BRB No. 91-1279

CHARLES M. OREAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of James J. Butler, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

Russell A. Metz (Metz & Frol), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (89-LHC-224) of Administrative Law Judge James J. Butler awarding benefits 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 worked as a painter for employer and frequently came into contact with solvents and epoxy-based paints. Claimant became sensitized to epoxy paint and suffered allergic reactions, and as a result cannot work with epoxy paints or solvents. Employer accommodated claimant's sensitivity by providing work that did not involve the use of epoxy paint from the date of the initial reaction in July 1980. On July 12, 1985, claimant was laid off as part of a general reduction in force. Claimant returned to work as part of a recall on September 11, 1985, but was refused work by employer on October 4, 1985, because of his inability to work with epoxy paint. On September 26, 1985, claimant filed a claim for a loss in earning capacity as a result of injurious exposure to epoxy paints and solvents. Claimant has worked as a warehouseman and counterperson for Keyston Brothers since September 1, 1987.

In his Decision and Order, the administrative law judge found that claimant's date of injury is October 4, 1985, inasmuch as until this date, claimant's problems with epoxy paint had not adversely affected his earning capacity since his sensitivity was accommodated by employer. Therefore, the administrative law judge found that the claim filed on September 26, 1985, was timely pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge applied the Section 20(a) presumption, 33 U.S.C. §920(a), to both the epoxy paint and solvent sensitivities, and found that the unrebutted evidence establishes the existence of a work-related impairment. The administrative law judge rejected evidence of alternate employment presented by employer and found that claimant's current job as a warehouseman at Keyston Brothers is the most representative of his post-injury earning capacity. Finally, the administrative law judge found that claimant's condition reached maximum medical improvement as of September 28, 1982. Thus, the administrative law judge awarded permanent total disability benefits from October 1985 to September 1987 and permanent partial disability benefits thereafter.[1] 33 U.S.C. §908(a), (c)(21). Subsequently, the administrative law judge denied employer's Motion for Reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that the claim for benefits was timely filed pursuant to Section 13. Employer also contends that the administrative law judge erred in finding that claimant suffered a loss in wage-earning capacity, or alternatively, that claimant's current job is most representative of his true earning capacity. Further, employer contends that the administrative law judge erred in awarding permanent total disability benefits from October 1985 through September 1987, and in admitting claimant's exhibits 33 through 42 into the record. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, employer contends that the administrative law judge erred in finding that the claim was timely filed pursuant to Section 13. Employer, citing *Thorud v. Brady Hamilton Stevedore Co.*, 18 BRBS 232 (1986), alleges that claimant became aware of the true nature of his condition, knew his ability to work was impaired and that his condition was related to his employment at least by

[1]The administrative law judge also awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

September 28, 1982, when Dr. Townes told him to minimize his exposure to toxic solvents.[2] The administrative law judge found that until October 4, 1985, claimant's problems with epoxy paint had not adversely affected his earning capacity since his sensitivity was accommodated by employer, and thus the claim filed on September 26, 1985, was timely filed.

Section 13(b)(2) requires a claim for compensation, in a case involving an occupational disease, to be filed within two years after the employee's awareness of the relationship between the employment, the disease, and the disability. 33 U.S.C. §913(b)(2)(1988). The regulations provide that the time limitations do not begin to run until the employee is disabled. 20 C.F.R. §702.222(c). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, has held that the limitations period of Section 13 does not begin to run until the employee becomes aware "that his injury has resulted in the impairment of his earning power." *Abel v. Director, OWCP*, 932 F.2d 819, 821, 24 BRBS 130, 134 (CRT)(9th Cir. 1991), *citing Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), *cert. denied*, 459 U.S. 1034 (1982); *see also Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987). Furthermore, the Ninth Circuit has held that an employee is not "injured for the purposes of the statute of limitations until `he [becomes] aware of the full character, extent and impact of the harm done to him.' " *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 183, 23 BRBS 127, 129 (CRT)(9th Cir. 1990)(quoting *Allan*, 666 F.2d at 401, 14 BRBS at 429). Thus, in order to be "aware" of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity.[3] *See generally Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

In the instant case, the administrative law judge found that when one becomes sensitized to the use of epoxy paint, he can no longer work with these substances. Decision and Order at 2. Claimant, however, was accommodated with a job involving non-epoxy paint for a number of years and had no actual loss in wages. We affirm the administrative law judge's finding that as claimant

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[2]The issue in *Thorud* involved determining the carrier responsible for the payment of benefits rather than whether Section 12 or Section 13 barred the claim. The Board held that although the claimant did not suffer an actual permanent loss of earnings until April 1980, he was warned of such disability in November 1979, and he was aware that if he continued working in grain dust his condition was likely to force his retirement, causing permanent economic harm. Thus, the Board held that although the claimant continued to work until April 1980, he was or should have been aware in November 1979 that his work-related condition had affected his ability to earn wages in this work. *Thorud*, 18 BRBS at 235.

[3]We reject employer's argument that the misdiagnosis and non-diagnosis cases should be distinguished on their facts from the present case. It does not matter whether a case involves a misdiagnosis, as the rule for triggering the statute of limitations is the same in all situations. *See Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

was assigned non-epoxy work by employer, his disability did not affect his wage-earning capacity until October 4, 1985, when employer refused to rehire him due to his sensitivity. *Love*, 27 BRBS at 152. Although he was initially laid off for reasons other than his sensitivity to epoxy paint and solvents, he was not hired back as a part of the recall due to his sensitivity. Moreover, the Board has held that as the holding in *Thorud* was based on its specific facts, and did not involve either Section 12 or 13, it does not support the proposition that mere awareness of potential future loss in wage-earning capacity will trigger the statute of limitations under those sections. *Love*, 27 BRBS at 153-154. Thus, we hold that claimant did not become aware that his injury resulted in the impairment of his earning power prior to October 4, 1985, the first date he was refused employment due to his condition, and we affirm the administrative law judge's finding that the claim was timely filed. *Abel*, 932 F.2d at 821, 24 BRBS at 134 (CRT).

We also reject employer's contention that the administrative law judge erred in finding that claimant suffered a loss in wage-earning capacity. Employer alleges that claimant had no loss as he continued to work at the shipyard for three years with no loss in income, he left the shipyard for reasons unrelated to his allergic condition, and he applied for and received unemployment compensation stating that he was willing and able to perform work as a painter.

The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). If claimant's actual earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge may fix a reasonable wage-earning capacity based on factors or circumstances such as the degree of physical impairment, his usual employment, and the possible future effects of the disability. *See Darcell v. FMC Corp., Marine and Rail Equip. Div.*, 14 BRBS 294 (1981); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In the instant case, claimant was provided employment as a shipyard painter for three years following the diagnosis of his sensitivity to epoxy paint and solvents with no loss in actual earnings. However, following a general reduction in force in July 1985, employer refused to rehire claimant on October 4, 1985, due to his sensitivities. As discussed earlier, in occupational disease cases, the employee does not have an "injury" under the Act until he is aware of the relationship between the disease, the disability and the employment. *See generally Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994). Therefore, claimant's date of "injury" in this occupational disease claim would be the date claimant became aware that his work-related disease has caused a loss in wage-earning capacity, October 4, 1985. Any wages earned prior to this date as a painter at the shipyard are not relevant in determining claimant's post-injury wage-earning capacity.

We also reject employer's contention that claimant did not suffer a loss in wage-earning capacity because he left the shipyard for reasons unrelated to his allergy. Although claimant did

initially leave as part of a general reduction in force, he attempted to return to work as part of a recall on October 4, 1985, but was refused work because of his inability to work with epoxy paint. In addition, we reject employer's contention that the fact that claimant applied for and received unemployment compensation on the basis that he was ready and able to work as a painter is evidence that claimant did not suffer a loss in wage-earning capacity. The medical evidence includes reports by Drs. Townes, Daniel, and Petrie advising claimant to avoid epoxy paint and solvents. Emp. Exs. 5, 8. The administrative law judge found that the medical evidence and claimant's testimony establishes that claimant's occupational skin disease restricts his employment. Therefore, we hold that claimant's registration for unemployment benefits is insufficient to establish an alternative wage-earning capacity. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Employer also contends that the administrative law judge erred in concluding that it did not demonstrate an alternative wage-earning capacity based on evidence provided by its vocational expert. Specifically, employer contends that claimant is capable of performing the positions of non-epoxy painter, warehouseman for a pharmaceutical company, window washer, production line worker, and dispatcher.

The administrative law judge found that the painting jobs identified by the rehabilitation counselor are inappropriate given claimant's inability to work with solvents. The administrative law judge also noted that claimant had attempted to work as a painter in a residential or commercial capacity but his job performance was not satisfactory. The administrative law judge concluded this demonstrated that claimant was insufficiently productive to be gainfully employed in the residential or commercial non-epoxy painting industry. Decision and Order at 8. Inasmuch as the medical evidence indicates that claimant has a sensitivity to solvents, including paint thinners, as well as epoxy paints, and the administrative law judge rationally found that claimant was not sufficiently productive in these positions to be gainfully employed, we affirm the administrative law judge's finding that the painting jobs identified by the vocational expert are insufficient to establish an alternative earning capacity. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

The administrative law judge also found that the window washer position was inappropriate given claimant's reaction to cleaning products and the requirement that he work up to 14 stories above ground. Given claimant's testimony that he has had reactions to other irritants such as cleaning supplies, we affirm the administrative law judge's finding that the window washer position is not reasonable alternative evidence of claimant's wage-earning capacity. *See generally Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990).

Further, the administrative law judge found the production line jobs and dispatcher job identified in the labor market survey are outside of claimant's manual dexterity capacity. Contrary to employer's contentions, Dr. Doer examined claimant on April 18, 1989, and found that claimant exhibited poor visual-spatial organization and manipulation and concluded that claimant should avoid situations where demands are made on speeded hand/eye coordination. Cl. Ex. 10. Dr.

Townes reported that claimant suffered general visual-spatial deficits and had difficulties with attention and concentration consistent with exposure to toxic solvents. Emp. Ex. 5. In addition, Janet Mott, claimant's rehabilitation counselor, testified in a deposition dated November 14, 1989, that claimant's manual dexterity was reduced. Cl. Ex. 44 at 8, 13. Inasmuch as employer has raised no error committed by the administrative law judge in making credibility determinations, we affirm the administrative law judge's finding that the production line positions and the dispatcher position do not establish that claimant had an alternative earning capacity.[4] *Uglesich*, 24 BRBS at 183.

Employer also contends that the position of warehouseman at a pharmaceutical distributor paying more in 1985 dollars than his current position is evidence that claimant has a higher post-injury wage-earning capacity than his current actual wages demonstrate. This position has similar physical requirements as the one claimant currently performs, and the vocational counselor discussed claimant with the potential employer who indicated claimant was competitive for the position. Emp. Ex. 10.16. The administrative law judge did not address whether this position would be appropriate for claimant or whether it establishes that claimant has a greater earning capacity than that represented by his actual post-injury wages. Although the Ninth Circuit has not addressed employer's burden of proof for purposes of establishing an alternative wage-earning capacity, the United States Court of Appeals for the Fifth Circuit has held that for purposes of Section 8(h), claimant's actual wages need not be utilized, even if the job is continuous and stable, if employer presents other reliable evidence of a higher wage-earning capacity. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). As the position as a warehouseman for a pharmaceutical company may be evidence that claimant is capable of earning wages higher than his actual wages reflect, we vacate the administrative law judge's finding that claimant's current position is representative of his true earning capacity and remand the case for the administrative law judge to consider all relevant evidence and to make findings regarding this position. *See generally Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Employer also contends that the administrative law judge erred in concluding that claimant is entitled to permanent total disability benefits from October 1985 to September 1987. The administrative law judge found that there was no evidence of claimant's post-injury earning capacity prior to September 1, 1987, when claimant got his current job.

The Ninth Circuit has held that disability becomes partial rather than total when suitable alternate employment is or was realistically available to the employee but the change of status is not retroactive to the date of maximum medical improvement. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). This does not prevent an employer from establishing that there was suitable alternate employment available at the time of maximum medical improvement, even several years after that point, but employer needs to overcome the limitations of "retroactive" evidence. *Id.*, 909 F.2d at 1260, 23 BRBS at 95 (CRT);

[4]Inasmuch as we affirm the administrative law judge's rejection of the dispatcher position based on the administrative law judge's evaluation of claimant's physical capability, we need not address employer's arguments regarding the availability of the dispatcher position.

Jones v. Genco, Inc., 21 BRBS 12 (1988)(Board affirmed administrative law judge's finding that suitable alternate employment existed in 1979 based on 1983 labor market survey and the fact that rehabilitation specialist had met with employee in 1978-79 and offered to place him in a job).

The labor market survey in the instant case identifies positions available at the time the survey was compiled, January through April 1989. The only evidence of available alternate work between 1985 and 1987 is the vocational expert's hearing testimony that the same kinds of jobs contained in his labor market survey were as readily available in 1985 as they were in 1989. The administrative law judge found in the Order Denying Motion for Reconsideration that employer failed to point to specific suitable alternate employment in the community which claimant could reasonably obtain and hold if he diligently tried, and he thus reaffirmed his finding that claimant was totally disabled from October 4, 1985 to September 1, 1987, when he found alternate work due to his own efforts.

The Ninth Circuit has held that the pivotal fact indicating that a disability has changed from total to partial must be proof of an actual job that the claimant could have performed and realistically obtained if diligently sought. *Stevens*, 909 F.2d at 1260, 23 BRBS at 94 (CRT). Employer could meet the burden of showing available alternate employment by presenting evidence of jobs which, although no longer open when located and identified, were available during time claimant was able to work. *Id.* Inasmuch as there is no evidence of actual jobs that were available prior to September 1987, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits from October 1985 through the first date alternate employment was established in September 1987.

Lastly, employer contends that the administrative law judge erred in admitting medical journal articles submitted by claimant into evidence, assigning them very little weight, *see* Tr. at 4-7, and then relying on them in his decision. Generally, the administrative law judge has great discretion concerning the admission of evidence and is not bound by any formal rules. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1991). Employer objects to the following use of the journal articles:

> Epoxy paint has the capacity to "sensitize" a certain number of its users. Once a person develops this allergic reaction, he will continue to react to the substance even with lower levels of exposure. It is agreed among the medical experts that once sensitization occurs, all use of that substance by the exposed individual should cease.

Decision and Order at 2. Employer states that administrative law judge did not cite to evidence he relied on in making this statement, but use of the term "medical experts" must mean the articles.

Contrary to employer's contention, there is other evidence of record supporting the administrative law judge's finding. Claimant was advised by Drs. Towne, Daniel and Petrie to avoid exposure to epoxy paint and solvents. Emp. Exs. 5, 8. Dr. Hackett testified in a deposition dated

April 28, 1989, that once a patient reacts to epoxy, he will react to it again if exposed to it. Emp. Ex. 14 at 12. The medical evidence of record supports the administrative law judge's findings that once a person develops a sensitivity to epoxy paint, he will continue to react to the substance even with lower levels of exposure, and that all use of that substance by the exposed individual should cease. Therefore, we hold that the admission of the medical journal articles was harmless error, if any. *See generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRB 40 (1991), *aff'd mem. sub nom., Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

Accordingly, the finding that the wages paid in claimant's current position are representative of his post-injury earning capacity is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge