BRB No. 89-3065

BERT LOVE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OWENS-CORNING FIBERGLAS COMPANY	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	DATE ISSUED:_____
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Motion for Reconsideration of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

E. Scott Wetzel, Seattle, Washington, for claimant.

Russell A. Metz (Metz & Frol), Seattle, Washington, for employer/carrier.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Motion for Reconsideration (87-LHC-473) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as an insulation installer for numerous shipyards beginning in the early 1950's, and in 1983, he worked for employer in that same capacity. Cl. Ex. 11; Tr. at 33. From 1973 until at least the date of the hearing, claimant also worked part-time as a business agent for the local asbestos and insulators union. Throughout his employment, claimant was exposed to asbestos, and the last exposure occurred during his employment with employer in October 1983. Emp. Ex. 8.14; Tr. at 32-33. Claimant filed a claim for compensation on October 26, 1984, and employer filed its first report of injury on November 28, 1984 and controverted the claim on December 5, 1984. Emp. Ex. 1.1, 1.3-1.4.

A hearing was held on March 15, 1988, wherein the parties disputed the timeliness of the notice of injury and the claim, the nature and extent of any disability, and whether employer is liable as the responsible employer. Decision and Order at 2. The Director, Office of Workers' Compensation Programs (the Director), and employer disputed employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. *Id.* The administrative law judge found the following: 1) claimant was exposed to asbestos while working for employer in October 1983; 2) neither Section 12, 33 U.S.C. §912, nor Section 13, 33 U.S.C. §913, bars the claim as claimant was not aware of his disability until October 26, 1984; 3) employer is liable for permanent partial disability benefits of $55.54 per week pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), from October 26, 1984 and continuing, and for medical expenses, but not for a Section 14(e), 33 U.S.C. §914(e), penalty; and 4) employer is entitled to a Section 33(f), 33 U.S.C. §933(f), credit against claimant's third-party settlements, but is not entitled to Section 8(f) relief. Decision and Order at 7, 13, 16-17.

Employer filed a motion for reconsideration and, citing *Thorud v. Brady Hamilton Stevedore Co.*, 18 BRBS 232 (1986), argued that Sections 12 and 13 of the Act bar claimant's claim. The administrative law judge granted the motion and re-evaluated her initial decision and the record evidence. She concluded that *Thorud* is distinguishable on the facts from this case, and she found that claimant was an overall credible witness and that nothing in his testimony indicated he was aware of an actual disability as defined in 33 U.S.C. §902(10) until October 26, 1984. Decision and Order on Recon. at 2, 5-6. Thus, the administrative law judge reaffirmed her earlier decision. *Id.* at 8. Employer appeals only the administrative law judge's finding that the claim is not time-barred. Claimant and the Director respond, urging affirmance.

Employer contends the administrative law judge erred in determining that the claim is not barred by Sections 12 and 13 of the Act. Particularly, employer contends that the facts of the case warrant a finding that, by 1978, claimant knew he was actually disabled because of his shortness of breath, and he knew of the potentially disabling effects of his asbestos-related lung condition. Further, employer contends claimant was not a credible witness, and that the Board's holding in *Thorud,* 18 BRBS at 232, indicates that a claimant need only be aware of a potential disability for the time limitations under Sections 12 and 13 to begin to run. Claimant responds, arguing that he was unaware of an actual disability within the meaning of the Act until 1984, and that his lack of awareness is borne out by the evidence. Claimant also avers that employer's reliance on *Thorud* is misplaced, or, alternatively, that *Thorud* was incorrectly decided. The Director concurs with claimant, maintaining that the administrative law judge used the proper standard in concluding that neither Section 12 nor Section 13 bars claimant's claim. The Director also contends that *Thorud* is distinguishable from the instant case.

Employer contends that claimant was aware of the relationship between his employment, his disease and his disability by 1978, making his claim for compensation in 1984 untimely. 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). Section 13(b)(2) requires a claim for compensation, in a case involving an occupational disease, to be filed within two years after the injury, and, as in Section 12(a), the time begins to run upon the employee's awareness of the relationship between the employment, the disease, and the disability. 33 U.S.C. §913(b)(2)(1988). The regulations provide that the time limitations do not begin to run until the employee is disabled. 20 C.F.R. §§702.212(b), 702.222(c). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, has held that the above sections provide that the limitations period does not run until the employee becomes aware "that his injury has resulted in the impairment of his earning power." *Abel v. Director, OWCP*, 932 F.2d 819, 821, 24 BRBS 130, 134 (CRT) (9th Cir. 1991), *citing Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *see also Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987). Furthermore, the Ninth Circuit has held that an employee is not "injured for the purposes of the statute of limitations until "he [becomes] aware of the full character, extent and impact of the harm done to him." *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 183, 23 BRBS 127, 129 (CRT) (9th Cir. 1990) (quoting *Allan*, 666 F.2d at 401, 14 BRBS at 429).[1]

[1]Initially, we reject employer's argument that the misdiagnosis and non-diagnosis cases, such as *Abel, Allan, J.M. Martinac*, and *Sweeney*, should be distinguished on their facts from the present case. It matters not whether a case involves a misdiagnosis, as the rule for triggering the statute of limitations is the same in all situations. *See, e.g., Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

The evidence of record supports the administrative law judge's finding that claimant was not aware of his disability until 1984. In November 1976, Dr. Cooper, a doctor at a clinic with which the union associated, first reported to Dr. Dale, claimant's physician, finding "changes [in claimant's lungs] consistent with asbestosis" and markedly reduced pulmonary functions. Emp. Ex. 6.1. Although he recommended claimant avoid "heavy exposures to dust" and non-powered respirators, Dr. Cooper stated there was "no contraindication to [claimant's] continuing to work as an insulator."[2] *Id.* On January 11, 1977, Dr. Dale noted claimant's "limited pulmonary function (asbestos)." Emp. Ex. 5.5. Claimant testified that, despite having discussed asbestosis with Dr. Dale and having learned of the potentially deadly effects of asbestos exposure in 1977, he was not informed that he was suffering the effects of the disease at that time. Tr. at 62, 65-66, 86. Further, based on the results of follow-up examinations in May 1978 and November 1981, the doctors continued to find "no contraindication" of claimant's continuing his usual work as an insulator. Emp. Ex. 6.10-6.12, 6.21-6.23. In October 1984, according to claimant, he discussed his third-party asbestos litigation with his attorney and was advised to file a claim under the Act to protect himself. Tr. at 58, 63-64. However, he stated it was not until December 1984 when he was examined by Dr. Shearer, a doctor at the clinic, that he learned he has asbestosis and should file a claim. Tr. at 56, 60.

Based on the above evidence, the administrative law judge found that claimant "has been suffering with shortness of breath since December 1976. . . ." Decision and Order at 10. She also found that claimant had previous knowledge of the relationship between his employment and his disease. *See* Decision and Order at 9-10; Decision and Order on Recon. at 6. Nevertheless, she acknowledged that the date claimant became aware of the relationship between his employment, his disease and his disability is at issue, and that date depends on when he became aware of the effect the disease would have on his ability to earn wages. *Id.* Although the administrative law judge determined that claimant knew of his work-related exposure to asbestos and his asbestos-related lung condition, possibly as early as 1977, she found that he was not then aware of a resultant disability. Consequently, she concluded that because claimant had been told he could continue to work, claimant did not know and cannot be held to have known that his work restrictions did or would affect his wage-earning capacity. Decision and Order at 12. She found this especially true given that claimant continued to earn high wages as an insulator and as a business agent for the union through 1983. Decision and Order on Recon. at 5-6.

The administrative law judge further decided that, although claimant's work may have been affected by his asbestos illness in October 1983 when he requested the use of a respirator,[3] the illness was not the cause of his subsequent absence from work and did not impair his wage-earning

[2]Dr. Cooper also urged claimant to quit smoking and noted that he is overweight and has diabetes, all of which could have contributed to claimant's history of shortness of breath. *See* Emp. Exs. 5.2, 5.4, 5.6, 6.1.

[3]In October 1983, one day before claimant was laid off in a reduction in force, he apparently suffered breathing problems. He testified that he asked for a respirator as a protective measure and that employer refused to give him one. Tr. at 32-33, 35.

power, as nothing which occurred during claimant's October 1983 employment for employer would have alerted him to the effect his lung condition would have on his wage-earning capacity. Decision and Order at 12-13. The administrative law judge then concluded that claimant was not aware of a loss in wage-earning capacity until October 1984. *See Abel*, 931 F.2d at 821, 24 BRBS at 134 (CRT); Decision and Order at 12-13. She rejected, as illogical, claimant's declaration that he did not know of his disability until December 1984 when a doctor diagnosed asbestosis and informed him of the diagnosis, and instead, determined that the October 1984 advice to file a claim was the event which triggered claimant's awareness of the relationship between his employment, his disease, and his disability. Decision and Order at 10.

The pre-1984 medical evidence of record which shows there was "no contraindication to [claimant's] continuing to work as an insulator" supports the administrative law judge's findings that claimant was not aware of a loss in wage-earning capacity due to asbestosis earlier than October 1984.[4] *See Abel*, 932 F.2d at 822-823, 24 BRBS at 136 (CRT); *Patterson*, 846 F.2d at 716-717, 21 BRBS at 52-53 (CRT); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). *See* Emp. Ex. 6. Further, claimant's admission that he filed the claim because he knew his condition was problematic, and he assumed he suffered from the disease, also supports the administrative law judge's determination on this matter. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Because the administrative law judge rationally found that claimant became aware of an actual disability which affected his wage-earning capacity on October 26, 1984, the date on which claimant filed his claim, employer was notified of the injury within one year and the claim was filed within two years of the date of awareness, in accordance with Sections 12(a) and 13(b)(2). *See Patterson*, 846 F.2d at 722, 21 BRBS at 57 (CRT); 33 U.S.C. §§912(a), 913(b)(2)(1988). Consequently, we reject employer's arguments and affirm the administrative law judge's finding that the claim is timely and is not barred by either Section 12 or Section 13 as it is rational and supported by substantial evidence.

Employer also contends that the Board's holding in *Thorud*, 18 BRBS 232, is controlling in this case. We reject employer's contention. The issue in *Thorud* involved determining the carrier responsible for the payment of benefits rather than whether Section 12 or Section 13 barred the claim. In that case, the sole question to be resolved was which of two carriers was liable for Thorud's disability benefits. Thorud suffered respiratory problems and was absent from work between July 25 and October 1, 1979, during which time his employer voluntarily paid temporary total disability benefits. *Thorud*, 18 BRBS at 235. In October 1979, Thorud's doctor diagnosed reactive airway

[4]The case at bar is similar to *Argonaut Insurance Co. v. Patterson*, 846 F.2d. 715, 21 BRBS 51 (CRT) (11th Cir. 1988), wherein a claimant learned of his condition in 1975 but did not miss any work due to his illness until 1977. *Patterson*, 846 F.2d at 716-717, 21 BRBS at 52-53 (CRT). The United States Court of Appeals for the Eleventh Circuit affirmed the administrative law judge's award of benefits, holding that: "Patterson should have become aware of the connection between his disability, his disease, and his employment when he first missed work because of his disease." *Id.*, 846 F.2d at 721, 21 BRBS at 57 (CRT). The court noted it was essential to its holding that Patterson have prior knowledge of the relationship between his disease and his employment. *Id.* at n. 11.

disease which could be exacerbated by grain dust, and he advised Thorud to avoid further exposure to that irritant. In November 1979, the doctor diagnosed asthma with acute episodes related to grain dust exposure, and he warned Thorud that continued exposure would be risky and could lead to a forced retirement. Thorud continued to work at the same job, however, citing financial need. In April 1980, Thorud's doctor diagnosed chronic asthma and advised him to retire. Thereafter, Thorud did not return to his usual work. *Id.* The administrative law judge found that Thorud became aware of an actual disability in April 1980. The Board, however, held as a matter of law that:

> [Thorud] was or should have been aware of the relationship between his employment, the disease and its disabling effects by November 5, 1979. Although [Thorud] did not suffer actual permanent loss of earnings until April 1980, Dr. Richardson warned of such disability in November 1979, and [Thorud] was aware that if he continued working in grain dust his condition was likely to force his retirement, thus causing permanent economic harm. Accordingly, we hold that although [Thorud] continued to work in grain dust until April 1980, he was or should have been aware in November 1979 that his work-related condition had affected his ability to earn wages in this work.

Thorud, 18 BRBS at 235. Accordingly, the Board held the carrier at risk in 1979 liable for Thorud's benefits. *Id.*

Employer would have us construe the holding in *Thorud* as requiring the time limit for giving notice of injury and filing a claim to begin when a claimant becomes aware of a potential disability rather than an actual disability. We reject this argument, as such an interpretation of Sections 12 and 13 is inconsistent with the implementing regulations and the case law interpreting those sections. We also note that the Board's awareness holding in *Thorud* was based on evidence indicating that claimant was or should have been aware of an impairment to his earning capacity at the time he was advised not to perform his usual work; the fact that his actual earnings were not yet impaired would not have precluded a finding of disability at that time.[5] In contrast, as the administrative law judge recognized, the evidence in this case demonstrates that claimant was told he could continue working as an insulator and was not warned of any future ill effects. *See* Decision and Order on Recon. at 5. As the administrative law judge found, there is no evidence in this case similar to that in *Thorud*. As the holding in *Thorud* was based on its specific facts, and did not involve either Section 12 or 13, it does not support the proposition that mere awareness of potential future loss in wage-earning capacity will trigger the statute of limitations under those sections. Consistent with the regulations, the Board has uniformly held that a claimant must be disabled in order to have the requisite awareness under Sections 12 and 13. *See Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986). *Thorud* is hereby limited to its facts. Consequently, it is distinguishable and is inapplicable in this case.

Claimant has submitted a petition for an attorney's fee for work performed before the Board.

[5]Under Section 8(c)(21), and (h), 33 U.S.C. §908(c)(21), (h), a claimant may be disabled where he has a loss in wage-earning capacity even if his actual earnings have not decreased. *See generally Jennings v. Sea-Land Service, Inc.*, 23 BRBS 312 (1990), *vacating on recon.* 23 BRBS 12 (1989).

He requests 7.75 hours at the rate of $90 per hour, totalling $697.50. Employer has not filed objections to the fee request. Claimant is entitled to a fee reasonably commensurate with the work performed before the Board if he successfully defends his award on appeal. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203. As we affirm the administrative law judge's award of benefits, and as the hours requested are reasonably commensurate with the necessary work done, we award claimant's counsel the requested fee. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order and the Decision and Order on Motion for Reconsideration of the administrative law judge are affirmed. Employer is liable for an attorney's fee for work performed before the Board in the amount of $697.50, payable directly to claimant's counsel.

SO ORDERED.

_____
NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge