BRB Nos. 12-0601
and 12-0601A

ROBERT CARRION	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SSA MARINE TERMINALS, LLC	)	DATE ISSUED: 06/25/2013
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Denying Reconsideration, and Amended Order Denying Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, Coronado, California, for claimant.

Laura G. Bruyneel, Judith A. Leichtnam, and Gursimmar S. Sibia (Bruyneel & Leichtnam, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

SSA Marine Terminals (SSA) appeals and claimant cross-appeals the Decision and Order Awarding Benefits, Order Denying Reconsideration, and Amended Order Denying Reconsideration (2009-LHC-1200, 2009-LHC-1201, 2009-LHC-1492) of Administrative Law Judge William Dorsey 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed by Matson Terminals (Matson) as a chassis mechanic when, on January 8, 1987, he sustained an injury to his right knee.[1] Claimant was diagnosed with a complex tear of the right medial meniscus and a probable tear of the right anterior cruciate ligament (ACL). On March 11, 1987, claimant underwent arthroscopic surgery to repair his medial meniscus tear, but it was decided at that time not to repair the torn ACL. Matson paid claimant temporary total disability benefits through July 12, 1987, 33 U.S.C. §908(b); on July 13, 1987, claimant returned to work wearing a knee brace.[2] On January 7, 1994, claimant reinjured his right knee. He received temporary total disability compensation from January 8 through 30, 1994, and returned to work on January 31, 1994. On July 9, 1999, claimant became the employee of SSA when that employer took over Matson's facility. Although claimant experienced knee symptoms, he continued to perform his usual employment as a chassis mechanic. On February 28, 2002, claimant retired when he found himself unable to perform his required duties due to his knee pain. Matson continued to authorize and pay for the medical care claimant sought with Dr. Caldwell for his ongoing right knee complaints. At the time of claimant's retirement, Dr. Caldwell suggested that claimant forego knee replacement surgery until his symptoms worsened. In 2007, Matson refused claimant's request for authorization for a medical examination by Dr. Caldwell. Claimant then obtained counsel and filed claims against Matson in February 2008 and against SSA in March 2008 seeking benefits under the Act; specifically, claimant's claim against Matson stated the date of injury as January 8, 1987, and his claim against SSA gave a date of injury of February 28, 2002.

In September 2008, claimant was examined by Dr. Stark on behalf of Matson. Dr. Stark opined that claimant needed a total knee replacement and that claimant's knee condition was the result of the natural progression of his degenerative arthritis and the cumulative trauma he experienced while employed as a chassis mechanic. Claimant also was examined by Dr. Schaefer, who similarly opined that claimant was a candidate for

[1]Matson classified claimant's employment duties as a chassis mechanic as involving primarily medium work with some physical demands in excess of those for medium work. Matson Ex. 10 at 10.3.

[2]Claimant, upon his return to work as a chassis mechanic, received scheduled permanent partial disability benefits for a 20 percent impairment to his right leg. 33 U.S.C. §908(c)(1).

knee replacement surgery. Claimant was evaluated by Dr. von Rogov at the behest of SSA. Dr. von Rogov concluded that claimant would benefit from a right total knee replacement, the need for which was the result of the natural progression of claimant's January 8, 1987, injury.

In his decision, the administrative law judge found that claimant did not become aware he had sustained a cumulative trauma injury while employed with SSA until so advised by Dr. Stark in September 2008. Consequently, the administrative law judge rejected SSA's contention that claimant's March 2008 notice of injury and claim for compensation were untimely filed.[3] 33 U.S.C. §§912, 913. The administrative law judge found SSA to be the responsible employer as it was the last employer to have subjected claimant to trauma that aggravated his knee condition. With regard to the merits of the claim, the administrative law judge found that claimant's knee condition had yet to reach maximum medical improvement, that claimant has been incapable of performing his usual work as a chassis mechanic with SSA since February 28, 2002, and that SSA did not establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant ongoing temporary total disability and medical benefits commencing March 1, 2002. 33 U.S.C. §§907, 908(b). The administrative law judge denied SSA's motion for reconsideration.

On appeal, SSA challenges the administrative law judge's finding that claimant filed a timely claim for benefits under the Act. Alternatively, SSA argues that the administrative law judge erred in awarding claimant total disability compensation commencing March 1, 2002. Claimant responds, urging affirmance of these findings. SSA has filed a reply brief. BRB No. 12-0601. In his cross-appeal, claimant asserts that the administrative law judge erred in determining that his knee condition remains temporary in nature. Additionally, claimant avers that interest due on any benefits owed under the administrative law judge's award must be calculated on a compound basis. SSA has filed a brief in response, to which claimant replies. BRB No. 12-0601A.

Section 13

SSA asserts that claimant's claim for compensation benefits under the Act was untimely filed in 2008 since the record establishes that claimant was aware or should have been aware that he had sustained an economic harm due to his work-related knee

[3] Moreover, the administrative law judge concluded that SSA did not show that it was prejudiced by its perceived lack of timely notice. 33 U.S.C. §912(d).

injury when he left SSA's employ on February 28, 2002.[4] Specifically, SSA argues that claimant's progressive knee pain resulted in his decision to retire in 2002, and that claimant was aware that his knee pain was work-related.

Section 13(a) of the Act applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his injury and his employment.[5] 33 U.S.C. §913(a). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, held in *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982), that a claimant is not injured for purposes of commencing the Section 13(a) one-year statute of limitations until the claimant is reasonably aware of the full character, extent and impact of his work-related injury. *See also J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). Pursuant to Section 20(b) of the Act, it is presumed that a claim was timely filed. 33 U.S.C. §920(b). Thus, it is employer's burden to produce substantial evidence that the claim was untimely filed. *E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011).

In this case, the administrative law judge found that claimant was not aware he had sustained an injury during his employment with SSA when he left SSA's employ on February 28, 2002. Specifically, while acknowledging that claimant retired due to his knee pain, the administrative law judge found that claimant was aware only that he had

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[4] SSA concedes that claimant's claim for medical benefits under the Act is never time-barred. *See* SSA Br. at 16-17.

[5] Section 13(a) states, in relevant part, that:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. . .The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

injured himself while in Matson's employ. *See J.M. Martinac Shipbuilding,* 900 F.2d 180, 23 BRBS 127(CRT); *Lopez v. Stevedoring Services of America,* 39 BRBS 85 (2005), *aff'd mem.,* 377 F.App'x 640 (9th Cir. 2010); *Allan*, 666 F.2d 399, 14 BRBS 427. The administrative law judge relied on claimant's testimony that, as Matson continued to pay for his medical care for his knee injury until 2007, claimant believed that his knee condition was related to the 1987 work injury he had sustained while employed by Matson. Tr. at 39, 61. Claimant testified that it was Matson's refusal to authorize a knee evaluation with Dr. Caldwell in 2007 that prompted him to seek legal counsel and to file a claim in March 2008 Claimant further testified he was not aware until he received Dr. Stark's report in September 2008 that his continued work for SSA resulted in additional injuries to his knee.[6] Tr. at 51-52.

Based on Matson's paying until 2007 claimant's medical expenses and claimant's testimony that he was not informed he had sustained a work-related injury to his knee due to his continued employment through February 28, 2002, the administrative law judge rationally found that claimant was unaware of a relationship between his knee condition, his employment with SSA, and his disability until he received Dr. Stark's report in September 2008. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008) (claimant must be aware of the work-related nature of his condition). As claimant was not aware of the full character, extent and impact of the harm he sustained until 2008, we affirm the administrative law judge's finding that claimant's claim against SSA was timely filed as it is rational, supported by substantial evidence, and in accordance with law. *J.M. Martinac,* 900 F.2d 180, 23 BRBS 127(CRT); *Abel*, 932 F.2d 819, 24 BRBS 130(CRT); *Allan*, 666 F.2d 399, 14 BRBS 427.

Extent of Disability

SSA contends the administrative law judge erred in awarding claimant total disability benefits as of March 1, 2002. In order to establish a prima facie case of total disability, claimant must demonstrate that he is unable to return to his usual work due to the work injury. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The burden then shifts to employer to demonstrate the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). An employer can establish suitable alternate

[6] Dr. Caldwell, claimant's treating physician through 2007, testified that he did not inform claimant at any time that his continued work for SSA had caused additional and continuing injuries to claimant's knee. Tr. at 133-134. Dr. Stark stated in his September 2008 report that claimant's continued employment with SSA caused cumulative trauma to claimant's knee. Matson Ex. 1 at 1.4.

employment by offering an injured employee a light-duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

SSA first asserts the administrative law judge erred in not addressing whether claimant voluntarily retired from his employment. We disagree. Contrary to SSA's contention, in a case such as this one wherein it is uncontroverted that claimant sustained a traumatic injury, the only relevant inquiry is whether claimant's work injury precludes his return to his usual work. *See Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001); *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). The Act's voluntary retiree provisions apply only in occupational disease cases. 33 U.S.C. §§902(10), 908(c)(23), 910(d). In his decision, the administrative law judge found that claimant met his burden of establishing that he is unable to return to his usual employment as a chassis mechanic.[7] Decision and Order at 37 – 38. A claimant's credible complaints of pain may support a finding that claimant cannot return to his usual work due to his injury. *See, e.g., Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Moreover, in 2008 and 2009 Drs. Stark and von Rogov respectively opined that claimant experiences pain in activities similar to those required of his former job. Matson Ex. 1 at 1.1; SSA Ex. 18 at 115. In this case, SSA has not established error in the administrative law judge's finding that claimant, due to his work-related right knee pain, could not return his usual employment duties as a chassis mechanic as of March 1, 2002. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). We, therefore, affirm this finding as it is supported by substantial evidence.

SSA contends it established the availability of suitable alternate employment as of March 2002 based on the testimony of Mr. Larson, one of SSA's managers. The administrative law judge rejected this contention. Mr. Larson discussed a light-duty roadability inspector position. Decision and Order at 38; *see* Tr. at 241-242. The administrative law judge found this job required many of the same physical tasks as that of a chassis mechanic, specifically, performing chassis inspections and minor repairs, walking, standing, stooping, bending and kneeling. Based on Mr. Larson's testimony that this position was always filled, although it could have been available on February 28, 2002, and that the position required physical labor, the administrative law judge concluded that SSA did not establish the availability of suitable employment. Decision and Order at 39; *see* Tr. at 257 – 258. On appeal, SSA avers that Mr. Larson's statement that he "could" assign

[7]The administrative law judge cited claimant's description of the employment duties required of a chassis mechanic and the effect his knee symptoms had on his ability to perform those duties. *See* Tr. at 33 – 37, 52 – 54.

claimant to replace another employee assigned to this position establishes the availability of that position and that, moreover, the duties required of a roadability inspector are less physically demanding that than those of a chassis inspector. *See* SSA's Br. at 26-27.

We reject these contentions. The administrative law judge rationally found Mr. Larson's testimony insufficient to establish that a specific, suitable job was available for claimant at SSA's facility. The administrative law judge found that SSA failed to establish that the roadability inspector position was actually available on a regular basis and that claimant would have been able to displace workers with greater seniority to assume that position. Decision and Order at 39. Additionally, the administrative law judge noted that this position required many of the same physical tasks as that of a chassis mechanic, a position which claimant was unable to perform.[8] *Id.* Referencing his finding that claimant demonstrated that he experiences disabling pain when performing the physical duties required of a chassis mechanic, the administrative law judge concluded that SSA did not offer evidence of genuinely suitable alternative employment for claimant. *Id.* In *Bumble Bee Seafoods*, the Ninth Circuit affirmed a finding that an employer did not establish suitable alternate employment at its facility where both the availability and suitability of the job were not established to the administrative law judge's satisfaction. *Bumble Bee Seafoods*, 629 F.2d at 1329-1330, 12 BRBS at 661-662. As the administrative law judge's findings are rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's conclusion that SSA did not establish the availability of suitable alternate employment, and the consequent award of ongoing total disability benefits.[9] *Id.*

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[8]SSA has not cited evidence in support of its statement that the frequency of bending, stooping, and kneeling required of an inspector position is "far less" than that of a chassis mechanic.

[9]SSA contends, and claimant concedes, that the administrative law judge did not address Mr. Larson's testimony regarding the position of "side-pick operator." *See* SSA Br. at 27; Cl. Br. at 12. Mr. Larson, however, did not testify when this position was available at SSA's facility; rather, he stated only that the position of side-pick operator "would be maybe" a light-duty position. *See* Tr. at 241. Mr. Larson proceeded to state that a side-pick operator was required to ascend six to seven steps to enter the vehicle's cab, and that an operator used his right leg and foot to operate the vehicle's throttle and brake. Tr. at 288. Claimant, who injured his right leg, testified in response to Mr. Larson's testimony that his knee symptoms would prohibit him from climbing the stairs to enter the side-pick's cab. *Id.* at 297. As the administrative law judge generally credited claimant's testimony regarding the level of his knee pain, *see* Decision and Order at 15, 38-39, we decline to remand this case for consideration of the "side-pick operator" position.

Maximum Medical Improvement

Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Moreover, a claimant may be found to have reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See, e.g., Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

On October 27, 2009, just before the formal hearing, claimant amended his initial pre-hearing statement to reflect his claim that he is entitled to ongoing temporary total disability benefits as a result of his work-related right knee condition. Thereafter, in his post-hearing brief, claimant argued in the alternative that: 1) his knee condition has not yet reached maximum medical improvement since Drs. Caldwell, Stark and von Rogov each opined that he would benefit from knee replacement surgery; or 2) his knee condition is permanent since it is of a lasting or indefinite duration. *See* Cl.'s Post-Hearing Br. at 11-12. In his cross-appeal, claimant contends the administrative law judge erred in failing to find that his right knee condition reached maximum medical improvement in 2002.

We reject claimant's contention of error. As claimant sought temporary total disability benefits, he cannot now claim error in the administrative law judge's award of such benefits. Moreover, the administrative law judge's finding is supported by substantial evidence. Drs. Stark and von Rogov opined that claimant's knee condition was not permanent, and all four of claimant's treating and examining physicians agree that claimant would benefit from knee replacement surgery.[10] Decision and Order at 34-

[10] Dr. Caldwell, claimant's treating physician, testified that claimant's delay in seeking total knee replacement surgery until 2007 was reasonable, and that this surgical procedure is the appropriate medical care required for claimant to reach maximum medical improvement. Tr. at 134-135. Dr. Stark opined that claimant's knee condition was not permanent and stationary pending total knee surgery, and that such surgery represented the only definitive treatment for claimant's condition. Matson Ex. 1 at 5. Dr. von Rogov agreed with Dr. Stark that claimant became temporary totally disabled in February 2002, Tr. at 158-159, and similarly opined that claimant would benefit from

37. Thus, the administrative law judge could rationally conclude that claimant is in need of additional medical treatment, specifically total knee replacement surgery, with a view to improving his right knee condition.[11] We therefore affirm the administrative law judge's finding that claimant's disability remained temporary. *See generally Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

Interest

In his decision, the administrative law judge awarded claimant temporary total disability benefits commencing March 1, 2002, plus "interest at the legal rate from the time those benefits became due." Decision and Order at 48-49. Claimant asserts that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012)(en banc), he is entitled to an award of compound interest on past-due compensation. We agree.[12] In *Price*, the court held that interest on outstanding benefits due a claimant under the Act should be calculated on a compound basis. *Id.*, 697 F.3d at 843, 46 BRBS at 65(CRT). As this case arises within the jurisdiction of the Ninth Circuit, we modify the administrative law judge's decision to reflect claimant's entitlement to an award of compound interest on past-due compensation consistent with *Price*.

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total knee replacement surgery. SSA Ex. 18 at 127. Dr. Shaeffer also recommended that claimant undergo a total knee replacement. Matson Ex. 4 at 8.

[11]The formal hearing was held in November 2009. SSA states in its brief that claimant underwent total knee replacement surgery on February 3, 2010.

[12]As interest under the Act is mandatory and cannot be waived in contested cases, we reject SSA's argument that claimant cannot raise for the first time on appeal the issue of the proper calculation of the award of interest. *See Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Moreover, the *Price* decision was issued after the administrative law judge issued his decision, so claimant had no basis to raise the interest calculation before the administrative law judge based on then-existing law.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is modified to reflect claimant's entitlement to compound interest on past-due compensation. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge