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| RENE OLDRICH          | ) |                    |
|                       | ) |                    |
| Claimant-Petitioner   | ) |                    |
|                       | ) |                    |
| v.                    | ) |                    |
|                       | ) | DATE ISSUED: _____ |
| LOCKHEED SHIPBUILDING | ) |                    |
| COMPANY               | ) |                    |
|                       | ) |                    |
| Self-Insured          | ) |                    |
| Employer-Respondent   | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Gibbs, Douglas, Theiler & Drachler), Seattle, Washington, for claimant.

Russell A. Metz (Metz & Frol), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (86-LHC-64) of Administrative Law Judge Alfred Lindeman denying benefits 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case has been before the Board, and the nature of the appeal warrants a review of the facts. Claimant, while working for employer as a shipscaler, injured her right shoulder on November 24, 1982, when she dove through a port hole in an attempt to avoid a loose air hose. Although claimant visited the shipyard doctor, she continued to work. Emp. Ex. 12.58. On December 9, 1982, claimant consulted Dr. Kirby, who tentatively diagnosed "tendinitis of the supraspinatus and infraspinatus on the right with impingement syndrome." Dr. Kirby recommended strengthening exercises and anti-inflammatory medication. Cl. Ex. 3 at 13-14. On December 14, 1982, employer filed its First Report of Injury. Cl. Ex. 13; Emp. Ex. 2. In February 1983, employer reduced its work force for economic reasons and claimant was laid off. Claimant, who subsequently operated a landscaping business, worked briefly at another shipyard, and performed several other odd jobs, continued to consult with Dr. Kirby throughout 1983, for which

employer paid. However, in response to Dr. Kirby's May 19, 1983 letter stating that claimant's ongoing problems are "more related to her sports activities than to the industrial injury[.]" employer filed a notice of controversion on June 3, 1983. Cl. Exs. 7, 14; Emp. Ex. 3; Tr. at 7. The district director then informed claimant of her need to file a claim "within one year after the date of the injury or the date of last payment of compensation" if she feels she is entitled to benefits. Emp. Ex. 4.1. Claimant subsequently remained under Dr. Kirby's care; in October 1983, after conservative treatment consisting of anti-inflammatory medication, strengthening exercises, and an injection failed to relieve claimant's symptoms, Dr. Kirby proposed surgery. On January 13, 1984, claimant enlisted counsel and filed a claim for compensation. Emp. Ex. 4.2. The formal hearing occurred on May 13-14, 1986.

Claimant sought temporary total disability benefits from February 28, 1983 through March 14, 1984, and permanent partial disability benefits from March 15, 1984 and continuing. At the hearing, claimant and employer stipulated that employer has paid medical benefits but not compensation, and they disputed the timeliness of the claim. Tr. at 5, 7. In his Decision and Order Denying Benefits, the administrative law judge, after determining that claimant was aware or should have been aware of the relationship between her injury and her employment as of the date of her injury, denied benefits based on a finding that claimant had not filed a timely claim pursuant to Section 13 of the Act. Claimant appealed the denial of her claim to the Board. *Oldrich v. Lockheed Shipbuilding Co.*, BRB No. 86-2356 (April 28, 1989) (unpublished). The Board affirmed the administrative law judge's finding that claimant was aware of the connection between her work and her injury as of the date of the injury. However, noting the absence of evidence regarding permanent work restrictions, the Board concluded that the administrative law judge erred in failing to consider whether claimant's lack of knowledge concerning the nature of her condition may have tolled the Section 13(a) statutory period; the Board therefore remanded the case to the administrative law judge to determine when claimant learned her work-related disability "might affect her wage-earning capacity." *Id.*, slip op. at 3-5.

In his Decision and Order On Remand, the administrative law judge found that claimant was not misled by Dr. Kirby's opinion regarding the nature of her condition, and in fact was aware of the "indefinite duration" of her condition.<sup>1</sup> Decision and Order on Remand at 2-3. Moreover, the administrative law judge concluded that, as of her December 9, 1982, appointment with Dr. Kirby, claimant was aware or should have been aware that her November 1982 work injury "might affect her wage-earning capacity." *Id.* at 4. Consequently, the administrative law judge again found the claim to be time-barred pursuant to Section 13(a).

On appeal, claimant challenges the administrative law judge's denial of her claim. Employer responds, urging affirmance.

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<sup>1</sup>Claimant experienced similar symptoms after a March 4, 1981 right shoulder injury which Dr. Perkins initially diagnosed as a strain. Emp. Ex. 5.1. After returning to work with instructions to avoid overhead work, claimant exacerbated the injury, and on March 19, 1981, the doctor diagnosed probable tendinitis. *See* Emp. Exs. 5.2-5.3, 12.17-12.20, 12.51-12.57. Based on this previous injury, the consistent diagnosis of tendinitis, and her restricted duty, the administrative law judge concluded that claimant knew her condition would be long-lasting. Decision and Order on Remand at 2-3.

Claimant contends the administrative law judge used an improper standard to determine her date of awareness under Section 13, 33 U.S.C. §913. Section 13(a) of the Act, provides that, in traumatic injury cases:

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. . . . The time for filing a claim shall 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). Subsequent to the issuance of the administrative law judge's decision on remand, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, held that the Section 13 limitations period does not commence until the employee becomes aware "that his injury has resulted in the impairment of his earning power." *Abel v. Director, OWCP*, 932 F.2d 819, 821, 24 BRBS 130, 134 (CRT) (9th Cir. 1991), citing *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), cert. denied, 459 U.S. 1034 (1982); see also *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987). Further, the Ninth Circuit has held that an employee is not injured for the purposes of the statute of limitations until "he [becomes] aware of the full character, extent and impact of the harm done to him." *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990) (quoting *Allan*, 666 F.2d at 401, 14 BRBS at 429). Pursuant to these holdings, the Board has held that the time limitations in Sections 12 and 13 do not begin to run until an employee is aware or should have been aware of the relationship between his employment, his disease and an actual, not a potential, disability which impairs his wage-earning capacity. See *Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993); see also *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); 33 U.S.C. §§912, 913.

We agree with claimant that the legal standard applied by the administrative law judge in finding that claimant possessed the requisite "awareness" in December 1982 is not consistent with current case precedent. Specifically, the administrative law judge determined that claimant, as of December 9, 1982, knew of a work-related disability which *might* impair her wage-earning capacity.<sup>2</sup> The Ninth Circuit Court of Appeals, however, has specifically stated that the Section 13 time period for filing a claim begins when claimant knows of the full character, extent and impact of the harm done to her, *i.e.*, she knows she has an actual and not a potential impairment to her earning power. See *Abel*, 932 F.2d at 822, 24 BRBS at 135 (CRT); *Love*, 27 BRBS at 152-153.

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<sup>2</sup>In light of the current law, we note that the administrative law judge improperly distinguished *Allan* as a misdiagnosis case. Indeed, "[i]t matters not whether a case involves a misdiagnosis, as the rule for triggering the statute of limitations is the same in all situations." *Love*, 27 BRBS at 151 n.1 (1993); see also *Abel*, 932 F.2d at 819, 24 BRBS at 130 (CRT).

In the instant case, claimant contends that she was not aware of the full character, extent and impact of her injury until October 25, 1983. Specifically, after claimant was injured on November 24, 1982, Dr. Kirby treated her injury conservatively. Cl. Ex. 3 at 14-16. Following his March 17, 1983 examination, Dr. Kirby classified the injury as "the usual complicated picture seen in a thrower's shoulder,"<sup>3</sup> and he believed her condition involved anterior instability as well as impingement. Cl. Exs. 3 at 16-17, 7. Dr. Kirby next saw claimant on October 25, 1983, at which time he noted her economic layoff from work, her subsequent landscaping and sporting activities, and her complaints of pain and difficulty with overhead work. His examination revealed marked pain and discomfort caused by typical impingement syndrome but no instability. Further, Dr. Kirby indicated he and claimant discussed the nature of the problem, and he introduced surgery as a possible course of treatment for the first time. Cl. Ex. 3 at 18.

After an office visit on January 12, 1984, Dr. Kirby summarized claimant's injury and restated his diagnosis of "[c]ontinued symptomatic impingement syndrome" which he believed to be a work-related injury aggravated by sports activities. Cl. Ex. 3 at 18-19. Again, he offered surgery as an option, and again claimant rejected it. *Id.* The next day, January 13, 1984, claimant filed a claim for benefits. By February 1984, Dr. Kirby realized that claimant's condition had stabilized and that she would not be able to return to shipyard work. He advised her to enroll in a retraining program, and he restricted overhead use of her arm and heavy lifting. Cl. Exs. 3 at 20, 27 at 21. In a letter dated March 6, 1984, Dr. Kirby reiterated his opinion that claimant's throwing aggravated the pre-existing work-related condition. Cl. Ex. 8. Also in March 1984, the Orthopedic Panel Consultants evaluated claimant and determined she has a five percent permanent impairment to her right shoulder. Cl. Ex. 9. Dr. Kirby described claimant's condition as "chronic" in July 1984. Cl. Exs. 9, 11.

We hold that the administrative law judge's conclusion regarding claimant's awareness cannot be upheld on the facts of this case. In finding that claimant was aware or should have been aware of the impact her injury would have on her wage-earning capacity on December 9, 1982, the administrative law judge erroneously related knowledge that claimant did not possess at that time back to that date. Claimant testified, for example, that her work restrictions had to be renewed after each appointment; thus, on December 9, 1982, claimant could not have known that those restrictions would continue until her layoff in February 1983 and would subsequently become permanent. Tr. at 62-63. In this regard, the Board, in its initial decision, noted the absence of evidence of permanent restrictions. *Oldrich*, slip op. at 4. Moreover, claimant did not miss work because of her work-related injury, and in fact her employment continued, albeit in a light duty capacity, until she was laid off for economic reasons in February 1983. Additionally, surgery was first set forth as an option on October 25, 1983, 11 months after the injury, claimant's inability to return to her shipyard job was not mentioned until February 1984, and her condition was first labelled "chronic" in July 1984. Based on this uncontroverted evidence, we conclude the administrative law judge erred in determining that claimant became aware of the full impact of her injury as of December 9, 1982. Rather, the evidence of record supports claimant's assertion she first became aware of the full character, extent and impact of her injury on October 25, 1983, at the earliest, at which time surgery

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<sup>3</sup>Claimant was an avid softball player.

was initially discussed as an option. Accordingly, as the one-year statutory limitation of Section 13(a) would have expired in October 1984, *see J.M. Martinac*, 900 F.2d at 183, 23 BRBS at 129 (CRT), we hold that the instant claim, filed in January 1984, is not barred by Section 13(a). *See Abel*, 932 F.2d at 821, 24 BRBS at 134 (CRT); *J.M. Martinac*, 900 F.2d at 183, 23 BRBS at 129 (CRT); 33 U.S.C. §913(a). We therefore reverse the administrative law judge's decision and hold as a matter of law that claimant filed a timely claim for compensation.

Accordingly, the administrative law judge's conclusion that the claim is barred pursuant to Section 13 is reversed, and the case is remanded for consideration of claimant's entitlement to disability benefits.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge