BRB No. 06-0646

KAREN McALLISTER (widow of JAMES McALLISTER)	)	
Claimant-Respondent	)	
v.	)	
LOCKHEED SHIPBUILDING	)	
and	)	
WAUSAU INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
ALBINA ENGINE AND MACHINE	)	DATE ISSUED: 04/26/2007
and	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
WILLAMETTE IRON AND STEEL COMPANY	)	
and	)	
SAIF CORPORATION	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT	)	

OF LABOR)
)
Respondent) DECISION and ORDER

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

Meagan A. Flynn (Preston, Bunnell & Flynn, L.L.P.), Portland, Oregon, for claimant.

Russell A. Metz and Scott E. Holleman (Metz & Associates, P.S.), Seattle, Washington, for Lockheed Shipbuilding and Wausau Insurance Company.

Dennis R. VavRosky (VavRosky, MacColl & Olson, P.C.), Portland, Oregon, for Albina Engine & Machine and Fireman's Fund Insurance Company.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for Willamette Iron & Steel and SAIF Corporation.

Matthew W. Boyle (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Lockheed Shipbuilding appeals the Decision and Order on Remand (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).

This is the second time this case has come before the Board and a brief review of the facts is in order. Decedent worked as a carpenter for three shipyards between 1956 and 1960. In 1956, he worked for both Albina Engine and Machine (Albina Engine) and Guy F. Atkinson's Willamette Iron and Steel Company (WISCO). In 1957, he began

working for Puget Sound Bridge and Dry Dock Company shipyard (now Lockheed). In 1960, decedent began working for a steel company, and, later, he became a self-employed roofer. He did not work in covered employment after 1960. In April 2002, Dr. Zbinden examined decedent, who had been experiencing shortness of breath. Dr. Zbinden suspected an asbestos-related disease. Decedent died on September 22, 2002, of left pleural mesothelioma. Cl. Exs. 10-13. Claimant, decedent's widow, filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, against all three shipbuilders for whom decedent worked. The administrative law judge found that Lockheed was the responsible employer, and he awarded benefits to claimant. Lockheed appealed.

The Board vacated the administrative law judge's award, holding that he conflated the law on causation with that on responsible employer, and it remanded the case for further consideration in accordance with its instructions. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). In his analysis of the issues on remand, the administrative law judge found there is "clear, credible, and unrebutted evidence" that decedent was exposed to asbestos while employed at WISCO. Decision and Order at 11. This, he stated, constitutes substantial evidence to invoke the Section 20(a), 33 U.S.C. §920(a), presumption "against all of the defendant employers." *Id.* He found that the presumption had not been rebutted; therefore, he stated that all the employers "are responsible employers," and he found that Lockheed is "the 'last responsible employer' and [is] obligated to pay" benefits to claimant. Decision and Order at 12. The administrative law judge rejected Lockheed's argument that the evidence should be weighed on a "more likely than not" basis, and he stated that, pursuant to the Board's decision, Lockheed is the liable employer. *Id.*

Lockheed appeals the administrative law judge's decision, contending he failed to follow the Board's instructions on remand. It argues that the administrative law judge did not discuss or weigh the evidence and make a finding as to which employer, by a preponderance of the evidence, was the most likely to have last exposed decedent to asbestos. Rather, it asserts that the administrative law judge merely held Lockheed liable because it was the last chronological maritime employer even though he did not make a finding that decedent was exposed to asbestos at its facility. Lockheed requests that the Board vacate the finding that it is the responsible employer, clarify the nature of the burden borne by each of the employers and the standard of proof necessary for the factual determination, and remand the case to the administrative law judge for further consideration on the responsible employer issue.

Albina Engine, WISCO, claimant, and the Director, Office of Workers' Compensation Programs (the Director), respond.[1] Albina Engine argues that the administrative law judge properly rejected Lockheed's "more likely than not" test, found that all of the employers are "responsible employers," and concluded that Lockheed is the "last responsible employer" because it was the last employer chronologically. Albina Engine and WISCO assert that Lockheed failed to uphold its burden because it did not present evidence showing that decedent was not exposed to asbestos at its facility. To each of these contentions in response, Lockheed replies. It argues that it bears the burden of persuasion, not production. Thus, it asserts, if no prior employer comes forward with evidence that establishes by a preponderance of the evidence that it exposed decedent to asbestos, then it need not establish the absence of exposure, as the earlier employers did not satisfy their burdens. It also argues that, even if it is the last chronological employer, it cannot be held liable absent a finding that it exposed decedent to asbestos in sufficient quantities to have potentially caused his disease. As the administrative law judge did not weigh the evidence and make any factual findings, it cannot be held liable.

The Director responds in support of Lockheed's position. He argues that the case must be remanded because the administrative law judge again conflated the issues of "compensability and liability[,]" making the Section 20(a) presumption "virtually determinative of the last employer issue." Dir. Brief at 2. The Director explains that the administrative law judge's finding that the Section 20(a) presumption was not rebutted was erroneously stated to mean that all the employers are responsible, as opposed to the claim's being compensable. After finding all the employers responsible, he deemed the last employer responsible, even absent a showing of exposure. The Director argues that, as claimant has met her burden of showing the compensability of the claim, the burden now is on each employer to show either that the decedent was not exposed to sufficient quantities of injurious stimuli at its facility to have caused the mesothelioma or that decedent was exposed at a subsequent covered employer's facility, and:

> Regardless of which of these facts each employer attempts to establish, the ALJ must weigh the evidence to determine which employer, more likely than not, last exposed the Employee to enough asbestos to cause his occupational disease.

Dir. Brief at 3. Thus, the Director asserts that this case must be remanded for the administrative law judge to "weigh the evidence, without reliance on the section 20(a) presumption, to determine which employer, more likely than not, last exposed the

[1]Claimant argues only that Lockheed did not challenge the finding that decedent's death is work-related. Claimant is correct; therefore, we affirm the administrative law judge's finding that claimant's claim is compensable.

Employee to asbestos." *Id.* Albina Engine replies to the Director's brief, arguing that the administrative law judge followed the Board's directives, including requiring Lockheed to bear the burden of proving there was no injurious exposure at its facility, and it argues that Lockheed did not satisfy its burden. Moreover, Albina Engine argues there is no "more likely than not" test for determining the responsible employer and that the Director is asserting a new rule.

The administrative law judge invoked the Section 20(a) presumption based on the undisputed evidence that decedent told claimant that he was exposed to asbestos at WISCO. Decision and Order at 11. However, he then stated:

> In addition, all parties, including Lockheed, agree that none of the defendants has rebutted the presumption and there is no evidence in the record disputing Dr. Brady's stipulated opinion that exposure to any level of asbestos can potentially cause mesothelioma. Hence, under the legal analysis set forth in the [Board's decision], all of the defendant employers are responsible employers. Moreover, because Lockheed was the last of these employers, Lockheed is therefore the 'last responsible employer' and [is] obligated to pay [benefits] to the claimant.

Decision and Order at 11-12. The administrative law judge also rejected Lockheed's argument that he must apply a "more likely than not" test, stating that it was not set forth in the Board's decision and is a test for traumatic injury, not occupational disease, cases. Decision and Order at 12.[2] Indeed, the administrative law judge found there was no need to use any other test, as the Board specifically required Lockheed to bear the burden of proving it did not expose decedent to asbestos or be held liable for benefits.[3] *Id.* The sole issue presently before the Board is whether the administrative law judge properly

[2]The administrative law judge reasoned that it is appropriate to have two different tests because the identity of the responsible employer in a traumatic injury case involves identifying the employer that made an "actual causal contribution" to the employee's disability whereas in an occupational disease case it is unnecessary to show an actual causal relationship. Instead, he stated there must simply be a "theoretical possibility" that exposure to potentially harmful stimuli contributed to the disability. Decision and Order at 12 n.8.

[3]The administrative law judge is referring to the Board's statement that "as there is no dispute that Lockheed was decedent's last employer, it would bear the burden of proving it did not expose decedent to injurious stimuli, in order to escape liability as the responsible employer." *McAllister*, 39 BRBS at 42.

addressed the responsible employer issue. We hold that he did not and that this case must be remanded for further consideration of that issue.

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d 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. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). To avoid liability, the employers bear the burden of establishing either that the employee was not exposed to injurious stimuli in sufficient quantities to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(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); *Black*, 717 F.2d 1280, 16 BRBS 13(CRT); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit has held that minimal exposure which is not injurious is insufficient to assign liability and that, in order to be held liable, the exposure must be in such quantities that it would have the potential to cause the disease. *Black*, 717 F.2d 1280, 16 BRBS 13(CRT); *see also Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT). The responsible employer determination is to be made without reference to the Section 20(a) presumption. *McAllister*, 39 BRBS at 37; *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). If there is uncertainty as to which employer was last, then the Ninth Circuit has stated that the purposes of the Act are best served by assigning liability to the employer claimed against. *General Ship*, 938 F.2d at 962, 25 BRBS at 25(CRT).

In *Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, 7 Fed. Appx. 547 (9th Cir. Feb. 26, 2001), the Board explained in a two-traumatic-injury case that each employer bears a burden of persuasion by a preponderance of the evidence that the employee's disability is due to his employment with the other employer. *Buchanan*, 33 BRBS at 35. In the event neither employer is able to persuade the administrative law judge that its evidence is entitled to greater weight, the Board concluded "that the purposes of the Act would best be served by assigning liability to the later employer, consistent with case law defining responsible employer in an occupational disease context." *Id.* at 36. Thus, the Board held that, as in an occupational disease case, the

initial burden of persuasion is on the later employer.[4] *Id.* In *Buchanan*, this meant that the later employer needed to show that the claimant's disability was due solely to the natural progression of his original injury with the earlier employer. *Id.*; *but see Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992).[5]

We agree with Lockheed and the Director that the administrative law judge erred in assessing the issue of responsible employer. First, the administrative law judge conflated compensability with liability in that, after finding the Section 20(a) presumption unrebutted, he automatically held the last chronological employer liable for benefits. As we stated previously, invocation of and failure to rebut the Section 20(a) presumption mandate a finding that the claim is compensable, but they do not mandate the assessment of liability against any particular employer. *McAllister*, 39 BRBS at 37; *see also Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005). Rather, once compensability of the claim is established, the administrative law judge must weigh the relevant evidence to determine which employer is liable for the claimant's benefits.

In this regard, we reject the administrative law judge's conclusion that the case precedent addressing responsible employer in a traumatic injury context is inapposite to the inquiry in an occupational disease case. The Ninth Circuit has stated that there is only one responsible employer rule and that the difference is in how it is applied to each

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[4]In support of this holding, the Board cited the Ninth Circuit's decision in *General Ship*, which discussed the Board's decision in *Susoeff*. In *Susoeff*, an occupational disease case, the Board held that the administrative law judge improperly placed the burden on the claimant to show no subsequent employment and injurious exposure because, if a claimant established exposure with a covered employer it was not also his responsibility to show that no other employer is liable. Thus, the Board held that it is the employer's burden to rebut the Section 20(a) presumption by showing that exposure did not cause the harm or it could escape liability by showing that the claimant was exposed to injurious stimuli while working for a subsequent covered employer. *Susoeff*, 19 BRBS at 151. On remand, the Board advised the administrative law judge to have the other potentially liable employers joined as parties. *Id.* at 152. In *General Ship*, the court, deferring to the Director, adopted the *Susoeff* rule which was interpreted as placing the burden on the employer claimed against – especially in a situation where it is uncertain which employer was last. *General Ship*, 938 F.2d at 961-962, 25 BRBS at 24-25(CRT).

[5]In *Cuevas*, Avondale, the earlier employer and the one claimed against, bore the burden of showing that a subsequent employer exposed the claimant to injurious noise. Because it failed its burden, the subsequent employer was not joined to the case.

particular type of case. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991) (court stated there is one "last employer rule" that is applied differently depending on whether the case involves an occupational disease (last employer rule) or two traumatic injuries (aggravation rule)). In both types of cases, the administrative law judge must address and weigh all the relevant evidence in order to make a finding as to which employer should be held liable. In a traumatic injury case, the pertinent issue is whether an employee's disability is the result of the natural progression of his injury with his earlier employer or whether his condition was aggravated by an injury with a later employer. *Buchanan*, 33 BRBS at 35. In an occupational disease case, the pertinent inquiry involves whether and which employer exposed the employee to injurious stimuli in sufficient quantities to have caused his disability. *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *aff'd on recon.*, 40 BRBS 1 (2005). In either type of case, each employer must persuade the fact-finder that the employee's disability is due to his injury with another employer. *Buchanan*, 33 BRBS at 35; *see also Schuchardt*, 39 BRBS at 67-68.[6] Therefore, we hold that the standard espoused in *Buchanan* is to be used in both traumatic injury cases and in occupational disease cases.

[6]In *Schuchardt*, a case similar to the instant case, the decedent was exposed to asbestos during the course of his shipyard employment. The administrative law judge found that the claimant was entitled to benefits under the Act and that Dillingham was the responsible employer. Although the administrative law judge incorrectly invoked the Section 20(a) presumption against two of the four employers in the case, the Board held, as a matter of law, that claimant had established entitlement to benefits. The Board then stated that the "burden of proof therefore is on each of decedent's covered employers to establish that it is not the responsible employer. . . ." *Schuchardt*, 39 BRBS at 67. The Board held that the administrative law judge erred by failing to conclusively weigh the evidence. *Id.* at 68. Although he discussed evidence establishing that the decedent had worked inside a boiler during his employment with Dillingham, "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." *Id.* at 68. Thus, the Board remanded the case for the administrative law judge to address the responsible employer issue "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." *Id.* On claimant's motion for reconsideration, the Board held that, because compensability is separate from liability, Dillingham remained liable for benefits until, if and when, the administrative law judge found another employer to be the responsible employer. If another employer was found to be liable, then Dillingham would be entitled to reimbursement. *Schuchardt*, 40 BRBS at 2.

There is significant argument on appeal devoted to the burden and standard of proof borne by each employer. In order to clarify any misapprehension caused by the Board's prior decision in this case, we note that each potentially liable employer bears the burden of persuading the administrative law judge that it is not liable. *See Schuchardt*, 39 BRBS 64. This burden is not sequential; it is simultaneous. Each employer may produce its own evidence or may rely on evidence produced by another party to persuade the administrative law judge that it should not be held liable for benefits. The administrative law judge must weigh all of the evidence, and he must make a finding on the facts as to which employer last exposed the employee to the injurious substance. He need not look to each employer's evidence chronologically or otherwise to relieve it of liability. Should the situation occur where the administrative law judge has not been persuaded by any employer, or if it is unclear which employer should be held liable, the Ninth Circuit and the Board have deemed that the ultimate burden of persuasion lies with the employer claimed against, *see General Ship*, 938 F.2d at 962, 25 BRBS at 25(CRT), or the later employer, *see Buchanan*, 33 BRBS at 36. In the present case, therefore, each employer bears the burden of persuading the administrative law judge that it is not liable for claimant's benefits. To do so, it may present its own evidence or it may rely on other evidence of record to convince the administrative law judge either that it did not expose decedent to quantities of asbestos sufficient to have potentially caused his disease or that a subsequent employer exposed decedent to sufficient quantities of injurious asbestos. The administrative law judge must weigh this evidence and make any inferences or credibility determinations necessary for him to arrive at a conclusion. Only by weighing all of the relevant evidence can the administrative law judge be assured that there is a "rational connection" between the exposure and the liability.

In weighing the evidence, the cases unequivocally hold that the party bearing the burden of persuasion must prove his case by a preponderance of the evidence. *See, e.g., Marinette Marine Corp.*, 431 F.3d 1032, 39 BRBS 82(CRT); *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997) (administrative law judge credited claimant's testimony, found employer's expert testimony unpersuasive, and concluded Jones Stevedoring was responsible employer); *Schuchardt*, 39 BRBS 64; *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999) (administrative law judge found injurious noise exposure occurred "more likely than not" at SSA); *Buchanan*, 33 BRBS 32; *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *see also* 5 U.S.C. §551 *et seq.*; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994) (proponent of argument bears burden of persuasion by a preponderance of the evidence). Thus, as the Director correctly states, the administrative law judge must decide which employer "more likely than not" last exposed decedent to injurious amounts of asbestos, and that employer will be held liable for claimant's benefits.

On remand, the administrative law judge must weigh all the relevant evidence, draw rational inferences therefrom, and determine which employer, by a preponderance of the evidence, is the last employer to have exposed decedent to potentially injurious stimuli.

Accordingly, the administrative law judge's finding that Lockheed is the responsible employer is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order on Remand is affirmed. Lockheed remains liable for claimant's benefits while this case is pending before the administrative law judge.[7]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7]Should the administrative law judge find on remand that Lockheed is not the responsible employer, Lockheed is entitled to reimbursement from the liable employer for its prior payments to claimant. *Schuchardt*, 40 BRBS at 2.