construction and overhaul;
3. Mr. Kelly was employed by EBC for varying periods from 1951-1997;
4. During the course and scope of his employment with EBC Mr. Kelly was regularly exposed to asbestos dust and particles;
5. As a result of his exposure to asbestos while he was employed at EBC, Mr. Kelly suffered from asbestos-related chronic lung disease;
6. EBC became self-insured in April of 1973;
7. There was insufficient evidence proffered to establish that Mr. Kelly was exposed to any asbestos after April 1973, thereby making Ace American Insurance Company ("Ace") the last responsible carrier in this matter;
8. In October of 2011, as a result of Mr. Kelly's exposure to asbestos dust and particles, Mr. Kelly suffered from a severe pulmonary impairment consistent with a 65% impairment of the lung and whole person pursuant to the AMA Guides;
9. Mr. Kelly was retired at the date of the onset of his impairment;

10. Mr. Kelly is entitled to permanent partial disability benefits from October 4, 2011 through the date of his death on February 9, 2012, as well as medical care and treatment; and
11. At the time of Mr. Kelly's injury, the national average weekly wage was \$647.60.

The Claimant's Motion for Summary Decision is **GRANTED, in part**, and the Carrier and the Employer's Motions for Summary Decision are **DENIED**. Accordingly, for the reasons stated on the record during the June 5, 2012 telephonic hearing, which are adopted and incorporated herein by reference, and based upon the facts set forth *supra*, the following order shall enter:

1. Mr. Kelly suffered from an asbestos-related lung disease caused by his occupational exposure to asbestos while he was employed at EBC and Ace is the last responsible carrier;
2. The Carrier, Ace American Insurance Company, shall pay the Estate of James W. Kelly Permanent Partial disability benefits pursuant to 33 U.S.C. § 908(c)(23) at the rate of \$280.63 per week for the period of October 4, 2011 to February 9, 2012;
3. Pursuant to 33 U.S.C. § 907, Ace American Insurance Company, shall furnish the Claimant with such reasonable, appropriate, and necessary medical care and treatment as the Claimant's work-related injuries require;
4. Ace American Insurance Company shall pay the Claimant interest on all past due benefit payments at the applicable Treasury Bill pursuant to 28 U.S.C. § 1961, computed from the date each payment was originally due until paid, and the appropriate rate shall be determined as of the filing date of the Decision and Order with the District Director;
5. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director;
6. If the Claimant seeks an award of attorney's fees and costs pursuant to 33 U.S.C. § 928, an application conforming to the requirements of 20 C.F.R. § 702.132(a) (2010) shall be filed within **30 days** of the date of this order. Should the Employer/Carrier object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Employer/Carrier's

objections shall be filed not later than **30 days** following service of the fee application. **The objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Claimant's attorney prior to the filing of the objections;** and

7. The hearing scheduled for July 24, 2012 in New London, Connecticut is **CANCELLED.**

SO ORDERED.

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JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts