BRB No. 04-0664

JORGE SALDAÑA LÓPEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED:May 16, 2005
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Motion for Summary Decision, the Decision and Order Denying Reconsideration, and the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Benito Gutierrez Diaz, Fajardo, Puerto Rico, for claimant.

Richard L. Garelick (Flicker, Garelick & Associates, L.L.P.), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Motion for Summary Decision, the Decision and Order Denying Reconsideration, and the Decision and Order (2002-LHC-0767) of Administrative Law Judge Thomas M. Burke 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a maintenance carpenter at the United States Naval Base in Roosevelt Roads, Puerto Rico. On June 4, 1998, during the course of his

employment, the following two accidents occurred: 1) while dismantling a freezer containing rotten and decomposing meat, meat juices spilled onto claimant's face; and 2) while removing an air conditioning unit from a ceiling, claimant was exposed to unspecified chemicals from that unit. Tr. at 11. Claimant continued to work. Three days later, claimant noticed a rash on his nose. He requested permission to go to the clinic. There, he was diagnosed with facial dermatitis, but the condition grew worse, and employer referred claimant to Dr. Cruz.[1] Cl. Ex. 2 at attachments; Tr. at 11-12. Dr. Cruz first saw claimant on July 28, 1998, and she ordered a biopsy because of the lesions on his face. She diagnosed the skin condition as a rare and chronic autoimmune disease called pemphigus erythematosus.[2] Cl. Exs. 1, 2 at 5, 18, 23. Claimant continued to work, but his skin condition worsened. Claimant testified that he treated with Dr. Cruz from July 1998 until September 1999. He stated that he could not afford the visits after his suspension from work, but he saw Dr. Cruz once again in May 2001.[3] Cl. Ex. 1; Tr. at 13. Claimant testified that, following his termination in June 1999, he looked for work but no one would hire him because of his skin condition. Tr. at 14-15. Claimant filed his notice of injury on July 14, 1998, and a claim for benefits on February 10, 2001. Emp. Ex. 4; Tr. at 28.

Employer moved for summary decision, contending claimant is barred from receiving benefits because his notice of injury and claim for compensation were untimely filed. The administrative law judge rejected employer's assertions, finding that claimant suffers from an occupational disease and that the notice of injury and claim for compensation, therefore, were timely filed. Decision and Order Denying M/SD at 5-8. Subsequently, the administrative law judge denied employer's motion for reconsideration, finding that even if claimant's injury was a traumatic injury, employer did not establish that claimant had the requisite awareness to make his notice and claim untimely. Decision and Order Denying Recon. The administrative law judge next issued

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[1]Two other employees were involved in the same accidents as claimant. They were referred to Dr. Cruz at the same time as claimant because they also suffered from rashes. Dr. Cruz testified, however, that one of those employees had a heat rash and one had a contagious disease called scabies. She treated them until their conditions resolved. Cl. Ex. 2 at 7-8; Tr. at 11.

[2]Dr. Cruz testified that in this form of pemphigus, the antibodies attack and destroy the superficial skin cells and not the deep tissue cells. Cl. Ex. 2 at 23.

[3]Claimant was suspended from work for fighting in April 1999, he faced disciplinary action in May for this disorderly conduct, and he was terminated as of June 11, 1999. Emp. Exs. 5-7. Claimant testified that, prior to his suspension, employer paid for the services of Dr. Cruz, but not for his prescriptions. Tr. at 13, 29.

a Decision and Order wherein he invoked the Section 20(a), 33 U.S.C. §920(a), presumption, found that employer failed to rebut the presumption, and concluded that claimant's skin condition is work-related. Because claimant established that he cannot return to his usual work and employer did not present evidence of suitable alternate employment, the administrative law judge awarded claimant permanent total disability benefits from the date of his injury. Decision and Order at 7-10. Employer appeals the administrative law judge's decisions, contending claimant's condition is a traumatic injury, that his notice of injury and claim for compensation were untimely filed and, in any event, that claimant's injury is not work-related. Claimant responds, urging affirmance.

Causation

Employer argues that the administrative law judge erred in finding that claimant's skin condition is work-related. Specifically, employer asserts there were no conditions at work that could have caused the harm, as both doctors stated that the condition is autoimmune and was not caused by the exposure to rotten meat and/or air conditioning chemicals. Employer also argues that an aggravation theory was not properly raised, and the administrative law judge thus erred in finding that employer failed to rebut the presumption that sun exposure aggravated claimant's pre-existing condition. For the reasons set forth herein, we vacate the administrative law judge's determination that claimant's skin condition is work-related, and we remand the case for him to consider this issue further.

Based on the temporal relationship between the specific spillage incidents and the development of the initial rash on claimant's nose, the administrative law judge found that claimant established a *prima facie* case by establishing a harm, pemphigus erythematosus, and conditions at work which could have caused the harm, the exposure to decomposing meat juices and air conditioning chemicals. In addressing whether employer presented substantial evidence to rebut the Section 20(a) presumption, the administrative law judge found that while both dermatologists agreed that pemphigus erythematosus is an autoimmune disease of unknown origin, not caused by the alleged exposures, they both stated that claimant's exposure to sun exacerbates his condition. Therefore, the administrative law judge found that the Section 20(a) presumption was not rebutted and that claimant's condition is work-related. Decision and Order at 7-9.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32

BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events or conditions neither directly caused the injury nor aggravated the pre-existing condition, resulting in an injury. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Dr. Cruz, claimant's treating physician, diagnosed pemphigus erythematosus based on a biopsy of the skin on claimant's nose. She described the condition as an autoimmune inflammatory condition of unknown origin that erodes the external layers of skin and causes lesions. She stated that claimant's condition is not contagious, and it can be treated with steroids, but that claimant must use sun block, wear protective clothing and be aware that climate, sun, and heat can make the condition worse. Cl. Ex.1; Cl. Ex. 2 at 18-23. She noted that claimant's condition in 2001 had worsened since she last saw claimant in 1999, as he had additional lesions on his face and additional areas of his body were affected. Cl. Ex. 2 at 19. With regard to whether the exposure to rotten meat and air condition chemicals could cause this disease, Dr. Cruz stated "no," explaining there is "no evidence in literature" that would corroborate that type of exposure as the cause. She agreed that "[i]t is a circumstantial situation," but because the cause of the disease is unknown, there is no test to verify that the exposure was the cause. Cl. Ex. 2 at 24, 30.

Dr. Vallejo, a dermatologist who examined claimant in 2003, agreed with Dr. Cruz on the diagnosis, prognosis and treatment. He also stated that this condition is "almost certainly not related to [claimant's] claimed work activities, except for the fact that this condition gets worse with sun exposure." Emp. Ex. 8. Dr. Vallejo agreed with Dr. Cruz that there is no literature linking the types of exposures claimant had in the spillage incidents with his condition, as the condition is not a "contact" condition. According to Dr. Vallejo, had claimant developed any type of skin reaction to the rotten meat juices or

the air conditioning chemicals, it would have shown up in the biopsy. Dr. Vallejo advised claimant to avoid sun exposure as well as physical stress and heat, especially when the condition is exacerbated as it was when he saw claimant. Emp. Ex. 9 at 11-13, 15, 17, 27.

It is evident claimant suffers a harm, and employer does not dispute that fact. We hold that, based on the specific incidents on which the administrative law judge relied in invoking the presumption, the doctors' opinions rebut the Section 20(a) presumption, as they stated that claimant's skin condition is not related to either spillage incident. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *see also O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Moreover, there is no evidence on the record as a whole to support claimant's assertion that his skin condition is related to either spillage contact. Therefore, as a matter of law, claimant's condition is not related to the work incidents on June 4, 1998. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996) (claimant bears the burden under the preponderance of the evidence standard). The administrative law judge addressed whether employer rebutted the presumption on an entirely different basis, *i.e.*, by showing that exposure to the sun while working did not aggravate claimant's skin condition. This finding, however, rests on a different theory of causation which may be only considered if claimant properly raised the aggravation of his condition due to sun exposure as an issue, as the Section 20(a) presumption applies only to those claims actually made. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631; Decision and Order at 8-9; Cl. Exs. 1-2; Emp. Exs. 8-9; *see also* Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[4] (2004).

Claimant's notice of injury form and employer's first report of injury form specifically referred to an accident involving exposure to air conditioning "stuff." Emp. Exs. 1, 3; *see also* Tr. at 27. Claimant's claim form described the accident involving the rotten meat exposure. Emp. Ex. 4. Moreover, claimant did not file a post-hearing brief, and employer's post-hearing brief addressed only whether claimant's skin condition was causally related to the exposure to air conditioning chemicals and/or rotten meat juices. The administrative law judge, in his recitation of the issues, stated the question as "whether Claimant's skin condition was caused, or aggravated, by his work-related accident[.]" Decision and Order at 2.

However, in addition to stating that an injury occurred while disassembling old refrigeration equipment, claimant's "Proposed Statement of Contested Issues," dated February 7, 2002, stated:

> [Claimant] developed a condition for which he was medically treated under the provisions of the Act; he was ruled to be suffering from a non-

> contagious skin condition that flourishes and cover (sic) extensive areas of his body if he comes in contact with sun rays.

At the hearing held in May 2003, the parties did not frame any specific causation issues. Claimant testified that, as a carpenter, he worked in the sun, and the sun aggravates his condition. He also testified that Dr. Cruz told him he could not work in the sun and that he needed to wear sun block for protection. Tr. at 9, 13-14, 23. In their post-hearing depositions, Drs. Cruz and Vallejo testified that the sun aggravates claimant's skin condition. Cl. Ex. 2; Emp. Ex. 9.

In *U.S. Industries,* 455 U.S. 608, 14 BRBS 631, the Supreme Court held that the Section 20(a) presumption attaches only to the claim asserted by the claimant. Pertinent to the instant case, the court discussed the requirements for a claim under the Act, specifically addressing the fact that the claim may be amended, noting that "'considerable liberality is usually shown in allowing the amendment of pleadings to correct . . . defects,' unless the 'effect is one of undue surprise or prejudice to the opposing party.'" *U.S. Industries,* 455 U.S. at 613-614 n.7, 14 BRBS at 633 n.7 (quoting 3 A. Larson, *The Law of Workmen's Compensation*, §78.11 (1976), currently 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[3] (2004)). In this regard, the Larson treatise states that a wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury completely different than the one pleaded. 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[5] (2004).

The administrative law judge did not address whether claimant amended his claim to include the issue of whether his work-related exposure to the sun aggravated his autoimmune skin condition. Consequently, the administrative law judge's conclusion that claimant's condition is work-related must be vacated, and the case remanded for consideration as to whether claimant raised an aggravation theory. Because we have held that claimant's skin condition is not related to the work incidents involving exposure to air conditioning chemicals and rotten meat, on remand, the administrative law judge must determine whether claimant amended his claim to include the issue of aggravation by sun exposure with sufficient notice to employer. If he did, then the administrative law judge must apply Section 20(a) and reconsider causation based on this theory. *See U.S. Industries,* 455 U.S. 608, 14 BRBS 631; *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

Timeliness

In the event claimant's condition is found to be work-related, employer argues that it should be considered a "traumatic injury," making his notice of injury, filed on July 14,

1998, untimely as it was filed 40 days after the June 4, 1998, incidents.[4] Similarly, employer contends that claimant's claim for compensation, filed on February 10, 2001, was untimely filed, as he knew of the relationship between his injury and his employment in July 1998. Thus, employer argues that the claim is time-barred under both Sections 12(a) and 13(a) of the Act. 33 U.S.C. §§912(a), 913(a).

The administrative law judge found that claimant's injury was an occupational disease because he found that manifestation of the disease did not occur immediately after the exposure to air conditioning chemicals and rotten meat. Therefore, he concluded that the extended statutes of limitation set forth in Sections 12(a) and 13(b)(2) of the Act apply and that neither filing was untimely. 33 U.S.C. §§912(a), 913(b)(2); Decision and Order Denying M/SD at 5-6. The administrative law judge denied reconsideration, finding that claimant would still be entitled to the extended statutes of limitations even if claimant's condition was a traumatic injury that produced a latent disease. Decision and Order Denying Recon. at 2-6; *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991) (latent and unknown injuries should be treated like occupational diseases for purposes of establishing applicable average weekly wage); *but see LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 160, 31 BRBS 195, 196(CRT) (5th Cir. 1997) (fall from ladder is traumatic injury even though claimant developed latent disease; average weekly wage at time of accident is to be used). As we conclude that claimant's condition does not meet the requirements for application of the Act's extended statutes of limitation for occupational diseases which do not immediately result in disability, we will remand this case for further findings by the administrative law judge.

Traumatic Injury vs. Occupational Disease

There is no dispute that claimant suffers from a "disease." Sections 12 and 13 provide extended filing deadlines for the notice of injury and claim for compensation when the employee suffers an "occupational disease *which does not immediately result*" in disability or death. 33 U.S.C. §§912(a),[5] 913(a),[6] (b)(2) [7] (emphasis added). In this

[4]Employer filed its first report of injury on July 15, 1998. 33 U.S.C. §930(a), (f); Emp. Ex. 3.

[5]Section 12(a), emphasis added, states in pertinent part:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and

case, claimant's potential work-related injury is a skin condition which is allegedly aggravated by his exposure to sun on the job and affects his employability. We conclude that the extended limitations periods in Sections 12 and 13 do not apply because the effect of the sun on claimant's skin condition is immediate, requiring him to always wear protection from the sun or stay out of the sun altogether. Claimant's condition is analogous to occupational hearing loss, and thus the Supreme Court's holding regarding the nature of such injuries controls our disposition on this issue.

In *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), the Supreme Court held that based on scientific evidence, the symptoms of occupational hearing loss occur simultaneously with the exposure to injurious noise, unlike a disease such as asbestosis which has a long latency period between exposure to asbestos and the development of disease. Thus, the Court held that hearing loss is not "an occupational disease which does not result in immediate disability." The Court explained

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> the employment, except that in the case of *an occupational disease which does not immediately result in a disability or death*, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

[6]Section 13(a) states, in pertinent 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 [sic] 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.

[7]Section 13(b)(2), emphasis added, provides in pertinent part:

> a claim for compensation for death or disability due to *an occupational disease which does not immediately result in such death or disability* shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later.

that in a hearing loss case, since the symptoms of deafness appear immediately and typically do not worsen, the injury is complete when the exposure to harmful noise ceases, whereas a worker who has been exposed to asbestos suffers no injury until his disease becomes manifest years later.[8] *Id.*, 506 U.S. at 163-165, 26 BRBS at 153-154(CRT); *compare with Bunge Corp. v. Carlisle*, 227 F.3d 934, 938-939, 34 BRBS 79, 81(CRT) (7th Cir. 2000) (repetitive use of joy sticks caused muscular and nerve diseases), *and Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993) (disease manifested in 1980s from exposure to asbestos in 1950s). Thus, in cases involving hearing loss due to occupational noise exposure, as the effects of the exposure are "immediate," the disease is one which *does* immediately result in disability, and the extended statutes of limitation do not apply. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994), *modifying* 26 BRBS 27 (1992).

In this case, claimant's condition is aggravated with each exposure to the sun's rays. As the effects of exposure occur simultaneously, claimant's disease is also one which does have immediate results.[9] *See generally Pan American Airways, Inc. v. Willard*, 99 F.Supp. 257 (S.D.N.Y. 1951); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). Since claimant's disease had immediate effects, the extended statutes of limitation do not apply. Therefore, we vacate the administrative law judge's determination that the extended statutes of limitation in Sections 12(a) and 13(b)(2) apply. The timeliness of claimant's filings, therefore, must be addressed using the 30-day and one-year statutes of limitation set forth in Sections 12(a) and 13(a), respectively.

Sections 12 and 13

[8]The Supreme Court thus held that Section 10(i) and Section 8(c)(23) are inapplicable to retiree hearing loss cases. 33 U.S.C. §§908(c)(23), 910(d)(2), (i). Section 10(i) provides a time of injury, for average weekly wage purposes, in certain cases where an occupational disease "does not immediately result in death or disability," which is the language also used in Sections 12(a) and 13(b)(2).

[9]In its opinion in *Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811 (1st Cir. 1991), *aff'd*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), the First Court discussed the Director's argument that there is a distinction between having the symptoms of the disease, *i.e.*, deafness in the case of hearing loss, and being aware of those symptoms. The fact that an employee does not notice his deafness and thus files no claim for many years does not mean the injury had not occurred. The Supreme Court quoted this portion of the First Circuit's opinion. Similarly, in this case, injury occurred upon exposure, even though claimant may not have been "aware" for purposes of notice and filing at that time.

Because we have held that the 30-day and one-year statutes of limitation apply to this case, it must be remanded for further findings. Employer argues that the notice of injury should have been filed within 30 days of the June 4, 1998, date of the accident and the claim for compensation should have been filed within one year of this date. Relying on *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979), the administrative law judge rejected this argument, stating that the "date of injury" is not equivalent to the date of the accident, the first pain, or the first symptoms, *i.e.*, the rash. Decision and Order Denying Recon. at 4-6. However, the administrative law judge did not specify a date of awareness. He merely concluded that "[e]mployer has not established that claimant became aware he was injured within the meaning of the Act at a point which would render his claim time-barred." *Id.* at 6.

Under Section 12(a) of the Act, a claimant who sustains a traumatic injury, or an occupational disease that results in an immediate disability, must file a notice of injury within 30 days of the date on which he became aware, or should have become aware, of the relationship between his injury and his employment. 33 U.S.C. §912(a); 20 C.F.R. §702.212(a). Section 13(a) provides a claimant with one year after he becomes aware, or should have become aware, of the relationship between his injury and his employment within which he may file a claim for compensation for the injury. 33 U.S.C. §913(a). Case law establishes that a claimant is not "aware" under these provisions until he knows or should have known the full extent of his condition and that it will likely impair his wage-earning capacity. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). The claimant is also entitled to a presumption that his notice of injury and claim were timely filed, and the burden of establishing the untimeliness of either or both filings is on the employer. 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). If the employer establishes that the notice of injury was not filed in a timely manner, the late filing may be excused in accordance with Section 12(d) of the Act, 33 U.S.C. §912(d).[10]

[10]Section 12(d) states:

> Failure to give such notice shall not bar any claim under this chapter (1) if the employer (or his agent or agents or other responsible official or officials designated by the employer pursuant subsection (c) of this section) or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by employer pursuant to subsection (c) of this section, was

In order to determine whether claimant's notice of injury and claim were timely filed, the administrative law judge must make a specific determination as to the date on which claimant became aware, or should have become aware, of the relationship between his injury, his employment and the likely impairment of his wage-earning capacity. *See, e.g., Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). As we have held, based on the medical evidence, that claimant's condition is not related to the specific incidents on June 4, 1998, employer's argument that claimant had the requisite awareness as of this date must be rejected. The administrative law judge's consideration of awareness must therefore relate to the time when claimant knew that his exposure to the sun was related to his condition and that his earning capacity was impaired as a result.[11]

Moreover, the administrative law judge properly rejected employer's assertion that the date of the *accident* is the commencement date for notice and filing under the applicable legal standard. The United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, specifically rejected this argument under Section 12, and the same reasoning applies under Section 13. In *Galen*, 605 F.2d 583, 10 BRBS 863, a worker felt sharp pain in his back on August 25, 1974. Although he felt pain, he believed it would eventually "work off" and, as he then developed a cold, he believed his continuing discomfort was related to the cold. However, he ceased work on November 14, 1974, due to pain, and he learned from a doctor on November 16, 1974, that his back pain was due to discogenic disease and arthritis. Employer received the claimant's notice of injury on November 25, 1974. The court held that the notice was timely filed because the date the claimant became "aware" of the relationship between the injury and the employment occurred not when the claimant first experienced pain but, rather, when he realized that the work-related injury disabled him from future

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> given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c) of this section, or (ii) for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

[11]This consideration, of course, will be necessary only if the administrative law judge finds on remand that the claim was amended to raise this theory of causation. Assuming claimant successfully amended his claim, the filing date of February 10, 2001, found by the administrative law judge is not affected.

employment. *Galen*, 605 F.2d at 584-585, 10 BRBS at 866; *see also Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970).[12]

The administrative law judge in this case did not make a specific finding as to claimant's date of awareness under this standard. Therefore, we vacate the administrative law judge's conclusion that claimant's notice of injury and claim for compensation were timely filed, and we remand the case to him. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980). Once he has determined when claimant became aware of the relationship between his disease, injurious exposure and impairment of earning capacity[13] in accordance with case precedent, he should reconsider the timeliness of both claimant's July 14, 1998, notice of injury and the February 10, 2001, claim for compensation under Sections 12(a) and 13(a). If he finds that the notice of injury was untimely filed and that the claim is not otherwise barred, then the administrative law judge should address whether Section 12(d) excuses the untimely filing of the notice of injury.[14]

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[12]The United States Court of Appeals for the D.C. Circuit stated in *Stancil*:

> [O]nce the man has been put on the alert . . . as to the likely impairment of his earning power, there is an 'injury;' before that time, while there may have been an accident, there is as yet no 'injury' for claim or filing purposes under this statute."

Stancil, 436 F.2d at 276-277.

[13]In this case, claimant continued to work, despite his condition, until he was terminated for other reasons. He testified that, thereafter, he was unable to find work because of his skin condition. Tr. at 14-15.

[14]Although the administrative law judge found the notice of injury timely filed, he summarily noted that claimant had not established circumstances to excuse a late filing under Section 12(d), and he declined to discuss Section 12(d) further. Decision and Order Denying M/SD at 4 n.5. Contrary to the administrative law judge's statement, however, the burden of showing that Section 12(d) does not excuse a claimant's late filing rests with the employer pursuant to Section 20(b). *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988).

Accordingly, the administrative law judge's decisions awarding benefits are vacated, and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge