

ERNEST WILLIAMS)
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 Claimant-Respondent)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: July 9, 2001
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) ORDER

By Motion for Expedited Review dated May 31, 2001, employer requests that the Board issue a final decision in the captioned case so that it may pursue an appeal of the Board's Decision and Order in this case dated October 31, 2000. *Williams v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 00-0249 (Oct. 31, 2000). Claimant has not responded to this motion. 20 C.F.R. §802.219.

In the initial Decision and Order in the captioned case, the administrative law judge found that claimant knew he had degenerative disc disease and that it was likely to impair his capacity to earn wages by July 22, 1996, based on the reports of Dr. Persons. Thus, as claimant filed his claim, for three days of temporary total disability benefits following a medical procedure on August 5, 1997, on August 26, 1997, the administrative law judge found it was untimely, *see* 33 U.S.C. §913, and he denied benefits.

Claimant appealed this decision, and the Board reversed the administrative law judge's finding that claimant's claim was untimely filed. The Board stated that claimant continued to work at his regular duties with no restrictions until August 5, 1997, and had no reason to be aware of a likely impairment of his earning power until July 30, 1997, at the earliest, when Dr. Kerner scheduled claimant for nerve blocks, which were administered on August 5, 1997. Claimant was off work as a result of this procedure on August 5, 6, and 7, 1997. As claimant's claim was filed on August 27, 1997, the Board held that it was timely as a matter of law. The Board noted that the facts that claimant experienced pain after an accident, that he continued to seek treatment for the pain, and that his doctor believed his condition would worsen, do not establish that claimant was aware that his earning capacity would be impaired until such time as he had a disability to claim, citing *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991), and *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). The Board remanded the case

to the administrative law judge for findings on any remaining issues.

On remand, the parties agreed that claimant is entitled to temporary total disability benefits for three days - August 5 through August 7, 1997 - based on an average weekly wage of \$539.83, and the administrative law judge accordingly issued a Decision and Order awarding these benefits.¹ Employer appeals the decision on remand, in order to preserve its right to appeal the Board's initial decision to the court of appeals.

¹The administrative law judge stated that the Board substituted its own finding of fact for his finding of fact that the claim was untimely filed. Whether a claim is timely filed is not a "finding of fact," but rather a conclusion based on a mixed question of law and fact. Thus, the Board actually held that, as a matter of law consistent with case precedent, claimant's claim filed after he was disabled due to the nerve block was timely filed, as he had no disability to claim on July 22, 1996, the date the administrative law judge found claimant knew or should have been aware of the likely impairment of his wage-earning capacity. Claimant was not actually disabled for more than one year after the date of awareness used by the administrative law judge. In fact, a claim filed at the administrative law judge's initial date of awareness would likely be viewed as premature under Fourth Circuit law. *See I.T.O Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT)(4th Cir. 1996). The Board's decision thus did not disturb the administrative law judge's factual findings, but rather overturned his ultimate conclusion which was not consistent with law.

Employer's Motion for Expedited Review is granted. Employer has raised no issues with regard to the administrative law judge's decision on remand, and the Board's initial decision constitutes the law of the case. *See, e.g., Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000). Accordingly, the administrative law judge's Decision and Order on remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge