BRB No. 12-0358

KENNETH R. WORTHEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BOLLINGER SHIPYARDS, INCORPORATED	)	DATE ISSUED: 04/03/2013
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
THOMA-SEA SHIPBUILDERS, LLC	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order on Motion for Clarification and/or Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Alan G. Brackett, Robert N. Popich, and Tyler A. Moore (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for Bollinger Shipyards and American Longshore Mutual Association.

Richard S. Vale, Eric E. Pope, and Jonathan S. Forester (Blue Williams, L.L.P.), Metairie, Louisiana, for Thoma-Sea Shipbuilders and Louisiana Workers' Compensation Corporation.

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

DOLDER, Chief Administrative Appeals Judge:

Bollinger Shipyards, Incorporated, appeals the Decision and Order and the Order on Motion for Clarification and/or Reconsideration (2010-LHC-2149, 2011-LHC-628) of Administrative Law Judge Lee J. Romero, Jr., 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).

In April 2000, shortly after claimant began working for Bollinger as a welding supervisor, he fell through a door leading to the engine room, down approximately 15 steps, hit his head, and lost consciousness. When claimant regained consciousness, he was taken to the hospital where the doctor examined him and released him to return to work. Claimant stated he continued to have pain in his knees, neck, low back and shoulders after this incident. It was soon discovered he sustained a hernia; he underwent surgery and was out of work for a short period during which time Bollinger paid workers' compensation benefits.[1] Claimant returned to work but left in 2002, claiming the work was too physically demanding, to pursue work for contract companies and to start his own business.

In 2006, claimant returned to Bollinger as a welding supervisor.[2] His job required him to bend, climb, squat, work in awkward positions and lift up to 50 pounds. He also was exposed to welding fumes, sandblasting dust, industrial cleaning solvents, and other fumes and chemicals. Tr. at 43-47. In August 2006, claimant underwent a pulmonary function test (PFT) that showed severe airway obstruction, and he was diagnosed with asthma. Cl. Ex. 9; Tr. at 114. In 2008, claimant had another PFT after which Dr. Bourgeois reported that claimant could no longer wear a respirator due to his lung

[1]Claimant did not file a claim for any other injuries sustained in the 2000 accident.

[2]Claimant stated he did not have treatment on his knees, neck, back or shoulders during the period he was away from Bollinger.

condition. Cl. Ex. 19 at 19. Claimant continued to work in his regular capacity, but he did not use a respirator. Tr. at 45. Claimant stated he continued to feel pain in his knees, shoulders, neck and back. On October 1, 2009, claimant underwent arthroscopic surgery on both knees. Thereafter, he returned to work three days per week while getting a series of injections for his neck, and he underwent arthroscopic surgery on his left shoulder on November 18, 2009. Cl. Exs. 12-20. In February 2010, Dr. Haydel released claimant to return to work based on his improved orthopedic conditions. Boll. Ex. 14 at 25-27; Tr. at 53.

Claimant returned to work for Bollinger in March 2010. Bollinger sent him to Dr. Bourgeois for a physical examination and PFT, and Dr. Bourgeois diagnosed chronic obstructive pulmonary disease (COPD), a left rotator cuff injury, bilateral knee pain, and cervical disc disease. Boll. Ex. 19 at 28-29. Dr. Bourgeois did not clear claimant for work. Instead, he gave claimant physical restrictions, sent him home, and told him to see a pulmonologist and his other doctors. *Id.*; Cl. Ex. 25. Despite Dr. Bourgeois' advice, claimant applied for work with Thoma-Sea that same day. Tr. at 111. Although claimant testified he told Thoma-Sea's doctor he had asthma and COPD, he passed a pre-employment physical and x-ray, and the doctor restricted claimant only from lifting more than 50 pounds. *Id.* at 112. Claimant was hired as a welding supervisor and worked approximately seven weeks for Thoma-Sea under the same conditions as he had worked at Bollinger.[3] *Id.* at 85-92. In May 2010, claimant's employment was terminated for reasons unrelated to his physical condition. Cl. Ex. 36. Claimant applied, and was approved, for Social Security disability benefits for his lung condition. Tr. at 102. Claimant filed claims under the Act for compensation against Bollinger for his orthopedic and lung conditions on May 27, 2010, and June 1, 2010, respectively. He filed claims under the Act for compensation for his orthopedic and lung conditions against Thoma-Sea on June 9, 2010. Cl. Ex. 2. In July 2010, Dr. Gomes examined claimant and administered another PFT. The results were essentially the same as the March 2010 test, and Dr. Gomes stated claimant cannot return to any job that exposes him to fumes and dust. Boll. Ex. 17; Boll. Ex. 18 at 9; Cl. Ex. 27.

The administrative law judge found that claimant is a credible witness and that he established a prima facie case for his orthopedic injuries, as he has injuries to his back, neck, knees, and shoulders, and he showed that conditions existed at each employer's facility that could have aggravated his pre-existing conditions. Decision and Order at 31, 33. The administrative law judge then found that, although claimant established a prima facie case against Thoma-Sea, Bollinger failed to present sufficient evidence to establish that claimant suffered aggravations to those orthopedic conditions while he worked for Thoma-Sea, as Bollinger did not establish that anything "actually aggravated" claimant's

[3]In addition, he was exposed to paint fumes. Claimant did not wear a respirator.

conditions. *Id.* at 35-36.[4] Accordingly, the administrative law judge held Bollinger liable for benefits for the work-related aggravations to claimant's back, neck, shoulder and knee conditions. *Id.* at 38; Cl. Ex. 35.

With regard to claimant's lung condition, the administrative law judge also found that claimant established a prima facie case against both employers, as he suffers from COPD, and he was exposed to welding fumes and other injurious stimuli at both jobs. The administrative law judge determined that March 22, 2010, the date of the PFT, was the date claimant became aware of the relationship between his disease and his employment, and the last employer prior to that date of awareness was Bollinger. As he found Bollinger did not rebut the Section 20(a) presumption, the administrative law judge held Bollinger liable for benefits for claimant's lung condition. Decision and Order at 41-42. The administrative law judge awarded claimant medical benefits, temporary total disability benefits, because claimant's lung condition has not reached maximum medical improvement, and permanent partial disability benefits for a 20 percent impairment to the knees under the schedule to be paid if and when claimant's lung condition becomes permanent and partial. *Id.* at 42-46; Order on M/Clarif. & Recon. at 3.

Bollinger appeals the administrative law judge's decision. It contends he erred in finding it to be the responsible employer for both types of injuries, as it asserts the evidence establishes Thoma-Sea was the last employer to expose claimant to aggravating conditions and to injurious stimuli. Thoma-Sea responds, urging affirmance.

Orthopedic Conditions

Bollinger first contends the administrative law judge erred in holding it liable for claimant's orthopedic conditions because claimant subsequently performed the same job for Thoma-Sea, and the doctors stated those activities could aggravate claimant's various orthopedic conditions. In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of the natural progression or an aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and the claimant's employer at that time is responsible. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent

[4]The administrative law judge also addressed Bollinger's assertion that the claim for benefits for his orthopedic injuries was not timely filed, as the accident to which claimant relates these conditions occurred in 2000, and he did not file his claim until 2010. The administrative law judge properly rejected this assertion, finding the claim timely filed because it is based on work-related aggravations.

employer is responsible. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

In this case, doctors agreed that the activities of the type claimant performed at both Bollinger and Thoma-Sea could have aggravated his underlying orthopedic conditions. Boll. Ex. 14 at 29-30, 37; Boll. Ex. 19 at 49-51. The facts of this case, however, clearly establish that claimant underwent knee surgery, shoulder surgery and neck injections during the period he was still employed by Bollinger in 2009. Boll. Ex. 14 at 24, 40; Boll. Ex. 19 at 26; Cl. Exs. 25, 35. Following the surgeries when claimant attempted to return to work with Bollinger, Dr. Bourgeois did not clear claimant to return. Instead, he diagnosed claimant with a left rotator cuff injury, bilateral knee pain, and cervical disc disease, and he gave claimant physical restrictions that precluded claimant's returning to his usual work as a welding supervisor,[5] sent claimant home, and told him to seek treatment from his doctors. Boll. Ex. 19 at 25-29, 42-43, 49-51; Cl. Ex. 25. Disregarding Dr. Bourgeois' advice, claimant applied for work at Thoma-Sea and commenced working in late March after the Thoma-Sea doctor cleared him to work. Bollinger contends claimant's orthopedic conditions were aggravated during the weeks claimant performed his job for Thoma-Sea, making Thoma-Sea liable for benefits.

Initially, it is obvious that Thoma-Sea cannot be held liable for the cost of the knee and shoulder surgeries, neck injections, other related treatments, or any loss of earnings that occurred before claimant began working for Thoma-Sea. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F. App'x 640 (9th Cir. 2010). As the administrative law judge rationally found that claimant's underlying orthopedic conditions were aggravated by his work at Bollinger after 2006, Bollinger is liable for benefits and expenses prior to March 29, 2010, when claimant began working at Thoma-Sea. The issue is thus whether claimant's orthopedic conditions were aggravated after he began working for Thoma-Sea on March 29, 2010, such that Bollinger is relieved of liability for benefits after that date.

Although doctors opined that the type of work claimant performed at Thoma-Sea *could have* aggravated claimant's orthopedic conditions, the administrative law judge found there is no evidence of any actual aggravation. Claimant had no incidents or accidents while at Thoma-Sea, and he lost no time from work due to his orthopedic conditions. Indeed, Dr. Bourgeois believed claimant was already disabled from his surgeries or conditions prior to working at Thoma-Sea, and neither Dr. Haydel nor Dr. Bourgeois examined claimant after his employment at Thoma-Sea, so there is no

[5]Dr. Bourgeois restricted claimant from climbing ladders, kneeling, squatting, lifting over 25 pounds, repetitive bending, and respirator use. Boll. Ex. 19 at 29.

evidence establishing whether any aggravation occurred during that employment. To the contrary, Dr. Haydel stated that claimant would have residual pain from his surgeries and, if there were no new accidents, his pain probably is due to his prior conditions, and that pain, alone, is not indicative of aggravation. Boll. Ex. 14 at 29-32. Moreover, claimant stated that his pain was essentially the same as when Dr. Haydel released him to return to work in February 2010. Tr. at 100. Based on this evidence, the administrative law judge rationally inferred there was no aggravation of claimant's orthopedic conditions at Thoma-Sea and that claimant's disability is the result of the natural progression of his condition as aggravated by his employment with Bollinger.[6] Decision and Order at 9-10, 35-36; *see Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). As there is substantial evidence of record to support the finding that claimant's conditions are the result of his work at Bollinger, and that there was no aggravation at Thoma-Sea, we affirm the administrative law judge's finding that Bollinger is liable for benefits for claimant's orthopedic injuries.

Respiratory Condition

Bollinger also contends the administrative law judge erred in holding it liable for claimant's lung condition. Bollinger contends the administrative law judge erred in failing to place any burden on Thoma-Sea, claimant's last chronological employer, to show that it was not the responsible employer. Additionally, Bollinger asserts it was not the last employer to expose claimant to welding fumes and other harmful stimuli that could have aggravated his lung condition. It also asserts that the administrative law judge erred in failing to consider when claimant became aware of his disability for purposes of setting claimant's date of awareness.

The administrative law judge stated that it is well-established that the responsible employer in an occupational disease case is "the employer who last exposed Claimant to injurious stimuli prior to the date upon which he was aware, or should have been aware, of the relationship between his disability, disease and employment." Decision and Order at 40. The administrative law judge correctly stated that this "awareness" is identical to that required by Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. Decision and Order at 40; *see Vanover v. Foundation Constructors*, 22 BRBS 453, 456 (1989), *aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). However, the administrative law judge then found that "Claimant was aware of the relationship between his COPD and employment on March

[6]Contrary to Bollinger's argument, *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004), is distinguishable, as the medical evidence in that case established that the claimant's single day of employment prior to a pre-scheduled surgery caused a minor but permanent increase in disability as well as in the need for surgery.

22, 2010, prior to going to work for Thoma-Sea," and that Bollinger did not rebut the Section 20(a), 33 U.S.C. §920(a), presumption, "making Bollinger the last responsible employer." Decision and Order at 41. This finding is based on claimant's PFT of this date; based on this test Dr. Bourgeois diagnosed COPD. We agree with Bollinger that the administrative law judge did not apply the proper standard in ascertaining which employer is responsible for claimant's COPD.

Pursuant to *Travelers Insurance 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 employer during whose employment the claimant was exposed to injurious stimuli, prior to the date the claimant became aware that he was suffering from an occupational disease arising from his employment. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has adopted this test. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981). Although none of the Fifth Circuit cases addressing the responsible employer issue specifically states that awareness of a disability is included in the standard for determining the responsible employer, *see, e.g., Ibos*, 317 F.3d 480, 36 BRBS 93(CRT); *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992), the standard is the same as that for awareness under Sections 12 and 13, and the Board has applied this standard in an occupational disease case arising in the Fifth Circuit. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). Moreover, the awareness of a disability[7] appears to be inherent in the *Cardillo* test and other circuits have expressly held in the responsible employer/carrier context that claimant's awareness of a work-related disability is required to determine the liable entity.[8] *See Argonaut Insurance Co. v.*

[7]"Disability" is defined as "incapacity because of injury to earn wages. . . ." 33 U.S.C. §902(10); *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992).

[8]In *Cardillo*, the United States Court of Appeals for the Second Circuit stated that a claimant had to be "suffering from an occupational disease" to be "aware," and it held that the responsible employer is the one prior to the time when the "cumulative effects of the occupational exposure manifested themselves" to the claimant. *Cardillo*, 225 F.2d at 144-145. In addressing the timeliness of the claims, the Second Circuit determined that awareness occurred when "the accumulated effects of the deleterious substance manifest themselves." *Id.* at 143.

Patterson, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988);[9] *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992);[10] *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979);[11] *Carver*, 24 BRBS 243; *see also Vanover*, 22 BRBS at 456. Accordingly, the administrative law judge erred in omitting consideration of claimant's onset of disability in ascertaining the date of awareness for determining the employer responsible for claimant's COPD. Therefore, we vacate the administrative law judge's finding that the date of awareness was in March 2010, and the consequent finding that Bollinger is liable for benefits for claimant's COPD. We remand the case for the administrative law judge to reconsider the issue, applying the proper standard. That is, the administrative law judge must determine the employer responsible for claimant's COPD by ascertaining which was the last employer during whose employment claimant was exposed to injurious stimuli prior to the date claimant became aware, or should have been aware, of the relationship between his disease, his employment, and his disability.

In this regard, Bollinger also contends the administrative law judge erred in placing the burden on it to rebut the Section 20(a) presumption when he should have first placed the burden on Thoma-Sea as the last employer. The Fifth Circuit has stated that, in order to meet its burden of establishing that it is not the responsible employer, an employer must prove either: (1) that exposure to injurious stimuli did not cause the employee's occupational disease; or (2) that the employee was performing work covered by the Act for a subsequent employer where he was exposed to injurious stimuli. *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT); *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Avondale Industries*, 977 F.2d 186, 26 BRBS 111(CRT); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). The most recent employer, provided the Section 20(a) presumption has been invoked against it, bears the burden of showing that it is not the

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[9]The United States Court of Appeals for the Eleventh Circuit stated that "'suffering' has very particular connotations which we cannot assume the Second Circuit meant to ignore." *Patterson*, 846 F.2d at 719, 21 BRBS at 55(CRT).

[10]In *Liberty Mutual*, the First Circuit observed that, in *Cardillo*, the worker's awareness of his disease and his disability coincided. If the two do not coincide, the court held that the responsible entity is the one that last exposed the claimant to injurious stimuli prior to the date claimant became disabled by an occupational disease arising naturally out of his employment. *Liberty Mutual*, 978 F.2d 756, 26 BRBS at 99(CRT).

[11]In interpreting *Cardillo*, the *Cordero* court stated that the onset of disability is a key factor in assessing liability under the last injurious exposure rule. It follows, therefore, that it does not matter that the disease was diagnosed or treated while the claimant worked for a previous employer. *Cordero*, 580 F.2d at 1337, 8 BRBS at 749.

responsible employer. *See Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (last employer, regardless of the duration of the exposure is liable for all benefits); *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981) ("given a succession of employers, no single employer may be held liable . . . until the next more recent employer is exculpated").

In this case, the administrative law judge found that claimant established his prima facie case against both employers. This finding is unchallenged on appeal and is supported by substantial evidence. Decision and Order at 39. It also is undisputed that Thoma-Sea was claimant's last chronological employer, and the administrative law judge found that claimant's "exposure at Thoma-Sea was of a kind that produces the occupational disease." Nevertheless, he placed the burden on Bollinger to rebut the presumption and found that Bollinger failed to do so. Decision and Order at 41. As Bollinger correctly argues, the administrative law judge erred by not requiring Thoma-Sea to bear any burden in showing it was not liable for benefits for claimant's COPD. *Smith*, 647 F.2d 518, 13 BRBS 391; *see also Albina Engine*, 627 F.3d 1293, 44 BRBS 89(CRT). Moreover, the administrative law judge did not properly apply *Ibos* to this issue. The Fifth Circuit stated in *Ibos* that in order for an employer to be held liable there need not be an actual causal relationship between claimant's work exposures at that employer and his disease.[12] "The issue on rebuttal [is not] whether an employer can prove that a particular exposure with a particular employer did not have the potential to cause the disease . . . or that an employer can prove that there is no evidence of a true causal link between a particular exposure and the development of the employee's disease." *Ibos*, 317 F.3d at 485, 36 BRBS at 96(CRT). Rather, once, as here, claimant makes his prima facie case, Bollinger can rebut the prima facie case by showing that claimant was exposed to injurious stimuli at Thoma-Sea or that claimant's injury is not related to the exposures, whereas Thoma-Sea can rebut the presumption only by showing that claimant's disease is not a work-related condition. *Id.; Avondale Industries*, 977 F.2d 186, 26 BRBS 111(CRT). Therefore, on remand, the administrative law judge must apply this law in determining the employer liable for benefits for claimant's COPD.

[12]The court rejected the Board's statement that the last employer could be absolved of liability by demonstrating that the employee's exposure to injurious stimuli did not have the potential to cause his disease. *See Ibos v. New Orleans Stevedores v. Ibos*, 35 BRBS 50, 52 (2001). The court stated that the issue does not involve whether "an employer can prove there is no evidence of a true causal link between a particular exposure and the development of the employee's disease." Thus, "aggravation" is not a concept applied to ascertaining the responsible employer in occupational disease cases. *Ibos*, 317 F.3d at 484, 36 BRBS at 96(CRT).

Accordingly, the administrative law judge's finding that Bollinger is liable for claimant's COPD is vacated, and the case is remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's determination to affirm the administrative law judge's decision holding Bollinger liable for claimant's orthopedic conditions. I also concur in the majority's decision to vacate the administrative law judge's decision holding Bollinger liable for claimant's disabling chronic obstructive pulmonary disease (COPD) because the administrative law judge failed to put the burden of proof on the last covered employer, Thoma-Sea, to rebut the presumption that it is liable for payment of claimant's benefits. However, I write separately because the majority has not addressed Thoma-Sea's argument that it rebutted the presumption of liability with pulmonary function testing results which were essentially the same before and after claimant's employment with Thoma-Sea. Thoma-Sea's Brief at 23-25. Bollinger disputes this contention, citing medical evidence in the record which it asserts establishes that injurious welding fumes at Thoma-Sea contributed to claimant's COPD. Bollinger's Brief at 12. Although the administrative law judge discussed the pulmonary function test results and relevant medical opinion evidence, he did not analyze all of the evidence and make a determination as to whether the medical evidence conclusively establishes that claimant's potentially injurious exposure at Thoma-Sea did not contribute causally to claimant's disabling pulmonary disease. If the administrative law judge determines that the evidence demonstrates that exposure at Thoma-Sea did not contribute to claimant's impairment, Thoma-Sea has successfully rebutted the presumption of liability.

I think that the majority has focused too narrowly on the statement by the United States Court of Appeals for the Fifth Circuit in *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004), regarding the last covered employer's burden to rebut the presumption of liability. In *Ibos*, the court held that medical opinion testimony regarding the latency period of mesothelioma was insufficient to establish rebuttal of the presumption that the last covered employer exposed claimant to injurious stimuli which contributed to his disease. The court summarized the medical evidence as "demonstrat[ing] that the latency period for the development of mesothelioma is long enough to suggest that Decedent's development of mesothelioma began years before Decedent's last period of employment with NOS, and that any additional exposure to asbestos during that period had no impact on the course of his disease." *Ibos*, 317 F.3d at 484, 36 BRBS at 95(CRT). The court observed that "two other major maritime circuits have rejected similar claims under the LHWCA," citing *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), and *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989). *Ibos*, 317 F.3d at 485 n.5, 36 BRBS at 96 n.5(CRT). The *Ibos* court agreed with the Director's observation that the "estimates of the latency period, ranging from ten to forty years, suggest that the 'responsible' employer in the Decedent's case may possibly have been any one of the forty-one longshore employers he worked for over the course of his entire career." *Ibos*, 317 F.3d at 486 n.7, 36 BRBS at 97 n.7(CRT). In sum, the court held that evidence which merely suggests that employer did not contribute to claimant's disability is insufficient to rebut the presumption that the last employer is liable. The *Ibos* court's statement of the rebuttal standard addressed the relevant facts of that case, but not of this case.

The issue presented by the pulmonary function testing evidence is whether evidence which affirmatively establishes that employer did not contribute causally to claimant's disability is sufficient to rebut the presumption of liability. That question was answered in the affirmative by the court in *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). In *Ronne*, the evidence of disability consisted of one audiogram taken before claimant began work for the last covered employer to expose him to injurious stimuli, although the contents of the report were not made known to claimant and his attorney until after claimant had commenced work with the last covered employer. The administrative law judge fixed liability on the employer prior to the last covered employer because it was the last employer to expose claimant to industrial noise prior to the audiogram. The Board reversed, explaining that the "last employer rule" as set forth in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), required it to hold that liability was fixed on the date of claimant's awareness of his disability, the day his attorney received the audiogram report. The Ninth Circuit reversed the Board's decision in *Ronne*. The court observed that the audiogram reflected the damage to claimant's hearing as of that date and the amount of compensation claimed. *Ronne*, 932 F.2d at 840, 24 BRBS at 143(CRT).

Hence, the court concluded: "It is factually impossible for Ronne's employment with Port of Portland, which began four days after the audiogram was administered, to have contributed in any way to Ronne's hearing loss." *Id.* The court explained its determination to reject the rationale of the Board's decision:

> It is true that *Cardillo* referred to the last injurious exposure before the employee became "aware" of his occupational disease, *Cardillo*, 225 F.2d 145, but in that case nothing turned on the distinction between the date of awareness and the date of onset of the disability. We reject any reading of *Cardillo* that would impose liability on an employer who *could not*, even theoretically, have contributed to the causation of the disability. Our emphasis on rational connection and causal relation in *Cordero* militates against such a reading. *See Cordero* [*v. Triple A Machine Shop*, 580 F.2d 1331, 1336, 8 BRBS 744, 748 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979)].

Id.

In *Cordero,* application of the last employer rule had been challenged as unconstitutional on the grounds that it violated the guarantees of equal protection and due process of law by placing full liability on one of several employers responsible for the disability. The *Cordero* court rejected the contention on the ground that "here there is a rational connection between the length of employment proven and the contribution to the development and aggravation of the disease." 580 F.2d at 1337, 8 BRBS at 748.

It is true that *Ronne* is not "on all fours" with the case at bar. Unlike the evidence in *Ronne*, claimant introduced evidence of disability both before and after his employment by Thoma-Sea, the last covered employer. There was medical opinion evidence that the two pulmonary function tests were essentially the same and that claimant's employment at Thoma-Sea did not aggravate claimant's lung condition. Thoma-Sea EX 21, p. 18, 21.

The disability evidence in claimant's case is similar to that in *Maersk Stevedoring Co. v. Container Stevedoring Co.*, 2000 WL 27883 (9th Cir. Jan. 11, 2000). In that case, claimant's evidence of disability consisted of four audiograms, the first of which was administered when claimant was working for Container. The other three were performed after claimant worked for Maersk, the last covered employer which had exposed him to potentially injurious noise. The uncontradicted evidence was that the four audiograms were "essentially the same." The administrative law judge held Container liable because claimant's exposure to injurious stimuli at Maersk bore no rational connection to his hearing loss disability which had existed when he was working for Container. A majority of the Board reversed, holding that there need not be medical proof that the last exposure advanced the disability or worsened the condition. In dissent, I wrote that where the

uncontradicted evidence establishes that exposure by a particular employer did not worsen claimant's condition, case law holds that employer cannot be held liable under the Act.

The Ninth Circuit reversed the Board majority, stating:

> The ALJ did find that Echamendi was exposed to potentially injurious noise while employed at Maersk. It was, then, "theoretically possible" that this exposure "had the potential" to contribute to Echamendi's hearing loss. Such a reading of our cases, however, is overly formalistic. We read our case law on this matter to stand for the limited proposition that *in the absence of proof to the contrary*, a theoretical possibility of injurious exposure which has the potential to contribute to a hearing loss is sufficient to establish liability. Here, we are presented with evidence—four audiograms that recorded essentially the same degree of injury—that eliminates any theoretical possibility that Echamendi's hearing deteriorated due to exposure while working at Maersk. Yes, Echamendi was exposed to *potentially* injurious noise at Maersk. The audiograms, however, demonstrate that this exposure was not *actually* injurious. [footnote omitted].

2000 WL 27883 at *3 (emphasis in original).

In accordance with the court's rationale in *Maersk*, I believe the administrative law judge on remand should analyze all of the evidence relevant to claimant's pulmonary function tests to determine if it establishes that the potentially injurious exposure at Thoma-Sea did not contribute causally to claimant's disabling pulmonary impairment. If so, Thoma-Sea should not be held liable. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1287, 16 BRBS 13, 18(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) ("the last covered employer rule means, plainly and simply, that the last employer covered by the LHWCA who *causes or contributes* to an occupational injury is completely liable for that injury." (emphasis supplied)).

The instant case arises in the Fifth Circuit, yet I rely upon cases from the Ninth Circuit because these are the only decisions which address the issue raised by Thoma-Sea. Although circuit courts have been known to disagree, the Fifth Circuit has shown its respect for the decisions of "other major maritime circuits," the Fourth and Ninth. *Ibos*, 317 F.3d at 485 n.5, 36 BRBS at 96 n.5(CRT). Furthermore, I believe the cited decisions are persuasive authority on the proper application of this federal statute. In *Cordero, Ronne, Maersk* and *Black,* the Ninth Circuit was not attempting to put its special gloss on statutory construction. Instead, it was expressing the justification under our federal constitution for application of the last employer rule to the Act: application of the rule

passes constitutional muster if the employer held liable for the injury is the last covered employer who caused or contributed to that injury. The obverse is also true: it would not pass constitutional muster if the evidence conclusively established that the last covered employer held liable for the injury had not caused or contributed to the injury. *Ronne*, 932 F.2d 836, 24 BRBS 137(CRT); *Maersk*, 2000 WL 27883.

In sum, I believe on remand the administrative law judge should apply the *Cardillo* rule by putting the burden of proof on Thoma-Sea to rebut the presumption of liability, and, in that regard, the administrative law judge should consider whether the medical evidence establishes that the potentially injurious exposure at Thoma-Sea did not contribute to claimant's pulmonary impairment. If so, the presumption of Thoma-Sea's liability would be rebutted and Bollinger should be held liable for claimant's pulmonary disability.

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REGINA C. McGRANERY
Administrative Appeals Judge