BRB No. 92-374

DONALD J. KEMP	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ROGERS TERMINAL & SHIPPING	)	DATE ISSUED:
	)	
and	)	
	)	
EPIC INSURANCE SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
JONES OREGON STEVEDORING COMPANY	)	
	)	
Self-insured Employer-Respondent	)	
	)	
UNITED GRAIN CORPORATION	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order - Award of Benefits and Order Awarding Attorney Fee of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

John Dudrey (Williams, Fredrickson, Stark & Weisensee, P.C.), Portland, Oregon, for Rogers Terminal & Shipping and Epic Insurance Services.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for Jones Oregon Stevedoring Company.

Gene L. Platt (Cummins, Brown, Goodman, Fish & Peterson, P.C.), McMinnville, Oregon, for United Grain Corporation and Liberty Northwest Insurance Company.

Stephen R. Rasmussen (Schwabe, Williamson & Wyatt), Portland, Oregon, for Stevedoring Services of America and Eagle Pacific Insurance Company.

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

PER CURIAM:

Rogers Terminal & Shipping (Rogers Terminal) appeals the Decision and Order and Order Awarding Attorney Fee (89-LHC-2819, 89-LHC-2820) of Administrative Law Judge Ellin M. O'Shea awarding benefits 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, a longshoreman since 1964, was diagnosed as suffering from an occupational disease, allergic asthma related to exposure to grain dust, on April 2, 1986. He filed a claim under the Act for temporary total disability benefits from April 24, 1986 through June 17, 1986, and for a *de minimis* permanent partial disability award, against four employers, Rogers Terminal, Jones Oregon Stevedoring Company, United Grain Corporation, and Stevedoring Services of America.

The administrative law judge found the evidence sufficient to support invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's condition is work-related and she further found that the evidence is not sufficient to establish rebuttal of this presumption. Decision and Order at 6. The administrative law judge also found that claimant became aware on April 2, 1986, that he was suffering from occupationally-induced asthma, and that the economic implications were known by that date even though claimant continued to work around grain using a dust mask after that date. Thus, the administrative law judge found that the claim filed on April 24, 1986 was timely pursuant to 33 U.S.C. §913. Decision and Order at 10.

After a review of claimant's work records and testimony, the administrative law judge found that claimant was last exposed to injurious grain or grain dust while working for Rogers Terminal on

March 25, 1986, prior to his date of awareness on April 2, 1986. Thus, Rogers Terminal was found to be the responsible employer. The administrative law judge awarded claimant temporary total disability benefits from April 24 to June 17, 1986, and a *de minimis* award of one dollar per week thereafter, as he does not currently have a loss in wage-earning capacity, but does have a potential loss due to his inability to work on jobs involving exposure to grain. In a Order Awarding Attorney Fee, the administrative law judge awarded claimant's attorney a fee in the amount of $8,194.50 to be paid by employer, Rogers Terminal.

On appeal, Rogers Terminal contends that the administrative law judge erred in finding that it was the last employer to expose claimant to grain dust prior to the date he became aware of the relationship between his disease, his employment and his disability. In addition, Rogers Terminal contends that the administrative law judge erred in ordering it to pay claimant's attorney's fee. The other named employers respond, urging affirmance of the administrative law judge's Decision and Order.

Rogers Terminal specifically contends that the administrative law judge used the wrong legal standard to determine claimant's date of awareness as she did not consider when claimant actually sustained a loss in wage-earning capacity.[1] We agree. In an occupational disease case, the responsible employer is the employer during the last employment where claimant was exposed to injurious stimuli prior to the date on which claimant became aware he was suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Although *Travelers* simply talks in terms of the claimant becoming "aware," this standard has subsequently and consistently been interpreted to require that claimant be aware of the relationship between his disability, disease and his employment. *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). Claimant cannot be held to be aware of the relationship between his occupational disease, employment and disability prior to the date he becomes disabled. *Liberty Mutual*, 978 F.2d at 756, 26 BRBS at 99 (CRT); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Carver*, 24 BRBS at 247. Furthermore, in order to be "aware" of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity. *Liberty Mutual*, 978 F.2d at 759, 26 BRBS at 105 (CRT); *see generally Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

In determining claimant's date of awareness, the administrative law judge found that the economic implications of his occupationally-induced asthma were known, or should have been know, by April 2, 1986. The evidence, however, is to the contrary. Although claimant was

[1]Rogers Terminal also contends, in the alternative, that it was not the last employer to expose claimant to injurious stimuli prior to the date he was diagnosed as suffering from an occupationally-related disease, April 2, 1986. Given our disposition of this case, we need not address this contention.

diagnosed with occupationally-related asthma on April 2, 1986, Dr. Baker released claimant to return to work on June 18, 1986, noting that it was "okay for him to return to work, recognizing that his exposure to grain dust can cause minor asthma and allergic rhinitis but it is unlikely to cause serious long-term lung damage." Jones Oregon Ex. 28; Stevedoring Services Ex. 58; United Grain Ex. 28. Following a trial period of two months during which time claimant used a dust mask and took medication, Dr. Baker concluded that claimant's symptoms were too severe for him to continue working around grain. He advised on August 18, 1986, that claimant work in an environment which is free of grain dust. Jones Oregon Ex. 22; Stevedoring Services Ex. 60. Moreover, Dr. Baker testified in a deposition that as of April 1986, he had not established that claimant's allergy was bad enough to preclude him from working around grain dust. Cl. Ex. 21 at 31-32. In addition, claimant testified that it was his understanding that he was not restricted from working around grain dust until August 1986. Tr. at 108-109.

We hold that claimant could not have been aware of the effect of his occupational disease on his wage-earning capacity prior to August 18, 1986. Dr. Baker advised claimant to return to work in June 1986 and stated that he did not believe claimant's condition to be severe enough to prevent his working around grain until August 18, 1986.[2] *See Love*, 27 BRBS at 152. We therefore vacate the administrative law judge's finding that as of April 2, 1986 claimant knew, or should have known, the relationship between his disability, disease, and employment. Further, we hold that August 18, 1986, is the date of awareness to be used in determining the responsible employer. Inasmuch as the administrative law judge used an improper standard for determining claimant's date of awareness, we must remand the case to the administrative law judge for a finding regarding claimant's last exposure to injurious stimuli prior to August 18, 1986.

In addition, we vacate the administrative law judge's Order Awarding Attorney Fee and instruct her on remand to assess claimant's counsel's fee against the employer found to be responsible for claimant's benefits under the Act. *See generally Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990).

Accordingly, the Decision and Order of the administrative law judge finding that Rogers Terminal is the responsible employer is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion. The decision is affirmed in all other respects. In addition, the Order Awarding Attorney Fee is vacated.

SO ORDERED.

[2]As Rogers Terminal correctly contends, the case at bar is distinguishable from *Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232 (1986), upon which United Grain mistakedly relies. In *Thorud*, the Board held that the claimant's date of awareness for purposes of establishing the responsible carrier was when he was initially told that continued exposure to grain dust would likely lead to a forced retirement, even though the claimant did not actually become disabled until five months later. By contrast, claimant in this case was initially told to return to work with precautions and had no reason to suspect the likely diminution of his wage-earning capacity in April 1986.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge