

BERNICE SCHUCHARDT)
(Widow of LAWTON SCHUCHARDT))

Claimant-Respondent)

v.)

DILLINGHAM SHIP REPAIR)

and)

ZENITH INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

NORTHWEST MARINE IRON WORKS)

DATE ISSUED: 09/29/2005

and)

SAIF CORPORATION)

Employer/Carrier-)
Respondents)

ZIDELL MARINE CORPORATION)

Self-Insured)
Employer-Respondent)

EL DORADO INSURANCE)
COMPANY/OREGON INSURANCE)
GUARANTY ASSOCIATION)

Carrier-Respondent)

SAIF CORPORATION)

Carrier-Respondent)

WILLAMETTE IRON AND STEEL/GUY F.)
 ATKINSON)
)
 and)
)
 WAUSAU INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Douglas A. Swanson (Swanson, Thomas & Coon), Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl & Olson, P.C.), Portland, Oregon, for Dillingham Ship Repair and Zenith Insurance Company.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Northwest Marine Iron Works and SAIF Corporation.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Zidell Marine Corporation.

Kenneth L. Kleinsmith (Radler, Bohy, Replogle & Miller), Portland, Oregon, for El Dorado Insurance Company/Oregon Insurance Guaranty Association.

Norman Cole and Jill Gragg (SAIF Corporation), Salem, Oregon, for SAIF Corporation.

Gene L. Platt (Gene L. Platt and Associates), Newberg, Oregon, for Willamette Iron and Steel/Guy F. Atkinson and Wausau Insurance Company.

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

PER CURIAM:

Dillingham Ship Repair (Dillingham) appeals the Decision and Order Awarding Benefits (2003-LHC-2540) of Administrative Law Judge Paul A. Mapes 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board heard oral argument in this case on June 30, 2005, in Portland, Oregon.

Decedent was first exposed to asbestos when he worked at an insulation plant from 1950 to 1965. Thereafter, decedent was exposed to asbestos during the course of his years of shipyard employment as a welder/fitter. He voluntarily retired in April 1991 at age 62. On April 11, 1991, a lung x-ray showed evidence of asbestosis. In January 1992, decedent was diagnosed with pulmonary asbestosis. On January 28, 1992, decedent was deposed as the plaintiff in a third-party lawsuit against multiple asbestos manufacturers and distributors. ZSX 6. Decedent subsequently developed a cardiac condition and his asbestosis worsened. Decedent died from a heart attack on August 23, 2000. His death certificate lists pulmonary asbestosis as a contributing cause of death. Claimant, decedent's widow, filed a claim for death benefits under the Act, 33 U.S.C. §909, against the employers for which decedent worked from 1966 to 1991.

The parties stipulated, *inter alia*, that there is no evidence that decedent's death was not hastened by his asbestosis. Tr. at 20. In his decision, the administrative law judge stated that the primary issue is the employer responsible for claimant's survivor's benefits. The administrative law judge determined that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), in relation to decedent's employment with Dillingham. The administrative law judge found the medical evidence uncontradicted that asbestos exposure contributed to decedent's death and he credited decedent's 1992 deposition testimony that he last worked inside a Foster Wheeler boiler in 1986 or 1987 as sufficient evidence to establish when decedent was last exposed to asbestos at work. ZSX 6 at 174-175. The administrative law judge determined there is no evidence that decedent was exposed to asbestos during his employment from 1988 to 1991 with Zidell Marine Corporation (Zidell), and West States, Incorporated. The administrative law judge found that the burden of proof thus shifted to decedent's two employers in 1986 and 1987, Dillingham and Northwest Marine Iron Works (Northwest), to rebut the Section 20(a) presumption. The administrative law judge found that Northwest rebutted the presumption and that the preponderance of the evidence establishes that decedent was not exposed to asbestos during the course of his employment for Northwest. In this regard, the administrative law judge credited testimony that, since 1975, Northwest has

contracted out its boiler repairs. The administrative law judge further credited employment records showing that decedent worked exclusively for Dillingham from September 1985 to April 1987, and for less than five months for Northwest from August 12 to December 14, 1987. The administrative law judge determined that Dillingham had the burden to show that decedent was not exposed to asbestos while repairing a Foster Wheeler boiler during the course of his employment with employer in 1986 and 1987. The administrative law judge discussed evidence stating that decedent could not have performed boiler repair work for Dillingham. The administrative law judge found that, even if this evidence were sufficient to rebut the Section 20(a) presumption, it is less probative than decedent's deposition testimony that he repaired a Foster Wheeler boiler for Dillingham in 1986 or 1987. The administrative law judge also credited decedent's deposition testimony that he did not wear a mask or respirator during the course of his employment. The administrative law judge therefore concluded that Dillingham is the responsible employer.

The sole issue raised on appeal is a challenge to the finding that Dillingham is the responsible employer. In this regard, Dillingham argues the administrative law judge erred by finding that claimant invoked the Section 20(a) presumption, that it failed to rebut the presumption, and that, based on the record as whole, claimant established that the death arose during the course of decedent's employment with employer. We agree with Dillingham that the administrative law judge's analysis and his responsible employer determination cannot be affirmed; however, as set forth below, we hold that claimant established that decedent's death is related to his covered employment. It is clear from the proceedings in this case that all parties erroneously conflate the issues of responsible employer and causation. Therefore, we begin our decision with a discussion of the case precedent governing these issues.

In determining whether an injury or death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that the decedent sustained a harm and that conditions existed or an accident occurred at work which could have caused the harm. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The causation determination is made without reference to a particular covered employer. That is, the Section 20(a) presumption is not invoked against a particular employer; instead, the evidence of record must be considered to determine if the evidence is sufficient to invoke the Section 20(a) presumption on behalf of a claimant. *McAllister v. Lockheed Shipbuilding*, __ BRBS __, BRB No. 04-0887 (Aug. 19, 2005); *see also Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

If the claimant establishes her *prima facie* case, Section 20(a) applies to connect decedent's asbestosis-related death to his exposure to asbestos. In a multiple employer

case, any of the employers can rebut the Section 20(a) presumption by producing substantial evidence that decedent's death was not related to or hastened by his employment exposure. *McAllister*, slip op. at 4; see *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); see also *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Fineman v. Ingalls Shipbuilding, Inc.*, 27 BRBS 104 (1993). If any of the employers rebuts the presumption, the presumption no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

If the death is found to be work-related, then the employers must establish which of them is liable for benefits. Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2^d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Zeringue*, 32 BRBS 275. Claimant does not bear the burden of proving which employer is liable; rather, each employer bears the burden of establishing it is not the responsible employer. *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986);¹ see also *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). In order to establish that it is not the responsible employer, an employer must demonstrate either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Liuzza*, 293 F.3d

¹ In *General Ship*, the United States Court of Appeals for the Ninth Circuit adopted the Board's holding in *Susoeff* that an employer who has exposed claimant to injurious stimuli can escape liability by demonstrating that the employee was exposed to injurious stimuli while performing covered work for a subsequent employer. In *General Ship*, there was no evidence as to which of several potential employers was last. Under those circumstances, the court held the Act's purpose was best satisfied by placing liability on the employer claimed against.

741, 36 BRBS 18(CRT); *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT); *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT); *Black*, 717 F.2d 1280, 16 BRBS 13(CRT).

In this case, we hold that the administrative law judge erred by stating that claimant invoked the Section 20(a) presumption against only particular employers in order to determine which of them is liable. Decision and Order at 6-8; *see McAllister*, slip op. at 6. Specifically, the administrative law judge invoked the presumption against Dillingham and Northwest based on decedent's deposition testimony in his third-party suit that he last worked in a Foster Wheeler boiler during 1986 or 1987. Decision and Order at 6-7. We vacate this finding, as the administrative law judge's analysis is not in accordance with law. *See McAllister*, slip op. at 4-5. To the extent that causation was at issue in this case, we hold, as a matter of law, that claimant established that decedent's death was related to his asbestos exposure during the course of his employment as a welder/fitter.² The evidence is uncontradicted that decedent was exposed to asbestosis during the course of his shipyard employment, decedent's death certificate lists asbestosis as a contributing cause of death, and the parties stipulated there is no evidence that decedent's death was not hastened by his asbestosis, *i.e.*, no evidence sufficient to rebut the Section 20(a) presumption with regard to causation. *See* CXs 25; 26 at 102; 27 at 105-106; Tr. at 20, 321, 330-331, 335-337, 350, 364; ZSX 6 at 204. Accordingly, claimant has established her entitlement to death benefits under the Act. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). The burden of proof therefore is on each of decedent's covered employers to establish that it is not the responsible employer without the benefit of the Section 20(a) presumption. *McAllister*, slip op. at 6; *see General Ship Repair*, 938 F.2d 960, 25 BRBS 22(CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff*, 19 BRBS 149. As Dillingham seeks to escape liability by asserting that decedent was not exposed to asbestos at its shipyard, we next address Dillingham's argument that the administrative law judge's conclusion that it is the responsible employer is not supported by substantial evidence.

In his decision, the administrative law judge credited decedent's 1992 deposition testimony that he "probably" or "maybe" last worked inside a Foster Wheeler boiler in 1986 or 1987 as evidence establishing decedent's last exposure to asbestos.³ Decision

² The issue of the relationship between decedent's death and his asbestos exposure was not directly raised as an issue before the administrative law judge, but was implicated by the employers due to their citation to Section 20(a) in support of their contentions that claimant must establish where he was last exposed to injurious asbestos.

³ Northwest contends in its response brief that the administrative law judge impermissibly credited decedent's hearsay deposition testimony from the third-party lawsuit because none of decedent's longshore employers had an opportunity to cross-examine decedent. This contention does not support the administrative law judge's decision, and therefore Northwest should have filed a cross-appeal to invoke review of this issue. *See, e.g., Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying*

and Order at 6-7; CX 15 at 46; ZSX 6 at 174-175. The administrative law judge reconciled this deposition testimony with decedent's testimony at the same deposition that he was last exposed to asbestos in the early to mid-1970s, CX 15 at 49; ZSX. 6 at 204, and the history recorded in Dr. Clark's October 10, 1991, report that decedent had not had "any significant asbestos exposure . . . since the late 1970's." CX 19 at 61. The administrative law judge "recognized" that there is nothing in the record explaining exactly what decedent considered exposure to asbestos. The administrative law judge found that decedent's deposition testimony that he was last exposed to asbestos in the mid 1970s just after testifying that he last worked inside a Foster Wheeler boiler in 1986 or 1987 "suggests" that decedent considered asbestos exposure to mean exposure to large quantities of asbestos or exposure to visible asbestos rather than exposure to small but potentially harmful amounts of asbestos, which occurred when decedent removed fire bricks from around the inside of a boiler. Decision and Order at 7. The administrative law judge rejected the hearing testimony of Scott Hernandez, an industrial hygienist formerly employed by Dillingham, who testified that only welders did boiler repair, and that decedent was employed as a fitter. Tr. at 256. Rather, the administrative law judge found this testimony consistent with decedent's dispatch records showing that he worked for employer as a welder/fitter, and decedent's deposition testimony that he welded approximately 20 percent of the time and that his work inside boilers required welding. CX 14 at 26-27; ZSX 6 at 77-78, 169. The administrative law judge also rejected the hearing testimony of Joe Otis, a co-worker, that members of decedent's boilermakers union did not repair boilers because Mr. Otis did not dispute decedent's deposition testimony that he did repair work inside Foster Wheeler boilers. Tr. at 189-192. Finally, the administrative law judge credited decedent's deposition testimony that he did not wear a respirator or mask at work. Decision and Order at 9-10; ZSX 6 at 78, 84, 121, 200.

The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). In this case, the administrative law judge fully addressed the evidence establishing that decedent last worked inside a Foster Wheeler boiler in 1986 or 1987. However, he did not address whether Dillingham established that decedent was not exposed to injurious stimuli in sufficient quantities inside the boiler to have the potential to cause asbestosis, a finding that is necessary to conclude that Dillingham is not the responsible employer. See *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); see also *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *General Ship Repair*, 938 F.2d 960, 25 BRBS 22(CRT); *Susoeff*, 19 BRBS

reconsideration in 36 BRBS 47 (2002). Nonetheless, for the reasons stated in McAllister v. Lockheed Shipbuilding, ___ BRBS ___, BRB No. 04-0887 (Aug. 19, 2005), slip op. at 6-7, we reject Northwest's contention that decedent's deposition was inadmissible. 33 U.S.C. §923(a).

149. The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and may draw his own inferences therefrom. His selection from among competing inferences must be affirmed if it is supported by substantial evidence and in accordance with law. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). However, in this case, the administrative law judge's weighing of the evidence, in part, substitutes for findings of fact statements that decedent's deposition testimony "suggests," or "seems to indicate," Dr. Clark's medical report "implies," and the medical reports of Dr. Clark and Dr. Foster "suggest." Decision and Order at 6, 9-10. In this case, we hold that the administrative law judge's failure to address whether decedent was exposed to potentially injurious asbestos inside a Foster Wheeler boiler and his inconclusive weighing of the evidence require that we vacate the administrative law judge's responsible employer determination. On remand, the administrative law judge must reconsider the responsible employer issue consistent with law, bearing in mind the principle that each employer bears the burden of proving it is not liable for claimant's benefits without reference to the Section 20(a) presumption. *See Jones Stevedoring Co.*, 133 F.3d 683, 31 BRBS 178(CRT); *McAllister*, slip op at 6.

Accordingly, we hold that decedent's death is work-related as a matter of law. The administrative law judge's Decision and Order finding Dillingham to be the responsible employer is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge