BRB Nos. 00-828
and 00-828A

PEGGY IBOS (Surviving Spouse of BERTRAND J. IBOS, Jr.) Claimant-Respondent Cross-Petitioner v. NEW ORLEANS STEVEDORES and SIGNAL MUTUAL ADMINISTRATION LIMITED Employer/Carrier-Petitioners Cross-Respondents NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS *Amicus Curiae*	)	DATE ISSUED: May 9, 2001 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant

Mark E. Solomons (Greenberg Traurig L.L.P.), Washington, D.C., for New Orleans Stevedores and Signal Mutual Administration.

Charles T. Carroll, Jr. (Wilcox, Carroll & Froelich, PLLC), Washington, D.C., for National Association of Waterfront Employers.

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

Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (99-LHC-0305) of Administrative Law Judge Clement J. Kennington 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).

Bertrand J. Ibos, Jr. (decedent) was employed by various steamship and stevedoring companies as a clerk, superintendent, gear man, and stevedore from 1947 to 1995. During decedent's last three periods of employment, he was employed by Valor Stevedoring Company (Valor) from 1978 to 1984, Anchor Stevedoring Company (Anchor) from 1985 to 1993, and New Orleans Stevedores (NOS or employer) from September 1993 to October 11, 1995. In August 1995, decedent experienced respiratory problems which subsequently were diagnosed as symptoms of mesothelioma caused by occupational exposure to asbestos. As the result of decedent's mesothelioma, he was forced to discontinue working on October 11, 1995. Decedent filed a claim for disability benefits under the Act, and on February 14, 1996, died due to metastatic mesothelioma. Thereafter, his widow (claimant) continued his disability claim and her own claim for survivor's benefits, naming Valor, Anchor and NOS as the potentially responsible employers. Following referral of the claim to the Office of the Administrative Law Judges, claimant entered into approved settlement agreements pursuant to Section 8(i), 33 U.S.C. §908(i), of the Act, with Valor and Anchor, and accordingly, those two employers and their respective carriers were dismissed from the instant claim.

In his Decision and Order, the administrative law judge initially found that because decedent's last period of injurious exposure to asbestos occurred during the course of his employment with NOS, NOS is the responsible employer under the Act. The administrative law judge then awarded claimant temporary total disability benefits for decedent's period of disability from October 11, 1995 to February 14, 1996, and death benefits from February 15, 1996, and continuing. *See* 33 U.S.C. §§908(b), 909. The administrative law judge further found that NOS is entitled to a credit for the net settlement proceeds paid to claimant by Valor and Anchor for the same injury that is the subject of the instant claim.

On appeal, NOS challenges the administrative law judge's determination that it is the responsible employer. The National Association of Waterfront Employers (NAWE), which has been granted permission to participate as *amicus curiae* in the instant case, also challenges the administrative law judge's designation of NOS as the responsible employer.

Claimant responds, urging affirmance of the administrative law judge's responsible employer determination. Claimant, in her cross-appeal, challenges the administrative law judge's award of a credit to NOS for the settlement monies paid by the other two longshore employers. NOS responds that the administrative law judge correctly awarded it a credit for the settlement proceeds paid by Valor and Anchor.

Responsible Employer

We note, at the outset, that it is undisputed that decedent's exposure to asbestos while in the course of employment covered under the Act caused his mesothelioma. Thus, the issue presented by employer's appeal is not the compensability of the claim itself but, rather, the identity of the employer responsible for the payment of compensation under the Act. *See Norfolk Shipbuilding & Drydock Corp. v. Faulk,* 228 F.3d 378, 34 BRBS 71 (CRT)(4th Cir. 2000), *cert. denied*, 121 S.Ct. 855 (2001); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *see also Suseoff v. The San Francisco Stevedoring Co.,* 19 BRBS 149 (1986). Once it is determined that the employee's employment exposures as a whole are causally linked to his disease, the compensability of the claim (*i.e.,* whether the employee had a work-related injury) has been established pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). The remaining issue is the determination of the employer responsible for the payment of compensation. *See Suseoff*, 19 BRBS 149. In order to determine employer liability in occupational disease cases involving successive employers, the courts and the Board have uniformly applied the last employer rule enunciated in *Travelers Insurance Co v. Cardillo,* 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *See, e.g., Faulk,* 228 F.3d 378, 34 BRBS 71 (CRT); *Cuevas,* 977 F.2d 186, 26 BRBS 111 (CRT); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Jacksonville Shipyards, Inc. v. Director, OWCP,* 851 F.2d 1314, 21 BRBS 150(CRT)(11th Cir. 1988). Pursuant to the last employer rule, the last covered employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for any compensation owed under the Act. A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; rather exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

The intent underlying the last employer rule is to avoid the difficulties and delays in the administration of the Act that would result if apportionment of liability among multiple employers was required. *Cardillo,* 225 F.2d at 145. The *Cardillo* court recognized that "[t]he nature of occupational diseases . . . makes it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences." *Id.* at 144. *Accord Newport News Shipbuilding & Dry Dock Co. v.*

Stilley, 243 F.3d 179 (4th Cir. 2001); *Faulk,*228 F.3d at 384, 34 BRBS at 75(CRT); *Port of Portland,* 932 F.2d at 841, 24 BRBS at 144(CRT). In recently reaffirming the importance of the last employer rule in furthering the prompt and efficient administration of claims, the United States Court of Appeals for the Fourth Circuit in *Stilley* reasoned that if apportionment of liability among successive employers were permitted, processing of claims "would be substantially delayed as employers resorted to expert testimony and scientific evidence in an effort to prove that other employers should share a percentage of liability." 243 F.3d at 182.

In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either that the employee's exposure while working for employer was not injurious or that the employee was exposed to injurious stimuli while working for a subsequent employer covered under the Act. *See Faulk,* 228 F.3d at 384, 34 BRBS at 75(CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *see also General Ship Service v. Director, OWCP [Barnes],* 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). An injurious exposure is one which had the potential to cause the disease or harm at issue. *See Faulk,* 228 F.3d at 385, 34 BRBS at 75(CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 1320, 24 BRBS 36, 39(CRT)(9th Cir. 1990). In the instant case, NOS contends that the administrative law judge misapplied the last employer rule in finding NOS to be the responsible operator where, as asserted by NOS, decedent's exposure to asbestos while employed by NOS had no causal link to his disability or death.[1]

In the case at bar, as decedent had no employer subsequent to NOS, the only way in which NOS could have established that it was not the responsible employer would have been to demonstrate that decedent's exposure to asbestos while working for NOS did not have the *potential* to cause his disease. *See Faulk,* 228 F.3d at 385, 34 BRBS at 76(CRT). In his consideration of this issue, the administrative law judge properly noted that there is no *de minimis* standard for exposure to injurious stimuli in order to hold an employer liable under the Act. *See* Decision and Order at 22; *Faulk,* 228 F.3d at 387-388, 34 BRBS at 78(CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *Fulks v. Avondale Shipyards, Inc.,* 637 F.2d 1008, 1012, 12 BRBS 975, 978 (5th Cir.), *cert. denied,* 454 U.S. 1080 (1981). Furthermore, the administrative law judge properly recognized that a demonstrated medical causal

[1]NOS does not contest the administrative law judge's determination that decedent had some exposure to asbestos in the course of his employment with NOS. *See* Petitioner's brief at 5.

relationship between the employee's exposure and his occupational disease is not required. *See* Decision and Order at 22; *Faulk,* 228 F.3d at 387-388, 34 BRBS at 78(CRT); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 692, 31 BRBS 178, 185(CRT) (9th Cir. 1997); *Port of Portland,* 932 F.2d at 840, 24 BRBS at 143(CRT); *Franklin v. Dillingham Ship Repair,* 18 BRBS 198 (1986).

The crux of NOS's argument on appeal is that the medical evidence of record demonstrates that, in light of the long latency period for the development of mesothelioma, decedent's mesothelioma began long before he began working for NOS in 1993, and any additional exposure to asbestos during his employment with NOS had no impact on the course of his disease. NOS contends that this medical evidence satisfies employer's burden of establishing that it is not the responsible employer. We disagree. In *Faulk,* Norshipco, the claimant's last employer, advanced a similar latency argument with respect to the claimant's mesothelioma. Specifically, Norshipco asserted that because the claimant in that case experienced abdominal symptoms prior to the time that he was exposed to asbestos aboard the USS Flint during his employment with Norshipco, and because of the long latency period for mesothelioma, it was factually impossible for the claimant's employment with Norshipco to have contributed to his disease. The Fourth Circuit rejected Norshipco's argument, holding that the evidence failed to support the inference that due to the long latency period, it was factually impossible for the claimant's exposure at Norshipco to have caused his mesothelioma. *See Faulk,* 228 F.3d at 387, 34 BRBS at 77(CRT). In rendering this determination, the court found it significant that the claimant was not diagnosed with mesothelioma until after the USS Flint incident. Moreover, the court noted that while Norshipco produced a physician's opinion that claimant's exposure while aboard the USS Flint did not cause his mesothelioma, the physician did not state that such exposure did not have the potential to cause the disease. *Id.* Similarly, the Ninth Circuit in *Lustig* rejected the insurance carrier's argument that there is a ten-year latency period for asbestos-related cancer and that any asbestos exposure after that time period would not have had any effect on the claimant's disability. The *Lustig* court ruled that the carrier's argument represented an unwarranted change of the last employer rule enunciated in *Cardillo. Lustig,* 881 F.2d at 596, 22 BRBS at 162(CRT).

The decisions of the Fourth Circuit in *Faulk* and the Ninth Circuit in *Lustig,* in which latency arguments were rejected, are supported by the reasoning of the *Cardillo* court in approving the last employer rule. In examining the legislative history of the Act, the Second Circuit in *Cardillo* noted that Congress had rejected a suggested provision to apportion employer liability on the basis of the extent of damage done during the period of employment with a particular employer. The court observed that Congress "acknowledged that, absent such a provision, a 'last employer' would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment.'" *Cardillo,* 225 F.2d at 145. The court

concluded that the importance accorded by Congress to the efficient administration of claims overrode Congressional concern for any apparent injustice in holding an employer liable for an injury that probably was not attributable, medically, to employment with that employer. *Id.* In its recent decision in *Stilley,* the Fourth Circuit restated the principle that notwithstanding that the last employer rule is rather arbitrary, it provides an equitable method for allocating liability because "all [maritime] employers will be the last employer a proportional share of the time." *Stilley,* 243 F.3d at 183, quoting *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 1336, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). *See also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285, 16 BRBS 13, 16(CRT)(9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984); *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97, 99 (2000).

In the instant case, as in *Faulk,* 228 F.3d at 387, 34 BRBS at 77 (CRT), decedent was not diagnosed with mesothelioma until after he was exposed to asbestos while employed by NOS. Both the instant case and *Faulk* are factually distinguishable from *Port of Portland,* 932 F.2d at 840, 24 BRBS at 143(CRT), in which the Ninth Circuit held that it was factually impossible for the claimant's employment with the employer to have contributed to his hearing loss where the audiogram determinative of his hearing loss was administered before the claimant began his employment with the employer. While the *Port of Portland* court declined to "impose liability on an employer who *could not,* even theoretically, have contributed to the causation of the disability," 932 F.2d at 841, 24 BRBS at 143(CRT), the impossibility, *even theoretically,* of a causal relationship between decedent's asbestos exposure at NOS and his disability and death has not been established in the instant case. As long as decedent's exposure at NOS had the potential to cause mesothelioma, that exposure is considered to be injurious, and NOS is responsible for the claim. *See Faulk,* 228 F.3d at 385-387, 34 BRBS at 75-78(CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *Picinich,* 914 F.2d at 1320, 24 BRBS at 39(CRT).

As previously discussed, the courts uniformly have rejected challenges to the last employer rule that are premised on the argument that it is inequitable to hold the last covered employer liable for an occupational disease that in all likelihood was not medically caused by employment with that employer. *See Stilley*, 243 F.3d at 179; *Faulk,* 228 F.3d 378, 34 BRBS 71(CRT); *Cuevas,* 977 F.2d 186, 26 BRBS 111(CRT). Contrary to the arguments of both NOS and NAWE, the *amicus curiae*, our rejection of NOS's latency argument does not give rise to an irrebuttable presumption that the last covered employer, in all cases, is responsible for payment of the claim in contravention of the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT) (1995). Rather, as recently noted by the Fourth Circuit in *Stilley,* 243 F.3d at 184, an employer can avoid liability entirely if it does not expose its employees to disease-causing conditions. Moreover, the last covered employer has been held not to be the responsible employer where it established that the claimant's exposure with that employer did not have

the potential to cause the disease. *See Picinich,* 914 F.2d 1317, 24 BRBS 36(CRT).

We hold, therefore, that NOS has not satisfied its burden of proving that it is not the responsible employer on the basis of medical opinions regarding the long latency period for the development of mesothelioma. *Faulk,* 228 F.3d at 386-387, 34 BRBS at 77(CRT); *Lustig,* 881 F.2d at 596, 22 BRBS at 162(CRT). As these opinions do not establish that the asbestos exposure experienced by decedent at NOS did not have the potential to give rise to mesothelioma, they are insufficient to relieve NOS of liability for this claim. *Id.; see also Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *Picinich,* 914 F.2d at 1320, 24 BRBS at 39(CRT); *Franklin,* 18 BRBS at 199.[2] We therefore affirm the administrative law judge's determination that NOS is the responsible employer.

Credit

We next consider claimant's contention, raised on cross-appeal, that the administrative law judge erred in awarding NOS a credit for the settlement proceeds paid by claimant's previous longshore employers, Valor and Anchor. The administrative law judge found that application of the general credit doctrine, which functions to prevent the double recovery of benefits where the claimant has been previously compensated for the same disability, supports a credit in this case. *See Strachan Shipping Co. v. Nash,* 782 F.2d 513, 18 BRBS 45(CRT)(5th Cir. 1986)(*en banc).* We affirm the administrative law judge's determination that NOS is entitled to a credit for payments of compensation made by other potentially liable employers in settlement of claimant's occupational disease claim. *See Alexander v. Triple A Machine Shop,* 32 BRBS 40, 44-46 (1998), *aff'd after remand,* 34 BRBS 34 (2000). In *Alexander,* the claimant settled, pursuant to Section 8(i), his claims for asbestos-related

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[2]In light of our holding, we need not specifically address NOS's arguments regarding the administrative law judge's findings with respect to a causal relationship between decedent's asbestos exposure at NOS and any immune system and cellular damage which decedent may have sustained. Inasmuch as NOS has not established that decedent's exposure at NOS did not have the potential to cause mesothelioma, any extraneous findings by the administrative law judge regarding asbestos-related medical conditions that decedent may have had, independent of his mesothelioma, need not be considered.

disease against other potentially responsible longshore employers prior to the administrative law judge's award of compensation, which was payable by responsible employer Triple A Machine Shop. The Board held that the general credit doctrine supports Triple A's entitlement to a credit for previous payments toward the claimant's disability due to his occupational disease. The Board reasoned that under rationale set forth in *Cardillo,* 225 F.2d 137, in the case of an occupational disease, the last covered employer to expose claimant to potentially harmful stimuli prior to claimant's awareness of his injury is liable for claimant's entire disability. Where an employer is found to be the responsible employer, it is wholly liable for claimant's disability. As claimant's other longshore employers had no legal obligation to contribute to claimant's compensation, Section 8(i) settlement payments paid by them could result only in claimant's receiving a double recovery. Thus, the Board concluded that as one employer is liable for the entire disability, a credit for previous payments toward that disability is proper to avoid double recovery. *Alexander,* 32 BRBS at 45.

Claimant's reliance on the decision of the Fifth Circuit in *ITO Corp. v. Director, OWCP, [Aples],* 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989), is misplaced, as *Aples* is clearly distinguishable from the case at bar. In *Aples,* the claimant sustained multiple traumatic back injuries in the course of his employment with successive longshore employers. The claimant received a settlement payment from a previous longshore employer which represented that employer's liability for the claimant's permanent partial disability; thereafter, ITO, the claimant's subsequent employer, was found to be responsible for the payment of permanent total disability benefits. The *Aples* court denied ITO a credit for the previous employer's settlement payment, reasoning that the claimant had not received a double recovery inasmuch as the amount of the claimant's permanent total disability award was based on his wage at the time of the second injury, which reflected the dimunition in his earning capacity caused by the first injury. As opposed to the *Aples* case involving multiple traumatic injuries with successive employers, the instant case involves an employer who is held solely liable for the entire disability caused by decedent's occupational disease. Thus, pursuant to our holding in *Alexander,* we affirm the administrative law judge's award of a credit to NOS for the net settlement proceeds previously paid by Anchor and Valor for the same disability.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge