

SANDRA ADAMS)
(Widow of WAYNE ADAMS))
)
 Claimant)
)
 v.)
)
 BATH IRON WORKS CORPORATION) DATE ISSUED: Oct. 20, 2004
)
 Self-Insured)
 Employer-Petitioner)
)
 and)
)
 ONEBEACON INSURANCE GROUP)
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 and)
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 LIBERTY MUTUAL INSURANCE)
 COMPANY)
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 and)
)
 BIRMINGHAM FIRE INSURANCE)
 COMPANY)
)
 Carriers-Respondents) DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Ronald W. Lupton (Piampiano Law Offices), South Portland, Maine, for employer and OneBeacon Insurance Group.

Jean S. Budrow (Lationico Black & Whitestone), Boston, Massachusetts, for employer and Liberty Mutual Insurance Company.

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

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Reconsideration (2002-LHC-0755) of Administrative Law Judge Jeffrey Tureck 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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's spouse (hereinafter the decedent) was employed in various capacities by employer from April 11, 1977, to May 1, 1995, when he took early retirement. On January 1, 2001, the decedent was diagnosed with mesothelioma; he died as a result of this disease on April 28, 2001. The parties stipulated to the existence of a causal relationship between the decedent's illness and death and his employment, and to the amount of his average weekly wage. The only issue before the administrative law judge is which of employer's carriers is responsible for the payment of benefits.

In his Decision and Order, the administrative law judge found that decedent was last exposed to asbestos at a time when employer was self-insured. Thus, the administrative law judge found employer liable for permanent total disability benefits from January 1, 2001, to April 28, 2001, and all related medical costs. Claimant was awarded funeral expenses and continuing death benefits, commencing April 29, 2001. 33 U.S.C. §909. On reconsideration, the administrative law judge affirmed his previous decision.

On appeal, employer contends that the administrative law judge erred in finding it liable for claimant's award of benefits. Employer's three prior carriers respond, urging affirmance of the administrative law judge's decision.

The record reflects that during the decedent's 18 years of employment, employer had three carriers before becoming self-insured on September 1, 1988. From the date the decedent was hired, April 11, 1977, to February 28, 1981, employer was insured by OneBeacon (formerly Commercial Union); from March 1, 1981, to August 31, 1986, by Liberty Mutual; and from September 1, 1986, until August 31, 1988, by Birmingham Fire. During his employment, the decedent worked initially as a technical writer from

April 1977 to August 6, 1979, when he became an assistant ship superintendent. In November 1987, the decedent became a chief ship superintendent. The decedent worked at employer's facility in Bath, Maine, except for the period from January 1989 to July 1992, when he worked in Portland, Maine. He returned to the Bath facility in July 1992 as an area manager until his retirement in 1995.

Employer contends the administrative law judge erred in finding that decedent was last exposed to asbestos after employer became self-insured on September 1, 1998. In this regard, employer argues that the administrative law judge applied the Section 20(a), 33 U.S.C. §920(a), presumption to presume that decedent was exposed to asbestos after employer became self-insured. Employer also contends that the administrative law judge's finding regarding decedent's exposure to asbestos is not supported by substantial evidence.

Initially, we reject employer's contention the administrative law judge misapplied the Section 20(a) presumption in his decision. As employer correctly states, Section 20(a) aids a claimant in establishing the compensability of his claim, *see generally U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), and does not apply to the issue of responsible employer. *See Lins v. Ingalls Shipbuilding, Inc.* 26 BRBS 62 (1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). In this case, employer conceded that the decedent was exposed to asbestos during his employment and that his disease and death were work-related. Decision and Order at 2. Thus, the administrative law judge properly found that the Section 20(a) presumption of causation has no relevance in this case. Order Denying Recon. at 2. Rather, the administrative law judge properly placed the burden on employer to establish that injurious exposure to asbestos had ceased prior to its assuming liability in its self-insured capacity. As the last employer, employer can escape liability only by establishing that the decedent was not exposed to injurious stimuli during the relevant period of its liability. *See Norfolk Shipbuilding & Drydock Corp. v. Director, OWCP [Faulk]*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2^d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see also Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992). Under the last exposure rule, any exposure to harmful stimuli during an insurer's coverage period will lead to liability, even if the most recent exposure was not the primary or triggering cause of the disability and death. *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F. 3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). Thus, we now address employer's contention that the record does not support the administrative law judge's finding decedent was exposed to asbestos after employer became self-insured on September 1, 1988.

It is uncontested by the parties that the decedent was exposed to asbestos during his employment with employer. Although the decedent was seldom aboard ships during

the first years of his employment as a technical writer, the decedent spent the majority of his time aboard ship and in the machinery spaces as an assistant ship superintendent and ship superintendent from August 6, 1979 until November 1987. As a chief ship superintendent after November 1987, the decedent was responsible for everything on board ship and for the work assignments and health and safety of his staff. Employer contends that based on the nature of the work being done on the ships under the decedent's supervision, the decedent's position, and increasing safety precautions, the decedent was most likely last exposed to asbestos prior to August 31, 1986, and therefore Liberty Mutual is the responsible carrier.

The administrative law judge stated that while there is no concrete evidence that the decedent was exposed to asbestos after September 1, 1988, there is strong anecdotal evidence that such exposure did occur. In reaching this conclusion, the administrative law judge relied heavily on the testimony of three co-workers/colleagues of the decedent, Mssrs. Downs, Carleton and Lowell. Mr. Downs worked as a ship superintendent and testified as to the decedent's probable exposure to asbestos after September 1, 1988, as decedent spent 95 percent of his time on ships supervising their overhaul, identifying and inspecting asbestos rip-out areas, and overseeing asbestos incidents. CX 6 at 13-18, 33-34. Mr. Carleton worked primarily as a pipefitter and opined that the decedent was exposed to asbestos throughout his career on board ship because it was part of the decedent's job to monitor the work, including rip-outs, exposure complaints, and asbestos incidents. CX 7 at 11-13, 18-20.

Although Mr. Lowell, a chief operating engineer for employer, testified concerning the aggressive safety precautions involving the handling of asbestos initiated in the mid-1980s, HT at 51, the decedent's adherence to safety rules involving asbestos, HT at 63, 94, and the procedures for asbestos incidents which would not have involved the decedent's presence, HT at 84, he conceded that incidents involving asbestos exposure occurred after 1988 on ships under the decedent's supervision.¹ HT at 92-94. The administrative law judge rejected Mr. Lowell's testimony that decedent was most likely last exposed in 1985 as inconsistent with the rest of his testimony. In so doing he specifically addressed Mr. Lowell's contention that an area manager, and not a ship superintendent such as decedent, would inspect the area where an asbestos incident occurred. The administrative law judge noted that decedent was promoted in 1992 to an area manager position at the Bath facility. Thus, the administrative law judge found that Mr. Lowell's testimony was not dispositive as to the date of decedent's last exposure to asbestos.

¹ Incidents occurred aboard the *Dallas* in February and March 1989. HT at 92-94.

The administrative law judge also examined the decedent's personal work diaries and first aid records. He noted that the work diaries recorded specific asbestos incidents in 1987 and 1989 and concluded that as a ship superintendent, the decedent could have been involved in the incidents or the ensuing clean-ups as part of his responsibilities for the overhauls. Decision and Order at 11. The administrative law judge also found that the decedent's first aid records regarding his asbestos exposure were inconsistent and lacked specificity sufficient to support a determination of the date of last exposure. Based on this evidence, the administrative law judge concluded that because there were asbestos incidents during the relevant time period and employer failed to establish that the decedent was not exposed to asbestos after September 1, 1988, it is liable for benefits.

On reconsideration, the administrative law judge addressed employer's contention that his reliance on the testimony of Mr. Downs was misplaced as Mr. Downs's testimony was inconsistent with that given in his own claim for compensation. The administrative law judge stated that even if Mr. Downs's testimony were eliminated from consideration he would have concluded that the decedent continued to be exposed to asbestos after September 1988 based on the other testimony of record and the decedent's work diaries.

After review of the record, we affirm the administrative law judge's decision as it is supported by substantial evidence. The administrative law judge discussed all relevant evidence and provided rational reasons for choosing from among competing inferences. It is the administrative law judge's prerogative to draw inferences and make credibility assessments, and we decline to disturb his judgment as the findings are adequately anchored in the record. *See Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). The administrative law judge did not abuse his discretion in crediting the testimony of the decedent's co-workers, and his reliance upon it is not "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, his reliance upon this testimony is supported by the decedent's work diaries. Thus, as it rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer did not establish that decedent was not exposed to asbestos after September 1, 1998, and his consequent finding that employer in its self-insured capacity is the responsible carrier in this case.

Accordingly the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge