BRB Nos. 86-1841
and 86-1841A

PAUL A. FISHER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MORRISON-KNUDSEN	)	DATE ISSUED:
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Order Following Reconsideration of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

William F. Mulroney (Ashcraft & Gerel), Landover, Maryland, for claimant.

Kevin J. O'Connell (Hamilton and Hamilton), Washington, D.C., for employer/carrier.

Lisa Donis Teuber (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: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals and claimant cross-appeals the Decision and Order and

Order Following Reconsideration (85-DCW-101) of Administrative Law Judge Frederick D. Neusner 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 Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the 1928 Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 was employed by employer for several months in 1975 as a tunnel miner on construction of the subway in Washington, D.C. He was exposed to rock dust during this employment. Claimant had performed this type of work in various jurisdictions since 1960. In September 1975, claimant was laid off by employer and immediately began working as a tunnel miner in Alabama. Thereafter, he went to Louisiana where he worked in a salt mine for a year. He then returned to Alabama where he worked on a tunnel mole machine for a year. Claimant began to experience breathing problems in the late 1970's. In 1980 he stopped performing underground mining work on his own accord because he believed that his symptoms could be resolved by avoiding such work for a while. In 1982 claimant worked as a welder for McDowell Company in Sylva, North Carolina. He also worked for his brother at American Fabrics Company, where he set up a lace machine, and he assisted his brother-in-law for three weeks on a tunnel job for L & J Boring and Tunnel Company. With the exception of these jobs in 1982, claimant has not been gainfully employed since 1980. In October 1983, Dr. Simon found that claimant's chest x-ray was compatible with early pneumoconiosis/silicosis and diagnosed a mild restrictive pulmonary impairment and hypertension. Claimant filed his claim on October 27, 1983. Emp. Ex. 3.

In his Decision and Order, the administrative law judge found that as claimant received injurious exposure while working for employer in 1975, the claim was governed by 20 C.F.R. §701.101(b), and accordingly should be decided under the 1928 Act, which extended the provisions of the Longshore Act to employees in the District of Columbia. The administrative law judge further determined that employer's liability was incurred at the time of the events which gave rise to the injury, *i.e.*, the time of exposure, and that the timeliness of filing of the claim should be determined under Section 13(b)(2) of the Longshore Act, as amended in 1984, 33 U.S.C. §913(b)(2)(1988). The administrative law judge concluded that inasmuch as claimant became aware of the relationship between his employment, disease, and disability in 1980, and did not file his claim until October 27, 1983, outside the two-year filing period provided under Section 13(b)(2), the claim was time-barred. The administrative law judge also found that as employer was not disadvantaged by the lack of timely notice under Section 12(d), 33 U.S.C. §912(d)(1988), the claim was not barred under Section 12(a). The administrative law judge, in addition, rejected claimant's argument that "equitable estoppel" precluded employer from raising the statute of limitations as a defense in this case. Finally, the administrative law judge determined that claimant's injury was at least partly related to his employment with employer, and that, therefore, an award of medical benefits was warranted under Section 7 of the Act, 33 U.S.C. §907. Thereafter, claimant's Motion for Reconsideration was denied.

Both parties appeal the administrative law judge's Decision and Order and Order Following Reconsideration. Claimant essentially reiterates the argument made below, asserting that he was unaware of the silicosis for which he claims benefits prior to its diagnosis in 1983. Claimant also asserts that the administrative law judge incorrectly applied the law relevant to the issue of awareness. Claimant alternatively argues that employer is estopped from raising the statute of limitations defense based on its violation of Occupational Safety Health Administration (OSHA) regulations regarding permissible silica dust levels and its failure to have a respiratory protection program at the job site. Employer has filed a protective cross-appeal, asserting that the administrative law judge's finding that claimant's claim is time-barred should be affirmed, but if it is not, then the claim should be denied for lack of subject matter jurisdiction, as it is not covered by the 1928 Act, but is subject to the District of Columbia Workers' Compensation Act of 1979, D.C. Code §36-301 *et seq.* (the 1979 Act).

The Director, Office of Workers' Compensation Programs (the Director), has submitted a response brief, in which he argues that the administrative law judge erred in finding that the claim was time-barred. The Director avers that when claimant stopped working in 1980, he did so temporarily to allow his lung condition to improve so that he could go back to work and that it was not until 1983, when he was diagnosed with pneumoconiosis and silicosis, that he had any reason to realize that his wage-earning capacity would be diminished. Accordingly, the Director contends that the administrative law judge's decision finding the claim barred under Section 13 should be reversed and the case remanded for consideration of the nature and extent of claimant's disability. Employer replies to the Director's brief, reiterating its argument that claimant's awareness of his occupational injury occurred in 1980 and that therefore the administrative law judge's Decision and Order should be affirmed.

SECTION 13

Claimant argues on appeal that although he experienced coughing and shortness of breath in 1980, these symptoms made him aware that he had industrial bronchitis, a disease process which he believed could be reversed by avoiding tunnel work for a while. Claimant maintains that it was not until Dr. Simon diagnosed his condition as silicosis in 1983 that he became aware that he had a permanent non-reversible disease process which would preclude him from performing future tunnel work. Claimant asserts that awareness under Section 13 should be based on the objective criteria of x-rays and pulmonary function studies which formed the basis for the 1983 diagnosis of silicosis, rather than on claimant's subjective symptoms. Claimant further argues that the administrative law judge erroneously found that the holding of the United States Court of Appeals for the District of Columbia Circuit in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), was limited to "misdiagnosis" cases and that the decision of the United States Court of Appeals for the Ninth Circuit in *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982), was inapplicable to the present case. The Director agrees with claimant that the administrative law judge erroneously found that *Stancil* applies only in cases of misdiagnosis.

Section 13(a) states, in pertinent part:

> [T]he right to compensation for disability or death under this chapter shall be barred unless a claim therefor 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)(1982).[1] The United States Court of Appeals for the District of Columbia Circuit first construed this provision in *Stancil*, and since that decision has consistently held that it is only after the claimant knows or should have known that the accident he has suffered will probably impair his ability to earn his previous wage that he is aware of an "injury" for purposes of Section 13(a). *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 294, 24 BRBS 75, 78 (CRT)(D.C. Cir. 1990), *citing Stancil*, 436 F.2d at 277; *Bechtel Assoc. v. Sweeney*, 834 F.2d. 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987). As this case arises within the jurisdiction of the District of Columbia Circuit, *Stancil* is controlling. Contrary to the administrative law judge's decision, the court in *Stancil* specifically stated that its decision is not limited to cases of misdiagnosis. *Stancil*, 436 F.2d at 278-79. Moreover, "a claimant is not injured for purposes of the Section 13(a) statute of limitations until he [becomes] aware of the *full character, extent and impact of the harm done to him.*" *Abel v. Director, OWCP*, 932 F.2d 819, 821, 24 BRBS 130, 134 (CRT)(9th Cir. 1991), *quoting Todd Shipyards Corp. v. Allan*, 666 F.2d at 399, 14 BRBS at 427 (quoting *Stancil*, 436 F.2d at 279) (emphasis in original). *See also Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 296, 23 BRBS 22, 24 (CRT)(11th Cir. 1990). The Board has also held that in determining the date of awareness, the date on which a claimant is informed by a doctor of the relationship between his work and his injury is significant, but is not controlling where there is other evidence that claimant was aware of the relationship at an earlier date. *See Wendler v. American National Red Cross*, 23 BRBS 408, 411 (1990)(McGranery, J., dissenting and concurring on other grounds); *Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1982).

In the present case, the administrative law judge found that claimant was aware of the relationship between his employment, his disease, and his disability in 1980, when he ceased underground employment for reasons connected with his pulmonary disease. Decision and Order at 9. The administrative law judge reasoned that given claimant's background in an area where the knowledge of the experience of underground tunnel workers was common to the community of his

[1]In his Decision and Order, the administrative law judge applied the two-year time limitation for filing occupational disease claims contained in Section 13(b)(2) of the Act as amended in 1984, 33 U.S.C. §913(b)(2)(1988). In *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), however, the United States Court of Appeals for the District of Columbia Circuit held that the 1984 Amendments to the Longshore Act were inapplicable to cases arising in the District of Columbia. Accordingly, the timeliness of the claim must be determined under the one year filing period contained in Section 13(a), 33 U.S.C. §913(a)(1982).

generation, he was aware of the hazard and its consequences at all times before entering this vocational specialty in 1960. Decision and Order at 9. The administrative law judge further noted that claimant testified that the reason he laid off from underground work was to permit his lungs to recover from such exposure in the past. The administrative law judge concluded that this testimony established that claimant both knew and should have known of the relationship between the underground exposure and the pulmonary impairment of which he then and thereafter complained. Decision and Order at 9.

The administrative law judge in addition determined that claimant was aware of his disability by no later than 1980, when he ceased performing underground work because of breathing problems associated with his working conditions. Tr. at 40. The administrative law judge inferred that claimant recognized the "implications" of his respiratory problems as far as his underground work long before he was told by Dr. Simon of the connection in 1983, stating:

> He stopped working in the tunnels in July 1980. His reason was that he then felt he could not do the work or hold a tunnel job at that point. He felt that if he laid off for a year or two his condition would get better.

Decision and Order at 11. Noting claimant's testimony that he was aware that his lungs were bad for many years, the administrative law judge concluded that claimant was aware that his lung impairment was job-related in 1980, and was aware of the nature and extent of his disability as early as 1979, but no later than the last day he worked in the tunnels in July 1980. Decision and Order at 10-11; Emp. Ex. 4 (Claimant's Deposition) at 30-32, 37, 39-44, 45-46, 48-49.

We agree with claimant that the administrative law judge erred in finding that he was aware for purposes of Section 13 in 1980. In making this determination, the administrative law judge did not evaluate the evidence consistent with the requirement that claimant may not be charged with awareness of his injury under Section 13 until he is aware of the full character, extent and impact of the harm done to him. *See Abel,* 932 F.2d at 821, 24 BRBS at 134-135 (CRT); *Stancil,* 436 F.2d at 279. We note that in so concluding the administrative law judge credited claimant's testimony that when he stopped working in 1980, he did so in the belief that his condition would improve. This testimony cannot logically be reconciled with a finding that claimant was aware of his permanent silicotic lung condition at that time. *See* Decision and Order at 9; Tr. at 40; Order Following Reconsideration at 2. Moreover, claimant returned to work in the tunnels after that date, and this fact must be considered in evaluating his awareness of likely impairment in his earning capacity. Although claimant may have been aware that he suffered from a lung condition in 1980, he cannot be found to have awareness for purposes of Section 13 until he was aware of the full extent of his injury, recognizing that his lung condition would not improve and his wage-earning capacity would be permanently affected. Accordingly, we vacate the administrative law judge's finding that claimant's date of awareness occurred in 1980 and remand the case for the administrative law judge to determine when claimant became aware that he had a permanently disabling injury which was

likely to affect his wage-earning capacity.[2] *See J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 184, 23 BRBS 127, 130 (CRT)(9th Cir. 1990), *aff'g Grage v. J. M. Martinac Shipbuilding*, 21 BRBS 66 (1988). *See also Brown*, 893 F.2d at 296, 23 BRBS at 24 (CRT); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277, 280 (1992)(Dolder, J., dissenting).

Claimant's alternative argument, that employer is equitably estopped from raising the statute of limitations defense because of evidence of employer's OSHA violations evidencing silica dust levels in excess of permissible limits, however, is rejected. The party invoking estoppel has to show that the party against whom he is seeking to invoke it committed some deceitful or wrongful act from which it is trying to profit. As there does not appear to be any connection between employer's alleged violation of silica levels under OSHA and claimant's filing of the claim in 1983 in the instant case, we hold that the doctrine of equitable estoppel is not applicable. *See J. M. Martinac*, 900 F.2d at 180, 23 BRBS at 127 (CRT). Moreover, as the administrative law judge properly noted, the Act does not provide him with any authority to enforce the OSHA regulations as a bar to employer's statute of limitations defense. We therefore affirm the administrative law judge's finding in this regard.

[2]Claimant also urges that based on *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982), there were two dates of awareness involved here: 1980 and 1982. In *Wilson* the question presented was whether the statute of limitations began to run on a latent occupational disease claim at the time of the invasion of the plaintiff's body or when the plaintiff knew or should have known of his injury, the so-called discovery rule. While the discovery rule appears to be consistent with awareness under Section 13(a), *Wilson* itself distinguishes its holding from workmen's compensation cases in recognizing that upon diagnosis of an initial illness such as asbestosis, workmen's compensation or private insurance may provide adequate compensation, and that if no additional disease ensues, the injured worker would not need judicial relief. *Wilson*, 684 F.2d at 120.

D.C. ACT JURISDICTION

In its appeal, employer argues that if the Board determines that claimant's date of awareness did not occur until 1983, as claimant avers, the claim must be dismissed for lack of subject matter jurisdiction because injuries which become manifest after July 26, 1982 are covered under the 1979 Act rather than the 1928 Act. As the administrative law judge may determine on remand that claimant's occupational disease became manifest subsequent to July 26, 1982, the enactment date of the 1979 Act, we will consider employer' subject matter jurisdiction argument at this time. A brief overview of the relevant statutory framework and case precedent is warranted.

In 1928, Congress, acting as legislative authority for the District of Columbia, enacted the District of Columbia Workmen's Compensation Act of 1928, which made the provisions of the Longshore Act applicable to private sector employees in the District of Columbia. Congress also provided that the 1928 Act would be administered by the Department of Labor, with review of administrative decisions in the United States Court of Appeals for the District of Columbia Circuit. *See Railco Multi-Construction Co. v. Gardner,* 564 A.2d 1167, 1170 (D.C. 1989). However, after Congress granted home rule to the District of Columbia, the D.C. Council repealed the 1928 Act and enacted the 1979 Act, which "narrowed the scope of coverage and lowered the level of benefits available to injured workers." Id. at 1171. The 1979 Act applies to injuries after July 26, 1982, and is administered by the District of Columbia Department of Employment Services (DOES), with judicial review of administrative decisions in the District of Columbia Court of Appeals. *Id.* at 1170. The D.C. Court of Appeals has held that for purposes of determining coverage under the 1979 Act or the 1928 Act, an injury occurs when it becomes manifest, and injuries which become manifest on or after July 26, 1982, are generally covered under the 1979 Act. *Id.* at 1173-74 n.21.

Notwithstanding its repeal, however, the 1928 Act remains in force under the general savings statute, 1 U.S.C. §109 (1982), for the purpose of preserving the provisions of the Longshore Act as they existed in 1982 for the benefit of employees whose claims are derived from injuries occurring before the 1979 Act became law where there is no subject matter jurisdiction under the 1979 Act or any other state act. *See Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 73-74, 23 BRBS 69, 72 (CRT)(D.C. Cir. 1990), quoting *Keener v. Washington Metropolitan Area Transit Authority,*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). The most recent version of the 1979 Act provides coverage for injuries or deaths occurring in the District of Columbia if the employee performed work for the employer at the time of injury while in the District of Columbia, and for injuries or deaths occurring outside the District of Columbia if at the time of injury the employment is principally localized in the District of Columbia. *See* D.C. Code §36-303 (1992).

In the present case, if the administrative law judge on remand finds that claimant's occupational disease became manifest subsequent to July 26, 1982, the 1979 Act will divest the Department of Labor of subject matter jurisdiction over the claim unless no jurisdiction exists under that Act or under any other state workers' compensation scheme. *See Gardner*, 902 F.2d at 73-74, 23 BRBS at 72. Because claimant was not working in 1983, when he alleges his occupational disease became manifest, and had not worked in the District of Columbia since 1975, the principally localized employment requirement of the 1979 Act is not satisfied on the facts presented in this case as a matter of law.[3] Accordingly, the question of whether the Department of Labor retains subject matter jurisdiction over the claim pursuant to the general savings statute if claimant's occupational disease became manifest after July 20, 1982, is contingent upon the determination of whether claimant could be covered under any other state act. The burden of disproving jurisdiction rests on the party opposing the claim. *See Edgerton v. Washington Metropolitan Area Transit Authority,* 925 F.2d 422, 24 BRBS 88 (CRT)(D.C. Cir. 1991); *Pryor v. James McHugh Construction Co.*, 27 BRBS 47 (1993). The existing record reflects that claimant worked in Alabama and Louisiana in underground mining after he worked for employer, and that he was also exposed to respiratory irritants while working as a welder in North Carolina. Tr. at 37-38. The issue of coverage under these states' workers' compensation laws, however, was not previously developed or adjudicated while the case was before the administrative law judge. Accordingly, if the administrative law judge determines that claimant's occupational disease became manifest subsequent to July 26, 1982, he must resolve this issue.

[3]DOES, which administers the 1979 Act, has formulated a three-part test for construing the term "principally located:"

1) The place(s) of the employer's business office(s) or facility(ies) at which the employee performs the principal services(s) for which he was hired; or

2) If there is no such office or facility at which the employee works, the employee's residence, the place where the contract is made and the place of performance; or

3) If neither (1) nor (2) is applicable, the employee's base of operation.

See Hughes v. District of Columbia Department of Employment Services, 498 A.2d 567, 569 (D.C. 1985).

Accordingly, the administrative law judge's Decision and Order and Order Following Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge