

WILLIE BROWN, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ALLSOUTH STEVEDORING COMPANY)	DATE ISSUED: _____
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order and Ruling Denying Motion for Reconsideration of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Shari S. Miltiades (Karsman, Brooks & Callaway, P.C.), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Ruling Denying Motion for Reconsideration (91-LHC-1469) of Administrative Law Judge Aaron Silverman 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 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).

On May 10, 1989, claimant, a longshoreman, injured his left side when he fell approximately ten to fifteen feet from the top of a crate while working for employer. Claimant was initially treated at Memorial Hospital in Savannah, Georgia. Thereafter, from May 15, 1989 until June 19, 1989, claimant was treated for bruises and sprains of the left leg and rib fractures by Dr. Hollomon, who, upon his retirement, referred claimant to Dr. Deriso. After treating claimant for left shoulder and rib pain and lumbar disc strain, Dr. Deriso released claimant to return to work without restrictions on August 13, 1989. The parties stipulated that employer voluntarily paid claimant temporary total disability compensation from May 10, 1989 to August 13, 1989.

Claimant returned to work on August 13, 1989, but went back to Dr. Deriso on October 16, 1989, complaining of continuing pain in his left knee. Dr. Deriso diagnosed lateral compartment arthritis with a possible tear, for which claimant was given an injection and placed on medication and an exercise program. After a follow-up examination on October 30, 1989, Dr. Deriso indicated that claimant might need arthroscopic surgery for a probable degenerative tear of his left lateral meniscus. Although employer initially refused to authorize the recommended surgery, it ultimately granted authorization in July 1990, and the arthroscopy was performed by Dr. Deriso on August 21, 1990.¹

Employer filed a Notice of Controversion with the district director on September 6, 1990, indicating that benefits had been paid to August 13, 1989, and that a compensation claim had not been timely filed. Claimant's counsel filed a letter on September 28, 1990, giving notice of his representation of claimant and asserting claimant's right to benefits; thereafter, he requested a hearing before an administrative law judge, seeking continuing temporary total disability benefits from August 1990. The sole issue for resolution at the hearing was whether claimant filed a timely claim pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a).

The administrative law judge found that because employer's Form LS-208, Notice of Final Payment, stated on its face that the last voluntary payment of compensation had been made on September 26, 1989, the claim was timely. In so concluding, the administrative law judge reasoned that Dr. Deriso's records showing claimant's continuing disability had been filed with the district director within one year of that date. The administrative law judge further determined that employer was aware of a claim because it prepared its Notice on Controversion on August 7, 1990. Finally, the administrative law judge found that, assuming that the documentary evidence he relied upon did not substantiate his conclusions, counsel's letter of September 28, 1990, would "nevertheless have been found filed in time consistent with decisions holding that the limitations commence when the Claimant becomes aware of the true nature of his condition and the possible loss of wage-earning capacity." Decision and Order at 4.

On appeal, employer challenges the administrative law judge's finding that the claim was

¹Dr. Deriso performed additional surgery on January 8, 1991, to correct a pre-existing genuvalgus condition and modify the results of the initial surgery, and scheduled additional corrective surgery in July 1991.

timely, arguing that claimant was aware at the time he was injured that his injury would have an impact on his wage-earning capacity, and thus his claim should have been filed within one year of August 13, 1989, the date the parties stipulated that the last voluntary payment of compensation was made. Claimant responds, urging affirmance.

We affirm the administrative law judge's finding that the September 28, 1990, claim² was timely filed under Section 13(a). Employer argues that the claim was not timely filed because it was not filed within one year of August 13, 1989, the date the parties stipulated that the last voluntary payment of compensation was made. Section 13(a) states that a claim is barred unless filed within one year after the injury or death and further provides that if compensation is voluntarily paid, " a claim may be filed within one year after the date of 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). The Board has thus held that the portion of Section 13(a) allowing claimant to file a claim within one year of the last voluntary payment does not supersede the provision stating that the time limit does not run until claimant is "aware" of his injury. *See Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT)(2d Cir. 1985); *see also Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Employer argues that claimant was "aware" for Section 13(a) purposes on the date of the accident, May 10, 1989, because he knew he had injured his knee and was unable to return to his usual employment due to his combined work-related injuries for approximately three months. We reject this argument. As the administrative law judge properly recognized in this case, claimant is not "aware" for purposes of Section 13(a) until he knows or has reason to know that he has sustained a permanent injury which is likely to impair his wage-earning capacity. *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). *Accord Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.3d 819, 24 BRBS 130 (CRT)(9th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990), *aff'g Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991); *Welch*, 23 BRBS at 398-400.

²It is not disputed that counsel's September 28, 1990, letter constituted a claim. Employer asserted below that no claim was filed prior to this date and that this filing was untimely.

In the present case, employer does not dispute that claimant was released to return to work without restriction on August 13, 1989, or that he continued to perform his usual employment from August 13, 1989 until his surgery on August 21, 1990. Moreover, at the hearing employer specifically stipulated that Dr. Deriso first informed claimant of the potential need for knee surgery on October 30, 1989. On these facts, we hold, as a matter of law, that the earliest possible date that claimant could have had the requisite awareness necessary to commence the Section 13(a) period was October 30, 1989. *See generally Welch*, 23 BRBS at 398-400. Inasmuch as the September 28, 1990, claim was filed within one year of that date, the administrative law judge's finding that the formal claim is timely under relevant case authority defining "awareness" under Section 13(a) is affirmed.³

The administrative law judge's finding that a timely claim was filed prior to September 28, 1990, is also affirmed as supported by substantial evidence. Inasmuch as Dr. Deriso's July 11, 1990 letter, Emp. Ex. 1 at 12, recommending arthroscopic knee surgery is sufficient to put employer on notice that claimant would have a period of post-surgical disability during which time he would be entitled to compensation, the administrative law judge reasonably viewed this document as sufficient to establish a timely filed claim. *See Walker v. Rothschild International Stevedoring Co.*, 526 F.2d 1137, 6 BRBS 324 (9th Cir. 1975); *Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989). Moreover, he also rationally inferred from the fact that employer prepared its Notice of Controversion, Emp. Ex. 1 at 4, 12, on August 7, 1990, and did not file this document with the district director until September 6, 1990, that employer knew that it was dealing with a claim as early as that time. Decision and Order at 3, 4; *See Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988). Inasmuch as the administrative law judge's findings are reasonable and supported by the evidence, they are affirmed.

³Because the date of the last voluntary payment is not determinative on the facts presented, we need not address employer's argument that the administrative law judge erred in disregarding the parties' stipulation that the last voluntary payment was made on August 13, 1989, and in concluding based on employer's Form LS-208 that the compensation due through August 13, 1989, was paid on September 26, 1989.

Accordingly, the Decision and Order and the Ruling Denying Motion for Reconsideration of the administrative law judge awarding benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge