BRB No. 91-1107

GEORGE GULA (Widower of DOROTHY GULA) Claimant v. KAISER COMPANY and TRANSAMERICA INSURANCE COMPANY Employer/Carrier-Petitioners and THE NOETIC GROUP AND E. J. BARTELLS COMPANY and SAFECO INSURANCE COMPANY Employer/Carrier-Respondents and WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Margaret H. Leek Leiberan (Leiberan & Gazeley) and Schuyler T. Wallace (Wallace & Klor), Portland, Oregon, for Kaiser Company and Transamerica Insurance Company.
John Dudrey (Williams, Fredrickson, Stark & Weisensee, P.C.), Portland, Oregon, for E.J.

Bartells Company.

Janet C. Knapp and Ronald W. Atwood (Williams, Zografos, Peck & Atwood, P.C.), Salem, Oregon, for Safeco Insurance Company.

John R. Wasberg (Office of the Attorney General of Washington), Seattle, Washington, for Washington Department of Labor and Industries.

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

PER CURIAM:

Transamerica Insurance Company (Transamerica) appeals the Decision and Order Awarding Benefits (89-LHC-375) of Administrative Law Judge Steven E. Halpern 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 findings of fact and conclusions of law of the administrative law judge if they 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).

Decedent was exposed to asbestos while working as an insulator on ships under construction at Kaiser's shipyard in the 1940's. She died due to mesothelioma on February 13, 1988. E.J. Bartells Company (Bartells) and Northwest Insulating Company (Northwest) had subcontracts with Kaiser to install insulation on ships, and decedent's Social Security records show she earned $216.65 from Bartells and $115.14 from Northwest in the first quarter of 1945. Bartells' personnel records show that decedent was laid off on February 6, 1945. She apparently returned to work, and worked through March 1945, when she voluntarily stopped working. Decedent deposed that Bartells was her only employer at the shipyards, and that in the first quarter of 1945 she performed the same work with the same co-workers. Henry Martin, the only living former co-owner of Northwest, testified that Northwest was founded at Henry Kaiser's prompting to compete with Bartells for insulation subcontracts and to replace Bartells. Mr. Martin testified that after entering into a subcontract with Kaiser, Northwest took over operations from Bartells, using Bartells' employees and materials. Mr. Martin also testified that the former Bartells' employees continued doing the same work for Northwest, and that conditions at the shipyard did not change at all with the substitution of employers. James Amis, the president and general manager of Bartells from 1944 through 1964, deposed that Bartells subcontracted with Kaiser throughout 1944 and the first half of 1945.

Based on the testimony of Mr. Martin, Mr. Amis and decedent, and on decedent's Social Security records, the administrative law judge found that Northwest succeeded Bartells as Kaiser's subcontractor in the first quarter of 1945. The administrative law judge found that Bartells' records indicating decedent was laid off on February 6, 1945, combined with decedent's testimony that she worked through March 1945 and only for Bartells performing the same work with the same co-

workers is consistent with Mr. Martin's testimony that Northwest succeeded Bartells with the working conditions unchanged. The administrative law judge concluded that "it is more probable than not that Northwest was decedent's last shipyard employer." Decision and Order at 4. The administrative law judge further found that the evidence does not establish that Northwest secured insurance under the Longshore Act and therefore found that Kaiser, as the general contractor, and its insurer, Transamerica,[1] are liable for benefits pursuant to Section 4 of the Act, 33 U.S.C. §904, which provides that the general contractor is liable for benefits if the subcontractor fails to secure the payment of compensation. The administrative law judge ordered Transamerica to pay claimant, on behalf of decedent, permanent total disability benefits from March 26, 1987 through February 13, 1988, and to pay death benefits to claimant commencing February 14, 1988, and funeral expenses.[2] 33 U.S.C. §§908(a), 909.

On appeal, Transamerica contends that Bartells, not Northwest, is decedent's last employer, and that Bartells and its carrier, Safeco, are therefore liable for benefits. In the alternative, Transamerica contends that if Northwest is the last employer, then the Washington Department of Labor and Industries (WDLI) is the responsible carrier. Bartells, Safeco, and WDLI respond, urging affirmance of the administrative law judge's decision.

On appeal, Transamerica first challenges the administrative law judge's finding that Northwest is the responsible employer. Transamerica suggests that decedent worked part-time for both Bartells and Northwest in the first quarter of 1945 because, if she worked full-time five days a week, from January 1 to February 6, 1945, at the hourly rate of $1.515, the combined total of the paychecks from Bartells and Northwest ($327.24) approximate the earnings reflected in the Social Security records ($331.79). Transamerica contends it is logical to conclude decedent worked full-time and somehow divided her time during this period between Bartells and Northwest, last working for Bartells on February 6, 1945, when Bartells' records show she was laid off.

The responsible employer is the employer during the last covered employment in which the employee was exposed to injurious stimuli, prior to the date upon which the employee became aware of the fact that she was suffering from an occupational disease arising naturally out of his employment. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). The responsible carrier is the carrier who insured the responsible employer at this time. *Id.*

In *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit addressed a case in which the decedent was exposed to asbestos while employed by two different maritime employers during the last quarter of 1944, the last year of decedent's exposure to asbestos while working in the shipyards. The evidence did not indicate for which employer decedent worked last. The court held that where

[1]Transamerica is the successor to Kaiser's 1945 longshore carrier.

[2]The parties stipulated to claimant's entitlement to benefits and to the applicable average weekly wage.

it was unclear for which of the covered employers decedent last worked, the purposes of the Longshore Act are best served by assigning liability to the employer who is claimed against. *Id.*, 938 F.2d at 962, 25 BRBS at 25 (CRT). Similarly, there also was an issue as to the identity of the responsible carrier, as there was a gap in coverage documentation for the period of October 1 to December 31, 1944. The court noted that "the paper trail in this case, as in many asbestos cases, is incomplete due to the passage of time," and that administrative law judges must draw reasonable inferences based on the evidence before them. *Id.*, 938 F.2d at 962, 25 BRBS at 25-26 (CRT). The court found that the administrative law judge's inference that the carrier who had covered employer in August 1944, May 1945 and September 1945 was the liable carrier was reasonable especially where the carrier in question had presented no evidence to the contrary. *Id.*

In this case, although both Bartells and Northwest are joined to the claim, the evidence is inconclusive as to the time periods decedent worked for Bartells and Northwest. The administrative law judge rejected Transamerica's contention that decedent worked simultaneously for Bartells and Northwest finding that decedent did not state that she always worked full-time, and while she thought she worked five days a week, she did not indicate that she always worked eight hours per day or that she did not take any time off. The administrative law judge found that an unpaid period of illness or vacation between January 1 and February 6, 1945, would not be inconsistent with her testimony or Bartells' personnel records, which show her employed through February 6. The administrative law judge also found that Transamerica's contention conflicts with the weight of the other evidence such as Mr. Martin's testimony that Northwest was created to compete with Bartells and to take over the subcontract from Bartells. Decision and Order at 5.

We hold that the administrative law judge rationally determined that Northwest was decedent's last employer based on logical inferences from the evidence of record. The administrative law judge credited decedent's testimony that she voluntarily terminated her employment at the shipyards in March 1945, and that the nature of her work remained the same to the end. The administrative law judge rationally explained that Mr. Martin's testimony that Northwest succeeded Bartells on the subcontract with Kaiser with the working conditions unchanged is consistent with decedent's testimony.[3] Further, the administrative law judge found that the wages decedent received in the first quarter of 1945, as reflected in the Social Security records, is consistent with his interpretation of decedent's and Mr. Martin's testimony. Additionally, Bartells' personnel records establish that decedent stopped working for Bartells on February 6, 1945, and, as noted by the administrative law judge, these records do not indicate that decedent returned to work

[3]Transamerica contends that the administrative law judge cannot rely on Mr. Martin's testimony to support the inference that Northwest began using Bartells' employees in early 1945, because Mr. Martin testified that Northwest obtained its first subcontract with Kaiser in the fall of 1944 and the company disbanded in August of 1945. The only Northwest subcontract in evidence is dated in March 1945, and Mr. Amis testified that Bartells worked for Kaiser through the first half of 1945. The administrative law judge acknowledged these conflicts in the record, and reasonably concluded that Bartells and Northwest worked simultaneously on separate Kaiser subcontracts in the first quarter of 1945.

for Bartells after that date. The administrative law judge's findings overall present a consistent and logical interpretation of the evidence in the absence of determinative proof that decedent last worked for one or the other employer. *General Ship Service*, 938 F.2d at 962, 25 BRBS at 26 (CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's finding that Northwest is the last responsible employer.

In challenging the administrative law judge's finding that Transamerica is the responsible carrier, Transamerica contends, as it did below, that the following establishes that WDLI provided Longshore coverage to Northwest: 1) the February 17, 1942, letter from Robert Harlin, then the Director of WDLI, stating that provisions of state law apply to all employment incidental to the construction of a new ship; 2) Kaiser's February 21, 1942, letter, in response to the February 17 letter, stating that if state workers' compensation is provided by WDLI, it will not be necessary for them to insure under the Longshore Act (or Jones Act) and that Kaiser hoped that WDLI would be able to provide coverage; 3) Kaiser's subcontract with Northwest dated March 21, 1945, stating that "subcontractor shall carry Workmen's Compensation Insurance with the Department of Labor and Industries of the State of Washington for any work performed hereunder in the State of Washington;" and 4) the "Insurance Instructions" for the United States Maritime Commission stating that insurance is required for workers' compensation including longshore coverage. Kaiser Exs. 2 at 4; 3 at 41. Through a series of inferences, Transamerica contends that Northwest could not have received a subcontract without providing proof to the Maritime Commission that it had longshore coverage, and that WDLI provided such coverage as evidenced by the 1942 and 1945 correspondence referenced above. Transamerica also alleges that Mr. Martin's and Mr. Amis' testimony establish that Northwest was covered by WDLI for longshore claims. Finally, Transamerica contends that WDLI met the requirements of Section 32(a)(1) of the Act, 33 U.S.C. §932(a)(1), and was authorized to and provided longshore coverage.[4]

[4]Section 932(a)(1) provides:

(a) Every employer shall secure the payment of compensation under this chapter--

> (1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; ....

33 U.S.C. §932(a)(1)(1988). Prior to 1946, subpart B provided that authorization needed to be obtained by the United States Employees' Compensation Commission.

The administrative law judge considered Transamerica's contentions at length, and found that none of the evidence cited by Transamerica actually establishes that Northwest had longshore coverage through WDLI or any other source. Mr. Martin specifically stated that the details of insurance were left to his partner, and Mr. Amis generally stated that employer's subcontractors were required to have longshore coverage. The February 17 and February 21, 1942 letters, the March 21, 1945 subcontract, and the Maritime Commission's instructions make no statement as to who, if anyone, covered Northwest. The administrative law judge found that the references to coverage in these documents are vague and general.[5]

Moreover, the administrative law judge specifically found that while there is no provision of state law that prohibited WDLI from providing Longshore Act insurance, WDLI would have had no reason to insure new ship construction workers under the Longshore Act since it had concluded that the state act applied.[6] Decision and Order at 7. He found this inference to be particularly apt since the State of Washington had always disavowed workers' compensation jurisdiction over any worker who had a remedy under the federal maritime law. The administrative law judge found, in fact, that the evidence does not establish that WDLI provided federal longshore insurance coverage to any shipbuilding employers in the 1940's. The administrative law judge also found that there is no evidence in the record showing that the Employees' Compensation Commission approved WDLI as Northwest's insurer under the Longshore Act, and therefore Section 32(a)(1) is not applicable. The administrative law judge concluded that Northwest did not secure payment of compensation under the Longshore Act through WDLI, and as there is no other evidence of longshore coverage, Kaiser and Transamerica are liable for benefits pursuant to Section 4 of the Act.

We affirm the administrative law judge's finding that WDLI did not provide Longshore Act coverage for Northwest, and that the evidence of record is insufficient to establish that Northwest had any longshore coverage at all, as he considered Transamerica's arguments at length and his findings are rational and in accordance with law. *See General Ship Service*, 938 F.2d at 962, 25

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[5]Indeed, the administrative law judge found that there is no evidence that Kaiser itself had longshore coverage through WDLI or that it discontinued its private longshore insurance, and that Bartells had its longshore coverage with a private carrier.

[6]Prior to the 1972 Amendments, the sole coverage requirement was contained in Section 3(a), 33 U.S.C. §903(a) (1970) (amended 1972 and 1984), which provided:

> Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability of death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if the recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law....

Prior to the decision of the Supreme Court in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), which overruled the distinction between new ship construction and ship repair, courts had held that employees engaged in new ship construction, even if injured on navigable waters, were not entitled to coverage under the Longshore Act because they had a remedy under state law. *See generally Grant Smith-Park Ship Co. v. Rohde*, 257 U.S. 469 (1922); *Travelers Ins. Co. v. Calbeck*, 293 F.2d 52 (5th Cir. 1961), *rev'd*, 370 U.S. 114 (1962); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1990).

BRBS at 25-26 (CRT). As the administrative law judge found, WDLI had no reason to insure employers for injuries subject to the Longshore Act given that there is no concurrent jurisdiction under the Longshore Act and Washington law as state law denies coverage under the state act to workers entitled to benefits under the Longshore Act. *See Davis v. Dept. of Labor and Industries*, 317 U.S. 249 (1942); *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1995). Moreover, as the administrative law judge rationally found that Transamerica's inferences are not supportable by the record and that no other evidence of record establishes that Northwest secured compensation under the Longshore Act, we affirm the finding that Kaiser and Transamerica are liable for benefits pursuant to Section 4 of the Act. *See generally Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1990); *Meagher v. B.S. Costello, Inc.*, 20 BRBS 151 (1987), *aff'd*, 867 F.2d 722, 22 BRBS 24 (CRT) (1st Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge