BRB No. 92-0211

PAUL L. RUDOLPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision Denying Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Bartinik, Stuart & Kelly, P.C.), Groton, Connecticut, for the claimant.

Edward J. Murphy, Jr. (Murphy and Beane), New London, Connecticut, for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Decision Denying Reconsideration (90-LHC-1591) of Administrative Law Judge David N. Di Nardi 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 which 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 was injured on July 21, 1977 while working for employer as a safety engineer, when he was hit in the left eye by a metal telephone holder. As a result of this injury, claimant experienced blurred vision and "black specks" in his left eye. Because his

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

symptoms persisted, Dr. Asher, the shipyard physician, referred claimant to Dr. Harold Woodcome, Jr., an ophthalmologist, in January 1978. After diagnosing inferior papillary vein occlusion and disc

and retinal neovascularization, with hemorrhage of the left eye, which represented a threat to further vision loss, Dr. Woodcome performed laser surgery on claimant on January 17, 1978. Additional laser surgery was apparently performed one week later. Although claimant's complaints continued, on August 23, 1978, Dr. Woodcome advised claimant that he had no further treatment to recommend.

In April 1982, claimant filed a Rhode Island state workers' compensation claim for the July 21, 1977, eye injury. Tr. at 46-47. Claimant returned to Dr. Woodcome in August 1983, complaining of tearing in his left eye while reading, headaches, and loss of left side vision. In his August 3, 1983 report, Dr. Woodcome indicated that claimant's visual acuity when he last saw him in August 1978 was 20/20. He also stated that when he re-examined claimant on August 1, 1983, the visual acuity in his left eye was 20/40, a level which should be perfectly adequate for most reading tasks without producing headaches or tearing and that he was unable to explain claimant's current complaints. Cl. Ex. 4. Claimant filed a claim for permanent partial disability compensation under the Act on May 4, 1984. Following subsequent medical evaluations, the parties stipulated that claimant has a 45 percent permanent partial disability of the left eye.

The administrative law judge denied the claim for compensation under the Act, finding it barred by the limitations period of Section 13(a), 33 U.S.C. §913(a). While recognizing that the filing of a state claim constitutes a suit for damages which could toll the Section 13(a) statute of limitations under Section 13(d), the administrative law judge found that as claimant immediately experienced visual symptoms in his left eye for which he received considerable medical care and treatment, he was aware or should have been aware of his work injury as of July 21, 1977, simultaneous with its occurrence. Accordingly, the administrative law judge found claimant should have filed a claim under the state statute or the Longshore Act by no later than July 21, 1978. The administrative law judge further determined that employer's filing of a BEC-202(a) No Time Loss Report on August 8, 1977, and LS-202 First Report of Injury Form on April 23, 1982, were sufficient to satisfy the filing requirements of Section 30(a), 33 U.S.C. §930(a). Inasmuch as claimant failed to file any claim until April 8, 1982, when the state claim was filed,[1] the administrative law judge determined that the May 4, 1984 claim for disability compensation under the Act was time-barred. Claimant's motion for reconsideration was denied.

[1]Although the administrative law judge found that the state claim was subsequently withdrawn as time-barred on May 17, 1984, this finding is not supported by substantial evidence. As claimant correctly asserts, the record indicates only that the claim was withdrawn and does not provide any explanation therefor. Cl. Ex. 12, 13.

Claimant appeals the administrative law judge's determination that his May 4, 1984, claim was untimely. Citing *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991), and *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991), claimant contends that the Section 13(a) time limitation does not begin to run until the employee is aware that he has suffered a work-related harm which is likely to impair his wage-earning capacity. Claimant asserts that inasmuch as he did not become aware that he had suffered a permanent disability resulting from the 1977 work injury until at the earliest August 1983, when he returned to Dr. Woodcome, the May 4, 1984 claim is timely. Claimant further maintains that neither the fact that his injury falls under the schedule where loss of wage-earning capacity is presumed, nor the fact that it was not initially misdiagnosed, provides a sufficient basis for distinguishing the present case from the applicable case authority and that the administrative law judge erred in concluding to the contrary. Claimant also contends that the administrative law judge erred in finding that he retired in 1979, asserting that the only evidence of claimant's termination of employment, employer's severance form, indicates that the severance occurred on May 31, 1987. Employer responds, urging that the denial of benefits be affirmed.

We agree with claimant that the administrative law judge's determination that his claim was not timely filed cannot be affirmed. The administrative law judge's finding regarding claimant's awareness was not made under the appropriate legal standard. Section 13(a), which is applicable to all traumatic injury cases including those resulting in disability compensated under the schedule, provides that the right to compensation for disability shall be barred unless the claim is filed within one year from the time claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a). As claimant asserts, the Section 13(a) statutory limitations period for a traumatic injury does not commence running until the employee knows, or should have known, that he is suffering from a compensable injury. *Stancil*, 436 F.2d at 274. In *Stancil*, the court held claimant must be aware that he has sustained an injury related to his employment which is likely to impair his wage-earning capacity in order for the Section 13(a) period to commence. *Accord Abel*, 932 F.2d at 819, 24 BRBS at 130 (CRT); *Parker*, 935 F.2d at 20, 24 BRBS at 198 (CRT); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). Moreover, it is well-established that a claimant is not injured for purposes of Section 13(a) until he becomes aware of the "full character, nature and extent of the harm done to him." *Todd Shipyards v. Allan*, 666 F.2d 399, 401, 14 BRBS 427, 429 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982), *quoting Stancil*, 436 F.2d at 277.

In addition, Section 20(b), 33 U.S.C. §920(b), provides a presumption that a claim has been timely filed. *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983). As part of its burden to rebut Section 20(b), employer must initially establish that it complied with the requirements of Section 30(a). Section 30(a), as amended, requires that employer file a report of injury within 10 days from the date of any injury which causes the loss of one or more shifts of work. 33 U.S.C. §930(a)(1988). Section 30(f), 33 U.S.C. §930(f), provides that where employer has been given notice or has knowledge of any injury and fails to file the appropriate Section 30(a) report, the statute of limitations provided in Section 13(a) does not begin

to run until such report has been provided. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 69 (1990).

In the instant case, the administrative law judge erred in finding awareness for purposes of Section 13 as of the date of injury based on his finding that claimant was immediately aware that his left eye symptoms were related to the July 21, 1977 work accident. It is apparent that claimant cannot be "aware" of the "full character, nature and extent" of a harm on the day of an accident. Contrary to the determination made by the administrative law judge in the present case, application of this standard is not limited to occupational disease claims or to traumatic injury claims filed many years after a work accident where claimant's condition was initially misdiagnosed. *See, e.g., Abel*, 932 F.2d at 822, 24 BRBS at 134-135 (CRT); *Stancil*, 436 F.2d at 279. Moreover, *Parker* and *Stancil* are applicable to traumatic injury cases and in both cases, the claim was filed years after the initial accident, as in the present case. Contrary to the administrative law judge's statement, *Parker and Stancil* are not distinguishable on these facts.

There is evidence in the record, moreover, which is relevant to when, in fact, claimant was aware or should have been aware that he sustained a compensable injury. The medical evidence is void of any objective evidence of physical impairment resulting from the work injury prior to August 1983. The medical evidence of the degree of permanent impairment stipulated by the parties is the result of examinations after this date. *See* Cl. Ex. 8, 9. The administrative law judge must consider this evidence in order to ascertain when claimant became aware of his permanently disabling eye condition. *See Welch v. Pennzoil Co.*, 23 BRBS 295 (1990). Since the claim is for a scheduled loss, claimant's awareness of a permanent impairment is relevant in determining when he became aware of a compensable injury.

In this regard, in finding that claimant was immediately aware for purposes of Section 13 in July 1977, the administrative law judge implicitly rejected the relevance of evidence as to loss in earning capacity, noting that the claim was for a scheduled injury under Section 8(c)(5) and thus loss in wage-earning capacity is presumed and finding that in any event, claimant retired in 1979, 3 years prior to filing the state claim. Even if claimant retired at that time, the administrative law judge must review the medical evidence and other evidence relevant to when claimant became aware of the full effects of his injury. Evidence regarding claimant's post-injury employment may be relevant, and the record contains evidence contrary to the administrative law judge's finding that claimant retired in 1979 which the administrative law judge did not address.[2]

[2]Although the record lacks any documentation regarding whether claimant missed any time from work during the years immediately subsequent to his injury, claimant testified at the hearing that he continued to work for employer during this period on an on-call, as needed basis, at full salary. Tr. at 45-46. In addition, the record contains a letter which claimant's attorney wrote to the administrative law judge in which she attempts to explain her inability to enlighten the court regarding the time claimant lost due to the work injury. In this letter, claimant's counsel states that claimant recalls "being out of work off and on," but that he continued to receive full salary, and that accordingly Electric Boat's records will not show periods of absence. Cl. Ex. 12A. The record also

contains two documents entitled, "Employee Severance" dated May 1, 1987 and December 8, 1987 respectfully, which indicate that while claimant voluntarily retired in May 1987, the last day claimant actually worked for employer was on May 15, 1979. *See* Emp. Ex. 7-5, 7-6. There is also a notation contained in Dr. Kaplan's October 15, 1979 report, which indicates that claimant apparently last worked in 1979. *See* Cl. Ex. 5. Other employment records submitted by employer, however, list claimant as a safety coordinator for employer as late as February 24, 1980, and May 31, 1987. Emp. Ex. 7-3, 7.4.

In light of the administrative law judge's failure to consider, weigh, and evaluate the evidence relevant to claimant's awareness under the appropriate legal standard, we vacate his finding that the May 4, 1984 claim is time-barred. The case is remanded for reconsideration of this issue consistent with this opinion under the precedent established in *Stancil*, *Parker* and the cases cited herein. If, on remand, the administrative law judge finds it necessary to address Section 30(a), he should reconsider this issue in accordance with *Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277 (1992)(Dolder, J., dissenting on other grounds), wherein the Board recognized that both claimant's duty to file a claim and employer's duty to file a Section 30(a) report are contingent upon knowledge of a compensable injury. *Id.* at 283-284.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge