

FILED

Dillingham Ship Repair v. United States Department of Labor, No. 07-73611

MAR 25 2009

FISHER, Circuit Judge, concurring in the result:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

Whether Dillingham's argument that the Benefit Review Board's decision in *McAllister v. Lockheed Shipbuilding*, 41 B.R.B.S. 28, 2007 WL 1289932 (Dep't of Labor Ben. Rev. Bd. 2007) (per curiam), impermissibly imposes the burden of proof on *each* employer *simultaneously* contains two analytically distinct points or those points are simply different sides of the same coin, I see no reason to address any aspect of the *McAllister* rule. Here, the administrative law judge (ALJ) clearly imposed the burden of proof sequentially, beginning with the last-in-time employer and moving to the preceding employer only after concluding the later-in-time employer had carried its burden. The three later-in-time employers carried their burden. Dillingham did not. In short, the ALJ did precisely what Dillingham maintains the last employer rule requires: he ensured each later-in-time employer had carried its burden of proving it did not expose claimant to sufficient harmful stimuli to cause the injury before imposing the burden of proof on Dillingham. I would therefore affirm because any legal error in the Board's formulation of the rule was immaterial and would decline to opine on whether imposing the burden of proof on *each* employer is appropriate.