BRB No. 06-0821

MARY PELAEZ (Widow of PAUL PELAEZ) Claimant-Respondent v. LEVINGSTON SHIPBUILDING COMPANY and TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION Employer/Carrier-Petitioner GULF COPPER & MANUFACTURING CORPORATION Self-Insured Employer-Respondent	)	DATE ISSUED: 06/25/2007 DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

C. Douglas Wheat and Gus David Oppermann V (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for employer/carrier.

John R. Walker (Hays, McConn, Rice & Pickering), Houston, Texas for Gulf Copper & Manufacturing Corporation.

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

PER CURIAM:

Levingston Shipbuilding Company (Levingston, employer), and its carrier, the Texas Property and Casualty Insurance Guaranty Association (TGA),[1] appeal the Decision and Order (2004-LHC-2751) of Administrative Law Judge C. Richard Avery awarding benefits 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).

Paul Pelaez (decedent) worked for Levingston as a ship fitter between 1963 and 1974, and thereafter for several different contractors, including CA Turner and Echo Construction, primarily as a pipe fitter, during which time he was allegedly exposed to asbestos products. He subsequently died of an asbestos-related lung disease on July 3, 2002, prompting claimant, decedent's widow, to file a claim for benefits against Levingston pursuant to Section 9 of the Act, 33 U.S.C. §909. Levingston impleaded Gulf Copper & Manufacturing Corporation (Gulf Copper), alleging that decedent's last covered exposure to asbestos occurred during his 1981 employment with that entity.

In his decision, the administrative law judge initially concluded that decedent's disease and death arose from his work-related asbestos exposure, as he found that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer "has not attempted to rebut this presumption." Decision and Order at 10. He then found that decedent's last exposure to asbestos occurred during his work for employer, and thus concluded that it is liable for claimant's benefits under Section 9(a) of the Act. The administrative law judge also held employer liable for an additional 10 percent assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, employer challenges the administrative law judge's findings that it is the responsible employer and that it is liable for a Section 14(e) assessment. Claimant and Gulf Copper respond, urging affirmance.

---

[1] TGA is a state-created insurer designed to protect claimants from financial loss caused by the insolvency of an original, covered insurer. In this case, employer's original insurer was Texas Employers Insurance Association, which was placed in receivership, liquated and ceased to exist. Employer also filed for bankruptcy and has likewise ceased to exist. CX 18 at 4.

Employer initially argues that the administrative law judge improperly placed the burden on it to establish that it is not the responsible employer since the record establishes that Gulf Copper was the last covered employer. Employer maintains that, in contrast to the administrative law judge's finding, substantial evidence establishes that decedent worked for, and was exposed to, asbestos during his work for Gulf Copper. Consequently, employer argues that Gulf Copper is liable for any compensation owed in this case.

Once, as here, the death is found to be work-related, the employers in the case must establish which of them is liable for benefits. 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. *Avondale Industries, Inc. v. Director, OWCP* [*Cuevas*], 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). Claimant does not bear the burden of proving the responsible employer; rather, each employer bears the burden of establishing it is not the responsible employer. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT). 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. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT). In *McAllister v. Lockheed Shipbuilding*, ____ BRBS ____, BRB No. 06-0646, (Apr. 26, 2007), the Board clarified the burden and standard of proof borne by each employer in resolving the responsible employer issue. The Board held that "each potentially liable employer bears the burden of persuading the administrative law judge [by a preponderance of the evidence] that it is not liable." *McAllister*, slip op. at 9. The Board further observed that "[t]his burden is not sequential; it is simultaneous." *Id.* Consequently, the Board held that the administrative law judge must weigh all relevant evidence and "decide which employer 'more likely than not' last exposed decedent to injurious amounts of asbestos," such that "that employer will be held liable for claimant's benefits." *Id.* In light of *McAllister*, we reject employer's assertion that the administrative law judge erred by not placing the initial burden of persuasion regarding the responsible employer issue on Gulf Copper merely because it was the last covered employer for which decedent worked. Rather, we hold that the administrative law judge properly weighed all of the relevant evidence in order to determine which employer "more likely than not" last exposed decedent to injurious amounts of asbestos.

In this case, the administrative law judge determined that while the record established that claimant worked for Gulf Copper for a brief period in 1981,[2] there is no evidence that decedent was exposed to asbestos in that employment. In this regard, the administrative law judge concluded, based on the testimony of a corporate representative for Gulf Copper, John Haughton, that "it would be mere speculation to try and assert that [decedent] was exposed to asbestos, when it is not clear where he even worked." Decision and Order at 12. Specifically, the administrative law judge relied on Mr. Haughton's statements that the only Gulf Copper facility in existence at the time of decedent's employment in 1981 was its Port Arthur headquarters which, to the best of his knowledge, did not contain any asbestos-related products. EX 13 at 10, 41-42. Additionally, the administrative law judge found that while Mr. Haughton testified that Gulf Copper was, at the time of decedent's employment, doing ship repair work at other facilities, ports or onboard ships, there is no evidence to establish that decedent worked at any of these other facilities.[3] Moreover, the administrative law judge found that there is "no evidence of asbestos being present at any of [Gulf Copper's] offsite locations." *Id.* As the administrative law judge rationally found that there is no evidence that decedent was exposed to asbestos during his employment with Gulf Copper, we reject employer's contention that Gulf Copper is the responsible employer in this case. *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT); *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT). As the administrative law judge applied the appropriate standard in addressing the responsible employer issue, *see McAllister*, slip op. at 8-10, and as his finding that employer is the last covered employer to expose the decedent to asbestos is supported by substantial evidence, it is affirmed.[4] Accordingly, we affirm the administrative law judge's conclusion that employer is the employer responsible for claimant's benefits in this case as it is rational, is in accordance with law, and is supported by substantial evidence. *Id.*

Employer also argues that TGA cannot be liable for a Section 14(e) assessment in this case as the statutory language of the Texas Property and Casualty Insurance Guaranty Act (TPCIGA), *see* Tex. Ins. Code Ann. Art. 21.28-C (2005), provides it with

[2] The record indicates that claimant worked approximately three weeks for Gulf Copper in 1981. EX 3.

[3] Specifically, Mr. Haughton stated that he was aware that decedent "was a pipe fitter," but that he did "not know if it was related to marine work or non-marine work." EX 13 at 26.

[4] Employer does not dispute the fact that decedent was exposed to asbestos while in its employ.

an exemption from any Section 14(e) assessment under the Act.[5] TGA maintains that the relevant TPCIGA clause, *i.e.*, Tex. Ins. Code Ann. Art. 21.28-C, §8(a), is akin to the Florida Insurance Guaranty Act (FIGA) clause interpreted by the Board in *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992), such that the Board should hold that TGA is exempt from the Section 14(e) assessment which the administrative law judge awarded claimant in this case. In pertinent part, Section 8(a) of the Texas statute provides:

> The association shall pay covered claims that exist before the designation of impairment or that arise within 30 days after the date of the designation of impairment, before the policy expiration date if the policy expiration date is within 30 days after the date of the designation of impairment, or before the insured replaces the policy or causes its cancellation if the insured does so within 30 days after the date of the designation. The obligation is satisfied by paying to the claimant the full amount of a covered claim for benefits. The association's liability is limited to the payment of covered claims. *The association has no liability for any other claim or damages, including claims for recovery of attorney's fees, prejudgment or post judgment interest, or penalties,* extra contractual damages, multiple damages, or exemplary damages, or any other amount sought by or on behalf of any insured or claimant or any other provider of goods or services retained by any insured or claimant in connection with the assertion or prosecution of any claims, without regard to whether the claims are covered, against the insured or an impaired insurer, the impaired insurer, the guaranty association, the receiver, the special deputy receiver, the commissioner, or the liquidator. *This subsection does not exclude the payment of workers' compensation benefits or other liabilities or penalties authorized by Title 5, Labor Code, arising from the association's processing and payment of workers' compensation benefits after the designation of impairment.*

Tex. Ins. Code Ann. Art., §8(a) (2005) (emphasis added).

Employer's contentions lack merit as the instant case is factually distinguished from *Canty*, 26 BRBS 147. In this regard, the language of the Florida and Texas

[5] Employer's contention regarding the (in)applicability of Section 14(e) was not raised below. Nevertheless, because the assessment of additional compensation under Section 14(e) is mandatory, it may be raised at any time. *McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981); *Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981); *Johnson v. C & P Telephone*, 13 BRBS 492 (1981).

provisions are not on par. The provision of the Florida statute, Fla. Stat. Ann. § 631.57(1)(b) (West 1992), at issue in *Canty* provides, upon the insolvency of a covered insurer:

> (1) The association shall: (b) Be deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. *In no event shall the association be liable for any penalties or interest*.

Canty, 26 BRBS at 152, citing Fla. Stat. Ann. § 631.57(1)(b) (West 1992) (emphasis added). The TPCIGA, however, as noted above, "does not exclude the payment of workers' compensation benefits or other liability or penalties," Tex. Ins. Code Ann. Art., §8(a), and requires that the TGA "pay the full amount of any covered claim arising out of a workers' compensation policy." Tex. Ins. Code Ann. Art., §5(8) (2005). As the language of the two statutes differs, *Canty* does not dictate the result employer seeks. It cannot be disputed that benefits paid pursuant to the Longshore Act are workers' compensation benefits, *see* 33 U.S.C. §901; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), such that the Section 14(e) assessment is not precluded by any provision of the TPCIGA. *See* Tex. Ins. Code Ann. Art. 21.28-C. Consequently, we reject employer's assertion that the TPCIGA exempts TGA from liability from the Section 14(e) assessment imposed by the administrative law judge in this case. We therefore affirm the administrative law judge's imposition of a Section 14(e) assessment in this case.[6]

---

[6] In the instant case, the administrative law judge found employer liable for a Section 14(e) assessment because it did not file its notice of controversion within 14 days of receiving knowledge of decedent's death. Specifically, the administrative law judge found, based on the parties' stipulations, that claimant gave notice to employer of decedent's death on June 10, 2003, and that employer did not file its notice of controversion until July 7, 2003. Moreover, employer did not institute timely payment of benefits back to the date of death. Inasmuch as employer has not challenged the merits of the administrative law judge's finding that claimant is entitled to a Section 14(e) assessment, it is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge