

BRB No. 93-270

VIVIAN PETERSON)	
(Widow of MORRIS PETERSON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
FAR WEST INSULATION)	
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DATE ISSUED:_____
)	
and)	
)	
OWENS-CORNING FIBERGLAS)	
)	
and)	
)	
AETNA CASUALTY AND)	
SURETY COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Norman Cole, Portland, Oregon, for Far West/SAIF Corporation.

William M. Tomlinson and Rick T. Haselton (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for Owens-Corning/Aetna.

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

PER CURIAM:

Far West Insulation and SAIF Corporation (hereafter Far West) appeal the Decision and Order (91-LHC-1420) of Administrative Law Judge Alfred Lindeman awarding benefits 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).

Decedent worked as an insulator for 30 years. Between 1970 and 1977, he worked primarily for Owens-Corning Fiberglas (hereafter Owens-Corning), performing land-based and maritime work. He last worked in a maritime capacity for Owens-Corning in 1976, and this employment exposed him to asbestos. During July and August 1977, the union was on strike at Owens-Corning, and decedent obtained maritime insulating work with Far West where he was exposed to asbestos. This was decedent's last maritime employment. Decedent returned to work for Owens-Corning until the early part of December 1977, and on December 11, 1977, he was diagnosed with lung cancer. On December 13, 1977, decedent underwent a pneumonectomy of the cancerous lung. He died on January 9, 1979, due to a poorly differentiated adenocarcinoma. OCF Ex. 15 at 66.¹ The autopsy report indicated decedent also had microscopic bronchopneumonia, chronic interstitial fibrosis, pleural thickening, dilated airspaces, fibrous adhesions, and readily apparent ferruginous bodies, all of which are consistent with pulmonary asbestosis. *Id.* at 67-68.

The administrative law judge awarded claimant death benefits, as well as decedent's temporary total disability benefits from December 10, 1977, through January 8, 1979. 33 U.S.C. §§908(b), 909; Decision and Order at 7. He determined that Far West is the responsible employer and is liable for benefits.² *Id.* at 4-5. The administrative law judge also found Far West entitled to relief from continuing liability on the claim for death benefits pursuant to Section 8(f), 33 U.S.C. §908(f). Decision and Order at 5-7. Far West appeals the administrative law judge's determination holding it liable as the responsible employer. Owens-Corning and claimant respond, urging affirmance.

Far West concedes that it is responsible for contributing to decedent's asbestosis. However, it contends it is not responsible for decedent's lung cancer, which was the cause of his temporary

¹The exhibits of Owens-Corning/Aetna are designated OCF Ex., and the exhibits of Far West/SAIF Corp. are designated SAIF Ex.

²The administrative law judge amended his Decision and Order, upon Far West's motion, to reflect that the award of temporary total disability benefits is subject to the maximum rate imposed by Section 6 of the Act, 33 U.S.C. §906. Order Granting M/Recon. This order has not been appealed.

total disability and was a contributing factor in his death. Therefore, Far West contends Owens-Corning is liable for the disability and death benefits, and, at most, Far West is liable jointly with Owens-Corning for death benefits. Far West separates the claim for benefits into two components -- one for disability due to lung cancer and one for death due to lung cancer and asbestosis -- and argues that asbestos exposure at its facility did not cause decedent's lung cancer because the disease existed prior to July/August 1977. Far West thus contends it refuted the Section 20(a), 33 U.S.C. §920(a), presumption and cannot be held liable for temporary total disability benefits or for death benefits. Claimant and Owens-Corning respond, arguing that an actual causal relationship is irrelevant under *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), and *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955), and that Far West has not presented sufficient evidence to rebut the Section 20(a) presumption.

Under the Act, the employer responsible for disability benefits is the last employer to expose the employee to injurious stimuli prior to the date on which the employee became aware of the fact that he was suffering from an occupational disease. *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 142-143 (CRT); *Cardillo*, 225 F.2d at 145; *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). An employer can escape liability by rebutting the Section 20(a) presumption by establishing that the exposure to injurious stimuli did not cause the harm or, consistent with *Cardillo*, by demonstrating that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff*, 19 BRBS at 149. Where an employee was exposed to asbestos with two different maritime employers, the last employer for which he worked is the responsible employer, even if he was exposed to less asbestos with that employer than he had been with his previous one. *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

Initially, we reject Far West's argument that it may, at most, be held jointly liable for benefits for decedent's death due to asbestosis and lung cancer. The purpose of the last employer rule under the Act is to avoid the complexities associated with assigning joint liability. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984); *Cardillo*, 225 F.2d at 137. Consequently, even if more than one maritime employer is responsible for exposing an employee to injurious stimuli which caused his disease, only one employer may be held liable. *General Ship Service*, 938 F.2d at 962, 25 BRBS at 25 (CRT). As asbestosis contributed to decedent's death, and as decedent was last exposed to asbestos while employed with Far West, it is liable for death benefits.

Next, we reject Far West's argument that it was not the last employer to expose decedent to quantities of asbestos sufficient to cause his disability due to lung cancer. In this case, the evidence of record establishes that Far West was decedent's last maritime employer prior to the discovery of his cancer and that asbestos exposure contributed to the cancer. SAIF Ex. 11; Tr. at 82, 86-87, 98. Further, contrary to Far West's contention, an actual causal relationship is irrelevant in applying the last employer rule, as there need only be a rational connection between the exposure and the

disability.³ *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143 (CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986). Thus, even if, as Far West argues, it did not expose decedent to the asbestos that actually caused his lung cancer, it is still liable for decedent's entire disability, as it was the maritime employer at risk at the time of the most recent injurious exposure related to his disease.⁴ *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143 (CRT).

Far West also contends it presented sufficient evidence to rebut the Section 20(a) presumption that decedent's cancer was work-related. It relies on the testimonial evidence of Dr. Smith, a pulmonary specialist, who stated that decedent's exposure to asbestos at the Far West facility did not aggravate or contribute to decedent's lung cancer.⁵ Tr. at 176. Dr. Brady testified that decedent's 1977 exposure to asbestos aggravated his disease and hastened his death.⁶ Tr. at 90-

³Far West contends this case is comparable to *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). Far West avers that, like employer Port of Portland, it cannot be liable for a disease contracted prior to decedent's employment. However, *Port of Portland* can be distinguished. In this case, decedent's disease was not discovered until after his employment with Far West, whereas claimant Ronne, in *Port of Portland*, underwent an audiometric evaluation which established a hearing loss *prior* to his employment with Port of Portland. Moreover, Ronne's claim covered only that hearing loss detected in the audiogram; therefore, Port of Portland could not be responsible for the disability. *See Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT).

⁴The United States Court of Appeals for the Ninth Circuit, wherein the jurisdiction of this case resides, has held that "minimal exposure" is insufficient to establish an exposure to injurious stimuli, as there must be evidence of exposure to stimuli in quantities sufficient enough to potentially cause the occupational disease. *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36 (CRT) (9th Cir. 1990) (citing *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984)). In *Picinich*, the court relied on the administrative law judge's finding that the uncontradicted evidence of record established that the asbestos to which the claimant was exposed was not injurious because, *inter alia*, the asbestos levels were below the government proscribed limit. The facts of this case are distinguishable from *Picinich*, as the administrative law judge found and the record supports that decedent was exposed to significant amounts of asbestos which had the potential to cause/aggravate his lung cancer and asbestosis. Decision and Order at 2-5; *see n.6, infra*.

⁵Dr. Smith stated that, given the size of the tumor, the first cell of the tumor was in existence about February 1976. He acknowledged that asbestosis played a role in causing the cancer, but he opined that decedent's exposure at Far West, although "significant," was not sufficient, in light of his overall exposure, to cause a lung cancer. Tr. at 171-175, 182-187.

⁶Dr. Brady specifically stated that once it is determined that a body cannot handle asbestos, any exposure is hazardous, and, if the exposure at Far West continued, it would have lead to a cancer tumor such as decedent's. Moreover, he testified that the Far West exposure "played a contributing

91. The administrative law judge found that Dr. Smith's testimony is insufficient to rebut the Section 20(a) presumption; however, he noted that even if it is sufficient rebuttal evidence, the more credible evidence is Dr. Brady's testimony. Decision and Order at 5 n.2. As Far West presented no other rebuttal evidence, the administrative law judge concluded that Far West is liable for benefits. Decision and Order at 4-5. Because Far West concedes its responsibility for contributing to decedent's asbestosis, and because it has not presented unequivocal evidence establishing that exposure to asbestos did not contribute to decedent's disease and death, the administrative law judge properly determined that Far West has not refuted the Section 20(a) presumption. Consequently, we affirm the finding that Far West is the responsible employer and is liable for benefits. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Co. of N. America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

role" in decedent's lung fibrosis and asbestos-related disease. Tr. at 81, 83, 86.