**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0369

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| RUSSELL J. ROBINSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ELECTRIC BOAT CORPORATION | ) | DATE ISSUED: Feb. 15, 2017 |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Melissa Riley (Embry and Neusner), Groton, Connecticut, for claimant.

Conrad M. Cutcliffe (Cutcliffe Gavin & Archetto), Providence, Rhode Island, for self-insured employer.

Jeffrey S. Goldberg (Maia Fisher, Associate Solicitor of Labor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-LHC-01462) of Administrative Law Judge Jonathan C. Calianos 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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 welder in the 1970s. Thereafter, he worked for non-covered employers and retired voluntarily. He was exposed to asbestos during the course of his employment with employer and, in 2009, was diagnosed with stage IIIB non-small cell carcinoma of the right lung. M/SD exh. 4 at 1-3. In August 2010, claimant filed a claim for benefits under the Connecticut workers' compensation law. M/SD exh. 5 at 1. In January 2011, Dr. Christiani concluded that claimant's history of smoking and work-related asbestos exposure combined to result in claimant's lung cancer. M/SD exh. 1 at 25-26. The state commissioner approved the parties' settlement on December 5, 2012, and issued an order decreeing its implementation; claimant received payment from employer on or about the same day. M/SD exh. 2 at 2-13; Cl. Br. at 8.

Claimant filed a claim under the Act in October 2013. EX 1 at 40. In September 2014, employer filed a motion for summary decision, asserting that claimant's claim was untimely filed. At the February 2015 hearing on the merits, the administrative law judge addressed and denied employer's motion in a bench ruling. Tr. at 20-37. The administrative law judge incorporated this ruling into his decision but did not reiterate the rationale. Thereafter, he awarded claimant permanent partial disability benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23), and medical benefits under Section 7, 33 U.S.C. §907. Decision and Order at 2, 18.

In his bench ruling, the administrative law judge stated that "payment in a state forum on an occupational disease does operate under this provision [Section 13(b)(2)], and the last payment will give the Claimant a year to file something in this forum to proceed with his or her claim." *Id.* at 32. Accordingly, the administrative law judge denied employer's motion for summary decision. *Id.* at 36-37. Employer appeals the award of benefits solely on the grounds that the motion for summary decision was wrongly denied. It asserts that claimant's claim for compensation under the Act was not timely filed. Claimant and the Director, Office of Workers' Compensation Programs (the Director), urge affirmance, arguing that the claim was timely filed because it was filed within one year of the state settlement payment.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan*

*v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), (d), 18.41(a) (2014).[1] The sole question before the Board is the applicability of the Section 13(b)(2), 33 U.S.C. §913(b)(2), tolling provision.

Section 13(b)(2) provides:

> *Notwithstanding the provisions of subsection (a) of this section*, 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.*

33 U.S.C. §913(b)(2) (all emphasis added); 20 C.F.R. §702.222(c). In this case, there is no dispute that claimant's claim under the Act was not filed within two years of his date of awareness. Consequently, the claim is time-barred unless the statute of limitations is tolled by virtue of employer's "payment of compensation" under the state award. If the state settlement payment constitutes a "payment of compensation" under Section 13(b)(2), claimant's October 2013 claim was timely filed, and the administrative law judge properly denied the motion for summary decision. If it is not a "payment of compensation," the claim was not filed in a timely manner and summary decision must be granted.

Employer contends claimant's October 2013 claim was filed more than two years after his "awareness," and the time for filing is not tolled by payments it made to claimant under the state workers' compensation act. Employer acknowledges that Section 13(b)(2) allows an additional year from the date of the last payment of compensation within which to file a claim. However, employer asserts there is no legal authority for considering payments made under a state workers' compensation law to be "compensation" within the meaning of Section 13(b)(2) so as to toll the time for filing a

[1] Although the revised OALJ Rules address motions for summary decision at 29 C.F.R. §18.72 (2015), those rules became effective on June 18, 2015, and the hearing with the bench ruling took place on February 25, 2015.

claim under the Act.[2]

Claimant acknowledges that this is a case of first impression, but urges affirmance of the administrative law judge's findings that Section 13(b)(2) does not limit the type of compensation that will toll the filing time and that the October 2013 claim was timely in relation to employer's payment under the state settlement on December 5, 2012. Claimant argues that employer's interpretation of Section 13(b)(2) is contrary to the purpose of the Act because it is "overly stringent" and technical. Further, claimant asserts that employer had actual or constructive notice of claimant's lung cancer because claimant was seeking workers' compensation and alleging that exposure at employer's facility was the cause, and employer was not prejudiced by the alleged late filing.

The Director also urges affirmance of the administrative law judge's finding that claimant's claim was timely filed. Specifically, the Director asserts that the payment in accord with the state settlement award constitutes "compensation" under Section 13(b)(2), because, unlike Section 13(a), Section 13(b)(2) does not limit tolling to only those cases in which the employer voluntarily paid compensation. Moreover, case precedent under Section 13(a) has interpreted the term "compensation" broadly enough to include payments under a state award, and the two subsections, (a) and (b)(2), should be interpreted in a congruent manner. Thus, based on the plain language of the Act and the case precedent defining "compensation" under Section 13(a), the Director asserts that claimant's October 2013 claim was timely filed as it was filed within one year after the December 2012 payment of the settlement proceeds under state law.

As stated above, Section 13(b)(2) provides that "[n]otwithstanding the provisions of subsection (a) of this section," a claimant has two years from the date of awareness to file a claim; otherwise, in order to be timely, the claim must be filed "within one year of

[2] All parties agree that Section 13(d), 33 U.S.C. §913(d), does not apply in this case, though employer discusses this section in its brief. Section 13(d) states: "Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit." 33 U.S.C. §913(d); *Bath Iron Works Corp. v. Director, OWCP* [*Acord*], 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997); *Ingalls Shipbuilding Div., Litton Sys., Inc. v. Hollinhead*, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978). The parties are correct that Section 13(d) is inapplicable. Section 13(d) refers only to the statute of limitations set forth in Section 13(a), which also is not applicable in this occupational disease case. Accordingly, neither the holding in *Hollinhead* nor the *dicta* in *Acord* is controlling in this case. *See* n.4, *infra*.

the date of the *last payment of compensation*, whichever is later." 33 U.S.C. §913(b)(2) (emphasis added); 20 C.F.R. §702.222(c). The term "compensation" is defined in the Act as: "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. §902(12). As employer states, and claimant agrees, there are no cases directly addressing the meaning of "payment of compensation" under Section 13(b)(2). There are, however, cases that have addressed the meaning of "payment of compensation" under Section 13(a), 33 U.S.C. §913(a).[3] These cases, collectively, have held that, when payments are voluntarily made under the Act, voluntarily paid under a state compensation scheme, or paid pursuant to an award under a state compensation scheme, they are "compensation" within the meaning of Section 13(a).

Under the plain language of Section 13(a), voluntary payments of benefits under the Act will toll the time for filing a claim. In *Travelers Ins. Co. v. Belair*, 290 F. Supp. 221 (D. Mass. 1968), *aff'd*, 412 F.2d 297 (1st Cir. 1969), although the claim was not filed within one year of the injury, it was filed within one year of the last payment of compensation Travelers voluntarily paid to the claimant under the Longshore Act. Travelers argued that voluntary payments are not "compensation" because they are not a "money allowance payable to an employee . . . *as provided for in this chapter*." *Belair*, 290 F. Supp. at 223; *see* 33 U.S.C. §902(12) (emphasis added). Both the district court and the circuit court rejected this argument and found the claim timely filed. *Belair*, 412 F.2d at 299-300; *Belair*, 290 F. Supp. at 223. The district court reasoned that employers are entitled to receive credit for advanced payments of compensation under the Act; therefore, voluntary payments for which Travelers could later claim a credit are "compensation" under the Act. *Belair*, 290 F. Supp. at 223.

Citing *Belair*, the Board held that voluntary payments of compensation pursuant to a state law constitute "payments of compensation" within the meaning of Section 13(a)

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[3] Section 13(a) (all emphasis added) states:

> 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. *If **payment of compensation** has been made **without an award** on account of such injury or death, a claim may be filed within one year after the date of the last payment.* Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. 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.

so as to toll the time for filing a claim. *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1978). In so holding, the Board acknowledged that courts have not construed the term "compensation" narrowly and that its decision in *Saylor* is guided by the general principle set forth by the United States Court of Appeals for the Fifth Circuit that Section 13 is meant to prevent prejudice to employers by prohibiting stale claims but is not meant to be a technical device for employers to avoid their obligations.[4] *Saylor*, 9 BRBS at 563 (citing *Ingalls Shipbuilding Div., Litton Sys., Inc. v. Hollinhead*, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978)); *see also Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (court held that voluntary payments of benefits under state law toll the time for filing a claim under Section 13(a)).

More recently, the Board addressed the Section 13(a) statute of limitations issue in *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004), and concluded that awards of compensation under a state act are "payments of compensation" under Section 13(a). In *Reed*, the claimant injured his back in 1985 and filed a claim under the Maine workers' compensation law. He was awarded benefits in 1992 and retired in 1996. In 1999, the claimant received a settlement under the Maine law for an increased impairment due to an aggravation that occurred in 1990. The claimant then sought total disability benefits for his back condition after his retirement. Although the state court found that the claimant was not entitled to total disability benefits, it awarded him temporary benefits during recovery periods following surgeries. The last payment pursuant to this award was made on December 2, 1999. In April 2000, the claimant filed a claim under the Act seeking total disability benefits commencing as of his 1996 retirement. The administrative law judge found that, although voluntary payments of compensation under a state act toll the time for filing claims under Section 13(a), there is no legal authority for finding that an award under a state law also can toll the time for filing a claim under the

[4] In *Hollinhead*, the claimant filed and withdrew a claim under the Mississippi workers' compensation act prior to filing a claim under the Act, which ultimately occurred approximately 13 months after the injury. The court held that, under Section 13(d), the filing of a claim under the Mississippi workers' compensation act tolled the time for filing a claim under the Longshore Act. Thus, Section 13(d) applied to toll the statute of limitations under Section 13(a), making the claimant's claim timely. *Hollinhead*, 571 F.2d at 274, 8 BRBS at 160-161. The Board acknowledged in *Saylor* that, although *Hollinhead* involved different facts, as well as the interpretation of Section 13(d) instead of Section 13(a), the purpose of the statute of limitations is fulfilled because the employer was aware of the state claim. *Saylor*, 9 BRBS at 563; *but see Acord*, 125 F.3d 18, 31 BRBS 109(CRT) (*dicta* suggesting *Hollinhead* was wrongly decided because a state workers' compensation claim is not "a suit in law or in admiralty"); *see* n.2, *supra*; n.6, *infra*.

Act. *Reed*, 38 BRBS at 1-2.

Being a case of first impression, the Board addressed the meaning of the phrase "payment of compensation . . . without an award" in Section 13(a), and determined that an "award" refers to an award of benefits *under the Act*. The Board reasoned that state and federal workers' compensation remedies were exclusive when the Section 13(a) provision was originally enacted, and an "award" at that time could refer only to an award under the Act. As the phrase has not been amended since its enactment, the Board held that this interpretation accords with the Act's history, as well as with the Act's specific credit provisions and its underlying policies. Therefore, where an employer makes any payments *without an award under the Act*, the time for filing a claim will be tolled by Section 13(a) because those payments would be credited to the employer by virtue of either Section 3(e) or Section 14(j) in the event an award under the Act were to follow. *Reed* at 4-5; *see* 33 U.S.C. §§903(e), 914(j).[5] Moreover, such a claim is not "stale" because the employer is aware of the work-related injury by virtue of the state

[5] Section 3(e), enacted in 1984, states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

In *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 76, 29 BRBS 11, 14(CRT) (1st Cir. 1994), the court stated:

> An employer's payment of workers' compensation under a state statute discharges the employer's liability *pro tanto* under the Longshore Act. This was well settled by court decision long ago and eventually Congress enacted a provision to this effect. 33 U.S.C. §903(e). Thus, in such dual liability cases, [the employer's] payments – purportedly under the Maine statute – erased its liability under the federal statute as well.

Section 14(j) states:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

claim. As the claimant's claim in *Reed* was filed in April 2000 and the last payment of compensation under the state award was made on December 2, 1999, the Board reversed the administrative law judge's finding that the claim was untimely filed and remanded the case for consideration of the merits. *Reed*, 38 BRBS at 6.[6]

In light of this Section 13(a) precedent, we hold that the payment of settlement proceeds under a state workers' compensation award constitutes the "payment of compensation" under Section 13(b)(2). Section 13(a), which states "if payment of compensation has been made without an award," conditions the tolling based on the nature of the compensation paid. This language, nevertheless, has been interpreted broadly to include payments made under a state award because they were not made pursuant to an award under the Act. *Reed*, 38 BRBS at 4-5. Section 13(b)(2) uses less restrictive language, basing its tolling provision on the "last payment of compensation," which, therefore, demands an equal or even broader interpretation, consistent with *Reed*.[7] 33 U.S.C. §913(a), (b)(2). Thus, the payment employer made to claimant in December 2012 pursuant to the state settlement award in this case is a "payment of compensation" for the purposes of tolling the Section 13(b)(2) statute of limitations. Therefore, claimant's October 2013 claim was timely filed within one year after the last payment of compensation in December 2012. 33 U.S.C. §913(b)(2).

The administrative law judge correctly found claimant's claim to be timely filed, such that employer is not entitled to a decision in its favor as a matter of law. *Morgan*, 40 BRBS 9. Therefore, we affirm the administrative law judge's denial of employer's

[6] We reject employer's assertion that *Reed* was incorrectly decided. We decline to apply the reasoning in *Windrem v. Bethlehem Steel Corp.*, 293 F. Supp. 1 (D.N.J. 1968), and *Acord*, 125 F.3d 18, 31 BRBS 109(CRT). *Windrem* was decided when the state and federal remedies were exclusive, and an award under one statute precluded an award under the other. *See Reed*, 38 BRBS at 4 n.3. In *Acord*, the primary issue was whether the claim was barred by the doctrine of collateral estoppel. Although, in *dicta* "for the benefit of future litigants," the United States Court of Appeals for the First Circuit addressed the alternate statute of limitations defense, that case involved Section 13(d), which is not applicable here. *Acord*, 125 F.3d at 19, 23, 31 BRBS at 109, 113(CRT).

[7] To the extent employer is asserting that Section 13(b)(2) also should be limited to voluntary payments of compensation, employer is incorrect. That interpretation of the language is contrary to the doctrine of statutory construction because it ignores the inclusion of the phrase "notwithstanding the provisions of subsection (a)" as well as the absence of the phrase "without an award" in Section 13(b)(2). *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010).

motion for summary decision. As there are no other challenges to the administrative law judge's decision, we also affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge