

BERNICE SCHUCHARDT)
(Widow of LAWTON SCHUCHARDT))

Claimant)

v.)

DILLINGHAM SHIP REPAIR)

and)

ZENITH INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

NORTHWEST MARINE IRON WORKS)

DATE ISSUED: 06/26/2007

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)
)
 FREMONT INSURANCE)
 COMPANY/OREGON INSURANCE)
 GUARANTY ASSOCIATION)
)
 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 on Remand of Paul A. Mapes,
 Administrative Law Judge, United States Department of Labor.

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.

Robert E. Babcock (Wallace, Klor & Mann), Lake Oswego, Oregon, for
 Fremont Insurance Company/Oregon Insurance Guaranty Association.

Norman Cole (Sather Byerly & Holloway, LLP), Portland, 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 on Remand (2003-LHC-1139) 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 case is before the Board for the second time. To recapitulate, 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. In his first decision, the administrative law judge stated 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 subsequent employment from 1988 to 1991 with Zidell Marine Corporation (Zidell), and West States, Incorporated (West States). 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. 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.

Dillingham appealed the administrative law judge's conclusion that it is the responsible employer. The Board first held that claimant established that decedent's death is related to his covered employment and that the death therefore is compensable. *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *modified in part on recon.*, 40 BRBS 1 (2005). The Board, however, vacated the administrative law judge's finding that Dillingham is the responsible employer inasmuch as the administrative law judge failed to address whether decedent was exposed to potentially injurious asbestos inside a Foster Wheeler boiler and his weighing of the evidence was inconclusive. *Id.*, 39 BRBS at 68. The Board remanded the case for the administrative law judge to address the responsible employer issue consistent with the applicable 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, which is not applicable to the issue of responsible employer. *Id.* On claimant's motion for reconsideration, the Board modified its decision to provide that Dillingham shall continue paying claimant death benefits while the case is pending before the administrative law judge on remand. *Schuchardt*, 40 BRBS at 2.

In his Decision and Order on Remand, the administrative law judge found that the preponderance of the evidence establishes that decedent was not exposed to asbestos during the course of his employment for Zidell from 1990 to 1991, nor was he exposed to asbestos during the course of his employment for West States during 1988 and 1989.¹ The administrative law judge next determined that the preponderance of the evidence

¹ Zidell and its insurance carrier during this period were dismissed as a party without prejudice on August 1, 2003. West States and its two insurers during this period were dismissed as parties without prejudice by orders issued on June 3, 2003, and July 2, 2003. Decision and Order on Remand at 11-12.

establishes that decedent was not exposed to asbestos during the course of his employment for Northwest, which intermittently employed decedent from August 1987 until March 1988. The administrative law judge found more probative decedent's deposition testimony that he thought he was last exposed to asbestos in the 1970s and that he last worked in a Foster Wheeler boiler onboard a ship in about 1986 or 1987 than the circumstantial evidence that decedent may have been last exposed to asbestos while working for Northwest. Decision and Order on Remand at 13-14. In addressing decedent's employment with Dillingham, the administrative law judge found that decedent worked exclusively for Dillingham from September 1984 to April 1987, and for Dillingham and Northwest from August 1987 to April 1988. The administrative law judge credited decedent's testimony that he last worked inside a Foster Wheeler boiler during the course of his employment for Dillingham and found that asbestos products were present inside the boiler. The administrative law judge credited the testimony of Scott Hernandez, an industrial hygienist formerly employed by Dillingham, that measurable asbestos levels were recorded on board the ships it repaired. The administrative law judge found this evidence evenly balanced against decedent's testimony that he thought he was last exposed to asbestos in the 1970s and the possibility that decedent did not remove any asbestos products when he worked inside the boiler, which is necessary in order to release airborne asbestos particles. The administrative law judge concluded that Dillingham, therefore, did not establish that it did not expose decedent to asbestos, and that therefore is it the responsible employer as the last to expose decedent to potentially injurious stimuli.

On appeal, Dillingham contends that the administrative law judge erred by finding that Northwest is not the responsible employer, and by concluding that Dillingham is the responsible employer. Alternatively, Dillingham argues that the case should be remanded to re-join decedent's Zidell and West States because as decedent's last employers, they must prove the absence of exposure to injurious stimuli, pursuant to *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). Decedent's other employers have filed response briefs, seeking rejecting of Dillingham's contentions.

Once, as here, the decedent is found to have a work-related condition, the employers in the case must establish which of them is liable for payment of death benefits. See *Schuchardt*, 39 BRBS at 66. 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. See, e.g., *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990). 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. *Id.* In *McAllister v. Lockheed Shipbuilding*, ___ BRBS ____, BRB No. 06-0646 (April 26,

2007), the Board recently clarified that in determining the responsible employer, the administrative law judge is required to weigh all relevant evidence and to make a finding, based on the preponderance of the evidence, as to which employer last exposed the employee to potentially injurious stimuli. Each employer bears this burden equally. *Id.*, slip op. at 9; see *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001).

The administrative law judge found “very weak” and circumstantial evidence that decedent may have been exposed to asbestos while working intermittently for Northwest from August 1987 until March 1988. The administrative law judge found significant the testimony of John Flynn, a former safety manager for Northwest, that since 1975 Northwest had hired outside contractors to perform boiler repair work. Decision and Order on Remand at 12; Tr. at 391-392. The administrative law judge noted Dr. Cohen’s testimony that Northwest performed repairs on Navy vessels which would have contained asbestos if the vessels had not undergone asbestos abatement and that civilian vessels would have had asbestos on board if they used steam propulsion; however, the only evidence identifying any vessel on which decedent worked for Northwest is decedent’s testimony of working on the *Rotterdam*, which he described as one of the “dirtiest jobs” he ever performed. See Tr. at 102. The administrative law judge found there is no evidence indicating that the *Rotterdam* contained asbestos and the mere fact that a job was “dirty” does not establish asbestos exposure. Decision and Order on Remand at 13. The administrative law judge further noted that decedent did not mention the *Rotterdam* when testifying at his deposition in the third-party action as to his work-related asbestos exposure. In addition, the administrative law judge relied on decedent’s testimony that he was last exposed to asbestos in the 1970s and that he thought he had last worked inside a Foster Wheeler boiler onboard a ship in 1986 or 1987. CXs 15 at 46, 49; 19 at 61. The administrative law judge therefore concluded that the preponderance of the evidence establishes that Northwest did not expose decedent to asbestos. Decision and Order on Remand at 14.

The administrative law judge next addressed Dillingham’s contention that there is insufficient evidence that decedent worked inside a boiler for Dillingham between September 1984 to April 1988. The administrative law judge found that decedent’s testimony that he “probably” and “about maybe” last worked inside a Foster Wheeler boiler in “86 or 87” is not so equivocal as to have no evidentiary value. Decision and Order on Remand at 14. The administrative law judge also rejected Dillingham’s argument that there is no evidence of asbestos inside the boiler. The administrative law judge credited decedent’s deposition testimony that fire bricks and high-temperature cement inside boilers contain asbestos and that, at times, he would have to tear out the bricks, which were very dusty when broken. CX 15 at 40-42, 44, 46; ZSX at 98-99. The administrative law judge found more significant the testimony of Scott Hernandez, an industrial hygienist formerly employed by Dillingham, that measurable asbestos levels were recorded on board the ships it repaired, and that Dillingham was particularly

concerned about the older boilers on ships it repaired because of the possibility that the gaskets, bricks, and mortar therein could contain asbestos. Tr. at 258, 271. The administrative law judge found that while this evidence of asbestos exposure is not particularly strong, Dillingham's only rebuttal was the argument that decedent's testimony of working inside a boiler in 1986 or 1987 is inconsistent with his testimony that he was last exposed to asbestos in the 1970s. The administrative law judge found that decedent's testimony reflected only his knowledge of the last time he was certain he was exposed to asbestos and that he did not address occasions when he was unsure or unaware of possible asbestos exposure. Decision and Order on Remand at 15-16. However, the administrative law judge also noted the absence of any evidence that decedent in fact removed fire bricks when he worked inside a boiler at Dillingham. Based on this record, the administrative law judge found that the evidence that decedent was exposed to asbestos during the course of his employment for Dillingham is in equipoise. The administrative law judge therefore concluded that Dillingham did not establish its burden of proving by a preponderance of the evidence that it did not expose decedent to asbestos. Thus, he held Dillingham liable for claimant's benefits.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge's crediting of decedent's deposition testimony to establish that any asbestos exposure decedent received after the 1970s was limited to the work performed inside a Foster Wheeler boiler is within his discretion as fact finder. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). As there is substantial evidence that decedent did not work inside a boiler during the course of his employment for Northwest, and Dillingham produced no evidence that decedent was otherwise exposed to asbestos there, the administrative law judge's finding that Northwest is not the responsible employer is affirmed as it is rational and supported by substantial evidence. *See Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

In contrast to the absence of evidence of asbestos exposure during decedent's employment with Northwest, the administrative law judge found significant the testimony of Mr. Hernandez that measurable asbestos levels were recorded onboard the ships Dillingham repaired. Moreover, substantial evidence supports the administrative law judge's finding that decedent last worked inside a boiler onboard a ship during the course of his employment for Dillingham from September 1984 to April 1988. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999). The administrative law judge determined, however, that the evidence that decedent actually was exposed to asbestos inside a boiler while working for Dillingham is in equipoise as there is no evidence that decedent in fact removed fire bricks during this employment.

Based on this evidence, the administrative law judge concluded that Dillingham did not establish that it did not expose claimant to asbestos, and therefore did not meet its burden of establishing that it is not the responsible employer.

We affirm the administrative law judge's finding. The administrative law judge's findings that asbestos was present onboard ships at Dillingham during the time decedent worked there and that decedent worked inside a boiler in which asbestos could have been present are supported by substantial evidence. Thus, the administrative law judge properly placed the burden on Dillingham to establish that decedent was not exposed to potentially injurious asbestos during this employment. *McAllister*, slip op. at 8-9. The administrative law judge rationally found that Dillingham did not meet this burden on the record presented.² *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *McAllister*, slip op. at 9; *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Therefore, we affirm the administrative law judge's finding that Dillingham is liable for claimant's benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

² We reject Dillingham's contention that Zidell and West States must be re-joined to the proceedings so that the administrative law judge can determine if they met their burden of establishing that they did not expose claimant to injurious stimuli. Dillingham does not challenge the administrative law judge's finding on remand that these employers did not expose decedent to potentially harmful levels of asbestos. Decision and Order on Remand at 11-12; *see McAllister*, slip op. at 9.

BETTY JEAN HALL
Administrative Appeals Judge