BRB No. 08-0403

K.M. (widow of J.M.)	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	DATE ISSUED: 12/30/2008
	)	
Employer/Carrier-Respondents	)	
	)	
ALBINA ENGINE AND MACHINE	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
WILLAMETTE IRON AND STEEL COMPANY	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
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 on Second Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

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

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

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

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

PER CURIAM:

Albina Engine appeals the Decision and Order on Second Remand (2003-LHC-2540) of Administrative Law Judge Steven B. Berlin 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 third 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.[1] His work for WISCO ceased in 1956, and his work for Albina Engine ceased in 1957. In 1957, decedent began working for Puget Sound (now Lockheed). In 1960, he ceased working for Lockheed and began working for a steel company. He later became a

[1]Claimant filed claims against the three shipbuilders for whom decedent had worked: Lockheed Shipbuilding, which purchased the assets and liabilities of the Puget Sound Bridge and Dry Dock Company shipyard (Lockheed), Albina Engine and Machine (Albina Engine), and Guy F. Atkinson's Willamette Iron and Steel Company (WISCO).

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. Cl. Exs. 10, 13. Decedent died on September 22, 2002, of left pleural mesothelioma. Cl. Exs. 11-12. Claimant, decedent's widow, filed this claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909.

Originally, Administrative Law Judge Mapes found that Lockheed was the responsible employer, and he awarded death benefits to claimant. Lockheed appealed. The Board vacated the administrative law judge's decision, holding that he conflated the law on causation and responsible employer, and it remanded the case to him for further consideration in accordance with its instructions regarding the inapplicability of Section 20(a), 33 U.S.C. §920(a), to the responsible employer issue. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005) (*McAllister I*). On remand, Judge Mapes found there is "clear, credible, and unrebutted evidence" that decedent was exposed to asbestos while employed at WISCO. This, he stated, constituted substantial evidence to invoke the Section 20(a) presumption "against all of the defendant employers." Further, he found that all parties agreed that the presumption has not been rebutted. Because Judge Mapes stated that this means all the employers "are responsible employers," he found that "Lockheed is therefore the 'last responsible employer' and [is] obligated to pay" benefits to claimant. Decision and Order on Remand at 4-10.

Lockheed appealed the administrative law judge's decision, contending he failed to follow the Board's instructions on remand. The Board stated that the administrative law judge again conflated the issues of compensability and liability, and it held that he should not have automatically held Lockheed liable merely because it was, chronologically, the last covered employer. Consequently, the Board vacated the administrative law judge's decision and remanded the case, stating that the administrative law judge must decide under a preponderance of the evidence standard which employer more likely than not last exposed decedent to asbestos. *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007) (*McAllister II*).

On remand, because Judge Mapes had retired, the case was assigned to Judge Berlin (the administrative law judge). The administrative law judge summarized the facts, history and relevant evidence of the case,[2] and he also set forth the responsible employer law, specifically noting that because the parties stipulated that any exposure, no matter how slight, was sufficient to cause decedent's mesothelioma, the issue of

[2]Pursuant to the previous decisions in this case, there is no dispute over the compensability of decedent's death.

"sufficient quantities of asbestos" was moot. Decision and Order on Second Remand at 2-8. Thus, he concluded that whichever employer last exposed decedent to any asbestos is the responsible employer. *Id.* at 8. Ultimately, having weighed the evidence, the administrative law judge found that Albina Engine was the last employer to expose decedent to asbestos and is the employer responsible for claimant's benefits. *Id.* at 4, 10-11.

Albina Engine now appeals. It contends the Board's interpretation of the responsible employer law is incorrect and, therefore, the administrative law judge's application of the law is incorrect. Alternatively, it argues that if *McAllister II* represents a correct statement of the law, the administrative law judge erred in applying that standard to the facts of this case. Lockheed and WISCO respond, urging the Board to reject Albina Engine's contentions and to affirm the administrative law judge's decision.

Where, as here, a death is work-related, it is for the employers in the case to establish which of them is liable. Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), and *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), 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. *See also 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 defeat 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 while working for them or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *General Ship Serv. 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);[3] *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Black*, 717 F.2d 1280, 16 BRBS 13(CRT); *McAllister II*, 41 BRBS at 31; *McAllister I*, 39 BRBS at 37-38; *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

[3]*Cf. New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004) (no minimal exposure rule); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001) (no minimal exposure rule). As the parties to this case stipulated that any exposure is sufficient to impose liability, the administrative law judge correctly noted that he need not address any issues regarding the degree of decedent's exposure to asbestos.

Cir. 2002). The responsible employer determination is to be made without reference to the Section 20(a) presumption. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997) (*Buchanan I*); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). If there is uncertainty as to which employer was last chronologically, then 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); *Susoeff*, 19 BRBS 149. If no employer presents persuasive exculpatory evidence, then the purposes of the Act are best served by assigning liability to the later employer. *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, 7 Fed. Appx. 547 (9th Cir. Feb. 26, 2001) (*Buchanan II*).

In the Board's prior two decisions in this case, it explained how compensability and liability are separate and distinct issues. *McAllister II*, 41 BRBS at 32; *McAllister I*, 39 BRBS at 37, 42. Once the compensability of the claim has been determined, then the employers bear the burden of establishing which of them is responsible for benefits. *McAllister II*, 41 BRBS at 33. Specifically, the Board stated that it is not claimant's burden to prove which employer is liable; rather, it is each employer's burden to establish that it is not the responsible party. *McAllister I*, 39 BRBS at 37. Each employer must persuade the fact-finder, simultaneously not sequentially, of its position by a preponderance of the evidence. *McAllister II*, 41 BRBS at 33.

Albina Engine contends the Board erred in interpreting the responsible employer law as set forth by the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises. Additionally, it argues that, in *McAllister II*, the Board deviated from its statements of law in *McAllister I* and *Buchanan II* in that it placed the burden on all employers simultaneously when, previously, it had placed the initial burden on the last employer. Albina Engine also asserts that the Board erred in requiring the administrative law judge to consider the employers' evidence simultaneously rather than sequentially.

We reject Albina Engine's arguments as to the statements of law. The Board has thoroughly discussed and set forth the responsible employer law and its two prior decisions are the law of the case. However, as Albina Engine argues that the Board's statement of law is inconsistent with the Ninth Circuit's decisions in *Cordero*, 580 F.2d 1331, 8 BRBS 744, *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940

(2004), and *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT), we shall address the issue briefly.[4]

Contrary to Albina Engine's argument, in responsible employer cases involving claims against multiple employers, the burden is placed on each employer to exculpate itself from liability. *See, e.g., Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT); *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, 67-68, *aff'd on recon.*, 40 BRBS 1 (2005). In *Picinich*, a Ninth Circuit case, the court found it undisputed that the decedent was exposed to significant amounts of asbestos while working at Lockheed between 1957 and 1972 and again from 1974 to January 1981. Less clear was whether the decedent was exposed to asbestos while working for Todd Shipyards between February and November 1981. The administrative law judge found, and the court affirmed, that the evidence established that the decedent was exposed to only minimal amounts of asbestos while working for Todd at that time due to an abatement program and testimony regarding air particle testing. As the law in the Ninth Circuit requires exposure to *sufficient quantities* of injurious stimuli to potentially cause the harm, and as there was only "minimal" exposure at Todd in *Picinich*, the court held that Lockheed did not submit any evidence to show that the asbestos levels to which the decedent was exposed at Todd were hazardous. Consequently, the court held that Lockheed, the *earlier* employer, failed to show subsequent exposure and was properly held liable for benefits. *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT). Thus, the Ninth Circuit does not require the later employer to bear any *initial* burden.[5] *See also Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir.

[4]Albina Engine also argues that the Board's *McAllister II* decision violates the last employer rule set forth in *Cardillo*, 225 F.2d 137.

[5]We reject Albina Engine's assertion that the Board's statements in *McAllister II* conflict with *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). *Price* involved a traumatic knee condition, and the court and Board affirmed the administrative law judge's finding that substantial evidence established that the claimant's work on a single day aggravated that knee condition. Pursuant to the evidence, the claimant's last chronological employer was held responsible for his injury. Thus, *Price* is distinguishable from the case herein. Similarly, only one employer was claimed against in *Cordero*; thus, it had the burden of establishing it did not cause or aggravate the claimant's condition. The evidence credited by the administrative law judge established that the claimant's pulmonary impairment was aggravated by his last, albeit brief, employment with Triple A.

1992).[6] The Board's statement of responsible employer law in *McAllister II* comports with Ninth Circuit precedent.

We also reject Albina Engine's argument that *McAllister II* is inconsistent with *McAllister I*. Albina Engine contends the Board placed the initial burden on the last chronological employer in *McAllister I* but changed it to a simultaneous burden in *McAllister II*. Albina Engine bases its argument on the statement that: "In this case, 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 I*, 39 BRBS at 42. This is an accurate statement of the law which Albina Engine misconstrues. Instead of placing the initial burden on Lockheed, the Board meant only that WISCO and Albina Engine could escape liability by showing no exposure at their facilities *or* exposure at a subsequent employer's facility, while Lockheed, as the last employer, could escape liability only by showing that it did not expose decedent to asbestos – liability could not be shifted to a non-existent subsequent maritime employer. Therefore, contrary to Albina Engine's argument, the Board did not change its interpretation of the law from one decision to the next.

McAllister II also is not inconsistent with *Buchanan II*. *Buchanan II* is cited, and remains the leading case, for the principle that in the event no employer is able to persuade the administrative law judge that its evidence is entitled to greater weight, then "the purposes of the Act would best be served by assigning liability to the later employer[.]" *Buchanan II*, 33 BRBS at 36. The Board has explained that each employer bears the burden of persuading the administrative law judge that it is not liable, and it may do this by presenting its own evidence or relying on evidence presented by another party. Then, the administrative law judge must weigh all of the evidence and make a finding as to which employer is responsible – he need not look at the evidence chronologically. However, if he is not persuaded by the evidence 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, [citing *General Ship*], or the later employer [citing *Buchanan II*]." *McAllister II*, 41 BRBS at 33.[7]

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[6]In *Cuevas*, the Fifth Circuit affirmed the Board's holding that the administrative law judge properly determined the responsible employer in a hearing loss case where 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 Avondale failed its burden, the subsequent employer was not joined to the case.

[7]In reiterating the *Buchanan II* sentence in *McAllister II*, the Board noted that its statement was supported by *General Ship* which interpreted *Susoeff* as placing the burden on the employer claimed against in the event there is uncertainty as to which employer

Therefore, the context of the statement is that, in the event the employers have not persuaded the administrative law judge, then the later employer, or the claimed-against employer, bears the ultimate burden of establishing it is not the responsible employer. If that employer cannot do so, it is liable. Thus, the later employer bears the ultimate burden only under certain circumstances. *McAllister II*, 41 BRBS at 33; *Schuchardt*, 39 BRBS at 67;[8] *see also General Ship*, 938 F.2d at 961-962, 25 BRBS at 24-25(CRT).

We also reject Albina Engine's argument that *McAllister II* circumvents the "rational connection" requirement of *Cordero* and *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), as it requires employers whose employment has no rational connection to the claimant's injury to disprove their liability. Placing responsibility on all employers to extricate themselves from liability not only comports with case precedent but is logical. Contrary to Albina Engine's argument, employers have always been required to establish which of them is responsible for a claimant's compensation. The Board's explanation that the burden lies with all employers and not just the last employer does not eliminate the "rational connection" between exposure and causation. Rather, it emphasizes it by allowing the administrative law judge to weigh all the evidence simultaneously to determine when exposure last occurred. If, as the administrative law judge found in this case, the employee had no exposure with the last employer, then there can be no rational connection between the death/disability and that last employer. *See Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT). Accordingly, we reject Albina Engine's argument that the Board espoused incorrect law.

Albina Engine also argues that the administrative law judge erred in applying the law and in holding it liable for claimant's benefits because the evidence against it was the weakest. We reject this argument. In this case, all three potentially liable employers were claimed against. The administrative law judge properly required all three to simultaneously bear the burden of proving by a preponderance of the evidence that another employer is liable for decedent's death. After considering the evidence, the administrative law judge rationally found that decedent was last exposed to asbestos at Albina Engine. Decision and Order on Second Remand at 8-9. Although he then stated that there is "*some* evidence against Lockheed," he concluded that this evidence is "thin

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was last. *General Ship*, 938 F.2d at 961-962, 25 BRBS at 24-25(CRT); *McAllister II*, 41 BRBS at 32; *Susoeff*, 19 BRBS at 151.

[8]In *Schuchardt*, the Board held that the decedent's death was compensable and then, citing *McAllister I* and *General Ship*, 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; *see also Schuchardt v. Dillingham Ship Repair*, BRB No. 06-0906 (June 26, 2007), *appeal pending*, No. 07-73611 (9th Cir.).

and entitled to little weight." *Id.* at 9 (emphasis in original). Specifically, the administrative law judge explained his rationale, as he stated that the new-construction job decedent performed for Lockheed was different from his repair jobs at the other two shipyards where he was exposed, that a carpenter coming home with dusty and dirty clothes does not necessarily mean that he was exposed to asbestos, and that decedent's mentioning exposure "at the shipyards" did not necessarily include Lockheed's facility when the other two were singled out. And, although Mr. Norgaard's testimony, in an unrelated case,[9] established the presence of asbestos at Lockheed's facility, the administrative law judge rationally found that this did not establish decedent's exposure to that asbestos. The administrative law judge also gave very little weight to the doctors' opinions, as they were concerned only with whether decedent was exposed to asbestos and not where he was exposed. *Id.* at 10-11.

Based on the record, the administrative law judge stated that there is convincing and undisputed evidence of exposure to asbestos at WISCO. Cl. Exs. 8-9; Tr. at 47, 59. However, he found that WISCO is exculpated by establishing decedent's subsequent exposure at Albina Engine, where he found that testimony from employees who worked contemporaneously with decedent established that work and conditions at Albina Engine were similar to those at WISCO.[10] Decision and Order on Second Remand at 10. There is substantial evidence to support his findings. Cl. Exs. 7, 9 (employees' depositions from other cases); Tr. at 47 (widow's statement that decedent specifically named Albina Engine as having exposed him to asbestos). He then found that Albina Engine did not establish an absence of exposure at its facility, nor did it establish exposure at Lockheed, as he found the evidence of exposure at Lockheed is so slight as to be evidence of no exposure.[11] Cl. Exs. 4-5; SAIF Ex. 12. Thus, the administrative law judge found that

[9]Mr. Norgaard was an employee of Owens-Corning Fiberglas which stored materials and had work-space at Lockheed's facility.

[10]The administrative law judge stated: "To be sure, the evidence of asbestos exposure at Albina is not as strong as at WISCO." Decision and Order at 11.

[11]Albina Engine cites to additional evidence in the record that was not addressed by the administrative law judge as support for its argument that decedent was last exposed at Lockheed. Contrary to Albina Engine's assertion, that evidence does not support its argument. SAIF Ex. 4, Dr. Keppel's note regarding exposure in the shipyards is no more persuasive than Dr. Zbinden's impression, which was given little weight. The Dodge deposition, SAIF Ex. 13, established only that Mr. Dodge could not confirm or deny decedent's history as he gave it to Dr. Zbinden, and two judicial decisions, AE Exs. 8-9, prove nothing regarding decedent's exposure. Similarly, claimant's answers to interrogatories about decedent's employment history are not proof of exposure. AE Exs. 5-7.

Lockheed established there was no exposure to asbestos at its facility, leaving Albina Engine as the responsible employer. Decision and Order on Second Remand at 11. We affirm the finding that Albina Engine is the responsible employer. The administrative law judge considered all the relevant evidence as a whole, and he found that the evidence establishes that, more likely than not, decedent was not exposed to asbestos at Lockheed's facility, leaving his exposure at Albina Engine as the last exposure. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Schuchardt*, 39 BRBS 64; *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Buchanan II*, 33 BRBS 32; *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

Accordingly, we reject Albina Engine's challenges to the administrative law judge's Decision and Order on Second Remand, and we affirm the finding that Albina Engine is liable for compensation to claimant.

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