

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 24-0316

DIANNA CARDWELL)
(Widow of ALLEN CARDWELL))
)
 Claimant-Respondent)
)
 v.)
)
ALBINA ENGINE & MACHINE WORKS)
)
 and)
)
EMPLOYERS INSURANCE COMPANY)
OF WAUSAU c/o LIBERTY MUTUAL)
INSURANCE COMPANY)
)
)
FMC CORPORATION)
)
 and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
)
NORTHWEST MARINE IRON WORKS)
)
 and)
)
ARGONAUT INSURANCE COMAPNY)
)
)
DILLINGHAM CORPORATION)
)

NOT-PUBLISHED

DATE ISSUED: 04/20/2026

and)
)
 ZENITH INSURANCE COMPANY)
)
 Employers/Carriers-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent)

DECISION and ORDER

Appeal of the Decision and Order and Order Granting Reconsideration in Part, and Denying Reconsideration in Part, Setting New Briefing Deadline of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton, John R. Wallace and Richard M. Grant (Brayton Purcell LLP), Novato, California, for Claimant.

Stephen E. Verotsky (SBH Legal), Portland, Oregon, for Albina Engine & Machine Works and Employers Insurance Company of Wausau c/o Liberty Mutual Insurance Company.

Christopher Boyd (Taylor, Day, Grimm & Boyd), Jacksonville, Florida, for FMC Corporation and Liberty Mutual Insurance Company.

Sarah B. Stewart and Judith A. Leichtnam (Thomas Quinn, LLP), San Francisco, California, for Northwest Marine Iron Works and Argonaut Insurance Company.

Robert E. Babcock (RBABCOCKLAW), Lake Oswego, Oregon, for Dillingham Corporation and Zenith Insurance Company.

Amanda Torres (Jonathan Berry Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and ULMER, Administrative Appeals Judges.

PER CURIAM:

Northwest Marine Iron Works and its carrier Argonaut Insurance Company (Employer) appeal Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order and subsequent Order Granting Reconsideration in Part, and Denying Reconsideration in Part, Setting New Briefing Deadline (2021-LHC-00664) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board must affirm the ALJ's Decision and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.¹ 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Decedent was an electrician who performed maintenance in shipyards and drydocks. He last worked for both Employer and Dillingham Corporation (Dillingham) in the first quarter of 1974.² Decision and Order (D&O) at 9; Claimant's Exhibit (CX) 2 at 11. Although both employers contested being the last responsible employer, the ALJ observed "nothing in the entire record" suggests which of the two employers actually employed Decedent last. D&O at 9. However, the ALJ addressed Dillingham first and determined it is not the last responsible employer because Claimant failed to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), linking Decedent's death to his work for Dillingham because the ALJ found nothing established Decedent's exposure to asbestos at

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent, Allen Cardwell, died in Oregon. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

² Claimant is the widow of Decedent, who died on September 7, 2026. CX 6. Decedent worked as an electrician for Albina Engine & Machine Works (Albina) in the third and fourth quarters of 1968 and FMC Corporation (Gunderson) in the fourth quarter of 1968 and the first quarter of 1969. D&O at 3-4; CX 2 at 6-7. Although the ALJ stated Decedent worked for Gunderson in "1989," this statement is a harmless scrivener's error as verified by Decedent's Social Security earnings report. D&O at 4; CX 2 at 7.

Dillingham.³ *Id.* at 11-17. In contrast, the ALJ determined Claimant invoked the Section 20(a) presumption linking Decedent's death to his asbestos exposure while working for Employer, and it rebutted the presumption with evidence that Decedent's death was not related to asbestos exposure. *Id.* at 17-19.

In weighing the evidence as a whole, the ALJ found Claimant established Decedent's death was related to his work for Employer by a preponderance of the evidence. *Id.* at 19-20. Therefore, he found Employer is the last responsible employer and awarded Claimant death benefits. On Employer's motion for reconsideration, the ALJ rejected its argument that he erred in finding Claimant invoked the Section 20(a) presumption.⁴ Order Granting Recons. in Part, and Denying Recons. in Part, Setting New Br. Deadline (Order) at 2. *Id.* at 3; Employer's Exhibit (EX) 6 at 94.

On appeal, Employer contends the ALJ did not correctly interpret the evidence of Decedent's asbestos exposure, asserting the evidence establishes Dillingham is the last responsible employer. Claimant, Albina Engine & Machine Works (Albina), FMC Corporation (Gunderson), Dillingham, and their respective carriers respond, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging affirmance of only the ALJ's Order Denying Claim for Section 8(f) Relief.⁵ Therefore, the sole question raised on appeal is whether the ALJ correctly

³ In considering Dillingham's arguments, the ALJ found Claimant's claim against Dillingham was timely filed. D&O at 10-11. We affirm this finding as unchallenged on appeal. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

⁴ The ALJ granted, but did not decide, Employer's motion for reconsideration on the alternate issue of its entitlement to Section 8(f) relief, 33 U.S.C. §908(f), and set a briefing schedule on that issue. Order at 3. Ultimately, the ALJ denied Employer relief under Section 8(f) because it failed to show Decedent had a pre-existing permanent partial disability manifest to Employer. Order Denying Claim for Sec. 8(f) Relief at 3-8.

⁵ In its brief before the Board, Employer states in one sentence that it "seeks reversal of the denial of relief under [Section] 8(f) of the [Act]." Employer's Br. at 2. As the Director asserts, Employer's argument is inadequately briefed; consequently, we will not address it. 20 C.F.R. §802.211(b); *see Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015) (citing *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227, 229 (1990)); *Plappert v. Marine Corps. Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); Director's Br. at 1-2.

determined Employer was Decedent's last maritime employer and therefore is liable to Claimant for death benefits under Section 9 of the Act, 33 U.S.C. §909.⁶

The rule for determining the responsible employer in occupational disease cases was enunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144-145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Pursuant to *Cardillo*, the responsible employer is the employer in the employee's last employment during which the employee was exposed to injurious stimuli, prior to his awareness that he was suffering from an occupational disease. *Cardillo*, 225 F.2d at 144. This employer is liable for the full amount of the award. *See, e.g., Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1284 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

The United States Circuit Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that to determine the responsible employer in a claim against multiple employers for an occupational disease, a claimant must invoke the Section 20(a) presumption against all employers against whom the claim is filed.⁷ *Albina Eng. & Mach. v. Director, OWCP [McAllister]*, 627 F.3d 1293, 1298-1299 (9th Cir. 2010). The ALJ should consider whether the claimant has invoked the Section 20(a) presumption against each employer sequentially, starting with the most recent employer. *Id.* at 1302. The Ninth Circuit has also held that where the evidence does not clearly indicate which of the covered and potentially liable employers was the last employer, the purposes of the Act

⁶ Under Section 9, eligible survivors and dependents are entitled to death benefits where a work-related injury causes the decedent's death. 33 U.S.C. §909. Section 20(a), 33 U.S.C. §920(a), presumes, in the absence of substantial evidence to the contrary, that the death was work-related. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982); *see also Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008).

⁷ As with a causation claim, to invoke the Section 20(a) presumption in a claim for death benefits, the claimant must present some evidence or allegation that (1) the decedent suffered a harm (death) and (2) a work-related accident or working conditions existed which could have caused the death. *Rose v. Vectrus Sys. Corp.*, 56 BRBS 27, 36 (2022) (en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023); *see Haw. Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 107 (1993). If the claimant invokes the presumption, and the employer rebuts it, the claimant must establish by a preponderance of the evidence that the decedent's death was related to his working conditions. *See Ogawa*, 608 F.3d at 651; *Fineman*, 27 BRBS at 107; *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994).

are best served by assigning liability against the employer who is claimed against.⁸ *Gen. Ship Serv. v. Director, OWCP [Barnes]*, 938 F.2d 960, 962 (9th Cir. 1991); see *Buchanan v. Int'l Transp. Servs.* 33 BRBS 32, 36 (1999), *aff'd sub nom. Int'l Transp. Servs. v. Kaiser Permanente Hosp., Inc.*, 7 F. App'x 547 (9th Cir. 2001).

If the claimant cannot invoke the presumption against the last employer, that employer may not be held liable and the ALJ must look to the next most recent employer. *McAllister*, 627 F.3d at 1299. If the Section 20(a) presumption is invoked, the employer may rebut the presumption with substantial evidence that it did not expose the employee to injurious stimuli, the employee was not harmed by the exposure, or the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Id.* at 1302; *Barnes*, 938 F.2d at 962; *Susoeff v. S.F. Stevedoring Co.*, 19 BRBS 149, 151 (1986).

In this case, the ALJ found Claimant established the working conditions element against Employer through the testimony of Decedent and Charles Ay.⁹ D&O at 11-18. Specifically, the ALJ found Decedent testified he worked as an electrician for Employer at “two or three” shipyards on Swan Island. D&O at 12, 17-18; CX 31 at 160. Decedent explained his responsibilities included taking out old wiring and pipes of the bulkheads and stripping insulation off them. CX 31 at 160-161. He said the electrical pipes ran alongside the steam pipes which were “covered with asbestos,” and he would continuously “rub[] against it [and] knock[] it off.” CXs 31 at 163-164, 67 at 17. He also said the insulation on the pipes would break off when he touched it, and there was residue he breathed in. CXs 31 at 165, 67 at 18-19. In addition, Mr. Ay acknowledged Decedent’s testimony about his work for Employer and opined the insulation and electrical components Decedent worked with while employed by Employer “more likely than not were asbestos-containing materials.”¹⁰ CX 64 at 21. The ALJ found Decedent’s testimony placed him “aboard a

⁸ In this case, as the ALJ correctly noted, there is no clear evidence as to which of the potential last two employers last employed Decedent in the first quarter of 1974, and Claimant filed her claim against both, so there is no brightline rule for starting with one or the other. D&O at 10.

⁹ As Employer does not dispute Decedent’s death or its relationship to his asbestos exposure, thereby establishing the harm element, we affirm it. *See Scalio*, 41 BRBS at 58.

¹⁰ Mr. Ay is certified by the State of California as an asbestos consultant and has experience inspecting commercial, residential, industrial, and marine properties for the presence of asbestos. CXs 64 at 1-4. He is also certified by the United States Environmental Protection Agency to sample and evaluate airborne asbestos fibers. *Id.* at 3.

ship or ships at specific locations for a specific employer” and provided “necessary context” for Mr. Ay’s opinion on the prevalence of asbestos aboard ships in shipyards. D&O at 17-18. Therefore, the ALJ found Claimant produced evidence sufficient to invoke the Section 20(a) presumption. *Id.* at 18. We reject Employer’s contention that the ALJ’s decision should be disturbed.

First, contrary to Employer’s characterization, the ALJ did not summarily find that it conceded Claimant invoked the presumption. Employer’s Br. at 3-4. While the ALJ accurately noted Employer “acknowledge[d] the Section 20(a) presumption applies to it,” he did not accept that statement as a concession of invocation against it. D&O at 18 n.15; Employer’s Post-Hearing Br. at 4 (“Claimant has produced substantial evidence sufficient make [sic] a prima facie case of causation and invoke the Section 20(a) presumption.”). Rather, he correctly placed the burden on Claimant to produce “some evidence” that Decedent was exposed to asbestos while working for Employer and conducted the proper analysis. D&O at 8 (citing *Rose v. Vectrus Sys. Corp.*, 56 BRBS 27, 37 (2022) (en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023)).

Next, we reject Employer’s contention that the ALJ erred in making inferences and finding that Employer, and not Dillingham, last exposed Decedent to asbestos. Employer’s Br. at 5-8. It asserts liability should be placed on Dillingham because the ALJ misinterpreted the testimony of record when he “assumed that all of Decedent’s deposition testimony” pertained to his work for Employer. *Id.* at 5.

Decedent stated he had a “memory” of working for Dillingham and the other shipyards when they were brought to his attention. CX 67 at 8.¹¹ After describing his work at Gunderson, he then generally explained that, in working at the shipyards, he worked with electrical pipes which ran alongside steam pipes that were covered in asbestos. *Id.* at 17, 19. When asked whether his exposure to asbestos dust “was the same” at Dillingham, with Employer, and at Albina, Decedent responded, “Yes, sir.” *Id.* He agreed he was “not distinguishing” one from the other in his mind and that he did not “have any distinct memory of any ship he worked on at one place rather than another.” *Id.* Decedent also testified that nobody at the time he was working told him the pipes he worked on were covered in asbestos, but “since then, [people told him] back in those days most of that stuff was covered with asbestos.” *Id.* at 18.

The ALJ noted that Decedent mentioned Dillingham but had no “distinct memory” of working there. D&O at 14; CX 67 at 19. Rather, the ALJ observed Decedent “lumped”

¹¹ The page numbers are the pages of the exhibits and not the pages of the depositions.

his work for Dillingham with all his work for other shipyard employers. D&O at 14. Further, the ALJ acknowledged that Decedent's testimony about his asbestos exposure working for Dillingham is "essentially based on statements made to him by unidentified other people." *Id.* at 16. The ALJ determined that while Decedent believed he was exposed to asbestos when he was deposed, he did not have personal knowledge of asbestos exposure while working for Dillingham. *Id.* at 14. Therefore, the ALJ rationally found Claimant failed to provide "some evidence" that Decedent was exposed to asbestos during his work for Dillingham. *See Rose*, 56 BRBS at 37; *Haw. Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 107 (1993); D&O at 17.

In contrast, the ALJ found Decedent specifically recalled working for Employer after joining the union and identified the locations of the shipyards he worked at. CXs 31 at 160, 33 at 404-405. He testified he worked on Swan Island and that Employer had "two or three" shipyards on Swan Island. CXs 31 at 160. 33 at 404-405. He also recalled working "on drydocks" and aboard ships for Employer. CX 33 at 405. In addition, Decedent testified that "other than Gunderson Brothers, I worked on the boats that [needed to] be refitted or repaired." CX 67 at 17. He explained that in performing a refitting, he would take out the old pipes and install new pipes, and in doing so, he inhaled asbestos insulation. *Id.* at 17-19. Although Decedent agreed he was "not distinguishing" one employer from another, the ALJ found Decedent nonetheless testified to working aboard ships for Employer and inhaling asbestos on those ships. *Id.* at 19; D&O at 17-18. Therefore, substantial evidence supports the ALJ's finding that Claimant met her burden as to Employer. *See McAllister*, 627 F.3d at 1298; *Brown v. I.T.T./Cont'l Baking Co. & Ins. Co. of N. Am.*, 921 F.2d 289, 296 n.6, (D.C. Cir. 1990) (a claimant need only adduce "some" evidence to establish a prima facie case); *Rose*, 56 BRBS at 36; D&O at 18. Consequently, we affirm the ALJ's finding that Claimant invoked the Section 20(a) presumption against Employer.¹² *See Ogawa*, 608 F.3d at 651; *Rose*, 56 BRBS at 36; *Fineman*, 27 BRBS at 107; D&O at 18.

As the ALJ's interpretation of the evidence is reasonable and demonstrates Claimant showed a harm (Decedent's asbestos-related death) and working conditions at Employer's

¹² Having found Employer rebutted the presumption with evidence that Decedent's death was not asbestos-related, *see McAllister*, 627 F.3d at 1302; EXs 4, 5 at 89, the ALJ next weighed the record as a whole and found Decedent's death was asbestos-related. D&O at 20; CXs 15-17. We affirm the ALJ's findings as unchallenged. *See Scilio*, 41 BRBS at 58; D&O at 18-19. The ALJ awarded Claimant death benefits commencing September 7, 2016, based on the national average weekly wage of \$703, as well as reasonable funeral expenses of \$709. D&O at 20.

facility (exposure to asbestos aboard ships), we affirm the ALJ's finding that Employer is the responsible employer and the award of death benefits. 33 U.S.C. §909; *see McAllister*, 627 F.3d at 1302; D&O at 20.

Accordingly, we affirm the ALJ's Decision and Order and Order Granting Reconsideration in Part, and Denying Reconsideration in Part, Setting New Briefing Deadline.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge