BRB No. 89-1533

CHERYL L. COLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of W. Ralph Musgrove, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (88-LHC-0534) of Administrative Law Judge W. Ralph Musgrove 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, while working in employer's machinery installation department on August 5, 1985, fell off a ladder and landed on her buttocks, causing pain in her lower back and right leg. At employer's clinic, claimant was diagnosed as suffering from a lumbosacral contusion and a contusion to the right lower leg; x-rays taken at this time revealed the presence of spondylolysis and spondylolisthesis. Emp. Ex. 11 at 1, 6. Claimant was later examined by Dr. Peach, who also diagnosed spondylolysis and spondylolisthesis, as well as a possible herniated disc associated with the injury; this physician released claimant to return to work on September 16, 1985 with light duty restrictions. Emp. Ex. 12 at 1-2. Claimant returned to light duty work on September 16,

1985.[1]

Upon her return to work, claimant spoke with Dr. Bobbitt, employer's clinic physician, who thereafter advised employer's manager of labor relations that claimant should be transferred to another department in light of her unstable congenital back problem. Thereafter, on October 10, 1985, claimant was examined by Dr. Nevins who stated that, while claimant's spondylolisthesis makes her more prone to having back problems and that she is not suited for heavy work activity, it was anticipated that with the passage of time claimant would recover from her back problems. Emp. Ex. 13, at 2. Dr. Nevins examined claimant again on March 4, 1986, and stated that claimant was 20 pounds overweight and needed to exercise, and that unless she gains proper muscle tone and loses weight, she will have her problems long term and eventually develop a disc problem. Emp. Ex. 2-3.

Claimant was laid off from her job on November 15, 1986; thereafter, in July 1987, claimant was recalled to work, although not to her "home department." However, claimant did not pass employer's physical examination due to her spondylolisthesis. On June 16, 1987, claimant's attorney sent a letter to the Department of Labor with regard to claimant's injury. Emp. Ex. 6. On July 31, 1987, claimant was examined by Dr. Morales who, after diagnosing spondylolysis, noted that claimant was asymptomatic before her August 1985 work injury and symptomatic since that time; Dr. Morales recommended claimant be put in a back brace for two to three months, and commented that claimant might need to have a spinal fusion performed to maintain spinal stability. Emp. Ex. 16. On July 31, 1987, claimant filed a formal claim under the Act, seeking temporary total disability benefits from November 24, 1986 to April 12, 1987, and temporary partial disability benefits from April 13, 1987 through February 7, 1988. Emp. Ex. 7.

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[1] Employer filed its First Report of Injury on August 13, 1985, Emp. Ex. 4, and voluntarily paid temporary total disability benefits from August 7, 1985 to September 15, 1985, plus three separate additional days thereafter; employer made its last payment of compensation on March 5, 1986. Emp. Ex. 5.

In his Decision and Order, the administrative law judge initially found that, although the parties stipulated that the issue of the instant claim's timeliness had not been raised at the informal conference before the deputy commissioner, employer was not barred by Section 13(b)(1) of the Act, 33 U.S.C. §913(b)(1), from raising the Section 13 issue at the formal hearing. Thereafter, the administrative law judge determined that claimant's June 17, 1987,[2] claim was not filed within the one-year period provided in Section 13(a) of the Act, 33 U.S.C. §913(a), and, therefore, denied the claim for benefits. On appeal, claimant contends that the administrative law judge erred in concluding that employer was not barred from raising the Section 13 issue at the formal hearing pursuant to Section 13(b)(1) of the Act, and that, additionally, the administrative law judge erred in barring the claim under Section 13(a). Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Claimant initially contends that the administrative law judge erred in allowing employer to raise the issue of the timeliness of the claim under Section 13 for the first time at the formal hearing; specifically, claimant argues that since the parties stipulated that employer had not raised this issue at the informal conference before the deputy commissioner, employer should have been barred, pursuant to Section 13(b)(1), from raising this issue at the formal hearing before the administrative law judge. We disagree.

Section 13(b)(1) provides that:

> Notwithstanding the provisions of subsection (a) of this section failure to file a claim within the period prescribed in such subsection shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

33 U.S.C. §913(b)(1). The Board has held that the phrase "first hearing" refers to the hearing before the administrative law judge and not the proceedings before the deputy commissioner. See Lewis v. Norfolk Shipbuilding and Dry Dock Corp., 20 BRBS 126 (1987); see also 33 U.S.C. §919(d); 20 C.F.R. §§702.314, 702.331, 702.332.[3]

[2] The record indicates that this letter is dated June 16, 1987. Emp. Ex. 6. The administrative law judge determined that this letter to the Office of Workers' Compensation Programs constituted a claim. See generally Peterson v. Washington Metropolitan Area Transit Authority, 17 BRBS 114 (1984).

[3] We note that, pursuant to Section 702.105 of the regulations, 20 C.F.R.§702.105, the term "district director" is used in the

In the instant case, it is uncontroverted that the timeliness of the claim was both listed on employer's pre-hearing statement and was discussed before the administrative law judge; therefore, pursuant to Lewis, supra, we affirm the administrative law judge's determination that the issue of timeliness pursuant to Section 13 of the Act was timely raised by employer.

Claimant next argues that the administrative law judge erred in concluding that her claim was barred pursuant to Section 13(a) of the Act. Section 13(a) of the Act applies in cases involving traumatic injuries and requires that a claimant file her claim for benefits within one year of the time she becomes aware, or with the exercise of reasonable diligence should have been aware, of the relationship between her injury and her employment. 33 U.S.C. §913(a). The United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case lies, has held that a claimant's time for filing under Section 13(a) does not commence to run until she knows or has reason to know that her injury is likely to impair her earning capacity. Newport News Shipbuilding and Dry Dock Co. v. Parker, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); see also Brown v. I.T.T./Continental Baking Co., 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990); J.M. Martinac Shipbuilding v. Director, OWCP, 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); Marathon Oil Co. v. Lunsford, 733 F.2d 1139, 16 BRBS 100 (CRT)(5th Cir. 1984).

In the instant case, the administrative law judge barred the claim under Section 13(a) after determining that claimant was aware, or should have been aware, that her work-related injury would negatively impact on her future earning capacity by September 16, 1985, when she returned to work and spoke with Dr. Bobbitt, or, at the latest, by October 10, 1985, when she was examined by Dr. Nevins. Decision and Order at 16.

We hold that the administrative law judge's conclusions cannot be upheld on the facts of this case. Specifically, our review of the record reveals that, with regard to the administrative law judge's September 16, 1985 date of awareness finding, Dr. Bobbitt's notes do not indicate that he informed claimant that the strenuous duties required by her position at the time of her injury would aggravate her congenital back problem. See Emp. Ex. 11. Similarly, the administrative law judge's finding that claimant's date of awareness under Section 13 was, at the latest, October 10, 1985, cannot be affirmed. Dr. Nevins, who examined claimant on October 10, 1985, opined that claimant's spondylolisthesis makes her more prone to having back problems and

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regulations, replacing the term "deputy commissioner" used in the statute.

that she is not suited for strenuous activity; Dr. Nevins concluded, however, that with the passage of time claimant would recover from her back problems. See Emp. Ex. 13 at 12. Thereafter, in a report dated March 4, 1986, Dr. Nevins stated that claimant's "problem" of being overweight must be solved by herself. Id. at 13. The Board has stated, however, that a claimant is not "aware" of the likely impairment of earning capacity or the true nature of the condition when the treating physician is advising that the work-related condition will improve. See Gregory v. Southeastern Maritime Co., 25 BRBS 188 (1991). Thus, Dr. Nevins' reports cannot establish claimant's awareness of a likely impairment of earning power. Additionally, contrary to employer's assertion, a claimant's pain following a work accident, or a claimant's being returned to light duty work, is insufficient as a matter of law to establish an awareness of a likely permanent impairment of earning power. See Parker, 935 F.2d at 27, 24 BRBS at 113 (CRT). See also Welch v. Pennzoil Co., 23 BRBS 395 (1990).

We hold that, based on the record before us, there was no reason for claimant to know that her August 5, 1985 injury would likely impair her wage-earning capacity at any time prior to July 31, 1987, the date of Dr. Morales' report. Specifically, the reports of Drs. Bobbitt and Nevins do not establish that claimant's injury was likely to permanently impair her earning capacity. In contrast, Dr. Morales, on July 31, 1987, diagnosed spondylolysis, noted that claimant's back condition was asymptomatic before her work-related injury and symptomatic since that time, recommended that she be put in a back brace for two to three months, and commented that claimant might need to have a spinal fusion performed. See Emp. Ex. 16. In view of the fact that the possibility of a back brace and surgery was not discussed until July 31, 1987, we hold that claimant could not have been aware that her injury would likely impair her earning capacity until July 31, 1987, and that, therefore, her June 16, 1987 claim is timely. See Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10, 14 (1988). We, therefore, reverse the administrative law judge's finding that claimant's compensation claim is barred pursuant to Section 13, and we remand this case for consideration of the remaining issues raised by the parties below.

Accordingly, the Decision and Order of the administrative law judge denying benefits is reversed, and the case is remanded for consideration of the merits of the claim.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge