BRB No. 93-0661

HUEY C. LEWIS	)	
	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED: _____
	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DUWAMISH SHIPYARDS	)	
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Amended Decision and Order Awarding Benefits, Order Awarding Attorney Fees and Costs and Denying Motion To Set Aside Decision and Reopen Record, and Order Denying Reconsideration and Awarding Additional Attorneys Fees of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Joel J. Delman (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Thomas G. Hall (Hall & Keehn), Seattle, Washington, for Todd Pacific Shipyards Corporation and Aetna Casualty and Surety Company.

Robert L. Brousseau (Brousseau, Jankovich & Ormiston), Seattle, Washington, for Duwamish Shipyards and Industrial Indemnity Insurance Company.

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

PER CURIAM:

Todd Pacific Shipyards Corporation (Todd) appeals the Order Awarding Benefits, Amended Decision and Order Awarding Benefits, Order Awarding Attorney Fees and Costs and Denying Motion To Set Aside Decision and Reopen Record, and Order Denying Reconsideration and Awarding Additional Attorneys Fees (91-LHC-1552) of Administrative Law Judge Henry B. Lasky 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, a general laborer, worked the last ten to fifteen years prior to his retirement in 1984 in the Seattle shipyards. He worked intermittently for Todd between 1974 and 1983, where he was exposed to asbestos, but his last maritime employment was with Duwamish Shipyards (Duwamish), where he worked from July 10, 1984, until July 19, 1984. Claimant, who suffered from numerous pre-existing physical maladies, including bronchopulmonary respiratory disease, heart disease, alcoholism, asthma and seizures, filed a claim under the Act on September 22, 1988, for asbestosis, and an amended claim on January 25, 1990, for occupational lung disease, against both employers. No benefits were voluntarily paid.

In his Decision and Order dated September 14, 1992, the administrative law judge found that the claim was timely filed under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and that Todd was liable as the responsible employer. He awarded benefits based on a 25 percent whole person impairment commencing January 27, 1992, pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). In addition, the administrative law judge granted employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f), and found that the compensation owed was subject to a credit for payments previously made and any other credit to which employer is entitled. In an amended Decision and Order dated September 25, 1992, the language pertaining to the credit was modified to clarify that the credit to which employer is entitled under the Act includes that recognized under Section 33(f), 33 U.S.C. §933(f), if applicable. In subsequent orders, the administrative law judge denied employer's September 29, 1992, Motion to Set Aside the Decision and Order and the amended Decision and Order and To Reopen the Record For Consideration of New Issues and Admission of New Evidence, in which Todd attempted to raise for the first time the Section 33(g)(1), 33 U.S.C. §933(g)(1)(1988), bar, in light of the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992).

On appeal, Todd argues that the administrative law judge erred in concluding that claimant gave timely notice and filed a timely claim, in determining that it is liable as the responsible employer, and in refusing to reopen the record and entertain its arguments relating to Section 33(g)(1) in light of *Cowart*. Claimant responds, urging affirmance. Duwamish responds, urging that the administrative law judge's finding that Todd is the responsible employer be affirmed, but otherwise expressing agreement with Todd's contentions. Todd has filed two reply briefs. Claimant has submitted a statement of additional authorities relating to the applicability of the Section 33(g) bar, citing *Glenn v. Todd Pacific Shipyards Corp.*, 27 BRBS 112 (1993).

SECTIONS 12 AND 13

Todd first argues that the administrative law judge erred in finding that the September 22, 1988, notice and claim were timely under Sections 12 and 13. Section 13(b)(2) provides that in the case of an occupational disease that does not immediately result in disability or death, the statute of limitations does not begin to run until the employee is aware or should have been aware of the relationship between his employment, the disease, and the disability. 33 U.S.C. §913(b)(2); *Martin v. Kaiser Company, Inc.*, 24 BRBS 112 (1990). Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease, to be filed "within one year after the employee . . . becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability." 33 U.S.C. §912(a) (1988). Thus, in an occupational disease case, the filing period does not begin to run under Sections 12 and 13 until claimant is actually disabled, or in the case of a voluntarily retired employee, until a permanent impairment exists. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986); 20 C.F.R. §§702.212(b), 702.222. Section 20(b), 33 U.S.C. §920(b), provides claimant with a presumption, applicable to both Sections 12 and 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed or notice timely given. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

We affirm the administrative law judge's finding that the September 22, 1988, notice and claim were timely. Employer argues that claimant was aware or should have been aware that he was disabled due to a work-related lung condition at various dates between 1983 and 1986. The administrative law judge, however, rationally found, based on the record before him, that although claimant had been advised by a physician in 1983 of the "possibility" that he had work-related lung disease,[1] he was not aware nor should he have been aware at any time prior to the fall of 1988, when Dr. Barnhart diagnosed work-related asbestosis or "asbestos-related pleural disease," that he had an employment-related lung condition. In so concluding, the administrative law judge specifically noted that all of claimant's symptoms were consistent with his pre-existing non-work-related chronic diseases, that the medical opinions regarding the cause of claimant's respiratory problems prior to Dr. Barnhart's definitive diagnosis were inconclusive, and that at least one physician had informed

[1]The administrative law judge was apparently referring to a letter summarizing the results of claimant's December 17, 1983, evaluation written by Dr. Linda Rosenstock. Ex. 17.

claimant that his condition was not work-related. Finally, the administrative law judge determined that there was no indication that claimant had any permanent impairment, as is required to commence the time limitations of Sections 12 or 13 where the claim involves a voluntary retiree, until Dr. Barnhardt's rating on January 23, 1992. Cx. 15 at 285, 286. *See* Decision and Order at 12; *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). The administrative law judge's findings that claimant did not become aware that he had an occupational lung disease prior to Dr. Barnhardt's fall 1988 diagnosis and had no evidence of permanent impairment necessary to commence the Sections 12 and 13 statute of limitations until January 23, 1992, are rational, in accordance with applicable law, and supported by substantial evidence in the record. We therefore affirm the administrative law judge's determination that the September 28, 1988, notice and claim were timely under Sections 12 and 13. *See generally Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993).

RESPONSIBLE EMPLOYER

Todd next challenges the administrative law judge's determination that it is the responsible employer. The standard for determining the responsible employer was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), which held that the last employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation. Employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that claimant was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); *Maes v. Barrett & Hilp*, 27 BRBS 128, 131 (1993).

The administrative law judge found that Todd is liable as the responsible employer because Todd failed to establish that claimant received subsequent exposure while working for Duwamish in 1984. Todd argues that the testimony of Mr. Meberg, which the administrative law judge relied upon in finding that claimant was not exposed to asbestos while working for Duwamish in 1984, does not provide substantial evidence to support this finding, because Mr. Meberg conceded that he did not know whether asbestos was present on the *Silas Bent*, the vessel claimant worked upon during his employment at Duwamish. After noting that Duwamish did not test for asbestos on the *Silas Bent*, and Mr. Meberg's testimony that he did not know for certain if asbestos was present on the ship, the administrative law judge nonetheless credited Mr. Meberg's testimony that it had been Duwamish's policy since 1976 to contract out asbestos-related work, Tr. at 50-51, and that claimant was not involved in any asbestos work and no asbestos work was being done on the *Silas Bent* prior to, or at the time, claimant was assigned to work there, Tr. at 48-49, 59, 73. Accordingly, he determined that Duwamish had presented convincing evidence that claimant was not exposed to asbestos at Duwamish in 1984. We affirm this finding, as it is rational based on the evidence. Moreover, any error the administrative law judge may have made in stating that Mr. Meberg's testimony was not contradicted by claimant's testimony is harmless on the facts presented, as he specifically considered the portions of claimant's testimony which Todd asserts contradict Mr. Meberg's testimony and found this testimony to be muddled and contradictory. Decision and Order at 13, 16. Inasmuch as the administrative law judge's finding that claimant did not receive

subsequent injurious exposure to asbestos while working for Duwamish in 1984 based on Mr. Meberg's testimony is rational, supported by substantial evidence, and in accordance with applicable law, his determination that Todd is liable as the responsible employer is affirmed. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 64-65 (1992).

REOPENING THE RECORD

We next direct our attention to Todd's argument that the administrative law judge abused his discretion in refusing to grant its request to reopen the hearing record regarding the applicability of Section 33(g)(1) in light of the United States Supreme Court's decision in *Cowart*.[2] On September 29, 1992, subsequent to the issuance of the administrative law judge's Decision and Order of September 14, 1992, and amended Decision and Order of September 25, 1992, Todd filed a motion to set aside both Decisions and to reopen the record for consideration of this issue. In support of its motion, employer asserted that on September 22, 1992, it received documentation from claimant of receipt of total net settlement proceeds of $6,596.50; that claimant did not secure written approval of the third- party settlements prior to the hearing; and that it was unaware of the extent of claimant's total net recovery until several days after issuance of the administrative law judge's initial Decision and Order. Employer further asserted that because it had no prior information to confirm that claimant had reached any settlements in his third-party cases, it was precluded from asserting the Section 33(g) defense at the hearing, which would likely have a tremendous bearing on the outcome of the case in light of *Cowart*, and that accordingly the record should be reopened to determine the resolution of "four new issues" relating to the applicability of the Section 33(g)(1) bar in light in *Cowart*.

On October 22, 1992, the administrative law judge denied employer's motion. The administrative law judge determined that based on his review of the existing record, employer had

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[2]Section 33(g)(1), as amended in 1984, states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)(1988).

notice of the third-party settlements prior to the hearing, by virtue of the pre-trial exchange of exhibits; at the hearing, by virtue of claimant's introduction of Claimant's Exhibit 11; and after the hearing by virtue of the parties' exchange of their Proposed Findings. Accordingly, he determined that inasmuch as Todd had ample notice at the hearing of the third-party settlements, but did not raise the Section 33(g)(1) defense until after an adverse decision was issued, its raising of this issue was clearly untimely. Finally, the administrative law judge found that because Claimant's Exhibit 11 documented receipt of total net settlement proceeds of $6,596.50, which exceeded employer's total liability of $6,065.30 under his decision, the prior written approval requirement of Section 33(g)(1), as interpreted in *Cowart*, would not be applicable, in any event. Thereafter, he issued an Order rejecting employer's request for reconsideration of his October 22, 1992, Order, based on its assertion that under *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980), the controlling decisional law of the United States Court of Appeals for the Ninth Circuit at the time of the hearing, it had no legal basis to assert a defense premised on the forfeiture provision of Section 33(g)(1).

On appeal, Todd reiterates the argument made below that the forfeiture defense afforded by Section 33(g)(1) was not available as of the time of the hearing under *O'Leary*. In addition, Todd asserts that the applicability of *Cowart* was timely raised in its September 29, 1992, motion seeking reopening. Todd also asserts that several errors were made by the administrative law judge in finding the Section 33(g)(1) bar was not applicable in any event, including his impermissible consideration of new evidence in the form of a post-hearing letter from employer. Claimant responds that the administrative law judge correctly ruled that the hearing should not be reopened to hear evidence on the Section 33(g) forfeiture provision, which could have been, but was not, raised at the original hearing. Moreover, claimant asserts that the figures employed by the administrative law judge in determining that the prior written approval requirement would not be applicable under *Cowart* are correct and are readily discernable from Claimant's Exhibit 11.

Under 20 C.F.R. §702.336(b), the administrative law judge has the discretion to consider a new issue at any time prior to the filing of the compensation order.[3] In *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996), the Board recently held that it was an abuse of discretion under this regulation for an administrative law judge to refuse to consider a Section 33(g) issue raised post-hearing, but prior to issuance of his decision. In that case, employer raised the issue in light of the holding of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2705 (1994), that a potential widow was "a person entitled to compensation," and employer's letter raising the applicability of *Cretan* was dated two days after *Cretan* was issued and was received by the administrative law judge prior to the filing of his compensation order.

[3]Although the record may also be reopened and a new issue raised pursuant to a Section 22, 33 U.S.C. §922, modification proceeding where reopening is premised on a mistaken determination of fact or change in conditions, modification is not available, where, as here, the basis for reopening is premised on a subsequent change in law. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988); *Ryan v. Lane & Co.*, 28 BRBS 132 (1994).

The facts in this case, however, are distinguishable from those in *Taylor*, and lead us to the opposite conclusion. As stated previously in *Taylor*, the applicability of *Cretan* was raised two days after its issuance and prior to issuance of the administrative law judge's compensation order. In contrast, in the present case, although *Cowart* was issued prior to the administrative law judge's decision, Todd waited more than three months after its issuance and until after the administrative law judge's adverse decision[4] before attempting to raise the applicability of Section 33(g)(1) in light of *Cowart.* Employer thus raised for the first time a wholly new issue in its September 29, 1992, motion. Moreover, the administrative law judge rationally found that as there were different interpretations of Section 33(g)(1) by the courts at the time of the hearing, and the Supreme Court's decision in *Cowart* was imminent, Todd's failure to preserve the Section 33(g) defense for appeal was not excusable, justifiable, or understandable.[5] In addition, the administrative law judge noted that even if on June 2, 1992, the date of the hearing, the law in the Ninth Circuit under *O'Leary* was contrary to *Cowart*, *Cowart* was issued on June 22, 1992, and published in August 1992, prior to the issuance of the administrative law judge's decision, yet Todd did not assert the Section 33(g) defense until September 29, 1992, and that its raising of this issue accordingly was not timely.

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[4]Although Todd contends that the Section 33(g) issue was raised by the administrative law judge on his motion by virtue of his references in his Amended Decision and Order to Todd's entitlement to the credit recognized under Section 33(f), we disagree. Because Section 33(f) presumes that there is an award of compensation against which employer's credit may attach, it cannot rationally be viewed as raising the Section 33(g) bar.

We also find no merit to Todd's assertion that the administrative law judge was compelled to take judicial notice of *Cowart* because it was issued while this case was pending since employer had not raised the Section 33(g) bar in the initial proceeding, and employer must raise this defense for it to apply.

[5]As of the time of the hearing, the only case on point from the United States Court of Appeals for the Ninth Circuit was the memorandum affirmance of the Board's interpretation of the phrase "person entitled to compensation" in Section 33(g) as applying only to a person who is being paid compensation by employer either pursuant to an award or voluntarily at the time of the third-party settlement. *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980). *See also Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), *appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27 (CRT) (11th Cir. 1987). The United States Court of Appeals for the Fifth Circuit, however, rejected application of *Dorsey* and held that the prior written approval requirement of subsection (g)(1) applies regardless of whether the employer or its carrier is paying benefits at the time of the settlement. *See Nicklos Drilling Co. v. Cowart*, 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990), *aff'd on recon. en banc*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991). The United States Supreme Court had granted *certiorari* in the case, resulting in its decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992).

We affirm the administrative law judge's determination that the applicability of *Cowart* was not timely raised. Initially, it is consistent with 20 C.F.R. §702.336, which permits a new issue to be raised only prior to the issuance of the administrative law judge's decision. Moreover, the administrative law judge's reasoning that employer could and should have raised this issue earlier in time is rational and supported by the record. Employer had notice of the third-party settlements prior to the hearing, yet it did not raise the issue despite the fact that a decision in *Cowart* was clearly imminent. Once *Cowart* was issued, moreover, employer did not take timely action to raise the issue prior to the administrative law judge's decision. Accordingly, we hold that the administrative law judge's refusal to reopen the record and entertain Todd's Section 33(g)(1) arguments did not involve an abuse of his discretionary authority and reject Todd's assertions to the contrary. *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 158 (1993); *Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 46, 50 (1989). In light of our affirmance of the administrative law judge's determination that Todd did not timely raise Section 33(g) and the applicability of *Cowart*, we need not address Todd's arguments relating to the administrative law judge's consideration of Section 33(g)(1) on the merits.

ATTORNEY'S FEE

Claimant submitted a petition for attorney's fees before the Board for services rendered between December 1, 1992, and January 29, 1993, for $1,828, representing 12 hours of attorney time at $150 per hour, and .7 hours for legal assistant time at $40 per hour. Todd objects to the first eight entries, with exception of the entry dated December 1, 1992,[6] arguing that they are clearly unrelated to work performed in connection with this appeal. Based on our review of counsel's fee petition, we disagree. As Todd's objections are unfounded, we award counsel the entire requested fee of $1,828, which we view as reasonable for the necessary work done before the Board in defending against Todd's appeal. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

Claimant has also submitted a second fee petition/affidavit to the Board with an Office of Workers' Compensation Programs heading, involving work performed during the same time period as the aforementioned fee petition but which relates to counsel's attempt to secure enforcement of the administrative law judge's award of benefits. We agree with Todd, however, that inasmuch as enforcement issues fall within the province of the district director, 33 U.S.C. §918, the Board lacks jurisdiction to entertain this fee petition, which should be submitted to the district director.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Amended Decision and Order Awarding Benefits, Order Awarding Attorney Fees and Costs and Denying Motion To Set Aside Decision and Reopen Record, and Order Denying Reconsideration and Awarding Additional Attorneys Fees are affirmed. Claimant's counsel is awarded a fee of $1,828 for work performed before the Board, payable directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]Claimant lists two entries on December 1, 1992. We assume that the entry to which employer does not object is the .2 hours for receipt and review of the Notice of Appeal.