BRB No. 96-255

ROOSEVELT SIMMONS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PATE STEVEDORING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Walter M. Cook, Jr., Allen E. Graham and M. Lauren Lemmon (Lyons, Pipes & Cook, P.C.), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees (87-LHC-1948) of Administrative Law Judge Quentin P. McColgin 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).[1] 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).

[1]By Order dated October 29, 1996, the Board noted claimant's September 23, 1996 election pursuant to Public Law No. 104-134, to maintain this case on the Board's docket until December 29, 1996.

Claimant worked as a longshoreman for at least 28 years, and had a history of asthma. On October 20, 1986, claimant was hired from the union hall by employer, Pate Stevedoring, to relieve the crane operator discharging lumber. As he waited on the docks to begin work that day, claimant began feeling sick and short of breath, and thus he left work and drove himself to the hospital. He was hospitalized for three days due to breathing problems, and he was diagnosed as suffering from a "marked episodic bronchospasm" and "chest pain, noncardiac in origin." Claimant remained off work, and in March 1987, he was released for work by his treating physician. Claimant obtained employment with Strachan Shipping Company on May 1, 1987, and continued to work, with some physical difficulty, until November 15, 1987, when he suffered another bronchospasm and left work.[2] Claimant sought benefits under the Act for a permanent disability which he asserted resulted from the October 1986 work incident at Pate Stevedoring.

In his Decision and Order, the administrative law judge found it is undisputed that claimant had a pre-existing asthmatic condition; the disputed question concerned whether claimant's worsening condition was related to the October 20, 1986, work exposure, for which Pate Stevedoring is the responsible employer, or to the later exposure at Strachan Shipping. The administrative law judge found that the onset of claimant's disability from asthmatic bronchitis did not occur until after claimant had recovered from the temporary disability resulting from the October 1986 asthmatic episode and had commenced working for a subsequent maritime employer in May 1987. Thus, the administrative law judge concluded that liability for the worsening of claimant's asthma lies with claimant's subsequent maritime employer, and he denied benefits for permanent disability as the claim against Strachan Shipping Company was settled.[3]

On appeal, claimant contends that the administrative law judge erred in relieving employer of liability for claimant's permanent disability. Specifically, claimant contends that as he knew he had an employment-related disease that caused disability after the bronchospasm in October 1986, the date he first missed work because of the disease, employer is liable for claimant's permanent disability. Claimant also appeals the administrative law judge's award of an attorney's fee. Employer responds, urging affirmance of the administrative law judge's Decision and Order, and the fee awarded to claimant's counsel.

[2]Claimant filed a claim for benefits based on the November 1987 asthmatic episode against employer Strachan Shipping Company, which was settled for a sum of $10,000.

[3]Claimant was awarded temporary total disability benefits from October 20, 1986 to March 10, 1987, and medical benefits for this period, to be paid by Pate Stevedoring. This award is not in dispute.

In an occupational disease case, the responsible employer is the employer during the last employment in which claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been 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 *Cardillo* does not actually define when claimant becomes "aware," this standard has subsequently been interpreted to require that claimant be aware of the relationship between his disability, disease, and his employment. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) (stating that "the onset of disability is a key factor in assessing liability under the last injurious-exposure rule"). This approach has been followed in later cases, and the test thus involves determining the employer at the time of the last injurious exposure prior to claimant's awareness of a disability due to an occupational disease arising from his employment. *See Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988). Claimant cannot be held to be aware of the relationship between his occupational disease, employment and disability prior to the date he sustains a loss in wage-earning capacity. *Liberty Mutual*, 978 F.2d at 756, 26 BRBS at 97 (CRT).

Following the enactment of the 1984 Amendments to the Act, the Board, in a hearing loss case, held that the awareness component of the *Cardillo* standard is in essence identical to the awareness standard of Sections 12 and 13 of the Act, 33 U.S.C. §§912(a) and 913(b)(2)(1988).[4] *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985); *but see* footnote 4, *infra*. The Board subsequently applied this standard in cases involving other occupational diseases. *See, e.g., Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

The relationship between the responsible employer standard and the awareness standard of Sections 12 and 13 was discussed by the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, in *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988). In adopting the rationale of *Cordero* that a claimant is not aware under the *Cardillo* standard until he is disabled, the court stated that *Cordero* is fully consistent with the legislative intent of amended Sections 12 and 13 that the onset of disability triggers the claim and "any attendant liability."[5] *Patterson*, 846 F.2d at 719, 21 BRBS at 56 (CRT).

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[4]Sections 12 and 13 state that, in the case of an occupational disease that does not immediately result in disability, a claimant need not give notice of injury or file a claim until he is aware, or should have been aware, of the relationship between the employment, the disease and the disability. 33 U.S.C. §§912(a), 913(b)(2)(1988).

[5]The *Patterson* court thus rejected the argument that the standard in Sections 10(i), 12 and 13, 33 U.S.C. §§910(i), 912, 913, should not apply to this issue and used the same date of "awareness" in resolving the responsible carrier and timeliness issues. We note that in *Port of Portland v. Director, OWCP [Ronne]*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit rejected the Board's view that the same date of "awareness" *must*

In *Patterson*, the claimant was diagnosed with silicosis in 1974 and was told to avoid dust exposure in 1975. Claimant continued to be exposed to dusty conditions and, in June 1977, claimant first missed work due to his silicosis, but he returned to work after this and a subsequent period of temporary disability. The administrative law judge found that claimant became permanently disabled in January 1979, and assigned liability to the carrier on the risk at that time. On appeal, the Board held that claimant's awareness occurred in 1974 or 1975 with the diagnosis of work-related silicosis, and held the carrier on the risk at that time liable. In holding that the administrative law judge erred in finding "awareness" in 1979 and that the Board erred in finding "awareness" in 1974 or 1975, the court stated that claimant should have been aware of the relationship between his disability, disease and employment "when he first missed work because of his disease. At that juncture Patterson should have realized that he had developed an `incapacity because of injury to earn the wages,' 33 U.S.C. §902(10), which he had previously received." *Patterson*, 846 F.2d at 719, 21 BRBS at 57 (CRT). The court held claimant had the necessary awareness in June 1977 when he sustained a period of temporary disability, rather than in conjunction with awareness of a permanent disability; thus, the carrier on the risk prior to the period of temporary disability was held liable for claimant's later permanent total disability as well, even though a subsequent carrier was on the risk during later exposure preceding the permanent total disability. *Id*. Therefore, under *Patterson,* the last employer prior to manifestation of claimant's occupational disease is liable for benefits under the Act, and the disease is manifest once claimant knows he has a work-related illness

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govern for purposes of fixing employer liability and for purposes of starting the running of the limitations periods under Sections 12 and 13. *Port of Portland*, however, involved determining the date of awareness in a hearing loss case. Pursuant to Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D)(1988), the statutes of limitations in a hearing loss case do not begin to run until the employee has received an audiogram, with an accompanying report, indicating a loss of hearing. *See also* 20 C.F.R. §§702.212(a)(3), 702.221(b). The Ninth Circuit noted the separate purposes of the timeliness and responsible employer provisions, and found no support for the proposition that Congress intended, in enacting the 1984 Amendments, to engraft the procedural requirement of the receipt of an audiogram and report onto a determination of responsible employer. Rather, the court, while agreeing with the Board that *Cordero* does not require a proven medical connection between the exposure and disease, held that under *Cardillo* and *Cordero* there must be a "rational connection" between the onset of the claimant's disability and his exposure; this connection is missing where the exposure occurred after an audiogram is taken and thus could not have even theoretically contributed to the disability evidenced on it. Thus, the court reversed the Board's determination that the responsible employer was the employer at the time of the receipt of the audiogram and report, and it held liable the employer to last expose claimant prior to the administration of the audiogram that formed the basis of the claim. *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT). The Board adopted the holding in *Port of Portland* for all hearing loss cases in *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). As the court stated in *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85 (CRT)(1st Cir. 1992), this case does not affect the usefulness of the 1984 Amendment changes to Sections 12 and 13 as support for the "onset of disability" rule of *Cordero*.

which has resulted in loss of time from work.

In the present case, claimant suffered a severe episodic bronchospasm in October 1986, which the treating physicians and reviewing physicians agree was brought on in part due to his exposure to dust and fumes at work. Dr. Gottlieb, one of claimant's treating physicians, noted in a letter dated March 20, 1987, that claimant has "several medical problems including diabetes and several reactive airway disease [sic] which requires intermittent hospitalizations and constant therapy." Cl. Ex. 13. He also noted that claimant should not be exposed to significant irritants such as dust, fumes, etc., and because of his respiratory disease, he is unable to perform heavy manual labor. Cl. Ex. 13. Nonetheless, according to claimant's testimony, Dr. Childs released claimant to return to work in March 1987 at claimant's request, and claimant returned to his usual job for another employer in May 1987, testifying that he did so because he needed the money. Tr. at 24.

Claimant contends that he returned to his usual work in May 1987 out of necessity to support his family, but that he had a great degree of difficulty performing his duties before he stopped working permanently in November 1987, continued to need medical treatment in the interval between his return to work in May 1987 and the asthmatic episode in November 1987, and suffered a significant drop in earning capacity during this period. The administrative law judge did not cite *Patterson*, but discussed the "onset of disability" concept of *Cordero*, and found that the onset of claimant's permanent disability due to asthmatic bronchitis, as opposed to disability from episodic asthma, did not occur until after the November 1987 asthmatic episode. The administrative law judge erred, however, in summarily stating that claimant was not disabled prior to November 1987 merely because Dr. Childs released him to return to his usual work without considering whether claimant was aware of a loss in wage-earning capacity prior to that time, either at the time of his temporary disability, at the time when his physician found he should not be exposed to irritants and was unable to perform heavy labor, or during the period following his return to work. Decision and Order at 14 n. 4; *See Metropolitan Stevedore Co. v. Rambo*, 115 U.S. 2144, 2148, 30 BRBS 1, 3-4 (CRT)(1995) ("The fundamental purposes of the Act is to compensate employees . . . for wage-earning capacity lost because of injury . . . ."); *see also Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232 (1986).[6] Pursuant to *Patterson*, claimant may been sufficiently aware of a disability

[6]We note that *Thorud* was decided prior to *Patterson*. In that case, claimant had a period of temporary disability due to respiratory problems from July to October 1979. In October 1979, he was diagnosed with reactive airway disease subject to exacerbation from grain dust and advised to avoid further exposure to dust. On November 5, 1979, claimant was again examined, diagnosed with asthma with acute episodes due to dust exposure and explicitly warned that he might have to retire if exposure continued. Claimant continued to work in the same job until April 1980, when he was again diagnosed and advised to find other work; thereafter, he did not return to his employment. The administrative law judge held claimant "aware" at this time, as his doctor first diagnosed his condition as chronic rather than acute. The Board held as a matter of law that claimant was or should have been aware by November 1979 of the relationship between his employment, his disease, and its disabling effects, so that the carrier insuring employer in 1979 was liable, rather than the carrier assuming coverage on January 1, 1980. The Board later noted that the holding in *Thorud* was

when he first missed work in October 1986, and he may have been disabled despite his subsequent return to work. Under *Patterson*, claimant's awareness of disability occurs at its onset; claimant need not be aware of a permanent disability in order for the proper employer to be held liable. As the administrative law judge did not discuss *Patterson*, or fully consider the evidence concerning claimant's awareness of a disability under the standard enunciated in that case, we vacate the administrative law judge's finding that employer is not liable for claimant's permanent disability. We remand the case to the administrative law judge to reconsider the responsible employer issue consistent with *Patterson.*

Claimant also appeals the administrative law judge's award of an attorney's fee to his counsel. Claimant contends that he is entitled to a greater attorney's fee if he succeeds in obtaining benefits for permanent disability. The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

The administrative law judge disallowed a fee for 9.8 of 14.7 hours of services rendered, inasmuch as claimant was not successful in obtaining benefits for permanent disability. Claimant's sole contention on appeal is that he is entitled to a greater fee if he succeeds in obtaining benefits for permanent disability by virtue of his appeal on the merits. We agree that on remand, the administrative law judge should reconsider the amount of the attorney's fee award if claimant obtains greater benefits. *See generally Hensley v. Eckerhart,* 461 U.S. 424 (1983).

Accordingly, the Decision and Order of the administrative law judge finding employer's liability limited to the period of temporary total disability following claimant's October 20, 1986 asthma attack is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH

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based on evidence that claimant should have been aware of impairment in his earning *capacity* when advised not to return to work. *See Love v. Owens Corning Fiberglas Co.*, 27 BRBS 148 (1993). The decision in *Patterson* suggests claimant could have been "aware" earlier than the November 1979 date used in *Thorud*, but *Thorud* is consistent with *Patterson* in using an earlier date than when claimant permanently left work. Moreover, *Thorud* also holds that the date when claimant receives a medical diagnosis is not dispositive if there is evidence that he was aware of a work-related condition at an earlier date. The Board's holding in *Thorud* that the date claimant was aware that his work-related condition affected his ability to earn wages, rather than the date he was informed by a doctor that his disease was chronic, is controlling appears consistent with recent law.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge