

BRB Nos. 90-1720
and 90-1720A

CHARLES B. HIRD, JR.)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 BATH IRON WORKS)
 CORPORATION)
)
 and)
)
 COMMERCIAL UNION INSURANCE) DATE ISSUED: _____
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Stephen Hessert and Michelle Jodoin LaFond (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits (88-LHC-2349) of Administrative Law Judge Martin J. Dolan, Jr., 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 which 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, a maintenance mechanic for employer, was injured on December 28, 1977, while attaching a new dry dock to the pier. Claimant testified that as he was reaching down to pick up a steel I-beam frame, he felt a sharp pain in his low back and legs. He was referred by the yard hospital to Dr. Giustra, who recommended physical therapy and cortisone injections. When this treatment proved ineffective, claimant consulted with Dr. Swengel, a neurologist, who diagnosed an acute lumbosacral strain. In May 1978, Dr. Swengel performed two facet rhizotomies intended to relieve claimant's pain. Although claimant missed several days of work when the rhizotomies were performed, his condition improved after the second procedure, and he was able to return to his job as a maintenance mechanic. Tr. at 32-33. Claimant was treated for minor back problems in November 1979 and October 1981 in employer's first-aid department, which caused him to lose a short time from work. Tr. at 34-35. In 1980, claimant was promoted to the salaried position of leadman.

On March 16, 1982, claimant experienced a sharp pain in his low back and legs and was unable to move after bending over to pick up a small piece of wood at home. His family doctor referred him to Dr. Mehalic, a neurosurgeon, who diagnosed a herniated nucleus pulposus. Dr. Mehalic subsequently performed four surgical procedures in 1982 for excision of the herniated disc and for ensuing complications. Claimant returned to work, but continued to suffer from dull pain in his back and numbness on the inside of both calves and feet. Claimant worked until August 13, 1984, when his pain and numbness became too severe for him to continue and Dr. Mehalic advised claimant not to return to work. Employer voluntarily paid claimant temporary total disability compensation under the Longshore Act from May 20, 1978, until August 15, 1978. Claimant filed a claim for compensation under the Longshore Act on July 14, 1982, and under the Maine Workers' Compensation Act on September 8, 1982. Although claimant was initially awarded benefits under the Maine Act, the award was reversed on appeal on the basis that the claim was untimely.¹ *Hird v.*

¹Claimant was awarded benefits on March 2, 1983 by the hearing commissioner on the ground that although claimant had not filed a claim within two years of injury, as required under Maine law, employer was estopped from raising the statute of limitations defense because claimant was lulled into a false sense of security and was mistaken about the nature of his injury, because he was not aware that it was compensable under the Maine Workers' Compensation Act. On November 19, 1985, the Appellate Division reversed the award, stating that the claim was barred by the statute of limitations and the Maine Supreme Judicial Court upheld the reversal. *Hird v. Bath Iron Works Corp.*, 512 A.2d 1035 (Me. 1986).

Bath Iron Works Corp., 512 A.2d 1035 (Me. 1986). By Order dated September 18, 1989, the Maine Workers' Compensation Commission ordered claimant to repay \$36,000 in state disability compensation, but not \$40,000 in medical benefits, he had received. Claimant has appealed the order to repay the disability benefits.

In a Decision and Order dated May 29, 1990, the administrative law judge initially rejected employer's argument that relitigation of the statute of limitations question is barred pursuant to the doctrines of collateral estoppel and full faith and credit by the Maine Supreme Judicial Court's determination that claimant's claim is untimely. Finding the July 14, 1982, Longshore Act claim timely filed, the administrative law judge awarded claimant additional temporary total disability benefits for various periods and permanent total disability compensation commencing July 17, 1984. He further found that although claimant was not entitled to reimbursement of his past medical expenses because he failed to seek authorization prior to obtaining treatment, he was entitled to future medical benefits. 33 U.S.C. §907. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's denial of reimbursement of his past medical expenses, arguing that since employer paid claimant's medical bills under the state act from 1977 until 1985, it is obvious that he requested authorization. In the alternative, claimant contends that because employer refused to provide further medical benefits after the state award was overturned on appeal, he was relieved of the obligation of having to obtain prior authorization from employer for medical care under the Longshore Act. Claimant also contends that the administrative law judge should be instructed on remand to modify his decision to reflect that claimant is subject to a state order requiring him to repay disability compensation, as employer was awarded a credit for the compensation benefits claimant received under the Maine Act. Employer responds, urging that the denial of reimbursement of past medical expenses be affirmed and that the Decision and Order not be modified to reflect the state order to repay, arguing that doing so would be premature, given that the order is currently on appeal.

On cross-appeal, employer reiterates the collateral estoppel and full faith and credit arguments it made below. In the alternative, employer asserts that the administrative law judge erred in finding that the July 14, 1982, claim was timely filed. Claimant responds, urging that the administrative law judge's finding regarding the timeliness of the claim be affirmed.

Claimant initially argues on appeal that the administrative law judge erred in determining that he is not entitled to past medical expenses because he did not seek employer's prior authorization for treatment. Inasmuch as a claim for medical benefits is never time-barred, we need not resolve the collateral estoppel argument raised by employer regarding the timeliness of the claim prior to considering claimant's argument. *See Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Section 7(d), 33 U.S.C. §907(d)(1988), requires that an employee request employer's prior authorization for the medical services performed by any physician, including claimant's initial free

choice.² See *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). If claimant's request for authorization is refused by employer, claimant may still establish entitlement to medical treatment at employer's expense if he establishes that the treatment he subsequently procured on his own initiative was necessary for treatment of the injury. See generally *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Claimant avers that the administrative law judge's summary conclusion that the evidence indicates claimant did not request prior authorization for medical treatment under the Longshore Act from either employer or the district director does not comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), because the administrative law judge failed to explain the basis for his finding. We reject this contention as claimant introduced no documentary or testimonial evidence that a request for authorization was made, and it therefore was not possible for the administrative law judge to make more detailed findings. Claimant also asserts that the administrative law judge's finding ignores the fact that employer paid benefits both voluntarily and pursuant to the state award from 1977 until 1985. Although claimant maintains that since employer paid medical benefits, it is obvious that he had requested treatment, neither employer's voluntary payment of medicals benefits nor its payment of benefits pursuant to the state award mandates a finding, in the absence of affirmative evidence, that claimant requested prior authorization for medical treatment under the Longshore Act.

Claimant alternatively argues that he was released from the obligation of obtaining employer's prior authorization because in 1985, subsequent to the Maine Compensation Commission Appellate Division's decision overturning the state award, employer refused further payment of medical benefits under the state act. As this argument, which was raised below but not addressed by the administrative law judge, requires fact-finding outside the Board's scope of review, we vacate the denial of past medical benefits and remand the case for the administrative law judge to consider this issue *de novo*.³ See generally *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C.

²Section 7(d)(1), 33 U.S.C. §907(d)(1)(1988), provides:

An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless --

- (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
- (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

³We note that employer does not dispute the administrative law judge's finding that claimant is entitled to future medical benefits provided he complies with Section 7.

Cir. 1994); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

We now direct our attention to employer's contention on cross-appeal that the administrative law judge erred in failing to find that the claim is time-barred under the doctrine of collateral estoppel. Specifically, employer argues that the administrative law judge erred by not according full faith and credit to the Maine Supreme Judicial Court's finding that claimant's state claim was time-barred.⁴

Employer correctly asserts that factual findings of a state court or administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980); *Formoso v. Tracor Marine, Inc.*, BRBS _____, BRB No. 92-1493 (Aug. 17, 1995); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). Collateral estoppel effect can be given to such findings only if the legal standards in the two jurisdictions are the same. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1978); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). In rejecting application of the doctrine of collateral estoppel, the administrative law judge in the present case determined that the standard applicable under the Maine Act differed from and was more stringent than that under the Longshore Act. The administrative law judge noted that while an employee seeking an award under the Maine Act has the burden of proof by a preponderance of the competent and probative evidence on all essential elements of his claim, a claim is presumed timely under the Longshore Act in the absence of evidence to the contrary pursuant to 33 U.S.C. §920(b). Decision and Order at 6-7.

Employer contends that the administrative law judge's finding that the applicable Maine standard is more stringent is in error because both acts require liberal construction in favor of the employee and the Maine Act allows the employee two years from the last voluntary payment in which to file a claim whereas only one year is allowed under the Longshore Act. *See* 33 U.S.C. §913(a), (b)(2). We disagree that the administrative law judge erred. The Maine statute in effect at the time of claimant's injury provided that a claim must be filed within two years after the date of injury or within two years of the last voluntary payment of compensation. The statute provided two excuses for delay in filing a claim: 1) physical or mental incapacity; or 2) mistake of fact as to the cause and nature of the injury. 39 M.R.S.A. §95 (1978), *amended by* P.L. 1983, Ch. 46; *Hird*, 512 A.2d at 1036-1037. Although the "mistake of fact" provision of the Maine Act, encompasses "those situations where the *injury* is latent or its relation to the accident unperceived," *Hird*, 512 A.2d at 1038, quoting *Pino v. Maplewood Packing Co.*, 375 A.2d 537 (Me. 1977), the statute of limitations under the Longshore Act also is tolled under these conditions, *see, e.g., Gregory v. Southeastern*

⁴Although employer cites the doctrine of full faith and credit, this doctrine does not apply to judicial findings but to judgments. *See Durfee v. Duke*, 375 U.S. 106, 109-111 (1963); *Formoso v. Tracor Marine, Inc.*, BRBS _____, BRB No. 92-1493 (Aug. 17, 1995), slip op. at 4 n.3. Employer's argument on appeal rests on acceptance of the Maine Supreme Judicial Court's finding that the state claim was not timely filed.

Maritime Co., 25 BRBS 188 (1991) (misdiagnosis or incorrect prognosis will toll statute of limitations), and additionally, until such time that the claimant is reasonably aware that his injury would impair his earning capacity.⁵ See *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (CRT) (1st Cir. 1977); see also *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). Moreover, as was noted by the administrative law judge, pursuant to Section 20(b) of the Longshore Act, 33 U.S.C. §920(b), a claim is presumed timely in the absence of substantial evidence to the contrary. See generally *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Finally, the fact that the Maine Act provides an employee with two years from the last voluntary payment of compensation in which to file a claim whereas only one year is provided under the Longshore Act is not determinative, because the Board has specifically held that the Section 13(a) requirement that claimant file a claim within one year of the last voluntary payment does not supersede the provision that claimant must be aware of the full extent of the harm done by the injury.⁶ *Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT)(2d Cir. 1985); see also *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). The administrative law judge thus reasonably concluded that the standards under the Maine Act differed from those applicable under the Longshore Act. Accordingly, his determination that he was not required to afford collateral estoppel effect to the state tribunal's findings regarding the timeliness of claim is affirmed. See, e.g., *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987).

Employer further avers that even if the doctrines of collateral estoppel and full faith and credit do not apply, the administrative law judge erred in concluding that claimant did not become aware of his injury for purposes of commencing the Section 13 statute of limitations until March 1982. Employer contends that inasmuch as claimant testified at the hearing before the State Workers' Compensation Commission that he had experienced intermittent ongoing lower back problems since the December 1977 accident and provided a five-year history of lower back discomfort dating back to his 1977 accident when he came under Dr. Mehalic's care in March of 1982, he was aware or should have been aware of the connection between his work-related injury and his disability in 1978. Accordingly, employer maintains that the administrative law judge should have found the July 14, 1982, claim time-barred.

Section 13(a) of the Act applies in cases involving traumatic injuries and requires that a claimant file a claim for benefits within one year of the time he becomes aware, or with the exercise

⁵Claimant argued in state court that the time for filing a state claim should be tolled because his belief that the Longshore Act was his exclusive remedy constituted a "mistake in fact." The court rejected this contention, stating that claimant "was completely aware that his injury on December 28, 1977 was related to his work at BIW and was thus not laboring under a mistake of fact as to the 'cause and nature of the injury' within the meaning of" the state act. *Hird*, 512 A.2d at 1038.

⁶Employer's argument that where, as here, voluntary payments are made, the claim must be filed within one year of the date of the last payment without regard to claimant's awareness is thus rejected.

of reasonable diligence should have been aware, of the relationship between his injury and employment. 33 U.S.C. §913(a). As was recognized by the administrative law judge in this case, claimant is not "aware" for Section 13 purposes until he knows or has reason to know that he has sustained a permanent injury which is likely to impair his wage-earning capacity. *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Brown v. I.T.T./ Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT) (5th Cir. 1984). *See also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979).

After considering the record evidence, the administrative law judge in the present case rationally determined that since claimant's injury was initially diagnosed as an acute lumbosacral strain, he was able to return to his regular job duties after the rhizotomy surgeries and was promoted to leadman, and no doctor diagnosed a serious medical condition related to the work injury at any time prior to Dr. Mehalic's diagnosis of a herniated disc on March 16, 1982, claimant had no reason to believe that he had any condition which would adversely effect his wage-earning capacity prior to that time. Because the administrative law judge's finding that claimant was not aware that his injury would impair his earning capacity until March 1982, is rational, supported by substantial evidence, and in accordance with applicable law, both this finding, and the administrative law judge's finding that the July 14, 1982 claim is timely, are affirmed.⁷ *See Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10, 14 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).⁸

In light of our affirmance of the administrative law judge's finding that the claim was timely, we must entertain an additional argument raised in claimant's appeal. Claimant contends that because he is subject to a state order requiring him to repay the disability compensation he previously received under the state act, and employer was awarded a credit for the compensation benefits claimant previously received, the administrative law judge's decision should be modified to

⁷Employer also argues that it rebutted the Section 20(b), 33 U.S.C. §920(b), presumption that the claim was timely filed. Although the administrative law judge did not specifically address Section 20(b) rebuttal, this is harmless error, as he ultimately concluded that the claim was timely under Section 13 of the Act, 33 U.S.C. §913, after considering the totality of the record evidence. *See generally Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983) (same reasoning applied where administrative law judge failed to apply 33 U.S.C. §920(a) presumption).

⁸Because we affirm the administrative law judge's awareness analysis, we need not address claimant's alternate assertions that the claim was timely because it was filed within one year of employer's last voluntary payment in 1985 and within one year of the termination of the state proceedings.

reflect that employer's Section 3(e), 33 U.S.C. §903(e)(1988), credit does not include any state disability benefits he is required to repay. We agree that allowing employer a Section 3(e) credit for state benefits claimant is required to repay would result in a windfall for employer. Section 3(e) provides a credit to employer for "any amounts paid to an employee for the same injury or disability" pursuant to any other workers' compensation law. If claimant is required to repay the state benefits, these benefits are no longer "amounts paid to [the] employee," and employer is not entitled to a credit for these amounts. *See generally McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 994 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993). We therefore modify the administrative law judge's decision to clarify that employer's Section 3(e) credit does not include any state disability benefits which claimant is ultimately required to repay. We reject employer's assertion that consideration of this argument is premature because claimant's appeal of the Order to Repay is pending, as our resolution of this issue at this time does not prejudice employer's Section 3(e) credit in any way.

Accordingly, the administrative law judge's denial of claimant's claim for reimbursement of past medical expenses is vacated, and the case is remanded for further consideration of this issue consistent with this opinion. The administrative law judge's decision is modified to reflect that employer's Section 3(e) credit does not include any state disability benefits which claimant is required to repay. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge