BRB No. 11-0510

CAROLYN RUBIDOUX (Widow of LEROY RUBIDOUX) Claimant-Petitioner v. OREGON SHIPBUILDING CORPORATION and GUNDERSON, INCORPORATED and POOLE, McGONIGLE and JENNINGS Employers-Respondents SAIF CORPORATION Carrier-Respondent	)	DATE ISSUED: 03/21/2012 DECISION and ORDER

Appeal of the Decision and Order Denying Request for New Hearing and Claim for Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and Lloyd F. LeRoy (Brayton Purcell, LLP), Novato, California, for claimant.

Holly O'Dell (SAIF Corp.), Salem, Oregon, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and O`rder Denying Request for New Hearing and Claim for Benefits (2009-LHC-00472) of Administrative Law Judge Gerald M. Etchingham 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 if they 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).

The decedent's Social Security records show that he worked for the three employers in this case, Oregon Shipbuilding Corporation (Oregon), Gunderson, Incorporated (Gunderson), and Poole, McGonicle and Jennings (PMJ), from the third quarter of 1942 to the third quarter of 1944. EX 1 at 3-4. At his deposition on June 28, 2005, decedent testified that he worked as a welder during this time constructing and repairing ships. He died on March 16, 2007; the death certificate lists lymphoma as the cause of death. CX 7. Dr. Kagen opined that the death was related to decedent's occupational exposure to asbestos fibers. CX 12. A medical assessment by Dr. Kagen rendered on August 25, 2006, notes that decedent was exposed to asbestos over the course of his career in occupations as a laborer, plasterer, insulator, welder and tire repairman. CX 11 at 3, 7, 9-11. Claimant, decedent's widow, filed a claim for death benefits based on the decedent's alleged occupational exposure to asbestos during the course of his longshore employment as a welder from 1942 to 1944. 33 U.S.C. §909.

In his decision, the administrative law judge stated that, pursuant to *Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), claimant must produce "some evidence" of asbestos exposure in order to establish her *prima facie* case of a compensable death. Pursuant to *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), the administrative law judge stated this evidence must indicate that decedent was exposed to "injurious stimuli in sufficient quantities to cause" asbestos-related disease. The administrative law judge found that the deposition testimony of decedent, and that of David Allen and Larry Rafferty, are insufficient to establish the existence of working conditions that could have caused an asbestos-related disease. The administrative law judge found decedent did not testify at his deposition to sufficient asbestos exposure and that the working conditions described by Mr. Allen and Mr. Rafferty contain significant discrepancies from the working conditions described by decedent. *Id*. at 10-11. Accordingly, the administrative law judge denied the claim for benefits under the Act.

On appeal, claimant challenges the administrative law judge's finding that she did not produce evidence of asbestos exposure at the shipyards sufficient to invoke the Section 20(a) presumption. 33 U.S.C. §920(a). Claimant also alleges that she was denied due process of law because her motion for a new hearing before a different administrative law judge was denied. Employer filed a response brief. Claimant filed a reply to which employer responded.[1]

We first address claimant's procedural contentions. The hearing in this case was conducted on July 14, 2010, by Administrative Law Judge Etchingham. On December 22, 2010, this administrative law judge issued a notice that he was transferring to another agency and that the case would be assigned to Administrative Law Judge Clark. The parties were afforded the opportunity to request a *de novo* hearing or to accept a decision by Judge Clark on the existing record. Claimant requested a *de novo* hearing. In an Order issued on February 2, 2011, Administrative Law Judge Gee denied this request. Judge Gee stated that Administrative Law Judge Etchingham was being detailed from his new agency back to the Office of Administrative Law Judges to complete a decision in this case; therefore, a new hearing was unnecessary.[2] The administrative law judge issued his decision on the merits on March 17, 2011.

We reject claimant's contention that she was denied due process of law because her motion for a *de novo* hearing was denied. The decision in her case was rendered by the judge who conducted the hearing. Therefore, a hearing before a new administrative law judge was not necessary and the denial of the motion for a new hearing is affirmed. 5 U.S.C. §554(d); *see generally Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981). Claimant's contention that she was unduly prejudiced by the lapsed eight months between the hearing and the issuance of the administrative law judge's decision is similarly unavailing. The administrative law judge's findings and conclusions in this case do not rest on his evaluation of live testimony. Rather, they rest on the deposition testimony of decedent, Mr. Allen and Mr. Rafferty. Therefore, the administrative law judge's memory of the hearing would not have affected the substance of his decision. Prejudice is not established merely because the decision was unfavorable. Thus, we reject claimant's contention that the administrative law judge's decision should be vacated and a new hearing ordered based upon the delay between the date of the hearing and the issuance of the administrative law

[1]We deny employer's motion to strike portions of claimant's reply brief. We accept the additional briefs filed by the parties. Claimant's motion to be permitted to file an additional pleading is denied. 20 C.F.R. §§802.215, 802.219.

[2]In his decision, the administrative law judge stated for the same reason that claimant's request for a new hearing was moot. Decision and Order at 4.

judge's Decision and Order, as claimant has not shown prejudice as a result of the delay. *See Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).

Claimant next contends that the administrative law judge applied an incorrect legal standard for establishing the working conditions element of a *prima facie* case. Claimant argues that the cases cited by the administrative law judge applied a rule for determining the responsible employer rather than for invocation of the Section 20(a) presumption.

In determining whether an injury or death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that the decedent sustained a harm and that conditions existed or an accident occurred at work which could have caused the harm. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. In *McAllister*, the Ninth Circuit stated that, in order to invoke the presumption, a claimant must offer "some evidence" of both factors.[3] *McAllister*, 627 F.3d at 1298, 44 BRBS at 91(CRT).

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[3]In finding Lockheed to be the responsible employer, the Ninth Circuit, in *Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 1303, 44 BRBS 89, 94-95(CRT) (9th Cir. 2010) stated:

> Claimant did submit *some* admissible evidence of asbestos exposure at Lockheed: (1) a deposition statement from George Norgaard, a former employee of Owens-Corning Fiberglass, that Owens-Corning stored asbestos-containing materials at Lockheed's shipyard during the period when Decedent worked there and that at times workers for Owens-Corning installed pipe insulation containing asbestos on ships being constructed in Lockheed's yard; (2) testimony from Decedent's first wife that he used to come home from work at Lockheed's shipyard with dusty clothes; (3) testimony from a Dr. Zbinden describing statements that Decedent made to Claimant and Dr. Zbinden regarding his asbestos exposure; and (4) testimony from Claimant regarding statements made by Decedent. Norgaard's deposition does not conclusively establish that Decedent worked around asbestos at Lockheed, but it does constitute reasonable circumstantial evidence of exposure: Norgaard describes the installation of asbestos-containing materials by Owens-Corning employees on ships being

The Ninth Circuit also held that the proper application of the Section 20(a) presumption in a multi-employer, occupational disease case requires that the presumption be invoked against each employer and if not invoked against a particular employer, that employer may not be held liable. *McAllister,* 627 F.3d at 1299, 44 BRBS at 91(CRT). In a footnote, the court stated, "[t]he First Circuit has interpreted this court's holding in *Picinich* as requiring a higher standard (for invocation of the presumption) than 'some evidence,'" which is incorrect. *McAllister*, 627 F.3d at 1298 n.1, 44 BRBS at 91 n.1(CRT) (citations omitted). Specifically, in *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999), the First Circuit summarized *Picinich* as holding that, in order to make out a *prima facie* case, "the claimant must show exposure was more than minimal and sufficient to cause the disease." *Brown*, 194 F.3d at 5 n.4, 33 BRBS at 165 n.4. However, the Ninth Circuit observed that, in *Picinich*, "it did not consider whether the claimant had introduced sufficient evidence to invoke the §20(a) presumption. Instead, the primary question concerned the level of injurious stimuli to which a claimant needed to have been exposed at a particular employer for that employer to be found liable." *McAllister*, 627 F.3d at 1298 n.1, 44 BRBS at 91 n.1(CRT). Thus, in *McAllister*, the court clearly rejected application of the *Picinich* standard for invoking the Section 20(a) presumption, which is the standard the administrative law judge employed in this case; therefore, the administrative law judge erred by applying it in this case. Additionally, *McAllister* directs that the Section 20(a) presumption must be invoked against each individual employer. *McAllister*, 627 F.3d at 1299, 44 BRBS at 91(CRT). In this case, the administrative law judge's decision is unclear as to whether he found there had been no asbestos exposure at the individual facility of each of the three employers. Instead, the administrative law judge denoted the three individual employers as "Employer." Decision and Order at 10-11. For these reasons, we vacate the administrative law judge's conclusion that claimant did not establish the working conditions element for invocation of the Section 20(a) presumption. We remand the case for application of the proper standard that claimant must produce only "some evidence" of asbestos exposure at a given employer's facility in order to establish working conditions that could have caused decedent's death. A particular employer cannot be held liable for death benefits if claimant does not establish "some evidence" of asbestos exposure at that employer.[4] If claimant does not establish the working conditions

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> constructed in shipyards, including Lockheed's, beginning in 1957, and also notes that members of "almost all" other crafts (presumably including carpentry, Decedent's craft) were in the vicinity when these materials were being installed.

[4]If the Section 20(a) presumption is invoked, an employer in reverse sequential order can rebut the presumption by producing substantial evidence that decedent's death was not related to his employment or it is not the last responsible employer. If the

element of her *prima facie* case at any of these employers, she is not entitled to the benefit of the Section 20(a) presumption and the claim for death benefits is properly denied.

With respect to claimant's burden to produce "some evidence" of asbestos exposure, claimant argues that the hearing testimony of Dr. Rischitelli that decedent "had a reliable history of (longshore) exposure sufficient to increase his risk for asbestos related cancers" is "some evidence" sufficient to invoke the presumption. Tr. at 85. In his Reply Brief, claimant further asserts that the deposition testimony of Dr. Cohen that, "I suspect he had some asbestos exposure (in longshore employment)," CX 18 at 3, also is sufficient evidence of working conditions to invoke the presumption. We disagree. Dr. Rischitelli also testified that he had no knowledge whether decedent was exposed to asbestos. Rather, he was given a "very brief description" of decedent's work history, medical reports, and a request that he assume, for purposes of his opinion, that decedent was exposed to asbestos. Tr. at 81-82. Dr. Cohen based his opinion on a one-page summary of decedent's job duties. CX 18 at 3; *see* CX 18 ex A. The summary of job duties refers to "William Goodloe" rather than to the decedent. Moreover, it describes Mr. Goodloe as working with asbestos welding rods, which does not correspond to decedent's deposition testimony concerning his employment. *See* CX 2; EX 2. In sum, the opinions of Drs. Rischitelli and Cohen are not supported by an adequate factual foundation and thus are legally insufficient to constitute "some evidence" of asbestos exposure at any of the employers.

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presumption is rebutted, claimant bears the burden of establishing the work-relatedness of decedent's death. *See McAllister*, 627 F.3d at 1301-1302, 44 BRBS at 93-94(CRT); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010).

Accordingly, the denial of the motion for a new hearing is affirmed. The administrative law judge's Decision and Order denying the claim is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge