

**U.S. Department of Labor**

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**Issue Date: 15 February 2008**

CASE NO.: 2003-LHC-02540

OWCP NO.: 14-138760

*In the Matter of:*

**K. M. (widow of J. M.),**  
Claimant,

vs.

**LOCKHEED SHIPBUILDING, ALBINA ENGINE & MACHINE,  
and WILLAMETTE IRON & STEEL CO. (a/k/a GUY ATKINSON),**  
Employers,

and

**WAUSAU INS. CO., FIREMAN'S FUND INS. CO., and SAIF CORP.,**  
Carriers.

Appearances: Meagan A. Flynn, Esq.  
For the Claimant

Norman Cole, Esq.  
For Willamette Iron & Steel Co. and SAIF Corp.,

Russell A. Metz, Esq.  
For Lockheed Shipbuilding and Wausau Ins. Co.,

Dennis R. VavRosky, Esq.  
For Albina Engine & Machine and Fireman's Fund Ins. Co.

Before: Steven B. Berlin  
Administrative Law Judge

## DECISION AND ORDER ON SECOND REMAND

### INTRODUCTION

This is an action for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("Longshore Act") and in particular section 909. Claimant is the decedent worker's widow. Decedent worked as a carpenter for three shipyards between 1956 and 1960. In 1956, he worked in Portland, Oregon, both for Albina Engine and Machine ("Albina") and for Willamette Iron & Steel Co. ("WISCO"). Decedent stopped working for WISCO in 1956, and for Albina in 1957. Saif Exh. 1.<sup>1</sup> In mid-1957, Decedent moved to Seattle and began to work for Lockheed Shipbuilding ("Lockheed").<sup>2</sup> He stopped working in the shipyards in approximately 1960, and did not work thereafter for a covered employer.

After Decedent's complaining of dyspnea for seven months, on April 2, 2002, a computerized tomography showed possible mesothelioma. Saif Exhs. 5, 6. Decedent's doctor described the risk of primary pleural mesothelioma as "significant." Saif Exh. 6. In his progress note of April 29, 2002, the doctor wrote: "Worked in shipyards 1950-60's/ carpenter/lots of ripping!" *Id.* Another computerized tomography on June 18, 2002, was "very consistent with mesothelioma." Saif Exh. 7. Decedent died on September 22, 2002. Saif Exh. 8. Board certified pathologist William Brady, MD,<sup>3</sup> conducted an autopsy and cited as the cause of death: "left pleural mesothelioma." Saif Exh. 9. This claim followed. After referral from the Office of Workers' Compensation Programs, the case initially was assigned to Administrative Law Judge Mapes.

### PROCEDURAL HISTORY AND PREVIOUSLY ADJUDICATED FACTS

*The trial.* The administrative law judge conducted a trial on February 26, 2004. The parties stipulated that: (1) any alleged injuries to Decedent occurred at a maritime situs and while Decedent was employed in a maritime status; (2) mesothelioma was the cause of Decedent's death; (3) Decedent's exposure to asbestos caused the mesothelioma; (4) Claimant is Decedent's widow and entitled to survivor's benefits under the Longshore Act, section 9, if there is a valid claim under the Act; and (5) if pathologist Dr. Brady were called to testify, he would testify that any level of exposure to asbestos can potentially cause a person to develop mesothelioma.<sup>4</sup> Given these stipulations, Decedent's illness and subsequent death were compensable as a matter

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<sup>1</sup> "Saif" refers to exhibits of WISCO. "C. Ex." refers to Claimant's exhibits. "BRB I" refers to the Board's Decision of August 19, 2005. "BRB II" refers to the Board's Decision of April 26, 2007. "Rptr. Tr." refers to the reporter's transcript of the trial held on March 26, 2004.

<sup>2</sup> Claimant's actual employer in Seattle was Puget Sound Bridge and Dry Dock Company. Lockheed and its carrier concede that in the purchase and sale of the business, Lockheed acquired the assets and the liabilities of Puget Sound Bridge and Dry Dock, including any liability in this action.

<sup>3</sup> See Dr. Brady's *curriculum vitae*. C. Ex. 15. He is a qualified expert medical doctor specializing in pulmonology.

<sup>4</sup> No party offered evidence contrary to Dr. Brady's opinion. Lockheed expressly waived any argument that the extent of the exposure at Lockheed (if there was any exposure) was insufficient to lead to the disease. I accept Dr. Brady's opinion and find that any level of exposure to asbestos can potentially cause a person to develop mesothelioma.

of law. Left for decision were two questions: which employer was responsible for the benefits, and what were Decedent's average weekly wages (and thus the amount of compensation).

On July 23, 2004, the administrative law judge entered a "Decision and Order Awarding Benefits." He found that: Claimant needed "to provide only 'some' evidence that [Decedent] was exposed to asbestos while working for an employer" to raise the presumption in Section 20(a) of the Act *against that employer*; Lockheed was chronologically the last maritime employer; testimony from witnesses in other asbestos cases (to which Lockheed was not a party) was admissible; the testimony from one of these witnesses provided "some" evidence involving Lockheed and was sufficient to raise the presumption of compensability against Lockheed; Lockheed did not offer sufficient evidence to rebut the presumption; and Lockheed, being chronologically last, therefore was the employer responsible to pay the benefits. The administrative law judge determined that the average weekly wage was \$1,288.68.

*The first appeal.* Lockheed appealed.<sup>5</sup> On August 19, 2005, the Benefits Review Board ("the Board") vacated the Decision. It found that the administrative law judge had conflated the Section 20(a) analysis with the analysis as to the last responsible employer. As the Board stated, the Section 20(a) presumption goes to whether the disease or death is *compensable*, not to which *particular employer* is the last responsible employer. Given that there is only a single, undivided Section 20(a) presumption, it follows that the presumption is rebutted if "any of the employers rebuts" it. BRB I at 4. If, as here, the presumption is not rebutted, "each employer bears the burden of establishing that it is not the responsible employer."<sup>6</sup> *Id.* This requires each employer to show "either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer." *Id.* The Board remanded for a determination: (1) whether Claimant had made a sufficient showing to invoke the Section 20(a) presumption; (2) assuming insufficient evidence to rebut the presumption, whether each employer met its burden regarding which of them was responsible; and (3) which employer was responsible. *Id.* at 12.

*The first remand.* On remand, all defendants conceded that Decedent was exposed to asbestos when working at WISCO. *See* "Decision and Order on Remand" (April 25, 2006) at 11. This was sufficient to raise the Section 20(a) presumption against all three employers. *Id.* All defendants agreed that there was no evidence to rebut the presumption. *Id.* at 12. The administrative law judge found no evidence to dispute Dr. Brady's opinion that any level of asbestos can cause mesothelioma. *Id.* Lockheed argued that the facts concerning the last responsible employer must be proved on a "more likely than not basis." The judge rejected this argument.<sup>7</sup> He held that, as Lockheed was the last employer chronologically, it was the last responsible employer and thus obliged to pay the survivor's benefits.

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<sup>5</sup> The average weekly wages were not raised on appeal. I therefore take as established that the amount was \$1,288.68.

<sup>6</sup> If the presumption is rebutted, "the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion." *Id.* At 4-5. If the claimant meets that burden, each employer bears the burden of showing that it is not the responsible employer.

<sup>7</sup> Judge Mapes held that a "more likely than not" standard applied to traumatic injury cases but not to cases of occupational disease.

*The second appeal.* Lockheed appealed again. On April 26, 2007, the Board vacated and remanded. BRB II at 10. It found that the administrative law judge erred when identifying the last responsible employer. *Id.* at 7. The Board cited one of its previous decisions<sup>8</sup> for the proposition that in a two-traumatic-injury case, “each employer bears a burden of persuasion by a preponderance of the evidence that the employee’s disability is due to his employment with the other employer, and that if neither employer is persuasive, liability should be assigned to the later employer.” BRB II at 6. The Board held that in the Ninth Circuit (which is controlling here), this rule applies equally in the occupational disease context and means in such cases that the “initial burden of persuasion is on the later employer.” *Id.* at 7.<sup>9</sup>

To clarify its earlier decision, the Board stated:

Each potentially liable employer bears the burden of persuading the administrative law judge that it is not liable. This burden is not sequential; it is simultaneous . . . . The administrative law judge must weigh all of the evidence, and he must make a finding on the facts as to which employer last exposed the employee to the injurious substance. He need not look to each employer’s evidence chronologically . . . .”

*Id.* at 9. As the Board concluded: “Only by weighing all of the relevant evidence can the administrative law judge be assured that there is a ‘rational connection’ between the exposure and the liability.” *Id.* Finally, the Board specified that a party bearing the burden of persuasion must prove his or its case by a preponderance of the evidence (*i.e.*, more likely than not). *Id.*<sup>10</sup>

*The second remand.* Judge Mapes has retired, and the case has been assigned to me. I will address the single remaining question: which employer is the last responsible employer and thus obliged to pay the benefits. For the reasons set forth below, I will find that Albina Engine & Machine is responsible.

#### FACTS RELEVANT TO REMAINING ISSUE

Over 40 years passed between Decedent’s last covered employment and his symptoms, diagnosis, treatment, and death from mesothelioma. Not surprisingly, the passage of decades leads to lost or destroyed documents, lost or weakened memories, and the death or unavailability of witnesses. Were he alive, the Decedent obviously would be a primary source of evidence. Moreover, he could identify witnesses with relevant knowledge. Here, no witness testified that he had worked with Decedent at any of the three relevant worksites, nor did any witness state from first-hand knowledge whether Decedent worked with or

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<sup>8</sup> *Buchanan v. Int’l Trans. Services*, 33 BRBS 32 (1999), *aff’d mem. sub nom. Int’l Trans. Services v. Kaiser Permanente Hospital, Inc.*, 7 Fed. Appx. 547 (9<sup>th</sup> Cir. 2/26/01).

<sup>9</sup> As the Board explained, in the Ninth Circuit there is only one last employer rule, which applies both to traumatic injuries and to occupational diseases. It requires the administrative law judge to consider all relevant evidence. BRB II at 8. “Each employer must persuade the fact-finder that the employee’s disability is due to his injury with another employer.” *Id.*

<sup>10</sup> “Should the situation occur where the administrative law judge has not been persuaded by any employer, or if it is unclear which employer should be held liable . . . the ultimate burden of persuasion lies with the employer claimed against.” BRB II at 9 (citations omitted).

around asbestos. Some of the employers had no records of the Decedent; the parties had to rely on the Social Security Administration's skeletal records to establish his work history.<sup>11</sup> *See* C. Ex. 1; Rptr. Tr. at 76.

With the very limited sources available, Claimant relied on deposition testimony from unrelated, earlier asbestos cases.<sup>12</sup> She offered her own testimony as Decedent's widow as well as the testimony of Claimant's ex-wife from an earlier marriage. Finally, Claimant offered evidence from Decedent's doctors. Albina offered an additional medical statement.

*Depositions from earlier, unrelated cases.* The transcripts were of the deposition testimony of George Norgaard taken on two days in August 1982; Jack Baker, taken on April 4, 1985; Norman Putnam, taken on November 10, 1986; Ernest Light, taken on September 4, 1990; and Norman Kinsman, taken May 24, 1984.<sup>13</sup>

George Norgaard was an employee of Owens-Corning Fiberglass, hired as a superintendent in 1957. C. Ex. 4 at 25. He was promoted to marine manager in 1971. *Id.* at 13. His management activity involved the installation and rip out of insulation products (including boilers) in Seattle area shipyards. Norgaard at 21. He also was involved with acoustic work, hull insulation, and reefer boxes. *Id.* As to these last three items, Mr. Norgaard testified that there was very little or no exposure to asbestos. *Id.* at 22. He bid on all of the jobs around the area, and had many responsibilities on the jobs that his company won. He hired the asbestos workers (all from the Asbestos Workers' Union). *Id.* at 25. He also hired other trades: shipwrights, boilermakers, sheet metal workers, painters, and pipefitters. *Id.* at 19, 47-48.

There were several years that Owens-Corning Fiberglass had no work at Lockheed's shipyard; other contractors did all of the work on the destroyers or frigates being built. *Id.* at 28. This occurred most frequently in 1965-70. *Id.* Mr. Norgaard mentioned two jobs on which he was superintendant at the Lockheed shipyard, one in 1965, and the other in 1967. *Id.* at 65, 130.

Jack Baker worked as a pipe insulator at WISCO in the 1940's and 1950's. C. Ex. 7 at 26-30. He did the same kind of work for Albina in the 1950's. *Id.* at 6-8. He stated that he worked with a number of asbestos-containing products. *Id.* at 7. He added that a number of laborers worked with the asbestos workers. *Id.* at 15-16.

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<sup>11</sup> Decedent's ex-wife gave testimony about the order in which Decedent *started* his former jobs. This is irrelevant: the relevant question is when Decedent *stopped* his former jobs. In any event, Decedent's ex-wife listed the employers in the same chronological order as do the Social Security records.

<sup>12</sup> Judge Mapes overruled objections to this testimony, and the Board affirmed.

<sup>13</sup> The Norgaard deposition was taken in *In re King County Asbestos Cases, et al.* (Wash. Sup. Ct. Case Nos. 81-2-08703-5, 81-2-00940-1). The Baker deposition was taken in *Graves v. GAF Corp., et al.* (U.S.D.C. D.Or. Case No. 83-1945-LE). The Putnam deposition was in *Putnam v. ACandS, Inc., et al.* (U.S.D.C. D.Or. Case No. 86-1139 LE). The Light deposition was in *Light v. ACandS, Inc.* (U.S.D.C. D.Or. Case No. 90-727 PA). Mr. Kinsman's deposition was in *Kinsman, et al. v. Johns Manville* (Wash. Sup. Ct. Case No. 82-2-11709-9). The other submitted deposition testimony of record is irrelevant or of *de minimis* relevance to the single remaining issue before me.

Norman Putnam worked for WISCO starting in 1955 and through 1956. C. Ex. 8 at 11. He worked as a ship painter on the *Mariposa* and the *Monterey*. *Id.* These are the same ships as Decedent worked on at the same time (1956). *See, supra.* Mr. Putnam stated that he worked in almost every compartment on both ships, including at times that asbestos workers were there. *Id.* at 12. The asbestos workers generally were sweeping up the dust after their work. *Id.* at 13. Mr. Putnam said that he never wore a respirator. *Id.* at 15. He was unable to recall the names of any of the others with whom he worked. *Id.* at 16.

Ernest Light worked for WISCO, doing carpentry (as a shipwright and joiner). C. Ex. 9 at 8. He testified that from 1956 to 1958, WISCO was refurbishing the *Mariposa* and the *Monterey*. *Id.* at 9. Mr. Light worked as a carpenter on those ships in the summer of 1956. *Id.* at 10. By that time the ships had been gutted. *Id.* at 9. Mr. Light said that the asbestos insulators had to get their work done before the carpenters could put on finish panels or cover work. *Id.* at 10. The asbestos pieces for the insulation had to be cut with a Skil saw so that the insulation would fit around the pipe joints. *Id.* at 12. Mr. Light stated that the asbestos insulators constantly were working in the same rooms as he did. *Id.* at 13.

Mr. Light also worked at Albina at some point in 1957-59 or 1964. *Id.* at 18. The only “distinct exposure” to asbestos that he recalls was when he would re-meet pipe covers. *Id.* at 19. This required that the covering material be pulled off. *Id.*

Norman Kinsman worked with asbestos, primarily at three shipyards, none of which was a party to the present action. C. Ex. 6 at 12. He did recall one job that he did at Lockheed; it did not involve asbestos. *Id.* at 29-30.

*Decedent’s first wife and his widow (Claimant).* Decedent’s first wife, to whom he was married while working at the three shipyards, testified that when working as a carpenter for each of the employers, Decedent went to work clean and returned dusty. *Id.* at 70-76. She did not know what was in the dust or whether there was any asbestos. She did not know what Decedent was working on while employed at Lockheed; she only knew that he was working in the shipyard. She never went to the shipyard herself. She did not know why Decedent stopped doing longshore work around 1960. *Id.* at 75-76.<sup>14</sup>

Claimant is in fact Decedent’s widow, but she did not marry him until March 1970. She has no first-hand knowledge of events involving the Decedent in the late 1950’s. Rptr. Tr. at 46. Once Decedent’s respiratory problems began, he discussed his employment history with Claimant. He said that he worked on two particular ships (the *Monterey* and the *Mariposa*), apparently while employed at WISCO. According to Claimant, Decedent said that “there was lots of real fine, powdery stuff, especially around the reefer areas. And he felt, as he

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<sup>14</sup> Cases with these proof problems are few because they generally run afoul of an applicable statute of limitations or equitable considerations such as laches. Here, however, the statute provides that the limitations period does not begin to run until “the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.” LHWCA, §13(b)(2). In the present case, Albina Engine raised a timeliness defense but later withdrew it. Rptr. Tr. at 83. Every indication is that the limitations period did not begin to run until 2002, and that the claim is timely.

thought back later, that it was asbestos.” *Id.* at 47, 63-64. Her recollection was that while working for WISCO, and then later for Albina Engine, Decedent was breaking down (liberty) ships, including stripping, tearing out, and sawing masonite paneling. *Id.* at 52-53, 58-59. She recalled that when her husband was first seeing pulmonologist Dr. Zbinden in 2002, he told the doctor that he had been exposed to asbestos while working in “the shipyards.” *Id.* at 61-63, 69, and *see infra*.<sup>15</sup>

*Medical statement.* Albina submitted a statement from Dr. Zbinden, which the doctor had signed on November 19, 2003. Saif Ex. 12. Dr. Zbinden states that Decedent spoke of being exposed to asbestos while “working [as a carpenter] in the shipyards in the 1950’s and 1960’s.” *Id.* at 35. Dr. Zbinden stated as well that Decedent did not name any particular employer as the one that exposed him to asbestos; he spoke only of working in “the shipyards.” *Id.* Dr. Zbinden added that it was his “impression, based on [his] interview, that when he [*i.e.*, Decedent] worked as a carpenter, either he or other workers in his vicinity caused asbestos to enter the work environment.” *Id.*

#### APPLICABLE LAW

“Under the ‘law of the case’ doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case.” *Citing, United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir.1984), *cert. denied*, 469 U.S. 1110 (1985); *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). An exception “allows reexamination when ‘controlling authority has made a contrary decision of law applicable to such issues.’” *Kimball*, 590 F.2d at 771-72”; *Richardson v. United States*, 841 F.2d 993, 996 (9<sup>th</sup> Cir. 1988). I find no change in the controlling law following the Board’s decisions in this case. I therefore am bound by the Board’s two prior decisions.

As the parties have stipulated that there is sufficient evidence to support the presumption of Section 20(a) and insufficient evidence to rebut it, I turn to the question of which of the three employers is liable. To answer that question, I look to the last responsible employer rule. Under that rule, each employer has the burden to establish by a preponderance of the evidence that it is

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<sup>15</sup> When Claimant testified on direct, her attorney asked a series of leading questions. One line of these questions suggested that the pulmonologist told Decedent in 2002 that the disease was caused by exposure to asbestos while working in the shipyards. Claimant, however, corrected her attorney by stating that it was Decedent who said this to his pulmonologist, not *vice versa*. Rptr. Tr. at 62-63.

Another line of leading questions was directed to a particular document that Claimant and Decedent wrote together in 2002 while discussing Decedent’s work history. *Id.* at 63-64. Claimant’s counsel’s leading questions suggested that the document was a list of his prior employers “where the asbestos would have been.” *Id.* at 63, 65-66. All three currently named employers are among those listed.

On cross-examination, however, Claimant admitted that Decedent never directly told her that he had been exposed to asbestos while working in Seattle (Lockheed’s location); whereas he did tell her directly that he had been exposed to asbestos while “doing the rip-out on the victory ships.” *Id.* at 66-68. The rip-out was at WISCO and Albina, not Lockheed. Claimant also admitted that the list actually went up to 2001, listing all of Decedent’s employers. *Id.* at 66-67. She admitted that none of the employers listed after Lockheed had anything to do with asbestos. *Id.* at 66-68. I infer that this was a list of prior employers, not a list of places at which Decedent believed he had been exposed to asbestos. There is no other way to explain the presence of all of Decedent’s post-Lockheed employers.

not responsible. It does this by either showing that “the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer.” In the present case, the parties have agreed that *any* exposure to asbestos – no matter how slight – can be a sufficient exposure to cause mesothelioma. The issue of sufficient quantities to have the potential to cause the disease thus is moot: any quantity is enough.

As I analyze whether each employer has met its burden, I do not examine the position of the employers in any sequence. Rather, I weigh all of the evidence and then make a finding as to which employer last exposed Decedent to asbestos. This approach is necessary to “be assured that there is a ‘rational connection’ between the exposure and the liability.” BRB II.<sup>16</sup>

### DISCUSSION AND FINDINGS

I find by preponderance that Lockheed’s evidence is entitled to greater weight than that of WISCO or Albina.

*WISCO*. I place great weight on the deposition testimony of Messrs. Putnam and Light. Both worked for WISCO on the same two ships (the *Mariposa* and the *Monterey*) at the same time (or nearly the same) as did Decedent. Mr. Putnam stated that he worked in almost every compartment of the ships. He consistently saw asbestos workers sweeping up dust from their work. Mr. Light worked on the ships as a carpenter just as did Decedent. He testified that before he could close up work areas containing asbestos, the asbestos workers had to complete their work, such as cutting pieces of insulation with a Skil saw so that they would fit around the pipe joints. He stated that the asbestos workers constantly were working in the same rooms as he did. The testimony of these two workers was based on first-hand experience. Because they worked on the same ships at or about the same time as Decedent (with Mr. Light also doing the same kind of work), I draw a strong inference that Decedent was exposed to asbestos while working

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<sup>16</sup> As it happens, my analysis will fix one of the employers as the last responsible. If, however, none of the employers was able bear its burden, liability would rest with the employer “claimed against.” BRB II at 6, *citing General Ship Service v. Director, OWCP*, 938 F.2d 960 (9<sup>th</sup> Cir. 1991). Here, the Claimant named all three employers. This means that I would need a different rule to determine which employer was responsible if none met its burden.

In its second decision, the Board discussed an earlier decision, stating that “in the event neither employer is able to persuade the administrative law judge that its evidence is entitled to greater weight, the Board concluded ‘the purposes of the Act would best be served by assigning liability to the later employer.’” BRB II at 6, *citing Buchanan v. Int’l Transportation Services*, 33 BRBS 32 (1999), *aff’d mem .sub nom. Int’l Transportation Services v. Kaiser Permanente Hospital, Inc.*, 7 Fed. Appx. 547 (9<sup>th</sup> Cir. Feb. 26, 2001).

The Board’s guidance as applied to the present case admits of two slightly different interpretations. The Board emphasizes that the sequence of employers is irrelevant to fixing responsibility among them. The proper question is whether, looking at the evidence as a whole, each employer (in no particular sequence) met its burden to show either (1) the absence of sufficient exposure while the worker was employed with that employer, or (2) the presence of sufficient exposure at a later employer. This means that if *none* of the employers met its burden, I would have to set responsibility based on the chronological sequence of employers. I appreciate that this is more a rule of convenience so that responsibility can be fixed with at least one of the employers, but it seems inconsistent with a rule that abjures any finding based solely on sequencing.

for WISCO on these same ships. Indeed, WISCO does not dispute that Decedent was exposed to asbestos while in its employ.<sup>17</sup>

*Albina.* The evidence suggests that the working conditions at Albina were similar to those at WISCO. Claimant recalled Decedent's telling her that he worked as a carpenter on liberty ships for both employers. In both cases, he was breaking down the ships, including stripping, tearing out, and sawing masonite paneling. The masonite paneling contained asbestos. Like WISCO, Albina was a ship repair company Saif Exh. 13/6. This suggests that Decedent was doing work at Albina that was similar to that at WISCO and included ripping out asbestos-carrying materials.<sup>18</sup>

For this purpose, I also place some minor weight on Mr. Baker's testimony. Mr. Baker worked as a pipefitter in the 1950's both for Albina and for WISCO. He testified that he was exposed to asbestos working in the same areas at both employers. I cannot know how much experience Mr. Baker had with identifying asbestos or knowing when he had been exposed. But I do infer that the work at the two shipyards was similar; otherwise Mr. Baker could not have worked in the same areas for both employers.

*Lockheed.* While there is *some* evidence against Lockheed, it is very thin and entitled to little weight.<sup>19</sup> The fact that a carpenter would go to work in clean clothing and return at day's end dusty would describe just about any carpenter; carpenters' work regularly creates dust, which often is no more than sawdust. The fact that Decedent believed that he was exposed to asbestos "at the shipyards" does not mean *each and every* shipyard and does not mean anything in particular about any one of them. Decedent specifically named WISCO and Albina as the shipyards at which he was exposed, and he never similarly named Lockheed. Thus, Decedent's opinion about where he was exposed points to WISCO and Albina, and not Lockheed.<sup>20</sup>

Mr. Norgaard's testimony establishes that Owens-Corning Fiberglass stored some asbestos at the Lockheed shipyard. The storage facility was given over to Owens-Corning's use; Lockheed's employees were not involved with it. Nothing on the record suggests that Claimant ever did any work with Owens-Corning's asbestos located on the Lockheed yard.

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<sup>17</sup> According to Claimant, Decedent told her that he thought he had been exposed to asbestos on the *Mariposa* and the *Monterey*, especially in the reefer area. I place limited weight on this opinion, given Mr. Norgaard's statement that work around reefer boxes had little or no risk of asbestos exposure. There is little on the record to suggest that Decedent actually knew of the instances when he was exposed to asbestos.

<sup>18</sup> As discussed in the text above, Decedent's treating pulmonologist emphasized in his progress notes that a significant risk factor for mesothelioma was that Decedent was engaged in "lots of "ripping!" Saif at 6.

<sup>19</sup> Although the Board held it irrelevant to the task of fixing liability, Judge Mapes found sufficient evidence to invoke the presumption in Section 20(a) against Lockheed in particular (as well as against the other two employers). Specifically, Judge Mapes found that Claimant had met the burden of showing "some" evidence to implicate Lockheed. I agree that there was "some" evidence. Claimant established that there was asbestos at the Lockheed shipyard when Decedent worked there. This might be enough to raise the presumption. But it establishes nothing about whether Decedent was exposed to the asbestos at Lockheed.

<sup>20</sup> For the reasons stated above, I give no weight to the list of employers that Claimant and Decedent prepared together. That list is no more than a simple list of Decedent's prior employers; it says nothing about exposure to asbestos.

Nor is Mr. Norgaard's knowledge of the operations at Lockheed of much use. Although Mr. Norgaard had an office at the Lockheed shipyard, he also had another office and testified that he worked "all over the place." Mr. Norgaard's testimony that there were several years in which Owens-Corning received no work from Lockheed also suggests his lack of familiarity with Lockheed's operations at those times. Mr. Norgaard cited the building of destroyers as an example of work that Owens-Corning did not receive over considerable periods of time, and that is the exact work that Decedent was doing for a considerable part of his time. This supports a conclusion that Mr. Norgaard knew little about Decedent's work at Lockheed.

I also give very little weight to the portions of Dr. Zbinden's testimony identifying the shipyards at which Decedent was exposed. As part of his medical work, Dr. Zbinden took a medical and work history from Decedent. Given the real possibility of mesothelioma, it was appropriate for Dr. Zbinden to give attention to Decedent's statement that he worked around asbestos at the shipyards. Dr. Zbinden recalls Decedent's saying this in the context of describing the work he was doing at the shipyards as long as 35 years earlier. Dr. Zbinden states his "impression" that Decedent was referring to all of his work at the shipyards.<sup>21</sup>

First, as I discussed above, there is no evidence to suggest that Decedent knew when he was being exposed to asbestos. He thought he had been exposed while doing reefers, when in fact there was little to no risk of exposure from such work. No witness has suggested that Decedent was able to identify any specific example of exposure to asbestos. Thus, even were Decedent implying that he was exposed at all three shipyards, he could well have been mistaken.

Second, I doubt that Dr. Zbinden would be interested to know the identity of the specific shipyards at which Decedent had been exposed to asbestos. Dr. Zbinden's inquiry likely was *whether* Decedent had been exposed to asbestos, not *where*. The "whether" is medically relevant to assist in diagnosis; the "where" is medically irrelevant and relates mostly to legal implications. This is consistent with Dr. Zbinden's statement that Decedent never actually named which of the shipyards was the place he had been exposed.

Third, Dr. Zbinden's "impression" is of little moment. Dr. Zbinden did not testify to anything specific that he saw or heard. He did not explain the basis for his inference that Decedent was referring to all of the shipyards at which he had worked. Notwithstanding Dr. Zbinden's "impression," Decedent's repeated statements that he had been exposed to asbestos while working "at the shipyards" said nothing about which shipyard.<sup>22</sup>

*Preponderance of the evidence.* Reviewing the evidence, I find it more likely than not that Albina is the last responsible covered employer. The evidence of exposure at WISCO is convincing and essentially undisputed. I find, however, that WISCO has met its burden in that there is sufficient evidence of exposure at Albina, a later covered employer.

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<sup>21</sup> I rely only slightly on Mr. Kinsman's testimony that he did one job at Lockheed and was unaware of any asbestos. If Mr. Kinsman knew that asbestos in fact was being used in the construction of the kinds of ships on which Decedent worked, that would merit considerable weight. But Mr. Kinsman's not seeing asbestos in the context of a single job at some vague time is not.

<sup>22</sup> There is some question as to the accuracy of Dr. Zbinden's recollection. He states that Decedent was working at the shipyards as long as 35 years earlier. Dr. Zbinden's examination of Decedent was in 2002. That would place Decedent at the shipyards as early as 1967 but not before. The dates are incorrect.

To be sure, the evidence of asbestos exposure at Albina is not as strong as at WISCO. For example, there is no sworn testimony from other longshore workers who worked on the same ships at the same times as Decedent (and at least one witness who also was doing carpentry). Nonetheless, the evidence is insufficient for Albina to establish by preponderance the absence of Claimant's exposure to asbestos while Decedent worked at WISCO.

As discussed above, Decedent was doing the same kind of work at Albina on the same kind of ships at about the same time as Decedent was doing at WISCO. Mr. Baker worked at both shipyards in the 1950's and stated that he was exposed to asbestos at both. Both companies were refurbishing ships. The work at both companies involved ripping out sections where there was masonite. Obviously it is difficult to gather evidence of working conditions more than 50 years ago, but it remains the burden of each of these employers to do so. Albina has failed to meet the burden to show (by preponderance) an absence of exposure.

That leaves Albina with the alternative way to avoid liability: demonstrate exposure at a later covered employer. Of course, Lockheed is a later covered employer. I find, however, that the evidence of exposure at Lockheed is so slight that Lockheed has met its burden of showing (more likely than not) the absence of exposure. Similarly, Albina has failed to show by a predominance that there was exposure at Lockheed.

The work Decedent did at Lockheed generally differed from that at the other two shipyards. He was building destroyers and other ships, not ripping out portions of ships to allow remodeling. Unlike the work at the other employers, there was no evidence at Lockheed of sawing asbestos-containing materials. While asbestos was to be found at the Lockheed shipyard, I find nothing adequate to show that Decedent was exposed to it.<sup>23</sup> The testimony of what Decedent told his wife and doctors in 2002 about his working conditions in 1957-1960 is insufficient. Decedent's memory after 50 years and shortly after learning that he had a terminal illness could well have been compromised, and we have only the hearsay reports of what he told others after the 50 years had passed. Claimant testified that, although Decedent mentioned his exposure to asbestos specifically at WISCO and Albina, he never mentioned Lockheed in particular. Similarly, the report that at all three shipyards Decedent returned from work dusty suggests nothing about asbestos. Decedent's statement to Claimant that there was fine powder on the destroyers being built at Lockheed does not show or even suggest that the powder was asbestos.

I therefore find that Lockheed met its burden of showing that the evidence of exposure at Albina is far greater than at Lockheed, and that, more likely than not, there was no exposure at Lockheed. Thus, Albina is the last responsible employer.

## CONCLUSION

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<sup>23</sup> As the Board stated: "While the Norgaard deposition supports a finding that there was asbestos on [Lockheed's] premises between 1957 and 1960 when decedent was employed, it does not establish that decedent was exposed to asbestos, which is an element of claimant's *prima facie* case that [Claimant] must prove by substantial evidence." BRB I at 7.

For the reasons stated above, I find Albina Engine & Machine to be the last responsible employer. Lockheed is entitled to reimbursement from Albina of benefits and compensation that it has paid Claimant in this matter.

### ORDER

1. The District Director shall be responsible for all computations of payments, benefits, and reimbursements owing under this Order.
2. Within 21 days, Lockheed and Wausau shall provide the District Director, Albina Engine & Machine, and Fireman's Fund a detailed statement of all benefits that they have paid Claimant on this claim. Within 14 additional days, Albina and Fireman's Fund may provide the District Director, Lockheed, and Wausau with any objections to any of the entries on the statement, together with the reasons and supporting evidence for any such objections. If there are objections, within an additional 7 days, Lockheed and Wausau may reply in writing provided to the District Director, Albina, and Fireman's Fund. The District Director will then determine the amount of benefits that Lockheed and Wausau have paid. Albina and Fireman's Fund will pay that amount to Lockheed and Wausau within 10 days of receipt of the District Director's determination.
3. Beginning 14 days from the date of this Order and for so long as Claimant remains unmarried, Albina Engine & Machine and Fireman's Fund will pay Claimant K.M. widow's benefits. The amount of benefits will be determined as follows: begin with \$644.34 as the correct amount of benefits as of September 22, 2002; adjust the amount as required by the provisions of Section 10(f) of the Longshore Act. Albina Engine & Machine and Fireman's Fund within 14 days will provide the District Director with a statement showing the calculation. The District Director may modify the amount if there is an error. If Claimant remarries, the payments will cease after two years.
4. Albina Engine & Machine and Fireman's Fund will pay interest on each unpaid installment of compensation from the date such compensation became due at rates that the District Director will determine.
5. As the issue of compensability no longer was pending on this remand, Claimant submitted no evidence or argument. Nonetheless, if Claimant's counsel believes there is a basis for an award of fees on remand, counsel shall within 20 days of this order submit a fully supported, detailed application for costs and fees to counsel for Albina and Fireman's Fund's counsel. Within 15 additional days, counsel for Albina and Fireman's Fund shall provide Claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within an additional 15 days, both counsel will discuss (verbally) each of the objections. If they agree on an appropriate award of fees and costs, they will file written notification within 10 days, together with a statement of the agreed-upon fees and costs. If counsel disagree on any of the proposed fees and costs, Claimant's counsel will file within 15 days a fully documented petition, listing those fees and costs in dispute and a statement of his position regarding such fees and costs. The petition also will identify those fees and costs not disputed, and Albina and Fireman's Fund shall pay that amount to Lockheed and Wausau within 10 days.

With respect to the areas of disagreement, counsel for Albina and Lockheed may file within an additional 15 days a response to the documents that Claimant's counsel filed. No reply will be allowed unless specifically authorized upon a showing of good cause.

**A**

STEVEN B. BERLIN  
Administrative Law Judge