

BRB No. 06-0252

ANN INCITTI	)	
(Widow of ANTHONY INCITTI)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	DATE ISSUED: 11/30/2006
CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Paul H. Teitler,  
Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New  
Jersey, for claimant.

Francis M. Womack (Field, Womack & Kawczynski), South Amboy, New  
Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2004-LHC-01584)  
of Administrative Law Judge Paul H. Teitler 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).

Decedent began working on the waterfront in 1964 or 1965 as a cargo checker. Tr. at 11. Decedent last worked on June 4, 2000, when he experienced shortness of breath. On August 22, 2000, decedent underwent a pulmonary function test after which Dr. Lipper diagnosed him with a severe restrictive lung defect. CX 12. Decedent's patient history references a significant smoking history, as well as significant exposure to asbestos for fifteen years. CX 13. Decedent died on December 14, 2001. CX 17. The death certificate lists his cause of death as respiratory failure due to interstitial pulmonary disease as a consequence of idiopathic fibrosis. CX 5, Part I. Thereafter, claimant, decedent's widow, filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's bilateral interstitial fibrotic disease of the lungs and death were causally related to his occupational asbestos exposure. CX 2; Tr. at 7.

The administrative law judge found that claimant invoked the Section 20(a) presumption that decedent's death was causally related to his asbestos exposure at work. 33 U.S.C. §920(a). Finding that employer did not establish rebuttal of the presumption, the administrative law judge found that decedent's death was work-related and awarded claimant death benefits.

On appeal, employer contends that the administrative law judge erred in awarding benefits, because he improperly invoked the Section 20(a) presumption without first determining if claimant established that decedent was, in fact, exposed to asbestos. In this regard, employer contends that the administrative law judge applied an improper legal standard and did not comply with the requirements of the Administrative Procedure Act (APA) by stating the evidence on which he relied to invoke the Section 20(a) presumption. Claimant responds, urging affirmance of the administrative law judge's decision.

In determining whether an injury or death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that the decedent sustained a harm and that conditions existed or that an accident occurred at the decedent's place of employment which could have caused the harm. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant establishes her *prima facie* case, Section 20(a) applies to relate decedent's death to his employment, and employer can rebut this presumption by producing substantial evidence that decedent's death was not related to his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If employer rebuts the presumption, it no longer controls and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with the claimant bearing the burden of persuasion.

*Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

With regard to the “working conditions” element of claimant’s *prima facie* case, the administrative law judge noted claimant’s claim that asbestos exposure contributed to her husband’s death. He stated that she introduced into evidence photographs from employer’s workplace warning of the presence of asbestos and the testimony of two witnesses concerning a white powder they observed. Decision and Order at 7. The administrative law judge did not assess the credibility of this evidence, as he found that employer did not rebut the existence of asbestos at its facility. In this regard, the administrative law judge stated that,

All the claimant has to do to initially receive the presumption is to make the subjective observation that conditions existed that could have caused the injury; the claimant does not have to prove it is asbestos unless the presumption falls out of the case.

*Id.* at 8.

We agree with employer that the administrative law judge applied an improper legal standard and that the case must be remanded for specific findings regarding the “working conditions” element of claimant’s *prima facie* case. Contrary to the administrative law judge’s statement, it is claimant’s burden to establish each element of her *prima facie* case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). The Section 20(a) presumption does not aid claimant in this regard. *Kelaita*, 13 BRBS 326. Thus, claimant bears the burden of persuasion on the issue of whether decedent actually was exposed to asbestos. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). Claimant’s mere allegation that decedent was exposed to asbestos does not afford her the benefit of the Section 20(a) presumption. *Martin v. Kaiser Co.*, 24 BRBS 112 (1990), *overruled on other grounds by McAllister*, 39 BRBS at 41.

As the administrative law judge discussed in his “Summary of the Evidence,” claimant submitted into the record evidence concerning her husband’s exposure to asbestos. Decision and Order at 3-6. This evidence includes: claimant’s testimony concerning her husband’s statements; the testimony of decedent’s son concerning “whitish” dust to which his father was exposed and his subsequent discovering that the buildings contained asbestos; the testimony of decedent’s co-worker, Salvatore Piro, that they were exposed to asbestos; and, a photograph of a sign stating “Danger: Asbestos” that was posted at employer’s facility. This evidence, if found credible by the

administrative law judge, may be sufficient to meet claimant's burden of establishing that decedent was exposed to asbestos. *See* 33 U.S.C. §923(a); *McAllister*, 39 BRBS 35; *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). The administrative law judge, however, did not assess the credibility of this evidence as he erroneously required employer to establish the absence of asbestos exposure.

Consequently, we vacate the administrative law judge's finding that claimant established the "working conditions" element of her *prima facie* case. We remand the case for the administrative law judge to reconsider this issue under the appropriate legal standard and to state the evidentiary basis for his findings. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). In accordance with the requirements of the APA, the administrative law judge must state on which evidence he relies and provide a rationale therefor. 5 U.S.C. §557(c)(3)(A); *Wensel v. Director, OWCP*, 888 F.2d 14 (3<sup>d</sup> Cir. 1989); *Cotter v. Harris*, 642 F.2d 700 (3<sup>d</sup> Cir. 1981); *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *modified in part on recon.*, 40 BRBS 1 (2005). If the administrative law judge finds on remand that claimant established that working conditions existed at employer's facility that could have caused decedent's respiratory illness and death, Section 20(a) applies to presume that decedent's death was due to those working conditions. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5<sup>th</sup> Cir. 2000). As employer does not challenge the administrative law judge's finding that Dr. Karetsky's opinion is insufficient to rebut the Section 20(a) presumption or allege that any other medical evidence is sufficient to establish rebuttal, we hold that decedent's condition is work-related as a matter of law in the event that the Section 20(a) presumption is invoked.<sup>1</sup> *Id.*

Accordingly, the Decision and Order-Awarding Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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<sup>1</sup> Dr. Karetsky did not state that decedent's pulmonary fibrosis was not related to asbestos exposure. He stated he could not come to any definite conclusion as to the cause of the fibrosis. EX 1 at 9, 14. Such an opinion is insufficient to rebut the Section 20(a) presumption. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1<sup>st</sup> Cir. 1997).

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge