No. 00-576

In the Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORP.,
PETITIONER

v.

THEODORE FAULK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found petitioner liable for an occupational disease claim under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, due to petitioner's failure to rebut the presumption in 33 U.S.C. 920(a) "[t]hat the claim comes within the provisions of [the LHWCA]."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 228 F.3d 378.[1] The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 3) and the decision and order of the administrative law judge (Pet. App. 2) are unreported.

[1] The court of appeals' decision was originally unpublished and noted at 217 F.3d 840 (Table), but was later released for publication with minor changes not relevant to this case.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2000. The petition for a writ of certiorari was filed on October 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Theodore Faulk worked as a shipfitter for respondent Newport News Shipbuilding and Dry Dock Company (NNS) from January 1973 to November 1978. Pet. App. 2, at 6; Pet. App. 3, at 3.[2] He then worked as a shipfitter for petitioner from November 1978 until November 1996. Pet. App. 1, at 4; Pet. App. 2, at 7. Both employers exposed him to asbestos. Pet. App. 1, at 4-11; Pet. App. 2, at 6-8. After being diagnosed with peritoneal mesothelioma in November 1996, shortly after being exposed to asbestos while working for petitioner aboard the *U.S.S. Flint*, Faulk filed claims for compensation against both employers under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Pet. App. 3, at 3.

Petitioner and NNS stipulated that Faulk's disease was caused at least in part by exposure to airborne asbestos and that he was permanently and totally disabled. Pet. App. 2, at 4-5. NNS did not dispute that it had exposed Faulk to asbestos. *Id.* at 6 n.3. Petitioner denied that it had done so and argued that even if it had exposed Faulk to asbestos while he worked aboard the *U.S.S. Flint*, the exposure was minimal and insufficient to cause Faulk's disease. *Id.* at 16. NNS

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[2] The appendices to the certiorari petition are not paginated. We accordingly have separately paginated each of the appendices for purposes of citation in this brief.

argued that petitioner was responsible under the "last employer rule," which provides, as relevant to this case, that full liability for an occupational disease falls on the last employer to expose an employee to injurious stimuli before the employee became aware or should have become aware of the relationship between the disability, disease, and employment. See *id.* at 15-16, 18; *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 144-145 (2d Cir.), cert. denied, 350 U.S. 913 (1955).

2. An administrative law judge (ALJ) held that petitioner is liable under the last employer rule. Pet. App. 2. The ALJ noted that the parties had agreed that Faulk was entitled to the presumption in 33 U.S.C. 920(a) "[t]hat the claim comes within the provisions of [the LHWCA]." Pet. App. 2, at 15. The ALJ concluded that NNS was not liable because it had established that Faulk had been subsequently exposed to asbestos upon at least one occasion in 1996 while working for petitioner after leaving the employment of NNS. See *id.* at 15-18. Under the last employer rule, the ALJ found that such subsequent exposure placed liability on petitioner rather than on NNS. See *id.* at 16, 18. The ALJ declined to follow the holding of the Ninth Circuit that "a claimant's employment must have exposed him to injurious stimuli in sufficient quantities to cause the disease," and therefore did not inquire into the extent of Faulk's exposure to asbestos. *Id.* at 18 (citing *Todd Pacific Shipyards Corp.* v. *Director, OWCP*, 914 F.2d 1317 (9th Cir. 1990)) (*Picinich*).[3]

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[3] The ALJ also concluded that petitioner failed to establish the conditions necessary to shift part of its liability to a special fund that the Department of Labor administers. Pet. App. 2, at 19-22; see 33 U.S.C. 908(f), 944. The Benefits Review Board affirmed the ALJ's decision on that point. See Pet. App. 3, at 9-13. Petitioner

3. The Benefits Review Board affirmed. Pet. App. 3. The Board reasoned that substantial evidence supported the ALJ's finding that the claimant was last exposed to injurious stimuli while working for petitioner and that petitioner accordingly is liable. *Id.* at 5; see 33 U.S.C. 921(b)(3) ("findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole"). In this regard, the Board noted that, under the last employer rule, a distinct aggravation of an injury need not occur for the employer to be liable because "exposure to potentially injurious stimuli is all that is required." Pet. App. 3, at 5; see also *id.* at 7-8. The Board concluded that petitioner's reliance on *Picinich* was misplaced because in that case the employer had produced evidence that its exposure was below levels considered injurious, whereas petitioner "has not produced such evidence her[e]." *Id.* at 8-9.

4. The court of appeals affirmed. Pet. App. 1. The court reasoned that to rebut the presumption "[t]hat the claim comes within the provisions of [the LHWCA]," 33 U.S.C. 920(a), an employer must present substantial evidence that its exposure of the claimant to injurious stimuli was not injurious or that the claimant was exposed to injurious stimuli while performing work covered by the LHWCA for a subsequent employer. Pet. App. 1, at 13-14. Exposure is injurious, the court reasoned, when it has "the potential to cause the disease or harm at issue." *Id.* at 14. Accordingly, the court rejected the ALJ's conclusion that NNS had rebutted the presumption against it by establishing that Faulk subsequently was exposed to asbestos while

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did not challenge that aspect of the Board's decision in the court of appeals, and it does not do so here.

working for petitioner, because NNS did not establish that such subsequent exposure had the potential to cause Faulk's mesothelioma. See *id.* at 16.

The court of appeals did agree, however, with the ultimate assignment of liability to petitioner, finding that substantial evidence supported the ALJ's conclusion that petitioner was the last responsible employer. Pet. App. 1, at 16. As an initial matter, the court noted that because petitioner was the claimant's last employer, petitioner could not establish that the claimant was exposed to injurious stimuli while working for any subsequent employer. *Id.* at 16-17. The court then determined that the ALJ's conclusion that petitioner exposed Faulk to asbestos was supported by substantial evidence, see *id.* at 17-20, and it rejected petitioner's alternative argument that even if Faulk was exposed, the disease's long latency period, coupled with the brevity of Faulk's exposure, should have led the ALJ to find that petitioner had rebutted the presumption of compensability. See *id.* at 20-24. The court of appeals concluded that "[t]he evidence in this case fails to support the inference that due to the prolonged latency period of mesothelioma it was factually impossible for Faulk to have sustained injury by his exposure" while working for petitioner. *Id.* at 22. Regarding brevity of exposure, the court rejected petitioner's argument that the court should follow the Ninth Circuit's reasoning in *Picinich* and hold that a LHWCA claimant must be exposed "to injurious stimuli in sufficient quantities to cause the disease." *Id.* at 24 (quoting *Picinich*, 914 F.2d at 1319). The court further noted that, even if a de minimis exception to the requirements of the Act did apply, petitioner "presented no evidence to establish that Faulk's exposure aboard the U.S.S. Flint was, in fact, de minimis. It

presented no evidence of the asbestos level on the U.S.S. Flint the day of the incident, nor did it present evidence of the level of exposure it would take to cause the disease." *Id.* at 22. The court noted that, in contrast, evidence in *Picinich* indicated that the ship on which the claimant worked had undergone a complete asbestos removal procedure prior to his arrival, and testing of the area showed asbestos levels 250 times below the limit allowed by government regulations. *Id.* at 24.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The LHWCA provides compensation for "disability," 33 U.S.C. 908, a term that generally means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10). An "injury" in turn includes any "occupational disease or infection as arises naturally out of * * * employment." 33 U.S.C. 902(2). Every circuit that has considered the issue has held that such an injury arises out of employment if the employment either causes the injury or aggravates a preexisting condition. See *Bunge Corp.* v. *Carlisle*, 227 F.3d 934, 939 (7th Cir. 2000); *Morehead Marine Servs., Inc.* v. *Washnock*, 135 F.3d 366, 371 (6th Cir. 1998); *Bath Iron Works Corp.* v. *Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Blanchette* v. *OWCP*, 998 F.2d 109, 112 (2d Cir. 1993); *Port of Portland* v. *Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991); *Strachan Shipping Co.* v. *Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (en banc); *Newport News Shipbuilding & Dry Dock Co.* v. *Fishel*,

694 F.2d 327, 329-330 (4th Cir. 1982); *Hensley* v. *Washington Metro. Area Transit Auth.*, 655 F.2d 264, 268 (D.C. Cir. 1981); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177 (8th Cir. 1979); *Atlantic & Gulf Stevedores, Inc.* v. *Director, OWCP*, 542 F.2d 602, 608 n.4 (3d Cir. 1976). Thus, a claimant such as Faulk is entitled to LHWCA compensation if he is disabled as a result of an occupational disease that is either caused by or aggravated by his LHWCA employment.[4]

Section 20(a) provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary[,] * * * [t]hat the claim comes within the provisions of this chapter." 33 U.S.C. 920(a). If the employer produces "substantial evidence to the contrary," the presumption drops from the case and the factfinder must weigh all the evidence in the record as a whole. See, *e.g.*, *American Grain Trimmers, Inc.* v. *OWCP*, 181 F.3d 810, 818 (7th Cir. 1999) (en banc), cert. denied, 120 S. Ct. 1239 (2000); cf. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935) ("Once the employer has carried his burden [of rebutting the presumption in Section 20(d) of the LHWCA, 33 U.S.C.

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[4] In cases where a claimant develops an occupational disease after exposure to injurious stimuli by more than one employer, courts have adopted the "last employer rule," which generally assigns liability for the disease to the last employer to expose the claimant to injurious stimuli before he became aware of the disease. See Pet. App. 1, at 12 and cases cited therein; H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 28 (1984) (in most recent LHWCA amendments, legislators "d[id] not disturb" the last employer rule and aggravation theory). The court of appeals applied that rule, the validity of which petitioner does not challenge, see Pet. App. 1, at 13, to assign liability to petitioner rather than to NNS, see *id.* at 12, 24.

920(d), that an employee's injury or death was not willfully intentional] by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case."); *U.S. Indus./Fed. Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982) ("It seems fair to assume * * * that the § 20(a) presumption is of the same nature as the presumption created by § 20(d).").

Petitioner concedes that "[o]nce the claimant establishes that an exposure had the potential to cause harm, he receives the benefit of the § 20(a) presumption that the exposure did, in fact, cause harm." Pet. 5. But petitioner contends that it met its burden of offering substantial evidence to rebut the presumption, noting that it offered medical testimony that Faulk's exposure to asbestos while working for petitioner did not cause his mesothelioma. Pet. 4-5.

Petitioner's argument lacks merit. Under the LHWCA, petitioner may be held liable for any exposure that either causes *or aggravates* a disease. Petitioner failed to present substantial evidence demonstrating that its exposure of Faulk to asbestos did not, at the very least, aggravate his mesothelioma. Petitioner "presented no evidence of the asbestos level on the U.S.S. Flint the day of the incident, nor did it present evidence of the level of exposure it would take to cause the disease." Pet. App. 1, at 22. Petitioner's medical expert, who did not personally examine Faulk, "merely opined that the U.S.S. Flint exposure did not *cause* Faulk's mesothelioma." *Id.* at 22-23 (emphasis added); see Pet. App. 2, at 12-13. Accordingly, the court of appeals did not err in holding that petitioner failed to meet its evidentiary burden and that it was therefore liable under the LHWCA.

Petitioner does not address its failure to produce evidence on the aggravation issue, but instead argues

that the court of appeals erred by rejecting evidence that its exposure "did not cause Faulk's disease" and by requiring evidence that the "exposure 'did not have the *potential* to cause the disease or was in insufficient quantities to cause'" the disease. Pet. 4 (quoting Pet. App. 1, at 23). Petitioner's arguments are meritless because, as discussed above, petitioner was required to show not only lack of causation but lack of aggravation. The court of appeals rightly concluded, as an evidentiary matter, that petitioner failed to produce substantial evidence that its exposure did not, *in fact*, contribute to the harm.

2. Contrary to petitioner's argument (Pet. 5), there is no conflict between the court of appeals' decision and this Court's decision in *U.S. Industries*. In that case, a claimant sought disability benefits under the LHWCA based on an alleged neck injury he sustained at work. 455 U.S. at 610. The ALJ denied benefits after concluding that the claimant testified falsely as to how the accident happened, and the Benefits Review Board affirmed. *Ibid.* The court of appeals vacated the denial of benefits on the ground that the claimant had invoked the presumption in 33 U.S.C. 920(a) by establishing an injury when he awoke in pain the day after the alleged accident. 455 U.S. at 611-612. This Court held that the court of appeals erred by (1) invoking the presumption in support of a theory of recovery that was not advanced by the claimant, and (2) incorrectly construing the term "injury," which is defined in 33 U.S.C. 902(2) as an accidental injury arising out of and in the course of employment. 455 U.S. at 612-616. The Court "d[id] not decide the scope of the § 20(a) presumption," *id.* at 609 n.1, nor did it address the employer's burden of rebutting the presumption. Accordingly, there is no conflict between *U.S. Industries* and the court of

appeals' holding that petitioner failed to rebut the presumption.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner also argues (Pet. 3) that the court of appeals' decision is inconsistent with decisions of other courts of appeals, but does not identify any such decisions. In this case, the court of appeals "declined to adopt," Pet. App. 1, at 24, the rule set forth by the Ninth Circuit in *Picinich* that a LHWCA claimant must be exposed "to injurious stimuli in sufficient quantities to cause the disease," 914 F.2d at 1319. However, the court noted that even if a de minimis exception existed, it would not apply here because petitioner "presented no evidence to establish that Faulk's exposure aboard the U.S.S. Flint was, in fact, de minimis." Pet. App. 1, at 22; see pp. 7-8, *supra*. Therefore, this case does not present an appropriate vehicle to consider the soundness of the Ninth Circuit's decision in *Picinich* or whether the LHWCA contemplates a de minimis exception.