

M.S. )  
(Widow of B.S.) )  
 )  
Claimant )  
 )  
v. )  
 )  
BAE SYSTEMS/NORFOLK SHIP REPAIR )  
 )  
Self-Insured )  
Employer-Petitioner )  
 )  
BATH IRON WORKS CORPORATION ) DATE ISSUED: 08/14/2008  
 )  
Self-Insured )  
Employer-Respondent )  
 )  
ONE BEACON INSURANCE GROUP )  
 )  
and )  
 )  
LIBERTY MUTUAL INSURANCE )  
COMPANY )  
 )  
and )  
 )  
AIG SERVICES/BIRMINGHAM FIRE )  
INSURANCE COMPANY )  
 )  
Carriers- )  
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 Daniel F. Sutton,  
Administrative Law Judge, United States Department of Labor.

Kevin M. Gillis (Trough Heisler), Portland, Maine, for BAE  
Systems/Norfolk Ship Repair.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for  
self-insured Bath Iron Works Corporation.

Richard F. van Antwerp (Robinson, Kriger & McCallum), Portland, Maine,  
for One Beacon Insurance Group.

Before: DOLDER, Chief Administrative Appeals Judges, McGRANERY  
and HALL, Administrative Appeals Judges.

PER CURIAM:

BAE Systems/Norfolk Ship Repair (BAE) appeals the Decision and Order Awarding Benefits (2007-LHC-00109) of Administrative Law Judge Daniel F. Sutton 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 employee (decedent) was employed by BAE from October 1965 to March 1972, and by Bath Iron Works (BIW) from November 1978 to October 2005. Decedent was diagnosed with lung cancer on March 17, 2005. He filed a claim against BIW on May 4, 2006, for disability benefits, alleging that his lung cancer was causally related to his occupational exposure to asbestos. CX 8.

The employee died on August 15, 2006, from lung cancer. His widow (claimant) filed a claim against BIW and BAE for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. On January 19, 2007, the disability and death claims were consolidated. ALJX 6.

At the formal hearing, the parties stipulated that decedent's injury and death were work-related, that decedent had a 100 percent permanent partial disability from October 25, 2005, to August 14, 2006, and that claimant is entitled to death benefits. With regard to the responsible employer issue, BAE did not contend that it did not expose decedent to

asbestos,<sup>1</sup> but alleged that BIW was the last covered employer to expose him to asbestos. The administrative law judge discussed decedent's deposition testimony,<sup>2</sup> and the post-hearing deposition of William Lowell, BIW's former chief operating engineer. Mr. Lowell contradicted decedent's testimony that he was exposed to asbestos while he was employed by BIW. The administrative law judge credited Mr. Lowell's testimony and concluded that decedent was not exposed to asbestos at BIW, and that, therefore, BAE is liable for benefits as the last employer to expose claimant to injurious stimuli.

On appeal, BAE contends that the administrative law judge erred in finding that it is the responsible employer. BAE contends that the administrative law judge did not acknowledge BIW's burden of persuading the administrative law judge that BIW was not the last employer to expose claimant to asbestos. BAE also avers that the administrative law judge erred in crediting the deposition testimony of Mr. Lowell over that of decedent regarding decedent's asbestos exposure at BIW. Self-insured BIW and one of its carriers, One Beacon, separately respond, urging affirmance of the administrative law judge's decision. Alternatively, each argues that if decedent was exposed to asbestos at BIW, such exposure did not occur while it was on the risk. Claimant and BIW's other carriers did not respond to this appeal.

In an occupational disease case, the responsible employer is the employer "during the last employment in which the [employee] was exposed to injurious stimuli, prior to the dated upon which the [employee] became aware of the fact that he was suffering from an occupational disease . . ." *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2<sup>d</sup> Cir.), *cert. denied*, 350 U.S. 913 (1955); *see Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1<sup>st</sup> Cir. 2001) (last exposure prior to onset of disability); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). In several recent cases, the Board has addressed the burdens borne by the employers to establish that each is not the responsible employer. In *McAllister [v. Lockheed Shipbuilding]*, 41 BRBS 28 (2007), the Board stated,

[E]ach potentially liable employer bears the burden of persuading the administrative law judge that it is not liable. *See Schuchardt [v. Dillingham]*

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<sup>1</sup> Decedent testified on deposition to asbestos exposure during his employment with BAE. CX 9 at 8-10.

<sup>2</sup> The administrative law judge noted that BAE was not represented at decedent's deposition but raised no objection to the deposition's admission. Decision and Order at 4, n.3

*Ship Repair*], 39 BRBS 64 (2005). 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 Board have deemed that the ultimate burden of persuasion lies with the employer claimed against, see *General Ship [Serv. v. Director, OWCP]*, 938 F.2d at 962, 25 BRBS at 25(CRT) [9<sup>th</sup> Cir. 1991], or the later employer. See *Buchanan [v. Int'l Transp. Services]*, 33 BRBS [32] at 36 [1999].

*McAllister*, 41 BRBS at 33; see also *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *aff'd on recon.*, 40 BRBS 1 (2005); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

We reject BAE's initial contention that the administrative law judge erred by failing to recognize BIW's burden of persuading him that it did not expose decedent to injurious stimuli. The essence of the Board's holding in *McAllister*, 41 BRBS 28, is that the administrative law judge must weigh all the relevant evidence regarding the employee's last exposure and arrive at a decision supported by substantial evidence. Although the administrative law judge did not cite the Board's recent decisions, his decision comports with them in that he fully discussed and weighed the relevant evidence consisting of the deposition testimony of decedent and Mr. Lowell. See Decision and Order at 5-9.

BAE also contends that the administrative law judge did not make specific findings of fact and/or that his findings of fact are not supported by substantial evidence. Decedent testified at his deposition that he was exposed to asbestos at BIW from 1978 to 1981 while he worked on board vessels undergoing renovation. He stated that he removed equipment covered with asbestos and that he was exposed to asbestos in areas where boilers were undergoing overhaul. CX 9 at 12-14, 24-25. Decedent stated that he recalled asbestos exposure on the USS Brumby overhaul project from March to December 1981 when the vessel's boiler was being removed. *Id.* at 24-25.

Mr. Lowell testified on deposition that, by 1978, BIW had a rigid program in place whereby vessels undergoing overhaul would have had asbestos removed by employees wearing protective suits and respirators.<sup>3</sup> EX 57 at 12-16. This process was monitored by laboratory personnel. Decedent would not have been present on the ships during this process, and any work decedent did on the overhaul projects thereafter would not have exposed him to asbestos as it had been removed. *Id.* at 14-17, 34-42. Mr. Lowell reviewed decedent's time cards to ascertain the hull numbers of the ships on which decedent worked. He stated his opinion that decedent was not exposed to asbestos as it was unlikely, as an outside machinist, that he handled gaskets and that the vast majority of gaskets were made of non-asbestos material by the late 1970s. *Id.* at 23-25. Mr. Lowell further testified that the vessels with pressure-fired boilers on which decedent worked, the McDonnell, the Brumby, and the Page, did not contain asbestos boilers, contrary to decedent's recollection. Rather, the insulation was mineral wool cement and felt. *Id.* at 28-33. Mr. Lowell acknowledged that airborne white flakes were visible during overhauls, but, given the strict conditions under which asbestos was removed, that they were non-asbestos materials. *Id.* at 30-31. Finally, on cross-examination, Mr. Lowell agreed that vessels on which decedent worked may have contained asbestos, but that any asbestos insulation on the turbines, pumps and steam pipes were encapsulated so as not to be ambient. *Id.* at 60-61.

The administrative law judge credited Mr. Lowell's "convincing testimony" that either asbestos previously had been removed from or was not present on the vessels on which decedent worked. Decision and Order at 9. The administrative law judge also found that there is no evidence that decedent worked with gaskets with encapsulated asbestos or that such were breached in his presence. The administrative law judge noted that both decedent and Mr. Lowell testified that it was not possible to distinguish between asbestos-based and non asbestos-based insulating materials. CX 9 at 28, 31; EX 57 at 30-31. The administrative law judge thus found that decedent's belief that he was exposed to asbestos at BIW, though sincere, "appears" to have been mistaken. Decision and Order at 9. The administrative law judge concluded that the "preponderance of the credible evidence" establishes that decedent was not exposed to injurious stimuli at BIW such that BAE is the responsible employer. *Id.*

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<sup>3</sup> Mr. Lowell was BIW's chief operating engineer from 1968 to 1989. He testified that he is very familiar with how asbestos was purchased, used, and discontinued at BIW. EX 57 at 3-5, 48-49.

We affirm the administrative law judge's finding that BAE is the responsible employer as it is rational and supported by substantial evidence. The administrative law judge acted within his discretion in giving greater weight to Mr. Lowell's testimony than to decedent's testimony. *Faulk*, 228 F.3d at 386, 34 BRBS at 76(CRT); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). He was not required to give Mr. Lowell's opinion less weight on the basis that he was a witness called by BIW.<sup>4</sup> See generally *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). If the administrative law judge's findings are supported by substantial evidence in the record, as in this case, the administrative law judge's findings may not be disregarded on the basis that the evidence also is susceptible to other conclusions. *Hutchins*, 244 F.3d at 231, 35 BRBS at 40-41(CRT). Moreover, contrary to BAE's contention, the administrative law judge did not "inconclusively" weigh the evidence merely because he stated that decedent "appears" to have been mistaken about his asbestos exposure. See *Schuchardt*, 39 BRBS at 67-68. Rather, the administrative law judge found that Mr. Lowell "convincingly" testified as to the absence of asbestos exposure in places where decedent worked for BIW. As the administrative law judge addressed the relevant evidence and made specific findings of fact regarding decedent's exposure to asbestos as BIW that are supported by substantial evidence, we affirm the administrative law judge's finding that decedent's last injurious exposure to asbestos occurred with BAE. *Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT); *Faulk*, 228 F.3d 378, 34 BRBS 71(CRT); *McAllister*, 41 BRBS at 33. Therefore, we affirm the administrative law judge's finding that BAE is the employer responsible for the benefits awarded.

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<sup>4</sup> The administrative law judge acknowledged that Mr. Lowell has served as a consultant in asbestos litigation since his retirement from BIW in 1995, but noted that he has appeared at the request of both plaintiffs and defendants. EX 57 at 4, 57-58; Decision and Order at 7.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge