BRB No. 96-0535

RAYMOND J. COURY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHWEST MARINE INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

David A. Hytowitz (Pozzi, Wilson & Atchison), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-3080, 93-LHC-3081) of Administrative Law Judge Robert G. Mahony 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 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, who worked for employer for over 30 years in various capacities, sustained a cervical sprain when he hit his head on a beam while inspecting a ship on May 11, 1991. On October 26, 1991, claimant sustained another work-related injury to the great toe of his left foot. Tr. at 65. Claimant continued to work at his usual job following both injuries and lost no time from work until he was laid off when employer closed its shipyard on October 30, 1992. Emp. Ex. 2 at 7; Tr. at 68. At that time, claimant alleges that he attempted to secure other work but was precluded from accepting a number of jobs that demanded a great deal of physical activity because of the effects of

his work-related injuries. At the time of hearing claimant was employed as a supervisor for a barge painting project earning $3,700 per month. On December 1, 1992, claimant filed separate claims under the Act for his neck and foot injuries, seeking permanent partial disability compensation based on a loss in his wage-earning capacity.

The administrative law judge found that the disability claims filed by claimant on December 1, 1992, are untimely. With respect to the May 11, 1991, neck injury, he determined that even though claimant had not lost any time from work due to this injury prior to November 1992, claimant should have been aware of the relationship between this injury and any compensable disability by May 28, 1991, at the latest, because in his First Report of Treatment, Form LS-1, filed on that date, Dr. Amato noted the injury and the possibility that it aggravated a preexisting degenerative condition. The administrative law judge further found that claimant knew of the work-related nature of his toe injury on October 26, 1991, the day it occurred, because he had stated on his Oregon State First Medical Report Form dated October 30, 1991, CX-12 at 72, that this condition was possibly due to kneeling for a long time. The administrative law judge found that this knowledge along with his failure to file his claim within one year of his October 26, 1991, toe injury was sufficient to rebut the Section 20(b), 33 U.S.C. §920(b), presumption. The administrative law judge also stated, based on his evaluation of the record as a whole, that there was no evidence which he credited that would suggest that harm was done to claimant of which he was unaware that would subsequently impair his earning power. Decision and Order at 19-20. Moreover, he found nothing in the record which would mandate tolling the Section 13 statute of limitations, noting that claimant was not lulled or otherwise uninformed as to the nature and extent of any alleged disability. *Id*. Inasmuch as neither claim was filed by claimant within one year of the date of awareness found by the administrative law judge, he concluded that both claims are untimely and denied benefits accordingly.

On appeal, claimant challenges the administrative law judge's finding that his claims were time-barred under Section 13(a). Claimant argues that he did not become fully aware of the full character, extent and impact of his neck injury until employer's plant closed in November 1992, when he tried unsuccessfully to get a new job. Claimant avers that he was not aware of any impairment of his wage-earning capacity prior to that time because he did not lose any time from work. In the alternative, claimant asserts that Dr. Amato's attending physician's form, Form LS-1, which formed the basis for the administrative law judge's finding that claimant's date of awareness occurred no later than May 28, 1991, is sufficient to establish a timely filed claim under Section 13(a). With regard to his left toe injury, claimant contends that he did not become aware of the full character, extent, and impact of the harm done to him due to this injury before he was examined by Dr. Amato on December 10, 1991. Claimant avers that prior to this date, Dr. McNeil, who had examined claimant on employer's behalf, did not provide a conclusive diagnosis; rather, he described claimant's x-rays as unremarkable and misdiagnosed claimant as having an acute inflammatory process of the left toe related to gout.

Employer responds, urging affirmance of the administrative law judge's findings that both claims are untimely. In addition, employer asserts that the Form LS-1 which Dr. Amato completed

on May 28, 1991, does not meet the filing requirements of Section 13(a) for claimant's neck injury. Claimant replies, reiterating the arguments previously made in his Petition for Review and characterizing employer's argument that Dr. Amato's Form LS-1 is insufficient to satisfy the filing requirements of Section 13(a), but is sufficient to confer claimant with the requisite awareness under Section 13(a), as circular and unreasonable.

Section 13(a) applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his injury and his employment. 33 U.S.C. §913(a). *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). In addition, the United States Courts of Appeals which have addressed the issue of "awareness" have uniformly held that the time for filing a claim under Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done to him as a result of the employment-related injury. *See 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); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Thus, 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. *See J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th 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). The Section 20(b), 33 U.S.C. §920(b), presumption applies to Section 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Initially, we agree with claimant that the administrative law judge erred in finding that Dr. Amato's attending physician's report, Form LS-1, filed on May 28, 1991, was sufficient to establish claimant's date of awareness under Section 13(a) for his May 11, 1991, cervical injury. In this report, Dr. Amato diagnosed claimant as having a cervical strain which had aggravated pre-existing degenerative disc disease and indicated that he would anticipate progression of the underlying condition and the possibility of future surgery. He also stated, however, that the permanent effects of claimant's injury were undetermined. Dr. Amato's opinion thus cannot establish that claimant was aware that his cervical injury had resulted in permanent impairment, a necessary prerequisite to commence the Section 13(a) statute of limitations. *See J.M. Martinac*, 900 F.2d at 180, 23 BRBS at 129-130 (CRT). The administrative law judge thus erred in concluding that Dr. Amato's May 28, 1991, report was sufficient to meet employer's burden of rebutting the Section 20(b) presumption that the claim was timely filed. *See Shaller*, 23 BRBS at 140.

Moreover, although Dr. Amato's May 28, 1991, attending physician's report may have been sufficient to make claimant aware that he sustained a work-related injury, claimant must also be aware of the full character, nature, and extent of the harm done to him before the Section 13(a)

statute of limitations commences running. In his May 28, 1991, report, Dr. Amato stated that claimant was released to return to work and had never missed work as a result of his cervical injury. Inasmuch as these statements indicate that as of May 28, 1991, claimant's cervical injury had not yet resulted in any disability, it was irrational for the administrative law judge to conclude based on this evidence that claimant was aware of an impairment in his earning capacity at this time. This determination is particularly puzzling given that the administrative law judge specifically found that claimant continued to work at his usual employment until employer's yard closed in November 1992, with no time lost from work because of his injuries. Inasmuch as there is no evidence of record which establishes that claimant was aware, or should have been aware, of the disabling impact of his work-related cervical injury at any time prior to the closing of employer's facility, we reverse the administrative law judge's findings that employer rebutted the Section 20(b) presumption based on Dr. Amato's May 28, 1991, report and hold that the claim filed on December 1, 1992, is timely as a matter of law.[1] *See Horton v. General Dynamics Corp.*, 20 BRBS 99, 102 (1987). The case is remanded for consideration of all remaining issues with regard to claimant's cervical injury claim.

We also agree with claimant that the administrative law judge erred in finding that claimant was aware of his work-related toe injury for purposes of commencing the Section 13(a) period as of October 26, 1991, on the basis that he had stated in his Oregon State First Medical Report form filed on October 30, 1991, that he had injured his left great toe and that this was possibly due to kneeling for a long period of time. Although claimant may have initially suspected that his toe injury was work-related, Dr. McNeil, who examined claimant on employer's behalf on October 31, 1991, described claimant's toe x-rays as unremarkable and attributed the acute inflammatory process he observed in claimant's left toe to gout. CX- 52 at 25. It was not until claimant saw Dr. Amato upon Dr. McNeil's referral on December 10, 1991, that blood tests were performed which conclusively ruled out gout as the cause of claimant's toe problems. Where, as here, claimant receives a misdiagnosis or incorrect prognosis which reasonably leads him to believe that his condition is not work-related or will not affect his wage-earning capacity, he is not "aware" for purposes of Section 13(a) until he secures a correct diagnosis. *See J.M. Martinac*, 900 F.2d at 184, 23 BRBS at 130 (CRT); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Inasmuch as claimant's toe injury was not correctly diagnosed as being related to his employment until he consulted with Dr. Amato on December 10, 1991, we agree with claimant that this diagnosis establishes the earliest date that claimant could be charged with awareness that his toe injury was work-related.[2] *See Abel*,

[1]Because we hold the claim timely as matter of law based on the fact that claimant did not become aware of the true nature and impact of his injury until November 1992, when employer closed its facility, we need not address claimant's alternative argument that Dr. Amato's attending physician's report constitutes a timely filed claim.

[2]We note that claimant did not lose time from work for this injury prior to November 1992, nor did he have an earlier permanent impairment rating. These facts could support a later date of awareness, but we need not address that issue as the claim is timely in any event.

932 F.2d at 822, 24 BRBS at 136 (CRT). We therefore vacate the awareness finding made by the administrative law judge and hold that the December 1, 1992, claim for claimant's left toe injury, which was filed within one year of Dr. Amato's December 10, 1991 diagnosis, is timely as a matter of law. Accordingly, the administrative law judge's finding that claimant's claim for his left toe injury was time-barred under Section 13(a) is reversed, and the case is remanded for consideration of all remaining issues relating to this claim.

Accordingly, the administrative law judge's Decision and Order denying claimant benefits is reversed and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge