

DAVID CHANDLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE	)	DATE ISSUED: 03/16/2005
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Pamela Creel Jenner (Denton, Jenner & Walker), Biloxi, Mississippi, for claimant.

Collins C. Rossi, Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2003-LHC-1075) of Administrative Law Judge Clement J. Kennington 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 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).

On October 15, 2001, claimant fell 10 to 15 feet from scaffolding during the course of his employment with employer as a welder. An MRI of claimant's right knee

on November 2, 2001, showed a tear of the medial meniscus. An MRI of claimant's back on November 6, 2001, was interpreted by Dr. Flynn on November 27, 2001, as showing a ruptured disc at L5. Claimant was released for light-duty work by Dr. Graham on October 30, 2001, and by Dr. Raynor on November 28, 2001. Claimant returned to suitable work in employer's tool room and electrical shop.

Dr. Flynn referred claimant to Dr. Winters, who performed arthroscopic surgery on claimant's right knee on January 7, 2002. On April 17, 2002, claimant sought treatment for lower back pain from Dr. Trieu, who provided trigger point injections and prescribed medication. Employer's facility closed on April 25, 2002. Claimant obtained employment as a welder with Tanco Engineers (Tanco) until November 30, 2002, when he stopped working due to back pain. Subsequently, claimant was unable to secure full-time employment, but he obtained part-time work as a construction helper. At the hearing before the administrative law judge, claimant sought reimbursement of medical expenses related to his work injury, and continuing compensation for temporary partial disability from November 30, 2002. 33 U.S.C. §908(e). Employer controverted claimant's entitlement to benefits, contending that claimant did not timely file a claim for compensation under the Act pursuant to Section 13(a), 33 U.S.C. §913(a).

In his decision, the administrative law judge found that claimant timely filed a claim. The administrative law judge credited the October 17, 2001, bill from Dr. Flynn, describing claimant's work injury and stating his inability to work due to that injury. The administrative law judge found that this bill was sent to employer, who forwarded the document to the Office of Workers' Compensation Programs (OWCP). Alternatively, the administrative law judge found that claimant was not aware that the work injury affected his wage-earning capacity until November 30, 2002, when he was forced to quit working due to back pain; therefore, the administrative law judge concluded that claimant's Claim for Compensation, Form LS-203, filed on September 8, 2003, was timely. The administrative law judge determined that claimant's work injury harmed his right knee and that he sustained a herniated lumbar disc. The administrative law judge found that, due to these injuries, claimant is unable to return to his former employment as a welder, and that the work injury has not reached maximum medical improvement insofar as claimant needs additional medical treatment, which employer has refused to authorize. The administrative law judge found that claimant's average weekly wage is \$620, and he credited claimant's vocational evidence to find that claimant has a post-injury wage-earning capacity of \$300. The administrative law judge therefore awarded claimant compensation for temporary partial disability from November 30, 2002, based on a loss of wage-earning capacity of \$320 per week. Finally, the administrative law judge found employer liable for the medical expenses claimant submitted into evidence.

On appeal, employer challenges the administrative law judge's finding that claimant's claim was timely filed, as well as the average weekly wage and post-injury wage-earning capacity determinations. Claimant responds, urging affirmance.

Section 13(a) of the Act provides a claimant with one year after he becomes aware

of the relationship between his traumatic injury and his employment within which he may file a claim for compensation for the injury with the district director. 33 U.S.C. §913(a); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001); *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002). The written claim requirement has been liberally construed, and any writing may suffice as a claim as long as it discloses an intention to assert a right to compensation under the Act. *See, e.g., Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9<sup>th</sup> Cir. 1997); *Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). In the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the filing of the claim was timely.<sup>1</sup> *See Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

Employer first asserts that the administrative law judge erred by finding that Dr. Flynn's medical bill dated October 17, 2001, constitutes the filing of a claim for compensation. We agree. In this case, claimant's counsel stated at the hearing that she obtained Dr. Flynn's October 17, 2001, bill from the OWCP in response to her request for a copy of the administrative file. Tr. at 10. Statements made by claimant's counsel at the hearing, however, are not part of the evidentiary record, and may not be credited to support a finding that a claim for compensation was timely filed with the district director. *See generally McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002); *see also* 5 U.S.C. §557(c); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981); 20 C.F.R. §702.340(a); 29 C.F.R. §§18.52(a), 18.57(b), 18.603. As there is no evidence in the record that Dr. Flynn's bill was filed with the OWCP, this document cannot provide a basis to find that claimant timely filed a claim for compensation. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

However, in finding that a claim was filed within one year of the date of the October 15, 2001, accident, the administrative law judge also credited the January 24, 2002, letter from the OWCP informing the parties that a claim and power of attorney had been filed with the district director, stating that a copy is being sent to employer's insurance carrier, and directing the carrier to forward its case file to claimant's attorney and to the OWCP.<sup>2</sup> CX 17. The purpose behind the reporting requirements of Section 13

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<sup>1</sup> In this regard, employer filed a First Report of Injury on October 17, 2001. EX 1; *see* 33 U.S.C. §930(a), (f).

<sup>2</sup> This letter is addressed to claimant's counsel, with copies to claimant and carrier. It states, *inter alia*,

Ladies and Gentlemen:

This letter will acknowledge the claim and power of attorney submitted on behalf of the employee. A copy is being sent to the insurance carrier.

is to ensure that employer receives prompt written notification of a claim through forwarding of the claim to employer from the district director. *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989). In this case, the January 24, 2002, letter from the OWCP provides sufficient written notice to employer that a claim has been filed, and an opportunity for employer to timely investigate its merits, notwithstanding that the claim itself is not part of the formal record. Accordingly, we affirm on other grounds the administrative law judge's finding that a claim was filed within one year of the date of injury.<sup>3</sup>

In addition, the administrative law judge found, based on the medical records and claimant's work history following the October 15, 2001, work event, that claimant did not become aware that his injury would cause a loss of wage-earning capacity until he was forced to quit working for Tanco due to back pain on November 30, 2002. The administrative law judge therefore concluded that the Claim for Compensation, Form LS-203, claimant filed on September 15, 2003, was timely. Decision and Order at 9; *see* CX 24. In *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit held that the one-year limitations period of Section 13(a) does not commence to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." *Stancil*, 436 F.2d at 279. Following *Stancil*, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant case arises, held that the limitations period in cases of traumatic injury does not commence running until the employee is aware or should be aware of the likely impairment of his earning capacity. *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5<sup>th</sup> Cir. 1984); *accord Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6<sup>th</sup> Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8<sup>th</sup> Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9<sup>th</sup> Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4<sup>th</sup> Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11<sup>th</sup> Cir. 1990); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1<sup>st</sup> Cir.

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CX 17. *See* 20 C.F.R. §702.224 (district director must give written notice of claim to employer within 10 days of claim's filing).

<sup>3</sup> We reject employer's contention that this writing does not constitute a claim because there is no indication that claimant sought compensation as opposed to only medical benefits. On its face, the letter from the OWCP provides employer with sufficient notice that compensation liability is possible. Moreover, any ambiguity is resolved by the February 1, 2002, letter from claimant's attorney to employer's claims adjuster, in which she requests, *inter alia*, a copy of claimant's payroll record for the year prior to the injury. CX 19. In his decision, the administrative law judge credited this letter as further evidence that a claim for compensation was filed within one year of the accident. Decision and Order at 9.

1979) (applying a similar standard to construe identical language in Section 12 of the Act, 33 U.S.C. §912).

We affirm the administrative law judge's determination that claimant timely filed a claim on September 15, 2003, as it is supported by substantial evidence. The administrative law judge rationally determined from the medical records and claimant's work history after October 15, 2001, that claimant did not become aware that his work injury would cause a loss of wage-earning capacity until he was forced to quit working for Tanco due to back pain on November 30, 2002. The administrative law judge's finding is supported by the facts that claimant returned to work for employer until the facility closed, and claimant earned \$18 per hour as a welder for Tanco before he quit working due to back pain, whereas he had earned \$15.25 per hour with employer. Tr. at 25, 41; CX 25 at 3. The administrative law judge found that the extent of claimant's back pain before November 2002 does not establish an earlier date of awareness inasmuch as claimant was able to continue working as a welder at a higher average weekly wage. *See Paducah Marine Ways*, 82 F.3d 130, 30 BRBS 33 (CRT). We reject employer's contention that claimant should have been aware of a possible loss of wage-earning capacity by November 6, 2001, when Dr. Graham advised claimant that he should undergo right knee surgery inasmuch as claimant was not then aware of the effect that his back injury would have on his wage-earning capacity. *See Hodges v. Calipher, Inc.*, 36 BRBS 73, 76-77 (2002). The administrative law judge's finding that claimant became aware of the full extent of his injury on November 30, 2002, is rational and supported by substantial evidence, 33 U.S.C. §913(a); *Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT); *see also Parker*, 935 F.2d 20, 24 BRBS 98 (CRT); *Hodges*, 36 BRBS 73. Accordingly, we affirm the administrative law judge's finding that the claim for compensation claimant filed on September 15, 2003, was timely, as it was filed within one year of that date.

Employer next challenges the administrative law judge's average weekly wage finding, as well as his finding that claimant has a residual wage-earning capacity of \$300 per week. Employer contends that the administrative law judge's decision does not clearly state claimant's average weekly wage, nor did the administrative law judge discuss the vocational evidence addressing claimant's post-injury wage-earning capacity. We disagree.

In his decision, the administrative law judge stated claimant's assertion that his average weekly wage should be \$620, pursuant to Section 10(c), 33 U.S.C. §910(c), based on an hourly wage of \$15.50, which represents the average of claimant's hourly wages as a welder with two prior employers for whom claimant worked during the year before his injury. *Id.* at 8. The administrative law judge found that claimant's proposed basis for determining his average weekly wage is the fairest method since it takes into account the fact that employer went out of business in April 2002. *Id.* at 15. Employer does not ascribe any error to this finding, and it therefore is affirmed. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5<sup>th</sup> Cir. 1998).

The administrative law judge then addressed claimant's post-injury wage-earning capacity. He summarized the hearing testimony of Leon Tingle, a vocational expert called as a witness by claimant. Decision and Order at 5-6. Mr. Tingle testified to his vocational assessment of claimant and he opined that claimant has the ability to earn no more than \$7 to \$8 per hour. Tr. at 81-86; *see also* CX 13. Employer presented no evidence addressing claimant's post-injury wage-earning capacity. The administrative law judge also stated claimant's contention, based on Mr. Tingle's testimony and report, that claimant has a post-injury wage-earning capacity of \$7 to \$8 per hour and a post-injury weekly wage-earning capacity of \$300. Decision and Order at 7-8, 15. The administrative law judge then agrees with claimant's approach.<sup>4</sup> *Id.* at 15. Inasmuch as the administrative law judge's decision clearly stated his rationale for determining claimant's average weekly wage of \$620, and he discussed the uncontradicted vocational evidence of record to find that claimant has a post-injury wage-earning capacity of \$300, we reject employer's assertions to the contrary.<sup>5</sup> *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). The administrative law judge properly based claimant's temporary partial disability compensation on two-thirds of the difference between claimant's average weekly wage and post-injury wage-earning capacity. 33 U.S.C. §908(e), (h). We therefore affirm the administrative law judge's award of compensation for temporary partial disability based on a weekly loss of wage-earning capacity of \$320.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

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<sup>4</sup> The administrative law judge's conclusion that claimant has a weekly post-injury wage-earning capacity of \$300, is based on a figure of \$7.50 per hour (the average of the \$7.00 and \$8.00 hourly figures provided by Mr. Tingle), multiplied by 40 hours. Decision and Order at 8.

<sup>5</sup> In its brief, employer does not cite any portion of Mr. Tingle's testimony that the administrative law judge failed to fully discuss regarding claimant's post-injury wage-earning capacity, allege error in the administrative law judge's finding, or propose an alternative wage-earning capacity.

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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JUDITH S. BOGGS  
Administrative Appeals Judge