BRB Nos. 86-2685
and 86-2685A

CHARLES PRYOR	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
JAMES McHUGH CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Order on Employer's Motion for Reconsideration of Order on Remand of Frank J. Marcellino, Administrative Law Judge, United States Department of Labor.

Allen J. Lowe (Ashcraft & Gerel), Washington, D.C., for claimant.

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

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Order on Employer's Motion for Reconsideration of Order on Remand (85-LHC-114) of Administrative Law Judge Frank J. Marcellino 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*. (1982) (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).

Claimant was employed by employer from 1974 until 1976 as a tunnel superintendent on Metro construction, during which time he was exposed to rock dust. He was laid off by employer when he returned to work after he recovered from a leg injury. He then went to work for Al Johnson Construction Company as a tunneling superintendent on projects in Georgia, North Dakota, and Alabama. During employment with both employers, he was exposed to silica and other dust. In 1982 claimant's leg again began to bother him, and when he was again laid off in August or September 1982, he retired. In October 1983, Dr. Simon concluded that claimant had silicosis due to his dust exposure as a tunneling superintendent. Claimant filed his claim on December 13, 1983, seeking benefits for permanent total disability due to silicosis arising out of dust exposure with employer.

In his initial Decision and Order the administrative law judge found that: (1) the Department of Labor had jurisdiction over the claim pursuant to the Longshore Act, as extended by the 1928 District of Columbia Workmen's Compensation Act; (2) the 1984 Amendments to the Longshore Act were not applicable to the claim; (3) James McHugh is the responsible employer; (4) the claim was timely filed under the pre-amendment version of 33 U.S.C. §913(a); (5) as claimant's failure to provide timely notice is not excused under the 1972 version of 33 U.S.C. §912(d), the claim is time-barred; and (6) even if the claim were not time-barred, claimant is not entitled to permanent total disability compensation because he failed to demonstrate any diminished wage-earning capacity under *Aduddel v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984).

In its initial decision, the Board affirmed the administrative law judge's holding that the Department of Labor had jurisdiction over the claim pursuant to the 1928 Act because claimant was exposed to injurious stimuli while employed by employer prior to July 26, 1982, the effective date of the District of Columbia Workers' Compensation Act of 1979, D.C. Code §36-301 *et seq*. (the 1979 Act). *Pryor v. James McHugh Construction Co*., 18 BRBS 273, 275 (1986). The Board also affirmed the administrative law judge's finding that James McHugh is the responsible employer as it was the last covered employer to expose claimant to injurious stimuli prior to Dr. Simon's diagnosis of silicosis in October 1983. *Id*. at 275-276. The Board concluded, however, that the administrative law judge erred in concluding that the 1984 Amendments were inapplicable to the claim and remanded the case for the administrative law judge to reconsider the timeliness issues under amended Sections 12 and 13. 33 U.S.C. §§912, 913 (1982). Specifically, the administrative law judge was to consider claimant's date of awareness under Section 13 of the amended Act and the implementing regulations, 20 C.F.R. §§702.212(b), 702.222(c), which state that the period for filing notices and claims in occupational disease cases does not begin to run until the employee is disabled. *Id*. at 276-277. In so concluding, the Board noted that the record demonstrated that claimant was aware of the relationship between his work and his breathing difficulties prior to Dr. Simon's October 1983 diagnosis, perhaps from as early as 1976, and that claimant had testified that he retired in September 1982 because of his leg and his breathing problems. *Pryor*, 18 BRBS at 277. Finally, the Board directed the administrative law judge to reconsider the issues relating to whether claimant was disabled.

On remand, the administrative law judge found that claimant was aware of his work-related breathing problems in September 1982 when he retired and that the claim filed on December 13, 1983 was timely under Section 13(b)(2), 33 U.S.C. §913(b)(2)(1988), because it was filed within two years of claimant's date of awareness. The administrative law judge further determined that claimant's failure to give timely notice was excused under Section 12(d)(2), 33 U.S.C. §912(d)(2)(1988), and that claimant was entitled to a permanent partial disability compensation based on his demonstrated loss of wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).

Employer sought reconsideration of the administrative law judge's Decision and Order on Remand in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 F.2d 918 (1987), holding that the 1984 Amendments to the Longshore Act do not apply to the 1928 Act. In his Order on Employer's Motion for Reconsideration, the administrative law judge vacated the Decision and Order on Remand to the extent that it applied the 1984 Amendments to the claim but preserved all factual findings therein. Because the 1984 Amendments, however, are inapplicable under *Keener*, the administrative law judge found the claim for disability benefits barred pursuant to Sections 12 and 13 of the Act. 33 U.S.C. §§912, 913 (1982).

Both parties appeal the administrative law judge's Order on Employer's Motion for Reconsideration of the Decision and Order on Remand. In addition, employer has filed two motions for summary affirmance of the administrative law judge's denial of benefits, as well as a supplemental brief further addressing the relevant issues. In the first motion, employer requests that the Board summarily affirm the administrative law judge's denial of the claim for failure to comply with the limitations provisions of Sections 12 and 13 of the Act as they existed prior to the 1984 Amendments. Claimant responds that he cannot in good conscience oppose this motion. Given the Board's prior determination in its initial Decision and Order that claimant was aware of the relationship between his work as a tunneling superintendent and his breathing problems before Dr. Simon's October 1983 diagnosis, claimant states the administrative law judge had no alternative but to conclude that claimant was aware of his work-related breathing problems in September 1982, and to accordingly find the claim barred under Sections 12 and 13 of the 1972 Act in light of *Keener*.[1]

[1] Claimant states, however, that he does not agree with the Board's "awareness" ruling or its determination that employer did not have actual knowledge of claimant's injury and wishes to preserve these issues for appeal.

In its second motion, employer seeks summary affirmance on the independent ground that the administrative law judge lacked subject matter jurisdiction over the claim in light of *Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990), *vacating* 19 BRBS 328 (1987), wherein the United States Court of Appeals for the District of Columbia Circuit held that the date of manifestation of an occupational disease is determinative in deciding whether the 1928 Act or the 1979 Act applies. While recognizing that *Gardner* also holds that the 1928 Act continues to apply to avoid depriving an injured worker of any workers' compensation remedy where there is no subject matter jurisdiction under the 1979 Act or any other state law at the time of manifestation, employer avers that claimant is not covered under the 1928 Act because even if he would not meet the subject matter jurisdiction requirement of "principally localized employment" required under the 1979 Act, he would not be without a remedy under any state law, as he would be able to recover under the Georgia statute from his last employer, Al Johnson. Claimant opposes this motion, arguing that the record does not support employer's contention that claimant received injurious exposure to industrial dust subsequent to his work in the District of Columbia and that even if he did, employer submitted no evidence sufficient to establish that he would be entitled to workers' compensation benefits under any other state's jurisdiction. Employer replies that the record indicates that claimant was in fact exposed to dusty conditions while working for Al Johnson on several tunneling projects in Georgia, North Dakota and Alabama, and that his last job in Georgia, which involved tunneling through dry shale with several quartz seams, was particularly dusty.

Employer's motion for summary affirmance of the administrative law judge's denial of the disability claim for failure to comply with the time limitations imposed by Sections 12 and 13 of the Act as they existed prior to the 1984 Amendments is granted, and claimant's appeal of the order on reconsideration is rejected. In *Keener*, 800 F.2d at 1175, the United States Court of Appeals for the District of Columbia Circuit held that the 1984 Amendments to the Longshore Act do not apply to cases arising under the 1928 Act. *See also Kulick v. Continental Baking Co.*, 19 BRBS 115, 117 (1987). Under the 1928 Act, a claimant has one year from the date of manifestation of his injury within which to file a claim for compensation benefits. 33 U.S.C. §913 (1982). In his Decision and Order on Remand, the administrative law judge found that claimant was aware of his work-related breathing problems in September 1982, when he retired due in part to his breathing problems. Although the record suggests that claimant may have been aware that he had a work-related injury prior to his September 1982 retirement, claimant was clearly not aware of his work-related disability until he retired. As claimant cannot be charged with awareness for purposes of the Section 12 and 13 statutory limitation periods until he is aware that he had sustained a compensable injury, the administrative law judge's September 1982 awareness determination is affirmed. *See, e.g., Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990). As the claim for compensation filed by claimant on December 13, 1983, was not filed within one year of claimant's September 1982 awareness date, the administrative law judge's finding that the claim for disability compensation is untimely under Section 13 is affirmed.[2]

[2]In view of our disposition of this issue, we need not address employer's arguments relating to Section 12 or employer's assertion that claimant is not entitled to disability compensation because he had no residual wage-earning capacity when his occupational disease became manifest.

Although claimant has also appealed, asserting his disagreement with the Board's prior determination in its initial Decision and Order that claimant was aware of the relationship between his work and his breathing problems prior to Dr. Simon's October 1983 silicosis diagnosis, this issue was fully considered by the Board in the prior appeal in this case. Accordingly, the prior decision regarding claimant's date of awareness constitutes the law of the case, and we decline to reconsider this issue. *See Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

Although we affirm the administrative law judge's determination that claimant's right to disability compensation is barred under Section 13(a), employer's second motion for summary disposition regarding subject matter jurisdiction over the claim must still be addressed as claimant is seeking medical benefits, and a claim for medical benefits is never time-barred. *See Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). In this motion, employer, citing *Railco Multi-Construction Co. v. Gardner*, 564 A. 2d 1167 (D. C. 1989), and *Gardner*, 902 F.2d at 71, 23 BRBS at 69 (CRT), asserts that claimant was required to pursue his claim under the 1979 Act, the law in effect at the time his occupational disease became manifest. Employer maintains that because claimant's occupational disease became manifest subsequent to the repeal of the 1928 Act, pursuant to these decisions the Department of Labor is divested of subject matter jurisdiction over this claim unless claimant establishes that his claim would not be covered under the 1979 Act or any other state law. Employer argues that claimant's claim would be covered under Georgia's workers' compensation law because the record establishes that his occupational disease was caused, at least in part, by occupational exposure he sustained there in the service of his last employer, Al Johnson. Citing Ga. Code Ann. §34-9-1, employer asserts that Georgia law covers claims for occupational diseases, such as silicosis, where it can be shown that injurious exposure to the disease-causing substance was sustained in Georgia.

In the alternative, employer asserts that even if the Board were to find that the claim would not be covered under the Georgia law, claimant has failed to establish that he would not be covered under the 1979 Act, noting that the Department of Employment Services (DOES), the agency charged with administration of the 1979 Act, held in *Richardson v. J. J. Maddan*, H & AS No. 89-662 (Jan. 23, 1991), that the 1979 Act's "principally localized" requirement may be satisfied with a showing that claimant worked in the District of Columbia at the time of the last exposure to industrial conditions in the service of employer. Employer maintains that because claimant has exclusive control over where a claim is filed, the easiest way for claimant to meet his burden under *Gardner* is to pursue and be denied benefits under any other applicable law. Employer avers that because claimant failed to meet his burden in this case, the claim should be denied for lack of subject matter jurisdiction.

As this case presents issues requiring the Board to apply the courts' decisions in *Gardner* in order to determine whether claimant's injury falls under the 1928 Act notwithstanding its manifestation in September 1982, a brief overview of the relevant statutory framework of the 1928 Act and case precedent is warranted. In 1928, 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 of Columbia.

Congress also provided that the 1928 Act would be administered by the Department of Labor, with review of administrative decisions in the United States Court of Appeals for the District of Columbia Circuit. *See Gardner*, 564 A.2d at 1170. However, after Congress granted home rule to the District of Columbia, the D.C. Council repealed the 1928 Act and enacted the District of Columbia Workers' Compensation Act of 1979, 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 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. *See Gardner*, 902 F.2d at 73-74, 23 BRBS at 72 (CRT), quoting *Keener*, 800 F.2d at 1175. The question in *Gardner* was whether the 1928 Act or the 1979 Act covers a claim for disability benefits of an employee where the employment events that gave rise to the injury occurred prior to July 26, 1982, the effective date of the 1979 Act, but the worker did not become aware of the injury and its relation to the employment until after that date. Finding this issue to present a matter of local law on which there was no controlling precedent, the United States Court of Appeals for the District of Columbia Circuit 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.[3] *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 would apply to cover an injured employee if there is no subject matter jurisdiction under the 1979 Act or any other state law. *Id*. at 1175-76.

After the District of Columbia Court of Appeals answered the question on certification, the United States Court of Appeals 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 70-72 (CRT). It therefore held that the Department of Labor regulation, 20 C.F.R. §701.101(b) (1986), which adopted the "exposure rule" by providing that the 1928 Act applies to all injuries arising out of "employment events" that occurred before July 28, 1982, is 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). *Cf. Shea, S&M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24

[3] 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 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 (1992).

BRBS 170 (CRT) (D.C. Cir. 1991), *aff'g Holden v. Shea, S&M Ball Co.*, 23 BRBS 416 (1990)(holding that the 1928 Act applies in death benefits case where death occurred in 1986 from causes unrelated to employment. Decedent was not employed in the District after July 26, 1982 and was not covered by any other workers' compensation law. In affirming the Board, the court stated that 1928 Act remains in effect for claims derived from injuries occurring before July 26, 1982, and decedent was injured in 1974).

We deny employer's motion for summary affirmance based on lack of subject matter jurisdiction under the 1928 Act. Initially, we reject employer's assertion that the Department of Labor lacks subject matter jurisdiction over this claim because claimant did not meet the burden of establishing that he would not be covered under the 1979 Act or any other state act. In *Edgerton v. Washington Metropolitan Area Transit Authority*, 925 F.2d 422, 24 BRBS 88 (CRT)(D.C. Cir. 1991), the United States Court of Appeals for the District of Columbia Circuit held that 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 upon the party opposing the claim. Citing *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), the court 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 of Columbia itself. *Edgerton*, 925 F.2d at 424, 24 BRBS at 90 (CRT). In the present case, it is undisputed that claimant lived and worked in the District of Columbia while working for employer as a tunneling superintendent from 1974 to 1976 performing Metro construction. Because such work activity along with employer's own substantial business presence in the District of Columbia would have sufficed to establish jurisdiction of 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 of the claim under the 1928 Act.

With regard to the issue of coverage under the 1979 Act, employer cites *Richardson v. J. J. Maddan, H & AS* No. 89-662 (Jan. 23, 1991), for the proposition that the "principally localized employment" requirement of the 1979 Act may be satisfied in occupational disease cases if claimant's employment with employer was principally localized in the District at the time of his last injurious exposure.[4] In *Richardson*, claimant, who received his last injurious exposure to asbestos in 1986 while performing employment principally localized in the District of Columbia, was found to be covered under the 1979 Act although his employment was not principally localized in the District in 1988, when his malignant mesothelioma became manifest.

Although employer argues that claimant would be covered under the 1979 Act under *Richardson* because his last exposure to rock dust while in its employ occurred at a time when his employment was principally localized in the District, we disagree. Whereas in *Richardson* claimant's last injurious exposure occurred while performing employment which was principally located in the District of Columbia subsequent to the July 1982 enactment date of the 1979 Act, in the present case, claimant's last injurious exposure in the District occurred prior to July 1982, and his employment was not principally located in the District of Columbia at any time thereafter. *Richardson* is thus distinguishable from the present case as it does not hold that the 1979 Act extends coverage based on the law at the time of manifestation to employment events occurring prior to July 26, 1982. We thus reject employer's assertion that claimant is covered under the 1979 Act pursuant to *Richardson*.

Even if claimant is not covered under the 1979 Act, however, employer is not liable under the 1928 Act if it establishes that claimant would be covered under another state act. As this issue was not previously developed while the case was before the administrative law judge, the case must be remanded to allow the administrative law judge to reopen the record on this issue. Although employer argues that claimant's claim would be covered under Georgia's workers' compensation law and that Ga. Code Ann. §34-9-1 covers claims for occupational diseases, such as silicosis, where it can be shown that injurious exposure to the disease-causing substance was sustained in Georgia, 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),

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[4] DOES, which administers the 1979 Act, has formulated a three-part test for construing the term "principally located:"

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

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 operation.

See Hughes v. District of Columbia Department of Employment Services, 498 A.2d 567, 569 (D. C. 1985).

rev'g in part 19 BRBS 15 (1989). As the question of coverage under the 1979 Act, the Georgia statute or any other applicable state act has not previously been adjudicated by the trier-of-fact, the case is remanded for consideration of this issue.

The final argument to be addressed is employer's assertion that the Board erroneously determined in its initial Decision and Order that it is liable as responsible employer pursuant to *Todd Shipyards Corp. v. Black*, 717 F.2d 1289, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). Employer avers that the reasoning in *Black* is inapplicable to the District of Columbia's local compensation law, and frustrates the local law's dual purposes of providing residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents while providing employer with a limited and determinant liability. Employer asserts that extending *Black* to the 1928 Act allows a claimant to hold his last employer on contingent and indefinite liability for decades after his "covered" employment terminates and is consequently grossly unfair to employers in the District of Columbia. Employer asserts that pursuant to *Black*, non-resident employees will forego remedies available in their home states in order to pursue the more generous benefits provided under the 1928 Act, allowing the last chronological employer to reap the benefit of claimant's labor at no cost because the full brunt of compensation liability falls upon the 1928 Act employer and ultimately on residents of the District of Columbia in the form of higher priced goods and services. Employer asserts that because the administrative law judge expressly found that claimant suffered injurious exposure to rock dust while employed by Al Johnson in Georgia, claimant has always had the right, and should be required, to seek redress there.

Employer's argument based on *Black* has been rendered largely moot by the United States Court of Appeals' determination in *Gardner* that the 1928 Act and 1979 are mutually exclusive; thus, the 1979 Act will generally apply in long latency cases where the employee continues to work. The economic concerns expressed by employer were addressed by the D. C. Council in enacting the 1979 Act. *See Gardner*, 902 F.2d at 73, 23 BRBS at 71-72 (CRT). Moreover, despite rejection of the Board's use of an exposure rule in determining District of Columbia Act jurisdiction, other aspects of the Board's reasoning in its decision in *Gardner*, 19 BRBS at 328, remained intact. Thus, the United States Court of Appeals for the District of Columbia Circuit noted that although the District of Columbia Court of Appeals had rejected an exposure rule for the purpose of determining coverage, it had recognized that the employer at the time of last exposure, as codified in the 1979 Act, will continue to determine liability. *See Gardner*, 902 F.2d at 75, 23 BRBS at 75 (CRT); D.C. Code §36-310 (1992).

Pursuant to *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955), cited with approval in *Gardner*, 902 F.2d at 75, 23 BRBS at 75 (CRT), in the case of an occupational disease, the responsible employer is the last employer covered under the Act 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 out of his employment. If claimant establishes exposure with a covered employer, claimant need not also prove that no other employer is liable. *See General Ship Service v. Director, OWCP*, 938 F.2d 960, 962, 25 BRBS 22, 25 (CRT) (9th Cir. 1991); *Suseoff v. The San Francisco Stevedoring Co.*, 19

BRBS 149, 151 (1986). While it is true that the last covered employer rule of *Black* was adopted in cases involving covered Longshore employment where claimant subsequently received exposure in employment covered by state law, in adopting the rule, the Board noted that it is consistent with state law placing liability on the last in-state employer. *Green v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 562 (1981), *vacated on other grounds*, 688 F.2d 833 (4th Cir. 1982). The last employer rule is a rule of liability assessment, and is not a vehicle for defeating coverage. Employer will have the opportunity here to defeat coverage consistent with the *Gardner* decisions. Inasmuch as our prior affirmance of the administrative law judge's determination that employer is the responsible employer because it was the last employer covered under the 1928 Act to expose claimant to injurious stimuli prior to claimant's awareness of his occupational disease comports with applicable law, we reaffirm this determination.

Finally, employer also appears to argue that it is not the responsible employer because claimant failed to establish that his exposure to rock dust while working for employer was the actual cause of his silicosis. This argument has previously been considered and rejected by the Board. *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986). *See also Lustig v. Todd Shipyards Corp.*, 20 BRBS 207, 213 (1988), *aff'd in pert. part and rev'd in part sub. nom. Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). The responsible employer rule requires only proof of injurious exposure. *Id.*

Accordingly, employer's Motion for Summary Affirmance on the ground that the disability claim is time-barred is granted, and the administrative law judge's denial of disability benefits is affirmed. Employer's motion on the ground that the administrative law

judge lacked subject matter jurisdiction over the claim is denied. The case is remanded for the administrative law judge to consider whether employer has established that claimant is covered under the 1979 Act or the workers' compensation statute of any other state. In all other respects, the prior decisions in this case are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge