BRB Nos. 99-1274
and 99-1274A

THERESIA J. BRAUCH-MAXAM	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/NAF	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Order Granting Motion to Reconsider of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

A. James McArthur, Lincoln, Nebraska, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and Order Granting Motion to Reconsider (95-LHC-2356) of Administrative Law Judge Stuart A. Levin 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 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).

Claimant began working for employer as a marina manager at the Anacostia Naval

Station in Washington, D.C., in September 1985. Her work required considerable lifting, walking, bending and climbing and oftentimes caused bruises and scrapes on her knees and other body parts. Claimant eventually left her job with employer in June 1991, after her husband was transferred out of the Washington, D.C. area by the military. At this time, claimant testified that she experienced "normal aches and pains," but did not notice anything unusual about her legs and/or knees. She further stated that since leaving the marina, she has not engaged in any type of work or recreational activity that made similar demands on her knees.

Claimant thereafter relocated with her husband first to Norfolk, Virginia, then to Mobile, Alabama, and then to Lincoln, Nebraska. At each location, claimant took some college courses and held temporary jobs doing clerical work. Claimant eventually attended the University of Nebraska at Lincoln on a full-time basis from August 1994 until June 1996.

Meanwhile, claimant stated that between the winters of 1991-1992 and 1992-1993, she began experiencing mild pain in her knees which intensified during the summer of 1993. She subsequently sought medical treatment from Dr. Reckmeyer on November 18, 1993, who diagnosed chronic patellofemoral dysfunction in both knees, and post meniscectomy pain in the left knee. Claimant stated that it was at this time that she first realized that her knee condition was causally related to her employment as a marina manager.

In his decision, the administrative law judge initially found that claimant became aware of the work-related nature of the disability due to her knee condition on November 18, 1993, and therefore found that her claim filed on May 16, 1994, was timely under Section 13(a) of the Act, 33 U.S.C. §913(a). The administrative law judge then found that as claimant's July 11, 1994, notice of injury to employer was filed more than 30 days after the date of awareness, it was untimely under Section 12(a) of the Act, 33 U.S.C. §912(a). He, however, determined that employer did not establish that it was prejudiced by the late notice of injury, and thus found that claimant's failure to provide timely notice of injury was excused under Section 12(d) of the Act, 33 U.S.C. §912(d). The administrative law judge next found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer did not establish rebuttal of this presumption. The administrative law judge therefore concluded that claimant sustained a work-related injury compensable under the Act. He then determined that claimant is capable of performing her usual job functions,[1] and thus, concluded that claimant is not totally disabled. Additionally, the administrative law judge

[1]The administrative law judge determined, based on claimant's change in vocation upon leaving her job as a marina manager in 1991, that claimant's usual employment for purposes of determining her entitlement to total disability benefits is as a secretary or clerical worker.

found that claimant is not entitled to compensation for temporary partial disability as she did not sustain any loss in wage-earning capacity based on her average weekly wage as calculated at the time of her disability in 1993. The administrative law judge, however, found claimant entitled to a scheduled award pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), based on the 21 percent permanent impairment to each knee. Claimant's motions for reconsideration were denied.

On appeal, claimant challenges the administrative law judge's calculation of her average weekly wage. Employer responds, urging affirmance. In its cross-appeal, employer challenges the administrative law judge's finding that the claim is timely under Sections 12 and 13 of the Act.

We first address claimant's challenge to the administrative law judge's average weekly wage determination. Claimant asserts that the administrative law judge erred in using her average weekly wage at the time of disability in 1993 to determine her entitlement to benefits. Claimant maintains that the use of the 1993 average weekly income is especially egregious in view of her clear and uncontroverted testimony that her reduced income was directly due to her work-related knee condition which prevented her from working to the fullest extent.

In his decision, the administrative law judge initially determined that pursuant to *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), and *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), claimant's average weekly wage should be determined on the date claimant became disabled, rather than the date on which the accident occurred. He therefore found that claimant's average weekly wage should be calculated as of 1993, as that reflects the first time that claimant was disabled due to her work-related accident. The administrative law judge thus concluded, based on the parties' stipulation, that claimant's average weekly wage in 1993 was $100.22.

Upon reconsideration, the administrative law judge reiterated his determinations that claimant was not disabled until 1993, and that her earnings in that year appropriately reflect her average weekly wage. Specifically, the administrative law judge determined that at the time of her disability in 1993, claimant had already freely switched occupations and reduced her time worked such that her earnings as a marina manager in 1991 were not indicative of her ability to earn wages at the time of her disability. Consequently, the administrative law judge did not use claimant's earnings as a marina manager in calculating claimant's average weekly wage, and instead relied on the parties' stipulation of claimant's average weekly wage in 1993.

In *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998), the Board addressed the issue concerning the "time of injury" for

calculation of a claimant's average weekly wage in cases involving a traumatic injury. In *McKnight*, the claimant initially sustained an injury to his left knee as a result of a work accident which occurred in 1984. Employer voluntarily paid claimant temporary total disability benefits for this injury. In 1989, claimant discovered, via arthroscopic surgery to his left knee, that he had a torn medial meniscus, early degenerative joint disease and mild chronic synovitis. The administrative law judge related claimant's 1989 surgery and permanent partial disability to the 1984 left knee injury, specifically finding there was no subsequent injury. Nonetheless, she relied on *Johnson* and *Kubin* and the analogy with occupational disease cases to conclude that claimant is entitled to benefits based on his 1989 average weekly wage, as the full extent of his disability did not become manifest until that time. *McKnight*, 32 BRBS at 172-173.

In its decision, the Board discussed the differing positions espoused by the Ninth Circuit in *Johnson*, and by the Second and Fifth Circuits respectively in *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985), and *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195 (CRT) (5th Cir. 1997). The Board first discussed the Ninth Circuit's decision in *Johnson* that, in a case involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the permanent disability becomes manifest, rather than at the time of the accident. *Johnson*, 911 F.2d at 247, 24 BRBS at 3 (CRT);[2] *see also Kubin*, 29 BRBS at 117. In contrast, the Second and Fifth Circuits have held that in traumatic injury cases, the time of the injury is the date the event causing the injury occurred; thus, average weekly wage is determined at the time of accident, and not when any latent effects become manifest. *LeBlanc*, 130 F.3d at 157, 31 BRBS at 195 (CRT); *Morales*, 769 F.2d at 66, 17 BRBS at 130 (CRT); *see also Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). In *LeBlanc*, the Fifth Circuit specifically rejected the reasoning in *Johnson.*

In rendering its decision in *McKnight*, the Board agreed with the reasoning of the Second and Fifth Circuits, and held that it would follow their decisions in *Morales* and

[2]In *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), the Ninth Circuit held, based on the facts of that case, that the claimant's average weekly wage should be calculated in reference to his earnings at the time he sustained the accident and not from the time that his subsequent work-related back injury became disabling. Specifically, the Ninth Circuit distinguished *Johnson*, noting that as opposed to Ronne whose disability was not latent in that he suffered from a significant loss of earning capacity at the time of his original injury which reduced his earnings thereafter, claimant Johnson's disabling symptoms of her earlier accident did not manifest themselves until years after the accident.

LeBlanc in all cases before the Board except for those arising within the Ninth Circuit. Specifically, the Board relied on the language of Section 10, which states that except as otherwise provided, the average weekly wage of an employee is determined at the time of injury and, according to *Morales* and *LeBlanc*, "time of injury" refers to the time of the accident causing injury. The Board also discussed the courts' reliance on the Congressional enactment of Section 10(i) of the Act, 33 U.S.C. §910(i), in 1984 which adopted a manifestation approach for occupational diseases but left Section 10 unaltered in traumatic injury cases. Thus, the Board held that in view of the fact that Section 10(i) "deems" the time of injury in the case of an occupational disease to be the date of manifestation, the better interpretation of "time of injury" in traumatic injury cases is the time the accident causing injury occurred. *McKnight*, 32 BRBS at 172-173. The Board therefore held that the administrative law judge erred in awarding claimant disability benefits based on his 1989 average weekly wage, and modified her decision to reflect that claimant's benefits must be based upon his 1984 average weekly wage. *Id.*

The Board's decision in *McKnight* and the opinions in *Morales* and *LeBlanc* rest on the specific language of Section 10 of the Act. Under this precedent, the date of the events causing injury establishes the time period for calculation of average weekly wage, and such factors as whether claimant left her job due to her injury or her earnings increased or decreased thereafter are not determinative. As this case does not arise in the Ninth Circuit,[3] we follow *McKnight* and vacate the administrative law judge's use of the date of disability in determining claimant's average weekly wage in this traumatic injury case. The case is remanded for the administrative law judge to recalculate claimant's average weekly wage pursuant to Section 10, 33 U.S.C. §910, as of the date of injury based upon claimant's earnings in the year prior to her leaving her position with employer in June 1991. *LeBlanc*, 130 F.3d at 157, 31 BRBS at 195 (CRT); *Morales*, 769 F.2d at 66, 17 BRBS at 130 (CRT); *McKnight*, 32 BRBS at 165.

[3]The instant case arises within the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit which has as yet to explicitly address this issue.

In its cross-appeal, employer argues that if the date of claimant's injury is in 1991 for average weekly wage purposes then the claim is untimely under Sections 12 and 13 of the Act as claimant did not file her claim until May 16, 1994. Unlike average weekly wage, however, the issue of timeliness under Sections 12 and 13 in a traumatic injury case hinges on the date claimant is aware, or should have been aware, of the relationship between her injury and her employment. In construing these sections, moreover, the courts have held that this "awareness" occurs when claimant knows, or should have known, of the relationship between the injury, employment and disability, and not on the date of the accident, or in this case, the last trauma to claimant's knees. *See Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21 (CRT)(5th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT) (5th Cir. 1984); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). As employer does not challenge the administrative law judge's finding regarding claimant's date of awareness, its contentions regarding the administrative law judge's findings at Sections 12 and 13 are rejected.[4]

[4]Furthermore, we note that the administrative law judge extensively considered the issue of timeliness under Sections 12 and 13, and as his findings on this issue are rational, supported by substantial evidence and in accordance with law, they are affirmed. 33 U.S.C. §§912(a), (d), 913(a); *see Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585, 10 BRBS 863, 865-866 (1st Cir. 1979); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

Accordingly, the administrative law judge's determination of claimant's average weekly wage is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, 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