BRB No. 00-1165

CHARLES T. McLAURIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HORNE BROTHERS, INCORPORATED (defunct)	)	DATE ISSUED: Sept. 7, 2001
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

Richard E. Garriott, Jr. and Jennifer G. Tatum (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for employer/carrier.

Lexine D. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-1768 and 99-LHC-2397) of Administrative Law Judge Daniel A. Sarno, 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for Newport News Shipbuilding and Dry Dock Company (Newport News) as a pipe coverer from 1958 until 1965, and the parties stipulated that he was exposed to asbestos in the course of this employment. Claimant then worked for Horne Brothers, Inc., a company now defunct, for one or two months in 1965, also as a pipe coverer, where he worked with asbestos products. In September 1998 claimant was diagnosed with asbestosis. Claimant filed a claim under the Act for medical benefits to cover the cost of periodic medical monitoring for his asbestosis.

The administrative law judge found that claimant is entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), that his asbestosis is causally related to asbestos exposure while working at Newport News, and that Newport News rebutted the presumption by showing that claimant was exposed to asbestos while working for Horne Brothers, a subsequent maritime employer. The administrative law judge concluded that Horne Brothers is the responsible employer as it was the last employer to expose claimant to injurious stimuli. Consequently, the administrative law judge awarded claimant medical benefits payable by Horne Brothers.

On appeal, Horne Brothers (employer) challenges the administrative law judge's findings regarding the causation/ responsible employer issue. Claimant and Newport News each respond, urging affirmance of the administrative law judge's decision, based on *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 121 S.Ct. 855 (2001). Horne Brothers replies to these response briefs, alleging that the decision in *Faulk* is not dispositive, because that case is distinguishable, in that claimant in this case did not establish a *prima facie* case with respect to Horne Brothers. Horne Brothers alleges claimant worked for it for no more than a few weeks, participated in only two small repair jobs, and therefore did not establish that he was exposed to a sufficient quantity of asbestos to cause his condition. Employer argues that claimant was exposed to much more substantial levels of asbestos while working for Newport News.

We note that employer confuses the issues of causation and responsible employer on appeal. In its brief, Horne Brothers erroneously contends that the administrative law judge

erred in finding that claimant established his *prima facie* case, asserting that claimant did not establish that his condition was caused by his employment with Horne Brothers, rather than his employment with Newport News. However, the question of causation in the instant case deals solely with whether claimant's condition is related to his exposure to asbestos in his employment or to some other cause. Once it is determined that claimant's employment exposures as a whole are causally linked to his asbestosis, then the responsible employer analysis is applied, involving whether a specific employer exposed claimant to injurious stimuli. *See Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In this case, the administrative law judge properly invoked the presumption that claimant's asbestosis is work-related pursuant to Section 20(a), based on claimant's exposure to asbestos while working for Newport News. *See generally Faulk*, 228 F.3d 378, 34 BRBS 71(CRT). Horne Brothers argues that claimant was exposed to injurious levels of asbestos at Newport News, a prior employer, and that claimant was not exposed to injurious levels of asbestos while working for it. Employer's argument challenges the administrative law judge's finding that it is the responsible employer, and not the work-relatedness of claimant's asbestosis. *See Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

Pursuant to *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the last employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for any compensation owed under the Act. *See Faulk*, 228 F.3d 378, 34 BRBS 71(CRT); *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). Once claimant has demonstrated a *prima facie* case, employer can rebut the Section 20(a) presumption by showing that any exposure claimant had in its employ was not injurious or that the employee was exposed to injurious stimuli while performing work for a subsequent covered employer. *Faulk*, 228 F.3d at 385, 34 BRBS at 75(CRT); *Cuevas*, 977 F.2d at 190, 26 BRBS at 113(CRT); *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001). An injurious exposure is one which had the potential to cause the disease or harm at issue. *Faulk*, 228 F.3d at 385, 34 BRBS 75(CRT).

In *Faulk*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, stated that an employer's evidence that a subsequent employer merely exposed claimant to injurious stimuli is insufficient for it to escape liability: an employer must show that the subsequent exposure had the potential to cause the harm. Therefore, the administrative law judge's finding in this case that Newport News can rebut the Section 20(a) presumption merely by showing that Horne Brothers was the last employer to expose claimant to asbestos, would, in and of itself, be insufficient to establish that Newport News is not the responsible employer. *Faulk*, 228 F.2d at 385, 34 BRBS at 76(CRT). Nevertheless, we affirm the administrative law judge's finding that Horne Brothers is the responsible employer. Horne Brothers argues that "[f]or each employer

against whom the Claimant claims, Claimant must prove that his exposure to asbestos was sufficient in quantity to cause asbestosis." Horne Brothers Br. at 9. This is not a correct statement of the law, because, as discussed previously, the burden is on Horne Brothers to establish that it is not the responsible employer. *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *Susoeff*, 19 BRBS 149.

In this regard, Horne Brothers argues that the administrative law judge erred in finding that claimant performed essentially identical work for it as he did for Newport News, and thus was exposed to the same levels of asbestos. Decision and Order at 5. Horne Brothers alleges that its working environment was different from the one at Newport News, because at Newport News claimant worked in proximity to other employees who were tearing out asbestos insulation, while at Horne Brothers he worked practically alone without exposure to asbestos particles generated by other employees, in a much less dusty environment, with good ventilation. Absence of visible dust, however, fails to mandate the inference that there was no injurious exposure at Horne Brothers. *See Faulk*, 228 F.3d at 386, 34 BRBS at 77(CRT). Further, it was within the administrative law judge's discretion to credit claimant's testimony as very credible in determining that claimant performed essentially identical work for the two employers. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 5.

The Fourth Circuit in *Faulk* refused to adopt a requirement that exposure to injurious stimuli be more than *de minimis,* and held that even assuming the applicability of a *de minimis* requirement, the employer in that case "presented no evidence of the asbestos level on . . . the day of the incident, nor did it present evidence of the level of exposure it would take to cause the disease."[1] *Faulk,* 228 F.3d at 387, 34 BRBS at 77(CRT). The court stated that a physician's opinion that the exposure did not cause the claimant's mesothelioma, where he did not state that such exposure did not have the potential to cause the disease or was in insufficient quantities to cause it, is insufficient for employer to avoid liability. *Id.; Ibos,* 35 BRBS 50. The court concluded by saying that it "has never required proof of a certain level of exposure to injurious stimuli in order to warrant attachment of liability under [the Act]." *Faulk,* 228 F.3d at 387, 34 BRBS at 78(CRT). The *Faulk* court favorably cited *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012, 12 BRBS 975, 978 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981), for the proposition that it also rejected a *de minimis* standard, and distinguished *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich],* 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), on which Horne Brothers relies in the instant case.[2]

[1]Claimant in *Faulk* was apparently exposed to asbestos only in the course of one day with the subsequent employer, which was held liable.

[2]Employer in *Picinich* had proved that the level of asbestos to which the claimant was exposed was 250 times below government minimum levels.

In the instant case, Horne Brothers does not point to any evidence of record which purports to establish that the level of asbestos to which claimant was exposed did not have the potential to cause claimant's asbestosis. It was within the discretion of the administrative law judge to credit claimant's testimony that the jobs he performed for both Newport News and Horne Brothers were virtually the same as far as the level of exposure to asbestos, and Horne Brothers has failed to establish that the asbestos to which claimant was exposed did not have the potential to cause claimant's disease. Thus, as the administrative law judge's finding that Horne Brothers is the responsible employer is rational, is supported by substantial evidence, and accords with law, it is affirmed. *Faulk*, 228 F.3d 378, 34 BRBS 71(CRT); *Ibos*, 35 BRBS 50.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge