BRB No. 92-2191

ROBERT E. THURSTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES	)	DATE ISSUED:_____
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Carriers-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand, Supplemental Decision and Order on Remand, and Decision and Order on Petition for Reconsideration of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Stephen D. Bither (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for self-insured employer.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for Commercial Union Insurance Companies.

Claire Gallagan Andrews (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Birmingham Fire Insurance Company.

Michelle Jodoin LaFond (Norman, Hanson & DeTroy), Portland, Maine, for Liberty Mutual Insurance Company.

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

PER CURIAM:

Self-insured employer appeals the Decision and Order on Remand, Supplemental Decision and Order on Remand, and Decision and Order on Petition for Reconsideration (87-LHC-1155) of Administrative Law Judge Martin J. Dolan, 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).[1] 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).

This is the second time this case has been before the Board. In view of the complicated procedural history, we will recapitulate the relevant history regarding this claim. Claimant worked as a material handler at employer's Hardings facility in 1952. In 1953-1954, he served in the United States Army in Germany, returning thereafter to employer's employ. In 1955, claimant worked as an electrician's helper at employer's main shipyard, where he worked near pipecoverers and was exposed to asbestos. Employer laid off claimant in December 1955 and recalled him in June 1956. Upon recall, claimant worked as a cleaner at the main shipyard where he was exposed to airborne asbestos. In January 1957, claimant transferred to the Hardings facility, where he was exposed to sandblasting dust, black dust, and fumes. Tr. 1 at 27, 31-32, 57-58. Claimant testified that while assigned to Hardings he worked a few nights and weekends during the late 1970's in the paint shop at the main shipyard. Tr. 1 at 17-26, 45. He began experiencing breathing difficulties in 1985, and he underwent a decortication of the left lung, performed by Drs. Golden and Katz, in January 1986. Cl. Ex. 10. Claimant filed a claim for compensation under the Act on March 4, 1986.[2] Cl. Ex. 2.

[1]Petitioner, self-insured employer (herein "employer"), was at risk of loss from 1951 until December 1962. Commercial Union served as the carrier for Bath Iron Works Corporation from January 1, 1963 until February 28, 1981, Liberty Mutual was the carrier from March 1, 1981 through September 1986, and Birmingham Fire became the carrier after September 1986. *See* Tr. 1 at 14.

[2]The claim for compensation alleged occupational exposure to "asbestos and other deleterious substances." Cl. Ex. 2.

Upon his return to work, claimant was restricted to lighter-duty work and could not work overtime; since May 1987, Dr. Golden has restricted claimant to four hours of work per day.

The first hearing in this case was held on July 16, 1987 before Administrative Law Judge Dolan. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption because claimant established evidence of his lung disease and exposure to various occupational inhalants during his employment which might have caused his disease. Next, after finding that employer failed to rebut the presumption, the administrative law judge found that claimant was temporarily totally disabled from January 13, 1986 through July 9, 1986, and temporarily partially disabled from July 10, 1986 to the present. Finally, the administrative law judge determined that claimant was last exposed to harmful stimuli in the 1970's and thus, he held Commercial Union liable as the carrier responsible for claimant's benefits. Subsequently, Judge Dolan issued an order awarding claimant's counsel an attorney's fee.

Commercial Union appealed Judge Dolan's decisions. Based on its decision in *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989), the Board reversed the administrative law judge's finding that employer's Hardings facility is a covered situs; however, it held that claimant's work from 1955 to 1957 at the main shipyard met the situs requirement under Section 3(a) of the Act, 33 U.S.C. §903(a). Because employer was self-insured during this period, the Board also reversed the finding that Commercial Union is the carrier responsible for claimant's benefits, and it held employer liable for "any compensable disability claimant may have." *Thurston v. Bath Iron Works Corp.*, BRB No. 88-3231 (September 30, 1991) (unpublished). The Board additionally noted that Judge Dolan, when invoking the Section 20(a) presumption, did not identify whether that presumption applied to claimant's exposure at Hardings, where he found exposure to numerous irritants, or the main shipyard, where he found exposure to asbestos only. Based on this ambiguity and the conflicting medical evidence regarding the cause of claimant's pulmonary problems, the Board remanded the case for further consideration. *Id.*, slip op. at 4-5.

After the Board's decision, but prior to the actual return of the record to Judge Dolan, Administrative Law Judge Di Nardi conducted a hearing on claimant's motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.[3] During the hearing, Judge Di Nardi accepted evidence and testimony addressing the remand issue only, despite claimant's pleas to also address his motion. Tr. 2 at 47-50, 79-80. Judge Di Nardi subsequently determined that claimant did not follow the proper procedure for a motion for modification and declared the motion moot "as there [was] no viable decision in existence. . . ."[4] Decision and Order Denying Motion for Modification at 4. Based on the procedural history of the case, Judge Di Nardi denied the request for modification and concluded that the principal claim must remain with Judge Dolan. *Id.*

[3]Claimant filed for modification based on a change in his condition from temporary to permanent disability. *See* Motion for Modification Exhibits - Cl. Exs. 10 at 17, 11 at 8.

[4]The Board was not advised of claimant's Motion for Modification and, consequently, was not able to remand the case prior to deciding the issues raised on appeal.

On remand, Judge Dolan found that claimant was exposed to asbestos between 1955 and 1957 at the main shipyard. After noting that Drs. Katz and Golden believed the cause of claimant's disability is "most likely related to his exposure to and inhalation of asbestos" at the main shipyard, he invoked the Section 20(a) presumption. Judge Dolan then determined that employer failed to rebut the presumption, and he held that claimant's disability is occupational. Decision and Order on Remand at 2-4. In accordance with the Board's decision, Judge Dolan held employer liable for claimant's compensation. *Id.* at 5. Thereafter, Commercial Union filed a motion for modification to amend the decision to reflect its entitlement to a credit for benefits paid, and employer filed motions for reconsideration and to supplement the record with evidence from the hearing before Judge Di Nardi. Judge Dolan granted Commercial Union's motion and amended his decision accordingly, but he denied both of employer's motions. Supp. Decision and Order on Remand at 1-2; Decision and Order on Recon. at 1.

On appeal, employer, in its self-insured capacity, challenges Judge Dolan's decisions on remand, contending that he erred in holding it liable for any compensable disability claimant may have because he failed to consider the supplemental evidence of claimant's subsequent exposure to injurious stimuli and because his findings on causation are inconsistent. In response, Commercial Union urges either affirmance of the decisions, as the responsible carrier issue has already been decided by the Board, or reversal of the award of benefits altogether, as Judge Dolan's findings on causation are not consistent. Claimant also responds to the appeal, urging either affirmance, based on substantial evidence which supports the finding that his disease is employment-related, or remand for further testimony and consideration, as Judge Dolan should have admitted and considered the evidence from the modification hearing before Judge Di Nardi. Liberty Mutual and Birmingham Fire also respond; however, they take no position on the matter.

Employer initially contends the administrative law judge erred in holding it liable for claimant's disability benefits. Commercial Union, in response, argues that this issue has been addressed previously by the Board and should not be re-opened. The standard for determining the responsible employer or carrier was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Pursuant to *Cardillo*, the last employer covered under the Act to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation; therefore, the responsible carrier is the carrier insuring the employer at that time. *See Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Maes v. Barrett & Hilp*, 27 BRBS 128, 131 (1993).

In its initial decision, the Board determined that claimant's most recent covered employment was at employer's main shipyard between 1955 and 1957, and it accordingly held employer, who was self-insured during that period, liable "for any compensable disability claimant may have."[5]

[5]The Board remanded the case for consideration of whether:

Thurston, slip op. at 4. This holding constitutes the law of the case, and Judge Dolan accepted it as such. *See Bruce v. Bath Iron Works Corp.*, 25 BRBS 157, 159 (1991); Decision and Order on Remand at 5. Employer now contends the law of the case doctrine should not be applied and the Board should re-open the responsible carrier issue based on testimony from the modification hearing before Judge Di Nardi which indicates claimant may have been exposed to harmful inhalants at the main shipyard subsequent to 1957.[6]

Section 702.339 of the regulations permits an administrative law judge to investigate a case so as to best ascertain the rights of the parties, and Section 702.338 requires the administrative law judge to inquire fully into the matter and receive relevant testimony and evidence. 20 C.F.R. §§702.338, 702.339. The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious or an abuse of discretion. *See generally Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pertinent part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992). Failure to inquire into a matter fundamental to the disposition of the issues in the case is a violation of Section 702.338. *Gray & Co., Inc. v. Highlands Insurance Co.*, 9 BRBS 424 (1978). Moreover, Section 22 of the Act, 33 U.S.C. §922, provides the means for changing otherwise final decisions. Modification of a decision is permitted based on a mistake of fact in the initial decision or a change in claimant's condition. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968).

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causation has been established based on claimant's exposure to asbestos at the Bath shipyard.

> On remand, the administrative law judge must initially determine whether claimant established conditions during his covered employment (*i.e.*, at the Bath shipyard) which could have caused his harm in order to determine whether claimant invoked the Section 20(a) presumption. It is then employer's burden on rebuttal to show that those conditions could not have caused the harm.

See Thurston, slip op. at 5 (citations omitted).

[6]Contrary to employer's alternate argument that it did not actively participate in the first hearing, so use of the law of the case doctrine would result in a "manifest injustice," we note that employer was a party to the claim from the outset, and that it chose both not to be present at the hearing before Judge Dolan and not to participate in the claim until after remand. Tr. 1 at 4-5. Consequently, we reject employer's "manifest injustice" argument.

In the instant case, claimant explained, at the modification hearing before Judge Di Nardi, how he worked as a cleaner on weekends and for two or three nights per week at the main shipyard, "off and on" for a few years during the late 1970's, where he came in contact with asbestos, spilled paint, oil, grease, and dust. Tr. 2 at 60-65. Judge Dolan, however, denied without explanation employer's request to admit into evidence the transcript of the modification hearing. *See* Decision and Order on Petition for Reconsideration. The administrative law judge thus refused to consider whether claimant's limited-duration, night and week-end employment at employer's main shipyard during the late 1970's had any effect on his lung condition. As employer was not self-insured at the time of the alleged subsequent exposure, claimant's testimony, which is admissible pursuant to Section 22 of the Act, is fundamental to the responsible carrier issue, and Judge Dolan erred in not considering it. *See Gray & Co.*, 9 BRBS at 426. Because evidence has come to light with regard to claimant's exposure to injurious stimuli which may result in the assessment of benefits against a carrier other than the self-insurer, we need not adhere to the law of the case doctrine. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). Therefore, we vacate the administrative law judge's holding that employer is liable for claimant's disability compensation and we remand the case to the administrative law judge for further consideration of the responsible carrier issue and for an appropriate Section 20(a), 33 U.S.C. §920(a), analysis should he determine that claimant was exposed to injurious stimuli while working at employer's main shipyard in the 1970's. *See Maes*, 27 BRBS at 131.

Alternatively, employer contends Judge Dolan erred in finding no rebuttal of the Section 20(a) presumption. Initially, we note that Judge Dolan cited the opinions of Drs. Golden and Katz in determining that claimant satisfied his burden of proof and in invoking the Section 20(a) presumption.[7] Decision and Order on Remand at 2. That the Section 20(a) presumption was properly invoked is not disputed, as claimant has established evidence of a pulmonary disease and exposure to asbestos at employer's main shipyard. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, accelerate, aggravate or contribute to his injury.[8] *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1264 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). If an employer submits substantial countervailing evidence to sever the connection between the

[7]As of 1986, both Drs. Golden and Katz believed claimant's lung disease was a rare form of asbestos disease. Cl. Ex. 10 at 2; Emp. Ex. 32 at 11; M/Modif. Exhibits - Cl. Ex. 10 at 1.

[8]Employer, as self-insurer, also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer/carrier. *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 63 (1992); *see also Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992).

injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

Employer argues that it successfully rebutted the Section 20(a) presumption because, while it was self-insured, claimant's only covered occupational exposure to harmful stimuli occurred between 1955 and 1957 when he was exposed to asbestos at the main shipyard, and doctors determined that asbestos is not the cause of claimant's symptomatic disease. In discussing the cause of claimant's lung problems, Judge Dolan first credited Drs. Golden and Katz, stating their opinions clearly evidence that claimant suffered from a pulmonary condition which was most likely related to his exposure to asbestos. Thereafter, the administrative law judge again credited Dr. Golden, describing his opinion as stating that claimant's condition was not caused by asbestos, but was caused by an unknown occupational inhalant. Cl. Ex. 17; Emp. Exs. 20-25, 27, 32. The administrative law judge also noted Dr. Golden's testimony that Dr. Selikoff and his colleagues in the pulmonary department at Mercy Hospital concur that claimant's lung disease is due to occupational inhalants. Because Dr. Golden stated the disease is occupational, Judge Dolan found there was no rebuttal of the Section 20(a) presumption. Decision and Order on Remand at 3-4.

Although questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), the administrative law judge here credited opposing opinions as to whether claimant's disease is asbestos-related and did not identify which opinion warrants greater weight. *See Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252, 254 n.1 (1988). If claimant's only occupational exposure in covered employment is to asbestos, then whether his disease is asbestos-related is critical. Therefore, we must remand the case for further consideration of the issue of causation. On remand, if Judge Dolan credits claimant's testimony as to exposure to injurious stimuli in the 1970's during his occasional employment at employer's main shipyard, then a variety of occupational causes are relevant, and the administrative law judge is correct that Dr. Golden's opinion does not rebut the Section 20(a) presumption. If, however, he determines that claimant's last covered exposure occurred in the 1950's, he must clarify his causation findings. Specifically, he must determine whether employer has presented sufficient evidence to rebut the Section 20(a) presumption and sever any causal or contributory connection between claimant's lung condition and his 1950's occupational exposure to asbestos,[9] and if he so finds, he must then resolve the causation issue based on the record evidence as a whole. *See generally Peterson*, 25 BRBS at 78; *Stevens*, 23 BRBS at 191.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand, Supplemental Decision and Order Awarding Benefits on Remand, and Decision and Order on Petition for Reconsideration are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this decision.

[9]We note that equivocal opinions cannot serve to rebut the Section 20(a) presumption. *See Dewberry v. Southern Stevedoring Corp.*, 7 BRBS 322 (1977), *aff'd mem.*, 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978).

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge