BRB Nos. 91-1888
and 91-1888A

JAMES M. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUNGE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA/CIGNA INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Robert R. Faucheux, Jr., LaPlace, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and employer/carrier cross-appeal the Decision and Order (90-LHC-293) of Administrative Law Judge Donald W. Mosser 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).

On March 22, 1985, claimant, while in the course of his employment as a basement beltman for employer, sustained injuries to his back and leg. Claimant has not returned to work since these injuries. Dr. Johnston, a neurosurgeon, performed a laminectomy for excision of a herniated disc on April 4, 1985, and again performed surgery for excision of a second herniated disc on October 29, 1985. Employer voluntarily paid claimant temporary total disability compensation, pursuant to 33 U.S.C. §908(b), from March 25, 1985 to July 21, 1986. On July 14, 1986, Dr. Johnston released claimant to return to his previous position as a basement beltman with the limitation on his activities of "climbing as tolerated." Thereafter, on July 23, 1986, employer offered to return claimant to his previous position; claimant declined employer's offer on the basis of his continuing back pain. Employer terminated claimant's employment on July 25, 1986 and, on August 7, 1986, notified claimant and the district director[1] that claimant's compensation had been terminated as of July 21, 1986. Claimant subsequently filed a claim for compensation under the Act on October 31, 1988.

In his Decision and Order, the administrative law judge found that claimant had not filed a timely claim pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), and, accordingly, denied the claim. Additionally, the administrative law judge found that, even if the claim was timely filed, claimant failed to establish that he was totally disabled in 1986; the administrative law judge further determined, however, that the evidence of record is not sufficient to establish that claimant could perform his previous employment or suitable alternate employment as of 1990. Finally, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, claimant challenges the administrative law judge's findings that the claim was not timely filed pursuant to Section 13(a) and that claimant did not establish that he is totally disabled.[2] Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge erred in finding that the claim was time-

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

[2]Although claimant also assigns error to the administrative law judge's denial of Section 8(f) relief to employer, claimant has no interest in this issue and, thus, we will not consider his arguments concerning Section 8(f). *See, e.g., Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77, 79 n.2 (1988).

barred. In its cross-appeal, employer assigns error to the administrative law judge's denial of its request for Section 8(f) relief, contending that the evidence is sufficient to establish both the pre-existing permanent partial disability and contribution elements. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Initially, we reject employer's assertion that the Board need not address claimant's challenge to the administrative law judge's finding that the claim is time-barred since claimant inadequately briefed that issue. We disagree. Claimant's brief raises the Section 13 issue and our review of the administrative law judge's Decision and Order reveals fundamental legal errors committed by the administrative law judge in his application of the standard for awareness pursuant to Section 13(a) and his failure to afford claimant the benefit of the Section 20(b) presumption that his claim was timely filed. These errors are also addressed by the Director in his response brief.[3]

Section 13(a) provides that the right to compensation for disability in traumatic injury cases shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, has held that the Section 13 statute of limitations period does not commerce until the claimant is aware, or should be aware, of the true nature of his condition, *i.e.*, that it interferes with his employment by impairing his capacity to work, and its causal connection with his employment. *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT)(5th Cir. 1984). *Accord 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); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). Under this standard, claimant is not "aware" until he is aware of the "full character, extent and impact of the harm done to [him]." *Stancil*, 436 F.2d at 279.

Moreover, Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that a claim has been timely filed. *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983). As part of its burden to rebut Section 20(b), employer must preliminarily establish that it complied with the requirements of Section 30(a), 33 U.S.C. §930(a), which requires employer to file a report of injury within ten days from the date of any injury which causes claimant to lose one or more shifts of work. *See also* 20 C.F.R. §§702.201-205. Section 30(f), 33 U.S.C. §930(f), provides that where employer has been given notice or has knowledge of any injury and fails to file the Section 30(a) report, the statute of limitations under Section 13(a) does not begin to run until such report has been provided. *See, e.g., Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277, 280-81 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 69 (1990).

In the instant case, the administrative law judge found that claimant sustained a work-related injury on March 22, 1985, that claimant subsequently received medical treatment for that injury, and

[3]In the Director's role as administrator of the Act, he is always a party-in-interest. *See generally* 33 U.S.C. §§921(b)(3), 939(a); 20 C.F.R. §§701.201; 701.202; 702.333(b); 801.2 (10); 801.102.

that he received disability compensation through July 26, 1986. He therefore concluded that claimant was or should have been aware that his back and leg injuries were related to his employment. *See* Decision and Order at 11-12. After additionally determining that Section 30(f) did not toll Section 13, the administrative law judge concluded that the claim filed on October 31, 1988, was untimely. *See id.*

We hold that the administrative law judge's conclusion regarding the timeliness of the instant claim cannot be upheld. Initially, the administrative law judge erred in failing to apply the Section 20(b) presumption which places the burden on employer to establish that the claim was not timely filed. Moreover, the administrative law judge found awareness established at the time claimant was aware, or should have been aware, that his back and leg injuries were related to his employment with employer. In making this finding, the administrative law judge failed to apply the standard which requires a finding as to when claimant was or should have been aware of an impairment in his earning capacity due to an injury related to his employment. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

In this regard, we note that, while employer did initially pay benefits, in July 1986 claimant's treating physician released him to return to his former job offered by employer and claimant thereafter refused to return to work based on his pain and his subjective opinion that he was unable to perform his former job. The administrative law judge, however, declined to credit claimant's testimony that his continuing pain precluded his return to his regular job, finding the evidence sufficient to establish that claimant was able to perform his former employment duties in July 1986. The administrative law judge further found, however, that as of 1990 claimant was totally disabled. As the Director notes, if claimant was able to perform his usual work in 1986 yet was unable to do so by 1990, he cannot logically be said to have been aware of the full extent of the harm in 1986. As the administrative law judge did not consider when claimant became aware that his work-related injuries would impair his earning capacity, we vacate his finding that claimant's compensation claim is barred pursuant to Section 13(a). The case is remanded for the administrative law judge to reconsider the Section 13 issue under the standard in *Lunsford* and *Stancil*. *See Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991); *Welch*, 23 BRBS at 395, *Wendler v. American National Red Cross*, 23 BRBS 408 (1990).

We additionally agree with the Director that the administrative law judge's suggestion that it is claimant's responsibility to affirmatively allege that Section 13(a) is tolled by Section 30(f) reflects a misapplication of the burden of proof under Section 20(b).[4] On remand, the administrative law judge must afford claimant the benefit of the Section 20(b) presumption as he reconsiders the Section 13 issue. His findings must be consistent with the presumption and applicable legal standards.

[4]On remand, the administrative law judge should reconsider his finding that the record does not contain the notice of injury filed by employer. As noted by the Director, included in the record is employer's First Report of Accident (Cl. Ex. 1) which may be sufficient to establish employer's compliance with Section 30(a), 33 U.S.C. §930(a).

Next, claimant challenges the administrative law judge's findings regarding the nature and extent of his disability. In his decision, the administrative law judge denied claimant's claim based upon his determination that claimant was capable of returning to his former employment duties in July 1986, at which time claimant's physician, Dr. Johnston, released him to return to work, albeit with limitations on climbing. Thereafter, the administrative law judge, based upon subsequent limitations placed on claimant by Dr. Johnston, found that as of 1990 claimant was incapable of performing either his former job with employer or the suitable alternate employment positions identified by employer's vocational expert; the administrative law judge concluded, however, that this conclusion was of "little value" to claimant since claimant failed to attempt to return to work in 1986 and thereafter failed to file a timely claim for compensation. *See* Decision and Order at 14-15. Claimant's failure to attempt to return to work in 1986 is irrelevant to the issue of the extent of disability in 1990. It is well-established that an employer is liable for the subsequent progression of a condition which is the natural and unavoidable result of a work-injury. *See, e.g., Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). We, therefore, vacate the administrative law judge's findings regarding the nature and extent of claimant's disability. On remand, should the administrative law judge determine that the instant claim was timely filed, he must reconsider the issue of the nature and extent of claimant's disability.

Finally, employer's cross-appeal assigns error to the administrative law judge's denial of its request for Section 8(f) relief in the event claimant is ultimately found to be disabled. To be entitled to Section 8(f) relief from continuing compensation liability where the employee is permanently totally disabled, the employer must establish: 1) that the employee had a pre-existing permanent partial disability; 2) that the permanent partial disability was manifest to the employer; and 3) that the current disability is not due solely to the employment injury. *See Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *see also E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1352-54, 27 BRBS 41, 52-56 (CRT)(9th Cir. 1993). Thus, to satisfy the contribution requirement, employer must demonstrate that the employment injury alone did not cause claimant's permanent total disability.

In support of its contention that it satisfied the contribution element, employer relies on Dr. Johnston's deposition testimony, contending that testimony establishes that claimant's pre-existing degenerative changes of the lumbar spine combined with his work injury to result in greater disability than would have resulted from the subsequent injury alone. The contribution element is not satisfied, however, by evidence indicating only that the two injuries create a greater disability than would the second injury alone; rather, employer must demonstrate that the second injury alone did not cause claimant's permanent total disability. Thus, if the later injury was sufficient to totally disable claimant, it is not relevant that his prior condition made his total disability even greater. *See E. P. Paup Co.*, 999 F.2d at 1353, 27 BRBS at 54 (CRT); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

In the present case, the administrative law judge discussed Dr. Johnston's deposition testimony and found it to be insufficient to meet employer's burden of establishing the contribution

element necessary for Section 8(f) relief. Dr. Johnston testified that claimant's acute herniated disc was "the central, by far the most important pathological event" that caused the condition requiring surgery, and that the "ruptured disc would likely have required surgical decompression even if the degenerative change had not been there." Emp. Ex. 13 at 22. As the administrative law judge's evaluation of Dr. Johnston's testimony is rational and within his authority as factfinder, we reject employer's allegation of error. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the finding that Section 8(f) relief is not available to employer in this case. *See Two "R" Drilling Co.*, 894 F.2d at 748, 23 BRBS at 34 (CRT).

Accordingly, the administrative law judge's findings that the claim is time-barred and that total disability was not established are vacated, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's denial of Section 8(f) relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge