BRB Nos. 05-0393
and 05-0393A

RICHARD A. JOHNSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY	)	DATE ISSUED: 01/19/2006
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Denial of Untimely Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Steven T. Moe (Petersen, Sage, Graves & Stockman), Duluth, Minnesota, for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart & Storm, Chartered), Chicago, Illinois, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denial of Untimely Claim (2004-LHC-1809) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a heavy equipment operator and mechanic, suffered a series of back injuries during the course of his employment. Claimant reported injuries in 1983, 1986,

and 1999. Claimant underwent back surgery in 1985, but did not allege this was for a work-related condition. After 1999, claimant complained of back pain related to his employment, and, on October 4, 2002, claimant retired due to his back pain. He filed a claim for compensation on May 27, 2003. In his Decision and Order, the administrative law judge found that claimant was, or should have been, aware that he suffered a compensable injury as of January 3, 2002, the date of his consultation with Dr. Eckman. As claimant failed to file a claim for compensation within one year of that date, the administrative law judge found that the claim was untimely filed, and he denied compensation. 33 U.S.C. §913(a).

Claimant appeals, arguing that the administrative law judge erred in finding that January 3, 2002, was his date of awareness under Section 13, and, based on that error, in concluding that the claim was untimely filed. BRB No. 05-0393. Employer responds, urging affirmance of the administrative law judge's finding in this regard. Employer has also filed a protective cross-appeal alleging that the administrative law judge erred in finding claimant established his *prima facie* case. BRB No. 05-0393A. Claimant has not responded to employer's cross-appeal.

Claimant contends that the administrative law judge erred in finding that his date of awareness was in January 2002. Claimant contends that the statute of limitations did not begin to run until he was aware of a loss in wage-earning capacity in October 2002, and thus that his claim was timely filed.

Section 13(a) of the Act, 33 U.S.C. §913(a), applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the date he becomes aware, or with the exercise of reasonable diligence, should have been aware, of the relationship between his injury and his employment.[1] In *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit held that the one-year limitations period does not commence to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." *Stancil*, 436 F.2d at 279. Following *Stancil*, the Courts of Appeals have held that the limitations period in cases of traumatic injury does not commence until the employee is aware or should be aware of the likely impairment of his earning capacity. *See, e.g., 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); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990);

[1] The administrative law judge found that claimant's claim was for a traumatic injury. This finding is not challenged on appeal.

Marathon Oil Co. v. Lunsford, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984)*; see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979) applying a similar standard to construe identical language in Section 12 of the Act, 33 U.S.C. §912). The United States Court of Appeals for the Eighth Circuit, within whose jurisdiction this case arises, specifically adopted the standard that the statute of limitations does not begin to run until "the employee becomes aware of the full character, extent, and impact of the harm done to him or her as a result of the employment-related injury." *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP,* 43 F.3d 1206, 1208 (8th Cir. 1994). The court rejected the employer's contention that the claimant's mere knowledge of a work-related condition was sufficient to commence the running of the statute of limitations. *Id.* Rather, it is the employee's awareness that his work-related injury will impair his earning capacity that commences the statute of limitations. *Paducah Marine Ways*, 82 F.3d at 131, 30 BRBS at 35(CRT); *see also J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990). In addition, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that, in the absence of substantial evidence to the contrary, the claim was timely filed.

With this law as our foundation, we agree with claimant that the administrative law judge's determination of claimant's date of awareness must be reversed, as it is based solely on a finding that claimant was aware of a back injury in January 2002. Decision and Order at 6. Claimant's mere knowledge of the injury is not sufficient to demonstrate the requisite "awareness" under Section 13. *Duluth*, 43 F.3d at 1208. Relevant to the issue of "awareness," claimant testified that his back pain increased over the last four or five years of his employment. HT at 49. Claimant's primary treating physician during this period of time, Dr. Peterson, diagnosed lumbar disk disease. EX 4. In January 2002, upon referral from Dr. Peterson, Dr. Eckman examined claimant and noted that claimant had not recently missed time from work. Dr. Eckman diagnosed spondylosis, and he discussed with claimant pain management strategies. EX 5. He specifically stated that, "It does seem reasonable that [claimant] continue with his work as he wishes. . . ," and he noted that claimant had no basis to seek disability benefits at that time. *Id.* at 5a-4. Dr. Peterson saw claimant again in July 2002 and noted that claimant's back pain interferes with his work, but that claimant has been able to "carry on." CX 4k. In August 2002, after reviewing claimant's CT scan, Dr. Peterson diagnosed a disc protrusion at L5-S1. CX 4o. In late August 2002 claimant submitted retirement papers, and he actually retired in October 2002. Subsequently, on March 4, 2004, after reviewing the CT scan, Dr. Eckman rendered a concurring opinion that claimant cannot return to his work as a heavy duty mechanic. EX 5b.

Contrary to the administrative law judge's decision, claimant had no basis to know in January 2002 that he had an "actionable claim" as he was not aware of a loss in wage-earning capacity at that time. The uncontradicted evidence establishes that claimant continued to work until October 2002, and indeed Dr. Eckman stated in January 2002 that

claimant should continue working. Similarly, Dr. Peterson noted in July 2002 that claimant was "carrying on" with his work despite his pain. Claimant's mere knowledge that his back pain was aggravated by his work is legally insufficient to commence the running of the statute of limitations in the absence of evidence that claimant was aware of the full impact of his work-related injury, *i.e.*, the absence of knowledge that his injury caused a loss in wage-earning capacity. *Duluth, Missabe & Iron Range Ry. Co.*, 43 F.3d at 1208; *see Paducah Marine Ways*, 82 F.3d at 131, 30 BRBS at 35(CRT) (court notes that claimants are not required to file claims for "aches and pains" that are not disabling); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). Therefore, we vacate the administrative law judge's finding that claimant was "aware" in January 2002 for purposes of Section 13(a) as it is not supported by substantial evidence or in accordance with law. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Moreover, we hold that claimant's May 27, 2003, claim was timely filed as a matter of law. Claimant first filed retirement papers in late August 2002 due to his back injury and actually retired in October 2002. Claimant's claim was filed within one year of either date, 33 U.S.C. §913(a), and thus we need not remand the case for findings as to when claimant was aware that the injury caused a loss in earning capacity. *Welch*, 23 BRBS 395. Accordingly, we reverse the administrative law judge's finding that claimant's claim was untimely filed.[2]

We remand the case for the administrative law judge to address any other issues raised by the parties, including the cause of claimant's back condition. Employer appeals the administrative law judge's "finding" that claimant established his *prima facie* case. Any statements the administrative law judge made in this regard were in the context of his finding that claimant was "aware" that the conditions of his employment were causing him pain, *see* Decision and Order at 6, and not in the context of whether claimant's back injury arose out of his employment in the sense that it is medically related to or was aggravated by his employment. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). On remand, therefore, the administrative law judge should address, *inter alia*, the issue of whether claimant's back condition is related to his employment in light of the case precedent addressing Section

[2] Given this disposition of claimant's appeal, we need not address claimant's contention that the administrative law judge erred in addressing the issue of the timeliness of claimant's claim due to employer's failure to raise the issue at the hearing. *See* 33 U.S.C. §913(b)(1); *Globe Indemnity Co. v. Calbeck*, 230 F.Supp. 14 (D.C.Tex. 1959); 20 C.F.R. §702.223.

20(a) of the Act, 33 U.S.C. §920(a), and the aggravation rule.[3] *Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

Accordingly, the administrative law judge's finding that claimant's claim was untimely filed is reversed. The Decision and Order denying benefits is vacated, and the case is remanded for the administrative law judge to address any other issues raised by the parties.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[3] In this regard, we note that the administrative law judge properly observed that an "injury" within the meaning of the Act can occur gradually over a period of time. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).