BRB No. 92-0652

WILLIAM PEACOCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of George G. Pierce, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (91-LHC-0558) of Administrative Law Judge George G. Pierce 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 if they 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 November 8, 1977, claimant was injured during the course of his employment as a shipfitter when he was struck in the hip and left leg by several stringers which had broken loose. After a brief period of incapacity, claimant returned to work but was unable to perform his usual job because of pain. Claimant was given a position with this employer as a filing clerk; thereafter he accepted a permanent assignment as a materials control technician. In the ensuing years, he has received raises and promotions and currently is classified as a Senior Technician. Claimant filed a

claim for permanent partial disability benefits under the Act on January 26, 1990.

In his Decision and Order, the administrative law judge found that claimant was aware or should have been aware of the relationship between his injury and his employment as well as the permanent nature of his condition as early as the late 1970's or early 1980's. Accordingly, the administrative law judge concluded that claimant had not filed a timely claim pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge further determined, however, that claimant is entitled to reimbursement for his reasonable and necessary medical expenses caused by the work accident.

On appeal, claimant challenges the administrative law judge's finding that his claim was not timely filed pursuant to Section 13(a) of the Act. Employer responds, urging affirmance.

Section 13(a)[1] 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. In the instant case, claimant contends that his January 1990 claim was timely filed, asserting that he was not aware that his condition would interfere with his wage-earning capacity until 1989, at which time Dr. Richardson opined that claimant's back condition would forever foreclose his return to work as a shipfitter.

[1] Section 13(a) states, in relevant part:

> 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. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. ... 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).

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 set forth in Section 13 of the Act 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 274. Under this standard, a claimant is not "aware," for purposes of commencing the Section 13 limitations period, until he is aware of the "full character, extent and impact of the harm done to [him]." *Stancil*, 436 F.2d at 279. *See 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). Noting with approval the court's opinion in *Stancil*, the United States Court of Appeals for the First Circuit, in whose jurisdiction the instant case arises, has similarly determined that a worker need not notify his employer, pursuant to Section 12 of the Act, 33 U.S.C. §912, that he has a compensable injury until he knows or reasonably should know that he has received an injury, arising in the course of his employment, that disables him from future employment. *See Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). In accordance with the above precedent, the Board has held that, under Section 13, the standard 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 generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

In the instant case, the administrative law judge initially found that claimant sustained a work-related injury on November 8, 1977, that claimant subsequently received medical treatment for that injury, that claimant last received disability compensation in 1978, and that the instant claim was filed on January 26, 1990. Thus, the administrative law judge concluded that the instant claim had not been filed within one year of the last payment of compensation to claimant. Next, the administrative law judge addressed claimant's contention that, prior to the time he saw Dr. Richardson in February 1989, there was no reason for him to believe that his injury resulted in a permanent condition which would prevent his return to work as a shipfitter. Specifically, the administrative law judge noted that:

a) Claimant attempted to return to his usual employment as a shipfitter following his work-accident, but was unable to do so due to pain, *see* tr. at 19-20;

b) Claimant acknowledged that he continues to suffer from the same pain and discomfort which he first experienced following the 1977 work-incident, *see* tr. at 16, 36;

c) In 1978, claimant accepted a permanent transfer to a light-duty position in employer's material handling department, *see* tr. at 16, and that claimant, based upon his ongoing symptoms, did not thereafter attempt to return to his former work, *see* tr. at 36-37;[2] and

d) In discussing claimant's condition prior to his first seeing claimant in 1989, Dr. Richardson, upon whom claimant relies in support of his position that he did not become aware of a loss in wage-earning capacity until 1989, deferred to the opinion of employer's medical director, Dr. Dominici, who in 1977 and 1978 placed restrictions on claimant which precluded his returning to work as a shipfitter, *see* Richardson depo. at 9-16; CX-12.[3]

Based upon the foregoing, the administrative law judge determined that claimant's contention that he did not become aware of a permanent condition until 1989 is clearly inconsistent with his own testimony and that the weight and credibility of the evidence indicates that claimant became aware that he could not return to his usual job as early as the late 1970's or early 1980's. Accordingly, the administrative law judge concluded that the claim was untimely filed pursuant to Section 13 of the Act.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Furthermore, the Board must affirm a decision if the findings of the administrative law judge are supported by substantial evidence in the record as a whole, if they are rational, and if the decision is in accordance with law. *See O'Keeffe*, 380 U.S. at 359. In the instant case, claimant does not contend that he was unaware of the relationship between his injury and his employment in 1977. Additionally, the administrative law judge, in rejecting claimant's contention that he did not become aware that his 1977 injury would preclude his return to employment as a shipfitter until 1989, set forth numerous statements made and actions taken by claimant following that incident indicating that he should have known of the effect of the injury on his earning capacity by the early 1980's at the latest. Specifically, the administrative law judge noted that claimant unsuccessfully attempted to return to his usual job and thereafter accepted a permanent transfer to a light-duty position, that claimant acknowledged that his pain and discomfort had not changed since his 1977 injury, that his condition precluded any further attempt to return to his usual job, and that employer's medical director, to whom claimant's chief witness Dr. Richardson deferred,

[2]Claimant, when testifying at the formal hearing, stated that he "probably knew" that he would never return to his former position as a shipfitter when he accepted the permanent transfer to employer's materials handling department. *See* tr. at 36.

[3]We note that Dr. Richardson also acknowledged that the diagnosis of claimant's condition by Dr. Mehalic immediately following claimant's 1977 injury was consistent with his own diagnosis rendered in 1989. *See* Richardson depo. at 7-8.

placed restrictions on claimant following his injury which precluded his employment as a shipfitter. These findings by the administrative law judge constitute substantial evidence in support of his determination that claimant had the requisite awareness needed to commence the Section 13 filing period by the early 1980's. *See generally Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982). We therefore affirm the administrative law judge's finding that claimant's claim filed in January 1990 was untimely.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge