BRB No. 93-0829

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| GASTON L. LAFAILLE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| GENERAL DYNAMICS CORPORATION | ) | DATE ISSUED: |
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| and | ) | |
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| INSURANCE COMPANY OF NORTH AMERICA | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Robert M. Glennon, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Scott E. Richardson (Parker, Coulter, Daley & White), Boston, Massachusetts, for employer/carrier.

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

PER CURIAM:

Carrier, Insurance Company of North America, appeals the Decision and Order on Remand (81-LHC-254) of Administrative Law Judge Robert M. Glennon awarding benefits on a claim filed pursuant to the provisions of 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 law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. Claimant worked as a welder for employer from May 1961 through August 1969 where he was exposed to dust, smoke, asbestos and fumes. Claimant worked for nonmaritime employers from 1969 through 1978. Claimant suffered a lung collapse three times between February 1977 and April 1977, and had a thoracotomy in April 1977. Claimant was out of work from May 1977 until July 1978. Claimant returned to work for employer from July 1978 through February 1979 as a welder/pipefitter. Claimant testified that he left this employment because the job involved too much physical exertion and exposure to smoke, and that he first became aware of a connection between his employment and his lung problems in 1979. Claimant filed his first report of accident and claim for compensation on April 19, 1979. Employer was insured by carrier, Insurance Company of North America, from January 1, 1955 through March 21, 1973. Employer became self-insured on April 1, 1973.

In the initial Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from May 12, 1977 through July 17, 1978. He denied permanent partial disability benefits from July 17, 1978, and continuing. On appeal, the Board remanded the case to the administrative law judge to determine the average weekly wage for the temporary total disability benefits. The Board affirmed the denial of permanent partial disability benefits. *LaFaille v. General Dynamics Corp.*, 18 BRBS 88 (1986) (DeGregorio, J., concurring and dissenting). On remand, the administrative law judge found that claimant's average weekly wage prior to April 1977 was $423.08. On appeal, the Board affirmed the administrative law judge's finding. *LaFaille v. General Dynamics Corp.*, BRB No. 88-2033 (Oct. 31, 1988) (unpub). Claimant appealed the Board's decisions to the United States Court of Appeals for the Second Circuit. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989). The court held that the administrative law judge should have applied the express language of Section 10(i), 33 U.S.C. §910(i), to determine claimant's average weekly wage, that the Board overstepped its authority by making a factual determination that claimant's earning capacity in 1979 showed no loss from the 1977 level, that claimant's pre-injury average weekly wage calculated as of 1977 must be compared to his actual 1979 earnings with adjustments for inflation to determine if he has a loss in wage-earning capacity, and that if on remand claimant is found not to have a loss in wage-earning capacity, the administrative law judge should enter a *de minimis* award.

On remand, the administrative law judge awarded claimant temporary total disability benefits from May 12, 1977 through April 10, 1978, based on an average weekly wage of $365.22, and permanent partial disability benefits from April 10, 1978 and continuing, based on a $290.24 loss in wage-earning capacity. Two days after the formal hearing on March 25, 1992, carrier submitted a motion to add self-insured employer as a party to this action, to which employer objected in a response dated April 8, 1992. The administrative law judge concluded that the responsible carrier issue was not before him on remand and did not further discuss carrier's motion. Decision and Order at 2. On appeal, carrier contends that the administrative law judge erred by failing to address the issue of the carrier responsible for the payment of claimant's permanent partial disability benefits. Claimant responds, urging affirmance of the award.

Carrier's sole contention is that the administrative law judge erred by failing to address the

issue of responsible carrier as claimant was found entitled to permanent partial disability benefits after July 1978, the date claimant returned to work for the then self-insured employer. Carrier maintains that claimant was exposed to injurious stimuli during his employment in 1978 and 1979, and that therefore self-insured employer is the responsible carrier. Carrier concedes its liability for temporary total disability benefits starting in May 1977, but claims no liability after that point as it was not the insurer during claimant's subsequent exposure to injurious stimuli. Claimant responds, contending that as the subsequent exposure to injurious stimuli did not produce greater disability than claimant had prior to returning to work for employer, the administrative law judge properly found that the responsible carrier was not at issue.

Under the Act, the carrier responsible for a claimant's disability benefits is the last covered employer to expose the claimant to injurious stimuli prior to the date on which claimant became aware of the fact that he was suffering from an occupational disease. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert denied*, 350 U.S. 913 (1955). In *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85 (CRT) (1st Cir. 1992), the United States Court of Appeals for the First Circuit held that the liable carrier is the one on the risk prior to the date claimant became disabled by his occupational disease. Similarly, the United States Court of Appeals for the Ninth Circuit has held that the liable employer is the employer covering the risk at the time of the most recent injurious exposure related to the disability. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). The court held that in assigning liability there must be a rational connection between the most recent injurious exposure and the disability. *Id.*

In the instant case, claimant was awarded permanent partial disability benefits from April 10, 1978. Thus, the onset of his permanent disability predates the subsequent exposure beginning in July 1978. Claimant's subsequent exposure to injurious stimuli did not contribute in any way to the compensable disability as the exposure did not increase claimant's loss in wage-earning capacity. Thus, there is no rational connection between the most recent exposure and the disability, *see Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993), and we reject carrier's contention that the administrative law judge erred in failing to address this issue. Carrier's liability for the award of benefits is affirmed.

Claimant's counsel submitted a fee application, requesting $2,000 for work performed before the Board in the three appeals, covering the period between November 1982 and April 1993. Employer/carrier has not objected to the fee application, and claimant's counsel is entitled to a fee payable by employer for successfully prosecuting his claim. *See Smith v. Alter Barge Line, Inc.*, BRBS , BRB No. 93-1449 (May 30, 1996); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). As the fee request is reasonably commensurate with the necessary work performed before the Board, we grant claimant's counsel the requested fee of $2,000, to be paid directly to counsel by employer/carrier. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed. Claimant's counsel is awarded an attorney's fee of $2,000 for work performed

before the Board.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge