BRB No. 90-0694

STANLEY R. SILER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DILLINGHAM SHIP REPAIR	)	DATE ISSUED:
	)	
	)	DECISION and ORDER on
Self-Insured	)	MOTION for RECONSIDERATION
Employer-Respondent	)	*EN BANC*

Appeal of the Decision and Order on Motion for Summary Judgment and Decision Denying Motion for Reconsideration of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Stanley R. Siler, Portland, Oregon, *pro se*.

Dennis R. VavRosky and Patric J. Doherty (VavRosky, MacColl, Olson, Doherty & Miller, P.C.), Portland, Oregon, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer has timely filed a Motion for Reconsideration *En Banc* of the Board's Decision and Order in *Siler v. Dillingham Ship Repair*, BRB No. 90-694 (March 24, 1993)(unpublished). 33 U.S.C. §921(b)(5); 20 C.F.R. §§802.301(a), (c); 802.407(b); 802.409. In its decision, the Board affirmed the administrative law judge's determination that claimant's claim was untimely filed pursuant to Section 13 of the Act, 33 U.S.C. §913, and remanded the case to the administrative law judge to determine whether claimant is entitled to medical benefits for a work-related injury. We hereby grant employer's request to reconsider this case *en banc*, but deny the relief requested.[1]

To recapitulate, claimant allegedly sustained a work-related cerebral accident on July 7, 1983; on June 1, 1984, claimant returned to work with restrictions on extended walking, climbing,

[1]On May 3, 1993, the Board received claimant's Summons and Complaint, dated April 29, 1993. By letter, dated July 9, 1993, the Board noted that it has no jurisdiction concerning copyright, unfair practices and unfair competition issues and, therefore, returned claimant's complaint to him.

bending, and heavy lifting. On August 24, 1988, claimant filed a claim seeking benefits under the Act. In her Decision and Order, the administrative law judge, after determining that the claim was untimely filed pursuant to Section 13 of the Act, dismissed the claim as time-barred without addressing the substantive issues raised by the parties. Subsequently, the administrative law judge denied claimant's petition for reconsideration.

On appeal, claimant, appearing *pro se*, challenged the administrative law judge's denial of his claim. The Board, in its decision, initially affirmed the administrative law judge's finding that the claim was untimely filed pursuant to Section 13 of the Act; after noting that the right to medical benefits is never time-barred, the Board remanded the case for the administrative law judge to determine whether claimant is entitled to medical benefits, since this issue had not been addressed by the administrative law judge.

In its motion for reconsideration, employer contends that the Board erred in holding that, although the underlying claim for compensation was time-barred pursuant to Section 13, claimant could still establish entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Specifically, employer's avers that the Board's holding that the right to medical benefits is never time-barred is incorrect. In this regard, employer argues that this holding is not based upon the statute but, rather, arises from the Board's decision in *Wilson v. Southern Stevedore Co.*, 1 BRBS 123 (1974), and the long line of ensuing Board cases which arose following *Wilson* which, employer asserts, erroneously adopted only the first part of the holding in *Wilson*, that

> [e]ntitlement to medical services and supplies payable by the employer, is never time barred....

Wilson, 1 BRBS at 126, while ignoring the essential end of the sentence

> where recurring disabilities are directly related to the <u>original compensable injury</u>... .

Id. at 126 (emphasis added). Thus, employer contends that in order for medical benefits to be awarded there must be an "original compensable injury." In this case, employer asserts that since claimant's claim was time-barred, there is no "compensable injury" and, therefore, no medical benefits may be awarded.

Initially, we note that employer's contention does not take into consideration that an injury may be "compensable" yet not "compensated" under the Act, due to the applicability of, for example, Sections 12, 13, or 33 of the Act. *See* 33 U.S.C. §§912, 913, 933. This distinction between a "compensable" injury and a "compensated" injury was implicitly recognized by the United States Court of Appeals for the Fifth Circuit in *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108, 1116 (5th Cir,), *cert. denied sub nom. Lewis v. Strachan Shipping Co.*, 409 U.S. 867 (1972), wherein the court determined that, despite the applicability of Section 13(a) with regard to an employee's claim for compensation benefits, employer has a continuing obligation to furnish medical care with respect to disabilities flowing from a work-related accident.

Section 907(a) states, in relevant part, that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a). Thus, Section 7 refers to an "injury." As noted by the employer, an extensive line of cases arising under the Act have held that despite the running of a period of limitations as to compensation benefits, employer has a continuing obligation to furnish medical care with respect to disabilities flowing from the accident in the course of employment. *See Hollis*, 460 F.2d at 1108; *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). This holding, that medical benefits are never time-barred, is supported by the decision of the United States Supreme Court in *Marshall v. Pletz*, 317 U.S. 383 (1943), wherein the Court held that the payment of medical benefits is not payment of compensation within the meaning of Section 13 and, therefore, the payment of medicals will not toll Section 13. *See Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.* No. 90-4135 (5th Cir. Mar. 5, 1991)(unpublished)(wherein the Board, citing to the Supreme Court's decision in *Pletz*, concluded that medical benefits are never time-barred under the Act); *see also Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984).

Furthermore, in urging the Board to reverse its decision, employer cites the holding of the United States Court of Appeals for the Fifth Circuit in *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT)(5th Cir. 1992), wherein the court, in finding that medical benefits are included in "compensation" for the purposes of enforcement proceedings under Section 18(a), 33 U.S.C. §918(a), stated that if

> employer refuses or neglects to furnish medical services, and the employee incurs expense or debt in obtaining such services, an award of medical expenses obtained by the employee in a suit against the employer is "compensation" within the meaning of §2.

958 F.2d at 1301, 25 BRBS at 148 (CRT). The court's decision in *Lazarus*, however, does not disturb the Fifth Circuit's prior determination that, despite the applicability of Section 13(a) with regard to an employee's claim for compensation benefits under the Act, employer has a continuing obligation to furnish medical care with respect to disabilities flowing from a work-related accident. *See Hollis*, 460 F.2d at 1108. Therefore, as the Board's determination on this issue is supported by substantial case law, and employer has failed to make any persuasive argument as to why this determination is in error, the panel's determination is affirmed.

Accordingly, employer's motion for reconsideration *en banc* is granted, but the relief requested is denied.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge