

BRB No. 01-0697

RENE G. CYR)
)
)
Claimant-Petitioner)
)
v.)
)
BATH IRON WORKS) DATE ISSUED: May 24, 2002
CORPORATION)
)
Self-Insured)
Employer-Respondent)
)
and)
)
LIBERTY MUTUAL)
INSURANCE COMPANY)
)
Carrier-Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of David W. Di Nardi,
Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker, PA),
Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroyn, LLC), Portland, Maine, for self-insured employer.

Kevin M. Gillis (Troubh, Heisler & Piampiano), Portland, Maine, for Liberty Mutual Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2000-LHC-1018 through 2000-LHC-1024) of Administrative Law Judge David W. Di Nardi rendered on claims 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).

Claimant sustained several work-related injuries over the course of his employment for employer between February 18, 1974, and September 7, 1991. Specifically, claimant alleged that work-related injuries occurred on May 3, 1984 (back sprain), October 16, 1985 (cervical strain), August 4, 1986 (right knee injury), December 3, 1990 (cervical strain), and February 14, 1991 (left knee injury), that he stopped working as of September 7, 1991, due to the cumulative effect of his prior work-related injuries, and that his repetitive use of pneumatic tools caused carpal tunnel syndrome in both wrists which arose on or about August 18, 1993.¹ As a result of the work-related back sprain of May 3, 1984, claimant missed several weeks of work for which employer's carrier, Liberty Mutual Insurance Company (Liberty Mutual, carrier), paid compensation. Claimant nevertheless returned to his usual employment as a tank tester in June 1984. Following the left knee injury on February 14, 1991, employer placed claimant on light duty bench work in March 1991, in compliance with Dr. Kalvoda's restrictions. Claimant thereafter underwent arthroscopic surgery on June 12, 1991, and returned to light duty bench work on July 15, 1991, with restrictions to avoid kneeling, squatting or climbing ladders or stairs. Employer paid claimant temporary total disability benefits from June 1991 until July 15, 1991 under the Maine Worker's Compensation Act. Emp. Ex. 4 at 15. Claimant continued to perform light duty work until September 7, 1991, at which time employer placed him out of work presumably because it had nothing available within claimant's medical restrictions.² He

¹Claimant filed a claim under the Act for the May 3, 1984 injury on December 20, 1993. Cl. Ex. 24. Claimant filed claims for the other five discrete injuries on February 26, 1994. Cl. Exs. 25-28, 30. He also filed a claim for "multiple," unspecified injuries on February 26, 1994, alleging total disability commencing September 7, 1991. Cl. Ex. 29.

²With regard to the injuries sustained on October 16, 1985 (cervical strain), December 3, 1990 (cervical strain), and August 4, 1986 (right knee), claimant did not lose any time from work and continued to perform his usual work as a tank tester.

remained out of work until July 1999, at which time he was recalled by employer to work as a parking lot attendant for two hours a day, five days a week.

Liberty Mutual again paid claimant workers' compensation benefits for the May 3, 1984, work-related injury commencing September 7, 1991, under the Maine Workers' Compensation Act, but subsequently sought review of the case by the State of Maine Workers' Compensation Board (the State Board). Emp. Ex. 4. At that proceeding, employer sought a determination regarding claimant's entitlement to compensation for the injury to his left knee on February 14, 1991. Following a hearing, the State Board concluded that claimant sustained a work-related back injury on May 3, 1984, while Liberty Mutual was the carrier on the risk, and a work-related left knee injury on February 14, 1991, while employer was self-insured,³ and that claimant's then current lower back problems were not due to his 1984 work injury. The State Board found the self-insured employer liable for benefits for claimant's fifty percent partial incapacity as a result of his February 14, 1991, left knee injury and ordered employer to repay Liberty Mutual for the benefits it paid claimant from September 7, 1991, through March 15, 1993, and to continue to pay such benefits to claimant after that date based on an average weekly wage of \$510.63.

Claimant also filed separate claims for each of his alleged injuries under the Longshore Act seeking compensation for permanent total disability beginning on September 7, 1991. Alternatively, claimant sought an award of permanent partial disability, alleging that his loss of wage-earning capacity is higher than that established by the State Board. In response, employer and carrier asserted, among other things, that the March 15, 1993, decision of the State Board is binding on the parties pursuant to the doctrines of *res judicata*, collateral estoppel and election of remedies, in light of the decision by the United States Court of Appeals for the First Circuit in *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT)(1st Cir. 1997).

In his decision, the administrative law judge found that claimant sustained seven work-related injuries, that the claims therefor were timely filed, that claimant could not return to his usual employment as of September 14, 1991, and that employer did not establish the availability of suitable alternate employment until March 17, 2000. Accordingly, the administrative law judge found that claimant established entitlement to permanent total disability benefits. He concluded, however, pursuant to *Acord*, that claimant's claims under the Act must be denied due to the March 15, 1993, decision by the State Board.

³The record establishes Liberty Mutual was the carrier on the risk for employer from March 1, 1981, through August 31, 1986, and that employer became self-insured as of September 1, 1988.

On appeal, claimant challenges the administrative law judge's finding that his claims under the Act must be denied by virtue of the decision by the State Board. Self-insured employer and Liberty Mutual respond, urging affirmance.

Claimant asserts that the administrative law judge erroneously applied the collateral estoppel doctrine to bar his entitlement to benefits under the Act since, as in *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000), his burden to establish entitlement to total disability in the state proceeding was greater than it is under the Act. Claimant also contends that the preclusive effect given to the state proceeding by the administrative law judge exceeded the limited scope of the State Board's decision. In particular, claimant avers that the state proceeding addressed only the issues as to whether there was a causal contribution of the May 3, 1984, back injury and February 14, 1991, left knee injury to claimant's incapacity and if so, the extent of the resulting incapacity. Claimant thus argues that as the remaining claims for injuries were not addressed in the state proceeding, collateral estoppel cannot apply to those claims at the federal level.

Collateral estoppel, or issue preclusion, is applied when: 1) the issue sought to be precluded is identical to one previously litigated; 2) the issue was actually determined in the prior proceeding; 3) the issue was a necessary part of the judgment in the prior proceeding; and 4) the prior judgment is final and valid. See *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317 (1st Cir. 2001), *cert. denied*, 122 S.Ct. 1064 (2002); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); see also Restatement (Second) of Judgments §27. The point of collateral estoppel is that the first determination is binding not because it is right but because it is first, and was reached after a full and fair opportunity between the parties to litigate the issue. *Acord*, 125 F.3d at 22, 31 BRBS at 112(CRT). Collateral estoppel effect may be denied because of differences in the burden of proof in the two forums. *Acord*, 125 F.3d at 21, 31 BRBS at 111(CRT); *Plourde*, 34 BRBS 45. Relitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 1278, 8 BRBS 723, 732 (4th Cir.), *cert. denied* 440 U.S. 915 (1978), citing Restatement (Second) of Judgments, §68.1(D), (year) Comment F at 38-39; see also *Plourde*, 34 BRBS 45.

In the instant case, the administrative law judge concluded that he was precluded by the State Board's decision from awarding benefits to claimant under the Act. After discussing *Acord*, the administrative law judge observed that claimant had a full hearing before the Maine Workers' Compensation Board in which both employer and carrier fully participated, and that the hearing officer, after a thorough review of essentially the same record as was presently before him, issued a detailed decision awarding claimant partial

disability benefits. The administrative law judge added that while one federal claim, carpal tunnel syndrome, is dated after the date of the State Board's March 15, 1993, decision, that claim is based on the evidence, facts, and events presented to the State Board. The administrative law judge further observed that while the Board has attempted to distinguish *Acord*, in *Plourde*, he was nevertheless bound to follow the precedent of the United States Court of Appeals for the First Circuit.

In the state forum, the State Board stated that employer filed a petition for review of incapacity and a certificate of suspension for the work-related injury sustained on February 14, 1991, and that Liberty Mutual petitioned for apportionment on account of the February 14, 1991, injury. Emp. Ex. 4 at 5. After a discussion of the relevant evidence, including brief references to the work-related injuries sustained on October 16, 1985, and August 5, 1986, the State Board concluded that claimant's work search efforts were too narrow to establish entitlement to total incapacity benefits. The State Board nevertheless concluded that claimant is 50 percent incapacitated as a result of his February 14, 1991, left knee injury, and thus ordered employer to reimburse Liberty Mutual for the benefits it paid claimant, based on a 50 percent incapacity, from September 7, 1991, to March 15, 1993, and then to pay claimant, on a continuing basis thereafter.

We reverse the administrative law judge's finding that the claims under the Act are barred by the doctrine of collateral estoppel. As discussed above, the State Board's decision addressed and resolved the issue of claimant's entitlement to benefits with regard to only two of his work-related injuries, *i.e.*, the back injury sustained on May 3, 1984, and the left knee injury sustained on February 14, 1991. The State Board did not consider many of the issues presented by claimant before the administrative law judge in his claims under the Act, *i.e.*, that claimant suffered work-related carpal tunnel syndrome that became manifest in 1993, and that claimant is totally disabled as a result of the cumulative effect of his work-related injuries including those sustained on October 16, 1985, August 5, 1986, and December 3, 1990. Thus, as collateral estoppel only applies to issues actually litigated and the issues in the two proceedings are not identical, it can not bar those claims or issues that were not addressed by the State Board. See *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995); *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995); *Kollias v. D&G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT)(2^d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995).

Furthermore, issue preclusion also is inapplicable to the disability issues in the two claims which were addressed by the State Board, as there are material differences in the burdens of proof. In *Plourde*, 34 BRBS 45, the Board reversed the administrative law judge's finding that collateral estoppel precludes claimant from litigating the issue of the extent of his disability under the Longshore Act after having brought a claim under Maine

law, as the allocations of the burdens of production and proof differ materially under the two statutes. Specifically, the Board observed that employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act,⁴ and that claimant bore a higher burden of establishing his inability to perform any work under state law than that required under the Longshore Act.⁵ The Board thus held that the issue of extent of disability is a mixed question of law and fact to which collateral estoppel effect is not given due to differing burdens of proof. *Plourde*, 34 BRBS at 47-49. In the instant case, the State Board determined that claimant was not entitled to total disability benefits based on the work-related injuries sustained on May 3, 1984, and February 14, 1991, because his "work search efforts have been too narrow." Emp. Ex. 4 at 15. Under the Longshore Act, claimant's initial burden involves establishing only his inability to perform his usual work; the burden then shifts to employer to establish suitable alternate employment. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). Because of the differing burdens, the finding of the State Board limiting claimant to an award for 50 percent incapacity cannot be subject to the doctrine of collateral estoppel.⁶ *Plourde*, 34 BRBS at 49. Accordingly, because of the

⁴With regard to the issue of total disability, the employer's initial burden under the state act, that of coming forward with nothing more than medical evidence evincing an ability to work, is significantly lighter than that required under the Longshore Act, which requires employer to establish the availability of suitable alternate employment by providing evidence of realistically available positions, either at its facility or on the open market, that claimant can perform given his age, education, vocational background and physical restrictions. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434, 24 BRBS 202, 208(CRT) (1st Cir. 1991); *see Plourde*, 34 BRBS at 48.

⁵Under Maine law, once employer establishes claimant's physical capacity to work, claimant must show that work is unavailable to him within his restrictions in order to retain total disability benefits or to obtain a larger partial disability award. Although a claimant under the Longshore Act bears a complementary burden of establishing reasonable diligence in attempting to secure alternate employment, *see CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986), this burden does not arise until employer has established the availability of suitable alternate employment. *See Plourde* 34 BRBS at 48.

⁶For the reasons stated in *Plourde*, 34 BRBS at 48-49, we hold that the instant case is distinguishable from *Acord*. We note, however, that while the doctrine of collateral estoppel does not bar all benefits in these claims, it would apply to any findings of fact made by the state Board which are common to the claims filed under the Maine Act and the Longshore Act and which were fully litigated and necessary to the judgment in the prior proceeding.

differing burdens of proof under the two acts, collateral estoppel effect is not due the decision of the State Board that claimant is not totally disabled. Thus, the administrative law judge's finding that collateral estoppel bars claimant's claims for benefits under the Act is reversed.⁷

For the reasons expressed below, the case is remanded to the administrative law judge for further consideration.

For instance, collateral estoppel would apply to the State Board's determination that claimant's complaints of low back pain are not related to his May 3, 1984, work injury as the ultimate burden of proof on causation under the state act and the Longshore Act is the same, *i.e.*, claimant has the ultimate burden to establish causation. *See Acord*, 125 F.3d 18, 31 BRBS 109(CRT).

⁷We observe, moreover, that if applicable, collateral estoppel would not preclude claimant's entitlement to all disability benefits under the Act, as the administrative law judge found, but would require the administrative law judge to conclude that claimant's 1991 knee injury was partially disabling in accord with the State Board's finding.

Carrier contends in its response brief that the administrative law judge's denial of claimant's claim can be affirmed on the alternative ground that the claims based upon the 1984, 1985, and 1986 injuries are, in contrast to the administrative law judge's determination, barred by Section 13, 33 U.S.C. §913.⁸ As this argument supports the result below, we will address it, even though it is raised in a response brief. *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Hansen v. Director, OWCP*, 984 F.3d 364, 17 BLR 2-48 (10th Cir. 1993); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); *see Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283, *modifying in pert. part on recon.* 32 BRBS 118 (1998); 20 C.F.R. §802.212(b). Section 13(a) of the Act provides that the right to compensation for disability under the Act is barred unless a claim is filed within one year of claimant's awareness of the relationship between his injury and his employment. The time limit in this provision is imposed in order to insure fairness to employers by preventing the revival of stale claims in cases in which evidence has been lost, memories have faded, and witnesses have disappeared. *See Belton v. Traynor*, 381 F.2d 82 (4th Cir. 1967). However, where an employer has voluntarily paid compensation, Section 13(a) provides that such payments toll the running of the statute of limitations. In such a case, the employer is fully aware of claimant's injured condition and the concern about stale claims is absent. *See generally Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). The Board has specifically held that voluntary payments made by employer under a state workers' compensation act constitute payment of benefits under Section 13(a) so as to toll the one year statute of limitations. *Id.*; *see also Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1978)(Smith, S., dissenting).

In the instant case, the claim for the back injury sustained on May 3, 1984, filed on December 20, 1993, Cl. Ex. 24, is timely as claimant filed his claim for this injury under the Act within one year of the last payment of compensation by carrier. *See, e.g., Smith*, 21 BRBS 83. Specifically, while carrier initially stopped paying benefits for the May 3, 1984, work injury on June 3, 1984, it voluntarily resumed the payment of state benefits for this injury on September 7, 1991, and continued to make such payments until the issuance of the State Board's decision on March 15, 1993. Claimant's claim for the May 3, 1984, injury was filed on December 20, 1993, within the one-year time limit. Carrier cites *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988), for the proposition that voluntary payments made under the state act after the statutory period contained in Section 13 has expired do not revive the claim for statute of limitations purposes. In that case, the injury occurred on April 5, 1977, and payments were made until July 1979. Thus, the statute of limitations expired

⁸We note that carrier raised this issue before the administrative law judge. *See* 33 U.S.C. §913(b)(1). Its argument is focused on these particular dates of injuries as they occurred during the time that Liberty Mutual was the carrier on the risk.

one year from that date. The claimant thereafter filed federal and state claims on October 22, 1980, and later received a lump sum payment pursuant to a state award on July 12, 1982. The Board held that the fact that claimant received state benefits almost two years after the federal claim was filed did not toll the time for filing. In so finding, the Board distinguished the case from *Smith*, 21 BRBS 83, and *Saylor*, 9 BRBS 561, as in those cases, like the one herein, the claim was filed while benefit payments were ongoing or within one year of the last payment. Moreover, we note that the subsequent state payment in *Colburn* was due to an award, and was not a voluntary payment. Carrier's contention is therefore rejected, and we hold that the claim for the May 3, 1984 back injury was timely filed.⁹

Carrier's contentions, however, regarding the timeliness of the claims for the injuries sustained on October 16, 1985, and August 4, 1986, have merit. In addressing the issues presented by Sections 12 and 13, the administrative law judge did not separately discuss the distinct work-related injuries claimed by claimant but instead lumped all of them into one general finding. For instance, with regard to the injuries sustained on October 16, 1985, and August 4, 1986, the record establishes that claimant lost no time from work nor received any compensation, that employer did not receive notice of these injuries until December 27, 1993, and that claimant's claims for these injuries were not filed until February 26, 1994. Cl. Exs. 25. 26. The record also establishes that claimant stopped working as of September 7, 1991. HT at 12; Cl. Ex. 29; Emp. Ex. 1. With regard to the October 16, 1985 and August 4, 1986, injuries, carrier raised the timeliness of the notice of injury and the filing of these claims, yet with regard to Section 12 the administrative law judge stated only that "although employer did not receive written notice of the claimant's injury or occupational illness as

⁹Employer did not argue before the administrative law judge that the claim related to the February 14, 1991, work injury was not timely filed. See 33 U.S.C. §913(b)(1). Thus, we need not address the issue of whether the filing of a state claim tolls the one-year filing requirement of Section 13(a), pursuant to Section 13(d), 33 U.S.C. §913(d), as the two federal claims that were the subject of state claims were filed pursuant to Section 13(a). But see *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997); Cf. *Ingalls Shipbuilding Div. v. Hollinghead*, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978).

required by Sections 12(a) and (b), the claims are not barred because the employer had knowledge of the work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice.” Decision and Order at 17. Under Section 13, the administrative law judge concluded that all of the claims are timely as the state proceeding tolled the statute of limitations with regard to all seven of claimant’s claims. As discussed above, however, the state proceeding involved only injuries sustained on May 5, 1984, and February 14, 1991, and thus if Section 13(d) were applicable, *see* n.9, *supra*, the tolling provision would affect only the claims filed in those matters.

Thus, we must vacate the administrative law judge’s finding that the notices of injury and claims associated with the injuries sustained on October 16, 1985, and August 4, 1986, are timely and remand for further consideration of this issue.¹⁰ On remand, the administrative law judge must consider the timeliness of these claims in terms of the filing requirements of Sections 12 and 13.¹¹ He must determine claimant’s date of awareness of the relationship between his injury and his employment, *see Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 5863 (1st Cir. 1979), and determine the timeliness of the notices and claim with reference to this date, mindful of the fact that claimant is afforded a presumption pursuant to Section 20(b), 33 U.S.C. §920(b), that his notices and claims were timely filed. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *see also Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 77 (1992) (Dolder, J., dissenting).

Self-insured employer argues that if the Board holds that collateral estoppel is inapplicable to the case at hand, remand is in order as it proffered numerous arguments in addition to the legal issue concerning collateral estoppel, which were not specifically addressed by the administrative law judge. In support of its assertion, employer notes that the administrative law judge wrote in his decision that “[i]n view of the foregoing [collateral

¹⁰The timeliness of the claim for bilateral carpal tunnel syndrome, filed on August 18, 1993, was not challenged below. *See* 33 U.S.C. §913(b)(1). Moreover, self-insured employer did not raise in its response a challenge to the timeliness of the claim for the December 3, 1990 cervical injury. Thus, we will not address this issue, as employer did not preserve any affirmative defense in this regard.

¹¹In addition, self-insured employer raised below the validity of the claim filed with regard to the “multiple injuries” allegedly sustained on September 7, 1991, since, for among other reasons, it is unclear whether this is actually a separate claim or not. *See* Cl. Ex. 29. As employer suggests, there is no specific or gradual injury to any body part described, and the administrative law judge on remand should address employer’s contentions regarding the nature of this claim.

estoppel ruling], all other issues are moot and need not be resolved at this time, pending further instructions from the Board or First Circuit.” Decision and Order at 23. Despite this statement, the administrative law judge did, in fact, consider other issues relating to claimant’s allegation that he is entitled to permanent total disability benefits. In this regard, he summarily determined that claimant’s injuries are work-related as claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), and employer did not rebut the presumption. Claimant agrees that the case must be remanded for further findings regarding whether his disability is related to the work injuries. *See* Cl. Reply Brief at 4. Thus, we vacate the administrative law judge’s summary finding that causation is established, and we remand for further findings on this issue. *See* 33 U.S.C. §920(a); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT)(1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

Additionally, the administrative law judge concluded that claimant was totally disabled until March 17, 2000, the date of employer’s Labor Market Survey, but due to his finding on the collateral estoppel issue, he did not specifically address claimant’s entitlement to benefits in this case. As employer stated in its post-hearing brief, and as the administrative law judge stated in his decision, claimant returned to light-duty part-time work as a parking lot attendant for employer on July 21, 1999, and continued in that employment at least up until the time of the hearing. The administrative law judge, however, did not address whether this position constitutes suitable alternate employment, and thus, whether claimant was entitled to an award of only partial disability benefits from that time. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Furthermore, the administrative law judge did not discuss the significance, if any, of the fact that several of claimant’s injuries, in particular the August 4, 1986, right knee injury, the February 14, 1991, left knee injury, and the August 18, 1993, bilateral carpal tunnel syndrome injury, are to scheduled members and thus the implications presented by *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980).¹² Lastly, the administrative law judge did not resolve the pertinent responsible carrier issues relevant to the various injuries in this case.¹³ *See generally Foundation Constructors, Inc. v.*

¹²In *PEPCO*, 449 U.S. 268, 14 BRBS 363, the Supreme Court held that a claimant who is permanently partially disabled due to an injury to a member listed in the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), is limited to the recovery provided therein, and may not receive an award under Section 8(c)(21) for a loss in wage-earning capacity. *See also Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 32 BRBS 171(CRT)(1st Cir. 1998).

¹³We note that either carrier or self-insured employer will be entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for all payments claimant received for the same injury or disability under the state law. *See D’Errico v. General Dynamics Corp.*, 996 F.2d 503,

Director, OWCP, 950 F.2d 621, 25 BRBS 71(CRT)(9th Cir. 1991); *Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001).

In summary, we reverse the administrative law judge's finding that collateral estoppel bars consideration of claimant's claims, and we vacate the denial of benefits. On remand, the administrative law judge must separately address the timeliness of the notices of injury and claims for compensation for the October 16, 1985, and August 4, 1986, injuries. He must fully address whether there is a causal relationship between each of claimant's injuries, the disability resulting therefrom, and the employment alleged as a cause in light of the Section 20(a) presumption, and render specific findings regarding the extent of claimant's disability from each injury. He also must determine which carrier, *i.e.*, self-insured employer and/or Liberty Mutual, is responsible for the payment of any benefits awarded.

27 BRBS 24(CRT) (1st Cir. 1993).

Accordingly, the administrative law judge's finding that the collateral estoppel doctrine bars claimant's entitlement to benefits under the Act is reversed. The denial of benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge