BRB Nos. 92-1424
and 92-1424A

EARL PASS, SR.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
and	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
and	)	DATE ISSUED:
	)	
BATH IRON WORKS CORPORATION	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	DECISION AND ORDER

Appeals of the Decision and Order Awarding Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Stephen D. Bither (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for self-insured employer.

Allan M. Muir (Richardson & Troubh), Portland, Maine, for Bath Iron Works and Liberty Mutual Insurance Company.

James C. Hunt (Robinson, Kriger, McCallum & Greene), Portland, Maine, for Bath Iron Works and Birmingham Fire Insurance Company.

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

PER CURIAM:

Bath Iron Works Corporation and Liberty Mutual Insurance Company (Liberty Mutual) appeal and claimant cross-appeals the Decision and Order Awarding Benefits (89-LHC-808, 809) of Administrative Law Judge Martin J. Dolan, Jr., 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was exposed to asbestos while working as a material handler for Bath Iron Works Corporation from 1940 until 1989. On May 7, 1981, claimant was informed by the shipyard physician, Dr. Zeller, that there was a possibility that he had an asbestos-related lung disease. After consulting with a number of physicians, claimant was hospitalized for short periods for his respiratory condition.[1] Claimant sought temporary total disability compensation under the Act for these periods. *See* 33 U.S.C. §908(b). With the exception of these distinct periods of temporary disability while he was hospitalized, claimant continued to perform his usual work for employer and continued to be exposed to asbestos until he retired as a result of his pulmonary condition, on April 30, 1989.

In a Decision and Order dated June 8, 1987, the administrative law judge awarded claimant temporary total disability compensation based upon his average weekly wage as of May 7, 1981, the date claimant first learned of the work-related nature of his respiratory condition from Dr. Zeller. The administrative law judge further determined that Liberty Mutual, the carrier providing coverage between March 1, 1981 and August 31, 1986, was liable as the responsible carrier because it was the carrier on the risk when claimant was last exposed to injurious stimuli prior to his May 7, 1981, date of awareness. This decision was not appealed.

[1]Claimant was hospitalized from February 5, 1982 to March 9, 1982, from February 21, 1983 through February 29, 1983, and from February 6, 1984 through March 8, 1984.

On July 7, 1990, claimant filed another claim, seeking permanent total disability compensation commencing on April 30, 1989, the date he retired. In a Decision and Order Awarding Benefits dated February 16, 1992, the administrative law judge initially determined that because his prior findings as to claimant's asbestos exposure, his May 7, 1981, date of awareness, and the identity of the responsible carrier were *res judicata*, these issues could not be re-litigated.[2] He did, however, find that based on the medical evidence submitted claimant's asbestosis, which had rendered him temporarily totally disabled at various times in 1982, 1983, and 1984, had progressively worsened to the level that claimant was unable to continue working at his usual job, and was forced to retire on April 30, 1989. He thus found that claimant was permanently and totally disabled due in part to his asbestosis as of April 30, 1989, noting that employer failed to demonstrate the availability of suitable alternate employment. Decision and Order at 8. Although the administrative law judge found that pursuant to his initial decision the applicable date of injury was May 7, 1981, he nonetheless determined that the average weekly wage for the award of permanent total disability compensation was $434.91, based on claimant's average weekly earnings during the 52-week period prior to his retirement on April 30, 1989. *Id.* at 9. The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and interest, and awarded Liberty Mutual a credit of $1,900 for the proceeds claimant received as a result of a third-party settlement. *See* 33 U.S.C. §933.

On appeal, Liberty Mutual challenges the administrative law judge's determination in his second Decision and Order that because the question of responsible carrier had previously been decided in his initial decision it was entitled to *res judicata* effect. Bath Iron Works (Bath Iron), in its capacity as a self-insured employer responds, urging affirmance. Birmingham Fire Insurance Company also responds, agreeing with the self-insured employer.[3] Liberty Mutual replies, reiterating its position that Bath Iron should be held responsible, citing *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992), as controlling authority.

Claimant cross-appeals, arguing that the administrative law judge erred in adopting the May 7, 1981, date of injury from the first claim rather than finding his April 30, 1989, retirement date to be the proper date of injury, as this was the date he first became aware that his worsening breathing problems would permanently force him to retire. Citing *Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991), claimant contends that because he sustained aggravating exposure up until he retired, he sustained a new injury on April 30, 1989, and the administrative law judge accordingly properly based the award of permanent total disability compensation on his average weekly wage at that time. Claimant also maintains that Liberty Mutual's argument that May 7, 1981 should be

[2]Liberty Mutual provided insurance coverage between March 1, 1981 and August 31, 1986.

[3]Commercial Union Insurance Company, the carrier providing coverage for employer prior to Liberty Mutual, submitted a letter in which it indicated that inasmuch as no one was contending that it should be held liable as the responsible carrier, it was not filing a formal brief.

employed as the date of injury for purposes of determining the average weekly wage ignores the fact that this case involves a separate claim based on the aggravation of his condition since his first claim and that, pursuant to Section 10(c), 33 U.S.C. §910(c), the administrative law judge has the discretion to use an average weekly wage which reflects claimant's lost earnings, even if that wage is determined as of a different date than the date of injury as defined by Section 10(i), 33 U.S.C. §910(i)(1988). Bath Iron responds to claimant's cross-appeal, reiterating that the administrative law judge's initial determinations regarding claimant's date of awareness and the responsible carrier are *res judicata*. It further asserts that claimant's reliance on *Spear* is misplaced because, while there arguably can be several dates of awareness with regard to the extent of claimant's hearing loss, each one determined by additional industrial exposure, there is no degree of quantification which can be ascribed to asbestos exposure. Bath Iron also asserts that while hearing loss will not progress in the absence of additional exposure, asbestosis is, in and of itself, a progressive disease.

Initially, we agree with Liberty Mutual that the administrative law judge erred in finding reconsideration of the responsible carrier issue barred by *res judicata*. The principle of *res judicata* or claim preclusion precludes re-litigation of a subsequent action between the same parties on the same cause of action. *See Thomas v. Evans*, 880 F.2d 1235 (11th Cir. 1989). In the present case, however, there are two separate claims; the first being limited to four distinct periods of temporary total disability compensation which were the subject of the administrative law judge's initial decision, and the second being a claim for permanent total disability benefits after claimant retired. As the parties in the present case were not attempting to re-litigate the same cause of action when the case came before the administrative law judge the second time, the doctrine of *res judicata* does not apply. Accordingly, we reverse the administrative law judge's finding in his second Decision and Order that inasmuch as he had previously determined the identity of the responsible carrier in his initial decision, reconsideration of the responsible employer was *res judicata* and accordingly could not be relitigated.

We further note that reconsideration of the responsible carrier issue is also not barred under the related doctrine of collateral estoppel. Under the doctrine of collateral estoppel, re-litigation of an issue necessarily and actually litigated in a prior adjudication is precluded where the parties or their privies had a full and fair opportunity to litigate the issue. Whether the application of collateral estoppel is appropriate necessitates four inquires; first, whether the party to be estopped was a party or assumed control of the prior litigation; second, whether the issues presented are in substance the same as those resolved in the earlier litigation; third, whether the controlling facts or legal principles have changed significantly since the earlier judgment; and finally whether other special circumstances warrant an exception to the normal rules of preclusion. *See Montana v. United States*, 440 U.S. 147, 153-155 (1979); *Klein v. C.I.R.*, 880 F.2d 260, 262-263 (10th Cir. 1989). In the present case, although the responsible carrier issue was litigated in the initial proceedings, the operative facts changed significantly since the administrative law judge's initial adjudication; claimant returned to work after the periods of temporary total disability compensation and received additional injurious exposure. Inasmuch as collateral estoppel of a judgment does not prevent re-examination of the same questions between the same parties where, as here, the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants, we hold that

collateral estoppel was also not an impediment to the administrative law judge's reconsideration of the responsible carrier issue in the second proceedings in this case. *See* 50 C.J.S. §712(b).

In light of our determination that consideration of the responsible carrier issue is not barred on *res judicata* or collateral estoppel principles, we direct out attention to the parties' arguments relating to this issue. The basic premise of Liberty Mutual's argument on appeal is that it is not the responsible carrier because claimant received subsequent exposure to injurious stimuli while Bath Iron was on the risk as a self-insured employer and that this exposure aggravated his underlying condition, resulting in his permanent total disability on April 30, 1989. Liberty Mutual avers that consistent with the recent opinion of the United States Court of Appeals for the First Circuit in *Liberty Mutual*, 978 F.2d at 750, 26 BRBS at 85 (CRT), the responsible carrier is the carrier on the risk when claimant first becomes disabled. While recognizing that *Liberty Mutual* did not arise in a situation such as the present case where claimant experienced an earlier period of disability and need for medical care which was deemed the responsibility of a prior carrier, Liberty Mutual avers that the First Circuit's pronouncement is consistent with the rules of aggravation articulated by the Board in *Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991).[4]

Bath Iron argues, however, that even if the administrative law judge's prior findings regarding the responsible carrier are not entitled to *res judicata* effect, his determination that Liberty Mutual is liable as the responsible carrier is nonetheless affirmable, as the administrative law judge provided an adequate factual basis for finding that claimant's permanent total disability is the extension and natural progression of the original 1981 injury. Moreover, the self-insured employer asserts that the argument that, due to claimant's subsequent exposure to asbestos after Liberty Mutual was no longer on the risk, the subsequent carrier should be held responsible, is not consistent with the rule enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.) *cert. denied*, 350 U.S. 913 (1955). Bath Iron argues that *Cardillo* focuses on exposure to injurious stimuli prior to the date of awareness and not on the date of last exposure under any circumstances.

We conclude that this case must be remanded for reconsideration of the responsible carrier issue, as the administrative law judge did not render findings on this issue based on the facts relating to the present claim and on current case precedent. The standard for determining the responsible

[4]In *Spear v. General Dynamics Corp*, 25 BRBS 254 (1991), the Board held that where claimant received a 1980 audiogram and accompanying report and filed a claim but continued working in covered employment where he was exposed to injurious noise resulting in an aggravation of his hearing loss reflected on a 1986 audiogram, the carrier on the risk at the time of the 1986 audiogram was liable notwithstanding that claimant may have been aware of his hearing loss based on receipt of the earlier audiogram. In this case, the claim for the hearing loss on the 1980 audiogram had not been adjudicated and merged with the later claim for the hearing loss evidenced on the 1986 audiogram. Although in *Spear*, claimant did sustain a distinct aggravation of his occupational hearing loss through continued employment resulting in a new injury, this fact was not determinative of the responsible carrier question. *Spear* indicates that in an occupational hearing loss case, the responsible carrier is the last carrier on the risk to expose claimant to injurious stimuli prior to his awareness of the full extent of his occupational injury.

employer or carrier was first enunciated in *Cardillo*, 225 F.2d at 137. Pursuant to *Cardillo,* the last employer or carrier to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable under the Act. *See also Todd Shipyard Corp. v. Black,* 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984). Liberty Mutual argues that it is not the responsible carrier because claimant received subsequent exposure to injurious stimuli when it was no longer on the risk and that this exposure aggravated his occupational lung condition, resulting in his permanent total disability. Bath Iron responds that the administrative law judge's finding that Liberty Mutual is liable as the responsible carrier can be affirmed even if his prior determination is not accorded *res judicata* effect because he reasonably concluded in his second decision that claimant's permanent total disability was due to the natural progression of the initial May 5, 1981 injury. Neither argument actually provides the correct analysis, however, as actual causation is irrelevant to carrier liability in occupational disease cases. Pursuant to *Cardillo,* the last employer or carrier to expose claimant to potentially injurious stimuli prior to claimant's date of awareness of his occupational injury is liable regardless of whether that exposure actually contributed to claimant's disability. *Franklin v. Dillingham Ship Repair,* 18 BRBS 198 (1986); *see also Lustig v. Todd Shipyards Corp.,* 20 BRBS 207, 213 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U. S. Dep't of Labor,* 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

Bath Iron also argues that because claimant was aware that he had a work-related lung condition in 1981 and sustained distinct periods of disability shortly thereafter, the administrative law judge properly determined that his date of awareness for purposes of assessing carrier liability occurred while Liberty Mutual was on the risk. This argument, however, is of dubious validity in light of the United States Court of Appeals for the First Circuit's decision in *Liberty Mutual, supra.* In *Liberty Mutual*, the First Circuit, within whose jurisdiction this case arises, held that in cases where claimant's awareness that he suffers from an occupational disease and his disability from that disease do not coincide, the date on which the worker suffers a diminution of earning capacity is the operative date of awareness for purposes of assigning carrier liability under the *Cardillo* last-injurious exposure rule.[5] In the present case, claimant was awarded temporary total disability compensation in the initial decision for the periods during which he had been hospitalized in 1982, 1983, and 1984. The administrative law judge, however, credited claimant's testimony and the opinions of his physicians, that with the exception of the periods of hospitalization, claimant was able to perform his usual work. Moreover, claimant continued to be exposed to asbestos until the end of his employment. In his second decision, in determining the applicable average weekly wage for the award of permanent total disability, the administrative law judge found that April 30, 1989, marked the onset of claimant's permanent total disability and the date on which his occupational disease first affected his wage-earning capacity, and thus was claimant's date of awareness for purposes of average weekly wage. *See* 33 U.S.C. §910(i). *Liberty Mutual* indicates that the date on

[5]The United States Court of Appeals for the First Circuit noted that predicating carrier liability on disability rather than on awareness of a potentially disabling occupational disease was warranted because of deficiencies in medical knowledge regarding the predication as to the course of progress of an occupational disease. *See Liberty Mutual Insurance Co. v. Commercial Union Co.,* 978 F.2d 750, 753, 26 BRBS 90-91 (CRT) (1st Cir. 1992).

which the worker suffers a diminution in his earning capacity is the date of disablement and that awareness for purposes of determining carrier liability turns on knowledge of the relationship between the injury, disease and death or disability. As the administrative law judge's decisions contain findings which suggest that claimant's wage-earning capacity was not adversely affected until after Liberty Mutual was no longer on the risk, we vacate the administrative law judge's finding that Liberty Mutual is liable as the responsible carrier and remand for him to reconsider this issue consistent with *Liberty Mutual*.

It is apparent from the foregoing that the same date of awareness is relevant in determining the responsible carrier under *Liberty Mutual* and claimant's average weekly wage. As these determinations must be made consistently based on the date that claimant becomes aware of the relationship between his employment, his disease and his disability, the administrative law judge's average weekly wage finding is also vacated. *See Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *Sans v. Todd Shipyards Corp*, 19 BRBS 24 (1986). On remand, if the administrative law judge concludes that claimant did not become aware of the relationship between his employment, his occupational disease, and his disability until April 30, 1989, when he retired, he should reinstate his prior average weekly wage determination consistent with claimant's arguments on cross-appeal. If, however, he determines on remand that claimant's date of awareness occurred at any other previous time, claimant's average weekly wage should be calculated as of that date.

Accordingly, the administrative law judge's finding in his Decision and Order Awarding Benefits that reconsideration of the responsible carrier issue is barred by *res judicata* is reversed. His finding that Liberty Mutual is liable as the responsible carrier and his findings regarding the applicable average weekly wage are vacated, and the case is remanded for further consideration of these issues consistent with this opinion. In all other respects, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY D. DOLDER
Administrative Appeals Judge

REGINA McGRANERY
Administrative Appeals Judge