

ARTHUR CLEMENT)
)
 Claimant)
)
 v.)
)
 BATH IRON WORKS CORPORATION)
)
 Self Insured)
 Employer-Respondent)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED: JUN 29, 2004
 COMPANY)
)
 Carrier/Petitioner)
)
 BIRMINGHAM FIRE INSURANCE)
 COMPANY)
)
 Carrier/Respondent)
)
 ONE BEACON INSURANCE COMPANY/)
 fka C OMMERCIAL UNION INSURANCE)
 COMPANY)
)
 Carrier/Respondent) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William J. Cowan,
Administrative Law Judge, United States Department of Labor.

Jean Shea Budrow (Latronico, Black & Whitestone), Boston,
Massachusetts, for Liberty Mutual Insurance Company.

John H. King (Norman, Hanson & DeTroy, LLC), Portland, Maine, for
self-insured employer.

Nelson J. Larkins (Preti Flaherty Beliveau Pachios & Haley, LLC), Portland, Maine, for Birmingham Fire.

Richard F. van Antwerp (Robinson, Kriger & McCallum, P.A.), Portland, Maine, for One Beacon Insurance Company/fka Commercial Union Insurance Company.

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

PER CURIAM:

Liberty Mutual Insurance Company (Liberty Mutual) appeals the Decision and Order Awarding Benefits (2002-LHC-2769) of Administrative Law Judge William J. Cowan 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Bath Iron Works (employer) in various capacities from February 1974 until his voluntary retirement in September 1997. Tr. at 13. It is undisputed that claimant was exposed to asbestos in the course of his employment with employer. Based on the opinion of claimant's expert, Dr. LaPrad, the administrative law judge awarded claimant permanent partial disability benefits for a 17.5 percent impairment, at the stipulated national average weekly wage of \$466.91, pursuant to 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for his asbestos-related pleural disease. The administrative law judge also awarded claimant reasonable and necessary medical care under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge found that Liberty Mutual is the carrier responsible for claimant's benefits as claimant was last exposed to asbestos in mid-1986 when Liberty Mutual was on the risk.¹

On appeal, Liberty Mutual challenges the administrative law judge's finding that it is the responsible carrier. One Beacon, Birmingham Fire, and employer in its self-

¹ One Beacon Insurance Company (formerly Commercial Union) insured employer from January 1, 1963 through February 28, 1981. Liberty Mutual covered employer from March 1, 1981 through August 31, 1986. Birmingham Fire Insurance Company was on the risk from September 1, 1986 through August 31, 1988. Employer became self-insured as of September 1, 1988.

insured capacity, respond, urging affirmance of the administrative law judge's finding that Liberty Mutual is the responsible carrier.

Liberty Mutual contends that the administrative law judge erred in finding it is the responsible carrier because there is evidence that claimant was exposed to injurious stimuli after Liberty Mutual's period of coverage ended. In this regard, Liberty Mutual argues that the administrative law judge erred in according determinative weight to the testimony of William Lowell, employer's General Manager and Vice-President, regarding claimant's likely period of exposure, and in mischaracterizing claimant's testimony regarding his exposure to asbestos.

The responsible carrier is the one which last insured the liable employer during the period in which the claimant was exposed to injurious stimuli prior to the date the claimant became disabled by his occupational disease. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). In this case, claimant became disabled after his retirement. Thus, the relevant inquiry concerning the responsible carrier is the date claimant was last exposed to injurious stimuli. *See Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). Liberty Mutual bears the burden of establishing that claimant was last exposed to injurious stimuli during a subsequent carrier's period of coverage in order to escape liability. *See generally General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

We affirm the administrative law judge's finding that claimant was last exposed to injurious stimuli in mid-1986 as it is rational and supported by substantial evidence. Claimant testified that he worked as an outside machinist on the overhaul of vessels from September 1984 until November 1986, when he became first class painter. Tr. at 29-30. Mr. Lowell testified that the Coast Guard cutter *Hamilton* was in the yard for overhaul from September 1985 to 1988, and that claimant may have worked on this vessel. Tr. at 68. Claimant recalled working on a Coast Guard vessel during this time. Tr. at 30. Mr. Lowell further testified that the *Hamilton* had only a limited amount of asbestos, *id.* at 67, and that the rip-out work, during which asbestos exposure could occur, was completed by mid-1986 at the very latest.² Tr. at 70, 79. Although claimant testified that

² The administrative law judge relied on Mr. Lowell's testimony that asbestos had been phased out as insulating material in new ship construction in the 1970's and, as of 1982, had also been phased out of gasket and packing use, so that after 1982 employer did not use any materials containing asbestos in new ship construction. Tr. at 61-65.

he thought he was exposed to asbestos after 1990, *id.* at 50, the administrative law judge credited the testimony of Mr. Lowell that this was a very remote possibility, *id.* at 87-88, given that claimant had transferred to a painting position, the type of ship repair work being performed at the shipyard, and employer's asbestos abatement program. Decision and Order at 9. The administrative law judge thus concluded that claimant was last exposed to asbestos in the period from 1985 to mid-1986 at the latest, and that Liberty Mutual, as the carrier on the risk during this time, is the responsible carrier.

It is within the administrative law judge's discretion to weigh the evidence and to draw inferences therefrom, and to make credibility determinations. *See Bath Iron Works Corp. v. U. S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003). If his findings are supported by substantial evidence in the record, the administrative law judge's finding may not be disregarded on the basis that other inferences may seem more reasonable. *See Hutchins*, 244 F.3d at 231, 35 BRBS at 40-41(CRT); *see also Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999). In this case, the administrative law judge rationally credited Mr. Lowell's testimony, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and it supports the administrative law judge's finding that claimant was not exposed to injurious stimuli after mid-1986. *See generally Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990). Therefore, we affirm the administrative law judge's determination that Liberty Mutual is the responsible carrier. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits payable by Liberty Mutual is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

