

ROGER BELLOWS)
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 Claimant-Respondent)
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 v.)
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 C&C MARINE MAINTENANCE) DATE ISSUED: 01/31/2007
 COMPANY)
)
 Self-Insured)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Fornella and Juliet Leopardi (Heintzman, Warren, Wise & Fornella, P.C.), Pittsburgh, Pennsylvania, for self-insured employer.

Peter B. Silvain, Jr. (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-01737) of Administrative Law Judge Thomas M. Burke 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in

accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on May 3, 2000, when he stepped in lime, causing second to third degree burns to the mid-calf area of his legs. The area became infected and claimant underwent a debridement procedure to remove the infected tissue on May 10, 2000. Claimant continued to complain of pain in his left ankle and was referred to an orthopedic surgeon, Dr. Thomas, for treatment in August 2000. Dr. Thomas treated claimant conservatively, but opined that claimant would be a good candidate for ankle fusion surgery. Claimant did not return to Dr. Thomas until April 2002, at which time he agreed to undergo the ankle fusion surgery. Claimant did not return to work following this surgery. Employer voluntarily paid claimant temporary total disability benefits from May 8, 2000 to October 1, 2000. Claimant filed a suit under the Jones Act, 46 U.S.C. §688, on October 17, 2002, which was dismissed on October 7, 2003. Subsequently, claimant filed a claim for benefits under the Longshore Act on October 13, 2003. Cl. Ex. E.

In his Decision and Order, the administrative law judge found that Dr. Thomas opined on July 12, 2002, that claimant’s ankle condition is related to the lime burn and that claimant was limited to light-duty work. The administrative law judge found that this opinion is the earliest evidence that claimant was aware of the relationship between his injury, the work accident, and his potential loss in wage-earning capacity. Thus, the administrative law judge found that the statute of limitations began to run on this date. Claimant filed his Jones Act suit on October 17, 2002, which tolled the time for filing a claim under the Act until the suit’s dismissal on October 7, 2003. Thus the administrative law judge found that the claim filed on October 13, 2003 was timely. 33 U.S.C. §913(d). Moreover, the administrative law judge found that Dr. Thomas opined that claimant’s lime burns could have aggravated claimant’s pre-existing arthritis and that there is no evidence to the contrary. Therefore, the administrative law judge found that the evidence establishes invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that the presumption that the chemical burn aggravated claimant’s pre-existing arthritic condition is not rebutted. The administrative law judge also found that claimant is unable to perform his former work as a welder and that employer did not submit any evidence of suitable alternate employment. Therefore, the administrative law judge found that claimant is entitled to permanent total disability benefits. With regard to employer’s application for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), the administrative law judge found that claimant’s arthritis in his left ankle qualifies as a pre-existing permanent partial disability and that claimant’s permanent total disability is not due solely to the lime burns. However, the administrative law judge found that there are no medical reports of record that claimant’s arthritis had been diagnosed prior to the work injury, and thus, the

condition was not manifest to employer. Consequently, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed, asserting that claimant was aware of the relationship between his injury and his employment in 2000, and that he should have been aware of the effect on his earning power when he had the pain in 2000. Employer also contends that the administrative law judge erred in finding that the work-related lime burn aggravated claimant's arthritic condition. Claimant has not responded to this appeal. Lastly, employer contends that the administrative law judge erred in finding that claimant's arthritis was not manifest to it prior to the work injury, and thus in denying relief from continuing compensation liability pursuant to Section 8(f). The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Employer filed a reply brief.

Initially, employer argues that the administrative law judge erred in finding that claimant's claim was timely filed. Specifically, employer contends that claimant was aware of the connection between the pain in his ankle and his work-related lime burn as early as July 2000 when he complained to Dr. Sangodeyi about the pain. In addition, employer contends that claimant continued to work in pain after his release for work in October 2000 and that he put off surgery as he did not want to quit work. Thus, employer asserts that claimant was aware that his ankle condition could affect his earning capacity as early as October 2000.

Section 13(a) of the Act provides a claimant with one year after he becomes aware, or with the exercise of reasonable diligence should be 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). In *Stancil v. Massey*, 436 F.2d 274, 278 (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." *Accord Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 27, 24 BRBS 98, 112(CRT) (4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991). In the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the claim was timely filed. *See Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990).

In the present case, the administrative law judge found that the doctors who were treating claimant for the lime burns and the ankle pain "struggled to explain the cause of claimant's ankle injury." Decision and Order at 7. Moreover, the physicians denied a

connection between the lime burns and claimant's arthritic ankle condition prior to recommending surgery in 2002. Claimant was treated by Dr. Sangodeyi, a general surgeon, for his lime burn and subsequent infection. In July 2000, claimant began complaining of pain and swelling in his left ankle. Dr. Sangodeyi ruled out osteomyelitis and recommended that the claimant be referred to a different specialist by his primary care physician. Claimant was referred to Dr. Thomas, an orthopedist, who diagnosed significant degenerative joint disease in claimant's left ankle, which he did not believe, in September 2000, was associated with the work-related burn. Emp. Ex. E. However, in a letter dated July 12, 2002, Dr. Thomas opined that the chemical burns may have aggravated claimant's arthritic condition. Emp. Ex. H. He testified in a deposition that although the lime burn did not cause claimant's arthritis, the irritation from the burn around the joint may have caused the arthritic condition to flare-up, causing claimant to undergo surgery to the ankle earlier than he would have needed if not for the injury. Cl. Ex. D. Dr. Schneiderman, claimant's primary care physician, also testified on February 2, 2005, that as a result of the work-related accident, claimant suffered second degree burns with an exacerbation of some arthritis in the ankle. Cl. Ex. B.

As the medical experts did not connect claimant's work-related lime burn to his ankle condition until July 2002, the administrative law judge found that it is not reasonable to find claimant should have been aware of the relationship between the two conditions prior to that time. Moreover, the administrative law judge found that claimant became aware that his ankle injury would result in an impairment to his wage-earning capacity in 2002, when Dr. Thomas recommended the ankle fusion surgery. H. Tr. at 28. Following his initial treatment for the burn injury, claimant was released for full-time work with no restrictions. Emp. Ex. F. However, in March 2002, in discussing the need for the ankle fusion, Dr. Thomas informed claimant that he would lose the movement in his foot and be unable to walk unaided following the surgery. In July 2002, Dr. Thomas concluded that claimant could perform only light-duty work and had lost 51 percent of the use of his left ankle. The administrative law judge found that as claimant was able to work full-time and without restrictions prior to his surgery, the earliest evidence of record that establishes that claimant's wage-earning capacity would be impaired due to the work injury is the letter from Dr. Thomas dated July 12, 2002. We affirm the administrative law judge's date of awareness finding as it is rational and supported by substantial evidence. *Stancil*, 436 F.2d at 279; *Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *see also Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Section 13(d) of the Act, 33 U.S.C. §913(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, until 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.¹ The one year limitation period begins to run from the date of termination of the suit. *See* 20 C.F.R. §702.222(b); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). In the present case, claimant filed suit under the Jones Act on October 17, 2002, within one year of the date of awareness. That suit was dismissed on October 7, 2003, and claimant filed a claim under the Act on October 13, 2003. Thus, contrary to employer's contention, the administrative law judge correctly found that the claimant's suit under the Jones Act tolled the statute of limitations pursuant to Section 13(d). *Vodanovich*, 27 BRBS at 289 n.3.

Employer also contends that the administrative law judge erred in finding that claimant's work-related lime burn aggravated his pre-existing arthritic condition. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT)(1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS

¹ Specifically, Section 13(d) provides:

Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury death on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit.

33 U.S.C. §913(d).

119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). Thus, application of Section 20(a) gives claimant a presumption that the work injury aggravated or contributed to the pre-existing condition, and the employer must present evidence addressing aggravation or contribution in order to rebut it. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

In this case, it is undisputed that claimant suffered a work-related lime burn in May 2000 and that he underwent an ankle fusion in May 2002 to treat his painful arthritic condition. The administrative law judge found that the Section 20(a) presumption that the arthritic condition was related to the burn injury was invoked based on the testimony of Dr. Thomas that the work-related lime burn exacerbated claimant's pre-existing arthritis. Cl. Ex. D at 16. Moreover, although Dr. Thomas stated that claimant's arthritis was an existing degenerative condition prior to the work-related accident, he also testified that claimant underwent surgery to treat the arthritis earlier than he would have otherwise due to the effect of the burns. Cl. Ex. D at 34. Consequently, we affirm the administrative law judge's finding that claimant invoked the Section 20(a) presumption, as claimant has established a harm and the existence of working conditions which could have aggravated that harm. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In addition, as the administrative law judge properly found that employer did not introduce any evidence that claimant's left ankle condition is not related, at least in part, to his work-related injury, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption, and that claimant's left ankle condition therefore is compensable under the Act. *See, e.g., Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Bass*, 28 BRBS 11; *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Lastly, employer contends that the administrative law judge erred in it denying relief from continuing compensation liability pursuant to Section 8(f). Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S. C. §§908(f), 944. In a case where claimant is permanently totally disabled, Section 8(f) relief is available to employer if employer establishes the following: 1) the claimant has a pre-existing permanent partial disability which 2) contributes to the claimant's permanent total disability such that the claimant's total disability is not due solely to the work injury, and 3) the pre-existing disability was manifest to employer. *See* 33 U.S.C. §908(f)(1);

Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis], 202 F.3d 656, 34 BRBS 55(CRT) (3^d Cir. 2000); *see also Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

It is undisputed that claimant suffered from a pre-existing permanent partial disability, arthritis, and that the pre-existing disability contributed to claimant's permanent total disability. However, the administrative law judge found that there are no medical records documenting claimant's arthritis and that claimant was asymptomatic prior to the May 3, 2000 lime burn. Thus, the administrative law judge concluded that employer failed to establish that the pre-existing condition was manifest prior to the work-related injury, and he denied Section 8(f) relief. In order to establish the manifest requirement for Section 8(f) relief, employer need not have actual knowledge of the pre-existing disability if it can show that there are medical records available that would confirm the presence of a disability. *Lewis*, 202 F.3d at 664, 34 BRBS at 60-61(CRT). However, in this case, the administrative law judge found that employer did not introduce any evidence that claimant's pre-existing arthritis had been diagnosed or treated prior to the work injury. Therefore, as there are no medical records that diagnose claimant's arthritis pre-dating the May 2000 injury, we affirm the administrative law judge's finding that claimant's pre-existing arthritis was not manifest to employer. *See Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.2d 132 (2d Cir. 1997).

In this regard, we reject employer's contention that the manifest requirement is met on the basis that prior unlocated medical records must contain reports of his childhood osteomyelitis, based on his self-reporting of this condition to his doctors, and thus the condition was constructively manifest to employer. Employer relies on the decision of the United States Court of Appeals for the Sixth Circuit in *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989), that the manifest requirement is met when employer can show that the pre-existing disability is shown to have existed prior to the second injury, *i.e.*, that it was manifest to "someone." However, this case arises in the jurisdiction of the United States Court of Appeals for the Third Circuit which has not adopted such an interpretation of the manifest requirement and has held that in order to satisfy the manifest requirement for Section 8(f) relief, an employer must show that it was aware of the disability or that there are medical records available that would confirm the presence of the disability. *Lewis*, 202 F.3d 656, 34 BRBS 55(CRT); *Director, OWCP v. Sun Ship, Inc. [Ehrentraut]*, 150 F.3d 288, 295, 32 BRBS 132, 137(CRT) (3^d Cir. 1998). As employer did not produce medical reports pre-existing the work accident, or establish the unavailability of such records, *see generally Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996), employer cannot meet the manifest merely because claimant told his current physicians he suffered from a condition in childhood. Therefore, we affirm the administrative law

judge's finding that any disabling condition was not manifest to employer prior to the work-related accident on May 3, 2000, and we affirm the denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge