BRB No. 85-2111

ROBERT GARDNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAILCO MULTI CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	on REMAND

On Remand from the United States Court of Appeals for the District of Columbia Circuit.

D. Stephenson Schwinn (Jordan, Coyne, Savits & Lopata), Washington, D.C., for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit. *Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990). Employer appealed the Decision and Order (84-DCWC-96) of Administrative Law Judge Robert S. Amery awarding benefits 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 Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973)(the 1928 Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

Because the present case involves the question of whether claimant's injury is covered under the 1928 Act, a brief overview of the relevant statutory framework is warranted. Congress, acting as legislative authority for the District of Columbia, enacted the District of Columbia Workmen's Compensation Act of 1928, which made the provisions of the Longshore Act applicable to private sector employees in the District. Congress also provided that the 1928 Act would be administered by the United States Department of Labor, with review of administrative decisions in the United States Court of Appeals for the District of Columbia Circuit. *See Railco Multi-Construction Co. v. Gardner*, 564 A.2d 1167, 1170 (D.C. 1989). However, after Congress granted home rule to the District, the District of Columbia Council repealed the 1928 Act and enacted the District of Columbia Workers' Compensation Act of 1979, D. C. Code §36-301 *et seq.* (the 1979 Act) which "narrowed the scope of coverage and lowered the level of benefits available to injured workers." *Id.* at 1171. The 1979 Act is administered by the District of Columbia Department of Employment Services (DOES), with judicial review of administrative decisions in the District of Columbia Court of Appeals. *Id.* Notwithstanding its repeal, the 1928 Act remains in force under the general savings statute, 1 U.S.C. §109 (1982), for the purpose of preserving the provisions of the Longshore Act as they existed in 1982 for the benefit of employees whose claims are derived from injuries occurring before the 1979 Act became law. *Railco Multi-Construction Co. v. Gardner*, 902 F.2d at 73-74, 23 BRBS at 72 (CRT).

In the present case, the facts relevant to the jurisdictional issue presented are not in dispute. Claimant first came to the District of Columbia in 1958 as a construction worker. For nine years he worked for several employers in connection with the construction of the Washington Metro subway project. Claimant's last employer on the Metro project was Railco Multi-Construction Company (Railco), beginning in September 1981. From September 1981 to June 1982, claimant worked for Railco on the subway construction project at L'Enfant Plaza in the District of Columbia. From June to September 1982, he worked for Railco on the subway in Virginia. Claimant was laid off on September 15, 1982, when the Virginia construction was completed. Claimant's work on the subway project for Railco exposed him to loud machinery in the underground tunnels, and in March 1982 he began to notice a constant ringing in his ears. On September 16, 1982, the day after he left Railco, claimant saw Dr. Fischer and was advised that he had suffered a work-related hearing loss. Claimant sought compensation for his occupational hearing loss pursuant to the 1928 Act.

In his Decision and Order, the administrative law judge found that there were sufficient contacts between claimant, employer, and the District of Columbia to satisfy the jurisdictional requirements of the 1928 Act pursuant to *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), noting that claimant resided in the District, employer's office was located there, claimant was hired in the District, and claimant was working in the District and Virginia on the subway project. The administrative law judge rejected Railco's argument that the Department of Labor lacked jurisdiction over the claim because the injury occurred after July 26, 1982. The administrative law judge found that although claimant first discovered his hearing loss and its work-relatedness on September 16, 1982, subsequent to the July 26, 1982 enactment date of the 1979 Act, his hearing loss actually occurred continually over a period of nine years ending September 16, 1982. Because almost all of the injury had occurred prior to the effective date of the 1979 Act, the administrative

law judge concluded that the parties were subject to the jurisdiction of the 1928 Act. Rejecting Railco's remaining argument that the claim was time-barred, the administrative law judge awarded claimant disability compensation, medical expenses and an attorney's fee. Railco appealed to the Board.

After hearing oral argument on April 8, 1986, on June 11, 1986, the Board issued a Decision and Order affirming the administrative law judge's decision. *Gardner v. Railco Multi-Construction Co.*, 18 BRBS 264 (1986)(*Gardner I*). With regard to the question of jurisdiction under the 1928 Act, the Board held that where a claimant who files an occupational disease claim meets the substantial contact requirements of *Cardillo*, 330 U.S. 469, and has been exposed to injurious stimuli prior to the effective date of the 1979 D.C. Act, jurisdiction of the claim properly rests with the United States Department of Labor under the Longshore Act as extended by the 1928 Act. In so doing, the Board rejected Railco's argument that the date of manifestation should determine when an occupational disease occurs for the purpose of determining jurisdiction. The Board further held that timely notice was given under Section 12, as amended in 1984, 33 U.S.C. §912 (1988).

On December 17, 1986, the United States Court of Appeals for the District of Columbia Circuit granted a motion to remand the case to the Board for reconsideration in light of *Keener v. Washington Metropolitan Area Transit Authority*, 800 F. 2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), which held that the 1984 Amendments to the Longshore Act do not apply to the 1928 Act. *Railco v. Multi-Construction Co. v. Gardner*, No. 86-1352 (D.C. Cir. Dec. 17, 1986)(*per curiam*). Railco moved for summary reversal of *Gardner I* on remand, or alternatively, for expedited consideration. The Board granted expedited review but denied employer's request for summary reversal.

On remand, the Board affirmed its prior determination that the Department of Labor had jurisdiction under the 1928 Act, but vacated its finding that employer received timely notice of the injury under Section 12, as it was based on the expanded one year time limitations for giving notice in occupational disease cases provided by the 1984 Amendments. *Gardner v. Railco Multi Construction Co.*, 19 BRBS 238 (1987)(*Gardner II*). Accordingly, the Board considered whether claimant's conceded failure to provide notice within the 30 days allowed by Section 12(a), 33 U.S.C. §912(a)(1982), was excused by Section 12(d), 33 U.S.C. §912(d) (1982). Based on the administrative law judge's finding that employer did not have knowledge of claimant's hearing loss until the claim was filed on January 6, 1983, the Board found that employer's lack of knowledge within the 30-day filing period precluded a finding of excuse pursuant to Section 12(d)(1).[1] Accordingly, the Board held the claim for disability compensation barred by Section 12, but

[1]The Board did not consider whether employer was prejudiced by the lack of timely notice, since lack of knowledge alone precludes a finding of excuse under the pre-1984 Act. Under amended Section 12(a), 33 U.S.C. §912(d) (1988), claimant's failure to file timely notice may be excused if employer either has knowledge of claimant's injury *or* employer is not prejudiced by the lack of timely notice. *Sheek v. General Dynamics Corp*, 18 BRBS 151 (1986)(decision on reconsideration).

affirmed the administrative law judge's Decision and Order in all other respects. Significantly, medical benefits were awarded, as these benefits are never time-barred.

Railco then appealed the jurisdictional issue to the United States Court of Appeals for the District of Columbia Circuit, once again arguing that the date of manifestation should define the relevant date of injury for purposes of determining whether coverage exists under the 1928 Act or the 1979 Act. The United States Court of Appeals, uncertain as to how to answer this question of local law, certified the question to the District of Columbia Court of Appeals.

In response, the District of Columbia Court of Appeals adopted the "manifestation rule" and held that an injury occurs when the employee's injury becomes manifest. *Gardner*, 564 A.2d at 1172-73. Because the 1979 Act applies to injuries that occur on or after July 26, 1982, the court held that the 1979 Act applies if the injury becomes manifest after that date. *Id*. at 1173-74 & n.21. The court recognized, however, that its holding might create a "coverage gap" that would deprive some injured employees of coverage under any workers' compensation act. In order to avoid depriving an injured employee of any workers' compensation coverage, the court also held that the 1928 Act should be extended to cover an injured employee who falls within the coverage gap. *Id*. at 1175-76. After the District of Columbia Court of Appeals answered the question on certification, the United States Court of Appeals for the District of Columbia Circuit reaffirmed that the 1979 Act applies to claims derived from injuries occurring after July 26, 1982, and that an injury is deemed to occur when it becomes manifest. *Gardner*, 902 F.2d at 72-74, 23 BRBS at 74 (CRT). It therefore found that the Department of Labor regulation, 20 C.F.R. §701.101(b), which adopted an "exposure rule" by providing that the 1928 Act applies to all injuries arising out of "employment events" that occurred before July 28, 1982, was invalid in light of its rejection by the District of Columbia Court of Appeals. *Id*., 902 F.2d at 75, 23 BRBS at 74 (CRT). Noting that as a result of the District of Columbia Court of Appeals' holding that the Department of Labor will have jurisdiction over Gardner's claim only if it appears that neither DOES nor any other state workers' compensation agency would exercise jurisdiction over the claim, the District of Columbia Circuit remanded the case to the Board to determine whether any other state statute, including the 1979 Act, would cover Gardner's claim. In so doing, the court noted that it shared the District of Columbia Court of Appeals' view that it is not entirely clear whether there is jurisdiction of Gardner's claim under the 1979 Act, and that accordingly, it could not reach the issue on the existing record. It is in this posture that the case currently stands before the Board.

The District of Columbia Circuit's opinion in *Gardner* makes it clear that, notwithstanding its repeal, the 1928 Act remains in force under the general savings statute, for a claimant whose disease became manifest subsequent to the effective date of the 1979 Act who would not be covered under that Act or any other state statute. *See Shea, S&M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT) (D.C. Cir. 1991), *aff'g Holden v. Shea, S&M Ball Co.*, 23 BRBS 416 (1990)(Board held that 1928 Act applies in death benefits case where the employee was permanently totally disabled as a result of a 1974 injury and death occurred in 1986 from causes unrelated to employment, on the basis that decedent was not employed in the District of Columbia after July 26, 1982, and was not covered by any other workers' compensation law. Court affirms, stating that 1928

Act remains in effect for claims derived from injuries occurring before July 26, 1982, and decedent was injured in 1974). Accordingly, Railco argues in its Brief on Remand that Gardner is covered under the 1979 Act because his employment was principally located in the District of Columbia at the time of his injury, and that subject matter jurisdiction over Gardner's hearing loss claim also exists under the Virginia workers' compensation statute.

The case must be remanded to the administrative law judge for resolution of the jurisdictional issues presented. As previously noted by both the District of Columbia Court of Appeals and the District of Columbia Circuit, it is not clear from the existing record that there is subject matter jurisdiction of Gardner's claim under the 1979 Act. 564 A.2d at 1174 n.22; 902 F.2d at 76, 23 BRBS at 77 (CRT). DOES, the agency in charge of administering the 1979 Act, has formulated a three-part test for determining whether at the time of injury the claimant's employment was "principally located" in the District, which requires consideration of the following factors:

1) The place(s) of the employer's business office(s) or facility(ies) at which or from which the employee performs the principal service(s) for which he was hired;

2) If there is no such office or facility at which the employee works, the employee's residence, the place where the contract is made and the place of performance; or

3) If neither (1) nor (2) is applicable, the employee's base of operations.

See Hughes v. District of Columbia Department of Employment Services, 498 A.2d 567, 569 (D.C. 1985).[2] Because the balancing test of *Hughes* requires an assessment of the importance or insignificance of the particular factual circumstances in each case, which is beyond the scope of the Board's review authority, the case is remanded for the administrative law judge to consider whether the employment relationship was principally localized in the District of Columbia at the time of claimant's injury. *See Pryor v. James McHugh Construction Co.*, 27 BRBS 47, 55 (1993).

Because the 1928 Act will also not apply if claimant is covered under any other state Act, this issue also must be considered by the administrative law judge on remand. Although Railco asserts that claimant would be covered under the Virginia statute, this issue was not previously adjudicated before the administrative law judge. Virginia has adopted a manifestation approach to determining the time of injury in occupational disease cases, Va. Code Ann. §65.1-49 (repealed 1987)(current version at Section 65.2-403). There seems to be a conflict in the law, however, regarding the compensability of hearing loss claims. *See Ingersoll-Rand Co. v. Musick*, 7 Va. App. 684, 376 S.E.2d 814 (1989); *Belcher v. City of Hampton*, 1 Va. App. 312, 338 S.E.2d 654 (1986);

[2]The most recent version of the 1979 D.C. Act provides coverage for injuries or deaths occurring in the District of Columbia if the employee performed work for the employer at the time of injury while in the District of Columbia, and for injuries or deaths occurring outside the District of Columbia if at the time of injury the employment is localized principally in the District of Columbia. *See* D.C. Code §36-303 (1993).

Va. Code Ann. §65.2-400 (1993). In addition, although under Virginia law the responsible employer is the last employer to provide injurious exposure, Va. Code Ann. §65.2-404 (1993), in the present case the administrative law judge found claimant's exposure in the period between July 1982 and September 1982[3] to be minuscule and of no significance. Although employer argues that claimant's claim would be covered under both the 1979 Act and the Virginia workers' compensation law, resolution of these issues requires fact-finding beyond the scope of the Board's review authority. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986). As the question of coverage under the 1979 Act or the Virginia statute has not previously been adjudicated by the trier-of-fact, the case is remanded for consideration of these issues.

Although Railco asserts in its brief on remand that claimant should bear the burden of establishing that he would not be covered under the 1979 Act or any other state act, we disagree. Inasmuch as the Section 20(a), 33 U.S.C. §920(a), presumption applies to the issue of jurisdiction under the 1928 Act, the burden of disproving jurisdiction rests on the party opposing the claim. *See Edgerton v. Washington Metropolitan Area Transit Authority*, 925 F.2d 422, 24 BRBS 88(CRT)(D.C. Cir. 1991); *Pryor*, 27 BRBS at 55. In *Edgerton*, the court, citing *Director, OWCP v. National Van Lines*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), stated that jurisdiction under the 1928 Act is limited "to cases where there is some substantial connection between the District and the particular employee-employer relationship" and that one factor strongly supporting application of the 1928 Act is work activity by the injured employee in the District itself. In the present case, it is undisputed that claimant lived and worked in the District while working for employer, performing construction work on the Metro subway project from September 1981 until June 1982. Because claimant's contacts along with employer's own substantial business presence in the District of Columbia would have sufficed to establish jurisdiction under the 1928 Act under *National Van Lines*, claimant clearly established a *prima facie* case, and under *Edgerton*, employer rather than claimant bears the burden of establishing non-coverage under the 1928 Act. *See Pryor*, 27 BRBS at 54.

Accordingly, the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

[3]Gardner began working in Virginia in June 1982, and his disease became manifest in September 1982. *See* discussion, *supra*.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge