BRB No. 03-0826

SCOTT D. MATZDORFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: Sept. 3, 2004
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Peter A. Clarkin (McKenney, Jeffrey & Quigley), Providence, Rhode Island, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-1015) of Administrative Law Judge Richard T. Stansell-Gamm awarding benefits 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 worked for employer as a grinder and carpenter, beginning in 1977. On October 18, 1984, claimant suffered a work-related fall down some stairs, injuring his back and neck. Employer's records reflect that claimant visited its clinic the next day, received physical therapy for a week, and, after about a month of light-duty work, returned to his usual employment as a grinder. In 1986, claimant permanently left his job with employer to work as a meat cutter at Universal Food Store, a position he held until March 31, 2001, when he resigned after unsuccessful surgery on his neck and in

anticipation of additional surgery. Thereafter, claimant filed a claim for benefits under the Act, alleging that his current disabling condition is related to his 1984 fall at work.

In his Decision and Order, the administrative law judge initially found that claimant's claim was timely filed under Section 13 of the Act, 33 U.S.C. §913. Next, the administrative law judge found that claimant submitted sufficient evidence to invoke the Section 20(a) presumption relating his condition to his 1984 work injury. 33 U.S.C. §920(a). The administrative law judge found that employer rebutted the presumption, and, upon weighing the evidence as a whole, the administrative law judge credited the opinion of Dr. Cherniack, as corroborated by the opinions of Drs. Abramovitz and Kwiatkowski, that claimant's current neck condition is causally related to claimant's 1984 injury. The administrative law judge found that claimant established his *prima facie* case of total disability, that employer did not present any evidence of suitable alternate employment, and that claimant's condition remains temporary. Thus, the administrative law judge awarded claimant continuing temporary total disability benefits from April 1, 2001. The administrative law judge relied on claimant's average weekly wage of $272.55 at the time of his October 18, 1984, injury, rejecting claimant's contention that he should use claimant's average weekly wage as of 2001, when claimant became disabled. In rejecting claimant's contention in this regard, the administrative law judge relied on the decisions in *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997), *Director, OWCP v. General Dynamics Corp. [Morales],* 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985), and *McKnight v. Carolina Shipping Co.,* 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

On appeal, claimant's challenges only the administrative law judge's reliance on his 1984 average weekly wage. Specifically, claimant contends that since his disability in this case was latent, it is appropriate to rely on his average weekly wage as of 2001, which is $613, when his disability due to the 1984 injury became manifest. Employer responds, urging affirmance of the administrative law judge's use of claimant's 1984 average weekly wage.

Section 10 of the Act provides: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee at *the time of the injury* shall be taken as the basis upon which to compute compensation . . . ." 33 U.S.C. §910 (emphasis added). Section 10(i) of the Act provides the exception to this rule, stating that in the case of an occupational disease that does not immediately result in disability, the "time of injury" for average weekly wage purposes is "deemed" to be the time the claimant becomes aware or should have been aware of the relationship between his employment, the disease, and his disability. 33 U.S.C. §910(i); *see, e.g., Leathers v. Bath Iron Works Corp.,* 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998). The United States Court of Appeals for the Ninth Circuit has held that, in a case involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the permanent disability

becomes manifest, rather than at the time of the accident. *Johnson v. Director, OWCP,* 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The Ninth Circuit reasoned that latent traumatic injuries are similar to occupational diseases, as the effect of the injury or disease is not known until a disability becomes manifest. Thus, the court held that claimant Johnson was not "injured" until several years after her accident when her disability became manifest, and the court used this later date for purposes of determining her average weekly wage. *Johnson*, 911 F.2d at 250, 24 BRBS at 5-7(CRT), citing *Todd Shipyards Corp. v. Black,* 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) (in a pre-1984 Act case, the court held in an occupational disease case that claimant is not "injured" until the disease manifests itself); *cf. Port of Portland v. Director, OWCP,* 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000) (holding *Johnson* is not applicable when the claimant's injury was immediately partially disabling; natural progression to total disability does not affect "time of injury" for average weekly wage purposes); *see also Deweert v. Stevedoring Services of America,* 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). Claimant relies on *Johnson* in support of his contention on appeal.

In contrast, in *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997), the United States Court of Appeals for the Fifth Circuit disagreed with the approach of the Ninth Circuit. In *LeBlanc*, the claimant sustained an injury in 1987 after which he missed several months of work before returning to his usual work. Several years later, in 1992, he became unable to perform his usual work due to his injury. The court rejected use of the date of the manifestation of the full disability as the time for determining the claimant's average weekly wage, stating that such an analysis is statutorily limited to instances involving occupational diseases, pursuant to Section 10(i). *LeBlanc*, 130 F.3d at 161-162, 31 BRBS at 198(CRT). The court noted that in enacting Section 10(i) in 1984, Congress specifically defined a different "time of injury" for occupational diseases, but did not change the approach to "time of injury" in traumatic injury cases. *Id*. Rather, the court held that in a traumatic injury case, the "plain meaning of the statute accords with common sense: the time of injury means the time of the event causing the injury." *Id.*, 130 F.3d at 161, 31 BRBS at 198(CRT). Thus, the court rejected the manifestation approach taken by the Ninth Circuit in *Johnson*. *Id.*

The Board addressed this conflicting case law in *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998), a case arising in the Fourth Circuit. In *McKnight*, claimant sustained a knee injury in 1984, and employer voluntarily paid claimant temporary total disability benefits for this injury. In 1989, claimant discovered after arthroscopic surgery to his left knee that he had a torn medial meniscus, early degenerative joint disease, and mild chronic synovitis. The administrative law judge found that claimant's 1989 surgery and resulting partial disability were related to the 1984 knee injury. Claimant contended that as the full extent of his 1984 injury was

not manifest until 1989, his benefits should be calculated based on his 1989 average weekly wage, and the administrative law judge agreed.

The Board held that in view of Section 10(i)'s "deeming" the time of injury to be the date of manifestation in the case of an occupational disease that does not immediately result in disability or death, the better interpretation of "time of injury" in traumatic injury cases is the time when the accident causing injury occurred. *McKnight,* 32 BRBS at 172-173. Thus, the Board explicitly agreed with the reasoning of the *LeBlanc* court.[1] The Board modified the administrative law judge's decision to reflect that claimant's benefits must be based upon his 1984 average weekly wage.

This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit, which, as claimant suggests, has not directly addressed the issue of average weekly wage in the case of a truly latent traumatic injury. Nonetheless, the court has spoken on the issue of the appropriate average weekly wage for use when there are two distinct periods of disability arising from one accidental injury. In *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2[d] Cir. 1985), the claimant sustained a knee injury in 1970, underwent surgery, and returned to work. Employer paid benefits for a permanent partial disability under the schedule. In 1979, doctors discovered post-traumatic arthritis in the claimant's knee which was attributed to the 1970 injury and which increased his disability. The administrative law judge found that the claimant had a "latent injury," and that therefore claimant's average weekly wage should be calculated on the same basis as if it were an occupational disease, *i.e.,* at the time the disability became manifest in 1979. The Board affirmed. *Morales v. General Dynamics Corp.,* 16 BRBS 293 (1984).

The Second Circuit rejected this approach, first holding that claimant's injury was not an occupational disease but that his "increased arthritic disability [fits] squarely within the statutory definition of accidental injury" of Section 2(2) of the Act.[2] *Morales*,

---

[1] The Board stated that it would follow the *Johnson* decision only in the Ninth Circuit, where it is controlling precedent. *McKnight*, 32 BRBS at 173.

[2] Section 2(2) of the Act states:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2).

769 F.2d at 68, 17 BRBS at 134(CRT). The court also held that there was no evidence of a second aggravating injury. The court therefore concluded that the average weekly wage for claimant's additional scheduled permanent partial disability had to be based on claimant's 1970 wages. The court stated,

> Based on the findings that were made, Morales' additional 10% of disability had its origin solely in his 1970 injury. The existence vel non of this cause-and-effect relationship is not determined by whether Morales was "aware" of it, awareness being a factor introduced by Congress solely to extend the limitation period for the filing of claims. *See Stancil v. Massey*, 436 F.2d 274, 276-79 (D.C. Cir. 1970). Congress has provided that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." 33 U.S.C. §910. This provision is mandatory, *see Belton v. Traynor*, 381 F.2d 82, 85 (4th Cir. 1967); it should not be amended by administrative decision, *see Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 449 U.S. 268, 101 S.Ct. 509, 66 L.Ed. 446 (1980).

Morales, 769 F.2d at 68, 17 BRBS at 134(CRT).

Although, as claimant contends, the injury in *Morales* was not truly latent in that the claimant had had an earlier period of permanent partial disability, the Second Circuit nevertheless quite clearly articulated that, in the case of accidental injury as here, the statute contemplates that average weekly wage is calculated as of the time of that accidental injury.[3] *Id.* Moreover, the court also addressed the contention raised by claimant on appeal that the "time of injury" should be the same for purposes of both Section 13 and Section 10. *Id.* Section 13 specifically contains an "awareness" component for all injuries, *see* 33 U.S.C. §913(a), (b)(2), whereas only Section 10(i) adopts this approach for purposes of average weekly wage in occupational disease cases. Based on the language of the statute and the controlling law, we hold that the administrative law judge properly relied on claimant's 1984 average weekly wage to calculate the benefits due for claimant's 2001 disability. *Morales*, 769 F.2d at 68, 17 BRBS at 134(CRT); *McKnight,* 32 BRBS at 173. Therefore, as it is in accordance with applicable law, we affirm the administrative law judge's use of claimant's 1984 average weekly wage. Consequently, we affirm the administrative law judge's award of

[3] We assume, without deciding, that the administrative law judge rationally found that claimant's injury in this case resulted in the latent disability. It appears that claimant worked in a light-duty capacity for a short period immediately following his injury. We need not consider the significance, if any, of this fact given our disposition of this case.

continuing temporary total disability benefits based on an average weekly wage of $272.55.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge