BRB No. 99-1197

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| HORACE JOHNSON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| UNITED STATES COAST GUARD EXCHANGE | ) | DATE ISSUED: 08/17/2000 |
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| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order of Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph H. Saunders (Fernandez & Saunders, P.A.), Pinellas Park, Florida, for claimant.

Gregory S. Unger (Michael S. Guillory, APLC), Metairie, Louisiana, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order of Remand (98-LHC-1937) of Administrative Law Judge Jeffrey Tureck filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a warehouseman, suffered a strain injury to his right shoulder on October 26, 1988, but was released to return to his usual employment on February 2, 1989. Employer voluntarily paid claimant for temporary total disability benefits until March 8, 1989. 33 U.S.C. §908(b). On February 28, 1990, claimant's employment was terminated due to a reduction-in-force. On March 1, 1990, claimant telephoned the Office of Workers' Compensation Programs (OWCP) allegedly requesting that a claim form be sent to him. The

Department of Labor (DOL) employee who took claimant's telephone call filled out a form documenting their conversation. Claimant subsequently filed a claim for compensation under the Act.

In his Decision and Order, the administrative law judge found that the DOL form containing its employee's notes of claimant's telephone call to OWCP on March 1, 1990, constitutes a claim under the Act and that, therefore, the instant claim was timely filed. Noting that the only issue initially raised by the parties before him was the timeliness of the claim, but that employer had subsequently raised arguments in its post-hearing brief concerning the nature and extent of claimant's disability, the administrative law judge remanded the case to the district director to address these issues.[1]

On appeal, employer argues that the administrative law judge erred in finding the March 1, 1990, telephone call from claimant constituted appropriate notice and that, therefore, the claimant's claim was timely filed. Claimant responds, urging affirmance.

Section 13(a) of the Act provides a claimant with one year after he becomes aware of the relationship between his traumatic injury and his employment within which he may file a claim for compensation for the injury. 33 U.S.C. §913(a); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33 (CRT) (6th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Gregory v. Southeastern Maritime Co.,* 25 BRBS 188 (1991). A claim need not be filed on any particular form to satisfy Section 13, as long as it discloses the claimant's intent to assert a

[1]Because the timeliness of the claim was the only issue addressed by the administrative law judge, the administrative law judge's decision does not include a compensation order as required by the Act. *See* 20 C.F.R. §702.348. In order to avoid piecemeal review, the Board does not ordinarily accept interlocutory appeals, *see Hartley v. Jacksonville Shipyards, Inc.*, 28 BRBS 100 (1994), and has held that bifurcated proceedings should be avoided. *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985). Nonetheless, as this appeal has been pending for a lengthy period and is fully briefed, review at this time serves the interests of administrative efficiency.

right to compensation. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988); *see also I.T.O. Corp. of Virginia v. Pettus*, 73 F.2d 523, 30 BRBS 6 (CRT)(4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996). Where employer pays compensation, as here, claimant has one year from the last payment to file his claim, unless he becomes aware of the true nature, extent and impact of his injury at a later date. *See, e.g., Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985).

In the instant case, it is undisputed that on March 1, 1990, claimant telephoned OWCP, and that this call was memorialized in a written report. *See* JX 1. That report contains notations regarding the months of September/October/November 1988, that claimant last saw a doctor in November 1989, and that claimant was advised to complete an LS-203 form and send a statement of facts to DOL. *Id.*

While employer disputed the nature and subject matter of claimant's March 1, 1990, telephone call to OWCP, the administrative law judge, citing *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974), found that this call indicated claimant's intent to file a claim under the Act. In rendering this determination, the administrative law judge concluded that it was "inconceivable that claimant would have been advised to file a Longshore Act claim if the telephone call had related only to complaints of race and age discrimination" as alleged by employer. *See* Decision and Order at 5.

We affirm the administrative law judge's determination as it is supported by substantial evidence. Specifically, the administrative law judge rationally concluded that OWCP's memorandum documenting claimant's March 1, 1990, telephone call would not have memorialized its advice that claimant file a claim had not claimant raised that issue. In this regard, contrary to employer's assertions on appeal, the United States Courts of Appeals for the Fifth Circuit's decision in *Bergeron*, 493 F.2d at 545, supports the administrative law judge's determination. In *Bergeron*, the court held that a memorandum prepared by the district director regarding a telephone conversation with a claimant's attorney, noting that claimant had received maximum partial disability compensation and would file for modification pursuant to Section 22 of the Act, was sufficient to constitute a "claim;" in so holding, the court acknowledged that the "trend of decisions appears to be that any written notice by or on behalf of the claimant within one year evidencing an intention to make a claim will be treated as sufficient to toll the running of the statutory period for filing a claim." *Bergeron*, 493 F.3d at 547. We therefore hold that the administrative law judge rationally found that the memorandum recording by OWCP of the telephone conversation with claimant constituted a claim under the Act since it disclosed claimant's intent to assert a right to compensation. *See Pettus*, 73 F.3d at 523, 30 BRBS at 6 (CRT); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon en banc*, 32 BRBS 251 (1998). Accordingly, we affirm the administrative law judge's determination that the instant claim was filed in a timely manner.

Accordingly, the administrative law judge's Decision and Order of Remand is affirmed. However, as a final order on this claim has not been entered, the case is remanded to the administrative law judge for such further proceedings as are necessary for entry of an order awarding or denying benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge