BRB Nos. 90-1504
and 90-1504A

PAUL J. UNDERHILL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
JEFFBOAT, DIVISION OF AMERICAN COMMERCIAL MARINE SERVICE COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Rejection of Claim of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul J. Underhill, Clarksville, Indiana, *pro se*.

Robert A. Donald, III (Conliffe, Sandmann, Gorman & Sullivan), Louisville, Kentucky, for self-insured employer.

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

PER CURIAM:

Claimant, representing himself, appeals, and employer cross-appeals, the Decision and Order - Rejection of Claim (88-LHC-3721) of Administrative Law Judge Rudolf L. Jansen 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). In reviewing this *pro se* appeal, the Board 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, on June 29, 1985, experienced pain around his beltline, groin and leg while working for employer as a foreman. Claimant's notice of injury, documenting a hernia injury, was completed on July 12, 1985; on July 28, 1985, claimant underwent surgery for a hernia repair. Claimant returned to work on September 10, 1985, and, because his usual position no longer existed, was assigned to work as a plant guard. Thereafter, on September 17, 1985, claimant alleges that he experienced pain in his lower abdominal area while he was opening a gate; claimant did not file a notice of injury for this alleged incident until May 22, 1986. Claimant was subsequently laid off due to economic conditions on May 30, 1986, and has not worked since that time. Claimant filed a claim for compensation for his hernia condition on August 20, 1986; at the formal hearing, claimant submitted into evidence medical testimony linking his back and psychological conditions to his initial employment injury.

In his Decision and Order, the administrative law judge, after finding that the claim had been timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913, determined that claimant was entitled to temporary total disability compensation, as a result of his hernia condition, from July 29, 1985, through September 8, 1985. Next, the administrative law judge, based upon the testimony of Drs. Coe and Shea, concluded that claimant's back condition did not arise out of and in the course of his employment with employer; thus, compensation for that condition was denied. Regarding claimant's psychological condition, the administrative law judge determined that that condition was due to claimant's non-work-related back condition and job loss and as such was not compensable under the Act.

On appeal, claimant, appearing *pro se*, challenges the administrative law judge's denial of benefits for his back and psychological conditions. Employer, in its cross-appeal, contends that the administrative law judge erred in not finding claimant's back and psychological claims to be barred pursuant to Section 13 of the Act; additionally, employer contends that no notice of injury was filed by claimant regarding his psychological injury.

In establishing that an injury arises out of his employment, a claimant is aided by the Section 20(a), 33 U.S.C.§920(a), presumption which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the instant case, the administrative law judge assigned probative weight to the testimony

of Drs. Coe and Shea in concluding that employer had rebutted the Section 20(a) presumption linking claimant's back condition to his employment with employer. Decision and Order at 18. However, Dr. Coe, claimant's family physician, specifically declined to offer an opinion as to the etiology of claimant's back condition, *see* Coe deposition at 15; rather, Dr. Coe opined that, while it is uncommon, it is not impossible for a low back injury to manifest itself in pain within the scrotal region. *See id.* at 18. Because Dr. Coe's testimony fails to rule out a causal relationship between claimant's back condition and his employment with employer, we hold that Dr. Coe's opinion is insufficient to rebut the Section 20(a) presumption. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Dr. Shea opined that claimant's June 1985 accident did not bring his back condition into a disabling reality and that, had claimant been experiencing back pain between June 1986 and October 1987, he would have expected claimant to complain of back discomfort prior to his initial visit in October 1986. *See* Shea deposition at 6, 22-23. Dr. Shea additionally stated, however, that claimant's 1986 work-injury aggravated his pre-existing back condition and made that condition temporarily symptomatic, and that it was possible that claimant's beltline pain was related to his back condition. *Id.* at 11-12, 15-16. Although the administrative law judge credited Dr. Shea's testimony without reservation when determining that employer had rebutted the presumption as it relates to claimant's back condition, *see* Decision and Order at 18-19, the administrative law judge subsequently acknowledged that Dr. Shea's testimony was equivocal regarding the etiology of claimant's disability. *Id.* at 25. If Dr. Shea's testimony is equivocal, it cannot rebut Section 20(a). Due to these conflicting evaluations of this evidence, we vacate the administrative law judge's finding of rebuttal, and remand the case for the administrative law judge to reconsider whether Dr. Shea's testimony is specific and comprehensive enough to rebut the presumed causal relationship between claimant's back condition and his employment with employer. Should the administrative law judge on remand determine that rebuttal has been established, he must then, in light of our determination that Dr. Coe's testimony fails to establish that claimant's back condition is not related to his employment, weigh the evidence and resolve the causation issue based on the record as a whole. *See Hughes*, 17 BRBS at 153.

Next, the administrative law judge failed to invoke the Section 20(a) presumption with regard to claimant's psychological condition; rather, the administrative law judge determined that claimant's psychological condition was not compensable under the Act since that condition was the result of either claimant's non-work-related back condition or claimant's economic lay-off. The administrative law judge, however, did accept the parties' stipulation that claimant sustained an injury while in the course of his employment with employer on June 29, 1985; subsequently, the administrative law judge concluded that this injury both caused claimant to experience pain and rendered claimant temporarily totally disabled until September 8, 1985. Furthermore, the record contains evidence that claimant continued to complain of pain after his return to work and that claimant subsequently experienced psychological problems which could be related to the pain associated with his work injury. Thus, claimant has established the two elements of his *prima facie* case and therefore is entitled to the invocation of the Section 20(a) presumption to link his psychological problems to his work injury. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326

(1981). An employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See, e.g., Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Pursuant to the parties' stipulations and the medical evidence documenting claimant's condition, the administrative law judge should have invoked the Section 20(a) presumption with regard to claimant's psychological condition. *See Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). We, therefore, vacate the administrative law judge's finding that there is no casual relationship between claimant's psychological condition and his work injury; on remand, the administrative law judge must reconsider the issue of causation in light of the Section 20(a) presumption and the aggravation rule.

In its cross-appeal, employer contends that the administrative law judge erred in not finding that claimant's claim for compensation based on his back and psychological conditions is barred pursuant to Section 13 of the Act. We disagree. Section 13(a) of the Act, 33 U.S.C. §913(a), provides that, in traumatic injury cases, the one year period for filing a claim does not begin to run until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. The time limitation under Section 13(a) does not commence to run until claimant knows or has reason to know that his injury is likely to impair his earning capacity. *J. M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990); *see also Newport News Shipbuilding and Dry Dock 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); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100 (CRT)(5th Cir. 1984). In order to satisfy the requirements of Section 13, a claim need not be on a particular form. *See Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988); 20 C.F.R. §702.221. Rather, any writing from which an inference may reasonably be drawn that a claim for compensation is being made will suffice, *see Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989), since the purpose behind the reporting requirements of Section 13 is to ensure that employer will receive prompt written notification of a claim. *See generally Paquin v. General Dynamics/Electric Boat Division*, 4 BRBS 383 (1976). Furthermore, the applicable regulations suggest that an amendment to a pleading is allowable if it is determined by the administrative law judge to be reasonably within the scope of the original claim. *See* 29 C.F.R. §18.5(e)(1989). In this regard, the United States Supreme Court has quoted with approval Professor Larson's observation that considerable liberality usually is shown in allowing the amendment of pleadings to correct defects, unless the effect is one of undue surprise or prejudice to the opposing party. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 102 S.Ct. 1312 (1982).

In the instant case, employer does not dispute that claimant's original request for benefits, filed August 20, 1986, was timely. Furthermore, employer concedes that it became aware of claimant's back condition in November 1986. Additionally, our review of the record reveals that employer submitted substantial evidence into the record regarding claimant's psychological condition. *See* Employer's Exhibits 5, 6. Based upon the record before us, we hold that claimant's raising a new theory of recovery constituted an amendment to his original claim which is reasonably with the scope of that original claim, since the new recovery theories arise as a result of claimant's work injury. Furthermore, on the undisputed facts of this case, we cannot say that employer was unduly surprised or prejudiced by claimant's allegations regarding his back and psychological conditions. Given the Supreme Court's stated policy of liberality in accepting amended pleadings, we therefore hold that the administrative law judge committed no reversible error in addressing claimant's request for relief for his back and psychological conditions. *See Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992).

Accordingly, the administrative law judge's Decision and Order denying benefits for a back condition and psychological problems is vacated and the case remanded for further consideration consistent with this opinion. In all other respects, 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