BRB No. 92-2030

JACK DRUSCOVICH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
Employer	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

James J. Wood, Long Beach, California, for employer and Travelers Insurance Company.

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

PER CURIAM:

Employer and Travelers Insurance Company (Travelers) appeal the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration (90-LHC-2962, 90-LHC-2963) of Administrative Law Judge Daniel L. Stewart 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. *O'Keeffe v. Smith,*

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged that he suffered a hearing loss, and heart, lung and back injuries while working for employer from August 22, 1960 through July 1989, when he was laid off for economic reasons.[1] Claimant's jobs for employer included coppersmith, assistant foreman, and planner, some of which involved working on ships, where claimant was exposed to asbestos. From 1971 to 1974, claimant worked mostly in an office as a planner; from 1974 to 1976, claimant worked as a foreman spending half his time on ships, and from 1978 to 1989, claimant worked as a quarterman or leadman, spending 5 hours each day aboard ships.[2] Travelers provided insurance coverage for employer until June 1, 1976, at which time Aetna Casualty and Surety Company assumed the risk. After his layoff with employer, claimant worked as a planner for McDonnell Douglas until July 1991 when he was laid off. Claimant has not worked since July 1991.

Claimant filed claims for his injuries under the California workers' compensation law and under the Longshore Act. In a decision issued by the California Workers' Compensation Appeals Board (WCAB), Judge Rebeck awarded claimant compensation for his lung injury, finding claimant was last exposed to asbestos in 1982. Judge Rebeck therefore found that Aetna is liable for claimant's benefits under the state act. Trav. Exs. A, B. In the Decision and Order Awarding Benefits under the Longshore Act, the administrative law judge found that claimant suffers a work-related lung condition, pleural plaques, which was caused by asbestos exposure and which is not disabling. The administrative law judge therefore found that claimant is entitled only to medical expenses, *i.e.*, yearly CT scans, x-rays, pulmonary function tests and physical examinations, for his lung condition. Citing *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36 (CRT)(9th Cir. 1990), the administrative law judge found that claimant's asbestos exposure after June 1, 1976, was too minimal to have contributed to claimant's lung disease, and therefore Travelers is the responsible carrier. The administrative law judge also found that the doctrine of collateral estoppel does not apply, and he therefore is not bound by the WCAB decision because it did not address the issue of the extent of claimant's asbestos exposure.

Travelers sought reconsideration of the administrative law judge's decision, again contending that collateral estoppel effect should be given to the state decision and maintaining that claimant had injurious exposure to asbestos after June 1, 1976, and that exposure to toxic substances other than asbestos after June 1, 1976, contributed to claimant's lung condition. In the Decision on Motion for Reconsideration, the administrative law judge reaffirmed his previous findings except that he issued a credit to Travelers for claimant's future medical treatment against third-party settlement recoveries.

On appeal, Travelers contends that the administrative law judge erred in finding it to be the responsible carrier. Specifically, Travelers contends that the administrative law judge erred in

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[1]Only the claim for the lung injury is before the Board in this appeal.

[2]The administrative law judge found that claimant's resume indicated he worked as a foreman from 1976 to 1978, and that it was more reliable than claimant's testimony that he began working as a foreman in 1977. *See* Decision and Order at 8 n.9.

failing to give collateral estoppel effect to the decision of the WCAB, and in finding that claimant was not exposed to injurious stimuli after June 1, 1976. Aetna has not responded to this appeal.

The responsible employer or carrier in an occupational disease case is the last employer to expose the claimant to injurious stimuli prior to his awareness that he is suffering from an occupational disease. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Moreover, the employer or carrier who seeks to escape liability has the burden of demonstrating that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer or carrier. *See General Ship Service*, 938 F.2d at 961, 25 BRBS at 25 (CRT); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1987). In *Picinich*, 914 F.2d at 1317, 24 BRBS at 36 (CRT), the United States Court of Appeals for the Ninth Circuit upheld an administrative law judge's finding that exposure to asbestos at levels significantly lower than that mandated by the Occupational Safety and Health Act is not sufficient to affix liability upon the employer to so expose the claimant in the absence of a showing by the prior employer that such levels were in fact hazardous. Rather, in order to affix liability, the court held that a claimant's employment with employer must have exposed him to injurious stimuli in sufficient quantities to potentially cause the disease. *Id.*, 914 F.2d at 1320, 24 BRBS at 40 (CRT).

We affirm the administrative law judge's determination that collateral estoppel effect need not be given to the decision of the WCAB in this case. The Ninth Circuit has held that collateral estoppel bars a party from relitigating an issue if 1) the issue at stake is identical to the one alleged in the prior litigation; 2) the issue was actually litigated in the prior litigation; and 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995); *see also Weber v. S.C. Loveland Co.*, 28 BRBS 321, 324 (1994). In the WCAB decision, the issue of the extent of claimant's asbestos exposure after June 1, 1976, was not litigated and was not a critical or a necessary part of the judgment. Judge Rebeck merely found that claimant was last exposed to asbestos in 1982. *See* Trav. Exs. A, B. Moreover, the administrative law judge properly noted that there was no showing that the standard for affixing liability under California law is the same as that espoused by the Ninth Circuit in cases arising under the Act. *See id.*; *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). The WCAB decision therefore does not preclude the administrative law judge's finding that Travelers is the responsible carrier in the proceedings under the Act.

Travelers next contends that the opinion of Dr. Markovitz, claimant's treating physician, establishes claimant last suffered hazardous asbestos exposure in 1978, and that claimant's lung condition was due to exposure to fumes, dust and chemicals as well as to asbestos during Aetna's period of coverage. The administrative law judge found that claimant did not suffer injurious exposure to asbestos after June 1, 1976, relying on claimant's testimony that his asbestos to exposure after 1976 was very minimal compared to his exposure from 1960 through 1971 and the testimony of employer's workers' compensation manager, Raymond Courtois, that in 1972 and 1974 employer and the Navy, with whom 80 percent of employer's work was involved, implemented strict asbestos

control measures.[3] The administrative law judge also found that claimant's testimony was ambiguous as to the date of his last exposure in that on direct examination he testified he was not sure when he was last exposed, and on cross-examination he said he was last exposed to asbestos in 1982. Further, the administrative law judge found that from 1976 to 1978, claimant worked in an office, and from 1978 onward, he worked as a supervisor and therefore would not be have as much asbestos exposure as non-supervisory employees.

In discussing Dr. Markovitz's opinion, the administrative law judge noted that the doctor relied, in part, on claimant's representations regarding asbestos exposure, and that Dr. Markovitz's opinion is ambiguous in that he stated that claimant last suffered injurious exposure to asbestos in either 1976 or 1978. Trav. Ex. E at 19. The administrative law judge further considered Dr. Markovitz's statement that any exposure after 1978 would be of no importance in the disability. *Id.* With regard to the nature of claimant's lung disease, the administrative law judge found that Dr. Markovitz diagnosed claimant with two lung conditions, pleural plaques related to asbestos exposure, and obstructive pulmonary disease caused in part by exposure to other work-related substances, and that Dr. Markovitz recommended monitoring only for claimant's asbestos-related condition. *Id.* at 1-2, 5. Therefore, the administrative law judge found that the impact of substances other than asbestos on claimant's lung condition is not relevant to the issue of responsible carrier.

As the trier-of-fact, the administrative law judge is required to weigh the evidence and draw his own inferences from it. *Cordero v. Triple A Machine Shop*, 580 F.2d 1131, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgement. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge's finding that claimant's exposure to asbestos after June 1, 1976, was too minimal to cause or contribute to claimant's pleural plaques is based on substantial evidence consisting of Mr. Courtois' testimony, and portions of claimant's testimony and Dr. Markovitz's opinion, and is rational. We therefore affirm the administrative law judge's finding that as claimant did not suffer injurious exposure to asbestos after June 1, 1976, Travelers is the responsible carrier.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

[3]Employer did not use asbestos in new construction after 1972. After 1976, claimant sometimes worked on new and old ships. Claimant testified that in 1974 the Navy removed asbestos whenever it was discovered. Claimant also testified that if asbestos was discovered, he was required to stay out of the area, but sometimes he might be exposed to asbestos while safety personnel were taking samples. Aetna's Ex. 5 at 281-184.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge