BRB No. 12-0414

LONI LEON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: 04/26/2013
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Stephen W. Webster and the Order on Reconsideration of William Dorsey, Administrative Law Judges, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Keith L. Flicker, Brendan E. McKeon and Daniel J. Louis (Flicker, Garelick & Associates, LLP), New York, New York, for employer and ACE American Insurance Company.

Michael W. Thomas and Lara D. Merrigan (Thomas, Quinn & Krieger, LLP), San Francisco, California, for employer and Insurance Company of the State of Pennsylvania.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

ACE American Insurance Company (ACE) appeals the Decision and Order Awarding Benefits of Administrative Law Judge Stephen W. Webster and the Order on Reconsideration of Administrative Law Judge William Dorsey (2011-LDA-00147) 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant was hired by employer in February 2005 to provide administrative office support on a Department of Defense contract involving a vessel, known as the HSV-X1. Claimant's duties as the logistics manager were to ensure equipment delivery and inventory status in support of the vessel, which required travel to Hawaii, Guam, Australia and Tasmania. Claimant's first two trips to Guam, stints of seven days in February 2006 and eight days in the summer of 2006, involved her taking an inventory of, and creating a data base for, all the tools, equipment and spare parts employer had installed on the vessel. Claimant's final trip to Guam, from August 30 through September 23, 2006, was prompted by the demilitarization of the HSV-X1. On this trip, claimant was involved in taking a final inventory of employer's equipment as it was dismantled, removed, unloaded and packed in crates. Claimant described her work environment aboard the HSV-X1 in Guam as requiring long hours in a hot, humid, dusty, dirty, and moldy environment. She added that the vessel routinely had standing pools of water on its decks. In particular, claimant stated the combination of the heat and humidity with the dust and debris stirred up by the work aboard the vessel made it difficult to breathe. HT at 53-58.

Shortly after completing the work in Guam, claimant was sent to Tasmania, where, for approximately eight days, she was required to uncrate the equipment and parts previously packed and secured from the HSV-X1 in order to perform another inventory audit. This work, too, was primarily performed aboard the vessel. Claimant described the working conditions in Tasmania as being bitterly cold and she stated that the vessel was not any cleaner though the "dust was more settled." While in Tasmania, claimant began experiencing joint, chest and back pain accompanied by a fever, chills, and a hoarse, raspy, phlegm-producing cough. At the time, claimant thought she had the flu. Claimant stated that while her symptoms somewhat improved upon her return to San Diego, California, continuing night sweats, chest pains and a recurring cough caused her to seek medical attention. Claimant subsequently came under the care of pulmonologist, Dr. Kavy, who diagnosed Mycrobacterium Avium-Intracellular Complex (MAC) and bronchiectasis, which is a sequela of MAC. Dr. Kavy believed that claimant most likely contracted MAC as a result of her cumulative trips to Guam. Dr. Kavy referred claimant

to Dr. Catanzaro who confirmed the diagnosis of MAC and bronchiectasis and informed claimant that she had likely contracted it as a result of her time in Guam. Dr. Kavy opined that claimant has been totally disabled since August 2007. In contrast, Dr. Drew, who examined claimant on behalf of carrier Insurance Company of the State of Pennsylvania (ICSP), opined that claimant was doing fairly well and that she could do desk work. Dr. Drew also stated that claimant's MAC was likely superimposed on an underlying disease, and that claimant probably acquired her exposure to MAC during her childhood in the United States mainland, as opposed to the time she worked aboard the HSV-X1.

Meanwhile, claimant worked for employer until August 17, 2007, when its contract for the HSV-X1 project ended. Claimant has not worked since that date. Claimant subsequently sought benefits under the Act. Employer controverted the claim for benefits. Employer's carrier for purposes of claims arising under the DBA, ICSP, paid claimant temporary total disability benefits from December 1, 2008 to November 7, 2010.[1] 33 U.S.C. §908(b).

In his decision, Judge Webster found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that her MAC is related to her occupational exposures at work for employer in Guam, and that employer could not establish rebuttal thereof. Judge Webster found that since ACE insured employer during the time of claimant's occupational exposures in Guam, i.e., "from August 30 through October 12, 2006," it is the responsible carrier. Judge Webster found that the Section 20(a) presumption was not invoked as to ICSP and thus, he held that it cannot be held liable for claimant's benefits. In light of the total disability opinion of Dr. Kavy, in conjunction with the parties' stipulation that claimant's condition has not yet reached maximum medical improvement, Judge Webster awarded claimant continuing temporary total disability benefits, as well as medical benefits. On reconsideration, Judge Dorsey corrected factual errors in Judge Webster's decision relating to the commencement date of claimant's disability benefits, i.e., August 2007 as opposed to August 2006, and as to the injuries for which claimant is entitled to medical benefits, i.e., her MAC and not for "work-related cervical spine and carpal tunnel injuries." Decision and Order at 26; Order on Reconsideration at 2. Judge Dorsey also ordered ACE to reimburse ICSP for the benefits it had paid claimant from December 1, 2008 to November 7, 2010.

On appeal, ACE challenges Judge Webster's (the administrative law judge) determination that it is liable for claimant's benefits.[2] Claimant and ICSP each respond,

[1]ACE insured employer for claimant's work in Guam and ICSP insured employer for claimant's work in Tasmania.

[2]We affirm the administrative law judge's findings that claimant is entitled to a continuing award of temporary total disability benefits and medical benefits as

urging affirmance of the administrative law judge's decision. ACE has filed a reply brief.[3]

ACE contends that the administrative law judge did not address the responsible carrier issue in terms of the appropriate standard set out by the United States Court of Appeals for the Ninth Circuit in *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010). Specifically, ACE argues that the administrative law judge erroneously stated, without explanation, that claimant did not raise the Section 20(a) presumption against ICSP, which is the last carrier to insure employer during claimant's employment. ACE maintains that under *Albina*, the correct analysis is to look first solely at whether the Section 20(a) presumption was invoked against ICSP, and if so, as ACE alleges it has been in this case, to determine next whether ICSP rebutted that presumption. ACE contends that since ICSP has not produced substantial evidence as to a lack of injurious exposure while claimant worked for employer in Tasmania, ICSP cannot rebut the Section 20(a) presumption. ACE, therefore, avers that ICSP, as employer's carrier at the time of claimant's last occupational exposure to the injurious substances which caused claimant's MAC, is liable for claimant's benefits.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held, in *Albina*, that:

> the ALJ in multiple-employer occupational disease cases should conduct a sequential analysis, as follows: the ALJ should consider *sequentially*, starting with the last employer, (1) whether the §20(a) presumption has been invoked successfully against that employer, (2) whether that employer has presented substantial, specific and comprehensive evidence so as to rebut the §20(a) presumption, *see Ramey*, 134 F.3d at 959 [footnote omitted], and (3) if the answer to the second question is yes, whether a preponderance of the evidence supports a finding that that employer is responsible for the claimant's injury, *see Volpe*, 671 F.2d at 700. The first employer in the analytical sequence (that is, the last employer in time) who is found to be responsible under this analysis shall be liable for payment of benefits, and the ALJ need not continue with this analysis for the remaining

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unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[3]ICSP has filed a motion to submit a sur-reply brief and/or a motion to strike ACE's reply brief, to which ACE, in turn, has filed a brief in opposition. We reject ICSP's motion to strike and accept the additional briefs submitted by the parties as part of the record. 20 C.F.R. §§802.213, 802.215.

> employers. In conducting this analysis, the ALJ should consider *all* evidence regarding exposure or lack thereof at a particular employer, and evidence supporting a finding of exposure at a given employer may be submitted either by the claimant or by earlier employers.

Albina, 627 F.3d at 1302, 44 BRBS 93-94(CRT) (emphasis in the original). The rule for determining which carrier is liable for the totality of a claimant's disability is the same as the rule for ascertaining the responsible employer. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see also Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

The administrative law judge, "in compliance with *Albina*," noted that he must first determine whether claimant raised the Section 20(a) presumption against ICSP because it was the carrier during claimant's potentially last exposure to injurious substances during her work for employer in Tasmania. The administrative law judge then summarily stated that since claimant "clearly did not raise the [Section 20(a)] presumption" against ICSP, he "must proceed as if the presumption was rebutted, and evaluate the record as a whole to determine the issue of causation." Decision and Order at 24. Noting that the conditions aboard the HSV-X1 in Guam and Tasmania "have been detailed," *id.*; *see also* Decision and Order at 7-9 (review of testimony of claimant and her supervisor Mr. Yasui), that "Dr. Lawrence [Drew] reporting for [ICSP], concluded that claimant's condition was not industrial," and that claimant's treating physician, Dr. Kavy, concluded that the injurious exposure occurred in Guam and that any exposure in Tasmania "did nothing to make claimant's condition worse," the administrative law judge found that he could not conclude that there was injurious exposure in Tasmania, under the coverage of ICSP. He thus undertook the same analysis with regard to ACE, employer's next most recent carrier.

The administrative law judge found claimant entitled to the Section 20(a) presumption against ACE because she established the requisite harm, i.e., her MAC, and because her testimony, as bolstered by that of Mr. Yasui, established that her work for employer in Guam exposed her to a hot, humid, wet, dirty and dusty environment in which the bacteria that causes MAC can grow. The administrative law judge next found, after reviewing the opinions of Drs. Kavy, Mosher and Drew, that ACE did not rebut the Section 20(a) presumption. The administrative law judge thus concluded that claimant's injury arose out of and occurred in the course of her work for employer in Guam from "August 30 to October 12, 2006," while employer was insured by ACE, and thus, found ACE liable for the payment of claimant's disability and medical benefits.

As ACE correctly contends, the administrative law judge provided no explanation for his summary finding that claimant "clearly did not raise the [Section 20(a)] presumption" that her disease is related to her work for employer in Tasmania, when ICSP was its carrier. Decision and Order at 24. The record contains evidence which may be sufficient to invoke the Section 20(a) presumption against ICSP. Dr. Mosher stated that claimant "had significant exposure of dust and debris in poorly ventilated areas during her work with [employer] which predisposed her to acquiring the infection" which coincided with the onset of her symptoms, and concluded that "it is my opinion, with a certain degree of medical certainty, that [claimant] likely acquired the infection at that time."[4] ACEX 15. Dr. Kavy opined that claimant could have come in contact with MAC and pseudomonas and been infected and exposed to MAC-causing bacteria while onboard the HVS-X1 in Tasmania.[5] HT at 101, 114, 116; ACEX 29, Dep. at 61-63. This evidence may be sufficient to establish that claimant's working conditions for employer in Tasmania *could have* caused or contributed to her MAC. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *see also Albina*, 627 F.3d at 1302, 44 BRBS at 93-94(CRT). Additionally, the testimony of claimant and Mr. Yasui regarding the working conditions claimant experienced in Tasmania indicate that there was dirt and dust aboard the vessel in each instance. ACEX 14, Dep. at 39, 40; ACEX 39, Dep. at 8-9, 56, 57-58, 62. Moreover, we note that the administrative law judge's discussion contains a significant inconsistency. Although the administrative law judge stated that he "cannot conclude that there was injurious exposure in Tasmania," he nevertheless stated that "claimant's injury arose out of and occurred in the course of her employment in Guam from August 30, 2006 *to October 12, 2006*." Decision and Order at 25 (emphasis added). As the parties stipulated that "[c]laimant worked in Guam from August 30, 2006 through September 23, 2006, and in Tasmania from September 30, 2006 through October 12, 2006," the administrative law judge's two statements regarding claimant's exposure are not consistent with one another. Decision and Order at 2. For these reasons, we must vacate the administrative law judge's finding that claimant did not invoke the Section 20(a) presumption against ICSP and remand this case for further consideration.

[4]As the administrative law judge observed, Dr. Mosher did not differentiate between claimant's work for employer in Guam and in Tasmania. *See* Decision and Order at 25.

[5]We acknowledge, however, Dr. Kavy's opinion that, on a more probably than not basis, claimant's MAC is due to exposure in Guam. ACEX 29, Dep. at 13, 29, 30; HT at 88, 119-120. This evidence is relevant to ICSP's rebuttal burden.

On remand, the administrative law judge must first determine whether claimant established a prima facie case against ICSP under Section 20(a).[6] *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT). If so, the Section 20(a) presumption applies to link the employee's injury or harm to her employment in Tasmania. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The administrative law judge must then address whether ICSP rebutted the Section 20(a) presumption with substantial evidence that it is not the responsible employer. *Albina*, 627 F.3d at 1302, 44 BRBS at 93-94(CRT). A distinct aggravation of an injury need not occur for a later carrier to be held liable; rather exposure to injurious stimuli is all that is required under the *Cardillo* standard. *See Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); *Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989). The Ninth Circuit has held, however, that exposure is not "injurious" if it did not have the potential to cause the claimant's disease. *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT) (administrative law judge rationally found that asbestos exposure below OSHA level was not "injurious"). Thus, ICSP's burden on rebuttal is to introduce substantial evidence that it did not expose claimant to stimuli that had the potential to cause claimant's disease.[7] *Jones Stevedoring*, 133 F.3d at 693, 31 BRBS at 186(CRT).

If ICSP rebuts the Section 20(a) presumption, the administrative law judge must then address whether a preponderance of the evidence supports a finding that ICSP is liable for claimant's injury. *Albina*, 627 F.3d at 1302, 44 BRBS at 93-94(CRT). In the event the administrative law judge finds that ICSP is not liable, the award payable by

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[6]As the administrative law judge who conducted the hearing is deceased, the parties should be provided the opportunity for a de novo proceeding before the new administrative law judge, particularly if it is determined that live testimony, and/or the credibility of a witness, is important to the resolution of the case. *See Garmon v. Aluminum Co. of America, Mobile Works*, 29 BRBS 15 (1995)(decision on reconsideration); *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981).

[7]In *Picinich*, the court stated,

> minimal exposure to offensive stimuli at a place of employment is not sufficient to place responsibility on a covered employer in the absence of proof that exposure in such quantities had the potential to cause his disease.

914 F.2d at 1320, 24 BRBS at 39(CRT). Thus, pursuant to *Albina*, if the Section 20(a) presumption applies to claimant's employment in Tasmania, it is ICSP's burden to rebut it with substantial evidence that claimant's exposure, if any, did not have the potential to cause her disease.

ACE stands as ACE has not challenged the findings that claimant was exposed to injurious stimuli while it was on the risk. Moreover, since ACE has asserted no errors in the administrative law judge's finding regarding claimant's entitlement to disability and medical benefits, ACE must continue to pay claimant the awarded compensation pending resolution of the responsible carrier issue on remand. *Schuchardt v. Dillingham Ship Repair*, 40 BRBS 1 (2005) (order on recon.). In the event that ICSP is found liable on remand, ACE will be entitled to reimbursement from ICSP for benefits paid to claimant. *Id.*

Accordingly, the administrative law judge's finding that ACE is the carrier liable for claimant's benefits is vacated, and the case is remanded for further findings consistent with this decision. ACE shall continue to pay claimant the awarded benefits pending resolution of the responsible carrier issue on remand. In all other respects, the Decision and Order Awarding Benefits and the Order on Reconsideration are affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge