SECTION 13 - TIMELY CLAIM

Introduction

The Act contains two timeliness provisions. Section 12 requires that claimant provide timely notice of injury or death, while Section 13 governs the timely filing of a claim for compensation. These time limitations are mandatory and jurisdictional in nature. *See, e.g., Director, OWCP v. Nat'l Van Lines Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975); *Young v. Hoage*, 90 F.2d 395 (D.C. Cir. 1937).

Section 13(a) states that, except as otherwise provided in this section, the right to compensation for disability or death shall be barred unless the claim is filed within one year after the injury or death. This time does not "begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." 33 U.S.C. §913(a). If voluntary payments have been made, a claim may be filed within one year of the last payment. Section 13(a) also states that the claim must be filed with the deputy commissioner in the compensation district in which the injury or death occurred.

The 1984 Amendments added Section 13(b)(2), which provides a separate statute of limitations for claims for death or disability due to an occupational disease which does not immediately result in death or disability. Such claims are "timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later." 33 U.S.C. §913(b)(2). Section 13(b)(2) was made applicable to claims pending on appeal on the date of enactment.

Section 13(b)(2) explicitly requires "awareness" of the relationship between the disease, employment and death or disability. Thus, in an occupational disease claim, the filing period does not begin to run until the employee is deceased or disabled, or in the case of a retired employee, until a permanent impairment exists. 20 C.F.R. §702.222(c). In traumatic injury cases, where the statute requires "awareness" of the relationship between the injury or death and employment, the courts have held that an employee is not aware of an "injury" until he is aware of work-related impairment resulting in a likely impairment of earning capacity. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. I.T.T./Cont'l 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). The determination of the date of "awareness" is discussed in detail, *infra.*

A separate claim must be filed for Section 9 death benefits by the survivor even though a claim for disability benefits was filed by the employee. *Almeida v. Gen. Dynamics Corp.*, 12 BRBS 901 (1980); *Stark v. Bethlehem Steel Corp.*, 6 BRBS 600 (1977). The Section 9 claim must also comply with Section 13. *Stark*, 6 BRBS 600. *See Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22, 25 n.2 (1983). Where a deceased employee's disability claim is pending at the time of death, his estate may pursue the pending claim without filing a new claim. *Id. See Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989).

As the Act contains a statutory limitation period for filing a claim under Section 13, the doctrine of laches does not apply. *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987). Moreover, a timely claim under Section 13(a) which is not closed by an order awarding or denying the claim remains open and pending until it is resolved. *Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Thus, a claimant need not take action to pursue a pending claim within one year of the last payment and may pursue entitlement to additional compensation without filing a request for modification under Section 22 at any time until an Order issues. *See Petit v. Elec. Boat Corp.*, 41 BRBS 7 (2007); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998); *Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991). *Cf. Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984) (in a case which did not cite *Intercounty* and was essentially overruled by subsequent decisions, the Board stated that, as a matter of policy, it would not allow an old claim to be reopened and litigated years after the last payment of compensation).

Where the employer fails to file a report of injury as required by Section 30(a), the Section 13 statute of limitations is tolled. 33 U.S.C. §930(a), (f). Section 30(f) states that where employer or carrier has notice or knowledge of an injury and fails to file the injury report required by Section 30(a), the Section 13 time period does not begin to run. *See* Section 30 of the desk book for a complete discussion; some representative cases are digested, *infra*.

Section 20(b) provides claimant with a presumption that his claim was timely filed. In order to rebut the presumption, employer must produce evidence that the claim was not filed within the required time after claimant's "awareness." *See Bath Iron Works Corp. v. U.S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp. Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only). Employer's burden under Section 20(b) includes establishing that it filed a first report of injury in compliance with Section 30 before it can prevail under Section 13. *See Blanding v. Director, OWCP*, 186

F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in pert. part* 32 BRBS 174 (1998); *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Nelson v. Stevens Shipping & Terminal Co*., 25 BRBS 277 (1992) (Dolder, J., dissenting); *Steed v. Container Stevedoring Co*., 25 BRBS 210 (1991); *Hartman v. Avondale Shipyard, Inc*., 23 BRBS 201, *vacated on other grounds on recon*., 24 BRBS 63 (1990). *See* Section 20(b) of the desk book for additional discussion of the presumption.

Medical benefits are not "compensation" under Section 13, and their payment thus cannot extend the statute of limitations. *Marshall v. Pletz*, 317 U.S. 383 (1943). As Section 13 provides a time limit for filing a claim for compensation, a claim for medical benefits is never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990); *Mayfield v. Atl. & Gulf Stevedores*, 16 BRBS 228 (1984). *See* Section 7 of the desk book.

The Fifth Circuit has held that the Section 12 and Section 13 time limitations do not begin to run against a previous employer where the employee timely filed against a later employer until the employee is aware that liability could be asserted against the earlier employer under the last employer doctrine. *Smith v. Aerojet Gen'l Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), *rev'g* 9 BRBS 225(1978). The court reasoned that if it held that the time periods begin to run on claims against all potentially liable employers when the employee discovers his injury is job related, the employee would have to file against all past employers even though the last employer doctrine precludes liability for all but the last responsible employer. The Board has applied the holding in *Smith*, which involved an occupational disease, in both occupational disease and traumatic injury cases and in cases where claimant timely filed against an earlier employer and then discovered a later employer which was potentially liable. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *Osmundsen v. Todd Pac. Shipyards*, 18 BRBS 112 (1986). These cases are discussed in the sections, *infra*, on "awareness" in cases involving traumatic injury and occupational disease.

Digests

Laches & *Intercounty*

The Board reversed an administrative law judge's determination that claimant's claim was barred by laches, holding that because the Act contains a statutory limitation period for filing a claim under Section 13, the doctrine of laches does not apply. The Board concluded that under *Intercounty*, 422 U.S. 1, 2 BRBS 3, claimant's claim, which was timely filed in 1973 and was never the subject of a formal award, remained open and was sufficient to protect claimant's right to recover for any later disability arising from the August 9, 1971, work-related injury. *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987).

The Board held that claimant's 1970 claim for siderosis was still open and pending where the deputy commissioner had exceeded his authority in issuing a 1973 compensation order on the siderosis claim after the effective date of the 1972 Amendments, and an approved settlement had not been achieved. Pursuant to *Intercounty*, 422 U.S. 1, 2 BRBS 3, the Board held that the siderosis claim was never the subject of a formal award and remained open and pending. Thus, the case was remanded for consideration of this claim. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in pert. part on recon.*, 22 BRBS 430 (1989).

The Board rejected employer's argument that although claimant's claim technically was not barred under Section 13 because of employer's failure to file its First Report of Injury under Section 30(a), the claim should be barred under the equitable doctrine of laches. In rejecting this argument Board noted that because the Act contains a specific statutory period for filing a claim under Section 13, the doctrine of laches does not apply. In addition, the Board noted that even if the defense were available to employer it would not apply in this case because in order for laches to apply, the plaintiff must have unreasonably and inexcusably delayed bringing suit, and the administrative law judge rationally concluded that the 36 year delay in filing under the Act was not unreasonable because claimant had long been injured, had no remedy under the Act until the Supreme Court's holding in 1962 that new ship construction could be covered, had lost contact with his attorney, and reasonably assumed that state benefits were his sole remedy. *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989).

Where the deceased employee was aware of the relationship between his asbestos-related disease and employment prior to death in 1979 but no claim for disability benefits was filed until his widow filed in 1985, the Board held that the administrative law judge erred in finding the disability claim barred, as the doctrine of laches does not apply under the Act. Moreover, the claim here was timely under Section 30(f) as employer failed to file the required report. An employer is liable for disability suffered by a deceased employee even though the disability claim was filed after his death by the widow, as the right to disability compensation survives the employee's death. *Maddon v. W. Asbestos Corp.*, 23 BRBS 55 (1989).

Citing *Lewis*, 20 BRBS 126, and *Intercounty*, 422 U.S. 1, 2 BRBS 3, the Board held that the administrative law judge properly considered 1979 and 1983 hearing loss claims as one, as the 1979 claim was timely filed but never adjudicated, and involved the same injury as the 1983 claim. The administrative law judge, therefore, did not err in computing one award for claimant's entire hearing loss and determining the respective liabilities of employer and Director at that time. *Krotsis v. Gen. Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

Citing *Krotsis*, 22 BRBS 128, the Board held that claimant's 1979 hearing loss claim remained open at the time of the hearing on the 1984 claim, as employer's payment was voluntary and did not constitute a Section 8(i) settlement. Since the claims were for the same injury, the administrative law judge did not err in treating the claims as one, or in computing the full extent of claimant's hearing loss and determining the liabilities of the Director and employer at that time. *Balzer v. Gen. Dynamics Corp.*, 22 BRBS 447 (1989), *recon. denied*, 23 BRBS 241 (1990) (Brown, J., dissenting on other grounds).

The Board reversed the administrative law judge's finding that claimant's failure to take any further action during the three years following his timely modification request constituted an abandonment of his modification claim. Since claimant filed no written request with the deputy commissioner to withdraw his claim, *see* 20 C.F.R. §702.225, and the claim was never adjudicated, *see Intercounty*, 422 U.S. 1, 2 BRBS 3, it remained open and pending. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

The Board, in essence, overruled *Rodriguez*, 16 BRBS 371, in which it held that an "old" claim, which technically remained open, could not be reopened because too much time had passed between the last payment of compensation and the subsequent pursuit of the claim. The Board noted that the doctrine of laches does not apply to cases arising under the Act in view of the specific statutes of limitations provided in the Act. Therefore, under *Intercounty*, 422 U.S. 1, 2 BRBS 3 (1975), claimant's 1975 timely claim, which was never adjudicated, remained viable and merged with the 1986 claim for disability arising out of the same injury. *Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

In a claim that was neither withdrawn nor settled pursuant to Section 8(i), the Board held that the administrative law judge erred in relying on *Rodriguez*, 16 BRBS 371, to find that the 1971 claim could not be adjudicated 25 years later. In light of *Intercounty*, 422 U.S. 1, 2 BRBS 3, and Board decisions post-dating *Rodriguez*, the Board held that the timely claim could be adjudicated, and it remanded the case for a decision on the merits. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998).

The parties initially stipulated that claimant was totally disabled, but the first administrative law judge did not issue an order based on these stipulations and there was no adjudication of the claim. Therefore, as no final compensation order was issued in this case, the current claim before the administrative law judge must be viewed as an initial claim for compensation, and Section 22 is not applicable, pursuant to *Intercounty*, 422 U.S. 1, 2 BRBS 3. The Board thus reviewed the administrative law judge's disability findings, which he made under Section 22, as though they were made in an initial adjudication of claimant's claim. *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002).

A claim remains pending until it is adjudicated and a formal order is entered, pursuant to *Intercounty*, 422 U.S. 1, 2 BRBS 3. In this case, where neither an order approving a Section

8(i) settlement nor one granting withdrawal of the claim was entered, the claim remained open and viable. The Board held that an administrative law judge's application of equitable estoppel based on findings that the employee's failure to actively and diligently pursue his entitlement to disability benefits for over twenty years led employer to believe that the disability claim was no longer live was essentially a finding that the claim was barred by the doctrine of laches. It is well established that this doctrine is not available to defend against claims under the Act. Moreover the Board reversed the administrative law judge's finding that the elements of equitable estoppel were satisfied. The case was remanded for consideration on the merits. *Petit v. Elec. Boat Corp.*, 41 BRBS 7 (2007).

Claimant notified his employer immediately after the injury and filed a claim for benefits within the time limits established by Section 13. Employer's carrier, Houston General, paid benefits to claimant for 12 years before disputing liability, claiming INA, another of employer's carriers, was liable for claimant's benefits. The Board held that neither Section 12 nor Section 13 operates to prevent INA from being held liable, as those sections apply to a claimant's claim for benefits and not to a carrier's request for reimbursement from another carrier. The Board rejected INA's argument that laches barred the claim for reimbursement. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Board held that the doctrine of laches is inapplicable to bar the initial employer for whom claimant worked when she sustained a back injury from joining subsequent employers with whom she sustained aggravating back injuries. The only "claim" is the one filed by claimant against the initial employer, which the parties stipulated was timely, whereas the responsible employer doctrine is one of liability allocation. Generally, an employer may defend the claim by asserting the liability of another employer and joining that employer to the proceedings. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Section 30 Reports

The Board held that the administrative law judge erred in imputing knowledge of a work-related injury for purposes of Section 30(f) to employer based on claimant's application for non-occupational health and disability insurance benefits. The record did not indicate that employer knew or should have known the injury occurred in its parking lot. The case was thus remanded for reconsideration of whether the claim was timely filed within one year of the date of awareness of the relationship between the injury and employment. *Alston v. Safeway Stores, Inc.*, 19 BRBS 86 (1986).

The Board held that employer's failure to file a Section 30(a) report for claimant's synovitis until 1982 did not toll the statute of limitations, inasmuch as employer filed a Section 30(a) report for the traumatic knee injury that led to the synovitis. Employer need not file a new report for all sequelae of the work injury. Since claimant did not file his claim within one year the latest date of awareness advocated, the claim was barred by Section 13. *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

The Second Circuit affirmed the Board's holding that employer's filing of the initial report of injury sufficed to prevent tolling of the Section 13 statute of limitations as to all possible sequelae. *Gencarelle v. Gen. Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

The Board vacated the administrative law judge's summary conclusion that the claim was time-barred and remanded for him to address whether employer complied with the requirements of Section 30(a) by filing a Form LS-202bT, a "No Lost time Log," rather than a Form LS-202 for a lost time injury. Claimant asserted that his back injury was much more serious than a "no lost time injury" and ultimately required surgery. The Director argued that the No Lost Time Log does not satisfy the requirements of Section 30, as it does not contain all of the relevant information. As the administrative law judge did not address this issue, the case was remanded. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990).

Where claimant was injured on April 27, 1980, entered into a settlement with employer, which was not approved under Section 8(i), in which employer agreed to pay claimant $54,420 in exchange for a signed release of liability, and later filed a claim for benefits under the Act on April 25, 1985, the Section 13(a) statute of limitations was tolled pursuant to Section 30(f) because employer failed to file a First Report of injury until May 31, 1985. Application of Section 30(f) does not require that employer have definite knowledge that the injury comes within the jurisdiction of the Act and the fact that the case may arise under a statute other than the Act (in this case the Jones Act) does not excuse employer's failure to file the Section 30(a) report. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990).

Following *Ryan*, 24 BRBS 65, the Board held that application of Section 30(f) does not require employer to have definite knowledge that the injury comes within the jurisdiction of the Act. Since employer had actual knowledge of claimant's injury and did not file a report until after claimant filed a claim for benefits under the Act, the Board held that the claim was timely filed. *Spear v. Gen. Dynamics Corp.*, 25 BRBS 132 (1991).

Under the facts of this case, the Board affirmed the administrative law judge's finding that claimant's contacts with employer's agent, PMA, were sufficient to impute to employer knowledge of a work injury from which compensation liability was possible. Employer did not dispute the administrative law judge's finding that PMA is its agent. *See Derocher v. Crescent Wharf & Warehouse,* 17 BRBS 249 (1985) (Board holds administrative law judge properly imputed notice to PMA to employer for purposes of Section 12). Since PMA had knowledge of the injury, and employer failed to file a Section 30 report of injury, the statute of limitations for filing a claim was tolled pursuant to Section 30(f), and employer failed to overcome the Section 20(b) presumption. Claimant's claim thus was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

Where claimant had not yet lost any time from his work injury when employer completed an LS-202 form, the Board, relying on the Preamble to the Final Rules Implementing the 1984 Amendments and a DOL Notice to employers and carriers, held that that form was not sufficient to satisfy the requirements of Section 30(a) and start the Section 13(a) statute of limitations running. Section 30(a) requires a report only where a claimant loses time from work. Where an injury does not result in lost time, the employer is not required to file a report and the filing of a report does not cause the time within which a claim must be filed to commence. Where employer's LS-202 failed to specify any loss of time from work, as none had yet occurred, and employer did not amend its LS-202 or file a new LS-202 when claimant's injury resulted in loss of time, the Board reversed the administrative law judge's finding that employer filed a report sufficient to satisfy the requirements of Section 30(a). Because employer's failure to comply with Section 30(a) tolls the Section 13(a) filing limitations, the Board reversed the administrative law judge's finding that the claim was barred under Section 13(a). *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting).

The Board affirmed the administrative law judge's finding that the information contained in a medical report and letter from claimant's counsel was sufficient to impute to employer knowledge that claimant suffered from a work-related respiratory impairment for which compensation liability was possible. Because employer's failure to timely file a Section 30(a) report tolled the Section 13(a) statute of limitations, the Board affirmed the administrative law judge's finding that the claim was timely filed. *Bustillo v. Sw. Marine, Inc.*, 33 BRBS 15 (1999).

The administrative law judge reasonably found employer had adequate knowledge of the possible work-relatedness of decedent's death by drowning on January 12, 2015, to warrant

further investigation and to require the filing of a Section 30(a) report. These circumstances included an argument and altercation with the base commander following a party on the base, the location of the base on the ocean, and the investigation of the death by the Navy. Because employer did not file a Section 30(a) report until January 31, 2018, employer did not rebut the Section 20(b) presumption and Section 30(f) tolled the time for claimant to file her claim until that date. The Board thus affirmed the finding that claimant's claim, filed on February 12, 2018, was timely. *Sabanosh v. Navy Exch. Serv. Command*, 54 BRBS 5 (2020).

Miscellaneous

In a pre-1984 Amendment occupational disease case, claimant filed a claim in 1980 in order to "avoid future problems with the statute of limitations;" he stated at informal conference he had no disability. After the case was transferred to an administrative law judge, who set the case for hearing, the Board accepted claimant's interlocutory appeal in which he contended that he was entitled to file a protective claim. The Board rejected claimant's argument, holding that the Act does not provide for protective filings and a claim, once filed, must proceed in accordance with the regulations. The Board noted that the Act as it existed at that time was poorly designed to accommodate occupational disease claims. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984).

The Fifth Circuit held that there is no provision in the Act for protective filing of claims. Thus, where claimants filed claims due to asbestos exposure, but were not yet disabled, their claims could not be held in abeyance, but must be adjudicated if a party so requested, as employer did here. The court noted that the filing of protective claims is no longer necessary in light of the 1984 Amendments which do not require that a claim be filed until a claimant is disabled. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994).

In the instant case, claimant filed a claim in 1987 due to harmful exposure to asbestos, although no disability was alleged. In 1992, employer requested that the district director refer the case to the OALJ for a hearing. After the district director denied employer's request, employer appealed the district director's denial to the Board. Following the Fifth Circuit's holding in *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT), and its decision in *Black*, 16 BRBS 138, the Board held that Section 19(c) imposes a mandatory duty on the district director to order a hearing upon the application of any interested party. *Eneberg v. Todd Pac. Shipyards*, 30 BRBS 59 (1996) (McGranery, J., concurring and dissenting).

Section 13(a) limits the period in which a claimant may file a claim in order to protect employers and their carriers from having to investigate and defend stale claims. While generally agreeing with the principle that the time limitations of Section 13 should be strictly applied, the Board found this general principle outweighed where this claimant was lulled into a false sense of security by employer regarding the filing requirements for his claim, thereby estopping employer from raising the Section 13(a) defense. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd on other grounds sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

On appeal, the Ninth Circuit held that a health care provider's mistaken representation to a worker that he had seven years within which to file a claim for permanent disability did not estop employer from asserting the Section 13(a) statute of limitations as a defense to

the claim, since employer did not lead the worker to believe the provider was its agent under Washington law. Nonetheless, the court affirmed the finding that the claim was timely filed based on claimant's date of awareness of a likely impairment of earning capacity. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

Where the administrative law judge found that claimant received an audiogram and report in 1988 which showed a 31.88 percent hearing loss, but she continued to work for employer and be exposed to additional injurious noise, and she underwent another audiogram in 1994 showing a greater loss of hearing, the Board held that claimant's 1994 claim properly included the original 31.88 percent loss. As claimant's continued employment aggravated her hearing loss, and as each aggravation is a new injury, claimant is entitled to be compensated for the entire loss (the combination of her pre-existing loss and her current loss) under the aggravation rule. Therefore, the Board rejected employer's argument that the claim for the initial 31.88 percent loss was time-barred pursuant to Sections 8(c)(13)(D) and 13(a), and it affirmed the administrative law judge's conclusion that employer was liable for the entire hearing loss. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

Where claimant had returned to work, employer had paid his scheduled permanent partial disability award, and claimant filed a claim for additional benefits within one year of the last payment, the Fifth Circuit rejected employer's contention that claimant lacked a viable claim at the time he filed his LS-203 claim form. The court stated that claimant had suffered a specific injury, that he was under active medical care prior to the filing, and that he first received a new diagnosis in the months preceding his filing the claim. Citing *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), and *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT), the court also held that it is not relevant that the claim may have been for prospective disability. The court stated that to the extent the Fourth Circuit's decision in *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996) (holding certain writings insufficient to constitute a claim under Section 22), suggests a claimant may seek compensation only for an antecedent period of disability, it is inconsistent with *Rambo*. The court stated that the proper resolution of a claim in which a claimant is found not to be disabled is a denial of benefits on the merits. The court further held that a "claim" does not refer to a "precise category of disability for a fixed period of time," and thus, that a claimant can liberally modify the dates or categories of disability for which he seeks benefits arising out of a single injury. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

In this case where claimant filed a motion for modification in 1999 and another in 2000, employer argued that the filing in 2000 did not "relate back" to the 1999 filing as required by FRCP 15(c). The Board rejected employer's assertion that the two filings were not sufficiently related so as to allow the administrative law judge to consider them together because the 1999 letter asserted a claim for a nominal award and the 2000 letter asserted a claim based on different facts for an award of permanent total disability benefits. The

Board held that FRCP 15(c) does not control cases under the Act because: 1) case precedent provides that once a claim is filed, it remains open until adjudicated or withdrawn; 2) the Act provides that an administrative law judge is not bound by technical or formal rules of procedure; and 3) the OALJ regulations specifically allow amendments to pleadings if they are reasonably within the scope of the original complaint. Accordingly, the Board found it unnecessary to resort to FRCP 15(c). The Board also stated in a footnote that, even if FRCP 15(c) applied to cases under the Act in general, it would not accept employer's argument that it did not apply here because under FRCP 15(c), the relation back theory allows amendments to claims when the later claim arises out of the same conduct, transaction or occurrence set forth in the original pleading. Here, all claims originated with the work-related injury. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

Where claimant sustained an injury to his back and neck in 1990, and the administrative law judge denied permanent partial disability benefits in a Decision and Order issued in 1996, the Board held that Section 22 and not Section 13 applied to determine whether a later claim for temporary total disability benefits for the same injury was timely. Neither party sought reconsideration or appeal of the administrative law judge's decision. Therefore, as Section 22 requires motions for modification to be filed within one year of the date the denial became final, in this case November 1997, the Board held that claimant was barred from seeking disability benefits following surgery in 2000, as the time for filing a motion for modification had expired. Section 13 is not implicated merely because claimant sought a different type of benefits in the later filing, as claimant alleged no new injury. *Alexander v. Avondale Indus., Inc.*, 36 BRBS 142 (2002).

As Section 13 contains a specific statutory period for filing a claim, and includes specific grounds for tolling the limitations period pursuant to Section 13(c) on the basis of mental incompetence and minority, the doctrine of equitable tolling is not applicable. *V.M. [Morgan] v. Cascade Gen., Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F. App'x 695 (9th Cir. 2010).

What Constitutes A Claim?

Section 13(a) provides that the claim must be in writing and filed with the deputy commissioner (district director) in the compensation district in which the injury or death occurred. *See* 20 C.F.R. §702.221. The Board has stated that the purpose behind the requirement in Section 13 that the claim be filed with the deputy commissioner is to ensure that employer will receive prompt notification of the claim. *See Downey v. Gen. Dynamics Corp.*, 22 BRBS 203 (1989).

Although the LS-203 is the official form for filing a claim for compensation, the Board and the courts have held that a "claim" need not be on a particular form in order to satisfy the requirements of Section 13. Any writing will suffice as long as it discloses an intention to assert a right to compensation. *Bingham v. Gen. Dynamics Corp.*, 14 BRBS 614 (1982); *Paquin v. Gen. Dynamics/Elec. Boat Div.*, 4 BRBS 383 (1976). It is not necessary that the writing explicitly state a claim as long as the fact that a claim is being made can be inferred from the writing. *Conde v. lnterocean Stevedoring, Inc.*, 11 BRBS 850 (1980) (Miller, concurring and dissenting).

In *Base Billeting Fund, Laughlin Air Force Base v. Hernandez*, 588 F.2d 173, 9 BRBS 634 (5th Cir. 1979), the Fifth Circuit, *inter alia*, affirmed the Board's determination that claimant's claim was timely filed. The Board relied on two documents in finding the claim timely. One of those documents was a letter written by employer within the one year time limitation informing claimant that her decision on group insurance was a matter entirely separate from her claim for workmen's compensation, which was on file and was being brought up to date. The other was a form for benefits under the Federal Employee's Compensation Act which was filled out and filed on the date of claimant 's injury and bore the name of claimant 's supervisor. *See also McKinney v. O'Leary*, 460 F.2d 371 (9th Cir. 1972) (telephone call to deputy commissioner inquiring as to further entitlement sufficient where memo placed in file); *Crawford v. Gen. Dynamics Corp./Elec. Boat Div.*, 7 BRBS 781 (1978) (claimant's written request for all forms necessary to protect his rights under the Act held sufficient); *Simonson v. Albina Engine & Mach. Works*, 7 BRBS 100 (1977) (three medical reports, two attached to employer's notice of termination of compensation to the deputy commissioner and one filed with employer's insurance carrier held sufficient). *Cf. Conde v. Interocean Stevedoring, Inc.*, 11 BRBS 850 (1980) (Miller, concurring and dissenting) (letter from deputy commissioner which appeared to be no more than a response to claimant's attorney's request for information found insufficient).

An attending physician's report indicating the possibility of a continuing disability filed within one year after the termination of voluntary payments is sufficient to satisfy the filing requirements of Section 13(a). *See Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). Where a medical report does not indicate the existence of any disability from work or anticipate any permanent effects, however, it will not suffice as a claim. *See Peterson v. Washington Metro. Transit Auth.*, 17 BRBS 114 (1984);

Bezanson v. Gen. Dynamics Corp., 13 BRBS 928 (1981) (Miller, dissenting); *Allen v. Granite Constr. Co.*, 11 BRBS 625 (1979) (S. Smith, dissenting).

A timely claim for an injury may be amended to, *e.g.*, include sequelae, add additional theories for causation or alter periods of disability. In addressing causation and the Section 20(a) presumption, the Supreme Court held that the presumption attaches only to the claim that is made by claimant, but in a footnote the Court noted the informal nature of workers' compensation proceedings and that "considerable liberality" is allowed in amending claims. *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982). Based on this language in *U.S. Industries*, the courts and the Board have held that claimant is not limited to his initial filing, but allegations raised in the LS-18, at the formal hearing, in briefs to the administrative law judge, or in other filings sufficient to put employer on notice of additional injury or disability claimed may be considered. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (claimant amended disability period); *Meehan Seaway Serv. Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) (cumulative trauma theory raised prior to hearing); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994) (new theory under Section 9); *Hartman v. Avondale Shipyard, Inc.*, 24 BRBS 63 (1990), *vacating in pert. part on recon.* 23 BRBS 201 (1990) (aggravation theory); *Dangerfield v. Todd Pac. Shipyards Corp.*, 22 BRBS 104 (1989) (Section 20(a) properly applied to back injury even though it was not stated in initial notice of injury; claimant clearly raised claim for back injury).

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The Board held that Dr. Long's chart notes stating that claimant continued to experience knee pain were not sufficient to state a claim under Section 13 or a request for Section 22 modification because the notes did not assert a right to compensation. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

The Board rejected employer's argument that the administrative law judge erred in concluding that the filing of claimant's LS-201 Notice of Injury was sufficient to constitute the filing of a claim pursuant to Section 13, noting that a claim need not be on a particular form to satisfy the requirements of Section 13 as long as it discloses an intention to assert a right to compensation. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

Where claimant filed a claim for hearing loss, and at the formal hearing filed a new audiogram indicated an increased hearing loss, the administrative law judge found that the new audiogram involved a new claim for an aggravation, but rejected employer's argument that this claim should be remanded for filing with the deputy commissioner, finding it would serve no purpose. The Board affirmed this result, finding it unnecessary to

determine whether the audiogram represented a new claim or updated evidence on the existing claim. The Board relied on prior holdings that the purpose behind the requirement in Section 13 that the claim be filed with the deputy commissioner is to ensure that employer will receive prompt notification of the claim, and this purpose was satisfied as employer received written notification of an increased hearing loss at the formal hearing, and was given the opportunity post-hearing to submit evidence challenging the claim. *Downey v. Gen. Dynamics Corp.*, 22 BRBS 203 (1989).

An attending physician's report indicating the possibility of a continuing disability, which is filed within one year after the termination of voluntary payments or which is filed while voluntary payments are being made, meets the filing requirement of Section 13(a). The Board therefore reversed the administrative law judge's finding that the attending physician's report must have been generated within the one-year period following the termination of voluntary payments and held that the report may be generated and filed while claimant is receiving voluntary payments. *Chong v. Todd Pac. Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

The requirements of Section 13 may be met by any writing from which an inference may reasonably be drawn that a claim for compensation is being made. An attending physician's report indicating the possibility of a continuing disability filed within the requisite time period may meet the requirements, unless the report does not indicate the existence of any disability from work or anticipate any permanent effects. The Board affirmed the administrative law judge's finding that the attending physicians' reports and claimant's testimony in this case established that the reports did not constitute a claim as they denied or were silent as to a permanent effect from the work injury. The Board also affirmed the administrative law judge's finding that a third party tort suit in which employer intervened did not constitute a claim. The Board held that employer may have been put on notice that a compensation claim might be filed in the future, but since the suit involved a claim against a third party, employer was not put on notice that claimant was asserting a right to compensation under the Act. *Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989) (G. Lawrence, J., dissenting).

In a case involving responsible employer issues between a borrowing and lending employer, claimant initially filed against the lending employer, which moved for reimbursement after a state court held in a tort suit filed by claimant that the borrowing employer (Pac Fish) was claimant's Longshore employer and thus immune from tort liability. The Board rejected the argument that Pac Fish could not be held liable as a timely claim was not filed against it. The Board initially held that this argument is moot, as claimant filed a formal claim against Pac Fish prior to the issuance of the administrative law judge's final order. Moreover, following the rule that any letter or notice to the deputy commissioner from which it may be reasonably inferred that a claim for compensation is being made is sufficient to constitute a claim under the Act, the Board held that claimant's

attorney's letter to the district director asking that it be construed as a claim against Pac Fish was sufficient to constitute a claim and was timely under Section 13(d) because filed within one year of the dismissal of the tort action. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

In the context of Section 49, the Board rejected claimant's argument that he had filed a claim against employer based on an injury report and chl discharge report, stating that these documents did not constitute a claim as they were not filed with the district director. *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996).

On the unique facts of this case, claimant, the widow of a deceased employee, had the option of filing under Section 9 as it existed prior to the 1984 Amendments based on either her husband's death from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury. She filed a timely claim, based on her husband's death due to an asbestos-related condition, and almost three years after her husband's death, indicated in writing that she also sought death benefits based on decedent's having been permanently totally disabled at the time of his death. The Board affirmed the administrative law judge's determination that claimant's raising of a new theory under Section 9 constituted a timely amendment of her original claim, upholding the administrative law judge's reasoning, and noting that the amendment's timeliness is determined by that of the original claim and that the U.S. Supreme Court has indicated that liberal amendment of pleadings is to be allowed. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Board granted claimant's motion for reconsideration of its holding that claimant did not raise an aggravation theory and remanded the case for the administrative law judge to address whether claimant made a claim for an aggravation injury due to his usual work activities. While the Section 20(a) presumption only attaches to the claim which was actually made, the record contained evidence and documents which could establish that claimant made a claim before the administrative law judge for an aggravation injury arising out of his 1984 work activities. The Board directed the administrative law judge to consider this evidence on remand. *Hartman v. Avondale Shipyard, Inc.*, 24 BRBS 63 (1990), *vacating on other grounds on recon.* 23 BRBS 201 (1990).

The Eighth Circuit denied employer's challenge to the sufficiency of the claim and lack of notice as claimant's claim alleging an injury to his right knee and pretrial stipulation providing notice to employer that he wished to reserve the right to claim that his knee injury was in the nature of a cumulative trauma, put employer on notice prior to the hearing that there was uncertainty as to the nature of claimant's injury with a possibility of cumulative trauma. Additionally, three months prior to the hearing, claimant's counsel sent a letter to the Department of Labor with a copy to the claim representative for employer's insurer stating that, after having time to consider the injury, the work claimant did at employer and

not the accident he had there aggravated his knee condition. Thus, employer had sufficient information on which it could investigate the claim. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

Although claimant's claim for compensation indicated an improper date of injury by nine days, the Ninth Circuit held that it would liberally construe whether a valid claim for compensation had in fact been filed, and that as claimant produced a writing that described the proper injury and alleged that the injury is employment-related with this employer, the claim was valid. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board held that the administrative law judge rationally concluded that claimant's May 1989 letter to the district director indicated an intent to seek compensation despite the fact that it stated it was to provide "notice of claim." The letter addressed claimant's request for disability compensation, medical expenses and an attorney's fee. Follow-up letters and the LS-203 form, which indicated that the claim had previously been filed, supported the administrative law judge's determination that claimant filed his claim for benefits within one year of the date he became aware of the relationship between his traumatic work injury and his disability. Therefore, the Board affirmed the administrative law judge's conclusion that the claim was timely filed. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Claimant was awarded permanent partial disability benefits for asbestosis in 1978. He continued working but in 1990 was transferred to a new work area where his lung condition was aggravated. Claimant ceased working in February 1991 and filed for modification to change his benefits to permanent total disability based on his average weekly wage at the time he stopped working. The First Circuit affirmed the Board's decision that claimant satisfied the statute of limitations under the Act, approving the Board's reasoning that because claimant's letter seeking modification was timely under Section 22, it was unnecessary for Jones to take the additional step of filing a new injury claim under Section 13 and that the Section 22 proceedings, if not the letter itself, provided a timely alert that Jones was asserting a new injury claim under an aggravation theory. The court stated that that by moving for modification and arguing that the benefits should be based on his 1991 salary, claimant was necessarily asserting either that he sustained a new injury or an aggravation of his prior injury. Claimant therefore was not required to file a separate formal claim under Section 13. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999).

The Fifth Circuit rejected employer's contention that claimant lacked a viable claim at the time he filed his timely LS-203 claim form. The court stated that claimant had suffered a specific injury, that he was under active medical care prior to the filing, and that he first received a new diagnosis in the months preceding his filing the claim. Citing *Metro*.

Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 31 BRBS 54(CRT) (1997), and *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT), the court also held that it is not relevant that the claim may have been for prospective disability. The court stated that to the extent the Fourth Circuit's decision in *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996) (holding certain writings insufficient to constitute a claim under Section 22), suggests a claimant may seek compensation only for an antecedent period of disability, it is inconsistent with *Rambo*. The court stated that the proper resolution of a claim in which a claimant is found not to be disabled is a denial of benefits on the merits. The court held that a "claim" does not refer to a "precise category of disability for a fixed period of time," and thus, that a claimant can liberally modify the dates or categories of disability for which he seeks benefits, arising out of a single injury. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

Where claimant injured his back and neck in 1990 and filed a claim for permanent partial disability benefits which the administrative law judge denied in a Decision and Order issued in 1996, the Board rejected claimant's assertion that his claim for temporary total disability benefits filed in 2000 for the same injury constituted a "new" claim implicating the provisions of Section 13 instead of Section 22. The Board, following the Fifth Circuit's decision in *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT), concluded that a "claim" may consist of requests for multiple types of benefits for an injury and, therefore, a filing cannot constitute a "new claim" merely because it requests a different type of disability benefits from the type originally sought. *Alexander v. Avondale Indus., Inc.*, 36 BRBS 142 (2002).

In cases involving the filing of a claim for purposes of attorney's fee liability pursuant to Section 28(a), the Board held that "a claim for compensation" need not include any competent evidence of disability in support of the claim in order to be "valid;" a claim need only be a writing evincing an intent to seek compensation. Thus, a claim for hearing loss benefits need not be accompanied by an audiogram or other evidence demonstrating a loss of hearing. Where Congress has determined that hearing loss claims are to be treated differently than other claims, it has specifically so provided. *Craig, et al v. Avondale Indus., Inc.*, 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Board rejected employer's contention that claimants did not file "valid" claims for hearing loss because the uninterpreted audiograms attached to the claim forms were insufficient to meet the "presumptive" evidence standard of Section 8(c)(13)(C) and 20 C.F.R. §02.441, in view of the Board's holding that no evidence need accompany a claim for compensation. Moreover, tests not meeting the "presumptive" standard are not invalid or inadmissable; the administrative law judge is entitled to determine the probative value of such audiograms. *Craig, et al. v. Avondale Indus., Inc.*, 36 BRBS 65 (2002), *aff'g on recon. en banc* 35 BRBS 164 (2001) (decision on recon. en banc), *aff'd sub nom. Avondale Indus., Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Fifth Circuit rejected employer's argument that a valid claim for hearing loss benefits for purposes of triggering employer's liability for attorney fees under Section 28(a) has not been made until the claimant has provided an audiogram and interpretive report that qualify as presumptive evidence of the amount of hearing loss under Section 8(c)(13)(C). A claim need only be a writing that discloses an intention to seek compensation. Form LS-203, filed by claimants, satisfies this requirement. *Avondale Indus., Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff'g Craig v. Avondale Indus., Inc.*, 35 BRBS 164 (2001) (en banc), *aff'd on recon. en banc*, 36 BRBS 65 (2002).

The Fourth Circuit held that a claim within the meaning of Section 28(a) refers to a formal action that initiates a legal proceeding. In this case, claimant filed an LS-203 claim form. Several months later, he filed a letter seeking additional benefits related to the same injury. The court held that the subsequent filing was not a "claim" for purposes of Section 28(a). *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005).

In a case involving sequential traumatic injuries, the Board approved the administrative law judge's use of the rationale of *Smith*, 647 F.2d 518, 13 BRBS 391, and *Osmundsen*, 18 BRBS 112, that claimant need not give notice of the injury or file a claim against subsequent employers until the responsible employer is identified. In this case, claimant timely provided notice and filed against Metropolitan, the employer for whom he was working when he sustained the initial traumatic injury, and the time limitations of Sections 12 and 13 did not begin to run against subsequent employers until this employer was found not liable for claimant's benefits. The Board rejected a subsequent employer's argument that claimant never filed a claim against it, holding that the documents surrounding its joinder to the claim by the initial employer were sufficient to fulfill the Section 12 notice and Section 13 claim requirements. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Section 13(a)—"Awareness" in Traumatic Injury Cases

In General

The Section 13(a) one-year period does not commence until a claimant "is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." The administrative law judge's failure to make specific findings as to the date claimant was, or should have been, aware necessitates remand. *Shoemaker v. Sun Shipbuilding & Dry Dock Co*., 12 BRBS 141 (1980).

The cases discussed in this section include all pre-1984 Amendment cases involving traumatic injuries and occupational diseases, as the same standards applied to all injuries or illnesses prior to the Amendments. This standard remains applicable for post-1984 traumatic injury cases, and it requires that claimant file a claim once he is aware or should have been aware of the relationship between his employment and "injury;" case law establishes that claimant cannot be aware of an "injury" until he has reason to know that it is work related and has resulted in a likely impairment of earning capacity. *See* discussion, *infra*. In occupational disease cases, the time period for filing has been extended to two years and a third element added, requiring "awareness" of the relationship between the injury, employment, and death or disability. *See* Section 13(b)(2), *infra*.

As discussed above, the Section 20(b) presumption applies to the timeliness of claims. Thus, the claim is presumed to be timely, and employer must establish that claimant was aware or should have been aware more than one year prior to the filing of the claim.

The "awareness" provisions of Section 13 are identical to those of Section 12, and additional cases are found under that section of the desk book.

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The Board held that the administrative law judge erred in relying on claimant's testimony to establish the date of her awareness of the relationship between decedent's disease, death and employment because the testimony was inherently unreliable, confusing and vague. Because there was no credible evidence to establish a date of awareness, employer did not rebut the Section 20(b) presumption that the claim was timely filed. The claim was therefore timely as a matter of law. *Horton v. Gen. Dynamics Corp.*, 20 BRBS 99 (1987).

The Fifth Circuit reversed the Board's affirmance of the administrative law judge's finding that claimant had timely filed this claim based upon his finding that the prescriptive period did not begin to run until the date, approximately 25 months after a work injury, when one of claimant's physicians reported that claimant's neurological problems were caused by a blow to his head rather than his diabetes. The court found this determination unsupported by the record based on claimant's completed and sworn to, but never filed, claim form, dated within one year of the injury, on which claimant related his head injury to his symptoms. Thus, the one year period in which to

file began to run, at the latest, as of the date claimant completed and signed the claim form even though it was never filed. As no claim was filed within one year of this date, the claim was time-barred. *Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997).

The Board vacated the administrative law judge's grant of employer's motion for summary decision on the issue of the timeliness of claimant's claim for death benefits. The case was remanded for a hearing as claimant's responsive pleadings raised an issue of material fact concerning claimant's date of awareness of the relationship between decedent's work-related knee injury and his death in a car crash. *Morgan v. Cascade Gen., Inc.*, 40 BRBS 9 (2006).

Following remand, the Board rejected claimant's contention that she could not be found to have possessed the requisite awareness of the relationship between decedent's work-related knee injury, his subsequent drinking problem and his alcohol-related fatal car accident until she was advised by counsel of the potential compensability of decedent's death under the Act. The Board held that Section 13(a) does not require that the claimant recognize that the relationship between the employee's death and the employment supports a potential claim for death benefits under the Act in order for the limitations period to commence. In addition, the Board rejected claimant's argument that she could not be found to be "aware" of the relationship between decedent's knee injury and his death until she obtained medical evidence of such a relationship and held that the administrative law judge could properly base his awareness finding on claimant's personal knowledge that a relationship existed between decedent's work-related knee injury, his subsequent drinking problem, and his alcohol-related fatal car crash. *V. M. [Morgan] v. Cascade Gen., Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F. App'x 695 (9th Cir. 2010).

In cases involving sequential traumatic injuries, the Board approved the administrative law judge's use of the rationale of *Smith v. Aerojet Gen. Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen v. Todd Pac. Shipyards*, 18 BRBS 112 (1986) (Section 12 case), that claimant need not give notice of the injury or file a claim against subsequent employers until the responsible employer is identified. In this case, the time limitations of Sections 12 and 13 did not begin to run against subsequent employers until the employer against whom claimant initially timely provided notice and filed was found not liable for claimant's benefits. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

In this case where claimant suffered from gastrointestinal problems that caused him to miss work immediately, the Board affirmed the administrative law judge's finding that claimant's condition is not an "occupational disease" and that Section 13(b)(2) of the Act is inapplicable. Specifically, although the Board agreed that claimant has a "disease," it affirmed the administrative law judge's conclusion that claimant's gastroenteritis episodes rendered him immediately disabled from work, unlike asbestosis which is a disease that is not immediately disabling. The Board also noted that gastrointestinal problems are not "peculiar" to work in Iraq, as would be required of an occupational disease. Accordingly, the Board affirmed the administrative law judge's finding that the timeliness of claimant's claim must be pursuant to Section 13(a) of the Act. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

Effect of Diagnosis

The Board initially held that the date on which a claimant is told by a doctor that he has a work-related injury is the controlling date for establishing "awareness." *See Stark v. Lockheed Shipbuilding & Constr. Co.*, 5 BRBS 186 (1976). The Board subsequently held, however, that the date of diagnosis is significant, but not controlling. *See, e.g., Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1981) (Miller, dissenting); *Bezanson v. Gen. Dynamics Corp.*, 13 BRBS 928 (1981) (Miller, dissenting); *Sicker v. Muni Marine Co.*, 8 BRBS 268 (1978).

This result had been reached by the Third Circuit in *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 10 BRBS 614 (3d Cir. 1979), *rev'g* 1 BRBS 509 (1975), which held that although the date on which a physician tells an employee that his injury is work-related establishes a date no later than which the employee knew this fact, it does not exclude the possibility that the employee should have known of the relationship of the injury to the employment prior to that date. The court stated that the appropriate test for date of awareness is not subjective, but objective, *i.e.*, the date claimant should have been aware of the relationship between his injury and his job. *See also Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982), *aff'd sub nom. Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Sinor v. Todd Shipyards Corp.*, 13 BRBS 959 (1981) (Miller, dissenting); *Canamore v. Todd Shipyards Corp.*, 13 BRBS 911 (1981) (S. Smith, concurring) (Miller, concurring and dissenting).

In *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979) (Miller, dissenting), the Board vacated the administrative law judge's finding that a claim was timely filed because it was filed within one year of the date that claimant's asbestosis was diagnosed by a doctor. The Board remanded the case for reconsideration, stating that the administrative law judge applied an improper legal standard and that there was evidence in the record to support a finding that claimant may have been aware or should have been aware of his medical condition prior to the doctor's diagnosis. *See also Gray & Co., Inc. v. Highlands Ins. Co.*, 9 BRBS 424 (1978) (Miller, dissenting); *Killmer v. Todd Shipyards Corp.*, 9 BRBS 534 (1978) (Miller, dissenting in pert. part) (S. Smith, dissenting), *appeal dismissed sub nom. Todd Shipyards Corp. v. U. S. Dep't. of Labor*, No. 79-7079 (9th Cir. May 31, 1979).

In *Bezanson*, 13 BRBS 928, the Board rejected claimant's argument that his claim was timely because it was filed within one year of his having received a 1976 diagnosis of asbestosis. The Board noted initially that the physician's report relied upon by claimant did not specifically diagnose asbestosis. Claimant did not receive a definite diagnosis of his condition until 1979. The Board affirmed a date of awareness in 1974, when claimant submitted a written statement to employer's compensation representative indicating his awareness of the relationship between his work and his lung condition and the deputy commissioner advised him to file a claim. As no claim was filed within one year of this date, the Board affirmed the conclusion that the claim was not timely filed.

Where claimant is misdiagnosed, *e.g.*, told his condition is less serious or not work-related, the Board and courts have held that he is not "aware" until he receives a correct diagnosis. Cases involving misdiagnoses are addressed, *infra,* under Awareness of a Work-Related Injury Which Likely Impairs Earning Capacity.

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The Board reversed the administrative law judge's finding that claimant was first aware of the relationship between his silicosis and his employment in October 1983 when he received Dr. Simon's diagnosis, in view of the evidence indicating claimant's earlier awareness that he suffered from a work-related condition. The date on which claimant is informed by a doctor that he has a work-related condition is not always controlling. The case was remanded for the administrative law judge to determine the date of claimant's disability and the date of his awareness of the relationship between his employment, disease and disability and then to decide whether the claim was timely filed under Section 13. *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986).

The D.C. Circuit affirmed an administrative law judge's finding that claimant's date of "awareness" was at least four years before he filed his claim in 1980, as it was supported by substantial evidence. Claimant testified that he believed the air in the pressroom was making his respiratory problems worse; that from his first day at work, he coughed up a black substance; that he wore a breathing mask for protection; that his doctor recommended in 1975 that he retire; that he did retire in 1976; that he retained an attorney in 1976 to represent him in a workers' compensation action; that he opted out of a class action against employer regarding lung conditions because he thought his was more serious; and that he did not file because his medical expenses were not large. *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Although the date a doctor tells claimant his injury is work-related can be determinative, the appropriate date of awareness is the time claimant should have been aware of such a relationship. The Board affirmed the finding that claimant should have been aware when he told his doctor of the accident and related his knee problems to the accident. *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991) (table).

Neither the Act nor regulations require that claimant's "awareness" be based on a medical opinion. Because Section 13(b)(2) is unequivocally written in the disjunctive, *i.e.*, claimant has two years to file from actual awareness *or* from the date she should have been aware by reason of medical advice, the Board held that the administrative law judge did not err as a matter of law in determining the date of claimant's awareness based upon her personal opinion. Moreover, substantial evidence supported the administrative law judge's finding of date of awareness based on numerous statements made and actions taken. As claimant did not file within two years of her date of awareness, the Board affirmed the finding that

the claim was untimely. *Wendler v. Am. Nat'l Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting).

Citing *Wendler*, 23 BRBS 408, the Board held that the administrative law judge could properly base his finding regarding claimant's date of awareness on her personal knowledge that a relationship existed between decedent's work-related knee injury, his subsequent drinking problem and his alcohol-related fatal car accident. Thus, the Board rejected claimant's contention that she could not be found to have the requisite awareness until she had obtained medical evidence of a relationship between decedent's knee injury and his death. *V.M. [Morgan] v. Cascade Gen., Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F. App'x 695 (9th Cir. 2010).

Awareness of a Work-Related Injury Which Likely Impairs Earning Capacity

Section 13(a) requires awareness of the relationship between the injury and employment. The courts have held that awareness of an injury cannot occur until claimant is aware of a work-related injury and the likely impairment of his earning capacity, or the full character, nature and extent of the work injury.

This determination regarding awareness of an "injury" has its genesis in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). *Stancil* was decided prior to the 1972 Amendments, and at that time, the statute provided that claims must be filed within one year of "injury." 33 U.S.C. §913 (1970) (amended 1972). The 1972 Amendments codified the "awareness" concept which was part of the *Stancil* holding. The *Stancil* decision is applicable to cases under the 1972 Act, and it has been adopted by the appellate courts which have addressed this aspect of the "awareness" inquiry.

In *Stancil,* the D.C. Circuit considered when the Section 13 time period begins to run where the facts indicate the extent of the harm is unknown to the employee at the time of the injury, such as where the employee suffers from an occupational disease or latent injury. The court stated that an "injury" for Section 13 purposes is not "tied to the fixed point of the 'accident' (or equated with 'disability)." Thus, the court concluded that an "injury" under Section 13 occurs once claimant knows or has reason to know of "the likely impairment of his earning power…; before that time, while there may have been an accident, there is as yet no 'injury' for claim or filing purposes under this statute." 436 F.2d at 277. The facts in *Stancil* established that at the time of his discharge from medical care, the employee reasonably believed that he had simply suffered a back strain, that he had no further physical disability and that his recurrent pain was due to the strain and would disappear without lasting effect. Claimant thus had no basis for filing a claim at the time or until he received a diagnosis of herniated discs several years later.

The *Stancil* court specifically addressed the fact that claimant may have been initially misdiagnosed, stating that it was "not holding that the running of limitations was deferred simply because a 'wrong diagnosis' was made….The issue is not the correctness of the diagnosis per se. The question is whether the employee reasonably believed that he was not physically disabled, *i.e.* he had not suffered a work-related harm which would probably diminish his capacity to earn his living." *Id.* at 279. The Court also distinguished the Supreme Court's decision in *Pillsbury v. United Eng'g Co.*, 342 U.S. 197 (1952), holding that the term "injury" in pre-1972 Section 13 did not equate with "disability." The D.C. Circuit reasoned that "disability" is a

> hybrid concept with both medical and economic components. It is such incapacity caused by injury which makes an employee actually (not merely potentially) unable to earn the wages he was receiving at the time of his injury. There was no latent, undisclosed, or unknown injury involved in

> *Pillsbury*. Each of those claimants suffered a clear physical injury, which did diminish their general capacity to earn money, but they were not technically 'disabled' under the Act in the year after the injury because the particular employers continued to pay them full wages during that time despite their injuries. There was no suggestion that the men were unaware, from the beginning, of the full character, extent, and impact of the physical harm done to them.

Id. (citations omitted). Thus, the D.C. Circuit concluded that the *Pillsbury* Court was not faced with the issue of defining the "injury" which triggers the limitations period.

Thus, the Section 13 period does not begin to run under *Stancil* until claimant is aware of a work-related harm which will likely diminish his earning capacity. The Board initially followed the *Stancil* holding without limitation. *See Crawford v. Gen. Dynamics Corp.*, 7 BRBS 781 (1981) (Smith, dissenting). For a period of time however, the Board limited *Stancil* to facts demonstrating that claimant received a misleading diagnosis or incorrect prognosis which reasonably led him to believe that his condition was not serious, *i.e.*, that it was not work-related or would not affect his wage-earning capacity. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *Wells v. Ocean Drilling & Exploration Co.*, 16 BRBS 59 (1983); *Lunsford v. Marathon Oil Co.*, 15 BRBS 204 (1982), *aff'd*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984).

In *Lunsford*, claimant had sustained an injury which was diagnosed as a cervical disc strain. In March 1976, claimant was told that his injury had healed and had not resulted in permanent injury, but that he might experience pain for about a year. Claimant returned to work, and the pain eventually subsided. In June 1978, however, claimant began experiencing pain again, and he was diagnosed in November 1978 as having a disabling herniated disc which probably resulted from his initial injury. The Board affirmed the finding that the claim filed in May 1979 was timely as it was filed within one year of the date when claimant became aware of the work-relatedness of this condition. The Board held that the statute of limitations did not begin to run while claimant labored under an incorrect prognosis, and the Board held that it was apparent that claimant relied on the misdiagnosis of his injury in failing to file a claim within one year of the last payment of compensation.

In affirming the Board's decision in *Lunsford*, the Fifth Circuit held that the Section 13 time limitation does not begin to run until claimant knows (or should know) the true nature of his condition, *i.e.*, that it interferes with his employment by impairing his capacity to work, and its causal connection with his employment. The court noted that at the time of claimant's traumatic injury, his physician regarded his problem as involving passing aches and pains with no significant effect on his earning capacity. The court held that the Section 13 time limitation did not begin to run until claimant's herniated disc was diagnosed

because, prior to that point, claimant had not sustained an impairment to his wage-earning capacity.

Other courts of appeals followed an approach similar to the Fifth and D.C. Circuits. In *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 14 BRBS 427 (9th Cir. 1982), *aff'g* 12 BRBS 589 (1980), *cert. denied*, 459 U.S. 1034 (1982), claimant, who had originally been diagnosed as having suffered a bad bruise to his back, tried to continue working despite recurrent pain and dizziness. Later, however, a second set of x-rays revealed that claimant had degenerative cervical discs. The court found the claim, which was filed within a year of the later x-rays, timely on the rationale that it was not until then that claimant learned that he had suffered an impairment in wage-earning capacity. *See also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979), *aff'g* 10 BRBS 391 (1979) (S. Smith, dissenting) (similar analysis applied to Section 12).

In *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 (1979), claimant, a welder, was informed by physicians in employer's clinic that he was suffering from infectious bronchitis which was aggravated by welding fumes. Nine months later, however, claimant learned that he had emphysema, rather than bronchitis, which was related to his employment. The Fourth Circuit held that the Section 13 filing provisions did not begin to run until claimant learned the nature and gravity of his true injury, stating "the Act does not require an employee to timely file a claim based on a misdiagnosis in order to preserve his right to compensation for the more drastic disability which a correct diagnosis later shows resulted from the injury." *Id.* at 1280.

In a series of cases, the Board found claims timely because the injuries were misdiagnosed. In *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979), claimant had been treated many times after the injury and had been told he had non-work related arthritis. The Board concluded that the statute did not begin to run until claimant was told by a radiologist that he had a possible torn medial meniscus.

Similarly, in *Pittman*, 18 BRBS 212, the Board held that where claimant was initially informed that his condition was not work related, the Sections 12 and 13 time periods did not run until he received a proper diagnosis. *See Razzi v. J. A. McCarthy Inc.*, 9 BRBS 834 (1978); *Barnes v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 528 (1978); *Benoit v. Gen. Dynamics Corp.*, 3 BRBS 453 (1976).

In *Smolinski v. Dynelectric Co.*, 13 BRBS 537 (1981) (S. Smith, dissenting), the Board found a claim made three years subsequent to claimant's back injury timely where the injury was originally misdiagnosed as producing no permanent disability and the claim was filed within one year of the subsequent diagnosis of permanent disability. *See Allen v. Granite Constr. Co.*, 11 BRBS 625 (1979) (S. Smith, dissenting).

Ultimately, the *Stancil* test was widely accepted by the appellate courts without regard to whether claimant was misdiagnosed. Thus, the Section 13 limitations period does not begin to run until claimant is aware that he has sustained a work-related injury resulting in the likely impairment of his earning capacity or of the full character, extent and impact of the harm done as a result of the work injury. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. I.T.T./Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 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); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987). An initial period of temporary total disability does not necessarily establish that claimant was aware of the full nature of the injury and thus the Section 13 time period may not commence until a later date when claimant becomes aware of a permanent impairment. *See Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *Grage*, 900 F.2d 180, 23 BRBS 127(CRT).

As *Stancil* itself and the appellate opinions following it are not limited to facts indicating a misdiagnosis, *e.g.*, *Abel*, 932 F.2d 819, 24 BRBS 130(CRT); *Brown*, 893 F.2d 294, 23 BRBS 22(CRT), the Board stopped requiring a misdiagnosis or incorrect prognosis before applying the *Stancil* definition of "injury." *See E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp. Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002). Thus, in order to be "aware," claimant must know, or should know, the true nature of his injury, *i.e.*, that he has a work-related condition resulting in a likely impairment of earning capacity.

Digests

The Board held that *Stancil*, 436 F.2d 274, will be applied as written in D.C. Circuit cases. Thus for Section 13 purposes, the statute of limitations does not begin to run until claimant is aware of a work-related harm which will probably diminish his earning capacity. In cases outside the D.C. Circuit, the Board limited *Stancil* to situations where claimant receives a misleading diagnosis or incorrect prognosis from a physician which reasonably leads him to believe his condition is not serious. The Board remanded this D.C. case for a determination as to when claimant was aware that his work-related harm would diminish his earning capacity. *Taylor v. Sec. Storage of Washington*, 19 BRBS 30 (1986).

The D.C. Circuit held that the statute of limitations for Section 13(a) begins only when the employee knows or should know that (1) his injury is causally related to his employment and (2) his injury is impairing his capacity to earn wages. The court affirmed the finding that the claim was timely filed as claimant was not aware of an adverse impact on his earning capacity until the day the doctor recommended that he retire, in view of claimant's

good attendance record, his non-strenuous job, and normal chest x-rays. *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987).

The Eleventh Circuit held that claimant should have been aware of the connection between his disability, his disease, and his employment once he missed work because of his disease--*i.e.*, once his disease resulted in economic effects. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *aff'g in part and rev'g in part Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

In a D.C. case, the Board affirmed the administrative law judge's finding that the claim was timely filed. Claimant was not "aware" until 1983 that the work-related effects of his injury caused a loss in wage-earning capacity. There was also no evidence that claimant was aware that the symptoms he was experiencing were due to the work injury until that time. *Forlong v. Am. Sec. & Trust Co.*, 21 BRBS 155 (1988).

Where claimant receives a misdiagnosis or incorrect prognosis which reasonably leads him to believe his condition is not work-related or will not affect his wage-earning capacity, claimant is not "aware" until he secures a correct diagnosis. In light of an erroneous medical opinion that claimant's condition had stabilized without residual permanent effect, the absence of an effect on wage-earning capacity until a subsequent medical opinion was offered, and the Section 20(b) presumption, the Board reversed the administrative law judge's finding that the claim was untimely under Section 13. *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).

The Board rejected claimant's argument that prior misdiagnoses in this case meant that the statute of limitations did not begin to run until he received the proper diagnosis. Applying *Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT), the Board held that claimant's injury was one that resulted in a significant disability for which no claim was filed until the disability became even greater. Pursuant to *Lunsford*, therefore, claimant should have filed for benefits as soon as he was aware that the work injury would affect his wage-earning capacity. Misdiagnosis is not a basis for tolling the statute of limitations where claimant's wage-earning capacity is continuously affected as a result of the work injury. *Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989) (G. Lawrence, dissenting).

The Board rejected claimant's contention that *Lunsford* applied in this case, noting the Board's holdings that the requirement that claimant know of an adverse effect on wage-earning capacity applies only when claimant's condition was initially misdiagnosed. Since the diagnoses in this case were correct, the Board held that *Lunsford* did not apply and the claim was filed more than one year from claimant's date of awareness that his knee injury was work-related. *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

The Board reversed the administrative law judge's finding that claimant was aware of the true nature of her injury where she returned to work after missing time due to pain caused by her injury, worked despite pain for almost a year, and was initially told by her doctor that she would get better. Claimant was not aware until she learned of the true nature of her condition and of a possible permanent impairment of her earning capacity. The Board concluded that the claim was timely filed. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

The Board vacated the administrative law judge's finding that the claim for an injury to claimant's left shoulder was barred by Sections 12 and 13, and remanded for the administrative law judge to reconsider whether the claim was time-barred, affording claimant the benefit of the Section 20(b) presumption. In reconsidering the evidence regarding claimant's date of awareness in light of employer's burden, the Board directed the administrative law judge to consider whether the evidence suggested that claimant received a misdiagnosis reasonably leading him to believe that his left shoulder was not work-related and to explain why claimant's experiencing pain in his left shoulder on the job necessarily led to the conclusion that he should have been aware that he had injured this shoulder in the earlier work accident. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

The Eleventh Circuit held that the statute of limitations under Section 13(a) does not begin to run until claimant is aware of the full character, extent and impact of the harm he has suffered and that there was an injury which resulted in an impairment of earning power. The test concerns claimant's awareness that he has suffered a compensable injury and not that he has suffered an accident. The court rejected employer's assertion that the statute of limitations is tolled only where there has been an initial misdiagnosis and held that the real issue which determines when the statute of limitations begins to run is whether the employee reasonably believed that he was not physically disabled. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990).

The Ninth Circuit held that the time for filing a claim does not begin to run until the employee is aware, or should have been aware, of a work-related injury resulting in an impairment in earning capacity and of the "full character, extent and impact" of the harm suffered. In the instant case, the administrative law judge erred in finding the time for filing was triggered when the employee knew he was temporarily unable to work, as the employee did not yet know at that time of the full extent of his work-related harm. The period was tolled until claimant knew his disability permanent as it was then that he knew the full character, extent and impact of his injury. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990), *aff'g on other grounds Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988).

The D.C. Circuit held that where the administrative law judge found a claim to be barred under Section 13(a) because he determined that claimant was immediately aware his injury was job-related, the administrative law judge applied the wrong legal standard. Since evidence existed in the record from which the administrative law judge could determine that claimant reasonably believed his condition would not adversely affect his earning

capacity, the case was remanded for the administrative law judge to ascertain at what point claimant knew or should have known that his condition would affect his ability to earn his previous wage, as it is only then that claimant could be "aware." *Brown v. I.T.T./Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990).

The Fourth Circuit adopted *Stancil* and held that the statute of limitations does not begin to run until the claimant is aware that his injury is likely to impair his earning capacity. In this case, claimant was initially injured and treated for six months and then was able to work for 25 years, even though he had pain. The court agreed with the Board that pain alone is not sufficient to provide "awareness," and it was not until surgery was arranged that claimant knew that the injury would impair his earning capacity. Thus, it affirmed the Board's reversal of the administrative law judge's finding of awareness nine years earlier. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991).

The Ninth Circuit reversed the Board's decision that claimant failed to file a timely claim pursuant to Section 13(a). The court noted its disagreement with the Board's interpretation that claimant's awareness of a work-related injury which may diminish his wage-earning capacity is relevant only when a physician misdiagnoses the work-related nature of a claimant's injury or issues an incorrect prognosis. The court concluded that under *Todd Shipyards*, 666 F.2d 399 14 BRBS 427, claimant is not "aware" of his injury for purposes of Section 13(a), and therefore, the statute of limitations does not begin to run, until he is reasonably aware of the full character, extent and impact of his work-related injury. In this case, claimant relied on his doctor's advice that his knee injury would heal, and was not aware of the full extent of his work injury until rest did not improve the condition and he was advised to see a surgeon. *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991).

In a case where claimant suffered a work-related injury but continued to perform his usual work for several years until his condition deteriorated to the point of requiring surgery, and where his condition was misdiagnosed, the Board affirmed the administrative law judge's finding that the time for filing a claim under Section 13(a) did not commence until he became aware of the true nature of the condition, *i.e.*, that the condition interfered with his employment by impairing his capacity to work and was related to his employment. *Gregory v. Se. Mar. Co.*, 25 BRBS 188 (1991).

The Eighth Circuit adopted the reasoning of other circuit courts and held that the Section 13 time limitation does not begin to run until the injured employee becomes aware of the full character, extent and impact of the harm done as a result of the work injury. In this case, claimant was not aware under this standard until employer refused to re-hire him after a pre-employment physical exam following a layoff. *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994).

The Sixth Circuit adopted the reasoning of the other courts of appeals and held that the Section 13 statute of limitations begins to run only after the employee becomes aware or reasonably should have become aware of the full character, extent and impact of the injury, which is when the employee knows or should know that the injury is work-related and that it will impair his earning capacity. In this case, claimant continued to work for several years following his recuperation from four separate work-related back injuries, and although he missed work temporarily and regularly experienced back pain, it was not until his herniated discs were diagnosed and he was unable to work that he was put on notice of a likely permanent impairment of his long-term earning capacity. Claimant's claim was timely filed within one year of this time. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996).

The Board affirmed the administrative law judge's finding that claimant did not become aware of the full impact of the 1984 work-related traumatic injury to his knee until a doctor performed arthroscopic surgery in 1989 and discovered that claimant had a torn medial meniscus. Prior thereto, claimant had, in effect, been misdiagnosed, and he had continued to work in his usual employment. Consequently, the Board affirmed the administrative law judge's conclusion that claimant's May 1989 claim was timely filed. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The Board affirmed the administrative law judge's finding, pursuant to *Parker*, 935 F.2d 20, 24 BRBS 98(CRT), that claimant did not become aware of a likely impairment of his wage-earning capacity from his September 1995 right eye injury until 1999, when claimant first noticed vision clouding and underwent unsuccessful surgery. Prior thereto, claimant was able to perform his usual employment as a welder, he had essentially normal vision, and laser surgery to remove corneal scarring was not recommended. Thus, claimant's claim, filed in 1999, was timely. The Board rejected employer's contention that *Parker* was superseded by the Supreme Court's decision in *Rambo II.* The statements regarding Section 13(a) by the Court in *Rambo II* are *dicta*, as the case solely addressed Section 22, and therefore are inapplicable to this claim. Moreover, employer's contention that claimant had to file for a *de minimis* award prior to becoming aware of a likely impairment of his wage-earning capacity would yield a result contrary to the Court's holding in *Rambo II*, which approved *de minimis* awards to, in effect, indefinitely extend the limitations period of Section 22. In addition, the Board noted that the standards for establishing entitlement to a *de minimis* award and for filing a claim under Section 13(a) are quite similar in that both require some evidence of a likely impairment of earning capacity. Finally, the awareness standard of Section 13(a) demonstrates the intent that claimants with latent traumatic injuries not be required to file until they are aware of a likely impairment of earning capacity; the statute of limitations does not run from the date of accident. *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

In a case where claimant sustained physical and psychological injuries following a shooting, the Board applied the principle that the mere diagnosis of a work-related

condition and treatment does not commence the running of the Section 13(a) statute of limitations as claimant must be aware of a likely impairment of earning capacity. Thus, in a case where claimant did not lose any work time due to her psychological condition and was not informed by a medical professional or employer prior to her dismissal that her condition would likely cause a loss of employment or reduction in earning capacity, the Board reversed the administrative law judge's finding that claimant should have been aware of a future impairment to her earning capacity on the date her condition was diagnosed. The Board stated that the purpose of the requirement that claimant be aware of an impairment of earning capacity is to avoid claimants' having "to protect their rights by filing claims for aches and pains that are not disabling and thus not compensable." Claimant's temporary inability to work due to her physical injuries did not make her aware that her earning power would be impaired due to a psychological injury, as she returned to work after her physical condition healed. Thus, the administrative law judge erred in relying on claimant's loss of sick time and subsistence and hazard pay after the physical injury to find claimant aware of the likelihood that she would incur a loss of wage-earning capacity in the future. As claimant filed a claim within one year of the date her employment was terminated due to her psychological condition, the claim was timely filed. *E.M. [Mechler] v. Dyncorp Int'l,* 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp. Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011).

The Second Circuit affirmed the Board's holding that claimant's claim was timely filed under Section 13(a) as a reasonable mind could not conclude that claimant knew or should have known that she had suffered a permanent impairment to her earning capacity prior to the date her employment with employer was terminated. During the year following claimant's work-related shooting, her work was largely unaffected by the psychological problems she was experiencing; claimant's light-duty work was provided because of the physical effects of her injury. The treatment claimant received for these psychological problems, which included therapy and medication, was not the sort typically associated with debilitating mental illness. Moreover, although employer arranged for claimant, along with the other survivors of the shooting, to undergo a psychological evaluation, the findings of that evaluation were not shared with claimant. *Dyncorp Int'l v. Director, OWCP [Mechler],* 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011).

The Third Circuit affirmed the finding that claimant's claim was timely filed under Section 13(a). Claimant was burned when he stepped in chemicals at work on May 3, 2000, and employer voluntarily paid benefits until October 6, 2000. Despite continued ankle pain, claimant continued to work until May 2002, when he had surgery to fuse his ankle. In July 2002, his doctor stated he could not return to work and expressed the opinion that the chemical burn exacerbated claimant's arthritic condition. Claimant filed a claim for benefits under the Jones Act on October 17, 2002. After that case was dismissed on October 7, 2003, claimant filed a claim under the Act on October 13, 2003. The court held that claimant did not become aware of the full extent of his disability until July 12, 2002, thus, he had until July 12, 2003, to file a claim under the Act. As the time for filing a claim under the Act was tolled during the pendency of the Jones Act claim pursuant to

Section 13(d), the claim filed on October 13, 2003, was timely. *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008).

The Ninth Circuit affirmed the finding that claimant's claim against SSA, the second employer, was timely filed. Claimant was not "aware of the full character, extent, and impact of the harm done to him" until he appreciated that his work for the last employer, SSA, caused a cumulative trauma knee injury resulting in an impairment of his earning power. Claimant's pain and ongoing medical treatment since the time of first injury were insufficient to put him on notice that he had suffered a cumulative trauma injury, particularly in view of the first employer's continued payment of his medical bills and a doctor's statement that he had never explained the concept of cumulative trauma to claimant. *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016).

The Board affirmed the administrative law judge's finding that claimant's May 2011 claim was not timely filed. The Board rejected the contention that the administrative law judge erred in finding claimant was or should have been aware of the relationship between his work, his injury, and the impairment to his earnings by December 29, 2009. The Board rejected claimant's contention that he was not aware of the full impact of his condition in December 2009 because he subsequently returned to work and then had additional disabling gastroenteritis episodes. The administrative law judge's finding is supported by claimant's own testimony that he believed, and told his doctor, in December 2009 that his condition was work-related and that he was unable to return to work at that time due to his illness. Also as of that date, claimant had experienced previous episodes of gastroenteritis, and his doctor had informed him that the condition could recur and cause more problems. The Board also rejected claimant's assertion that his awareness commenced when he received his August 2010 diagnosis of irritable bowel syndrome. As claimant's May 2011 claim was for temporary total disability benefits for a finite period in January 2010, the Board held that it was unnecessary for claimant to be "aware" of any particular diagnosis of a permanent condition or to know the likelihood of any permanent effect on his wage-earning capacity. Because claimant's claim was not filed within one year of the date employer filed its first report of injury, January 14, 2010, the claim was untimely filed and cannot be amended to include claims for benefits for periods in August 2010 and post-March 2014, and those periods cannot be used to render the May 2011 claim timely. Consequently, the Board affirmed the administrative law judge's denial of disability benefits. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

Occupational Diseases and Hearing Loss

The 1984 Amendments added Section 13(b)(2), which provides that in the case of "an occupational disease which does not immediately result in death or disability" the statute of limitations does not begin to run until claimant "becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability." 33 U.S.C. §913(b)(2). A claim must be filed within two years of the date of "awareness" or the last voluntary payment of compensation, whichever is later.

Thus, where a claimant suffers from an occupational disease, he must be aware that the disease has resulted in disability before the two-year period begins to run. Section 702.222(c) of the regulations, 20 C.F.R. §702.222(c), provides that in occupational disease cases, "the time limitation for filing a claim does not begin to run until the employee is disabled, or in the case of a retired employee, where a permanent impairment exists." *See Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986) (although claimant knew of asbestosis in 1976, awareness under amended statute did not occur until he was forced to stop work in July 1980; therefore, his August 1980 claim was timely filed).

Prior to the 1984 Amendments, where claimant filed a protective claim upon becoming aware of his asbestosis and its relationship to his employment, but conceded that he had no disability, the Board held that the claim must proceed to a resolution. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984). The Board stated that the Act does not provide for protective filings to avoid future statute of limitations problems, and a filed claim must be processed in accordance with the regulatory procedures. Thus, if employer requests a hearing, a claim must be referred to the OALJ. *Accord Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994). Under the 1984 Amendments, such protective claims are unnecessary as the limitations period cannot commence until claimant is disabled.

The Second Circuit defined an "occupational disease," requiring that the employee have a disease caused by hazardous conditions of employment, which are peculiar to the employee's employment as opposed to other employment generally. Hazardous activity need not be exclusive to the particular employment, but it must be sufficiently distinct from hazardous conditions associated with other types of employment. *Gencarelle v. Gen. Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). *Accord Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997).

The Board initially held that hearing loss due to long-term exposure to noise is an occupational disease and thus the extended time limits apply. *See, e.g., Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989); *Cox v. Brady-Hamilton Stevedore Co.*, 18 BRBS 10 (1986); *Ronne v. Jones Oregon Stevedore Co.*, 18 BRBS 165

(1985). However, addressing whether hearing loss is an occupational disease "which does not immediately result in death or disability" and thus whether retirees with hearing loss were appropriately compensated under Section 8(c)(23) rather than Section 8(c)(13), the Supreme Court held that since a hearing loss is complete once exposure ends, hearing loss results in immediate disability. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Thus, the expanded limitations periods of Sections 12 and 13 do not apply in hearing loss cases. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g on other grounds* 26 BRBS 27 (1992).

Section 8(c)(13)(D) provides that the Section 13 period does not begin to run in hearing loss cases until claimant receives an audiogram and accompanying report. *See Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986); *Regiannini v. Bethlehem Steel Corp.*, 17 BRBS 254 (1985); *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985). Thus, in a hearing loss case, the time period does not commence until claimant receives an audiogram and written report indicating a hearing loss and is aware of the relationship between his hearing loss and employment. *Cox*, 18 BRBS 10. Cases on the timeliness provision of Section 8(c)(13)(D) are digested in this section, *infra*, and under Section 8(c)(13) of the desk book.

Another problem to arise in occupational disease cases involves multiple employers. The Board initially held that where claimant files a timely claim against one employer but does not file within the time period against the employer found responsible, the claim is time barred. *Smith v. Aerojet Gen. Shipyards, Inc.*, 9 BRBS 225 (1978) (Miller, dissenting), *rev'd*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981). Reversing on appeal, the Fifth Circuit held that the filing provisions do not begin to run against a prior employer where the employee timely files against a later employer until the employee is aware that the later employer is not liable. *Smith v. Aerojet Gen. Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391. The Board has followed the Fifth Circuit's decision in *Smith*. *See Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006) (traumatic injury case); *Osmundsen v. Todd Pac. Shipyards*, 18 BRBS 112 (1986) (Section 12 case). This issue is also discussed in Section 12 of the desk book.

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Occupational Disease Cases

The time limitations of Section 13(b)(2) do not begin to run until claimant is actually disabled by his condition, or in the case of a voluntarily-retired employee, until permanent impairment exists. The Board therefore reversed the administrative law judge's finding that claimant had to file his claim within two years after he became aware of his work-related disease and the likelihood of a *future* loss in earning capacity. The claim is timely, as it was filed within two years of the time claimant became unable to perform his duties

because of work-related respiratory problems. *Curit v. Bath Iron Work Corp.*, 22 BRBS 100 (1988).

In an occupational disease case, the Board noted that the statute of limitations does not begin to run until claimant is aware or should be aware of the relationship between the employment, the disease and the disability, which in the case of a voluntary retiree means permanent impairment. The Board remanded the case, as the administrative law judge made no findings regarding when claimant became aware that his pulmonary condition resulted in permanent impairment. *Lombardi v. Gen. Dynamics Corp.*, 22 BRBS 323 (1989).

The Board held that claimant's chronic synovitis was not an occupational disease entitling him to the extended statute of limitations inasmuch as the condition did not have the characteristics of an occupational disease: unexpectedness, *i.e.*, an inherent hazard of continued exposure to conditions of employment, and gradual, rather than sudden, onset. As claimant did not timely file a claim within one year of his date of awareness, the Board affirmed the finding that the claim was time-barred. *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

The Second Circuit affirmed the Board's holding that claimant was not entitled to the extended statute of limitations for occupational diseases, as claimant's condition did not meet the criteria. The employee must have a disease caused by hazardous conditions of employment, which are peculiar to one's employment as opposed to other employment generally. Hazardous activity need not be exclusive to one's employment, but it must be sufficiently distinct from hazardous conditions associated with other types of employment. Claimant alleged that his chronic synovitis was the result of repetitive trauma--bending, stooping, climbing--required by his nor position with employer. The Second Circuit held that claimant's activities were not "peculiar to" his employment, since these activities are common to many occupations and life in general. *Gencarelle v. Gen. Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

The Board affirmed the administrative law judge's finding that the claim was timely filed under the rationale of *Smith*, 647 F.2d 518, 13 BRBS 391, inasmuch as claimant timely filed a claim against the United States within one year of decedent's death and immediately amended the claim to name employer, once she received the updated Social Security records. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Because the Fifth Circuit, in whose jurisdiction this case arises, has stated that the time limitations of Sections 12 and 13 do not begin to run against a previous employer where the employee timely files a claim against a later employer until the employee is aware that liability could be assessed against that particular employee under the last employer doctrine, *see Smith*, 647 F.2d 518, 13 BRBS 391, the administrative law judge erred in

finding the claim against Avondale barred. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

The word "employment" as it is used in Section 13(b)(2) of the Act necessarily refers to employment covered under the Act for which employer is potentially responsible. Thus, in occupational disease cases the time limitations of Section 13(b)(2) do not begin to run until the claimant or employee is aware of the relationship between his *covered* employment, the disease, and the death or disability. In this case, as there was no evidence that decedent was ever aware of the relationship between his covered employment and his lung cancer, the Section 20(b) presumption is not rebutted and the administrative law judge's finding that the *inter vivos* claim was untimely is reversed. The administrative law judge relied on evidence that decedent might have known of the relationship between his cancer and his post-maritime employment as a roofer where he also was exposed to asbestos. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board affirmed the administrative law judge's finding that decedent's *inter vivos* claim was barred. The administrative law judge rationally inferred that decedent should have been aware of the relationship between his employment, his disease and his disability no later than Nov. 1, 1984, based on medical reports that related the asbestosis to occupational exposure and stated he was impaired. The case was distinguished from *Martin*, 24 BRBS 112, because decedent here was never told that his disease was related only to non-covered employment. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

Claimant's claim, which was not filed within one year of awareness of a compensable injury, was untimely, as Section 13(b)(2) providing a two-year period of limitations for occupational diseases does not apply to cases arising under the 1928 D.C. Act. *Pryor v. James McHugh Constr. Co.*, 27 BRBS 47 (1993).

Where an employee was exposed to asbestos beginning in the early 1950's, learned of the hazards of asbestos exposure and that he had contracted asbestosis in the 1970's and filed a claim for compensation in 1984, the Board held that neither Section 12 nor 13 bars the claim as the record evidence supports the administrative law judge's finding that claimant was not aware of the relationship between his employment, his disease and his disability until October 1984. The limitations period begins to run only when an employee becomes aware of the relationship between his employment, his disease and an actual disability which impairs his wage-earning capacity. In this case, claimant was told there was no contraindication of his continuing to work. The Board rejected employer's contention that the date of awareness can occur when an employee becomes aware of a potential disability, distinguishing *Thorud v. Brady Hamilton Stevedore Co.*, 18 BRBS 232 (1986), and limiting it to its facts as it involved a responsible carrier issue and not timeliness under Section 12 or 13. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

The Board rejected the Director's argument that claimant should be granted a *de minimis* award so that if his non-disabling lung condition developed into a quantifiable disability, his right to request modification would be preserved under Section 22. In this case, a *de minimis* award is not necessary because claimant's right to re-file a claim for disability is protected by Section 13(b)(2). Under this section, the time for filing a claim does not begin to run until claimant is disabled and he is aware of the relationship between the injury, the disability and his employment. Claimant was not economically disabled prior to his voluntary retirement and the record is devoid of evidence of medical impairment. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

Claimant's notice and claim under Sections 12 and 13 were timely where, although claimant had been advised by a physician in 1983 of the "possibility" that he had work-related lung disease, he was not aware nor should have been aware that he had an employment-related lung condition until 1988, when Dr. Barnhart diagnosed work-related asbestos injury; the administrative law judge noted that all of claimant's symptoms were consistent with his preexisting non-work-related chronic diseases, previous medical opinions regarding the cause of claimant's respiratory problems were inconclusive and at least one physician had informed claimant that his condition was not work-related. Moreover, there was no indication that claimant had any permanent impairment, required where claim involves a voluntary retiree, until Dr. Barnhart's impairment rating in 1992. *Lewis v. Todd Pac. Shipyards Corp.*, 30 BRBS 154 (1996).

The Board reversed the administrative law judge's finding that the death benefits claim filed in 1992 was timely filed in this asbestosis case after holding that claimant was or should have been aware on the date of death in May 1987 that her husband's death due to mesothelioma was related to asbestos exposure at work since she knew before his death that the disease was caused by asbestos exposure, that he was exposed to asbestos at work, and that the disease was fatal. The Board rejected the administrative law judge's reasoning, based on *Smith* and *Osmundsen*, that claimant had to be aware of the relationship between a specific covered employment and the disease and death. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd in pert. part sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

The Second Circuit reversed the Board's decision, holding that employer and carrier did not rebut the Section 20(b) presumption. The court held that the carrier's controversion indicating that the date employer learned of the decedent's death was "unknown" was insufficient to rebut the presumption as it did not indicate that employer lacked knowledge of the decedent's work-related death before the claim was filed in 1992, and as there was no evidence indicating when the carrier learned of the decedent's death. The court also held that claimant's returned claim form (undeliverable by the post office) did not constitute substantial evidence that employer lacked knowledge of the decedent's work-related death before 1992, and that the carrier presented no evidence that it lacked knowledge of the decedent's work-related death prior to 1992. Thus, employer and

carrier's failure to file a Section 30(a) report tolled the statute of limitations under Section 30(f), and the court reinstated the administrative law judge's award of death benefits. *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

The Board held that the administrative law judge properly applied the legal standard espoused in *Gencarelle*, 892 F.2d 173, 23 BRBS 13(CRT), and *LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT), for determining whether an occupational disease exists. Moreover, the evidence supported the determination that the conditions of claimant's employment which involved the use of joysticks were "peculiar to" his employment. The Board thus affirmed the finding that claimant's carpal tunnel and cubital tunnel syndromes were occupational diseases subject to the extended statute of limitations at Sections 12(a) and 13(b)(2). The Board affirmed the conclusion that the claim was timely filed under these provisions. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

The Seventh Circuit adopted the standard for determining occupational disease used by the Second Circuit in *Gencarelle*, 892 F.2d 173, 23 BRBS 13(CRT), and the Fifth Circuit in *LeBlanc*, 130 F.3d. 157, 31 BRBS 195(CRT): a gradual condition arising out of exposure to harmful conditions of employment when those conditions are present in a peculiar or increased degree by comparison to employment generally. As the administrative law judge's finding that claimant's repetitive hand and arm movements were due to more than a normal amount of use of joy sticks at work is supported by substantial evidence, the court affirmed the use of the two-year statute of limitations for claimant's carpal tunnel syndrome. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

The Board affirmed the administrative law judge's determination that claimant's claim for death benefits was timely filed. Although the claim was filed 14 years after decedent's death, it was filed within one month of her reading a doctor's report which linked decedent's employment and his exposure to asbestos to his death from cancer, and this was the first time claimant became aware of the relationship between decedent's disease, death and employment. The Board agreed with the administrative law judge that any warnings regarding asbestos posted at employer's facility, which might serve as "presumed knowledge" to decedent, did not extend to claimant. *Jones v. Aluminum Co. of Am.*, 35 BRBS 37 (2001).

Claimant (decedent's widow) filed a claim for death benefits 3 years after her husband's death due to stomach cancer in 1996. At the behest of claimant's attorney, a physician examined decedent's medical records and his pathology specimens and concluded that decedent died of mesothelioma due to long-term exposure to asbestos. The First Circuit affirmed the administrative law judge's finding that claimant credibly testified that she first realized that there was a connection between her husband's death, asbestos, and her husband's job after reading the report in 1999, and it agreed that Section 20(b) applied to place the burden of demonstrating to the contrary on employer. As substantial evidence

supported the administrative law judge, the court affirmed the conclusion that claimant had no reason to suspect, much less believe, that there existed a relationship between her husband's disease, his death, and his employment until 1999, and held that this finding was sufficient to establish a lack of awareness under both the subjective and objective standards. The court thus rejected employer's argument that since claimant knew some employees had filed claims for asbestos-related disease and knew that the white powder on decedent was asbestos, she should have been aware through the exercise of reasonable diligence at an earlier date. *Bath Iron Works Corp. v. U.S. Dep't of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003).

The Board affirmed the administrative law judge's finding that the claim for death benefits resulting from the employee's death in a car crash due to alcohol abuse fell under Section 13(a), as the fact that his death occurred immediately upon the occurrence of the accident precluded application of Section 13(b)(2), regardless of whether the prior alcoholism and depression leading to the accident are "occupational diseases" within the meaning of the Act. *Morgan v. Cascade Gen., Inc.*, 40 BRBS 9 (2006).

In this case where claimant suffered from gastrointestinal problems that caused him to miss work immediately, the Board affirmed the administrative law judge's finding that claimant's condition is not an "occupational disease" and that Section 13(b)(2) of the Act is inapplicable. Specifically, although the Board agreed that claimant has a "disease," it affirmed the administrative law judge's conclusion that claimant's gastroenteritis episodes rendered him immediately disabled from work, unlike asbestosis which is a disease that is not immediately disabling. The Board also noted that gastrointestinal problems are not "peculiar" to work in Iraq, as would be required of an occupational disease. Accordingly, the Board affirmed the administrative law judge's finding that the timeliness of claimant's claim must be pursuant to Section 13(a) of the Act. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016).

The Board vacated the administrative law judge's decision granting employer's motion for summary decision on the ground that claimant's claim was untimely. Because claimant had voluntarily retired prior to the date of manifestation of his alleged condition, the filing period begins to run from the date claimant became permanently physically impaired by his alleged work-related condition and was aware of the relationship between the injury, the permanent physical impairment and his employment. 20 C.F.R §702.222(c). The Board remanded the case for a finding, based on employer's motion for summary decision or after a formal hearing, as to the date claimant became permanently physically impaired and to assess the timeliness of claimant's claim with respect to that date. *Wilson v. Boeing Co.*, 52 BRBS 7 (2018).

The Board reversed the ALJ's finding that Claimant's March 2018 psychological injury claim was not timely filed. It concluded Employer did not rebut the Section 20(b) presumption, as it did not establish Claimant was aware of the relationship between his

employment, his PTSD, and his disability more than two years prior to filing his claim in this occupational disease case. That is, Employer did not show Claimant was aware of his work-related disabling psychological injury in either 2010 or 2014. Contrary to the ALJ's finding, Claimant's rejection for a job in 2010 was not based on a diagnosis of an actual work-related psychological condition, so there could be no awareness at that time. Additionally, Claimant was not provided a copy of his 2014 psychological examination; therefore, even assuming it contained a diagnosis, "awareness" within the meaning of the Act could not be imputed to Claimant. The earliest date Claimant could have been aware of a work-related psychological injury was on October 21, 2016, when he was diagnosed with PTSD related to his employment in Iraq. As Claimant's claim was filed in March 2018, within two years of this time, his claim is timely. The Board remanded the case for further proceedings on this claim. *Rodriguez v. Triple Canopy, Inc.*, 55 BRBS 17 (2021).

Hearing Loss

The Eleventh Circuit held, consistent with Section 8(c)(13)(D), that in a hearing loss case, the employee must both receive an audiogram and be aware of the connection between the disability and the employment before the statute of limitations begins to run. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991).

The Board held that oral explanation of the results of an audiogram will not suffice as an accompanying report and that claimant's actual physical receipt of the audiogram and written accompanying report is required under Sections 12 and 13 of the Act. Accordingly, the Board vacated the administrative law judge's finding to the contrary. Because the earliest possible date that claimant received an audiogram and accompanying written report in this case occurred on January 6, 1986, the Board modified the administrative law judge's decision to reflect this date of awareness under Section 8(c)(13)(D) and affirmed the administrative law judge's determination that the notice provided to SAIF on February 13, 1986, and the claim dated January 11, 1986, but filed on February 11, 1986, were timely pursuant to Sections 12 and 13. *Mauk v. Nw. Marine Iron Works*, 25 BRBS 118 (1991).

The Board held that counsel's receipt of an audiogram is not constructive receipt by the employee, as Section 8(c)(13)(D) states that the Section 12 and 13 time limitations do not begin to run until claimant has physical receipt of an audiogram and accompanying report indicating a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994). On reconsideration, the Board rejected employer's agency and constructive receipt arguments, holding that Congress specified that the statute of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g* 26 BRBS 27 (1992).

In a Section 12 case, the Ninth Circuit rejected the Board's holding in *Vaughn*, 26 BRBS 27. Although claimant did not personally receive a copy of his audiogram and did not personally see the report until after the administrative law judge rendered a decision, it was uncontested that claimant's attorney received the audiogram. Under the principles of agency, the Ninth Circuit held that the deadline for giving notice was not tolled until claimant personally received the audiogram, as the attorney's receipt of the audiogram was constructive receipt by the employee under Section 8(c)(13)(D). The court nonetheless held the notice and claim timely on other grounds. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board held that a letter accompanying an audiogram, which indicated that claimant had "fair" and "below normal" hearing and was silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear earplugs, was inadequate to constitute an accompanying report which would trigger the running of the Section 13 time limitations. Such a letter is insufficient to confer

"awareness" of an employment-related hearing loss as contemplated by the statute. Moreover, Section 8(c)(13)(C) and 20 C.F.R. §702.441, setting out the requirements for an audiogram to be presumptive evidence of the amount of hearing loss, is not related to timeliness determinations under Sections 8(c)(13)(D), 12 and 13. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

Voluntary Payments

Subsections (a) and (b)(2) also provide that a claim is timely if filed within one year of the last payment of compensation. After the sentence stating that the right to compensation is barred unless a claim is filed within one year after the injury or death, Section 13(a) states that where compensation has been paid for such injury or death *without an award*, "a claim may be filed within one year after the date of the last payment." 33 U.S.C. §913(a); *see Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004). Section 13(b)(2) provides that a timely claim is one filed within two years of claimant's date of awareness, or "within one year of the date of the last payment of compensation, whichever is later." 33 U.S.C. §913(b)(2). This phrase does not require that the payment of compensation be "voluntary," as in Section 13(a). *Robinson v. Elec. Boat Corp.*, 51 BRBS 1 (2017).

While Section 13(b)(2) explicitly provides for use of the later date, the same result applies in cases under Section 13(a). Thus, where claimant sustained an injury to his knee in 1970 and the last payment was made in May 1971, the statute of limitations began to run only after he was aware in 1979 that the deterioration of his knee was related to his employment. *Morales v. Gen. Dynamics Corp.*, 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985).

The payment of medical benefits is not the payment of "compensation" which will toll the Section 13(a) period. *Marshall v. Pletz*, 317 U.S. 383 (1943); *Bingham v. Gen. Dynamics Corp.*, 14 BRBS 614 (1982). Thus, a claim must be filed within one year of the last payment of disability benefits.

In *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1978) (S. Smith, dissenting), the Board held that payments made by employer under the state workmen's compensation act constituted payment of compensation as defined in Section 13(a) so as to toll the running of the one year statute of limitations. *Accord Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). The Board majority in *Saylor* also noted that the purpose of the Section 13 statute of limitations, which is to prevent the revival of stale claims where evidence has been lost, memories have faded, and witnesses have disappeared would not be served by barring the claim in the factual pattern before it. *See Belton v. Traynor*, 381 F.2d 82 (4th Cir. 1967).

Where a timely claim is filed under Section 13, the claim remains open until a formal award is issued. *Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Section 22 does not apply under these circumstances, and there is no requirement that claimant renew a request for benefits within a year of the last payment of compensation. *See Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993)(Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991), and cases cited in Introduction, *supra*.

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The Board affirmed the administrative law judge's finding that employer's payment of claimant's full salary during claimant's hospitalizations was not intended as compensation. The statute of limitations therefore was not tolled until one year after the date of the last payment of this salary. *Taylor v. Sec. Storage of Washington*, 19 BRBS 30 (1986).

The Board upheld the administrative law judge's summary judgment ruling dismissing the claim where claimant filed his claim more than one year after the last voluntary payment under Section 13(a). The Board rejected claimant's contention that the one year period should begin to run on the date claimant became aware of employer's erroneous calculation of claimant's average weekly wage resulting in underpayment of compensation. *Daigle v. Scully Bros. Boat Builders, Inc.*, 19 BRBS 74 (1986).

The Board affirmed the administrative law judge's finding that the widow's claim was timely filed under Section 13 because it was filed while voluntary Section 9 death benefits were being paid to her two minor children. The administrative law judge found that Section 9 provides only for one death benefit, with differing distributions depending upon who the survivors are. There is no requirement in Section 13 that payments to a specific survivor toll time limits only with regard to that individual. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Claimant's claim was not barred since he was receiving state workers' compensation benefits when his claim under the Act was filed. Since the purposes of Section 13(a) would not be furthered by barring the claim under these circumstances, the payments under the state act toll the provisions of Section 13(a). The Board rejected employer's contention that the payment of compensation must be in accordance with the Section 2(12) definition of "compensation" as money payable "as provided for in this Act." In this case, employer chose to pay claimant under the state act, and there was no danger of a stale claim, etc. *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 Fifth Circuit affirmed the Board's holding that the claim was not barred as his Longshore Act claim was filed while employer was making voluntary payments under the state act. *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

Where claimant's receipt of state benefits occurs after the Section 13 statute of limitations has run, the Board held that the rationale of *Saylor*, 9 BRBS 561, and *Smith*, 21 BRBS 83, does not apply and the running of the statute is not tolled. In those cases, the Board held that receipt of state benefits tolled the running of the statute, just as the receipt of Longshore benefits does, because employer was aware of claimant's injured condition. Here, the last payment under the Act was in July 1979, the state and Longshore claims were filed in Oct.

1980, and a lump sum payment under a state award occurred in 1982. Thus, the Board reversed the finding that the claim was timely filed and the award of disability benefits. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219 (1988).

The Board held that an attending physician's report indicating the possibility of a continuing disability, which is filed within one year after the termination of voluntary payments or while voluntary payments are being made, meets the filing requirement of Section 13(a). The Board therefore reversed the administrative law judge's finding that the attending physician's report must have been generated within the one-year period following the termination of voluntary payments and held that the report may be generated and filed while claimant is receiving voluntary payments. *Chong v. Todd Pac. Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

The Board affirmed the administrative law judge's finding that payments under an employer's short-term disability plan or for unused vacation time are not payments of compensation under the Act sufficient to toll the Section 13(a) period. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

In a case where the borrowing employer challenged timeliness on several grounds, the Board stated that as the lending employer continued to make voluntary payments, the Section 13(a) limitations period for a claim to be filed against borrowing employer would not commence until one year from the last payment of compensation. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The Board construed the word "award" in the phrase "without an award" in Section 13(a) as meaning an award under the Act. Thus, where payment is made without an award under the Act, a claim is timely if filed within one year of the last payment. In this case, employer's payment pursuant to a state award constituted a payment without an award under the Act and the statute of limitations was therefore tolled until one year after employer's last payment. Accordingly, the Board reversed the administrative law judge's finding that the claim filed within one year of employer's last payment pursuant to a state compensation award was not timely. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

The Board affirmed the administrative law judge's award of benefits in this case where claimant was diagnosed with lung cancer after his retirement. He filed a claim under the state workers' compensation law in August 2010 and settled that claim with employer, receiving the settlement proceeds in December 2012 after the judge approved the settlement. In October 2013, claimant filed a claim under the Act. The administrative law judge found that the claim was timely filed and denied employer's motion for summary decision. The Board affirmed, holding that the payment of settlement proceeds under the state law constituted "payment of compensation" under Section 13(b)(2). The Board noted that Section 13(b)(2) contains less restrictive language than Section 13(a), which states that

a claim is timely if filed within one year of the last voluntary payment of compensation (under the Act). Although claimant's 2013 claim was not filed within two years of the date claimant became aware of the relationship between his employment and his condition, it was filed within one year after "the last payment of compensation" and was timely filed. *Robinson v. Elec. Boat Corp.*, 51 BRBS 1 (2017).

Raising the Section 13 Bar

Section 13(b)(l) provides that the Section 13(a) time limitation will not be a bar unless it is raised at the first hearing on the claim. *See* 20 C.F.R. §702.223; *Shoener v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 630 (1978); *Shelton v. Washington Post Co.*, 7 BR6S 54 (1977). The "first hearing" refers to a hearing before an administrative law judge and not the informal proceedings before the district director. *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987); *Carlow v. Gen. Dynamics Corp.*, 15 BRBS 115, 121 n. 5 (1982). The contention, raised on a pre-hearing statement (Form LS-18), that claimant's claim was not timely filed, was properly addressed by the administrative law judge. *Lewis*, 20 BRBS at 129.

Section 13(c)

Section 13(c) provides that the Section 13 time limitation period does not apply to a mentally incompetent person or a minor until an authorized representative or guardian has been appointed. In the case of a minor who has had no guardian before he or she becomes of age, the time limitation begins to run from the date he or she becomes of age. *See* 20 C.F.R. §702.222(a).

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The Board held that the term "minor," which is not defined by the Act and which has no clear common meaning, must be defined by appropriate state law, as there is no "federal common law." Thus, the administrative law judge erred in relying on the Act's definition of "child" at Section 2(14) to determine whether this claim was timely, as the terms must have different meanings. In this case, the use of Mississippi law is proper for defining the term "minor," and Mississippi has established the age of 21 as the age of majority. Because claimant herein was two when decedent died, and because claimant did not have an appointed guardian for purposes of filing a claim under the Act, her claim for death benefits filed within one year of her 21st birthday was filed in a timely manner. Consequently, the Board reversed the administrative law judge's decision and remanded the case for consideration on the merits. *Smith v. Shell Offshore, Inc.*, 33 BRBS 161 (1999).

The Board affirmed the administrative law judge's finding that claimant did not lose the ability to engage in rational thought and therefore was not mentally incompetent at any time during the year following decedent's death and, thus, Section 13(c) did not toll the statute of limitations. The administrative law judge acknowledged evidence of claimant's grief over her husband's death but properly accorded greater weight to the absence of a medical diagnosis or any treatment for a mental disorder and the absence of an appointment of a guardian for claimant's person or property than to the lay testimony regarding claimant's emotional state in the months after decedent's death. *V.M. [Morgan] v. Cascade Gen., Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F. App'x 695 (9th Cir. 2010).

Section 13(d)

Section 13(d) provides that the Section 13(a) one year statute of limitations is tolled where a claimant has brought a suit in law or admiralty for damages due to injury or death, recovery is denied because claimant is an employee and defendant an employer within the meaning of the Act, and employer has secured compensation for the claimant under the Act. The one year limitation period begins to run from the date of termination of the suit. *See* 20 C.F.R. §702.222(b). *See Calloway v. Zigler Shipyards, Inc.*, 16 BRBS 175 (1984); *George v. Lykes Bros.*, 7 BRBS 877 (1978); *Hollinhead v. Litton Sys., Inc.*, 6 BRBS 84 (1977), *aff'd sub nom. Ingalls Shipbuilding Div., Litton Sys., Inc. v. Hollinhead,* 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978); *McCabe v. Ball Builders, Inc.*, 1 BRBS 290 (1975). The burden of establishing the elements of Section 13(d) is on claimant. *George*, 7 BRBS 877.

In *Hollinhead*, 571 F.2d 272, 8 BRBS 159, the Fifth Circuit affirmed a Board decision affirming the administrative law judge's finding that claimant's filing of a claim under the Mississippi workers' compensation statute tolled the filing period under the Act. The court adopted the reasoning of the administrative law judge's decision, attaching it as an appendix. In his decision, the administrative law judge discussed case law, including *Wilson v. Donovan*, 218 F.Supp. 944 (E.D. La. 1963), *aff'd mem. sub nom. T. Smith & Son, Inc. v. Wilson*, 328 F.2d 313 (5th Cir.), *cert. denied*, 379 U.S. 816 (1964) (a claim under the Louisiana workers' compensation statute tolls the limitation period under the Act), and concluded

> Statutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them. I hold that the filing and processing by Claimant of his claim before the Mississippi Workmen's Compensation Commission is an adequate excuse under Section 13(d) of the Act for failing to file his claim under the Longshoremen's Act within the year allowed by Section 13(a) of said Act, and that Claimant's claim is not barred by the time limitation provided in Section 13(a). There is no evidence that Respondents suffered any prejudice due to the failure of Claimant to file his claim within the statutory period. Section 13 was not intended to provide a technical device to release the employer and insurer from their obligations, but merely to prevent prejudice to them from the entertainment of stale claims.

Hollinhead, 571 F.2d at 274-275, 8 BRBS at 161.

In *Calloway*, 16 BRBS 175, Board stated that under *Hollinhead*, the grounds on which recovery is denied are irrelevant because the filing of an action alone is sufficient to toll the statute. In *Calloway*, claimant filed suit under the Jones Act which was dismissed because employer was not the owner of the barge and decedent was not a seaman under the Jones Act. The Board rejected employer's argument that the suit was not within Section

13(d) because recovery was not denied on the basis that decedent was an employee and defendant an employer which had secured the payment of compensation under the Act. The Board stated that *Hollinhead* controlled as the case arose in the Fifth Circuit, and that in that case the court held that the filing of a state claim was sufficient to toll the Section 13(a) time period even though the court was unable to determine the basis for the denial of recovery under the state act because the state claim was withdrawn. Concluding that under Fifth Circuit law, the grounds upon which recovery is denied in a suit brought at law or in admiralty are irrelevant because the filing of an action alone tolls the Section 13(a) statute of limitations, the Board held that the filing of the admiralty claim tolled the Section 13(a) time period and the claim under the Act, which was filed before the admiralty claim was dismissed, was thus timely. *Cf. Bath Iron Works Corp v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997) (First Circuit discussed its doubts regarding the validity of *Hollinhead*).

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Where claimant filed a Longshore claim against a lending employer and filed suit in tort against the borrowing employer, the Board held that a claim filed against the borrowing employer within one year of the date that claimant's third party tort action was dismissed because that employer was claimant's employer under the Act and thus immune from tort liability was timely pursuant to Section 13(d). *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

In a case where the First Circuit held that a state finding that claimant's permanent disability was not due to the work injury was entitled to collateral estoppel effect and thus that the claim must be denied on that basis, the court noted in *dictum* its doubts about the validity of the holding in *Hollinhead*, 571 F.2d 272, 8 BRBS 159, that the filing of a state workers' compensation claim is considered to be a suit for damages as contemplated by Section 13(d) sufficient to toll the Section 13(a) limitations period. The court also noted that recovery was not denied on the grounds stated in the statute. Nonetheless, as *Hollinhead* was the only circuit precedent on the issue, the court stated its reluctance to depart from that holding without warning. Therefore, it rested its decision on collateral estoppel while noting its "substantial doubts" about timeliness in order to provide future claimants with notice that a claim should be filed within one year of awareness. *Bath Iron Works Corp v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997).

The Board held that the filing of an untimely state claim cannot toll the statute of limitations under the Act pursuant to Section 13(d). In this case, claimant sustained an injury in October 1980 and became aware of the full impact of his injury in August 1983. His state claim, which was filed in February 1984, would have been timely under the Act, but was untimely under the state law. Consequently, the Board held that claimant's claim under the Act, which was filed in June 1992, during the pendency of the state claim, was untimely under Section 13, as Section 13(d) did not toll the statute of limitations for filing a claim

under the Act. The Board distinguished this case from the Fifth Circuit's decision in *Hollinhead*, 571 F.2d 272, 8 BRBS 159, and the Board's decision in *Calloway*, 16 BRBS 175. Therefore, the Board affirmed the administrative law judge's denial of claimant's claim for disability benefits, as it was filed in an untimely manner. *Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

The Fifth Circuit affirmed the Board's holding that the statute of limitations was not tolled by the provisions of Section 13(d) where claimant's state claim was held to be untimely filed under the state workers' compensation law. The court distinguished this case from the decisions in *Hollinhead*, 571 F.2d 272, 8 BRBS 159, and *Calloway*, 16 BRBS 175. *Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

The Third Circuit affirmed the finding that claimant's claim was timely filed. Claimant was burned when he stepped in chemicals at work on May 3, 2000, and employer voluntarily paid benefits until October 6, 2000. Despite continued ankle pain, claimant continued to work until May 2002, when he had surgery to fuse his ankle to his leg. In July 2002, his doctor stated he could not return to work and expressed the opinion that the chemical burn exacerbated claimant's arthritic condition. Claimant filed a claim for benefits under the Jones Act on October 17, 2002. After that case was dismissed on October 7, 2003, claimant filed a claim under the Act on October 13, 2003. The court held that claimant did not become aware of the full extent of his disability until July 12, 2002, thus, he had until July 12, 2003, to file a claim under the Act. As the time for filing a claim under the Act was tolled during the pendency of the Jones Act claim pursuant to Section 13(d), the claim filed on October 13, 2003, was timely. *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008).