BRB No. 04-0887

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| KAREN McALLISTER (widow of JAMES McALLISTER) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| LOCKHEED SHIPBUILDING | ) | |
| and | ) | |
| WAUSAU INSURANCE COMPANY | ) | |
| Employer/Carrier-Petitioners | ) | |
| ALBINA ENGINE AND MACHINE | ) | DATE ISSUED: 08/19/2005 |
| and | ) | |
| FIREMAN'S FUND INSURANCE COMPANY | ) | |
| Employer/Carrier-Respondents | ) | |
| WILLAMETTE IRON AND STEEL COMPANY | ) | |
| and | ) | |
| SAIF CORPORATION | ) | |
| Employer/Carrier-Respondents | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, | ) | |

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| UNITED STATES DEPARTMENT OF LABOR | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Peter W. Preston and Meagan A. Flynn (Preston, Bunnell & Stone, L.L.P.), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Lockheed Shipbuilding and Wausau Insurance Company.

Dennis R. VavRosky (VavRosky, MacColl & Olson, P.C.), Portland, Oregon, for Albina Engine & Machine and Fireman's Fund Insurance Company.

Norman Cole and Jill Gragg (SAIF Corporation), Salem, Oregon, for Willamette Iron & Steel and SAIF Corporation.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Lockheed Shipbuilding (employer) appeals the Decision and Order Awarding Benefits (2003-LHC-2540) of Administrative Law Judge Paul A. Mapes 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). The Board heard oral argument in this case on June 30, 2005, in Portland, Oregon.

Decedent worked as a carpenter for three shipyards between 1956 and 1960.[1] In 1956, he worked for both Albina Engine and WISCO. In 1957, he began working for employer. In 1960, decedent worked for a steel company and then he became a self-employed roofer. He did not work in covered employment after 1960. In April 2002, Dr. Zbinden examined decedent, who had been experiencing shortness of breath. Dr. Zbinden suspected an asbestos-related disease. Cl. Exs. 10, 13. Decedent died on September 22, 2002, of left pleural mesothelioma. Cl. Exs. 11-12. Claimant, decedent's widow, filed this claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909.

The parties stipulated that decedent's mesothelioma was caused by exposure to asbestos and that if Dr. Brady, the Board-certified pathologist who performed the autopsy, was called to testify, he would state that any level of exposure to asbestos can potentially cause mesothelioma. The only disputed issues for the administrative law judge to address were the identity of the responsible employer and average weekly wage. Decision and Order at 3. The administrative law judge found that the only evidence sufficiently probative to establish exposure at employer's shipyard and warrant invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, was the deposition of Mr. Norgaard taken in an unrelated case that established the presence of asbestos at employer's facility at the time decedent was employed there. The administrative law judge, therefore, invoked the "presumptions (1) that [decedent] was exposed to asbestos while working at the Puget Sound-Lockheed shipyard between 1957 and 1960, and (2) that there was a causal relationship between [decedent's] mesothelioma and that employment." Decision and Order at 6. Because employer did not present evidence to rebut the Section 20(a) presumption, the administrative law judge found it to be the responsible employer.[2] *Id.* He awarded claimant benefits pursuant to Section 9 of the Act. Employer appeals the decision, and claimant, Albina Engine, WISCO, and the Director, Office of Workers' Compensation Programs (Director), respond, urging affirmance of the administrative law judge's findings and award.

The sole issue raised by employer on appeal is a challenge to the finding that it is the responsible employer. In this regard, employer first argues that the administrative

[1]Claimant filed her claim against the three shipbuilders for whom decedent had worked: Lockheed Shipbuilding, which purchased the assets and liabilities of the Puget Sound Bridge and Dry Dock Company shipyard (employer), Albina Engine and Machine (Albina Engine), and Guy F. Atkinson's Willamette Iron and Steel Company (WISCO).

[2]There is no dispute that, chronologically, employer was decedent's last maritime employer, and the administrative law judge so found. Decision and Order at 4; SAIF Ex. 1.

law judge erred in finding that claimant is entitled to invocation of the Section 20(a) presumption. We agree with employer that the basis for the administrative law judge's finding that the Section 20(a) presumption is invoked cannot stand; however, as set forth below, we reject employer's reasoning. Moreover, it is clear from the administrative law judge's decision and the briefs in this case that all parties erroneously conflate the issues of responsible employer and causation. Therefore, we begin our decision with a discussion of the case precedent governing these issues.

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 an accident occurred at work which could have caused the harm. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *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). The causation determination is made without reference to a particular covered employer. That is, the Section 20(a) presumption is not invoked *against a particular employer*; instead, the evidence of record must be considered to determine if the evidence is sufficient to invoke the Section 20(a) presumption *on behalf of a claimant*. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998);[3] *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). In this case, claimant must establish that decedent was exposed to asbestos during the period of his shipyard employment as a whole in order to invoke the Section 20(a) presumption that his condition was related to that employment.

If the claimant establishes her *prima facie* case, Section 20(a) applies to relate decedent's mesothelioma to decedent's exposure to asbestos. In a multiple employer case, any of the employers can rebut the presumption by producing substantial evidence that decedent's death was not related to or hastened by his employment exposure. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Fineman v. Ingalls Shipbuilding, Inc.*, 27 BRBS 104 (1993). If any of the employers rebuts the presumption, the presumption no longer controls, and the issue of causation must be

[3]As in *Zeringue*, employer here asserts that claimant did not prove that decedent's disease and death were caused by his employment with employer and not by his employment with a prior employer. This is an incorrect assessment of the burden of proof and the applicability of the Section 20(a) presumption, as claimant is not required to prove which employer is responsible for benefits. *See* discussion, *infra*.

resolved on the evidence of 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) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Once causation is found, and the death is found to be work-related, then the employers in the case must establish which of them is liable for benefits. Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Zeringue*, 32 BRBS 275. Claimant does not bear the burden of proving the responsible employer; rather, each employer bears the burden of establishing it is not the responsible employer. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986);[4] *see also Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). In order to establish that it is not the responsible employer, an employer must demonstrate either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT); *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT); *Black*, 717 F.2d 1280, 16 BRBS 13(CRT).

[4]In *General Ship*, the United States Court of Appeals for the Ninth Circuit adopted the Board's holding in *Susoeff* that an employer who has exposed an employee to injurious stimuli can escape liability by demonstrating that the employee was exposed to injurious stimuli while performing covered work for a subsequent employer. In *General Ship*, there was no evidence as to which of several potential employers was last. Under those circumstances, the court held the Act's purpose was best satisfied by placing liability on the employer claimed against.

In the instant case, the administrative law judge erred by applying the Section 20(a) presumption against a particular employer. Decision and Order at 5-6; *see Zeringue*, 32 BRBS 275. Specifically, the administrative law judge invoked the presumption *against employer* solely on the basis of Mr. Norgaard's deposition testimony establishing that asbestos was present at employer's facility at the time of decedent's employment. In order to address whether we can affirm the administrative law judge's finding that the Section 20(a) presumption is invoked, notwithstanding this error of law, we first must address employer's assertion that the Norgaard deposition is not admissible.

Mr. Norgaard was a superintendent for Owens-Corning Fiberglas from 1957 until at least 1982 when his deposition was taken in two tort cases against Owens-Corning. He testified that he worked in offices at employer's facility, as well as other shipyard facilities in the Seattle area, and that Owens-Corning hired employees from the Asbestos Workers Union to install insulation products in new ship construction projects and to rip out and install insulation on ship repair projects. Cl. Ex. 4 at 7, 12-13, 15, 17. He testified that between 1957 and 1972 many of the insulation products contained asbestos and these products were used in the Seattle/Tacoma shipyards. *Id.* at 56, 59, 61-62. He also stated that he visited the Owens-Corning job sites, was aware of the conditions in which the employees worked, and that almost all crafts would be working near the areas where the asbestos-containing insulation was being installed. *Id.* at 19, 41-42, 47-49, 51-52. As employer argues, decedent is not mentioned in the deposition.

While employer correctly asserts that the parties to the case herein were not parties to the tort cases in which Mr. Norgaard testified and that its interests were not represented by the parties in those cases,[5] the Norgaard deposition is nonetheless admissible in this administrative proceeding. Section 23(a) of the Act, 33 U.S.C. §923(a), provides in pertinent part:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

[5]As employer contends, its interest in disproving liability for an allegedly work-related death is different from the interests of the defendants who were trying to defend against a tort liability claim by exculpating their own asbestos products. Whereas the third-party defendants acknowledged that asbestos existed at the shipyard, *see* Cl. Exs. 4-5, employer in this case has not made such a concession.

*See also* 20 C.F.R. §702.339. The Supreme Court has held that hearsay is permitted in administrative cases if it is reliable, *Richardson v. Perales*, 402 U.S. 389 (1971); *Camarillo v. National Steel & Shipbuilding Co.*, 10 BRBS 54 (1979), and, contrary to employer's argument, an agency finding may be based on hearsay alone.[6] *Richardson*, 402 U.S. at 402. Moreover, the administrative law judge is to "inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and documents which are relevant and material to such matters." 20 C.F.R. §702.338; *see Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986). Therefore, as the administrative law judge rationally found it relevant, the Norgaard deposition is admissible. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997). In many instances where there are no eyewitnesses to an accident, such as in the case presently before the Board, there is no direct evidence on which the administrative law judge can rely, and he is left to resolve the dispute using the evidence available, including circumstantial evidence. *See, e.g., Compton*, 33 BRBS at 176; *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 597 (1981). The administrative law judge rationally found the Norgaard deposition to be reliable, probative and relevant. Therefore, the administrative law judge rationally admitted the Norgaard deposition into evidence.[7]

While the Norgaard deposition supports a finding that there was asbestos on employer's premises between 1957 and 1960 when decedent was employed, it does not establish that decedent was exposed to asbestos, which is an element of claimant's *prima facie* case that she must prove by substantial evidence. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). For this reason,

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[6]As claimant argues, *Colliton v. Defoe Shipbuilding Co.*, 3 BRBS 331, 335 (1976), is at odds with the hearsay rule in administrative proceedings. *Colliton* cites to a commentary written before the Supreme Court decided *Richardson*, 6 A.L.R. Fed. 76 (1971), but it did not cite *Richardson*, despite being issued five years after *Richardson* was decided. In *Richardson*, the Supreme Court held that hearsay evidence, even in the presence of opposing evidence, may constitute substantial evidence to support a finding. *Richardson*, 402 U.S. at 402.

[7]We agree with employer that findings of fact in one cause of action cannot be used, via judicial notice, to supply facts in another cause. *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003); *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483 (9th Cir. 1983); *Paridy v. Caterpillar Tractor Co.*, 48 F.2d 166 (7th Cir. 1931). However, the Norgaard deposition does not contain findings of fact; it contains statements the administrative law judge may admit and credit or accept, as is within his discretion. *See Casey*, 31 BRBS 147.

contrary to the Director's argument, the Norgaard deposition, alone, is insufficient to invoke the Section 20(a) presumption on claimant's behalf. Although it is undisputed that decedent suffered an asbestos-related disease and death, the mere fact, as established by the Norgaard deposition, that asbestos was present on employer's facility does not establish that decedent was exposed to asbestos. *See Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989) (claimant's work was far-removed from asbestos site; affirm finding that claimant was not exposed to asbestos); *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985) (remand to determine if claimant met burden of proving exposure to toxic chemicals on facility where she worked); *see also Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001) (some exposure to asbestos must have occurred on a covered portion of the facility where decedent worked for employer to be held liable). Accordingly, we vacate the administrative law judge's invocation of the Section 20(a) presumption and his award of benefits.

Claimant, Albina Engine, and WISCO argue that the record contains additional evidence which, if credited, could support the administrative law judge's decision to invoke the Section 20(a) presumption. They assert that claimant's testimony, the statement signed by Dr. Zbinden, and the testimony of Ms. Mitchell, decedent's former wife, constitute substantial evidence in support of the invocation of the Section 20(a) presumption. The administrative law judge did not fully discuss Ms. Mitchell's testimony, and, moreover, in addressing the other evidence, he considered "types" of evidence individually and rejected each as being insufficient, alone, to invoke the Section 20(a) presumption.[8] The administrative law judge found that claimant's testimony and the statement signed by Dr. Zbinden do not establish that decedent ever specifically alleged that he was exposed to asbestos at employer's facility, and, at best, the evidence gives only the general impression that decedent believed he had been exposed during that period; therefore, he found it insufficient to invoke the presumption. Decision and Order at 5; Cl. Ex. 13; Tr. at 47-69. The administrative law judge also found the subjective perceptions in claimant's testimony and the statement signed by the doctor to be relevant. He rejected them only because he found "it is doubtful they are sufficiently probative to warrant invocation" against Lockheed.[9] Decision and Order at 5. Assuming, *arguendo*,

[8]The administrative law judge discussed the statements of claimant and Dr. Zbinden in one "category," the depositions from other cases as another category, and decisions by the Board and the United States Court of Appeals for the Ninth Circuit as a third category. Decision and Order at 4-6. With the exception of the Norgaard deposition, he rejected each of the other categories, individually, as being insufficient to invoke the Section 20(a) presumption. He did not consider the pieces of evidence in conjunction with one another.

[9]The administrative law judge found that the Board and court decisions offered by the parties did not establish asbestos exposure at employer's facility during decedent's

the administrative law judge correctly determined that claimant's testimony and the statement of Dr. Zbinden, alone, are insufficient to invoke the Section 20(a) presumption, *but see* discussion, *infra*, we agree with claimant, Albina Engine and WISCO that this evidence, when viewed in conjunction with Ms. Mitchell's testimony and the Norgaard deposition, could suffice to invoke the presumption.

Dr. Zbinden examined decedent in April 2002.[10] His notes indicate he diagnosed decedent with asbestos-related pleural thickening/plaques and believed he was at significant risk for lung cancer or mesothelioma. Cl. Ex. 10. Claimant's counsel discussed decedent's condition with Dr. Zbinden and, on November 17, 2003, typed up a letter clarifying the doctor's position on the matter. The doctor signed the statement as being a correct summary of his opinion. The letter states that decedent told Dr. Zbinden that he had worked at ship repair operations in Portland and Seattle in the 1950s and 1960s, that decedent told Dr. Zbinden he had worked around asbestos as a carpenter at the shipyards and did a lot of ripping out work, but he did not mention any particular employer, though he gave Dr. Zbinden the impression that he had been exposed to asbestos throughout his shipyard career. Finally, Dr. Zbinden stated that he believed every exposure to asbestos, including those in the shipyards, contributed to the development of decedent's mesothelioma and death. Cl. Ex. 13.

Claimant testified that she and decedent discussed his previous employment at the shipyards where he said he was exposed to asbestos.[11] She testified that he stated he worked on vessels being stripped and that he was exposed to "fine powdery stuff" and that he worked on destroyers in Seattle for two years. She also stated that decedent talked of tearing out paneling, and cutting and sawing materials to be installed. She stated that decedent never mentioned employer's facility in particular, just that he worked on destroyers in Seattle, but that he did mention specific asbestos exposure at Albina Engine and WISCO. According to claimant, their purpose in making notes and listing the

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tenure and that other depositions were admissible to establish the presence of asbestos at Albina Engine and WISCO, but only the Norgaard deposition was relevant to asbestos at employer's facility. Decision and Order at 5-6.

[10]Claimant stated she accompanied decedent. She testified as to what she heard decedent tell Dr. Zbinden. Tr. at 51, 63.

[11]This discussion occurred approximately one week after the appointment with Dr. Zbinden. Claimant stated that she and decedent discussed where he had been exposed to asbestos, and she took notes. Tr. at 63. The administrative law judge excluded the notes based on employer's objection that they were duplicative of claimant's testimony and not any more probative than other evidence. Tr. at 55-56.

shipyards was to identify places decedent thought he had been exposed to asbestos. Tr. at 47-69.

Ms. Mitchell testified that she was married to decedent while he was working in the shipyards and that they divorced in 1966. She testified that decedent's clothes would be clean before work but that he would come home from all three shipyards dusty and dirty.[12] Tr. at 70-76.

Decedent's statements to Dr. Zbinden and to claimant allege asbestos exposure at the shipyards during his entire period of employment. Cl. Ex. 13; Tr. at 65-66, 69. While he specifically mentioned having been exposed to asbestos at Albina Engine and WISCO to claimant, his statements to the doctor appear to have been more general, *i.e.*, that he had been exposed to asbestos in the shipyards in the 1950s and 1960s. Cl. Ex. 13; Tr. at 47, 51, 59-60, 63-64, 67. According to claimant, decedent's general belief was that he had been exposed to asbestos during his work at "the shipyards." Tr. at 69. The administrative law judge did not discredit this evidence. Rather, he found it "certainly reliable," as it gave the "general impression that [decedent] believed he had been exposed to asbestos during the period he worked at the Puget Sound-Lockheed shipyard[,]" Decision and Order at 5, but he was "doubtful" that it was sufficient to invoke the Section 20(a) presumption *against employer*. However, as we have discussed, the presumption is to be invoked *on behalf of claimant* and not against a specific covered employer. Thus, claimant's burden is to establish asbestos exposure during decedent's shipyard employment as a whole, and the evidence described above, in conjunction with the Norgaard deposition, is relevant to this issue. We therefore remand the case for the administrative law judge to consider all of the evidence of record to determine whether claimant established decedent's exposure to asbestos during his period of shipyard employment and thus whether the Section 20(a) presumption is invoked.

In this regard, claimant is also aided by Section 23(a) of the Act, which states, in pertinent part:

> Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

[12]Although the administrative law judge referred to Ms. Mitchell's testimony in one sentence in his statement of the facts, he did not discuss that evidence in his discussion on causation/responsible employer. Decision and Order at 2, 4-6.

33 U.S.C. §923(a). Employer argues that Section 23(a) is inapplicable to the consideration of decedent's statements because, pursuant to *Martin v. Kaiser Co.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only), Section 23(a) allows a decedent's statements to establish only the "harm" element necessary for invocation of the Section 20(a) presumption, and claimant has already established that decedent suffered disease and death. Therefore, it asserts that Section 23(a) does not apply to this case. We reject this contention and hold that, on remand, the administrative law judge may consider decedent's declarations pursuant to Section 23(a) of the Act.

The Board has held that Section 23(a) assists a claimant in establishing a *prima facie* case, but does not render the decedent's declarations conclusive proof of a work-related injury if employer offers substantial evidence to the contrary, *i.e.*, if the Section 20(a) presumption is invoked and rebutted, the administrative law judge need not credit a declaration of a decedent when weighing the evidence as a whole. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). More specifically, the Board has held that the term "injury" in Section 23(a) refers only to the "harm" element of a *prima facie* case. *Martin*, 24 BRBS 112. Upon further reflection, however, we believe that *Martin* is incorrect on this point.

In *Martin*, the administrative law judge found the decedent's statements concerning his asbestos exposure probative, but not conclusive, evidence because they were not corroborated. On appeal, the employer contended that, as the decedent's statements were uncorroborated, they were insufficient under Section 23(a). The Board rejected this contention, but reasoned that the term "injury" in Section 23(a) refers only to the physical harm element, based on precedent establishing that an "injury" for purposes of average weekly wage and coverage under the Act occurs when an occupational disease becomes manifest. The Board thus concluded that "injury" in Section 23(a) refers to the harm manifested as a result of the disease rather than the exposure causing it. *Martin*, 24 BRBS at 119-120 (citing, *inter alia*, *Black*, 717 F.2d 1280, 16 BRBS 13(CRT)). Therefore, the Board held that the administrative law judge could rely on the decedent's uncorroborated statements if he found them credible.

The holding in *Martin* that the administrative law judge could properly credit a decedent's uncorroborated statements regarding exposure to asbestos if he found them credible is consistent with Section 23(a). Initially, the first sentence of the section, *supra* at 6, affords an administrative law judge great discretion regarding the conduct of the hearing and determinations regarding the evidence. The second sentence, which specifically addresses a deceased employee's statements, does not require that a decedent's statements be corroborated in order for the statements to be considered probative or substantial evidence. Rather, corroboration is only necessary for the statements to be *conclusive* evidence of the injury. Thus, employer's argument in *Martin* lacked merit under the plain language of the statute. Moreover, the construction of the

term "injury" in *Martin* does not address the statutory definition of "injury," which refers to the harm arising out of and in the course of employment. 33 U.S.C. §902(2).[13] This connection to the employment is at issue in a claimant's *prima facie* case, and thus the Section 2(2) definition is most relevant to Section 23(a). Thus, we hold that "injury" in Section 23(a) includes the "working conditions" element as well as the "harm" element of a *prima facie* case.[14]

Therefore, we reject employer's assertion that Section 23(a) is inapplicable, and we hold that Section 23(a) assists in proving both the "working conditions" and the "harm." Thus, if a decedent's declaration is corroborated, it shall be sufficient to establish the "injury," that is, it shall be sufficient to establish the elements for invoking the Section 20(a) presumption. 33 U.S.C. §923(a); *see, e.g., John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961)*; Associated General Contractors of America v. Cardillo,* 106 F.2d 327 (D.C. Cir. 1939); *Puget Sound Nav. Co. v. Marshall,* 31 F.Supp. 903 (D.C. Wash. 1940). If the declaration is uncorroborated, then Section 23(a) does not apply and it may be sufficient to establish "the injury" if the evidence is otherwise credible and probative.

In this case, the administrative law judge did not discuss Section 23(a), and other than stating it is relevant, he made no findings regarding decedent's statement. As the Section 20(a) presumption is to be invoked on behalf of a claimant instead of against an individual employer, the administrative law judge could credit decedent's declarations and invoke the Section 20(a) presumption if he finds them probative and credible. 33 U.S.C. §§902(2), 923(a); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989) (affirmed invocation based on claimant's and son's testimony that decedent worked with asbestos in shipyards and told his physicians this). Accordingly, on remand the administrative law judge must evaluate this evidence and determine whether claimant established that decedent was exposed to asbestos during all or part of his shipyard employment from 1956 to 1960.

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[13]Section 2(2) states:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

[14]In a death benefits case, the harm element is necessarily proven because this portion of Section 23(a) is only potentially applicable if an employee has died.

If, on remand, the administrative law judge finds that claimant has established a *prima facie* case, and invokes the presumption then, as he found previously, there is no evidence to rebut the presumption that decedent's death was related to his work in the shipyards. Decedent's death would be work-related as a matter of law. *Cairns v. Matson Terminals, Inc.*, 20 BRBS 252 (1988). The next step in the analysis would be to determine which employer is liable for benefits. In a dispute over the responsible employer, the burden of proof rests on the employers and not on claimant. The employers bear the burden of establishing either that the employee was not exposed to injurious stimuli at their facilities in sufficient quantities to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *General Ship*, 938 F.2d 960, 25 BRBS 22(CRT); *see also Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT); *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT); *Black*, 717 F.2d 1280, 16 BRBS 13(CRT). In this case, as there is no dispute that Lockheed was decedent's last employer, it would bear the burden of proving it did not expose decedent to injurious stimuli, in order to escape liability as the responsible employer. In light of our decision to remand the case for reconsideration of decedent's asbestos exposure, we vacate the conclusion that employer is the employer liable for benefits, and we remand the case to the administrative law judge for consideration of the responsible employer issue consistent with law.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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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