BRB Nos. 90-881
and 90-881A

SENAIDA MAES (Widow of JOSEPH MAES)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
BARRETT & HILP	)	
and	)	
LUMBERMAN'S MUTUAL CASUALTY COMPANY	)	DATE ISSUED:
Employer/Carrier-Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Herman Ng (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for carrier.

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

PER CURIAM:

Employer/carrier appeals and claimant cross-appeals the Decision and Order Awarding Benefits (89-LHC-900) of Administrative Law Judge Alexander Karst 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*. (the 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).

Decedent worked from 1939 until his retirement in 1969 for the Plant Rubber and Asbestos Works and its successor, the Fibreboard Corporation, both non-maritime employers, where he was exposed to asbestos. During a two-week period in 1943, decedent worked for Barrett & Hilp (employer),[1] a maritime employer. The record reflects that in June 1942, employer contracted with the United States Maritime Commission to construct a shipyard on federal land in South San Francisco and to build 26 concrete barges at the facility. According to the record, on August 11, 1943, employer subcontracted with Asbestos Company of California to supply insulation containing asbestos for installation on the barges. Decedent died on December 22, 1986, from pulmonary asbestosis. Cl. Ex. 7 at 73.

Claimant, decedent's widow, filed a claim under the Act for death benefits on June 28, 1988, as well as *inter vivos* disability benefits, naming Lumberman's Mutual Casualty Company (carrier or Lumberman's) as the responsible carrier.[2]

In his Decision and Order, the administrative law judge awarded claimant survivor's benefits under Section 9, 33 U.S.C. §909. He denied the claim for disability benefits for disability prior to decedent's death, finding that claim time-barred. The administrative law judge held carrier liable for the benefits awarded. Finally, he denied claimant's request for a Section 14(e), 33 U.S.C. §914(e), penalty.

On appeal, carrier challenges the finding that it is the carrier responsible for this claim, contending there is no evidence that it was the carrier on the risk during the period of decedent's employment with employer in 1943. Carrier also argues that claimant failed to establish that decedent was covered by the Act. Claimant responds, urging that Lumberman's arguments be rejected.

On cross-appeal, claimant argues that the administrative law judge erred in finding the *inter vivos* disability claim time-barred and in failing to assess a Section 14(e) penalty. Lumberman's responds, urging that the administrative law judge's finding that the disability claim was time-barred and his denial of a Section 14(e) penalty be affirmed. Claimant replies, reiterating her arguments on cross-appeal.

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[1]In its motion for summary judgment, Lumberman's Mutual Casualty Company states that records indicate that Barrett & Hilp was dissolved on March 14, 1946. Employer's Motion for Summary Judgment at 2.

[2]Claimant also filed a claim for California state workers' compensation death benefits on February 12, 1987, which was settled and from which claimant received a net recovery of $46,750. Tr. at 8; Decision and Order at 8 n.2.

RESPONSIBLE CARRIER

Lumberman's contends that there is no evidence that it was the carrier for Barrett & Hilp during the last quarter of 1943 for purposes of this Act. We disagree. The standard for determining the responsible employer or carrier was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Pursuant to *Cardillo*, the last employer or carrier to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation. *Accord Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988). Moreover, since this rule involves the assessment of liability under the Act, the responsible carrier is the carrier insuring the last employer covered under the Act to expose the employee to injurious stimuli prior to his awareness. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). In *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed employer's burden of proof regarding causation and the determination of the responsible employer. The Board held that once an employee has established that he was exposed to injurious stimuli while engaged in covered employment, employer may escape liability by showing that the employee's injury is not work-related or by establishing that he was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Id.* at 151. *Accord Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In finding that Lumberman's was the responsible carrier in this case, the administrative law judge noted that the contract under which Barrett & Hilp built barges for the United States Maritime Commission during 1943 contained a clause requiring employer to carry workers' compensation insurance. Cl. Ex. 2 at 46, 48. Further, a Maritime Commission document listing the workers' compensation carriers for shipyards operating under Maritime Commission contracts reflects that as of July 1943 Lumberman's was the carrier for Barrett & Hilp. Cl. Ex. 4 at 61-63. The administrative law judge further relied on an undated list of workers' compensation carriers from a United States Maritime Commission file, allegedly containing correspondence dating from 1944, which also indicated that Lumberman's was employer's carrier. The administrative law judge concluded that this evidence led to the inference that Lumberman's was on the risk during the relevant period. Cl. Ex. 3 at 59; Cl. Ex. 19 at 101. The administrative law judge rejected Lumberman's argument, which it again raises on appeal, that *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985), wherein the Board held that the burden is on the carrier to show that it is not the responsible carrier, is not applicable here. In so doing, the administrative law judge reasoned that inasmuch as the carrier appeared to concede that it insured Barrett & Hilp at some point, and substantial credible evidence of record exists that it was the carrier on the risk in the last quarter of 1943, any evidence to the contrary would be in Lumberman's control. As it had not presented such evidence, the administrative law judge concluded that Lumberman's was liable as the responsible carrier.

Lumberman's argues that *Dolowich* is distinguishable from the instant case on the basis that in *Dolowich* it was undisputed that the named carrier had provided workers' compensation coverage

for the periods in question and the issue was whether the insurance contract included coverage under the Longshore Act, while the issue presented here is whether Lumberman's was on the risk at all during the relevant time period. Lumberman's asserts that requiring it to disprove coverage is unreasonable, since due to the distance in time of the underlying events, it is in no better position than claimant to support its position.

We reject this argument. In *General Ship*, 938 F.2d at 960, 25 BRBS at 22 (CRT), the United States Court of Appeals for the Ninth Circuit, wherein the instant case arises, addressed the issue of the responsible carrier in a case with scant record evidence due to the passage of time of the underlying events, similar to that in this case. The court agreed with the Board's decision in *Suseoff*, holding that employer bears the burden of proving it is not the liable employer, and stated:

> We must uphold the administrative law judge's finding if it was supported by substantial evidence. *McDonald*, 897 F.2d at 1512. We hold that it was. The paper trail in this case, as in many asbestos cases, is incomplete due to the passage of time. Administrative law judges must draw reasonable inferences based on the evidence before them. The administrative law judge here drew the reasonable inference that coverage was continuous. Because Liberty Mutual, the only other party who could possibly produce records pertaining to the coverage issue, failed to present any evidence to the contrary, we hold that the administrative law judge's finding was supported by substantial evidence.

938 F.2d at 962, 25 BRBS at 25-26 (CRT). The court also cited *Dolowich* with approval. *Id.* at n.2. Because the administrative law judge in analyzing the responsible carrier issue properly placed the burden of proof on Lumberman's, consistent with *General Ship*, and rationally inferred from the evidence before him that Lumberman's was the carrier on the risk during the relevant period, his finding that Lumberman's is liable as the responsible carrier is affirmed.[3]

[3]Alternatively, Lumberman's argues that even if it was the carrier for employer during the relevant period, it is not liable pursuant to *Shaller v. Cramp Shipbuilding and Dry Dock Co.*, 23 BRBS 140 (1989), because there is no evidence of insurance coverage under the Longshore Act as opposed to coverage under the California workers' compensation law. We will not address this argument, as it raised for the first time on appeal. *See, e.g., Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

COVERAGE UNDER THE ACT

Citing *SAIF Corporation/Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990), Lumberman's next contends that the administrative law judge erred in evaluating jurisdiction under the law in effect in 1943, the time of decedent's injurious exposure, rather than under the 1972 Act, the law in effect at the time decedent's injury became manifest. Citing *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983)(*Perini*), claimant responds that even if decedent's injury became manifest after the status requirement was added to the Act pursuant to the 1972 Amendments and *SAIF* applies, it would not defeat a finding of Longshore Act coverage on the facts presented in this case. Claimant asserts that the court in *SAIF* liberally construed the Act in the context of an injury which would not have been covered under the pre-1972 Act to find coverage and that *SAIF* was not intended to preclude coverage to employees, such as decedent, who would have been covered under the pre-amendment Act because their injuries occurred upon navigable waters as defined by Section 3(a) prior to the 1972 Amendments, 33 U.S.C. §903(a) (1970)(amended 1972).

We agree with carrier that *SAIF* is applicable and that the question of coverage under the Act must be determined under the law in effect at the time decedent's injury became manifest. In deciding the issue of jurisdiction under the pre-1972 Act, the administrative law judge relied on *Paul v. General Dynamics Corp.*, 16 BRBS 290, 291 (1984), wherein the Board held that jurisdiction must be decided under the law in effect at the time of the event which caused the injury, regardless of when its effects became manifest. The administrative law judge determined that under the pre-1972 Act claimant was not required to prove decedent's "status" under Section 2(3), 33 U.S.C. §902(3) (1982) (amended 1984), and, as decedent was an employee injured while working on navigable waters for a covered employer, he was covered under Section 3(a) of the Act.

In *SAIF*, however, the United States Court of Appeals for the Ninth Circuit held that in determining coverage under the Act, the applicable law is that which is in effect at the time of injury, which in an occupational disease case occurs at the time the disease becomes manifest.[4] The Board subsequently adopted the approach in *SAIF* for the purpose of determining coverage under the Act and overruled *Paul* and its progeny to the extent that they are inconsistent. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 75 (1975), *aff'd sub nom. Insurance Co. of North America v. Director, OWCP*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). Accordingly, as *SAIF* is applicable, and as the administrative law judge reasonably found that decedent became aware of the connection between his occupational asbestos exposure and his disabling respiratory problems in 1974 at the earliest, the question of coverage must be resolved

[4]In reaching this conclusion, the court cited extensively from *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), wherein the court had previously recognized that in an occupational disease case, the time of injury for purposes of computing the applicable average weekly wage is the date the disease manifests itself through a loss of earning capacity.

under the 1972 Act. In order for an employee to be covered under the Act as amended in 1972, both the situs requirement of Section 3(a)[5] and the status requirement of Section 2(3)[6] must be satisfied. *See, e.g., Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977).

While we thus agree with Lumberman's that the administrative law judge erred in not analyzing coverage under the 1972 Act, we nonetheless agree with claimant that coverage is established on the facts in this case and that *Perini* is dispositive. The record in the present case reflects that in 1942 employer contracted to build 26 concrete barges and to construct a shipyard on federal land in South San Francisco with delivery between January 15, 1943 and January 9, 1944. Cl. Ex. 2 at 36. In finding claimant was injured on a situs covered by the pre-1972 Act, the administrative law judge, acting within his discretion, credited claimant's testimony that decedent worked installing asbestos insulation on concrete barges which were being built on dry docks in the shipyard. Under the Act prior to 1972,

in order to be covered, an employee's injury had to occur upon the navigable waters of the United States (including any dry dock). 33 U.S.C. §903(a)(1970)(amended 1972). In *Perini*, the Supreme Court ruled that where, as here, a worker is injured on navigable waters as defined pre-1972 in the course of his employment, and would have therefore been covered under the Act prior to the 1972 Amendments, he is engaged in maritime employment and has satisfied the status test of Section 2(3). As the administrative law judge in the present case rationally concluded based on claimant's testimony that decedent was injured while performing work on a dry dock, decedent was injured on navigable waters as defined under the pre-1972 Act. Pursuant to *Perini*, this finding suffices to

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[5]Section 3(a), 33 U.S.C. §903(a)(1982)(amended 1984), states:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

[6]Section 2(3), as added to the Act by the 1972 Amendments, states:

> The term "employee" means 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, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. §902(3)(1982)(amended 1984)(emphasis added). Both this element and the situs elements must be met in order for a claimant to be covered under the post-1972 Act.

satisfy both the situs and status requirements of the 1972 Act. *See Center v. R & D Watson, Inc.*, 25 BRBS 137, 139-140 (1991).

In addition, decedent's work also would independently satisfy the status requirement of Section 2(3) as a matter of law, on the facts presented in this case . In considering Section 2(3), the Board and the courts have held that employees engaged in any aspect of shipbuilding, including construction of component parts and maintenance of yard buildings or equipment, are considered maritime employees. *See, e.g., Alford v. American Bridge Division, U.S. Steel Corp.*, 642 F.2d 807, 13 BRBS 268 (5th Cir. 1981), *modified*, 655 F.2d 86, 13 BRBS 837 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *Peterson*, 25 BRBS at 71. Because the administrative law judge in the present case rationally credited claimant's testimony that decedent's work involved installing insulation on concrete barges and there is no evidence to the contrary, there is no basis in this case for concluding that decedent's work was not related to shipbuilding. Accordingly, he must be considered a maritime employee under Section 2(3). *See Peterson*, 25 BRBS at 76-77; *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990). Inasmuch as the situs and status requirements of the 1972 Act have been met, the administrative law judge's finding that decedent was an employee covered under the Act is affirmed, albeit on alternate grounds than those employed by the administrative law judge.[7]

SECTION 13

On cross-appeal, claimant challenges the administrative law judge's finding that the disability claim for *inter vivos* benefits was untimely filed under Section 13(b)(2), 33 U.S.C. §913(b)(2). Claimant asserts that the administrative law judge's determination regarding decedent's date of awareness is not supported by substantial evidence. Claimant maintains that the record is void of any evidence that decedent was ever aware of the exact nature of his lung problem or that he suffered from a compensable work-related injury. Claimant further asserts that even if an objective standard is applied, the record is insufficient to establish that decedent should have been aware of the relationship between his lung problems and his occupational disease in 1984 in light of the conflicting diagnoses of chronic bronchitis and pneumonia and his lack of education and sophistication.

Section 13(b)(2) provides that in the case of an occupational disease that does not immediately result in disability or death, the statute of limitations does not begin to run until the employee is aware or should have been aware of the relationship between his employment, the disease, and the death or disability. The claim must be filed within two years of the date of awareness. 33 U.S.C. §913(b)(2)(1988).

[7]In light of this decision, we need not address claimant's alternate argument that for purposes of determining coverage, his disease should be considered manifest in 1969 because he retired in part due to respiratory problems.

In the instant case, the administrative law judge concluded that decedent was probably aware of a connection between his occupational asbestos exposure and disabling respiratory problems in 1974, recognizing that more than one doctor had noted decedent's history of asbestos exposure in connection with his progressive lung disease. The administrative law judge further determined that even if decedent had not realized the connection between his disabling respiratory problems and his occupational asbestos exposure, a reasonable person exercising reasonable diligence should have become aware of the relationship by no later than November 1, 1984. In so concluding, the administrative law judge relied on Dr. Rosenberg's report of that date wherein he recorded that decedent related his lung problems to his 35 years of asbestos exposure and also noted that decedent's interstitial fibrosis had progressed dramatically and his impairment was evident as of that time. The administrative law judge accordingly concluded that as the claim was filed on March 5, 1988, outside the two-year filing period provided by Section 13(b)(2) from the later November 1984 date, the claim for disability compensation was barred.

The administrative law judge's finding that the *inter vivos* claim for disability benefits is barred under Section 13(b)(2) is affirmed, as it is rational and supported by substantial evidence in the record. *See O'Keeffe*, 380 U.S. at 359. In finding this claim untimely, the administrative law judge found claimant's assertion that decedent was never aware of the connection between his occupational exposure to asbestos and his respiratory problems belied by the evidence of record. In addition to the medical records noted above, the administrative law judge found that decedent was plagued by frequent attacks of pneumonia and shortness of breath in his last years of employment and that he had retired in 1969 at the age of 65 partly because of his deteriorating health. The administrative law judge also alluded to claimant's conflicting testimony regarding when decedent first became aware of the relationship between asbestos and his lung condition, and recognized that she had also testified on deposition that she first read about the hazards of asbestos exposure in newspaper articles in 1976 or 1977.[8] Finally, the administrative law judge referred to a February 20, 1975 x-ray report which showed evidence of interstitial fibrosis, a March 5, 1979 x-ray report showing that the interstitial fibrosis has progressed, Cl. Ex. 5 at 68-69, and the notation contained in Dr. Rosenberg's November 1, 1984 report that decedent "has known chronic lung disease felt to be due to working in an asbestos plant for 35 years..." Cl. Ex. 5 at 67.

As the evidence relied upon by the administrative law judge provides substantial evidence to support his determination that decedent should have been aware of the relationship between his disability and employment by no later than November 1, 1984, his finding that the claim is barred is affirmed.[9] We reject claimant's contention, based on *Martin v. Kaiser Co., Inc.*, 24 BRBS 112

[8]Claimant argues that the administrative law judge erred in finding that claimant and her deceased husband knew about the hazards of asbestos exposure in 1977, rather than in 1985. At the hearing before the administrative law judge, claimant testified that she read about the hazard of asbestos exposure in 1985 and did not discuss it with her husband. In her October 7, 1987 deposition, however, claimant testified that she read about it in 1976 or 1977. *See* Tr. at 35-36; RX 3 at 21.

[9]Carrier's contention, raised in its answer to claimant's cross-appeal that inasmuch as decedent did

(1990), that the administrative law judge's finding that the disability claim was time-barred should be reversed on the basis that there is no evidence that decedent was ever aware that his disability was related to his covered employment with employer, as *Martin* is distinguishable from the facts presented in this case. In *Martin*, unlike the present case, decedent had been informed by a physician specifically that his lung cancer was caused by his exposure to asbestos while working as a roofer in non-covered employment subsequent to his maritime employment, and that this condition might have developed more quickly due to the combination of exposure and his heavy smoking. The doctor stated moreover, that he did not tell decedent his cancer was related to asbestos exposure in general or discuss his work history. The Board concluded that this evidence was insufficient to support a finding that decedent was aware of a relationship between his lung condition and his covered employment because it did not specifically relate decedent's problems to his prior shipyard exposure to asbestos. On these facts, since the doctor related decedent's disease to his most recent exposure while working as a roofer, a reasonable person would have no basis for believing that his lung conditions could be related to his covered employment. In the present case, however, there is no medical evidence similar to that in *Martin* which would lead a reasonable person to connect his illness only with non-covered employment. As the administrative law judge reasonably inferred that decedent should have been aware of the relationship between his employment, his disease, and his disability by no later than November 1, 1984, his finding that the disability claim is barred by Section 13(b)(2) is affirmed.[10]

SECTION 14(e)

We agree with claimant that the administrative law judge's denial of a Section 14(e) penalty is erroneous on its face. Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director after a showing that, owing to conditions over which it had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the

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not file a claim for compensation during his lifetime, the right to assert a claim expired with his death, is rejected. Section 19 of the Act provides for filing a claim for compensation at any time after death. 33 U.S.C. §919(a); *see Muscella v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 830 (1978).

[10]The instant case is also distinguishable from *Smith v. Aerojet General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), which claimant cites in her reply brief. In *Smith,* where the employee had worked for several potentially liable employers and had filed a timely claim against the last employer, the court held that the limitations period does not commence against earlier employers until the employee becomes aware that the earlier employer is potentially liable. In the instant case, however, Barrett & Hilp was claimant's only maritime employer, and the issue is whether a timely disability claim was filed against it.

injury. Under Section 14(d), the notice of controversion must be filed within 14 days of employer's knowledge of the injury. The assessment of a Section 14(e) penalty is mandatory. *See Canty v. S.E.L. Maduro*, 26 BRBS 147, 153 (1992); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978).

Thus, employer's duty to pay or controvert begins when it receives notice of the injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990); *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992). Employer must either controvert the claim within 14 days of receiving notice or commence the payment of benefits within 28 days; if it fails to do so, it is liable for a penalty under Section 14(e), which terminates at the earliest point at which the Department of Labor has notice of the relevant facts which a proper controversion would reveal, such as the date of an informal conference. *Id.*, 26 BRBS at 20; *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980) (Miller, J., concurring and dissenting); *see also National Steel & Shipbuilding, Co. v. U.S. Department of Labor, OWCP*, 606 F.2d 875, 880, 11 BRBS 68 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel and Shipbuilding Co.*, 5 BRBS 794 (1977).

In the present case, after finding that Lumberman's had knowledge of claimant's injury no earlier than July 1, 1988, that the first installment of compensation was accordingly due on July 15, 1988, and that Lumberman's had controverted the claim at an informal conference held on July 26, 1988, the administrative law judge determined that the Section 14(e) penalty sought was unwarranted.[11] Since Lumberman's did not controvert its liability within 14 days of having knowledge of claimant's injury, however, and did not pay compensation voluntarily, claimant is entitled to a Section 14(e) assessment. Since all compensation accruing since December 22, 1986, the date of decedent's death, became due on July 15, 1988, the penalty is imposed on compensation due and unpaid from December 22, 1986, until July 26, 1988, the date of the informal conference. *See Pullin v. Ingalls Shipbuilding Inc.*, BRBS , BRB No. 91-131 (May 17, 1993)(order on reconsideration).

Lumberman's contends, however, that the administrative law judge did not err in denying claimant a Section 14(e) assessment because as of July 15, 1988, when the first installment of compensation was due, claimant had already received $46,750 in a California state workers' compensation settlement, which could be used to offset its liability to claimant under Section 3(e) of the Act, 33 U.S.C. §903(e). We disagree. Section 3(e) provides for a credit for "amounts paid to the employee" against "liability imposed" by the Act. *See Kinnes v. General Dynamics Corp.*, 25 BRBS 311, 313 (1992). Thus, the Section 3(e) credit is applied once employer's total liability, which includes compensation, penalties and interest, is determined, and the total amount paid to the employee under state law offsets the "liability imposed." In the present case, carrier's liability, by its own admission, attached on July 15, 1988, when the first payment was due. In order to avoid additional liability under Section 14(e), carrier had only to file a notice of controversion on that date, asserting the state payment as a basis for its non-payment of benefits. *See* 33 U.S.C. §914(d). Carrier did not timely file a controversion and is liable for a Section 14(e) penalty, as discussed above. Once the liability imposed by the Act is determined, the settlement proceeds offset the total liability. Employer's argument that a state credit renders Section 14(e) inapplicable is therefore

[11]Employer subsequently filed a Notice of Controversion after the informal conference on August 4, 1988.

rejected.

Accordingly, the administrative law judge's finding that Lumberman's is not liable for a Section 14(e) assessment is reversed, and the decision is modified to award an assessment in accordance with this decision. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge