BRB Nos. 91-1713
and 91-1713A

DONALD E. HUTCHINS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: _____
	)	
Employer/Carrier-Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision and Order on Motion for Clarification and Petition for Reconsideration of George G. Pierce, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Bath Iron Works Corporation and Birmingham Fire Insurance Company.

Allan M. Muir (Richardson & Troubh), Portland, Maine, for Bath Iron Works and Commercial Union Insurance Companies.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals and employer and Birmingham Fire Insurance Company (Birmingham Fire) cross-appeal the Decision and Order Awarding Benefits and Decision and Order on Motion for Clarification (90-LHC-350) of Administrative Law Judge George G. Pierce on a claim filed for medical benefits pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In 1977 claimant began working as a pipefitter for employer, Bath Iron Works Corporation (Bath Iron), where he worked on ship conversions. Claimant stated that while working as a pipefitter, he often had to work in confined areas with little ventilation and large quantities of asbestos dust. In 1985, claimant was transferred to employer's pipe shop, where he was no longer exposed to asbestos, but exposed to a number of cleaning solvents, including oakhite and dynodec which allegedly caused him to experience lung irritation and breathing difficulties. In July 1988, claimant transferred into employer's planning department because he was experiencing breathing problems in the pipe shop, and he is currently employed there as a senior planner. Claimant sought medical benefits under the Act for the treatment and monitoring of his work-related pulmonary disease. *See* 33 U.S.C. §907. [1]

Bath Iron has been insured by several companies since claimant began working for employer. The parties stipulated that Commercial Union Insurance Companies (Commercial Union) provided coverage for employer from January 1, 1963 until February 28, 1981, Liberty Mutual Insurance Company (Liberty Mutual) provided coverage from March 1, 1981 to August 31, 1986, and Birmingham Fire Insurance Company provided insurance from September 1, 1986 until August 31, 1988. On September 1, 1988, Bath Iron became self-insured.

In his Decision and Order Awarding Benefits, the administrative law judge determined that, as claimant was last exposed to injurious stimulus in the form of cleaning solvent fumes after

[1]There is no disability claim pending in this case.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Birmingham Fire assumed coverage, Birmingham Fire is the carrier responsible for the payment of claimant's medical bills. A petition for clarification was filed by claimant, and Birmingham Fire filed a petition for reconsideration. On June 3, 1991, the administrative law judge issued a Decision and Order on Motion for Clarification and Petition for Reconsideration in which he determined that claimant suffered two separate medical conditions caused by separate work exposures. The administrative law judge determined that as claimant was last exposed to asbestos in 1984, the year he worked on his last ship conversion, and in any event no later than August 31, 1986, Liberty Mutual was the carrier responsible for the medical expenses claimant incurred in the monitoring and treatment of his pleural plaques. The administrative law judge then found that as claimant was last exposed to injurious cleaning solvents during the period from 1985 until July 1988 when he worked in employer's pipeshop, Birmingham Fire was responsible for those medical expenses incurred in the monitoring and treatment of claimant's obstructive pulmonary disease.

Claimant appeals, contending that the administrative law judge's decisions appear to improperly limit his medical benefits to only that portion of his pulmonary disease which is clearly work-related. Claimant also contends that the administrative law judge erred in apportioning responsibility for his medical benefits between the two different insurance carriers. Birmingham Fire responds that the administrative law judge did hold employer responsible for all claimant's pulmonary problems, not just his work-related ones, and that claimant lacks standing to assert his apportionment argument on behalf of Liberty Mutual. In the alternative, Birmingham Fire contends that inasmuch as the administrative law judge determined that claimant suffered two distinct injuries, he properly ruled that the carrier on the risk at the time of each injury was responsible for the medical treatment related to that injury. Birmingham Fire also filed a cross-appeal in which it argues that the administrative law judge erred in finding that claimant was entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption and that the record as a whole fails to establish that claimant's obstructive pulmonary disease is work-related.

Commercial Union responds to both appeals, contending that the administrative law judge properly applied the Section 20(a) presumption with regard to claimant's obstructive pulmonary condition, and that if only one carrier is to be deemed liable that carrier should be Liberty Mutual or a later carrier, inasmuch as there is ample evidence indicating that claimant was exposed to asbestos as late as 1984 and to other irritants capable of causing obstructive lung disease as late as 1988, subsequent to its period of coverage. Liberty Mutual has not responded to either appeal.

On appeal, claimant contends that he suffers from at least three pulmonary disorders, *i.e.*, an underlying severe obstructive lung disease, a small reversible component of that underlying severe obstructive lung disease, and pleural plaques. Claimant contends that he is entitled to medical benefits under the Act for all of these conditions. Claimant asserts, however, that in making the award of medical benefits, the administrative law judge improperly "separated out" his work-related lung conditions from his pulmonary disease in general.

In awarding medical benefits in the present case, the administrative law judge gave claimant the benefit of the Section 20(a) presumption, and found that he was entitled to medical benefits for

the monitoring and treatment of his pleural plaques and obstructive pulmonary disease. Although it is not clear to us that the administrative law judge did in fact "separate out" claimant's work-related pulmonary disease from his pulmonary disease in general, claimant correctly asserts that he is entitled to medical benefits for his entire lung condition. It is well established that an employment injury need not be the sole cause of a disability; rather if the employment injury aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedores Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Northwest*, 22 BRBS 142 (1989). Accordingly, we modify the administrative law judge's Decision and Order and Decision and Order on Motion for Clarification and Petition for Reconsideration to clarify that pursuant to the "aggravation rule," claimant is entitled to medical benefits for his entire lung condition.

We also agree with claimant that the administrative law judge erred in apportioning liability for his medical expenses between Liberty Mutual and Birmingham Fire. Although Birmingham Fire asserts that claimant lacks standing to raise this argument, we disagree. Birmingham Fire correctly asserts that a claimant typically does not have any interest in the source of his payments. In the present case, however, the administrative law judge's apportionment scheme is likely to result in delay and confusion over which of the carriers is liable for claimant's medical bills. We hold that claimant does have standing to raise the apportionment issue on the facts presented, because he has a legitimate interest in seeing that his medical expenses are promptly paid. When enacting the Longshore Act, Congress rejected an apportionment provision that would have avoided imposition of total liability on the last employer, based upon a realization of these types of difficulties. Hearing on H.R. 9498, 69th Congress, 1st Sess. (April 8, 15, 22, 1926); *see also Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85, 93 (CRT) (1st Cir. 1992).

Birmingham Fire also asserts that responsibility for claimant's medical benefits may properly be apportioned on the facts presented because, as the administrative law judge determined, pleural plaques and obstructive pulmonary disease are separate and distinct conditions. We disagree. Such an apportionment scheme might be plausible where different parts of the body are injured and accordingly the party responsible for paying a particular medical bill could be readily identified, for example, where a claimant suffers from both asbestosis and an occupational hearing loss. In the present case, however, given that pleural plaques and obstructive pulmonary disease affect the same body part, *i.e.*, the lungs, the determination of which of the carriers is liable for any particular medical expense would be virtually impossible. The judicially-created "last injurious exposure" doctrine was developed in response to these type of administrative problems. It is well established that the employer or carrier during the last period of covered employment in which claimant was exposed to injurious stimuli prior to his awareness that he is suffering from an occupational disease is liable for all of the employee's benefits. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see also General Ship Service v. Director, OWCP*, 938 F.2d 960 , 25 BRBS 22 (CRT)(9th Cir. 1991).

As the administrative law judge's apportionment of liability for claimant's medical benefits in this case violates the well-established principles for employer and carrier liability set forth in

Cardillo and *Liberty Mutual*, we reverse this finding. In the present case inasmuch as Birmingham Fire was the carrier on the risk when claimant was last exposed to chemical solvents which could have contributed or aggravated his lung problems, see discussion *infra*, we hold that Birmingham Fire is the responsible carrier solely liable for claimant's medical benefits on the facts presented as a matter of law.

In its cross-appeal, Birmingham Fire challenges the administrative law judge's finding that claimant's obstructive pulmonary disease is causally-related to his employment. In establishing that an injury arises out of his employment, a claimant is aided by the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated that condition. *See Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2nd Cir. 1989).

Birmingham Fire initially asserts that the administrative law judge erred in invoking the Section 20(a) presumption because claimant failed to establish that he sustained any harm while Birmingham Fire was on the risk. Birmingham Fire asserts that the harm element of Section 20(a) was not established inasmuch as the subjective onset of claimant's complaints of shortness of breath and chest pain occurred prior to the time that it assumed coverage, claimant did not exhibit any pattern which correlated his respiratory symptoms with his work exposure,[2] and claimant failed to introduce any objective evidence which indicated that his obstructive lung condition worsened while Birmingham Fire was on the risk. We disagree. The administrative law judge properly determined that claimant established the injury or harm element of his *prima facie* case inasmuch as claimant alleged that he suffered chest pain and severe shortness of breath, Dr. Altman specifically related claimant's symptoms to obstructive lung disease and chronic bronchitis, and claimant's x-rays revealed the presence of pleural plaques. Moreover, to the extent that Birmingham Fire is making this causation argument in an attempt to escape carrier liability, the Board has previously recognized that it is irrelevant that claimant's disease may have pre-existed the time that the potentially liable carrier assumed coverage and that a distinct aggravation of an injury need not occur for an employer or carrier to be held liable as the responsible employer or carrier under the last injurious exposure rule established in *Cardillo*; exposure to potentially injurious stimuli is all that is required. *Good v. Ingalls Shipbuilding Co.*, 26 BRBS 159, 163 n.2 (1992). *See also Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989); *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986).

Birmingham Fire's assertion that claimant failed to establish the requisite working conditions

[2]We note that Dr. Altman attempted to explain this phenomenon. He testified that after years of harmful exposure the pulmonary disease becomes fixed, and even when you take the person away from the noxious substance, the disease does not regress.

necessary to invoke the Section 20(a) presumption similarly must fail. Although Birmingham Fire avers that no evidence was introduced sufficient to establish that claimant's exposure to either oakhite or dynodec was competent to produce his respiratory problems, we disagree. While Birmingham Fire correctly asserts that the medical evidence in the record is inconclusive as to what definitely caused claimant's obstructive pulmonary disease, there is evidence in the record which does establish that exposure to cleaning solvents may have contributed to his injury. In his May 19, 1988, report, Dr. Altman notes that the slowly progressive infiltrates and drop in claimant's DLCO pulmonary function test probably are not sufficient to explain all of claimant's pulmonary symptoms and that he exhibited evidence of progressive interstitial disease which could be due to his past history of significant asbestos exposure. Dr. Altman, however, also noted that damage from inhalation of other toxic substances while at work could not be ruled out. Dr. Altman told claimant that he could not be sure that this interstitial pattern was being caused by any recent exposure at the plant, but noted that by history, claimant did appear to be bothered by his exposures at work. Claimant's Exhibit 11; Employer's Exhibit 10. Moreover, on deposition, Dr. Altman testified that there were a number of irritants that could have caused claimant's problems, that he tried to use claimant's history as a major determinant, and that he thought oakhite and dynodec were major irritants. Claimant's Exhibit 18 at 10. Dr. Altman also noted that on November 8, 1989, claimant described himself as having improved over the past year and that he attributed this improvement to his no longer being exposed to noxious products at work. *Id.* at 29. Inasmuch as the medical opinion of Dr. Altman indicates that claimant's exposure to chemical solvents may have caused, contributed to, or aggravated his lung condition, we reject employer's assertion that working conditions sufficient for invocation of Section 20(a) were not established. As claimant established the existence of working conditions which could have caused his obstructive lung condition, the administrative law judge's determination that claimant succeeded in establishing a *prima facie* case under Section 20(a) is affirmed. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 54 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). In the present case, although the administrative law judge erred in failing to evaluate the evidence of record in terms of Section 20(a) rebuttal, we conclude that on the facts presented this error is harmless; there is no evidence in the record sufficient to rebut the presumed causal connection afforded to claimant pursuant to Section 20(a). Although Birmingham Fire suggests otherwise, Dr. Altman's opinion cannot properly support a finding of rebuttal because he recognized that exposure to toxic inhalants could have caused or aggravated claimant's respiratory problems. Claimant's Exhibit 12; Employer's Exhibit 10. *See Caudill v. Sea Tac Alaska Shipbuilding,* 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP,* No. 91-70743 (9th Cir. Sept. 17, 1993). Inasmuch as employer did not introduce any evidence sufficient to establish that claimant's pulmonary condition was not caused or aggravated by his working conditions, we affirm the administrative law judge's finding

that causation was established based on application of the Section 20(a) presumption. As rebuttal was not established, Birmingham Fire's final argument that the evidence as a whole fails to establish that claimant's obstructive lung disease arose out of and the course of his employment need not be addressed.

Accordingly, the administration law judge's Decision and Order Awarding Benefits and Decision and Order on Motion for Clarification and Petition for Reconsideration are modified to clarify that claimant is entitled to medical benefits for all of his pulmonary conditions. The administrative law judge's determination that Liberty Mutual is responsible for medical expenses associated with the treatment and monitoring of claimant's pleural plaques contained in the Decision and Order on Motion for Clarification and Petition for
Reconsideration is reversed, and the decision is modified to hold Birmingham Fire liable for all of claimant's medical benefits for his pulmonary conditions. In all other respects, the Decision and Order Awarding Benefits and the Decision and Order on Motion for Clarification and Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge