BRB No. 02-0327

SAMUEL M. PIACENZA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALLVILLE BAY MARINA	)	
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY (NEVADA INSURANCE GUARANTEE ASSOCIATION)	)	DATE ISSUED: Jan. 14, 2003
	)	
Employer/Carrier-Petitioners	)	
	)	
GENERAL DYNAMICS/ELECTRIC BOAT CORPORATION	)	
	)	
Self-insured Employer-Respondent	)	
	)	
and	)	
	)	
ACE USA (F/K/A CIGNA)	)	
	)	
Carrier-Respondent	)	
	)	
THAMES VALLEY STEEL CORPORATION	)	
	)	
and	)	
	)	
HARTFORD INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	
ON-SITE MARINE CONSTRUCTION	)	

	)	
Joined Employer-Respondent	)	
	)	
ADVANCE AQUATECHNICS	)	
	)	
Joined Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Employer=s Petition for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Roger F. Balkenbush (Thorndal, Armstrong, Delk, Balkenbush & Eisinger), Reno, Nevada, for Callville Bay Marina and Nevada Insurance Guarantee Association.

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

PER CURIAM:

Callville Bay Marina (Callville) appeals the Decision and Order and Order on Employer=s Petition for Reconsideration (01-LHC-0113, 0114, 0115) of Administrative Law Judge Larry W. Price 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).

Claimant began working as a shipfitter/welder for General Dynamics/Electric Boat Corporation (Electric Boat) in 1962, where he was exposed to asbestos,

welding fumes and dust. Thereafter, claimant worked for various employers, and he also was self-employed from 1988 or 1989 to 1995, as a steel fabricator/fitter/welder, where he was exposed to welding fumes, smoke and dust. Claimant moved to Nevada in 1995 to work on Lake Mead constructing and repairing floating docks. Lake Mead is located on the border between Arizona and Nevada. Claimant=s job duties included steel fabrication, welding, and grinding, and he was exposed to welding fumes and dust. In 1995, claimant worked for On-Site Marine Construction. He next was employed by Advanced Aquatechnics (Aquatechnics) from 1998 to September 9, 1999. Finally, claimant was hired by Callville on September 20, 1999. On October 29, 1999, claimant experienced shortness of breath during the course of his employment. Claimant was hospitalized for this condition on October 31, 1999, and he was diagnosed with chronic obstructive pulmonary disease (COPD). Presently, claimant has severe shortness of breath and exhaustion, and he requires an oxygen tank approximately 20 hours daily to assist his breathing. He has not returned to work. In addition to his work exposure to asbestos, welding fumes, smoke, and dust, claimant has a cigarette smoking history of approximately 48 years, during which he smoked one and a half to two packs a day.

The administrative law judge found that claimant=s COPD is due, in part, to work exposure to asbestos, welding fumes, and dust from 1962 to 1999, and he determined that Callville is the employer responsible for claimant=s compensation and medical benefits. The administrative law judge found that claimant=s COPD is caused by emphysema and pneumoconiosis, which conditions were contributed to or aggravated by claimant=s exposure to welding fumes and dust during the course of his employment for Callville. The administrative law judge next determined that claimant is totally disabled due to COPD, and that his condition reached maximum medical improvement on June 6, 2000. Finally, the administrative law judge found that claimant=s average weekly wage is $379.33. On Callville=s motion for reconsideration, the administrative law judge rejected Callville=s contention that claimant failed to establish a *prima facie* case linking his COPD to his employment. The administrative law judge concluded that the weight of the evidence establishes that claimant=s continued exposure to welding fumes, dust and smoke aggravated and accelerated the progression of his pulmonary disease. Finally, the administrative law judge found Callville entitled to relief from continuing compensation liability, pursuant to Section 8(f) of the Act, 33 U.S.C. ' 908(f).

On appeal, Callville challenges the administrative law judge=s finding that claimant has a work-related injury, and that it is the employer responsible for claimant=s compensation and medical benefits. Claimant responds, urging affirmance.

Callville initially contends that the administrative law judge erred by invoking

the Section 20(a) presumption, 33 U.S.C. ' 920(a). Specifically, employer asserts that the opinion of Dr. DeGraff is not sufficient to invoke the presumption linking claimant=s COPD to his employment. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he suffered a harm, and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff=d*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Volpe v. Northeast Marine Terminals,* 14 BRBS 17 (1981), *rev=d on other grounds,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Claimant, in establishing his *prima facie* case, is not required to prove by affirmative medical evidence that the accident or working conditions in fact caused the harm; rather, claimant must show only the existence of an accident or working conditions which could have caused or aggravated the harm alleged. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989).

In this case, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as it is undisputed that claimant has COPD, and the administrative law judge rationally found that working conditions existed which could have caused or aggravated this harm. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge credited claimant=s testimony that he was exposed to asbestos during the course of his employment for Electric Boat, and that he continued to be exposed to welding fumes and dust with various employers, including Callville. Claimant=s July 25, 2001, deposition at 47-51; CX 7 at 32-34. The administrative law judge also credited Dr. DeGraff=s diagnosis attributing claimant=s COPD to emphysema and pneumoconiosis. In his deposition testimony, Dr. DeGraff opined that claimant=s emphysema was caused by cigarette smoking and exposure to welding fumes, and that claimant=s pneumoconiosis was related to his exposure to asbestos and welding fumes. CX 10 at 7, 10, 13-19. On reconsideration, the administrative law judge rejected Callville=s assertions that Dr. DeGraff=s opinion is insufficient to make out claimant=s *prima facie* case. The administrative law judge found that claimant=s testimony alone is sufficient to meet his burden, and that moreover Dr. DeGraff=s opinion is well-reasoned and supported by the evidence. The administrative law judge further found the opinions of Dr. DeGraff and Dr. Daum entitled to more weight than the opinion of Dr. Prabhu, who opined that claimant=s emphysema is due to cigarette smoking, and that there is no x-ray evidence of asbestosis. Electric Boat Exhibit 1. Dr. Daum evaluated a chest x-ray of claimant, which she interpreted as showing pulmonary and pleural changes related to asbestos exposure. CX 9. The administrative law judge reasoned that Dr. Prabhu=s opinion is expressed in an unsigned report, and that very little is known of his credentials, whereas Dr. DeGraff submitted both a written report and deposition

testimony and his credentials are impressive, and Dr. Daum is a B-reader. The administrative law judge thus concluded that the weight of the evidence establishes that claimant=s continued exposure to welding fumes, dust, and smoke aggravated and accelerated the progression of his COPD. As the administrative law judge=s finding is established rational and supported by substantial evidence, we affirm the administrative law judge=s invocation of the Section 20(a) presumption. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Sinclair,* 23 BRBS 148.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut that presumption with substantial evidence that claimant=s condition was not caused or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000). In this case, Callville contends that the administrative law judge erred in finding that it failed to submit sufficient evidence to establish rebuttal. Callville argues that Dr. Prabhu=s opinion that claimant has emphysema due to cigarette smoking rebuts the presumption. Dr. Prabhu also stated that claimant does not have asbestosis. The administrative law judge found that no employer presented evidence that claimant=s pulmonary condition was not caused or aggravated by his employment. We hold that Dr. Prabhu=s opinion is legally insufficient to rebut the Section 20(a) presumption as his report fails to address whether claimant=s COPD was aggravated by his employment exposures. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see also Louisiana Ins. Guar. Ass=n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT). Dr. Prabhu=s report does not contain any reference to claimant=s

[1]We also reject Callville's assertions that the administrative law judge erred by crediting the opinion of Dr. DeGraff because he did not personally examine claimant and review the chest x-ray evidence, but instead rendered his opinion after reviewing claimant's medical record; it is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but may instead draw his own inferences and conclusions from the evidence as he sees fit. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, notwithstanding Callville's challenge to Dr. DeGraff's credibility based on his not having published a peer-reviewed article on pneumoconiosis, the administrative law judge rationally found Dr. DeGraff well-credentialed. Dr. DeGraff testified that he is Board-certified in internal medicine and pulmonary disease. CX 10 at 31-33.

employment as a steel fabricator, welder and shipfitter and claimant=s work exposures to welding fumes, dust, and smoke during the course of his employment with various employers from 1962 to 1999. Accordingly, as Dr. Prabhu does not state that claimant=s pulmonary condition was not aggravated by his employment exposures, we affirm the administrative law judge=s finding that the Section 20(a) presumption was not rebutted. *See Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *see also Burley v. Tidewater Temps, Inc.,* 35 BRBS 185 (2002); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). Thus, we affirm the administrative law judge=s finding that claimant has a work-related pulmonary condition. *See Jones,* 35 BRBS 37.

Once it is determined that the employee=s employment exposures as a whole are causally linked to his disease, the compensability of the claim (*i.e.,* whether the employee has a work-related injury) has been established pursuant to Section 20(a) of the Act. The remaining issue is determining which employer is responsible for the payment of compensation. *See Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). In order to determine employer liability in occupational disease cases involving successive employers, the courts and the Board have uniformly applied the last employer rule enunciated in *Travelers Ins. Co. v. Cardillo,* 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *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); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Jacksonville Shipyards, Inc. v. Director, OWCP,* 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). Pursuant to the last employer rule, the last covered employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable to claimant for compensation and medical benefits. A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; rather exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989). In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either that the employee=s exposure while working for employer was not injurious or that the employee was exposed to injurious stimuli while working for a subsequent employer covered under the Act. *See Faulk,* 228 F.3d at 384, 34 BRBS at 75(CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *see also General Ship Service v. Director, OWCP [Barnes],* 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). An injurious exposure is one which had the potential to cause the disease or harm at issue. *See Faulk,* 228 F.3d at 385, 34 BRBS at 75(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 1320, 24 BRBS 36, 39(CRT) (9th Cir. 1990). Callville contends that the

administrative law judge misapplied the last employer rule in finding Callville to be the responsible employer where, as asserted by Callville, claimant was aware of the relationship between his COPD, his disability, and his employment when he sought emergency room treatment and was unable to work for approximately one week in March 1999 after exposure to galvanized steel fumes during the course of his employment for Aquatechnics. Callville also asserts that claimant was not exposed to injurious stimuli during the course of his employment with Callville; rather, Callville alleges that claimant=s inability to work subsequent to his employment with Callville is due solely to the natural progression of his pre-existing COPD.

In *Port of Portland*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, stated that Aonset of disability@ is a key factor in assessing liability, and that liability should fall on the employer Acovering the risk at the time of the most recent injury that bears a causal relation to the disability.@ *Port of Portland,* 932 F.2d at 841, 24 BRBS at 144(CRT). It is uncontested that claimant has been unable to work subsequent to his employment with Callville due to his COPD. Thus, the only way in which Callville can establish that it is not the responsible employer is to demonstrate that claimant=s exposure to welding fumes and dust while working for Callville did not have the *potential* to cause his disease. Claimant=s prior emergency room examination, his inability to work for a week in March 1999 after experiencing nausea and weakness during the course of his employment with Aquatechnics, and any resulting awareness by claimant of the relationship between his COPD, his period of temporary disability, and his employment, does not absolve Callville of liability if claimant was subsequently exposed to potentially injurious stimuli while in Callville=s employ. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Faulk,* 228 F.3d at 385, 34 BRBS at 76(CRT).

In his consideration of the responsible employer issue, the administrative law judge credited the testimony of Dr. DeGraff that claimant=s exposure to asbestos, welding fumes and grinding dusts contributed to his COPD, and that claimant=s work at Callville aggravated his condition. CX 10 at 70-86. Specifically, Dr. DeGraff testified that claimant=s exposure to welding gases after he returned to work in March 1999 would have aggravated his COPD, and that only a small change in claimant=s pulmonary condition can cause rapid declination from being able to work to being totally disabled. CX 10 at 78-80. The administrative law judge=s crediting of Dr. DeGraff=s testimony is within his authority as fact finder. *See Taylor*, 133 F.3d 683, 31 BRBS 178(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT). Accordingly, as the credited evidence establishes that claimant was exposed to injurious stimuli in Callville=s employ, we affirm the administrative law judge=s determination that Callville is the responsible employer as it is rational, supported by substantial evidence, and in accordance with law.

The attorney for claimant and the attorney for Callville submitted to the Board on September 18, 2002, a jointly signed Stipulation to Correct Clerical Error. The parties stipulated that claimant=s last day of employment was October 29, 1999, and that the administrative law judge=s decision contains a clerical error in awarding claimant compensation for temporary total disability from October 29, 1998, to June 6, 2000. Accordingly, we modify the administrative law judge=s Decision and Order to award claimant temporary total disability benefits from October 29, 1999, to June 6, 2000, to correct this apparent clerical error. *See generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff=d*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*).

Finally, appended to his response brief, claimant=s counsel filed a fee petition to the Board in which he requests a fee of $1,703.50, representing 7.5 hours of attorney time at an hourly rate of $225, and .25 of an hour of paralegal services at the hourly rates of $64. By Order dated April 22, 2002, the Board denied the fee request as premature. Claimant is entitled to an attorney=s fee payable by Callville for successfully defending against its appeal. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). It is not inappropriate for claimant=s attorney to file a fee petition during the pendency of the appeal, or for the Board to award an attorney=s fee at the same time it addresses the parties= substantive contentions. *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980); *see*, *e.g.*, *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff=d*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Nonetheless, we afford Callville 10 days from receipt of this decision in which it may file any objections to counsel=s fee petition. *See* 20 C.F.R. ''802.203(g), 802.219(e).

Accordingly, the administrative law judge=s Decision and Order and Order on Employer=s Petition for Modification are affirmed. The decisions are modified to reflect that claimant=s entitlement to total disability benefits commences on October 29, 1999. Callville may file a response to claimant=s fee petition within 10 days of its receipt of this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge