

GLENICE ASHTON )  
(Widow of ARTHUR S. ASHTON) )  
 )  
Claimant )  
 )  
v. )  
 )  
BATH IRON WORKS CORPORATION )  
 )  
Self-Insured )  
Employer-Respondent )  
 )  
LIBERTY MUTUAL INSURANCE ) DATE ISSUED: July 28, 2004  
COMPANY )  
 )  
Carrier-Petitioner )  
 )  
AIG CLAIMS SERVICES, )  
INCORPORATED )  
 )  
and )  
 )  
BIRMINGHAM FIRE INSURANCE )  
COMPANY )  
 )  
and )  
 )  
ONE BEACON INSURANCE COMPANY )  
 )  
Carriers-Respondents ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton,  
Administrative Law Judge, United States Department of Labor.

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

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

Nelson J. Larkins (Prete Flaherty Beliveau Pachios & Haley, LLC), Portland, Maine, for Birmingham Fire Insurance Company/AIG Claims Services.

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

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

PER CURIAM:

Carrier Liberty Mutual Insurance Company (Liberty Mutual) appeals the Decision and Order Awarding Benefits (02-LHCA-1213) of Administrative Law Judge Daniel F. Sutton rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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).

The decedent was employed by Bath Iron Works Corporation (employer), at its shipyard in Bath, Maine, over four separate time periods. From November 15, 1965, through November 28, 1965, the decedent was employed as a painter and cleaner; from November 25, 1975, through January 9, 1976, he was employed as a laborer; from September 20, 1976 through September 27, 1976, he was employed as a laborer; and from January 29, 1979 through May 24, 2001, he was employed as an insulator. It is undisputed that the decedent was exposed to asbestos in the course of his employment with employer. *See* Decision and Order at 3.

Over the years, employer has obtained coverage under the Act from a succession of insurance companies. Specifically, One Beacon Insurance Company (One Beacon formerly Commercial Union) insured employer from January 1, 1963, through February 28, 1981; Liberty Mutual insured employer from March 1, 1981 through August 31, 1986; and Birmingham Fire Insurance Company (Birmingham Fire) insured employer from September 1, 1986 through August 31, 1988. Employer has been self-insured since September 1, 1988.

In his decision, the administrative law judge found that the decedent's last exposure to asbestos prior to disability occurred between March 1, 1981 and August 31, 1986. The administrative law judge thus concluded that Liberty Mutual is the responsible carrier for any benefits awarded. Decision and Order at 4-8. On the merits, the administrative law judge determined that decedent stopped working on May 24, 2001,

because of unbearable hip pain caused by cancer and that there was no evidence in the record that he regained the capacity to work prior to his November 9, 2001, death. The administrative law judge therefore awarded decedent's estate permanent total disability compensation from May 24, 2001, through the date of death. Decision and Order at 9. In addition, the administrative law judge determined that the decedent's death was due to lung cancer and that his work-related asbestos exposure contributed to his death. Decision and Order 10; Claimant's Exhibits 2, 10G, 10H. Consequently, he awarded claimant, the decedent's surviving spouse, death benefits and funeral expenses pursuant to Section 9 of the Act, as well as all relevant medical expenses incurred as a result of decedent's work-related lung cancer pursuant to Section 7 of the Act. 33 U.S.C. §§907, 909; Decision and Order at 10-11. Lastly, the administrative law judge found Liberty Mutual responsible for an attorney's fee and costs in the amount of \$10,308.23. Decision and Order at 11.

On appeal, Liberty Mutual challenges the administrative law judge's finding that it is the responsible carrier. One Beacon, Birmingham Fire, and Bath Iron Works in its self-insured capacity, each respond urging affirmance of the administrative law judge's finding that Liberty Mutual is the responsible carrier.

Liberty Mutual argues that the administrative law judge erred in determining that it is the responsible carrier as there is substantial evidence that the decedent was exposed to asbestos after August 31, 1986, when Liberty Mutual's coverage of employer ended. Liberty Mutual avers that the testimony put forth by employer's employees, Ms. Horton, Mr. Lowell and Mr. St. Pierre, establish that the decedent was exposed to asbestos subsequent to 1986. Alternatively, Liberty Mutual argues that the record does not reflect any asbestos exposure after the 1970's. Liberty Mutual argues that the decedent's affidavit demonstrated that he worked with asbestos only until 1976 and that other than testimony from Ms. Horton, whose testimony on post-1986 exposure was discredited, there were "no specific incidents of exposure cited after 1979." Liberty Mutual's Brief at 13. Liberty Mutual thus argues that there is no evidence of exposure during its time of coverage.

In occupational exposure cases such as the instant case, the United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, has held that the carrier which insured the liable employer during the period in which the decedent was last exposed to injurious stimuli prior to the date upon which the decedent became disabled by an occupational disease arising naturally out of his employment is responsible for discharging the duties and obligations of the liable employer. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1<sup>st</sup> Cir. 1992); *see also Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35

BRBS 35 (CRT)(1<sup>st</sup> Cir. 2001); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2<sup>d</sup> Cir. 1955).

Here, the administrative law judge determined that Liberty Mutual is the responsible carrier as he found that the decedent's last exposure to injurious asbestos occurred during the 1981 through 1986 period when Liberty Mutual provided employer's coverage. In so finding, the administrative law judge considered the affidavit of the decedent as well as the hearing testimony of Mr. Lowell, Ms. Horton and Mr. St. Pierre. In considering the entirety of such evidence, the administrative law judge credited testimony of Ms. Horton regarding one particular incident of asbestos exposure in which Ms. Horton testified in detail as to a time that she and the decedent were present when a sailor cut into asbestos pipe covering, thereby sending the asbestos insulation airborne. The administrative law judge noted Ms. Horton's testimony that the incident occurred in the 1980's "in '84, '85 maybe '86," Claimant's Exhibit 8, and further determined that the incident occurred subsequent to 1982 as that was when Ms. Horton became an insulator. The administrative law judge relied upon testimony by Mr. Lowell to ascertain a more specific date of exposure for this incident. Mr. Lowell testified that such an incident would have taken place, at the latest, during an overhaul of the *USS Page*, which occurred between September 1984 and June 8, 1986, as that was the last ship undergoing an overhaul at employer's facility with a Navy crew aboard. Decision and Order at 8; Hearing Transcript at 46-47, 49-50. The administrative law judge further credited Mr. Lowell's opinion that the decedent's last asbestos exposure at employer's facility was probably in the summer of 1985, when the decedent worked on boiler problems on the *USS Page*. Hearing Transcript at 51. The administrative law judge thus concluded that the decedent's last exposure to asbestos was during Liberty Mutual's coverage of employer.

In concluding that the evidence failed to establish that the decedent was exposed to asbestos subsequent to Liberty Mutual's coverage period, the administrative law judge found that there was no specific evidence of actual injurious exposure to asbestos. In particular, the administrative law judge concluded that parts of Ms. Horton's testimony and all of Mr. St. Pierre's testimony were too vague to be accorded weight. Decision and Order at 9. Specifically, the administrative law judge stated that he was discrediting "virtually all" of Mr. St. Pierre's testimony because of his erroneous belief that the decedent worked in Portland, Maine, when in fact, based on the testimony of Mr. Lowell, decedent's personnel records indicate that he worked exclusively at employer's shipyard in Bath, Maine. Decision and Order at 7, 9. The administrative law judge further found that Ms. Horton's testimony of later exposure was too vague to establish injurious exposure particularly in light of Mr. Lowell's testimony that there were many false or

mistaken reports of asbestos exposure during this period of time.<sup>1</sup> Decision and Order at 9. We thus hold that substantial evidence supports the administrative law judge's determination that the decedent's last injurious exposure to asbestos occurred between March 1, 1981, and August 31, 1986.<sup>2</sup>

It is within the administrative law judge's discretion to draw inferences and make credibility determinations. If his findings, as in the instant case, are in accordance with law and supported by substantial evidence in the record, the administrative law judge's findings may not be disregarded on the basis that other inferences may appear more reasonable. *See Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT); *see also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT)(4<sup>th</sup> Cir. 1994). As the administrative law judge has considered the entirety of the relevant evidence of record, and his findings are supported by substantial evidence and in accordance with law, we affirm the administrative law judge's determination that Liberty Mutual is the responsible carrier. *See Liberty Mutual Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT); *see also Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT); *Cardillo*, 225 F.2d 137.

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<sup>1</sup> Mr. Lowell testified as to his strong belief that there was not any work done after the summer of 1985 that would have exposed the decedent to asbestos and that the decedent would not have been exposed to asbestos on the *USS Hamilton* in 1988 as there was limited asbestos aboard. Hearing Transcript at 39-40.

<sup>2</sup> As substantial evidence supports the administrative law judge's finding that the decedent's last exposure to asbestos occurred sometime between 1981 and 1986, Liberty Mutual's contention that the decedent's last exposure occurred prior to 1979 must be rejected.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge