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Electric Boat Corporation v. Rheta DeMartino and Director, Office of Workers' Compensation Programs, United States Department of Labor United States Court of Appeals for the Second Circuit 495 F.3d 14 (Decided August 1, 2007)

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**COURT OF APPEALS DENIES EMPLOYER'S PETITION FOR REVIEW UNDER
LHWCA § 8(f).**

The Court of Appeals for the Second Circuit denied employer's petition for review under Longshore and Harbor Workers Compensation Act, holding that the employer was ineligible for relief under section 8(f), since the employer failed to prove that the employee suffered from a distinct pre-existing disability and second injury that both arose during the same course of employment with the same employer.

Electric Boat Corporation v. Rheta DeMartino and Director, Office of Workers' Compensation
Programs, United States Department of Labor
United States Court of Appeals for the Second Circuit
495 F.3d 14
(Decided August 1, 2007)

Electric Boat Corporation ("Electric Boat") petitioned the United States Court of Appeals for the Second Circuit, requesting relief from its worker's compensation liability pursuant to section 8(f) of the Longshore and Harbor Workers' Compensation Act ("LHWCA").¹ Section 8(f) limits an employer's liability for Workers' Compensation to instances "when an employee's pre-existing disability and second injury both arise out of the same course of employment with the same employer."² The remainder of the Workers' Compensation payment is derived from a "special fund," which in turn is generated from payments by employers. Electric Boat's petition for review concerns a Workers' Compensation claim initiated by DeMartino and his widow under the LHWCA,³ for DeMartino's death, which was caused by "bilateral pneumonia due to or as a consequence of end-stage asbestosis."⁴ DeMartino was first diagnosed with asbestosis in 1970. Electric Boat argued that this diagnosis of asbestosis established a pre-existing disability arising from DeMartino's exposure to asbestos during his course of employment. Electric Boat further argued that DeMartino's continued exposure to asbestos should be classified as a second injury, entitling Electric Boat to relief under section 8(f).

Electric Boat had previously been denied section 8(f) relief by the Benefits Review Board ("BRB"), which had affirmed the decision of Administrative Law Judge Colleen A. Geraghty ("ALJ"). The ALJ denied Electric Boat's application for section 8(f) relief on claims filed by DeMartino and his widow under the Act for several reasons. First, the ALJ stated that the extent of DeMartino's exposure to asbestos after 1970, in either warehouses where asbestos materials had been stored or on touring ships which used asbestos as a building material, was unclear. Second, the factual record did not clearly indicate if Electric Boat stopped using asbestos material in the construction of its ships in 1979 or prior to 1979. As a result, the ALJ concluded that DeMartino's second injury, allegedly cause by the continuing exposure to asbestos after 1970, did not aggravate his pre-existing asbestosis. Electric Boat petitioned the United States Court of Appeals for the Second Circuit to review the BRB's decision, arguing that its decision had been based on the prior rationale of the ALJ whose conclusions were not "supported by substantial evidence."⁵

The United States Court of Appeals for the Second Circuit held that in order for an employer to be eligible for section 8(f) relief, the "employee's pre-existing disability and second injury [must] both

¹ 33 U.S.C. § 908(f) (2001).

² *Electric Boat Corp. v. DeMartino*, 495 F.3d 14, 15 (2d Cir. 2007).

³ 33 U.S.C. § 901 (2001).

⁴ *Electric Boat Corp.*, 495 F.3d at 15.

⁵ *Id.* at 16.

arise from the same course of employment with the same employer.”⁶ However, the court admitted that it had not “yet . . . expressly affirm[ed] an employer’s eligibility for relief in this context.”⁷ To determine whether Electric Boat was eligible for relief under section 8(f), the court looked at the legislative history of section 8(f) to determine the purpose behind its enactment. Before the passage of section 8(f), employers were required to compensate employees in full for injuries that occurred during the course of employment. However, the measure of compensation did not take into account whether the employee had a pre-existing disability. As a result of this lack of consideration, employers were discouraged from hiring workers with pre-existing disabilities.⁸ Congress, in response, adopted section 8(f) for the purpose of reducing the burden placed on employers to pay additional compensation to employees with pre-existing disabilities, so that employers would not be discouraged from hiring and retaining these employees. This court concluded that Electric Boat would have been eligible for section 8(f) relief provided that it could prove that DeMartino suffered from two discrete injuries that both arose during his course of employment with Electric Boat.

Electric Boat argued that DeMartino’s continuing exposure to asbestos after this 1970 diagnosis “aggravated his pre-existing asbestosis and thus constituted a second injury for the purposes of section 8(f) relief.”⁹ Electric Boat presented evidence to suggest that DeMartino was exposed to asbestos material that was stored in a warehouse from 1974 to 1977, and was again exposed to asbestos during ship tours from 1970 to 1979. However, the court stated that this evidence did not prove that DeMartino suffered a second injury that would entitle Electric Boat section 8(f) relief. The court agreed with the ruling of the ALJ and stated that it was supported by substantial evidence. In addition, the court recognized the same flaws with the evidence that Electric Boat presented as proof of DeMartino’s second injury as the ALJ had. The court stated that the ALJ had properly ruled that there was insufficient evidence to determine the extent of DeMartino’s post-1970 asbestos exposure and the date upon which Electric Boat ceased to use asbestos in the construction of its boats. The court further held that even if these boats were constructed with asbestos, the ALJ had correctly stated that there was neither proof of the post-1970 exposure, nor proof to the extent that such exposure “might have aggravated . . . [DeMartino’s] progressive illness.”¹⁰ In conclusion, the court denied Electric Boat’s petition for review of the BRB’s decision denying section 8(f) relief to Electric Boat.

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⁶ *Id.*

⁷ *Id.*

⁸ Director, OWCP v. General Dynamics Corp., 705 F.2d 562, 564 (1st Cir. 1983).

⁹ *Electric Boat Corp.*, 495 F.3d at 15.

¹⁰ *Id.* at 17.