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Case Comments: Labor Law

an appellate court would normally accept a lower court's finding of a *prima facie Batson* violation and only consider the proffered explanations, the *Joe* court stated that in the present case the record was insufficient to conduct a meaningful review. The *Joe* court then remanded the case so that the district court could conduct a full *Batson* analysis, make factual findings, and state rationales for its rulings.

The Fourth Circuit's decision in *United States v. Joe* is in accord with other circuits. Other circuits have agreed that no one fact or relevant circumstance should be controlling in evaluating a *Batson* challenge.[37] Furthermore, common sense dictates that the best time to evaluate a *Batson* challenge is before the trial begins. The remedy for a *Batson* violation is inexpensive and easy to provide prior to trial, but becomes increasingly difficult and expensive as the litigation proceeds. *Batson* raises several difficult questions, mainly as to what constitutes a valid reason for the exercise of a peremptory challenge. The Fourth Circuit's decision in *Joe* dealt with a less difficult, more mechanical procedural question, but a necessary one in helping lower courts deal with *Batson* challenges.

LABOR LAW

Congress enacted the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1991) (ADEA or the Act) both to promote the employment of older persons based on their ability, rather than on their age, and to prohibit arbitrary age discrimination. Section 626 of the Act provides remedies for violations of the ADEA. While front pay is not a clearly enumerated remedy, courts have sustained its award under the Act.[38] Against this background, the United States Court of Appeals for the Fourth Circuit considered, in *Duke v. Uniroyal Inc.*, 928 F.2d 1413 (4th Cir. 1991), whether an award of front pay is an aspect of equitable relief to be considered by the court or a legal question that should be submitted to the jury.

Uniroyal Chemical Company (the Company or Uniroyal), as part of a reduction in its work force, discharged employees Jesse T. Duke (Duke)

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37. *See* United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990) (holding that fact that simply because blacks are ultimately seated on jury does not necessarily bar finding of discrimination in use of peremptory challenges); United States v. Chinchilla, 874 F.2d 695, 698 n.4 (9th Cir. 1989) (holding that fact that all Hispanic jurors were challenged was significant though not required for showing *prima facie Batson* violation); United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir. 1989) (holding that *prima facie Batson* case does not require pattern of peremptory strikes against minimum of three or four black venirepersons because number of black jurors struck is not dispositive of issue); United States v. Sangineto-Miranda, 859 F.2d 1501, 1521 (6th Cir. 1988) (refusing to adopt per se rule that *prima facie* case is established if prosecution used its peremptory challenges to exclude blacks because such a rule would not allow court to consider all relevant factors).

38. *See* McNeil v. Economic Laboratory Inc., 800 F.2d 111, 118 (7th Cir. 1986) (stating front pay, under ADEA, is within trial court's discretion); Pudge v. Fruehauf Corp., 690 F. Supp. 692, 692 (N.D. Ill. 1988) (noting front pay should be awarded where needed to effectuate purpose of ADEA).

and Sidney W. Fox (Fox). Duke, age 51, was a sales representative of Agri Chemicals and Fox, age 50, was a sales development representative. Both plaintiffs were among the oldest in their departments. The Company contended that it terminated Duke because the Company had eliminated Duke's territory and assigned his customers to other territories and because Duke's performance did not hold up well against the stated reduction criteria. Similarly, Uniroyal claimed that the Company terminated Fox because of his weak knowledge of herbicides and pesticides, an area which Uniroyal had decided to promote. The plaintiffs alleged instead that Uniroyal's articulated reasons for their terminations were a pretext for age discrimination.

The Federal District Court for the Eastern District of North Carolina decided in favor of the plaintiffs, holding that the company had violated the ADEA. The jury awarded Duke and Fox monetary compensation for both front pay and back pay. Because the judge concluded that the Company did not willfully violate the ADEA, the court did not award liquidated damages. The judge also denied Fox's motion for reinstatement and entered an award of attorney's fees and costs in the amount of $298,130.81.

The Company appealed, arguing error in virtually every aspect of the trial. Specifically, Uniroyal asserted that (1) the jury verdict was not supported by substantial evidence of age discrimination; (2) various rulings by the district court on the evidence were improper; (3) the district court abused its discretion in refusing to sever plaintiffs' claims for trial; (4) the instructions to the jury failed to accommodate adequately the particular facts in evidence; (5) front pay should not have been submitted to the jury; and (6) the district court abused its discretion in its award of attorney's fees.

To resolve the first issue on appeal the Fourth Circuit noted that under *Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988), a plaintiff must prove several elements to establish a *prima facie* case of age discrimination in a reduction in work force case. First, the plaintiff must demonstrate that he/she is in the protected age group. Second, the plaintiff must show that the employer discharged him/her. Third, the plaintiff must afford that, at the time of the discharge, plaintiff was performing his/her job at a level that met his/her employer's legitimate expectations. Finally, the plaintiff must allege that the employer retained persons outside the protected age class in the same position or that there was some other evidence that indicated that the employer did not treat age neutrally when the employer dismissed the plaintiff.

The Fourth Circuit began by noting that *Duke* differed from *Hajoca* in that Uniroyal had legitimate business reasons for reducing employees in an identified group or territory and that Uniroyal's stated criterion for selection was employee performance. Tailoring the *Hajoca* requirements to the facts of *Duke*, the Fourth Circuit held that to establish a *prima facie* case of age discrimination, the plaintiffs must establish that they were protected by the ADEA, that they were performing at a level

substantially equivalent to the lowest level of those retained in the group or territory, and that the selection process resulted in the Company retaining unprotected persons whose performance was at a level lower than the plaintiffs'. The Fourth Circuit stated that once the plaintiff establishes a *prima facie* case, the employer may articulate a legitimate, nondiscriminatory basis of termination selection. If the employer asserts a legitimate reason for the termination, the burden then shifts back to the plaintiff to demonstrate that the employer's legitimate reason for the termination was merely a pretext for discrimination and that age, in fact, was the determining factor in the selection process.

The Fourth Circuit determined that the plaintiffs in *Duke* had asserted a *prima facie* case. The Fourth Circuit also found that the Company had articulated a legitimate reason for terminating the plaintiffs, which was that the plaintiffs were the least qualified to meet the needs of Uniroyal. The Fourth Circuit then considered whether a reasonable jury could conclude that the reasons articulated by the Company were a pretext for age discrimination. Looking at the facts in the light most favorable to the plaintiffs, the Fourth Circuit in *Duke* concluded that because the Company did not follow its own policy in reducing the work force, the reasons advanced by Uniroyal were in fact pretextual.

The Fourth Circuit further concluded that the alleged incorrect evidentiary ruling was harmless error, that the district court properly joined the plaintiffs' claims and that the district court judge sufficiently adapted the jury instructions to the cases. In addition, the Fourth Circuit affirmed the award of attorney fees.

The Fourth Circuit in *Duke* additionally addressed the Company's contention on appeal that front pay is an aspect of equitable relief for the court's consideration. The plaintiffs asserted, to the contrary, that front pay is a legal remedy for the jury's consideration. The *Duke* court initially looked to the ADEA's remedies section and noted that the remedy for an ADEA violation can be legal or equitable. While the preferred remedy to compensate for preventing future loss is a reinstatement of the job position, front pay can serve as a substitute or a complement remedy. The Fourth Circuit recognized that in some instances reinstatement is impossible or impractical, and in those instances front pay would be an appropriate remedy. The Fourth Circuit acknowledged that, although money damages can be either legal or equitable in nature, the award is equitable if it is restitutionary. The court in *Duke*, noting the speculative nature of front pay where employment is terminated without destroying the capacity to work, determined that front pay was a restitutionary award. The Fourth Circuit then held that front pay is an equitable remedy, and that both its award and amount is a question for the court sitting in equity to decide. The *Duke* court then held that the district court improperly submitted the issue to the jury, and vacated the part of the jury award attributable to front pay. The Fourth Circuit finally ordered the district court to conduct an equitable hearing to determine, in accordance

with the Fourth Circuit's ruling, whether front pay should be awarded, and if so in what amount. The remand order also directed the district court to reconsider the total equitable remedies available to Fox, including the possibility of reinstatement, front pay, or if appropriate, no remedy.

The Fourth Circuit's decision in *Duke* is consistent with decisions by the First, Second, Eighth and Eleventh Circuits that have expressly held that front pay is an equitable remedy.[39] While the Tenth Circuit has not precisely ruled on this issue, the Tenth Circuit appears to support the position that front pay is an equitable remedy for the court to decide.[40] On the other hand, *Duke* places the Fourth Circuit in direct conflict with the Third, Sixth and Ninth Circuits.[41] The Fifth and Seventh Circuits have issued conflicting guidance on this issue.[42]

Section 626 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1991), requires that any civil action filed by an individual under the statute "shall be filed . . . within 180 days after the alleged unlawful practice occurred . . . ."[43] In construing the ADEA

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39. *See* Ramsey v. Chrysler First, Inc., 861 F.2d 1541, 1545 (11th Cir. 1988) (holding that award of front pay is equitable relief dependent upon district court's discretion); Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1257 (2d Cir. 1987) (holding that award of front pay should be made by court); Wildermen v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (holding that district court has discretion to award front pay when reinstatement is impracticable or impossible); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982) (stating that district court may grant, as equitable relief, monetary damages in lieu of reinstatement).

40. *See* Spulak v. K Mart Corp., 894 F.2d 1150, 1157-58 (10th Cir. 1990) (affirming district court's post-trail award of front pay); Anderson v. Phillips Petroleum Co., 861 F.2d 631, 637 (10th Cir. 1988) (holding that front pay and reinstatement are alternative remedies for making plaintiff whole).

41. *See* Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 893 (6th Cir. 1988) (stating that front pay award is question for jury); Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1347 (9th Cir. 1987) (concluding that jury decides amount of front pay award), *cert. denied*, 481 U.S. 1047 (1988); Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985) (holding that amount of damages available as front pay is jury question), *cert. denied*, 474 U.S. 1057 (1986).

42. *Compare* Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1470 (5th Cir.) (holding that jury determines amount of front pay), *cert. denied*, 110 S. Ct. 129 (1989) *and* Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1333, n.4 (7th Cir. 1987) (stating that "authority and reason" suggest that amount of front pay is jury question), *cert. denied*, 485 U.S. 1007, *vacated on other grounds*, 486 U.S. 1020 (1988), *with* Deloach v. Delchamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990) (holding that front pay is equitable remedy and amount is within trial court's discretion) *and* Graefenhain v. Pabst Brewing Co., 870 F.2d 1198. 1206 (7th Cir. 1989) (stating that "we need not address the difficult question").

43. 29 U.S.C. § 626(d) provides in relevant part that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
> (1) within 180 days after the alleged unlawful practice occurred.

Id.

statute of limitations, a number of United States Supreme Court and Fourth Circuit opinions have dealt with the question of when the 180 day period begins to run on claims of discriminatory discharge and on claims that a facially neutral seniority system has a discriminatory effect.[44] These cases involving the alleged discriminatory termination of an employee have held that a plaintiff must file a claim within 180 days of receiving actual notice that employment will be terminated, as opposed to the actual date of termination, even if the plaintiff does not learn until later that the discharge was discriminatory. Similarly, these cases have also held that a plaintiff must file charges within 180 days of the institution of a new seniority system, rather than at a later date after discovering the discriminatory effects of the system.

In *J.D. Hamilton v. 1st Source Bank*, 928 F.2d 86 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit considered when the statute of limitations for filing age-based pay discrimination claims with the Equal Employment Opportunity Commission (EEOC) begins to run under the ADEA. The plaintiff in *1st Source*, Hamilton, joined 1st Source Bank as a Vice-President in the Truckers Bank Plan division in 1980. The plaintiff was fifty-three years old at the time. On April 21, 1986, the bank fired Hamilton without advance notice, claiming that Hamilton had failed to perform his duties. Hamilton filed a timely complaint with the EEOC alleging that the bank had discharged him because of his age in violation of the ADEA. The EEOC failed to commence enforcement proceedings within sixty days, and Hamilton filed suit against 1st Source Bank in the United States District of North Carolina.

During pretrial discovery in May 1987, Hamilton learned that he had received a lower salary than younger vice-presidents in the same job category.

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44. *See* Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 911 (1989) (holding that limitations period on claim that seniority system implemented by employer was discriminatory commenced when employer adopted system); Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (holding that limitations period commenced when administrators received notification of termination at specified date in future); Delaware State College v. Ricks, 449 U.S. 250, 259 (1980) (holding that limitations period commenced when professor was officially notified that he would be offered one year "terminal" contract); United Airlines, Inc. v. Evans, 431 U.S. 553, 561 (1977) (Marshall, J., dissenting) (holding that certain violations are continuing in nature and thus do not trigger limitations period); English v. Pabst Brewing Co., 828 F.2d 1047, 1048 (4th Cir. 1987) (holding that cause of action in age discrimination case runs from date on which plaintiff notified of termination), *cert. denied*, 486 U.S. 1044 (1988); Morse v. Daily Press, Inc. 826 F.2d 1351, 1353 (4th Cir.) (holding that unequivocal notice of termination triggers limitations period), *cert. denied*, 484 U.S. 965 (1987); Felty v. Graves-Humphreys Co., 785 F.2d 516, 519 (4th Cir. 1986) (same); Greene v. Whirlpool Corp., 708 F.2d 128, 130 (4th Cir. 1983) (holding that oral claim not sufficient, written claim must be filed within 180 day limitations period), *cert. denied*, 464 U.S. 1042 (1984); Price v. Litton Business Sys., 694 F.2d 963, 965 (4th Cir. 1982) (holding that filing period runs from time at which employee is informed of allegedly discriminatory employment decision, regardless of when employee feels effects of that decision); Lawson v. Burlington Indus., 683 F.2d 862, 863-64 (4th Cir.) (holding that layoff constitutes completed act at time it occurred, and that employer's failure to recall or rehire employee does not constitute separate and completed act which triggers new limitations period), *cert. denied*, 459 U.S. 944 (1982).

He then filed a new complaint with the EEOC on September 16, 1987, seventeen months after his discharge, alleging pay discrimination. Once again, the EEOC did not commence enforcement proceedings within sixty days. The district court allowed Hamilton to amend his complaint to incorporate the pay discrimination claim.

The jury returned a special verdict finding that the bank had discriminated against Hamilton on the basis of age by paying him a lower salary as well as by discharging him, and the jury awarded Hamilton over $100,000 in damages. The district court entered an additional judgment against the bank because the jury found that the bank had willfully discriminated against Hamilton when it terminated his position. The court awarded an additional $99,000 to Hamilton for the second judgment.

The bank appealed, contending that the pay discrimination claim was statutorily time-barred and that the district court therefore erred in submitting the pay discrimination claim to the jury. A panel of the Fourth Circuit affirmed the jury verdict in *Hamilton v. 1st Source Bank*, 895 F.2d 159 (4th Cir. 1990), and ruled that Hamilton's pay discrimination claim was not time-barred under section 626(d). The panel reasoned that the 180 day statute of limitations for a pay discrimination charge does not begin to run until an employee discovers, or by reasonable diligence could have discovered, that he or she was a victim of pay discrimination. 1st Source Bank petitioned for a rehearing *en banc*, arguing that the discovery rule, as applied by the Fourth Circuit panel to the ADEA statute of limitations, was contrary to congressional intent as well as circuit precedent, and contended that Hamilton's charge of pay discrimination was time-barred. The bank additionally requested a new trial on the ground that consideration of the pay claim tainted the entire jury verdict.

To resolve this issue of statutory construction, the Fourth Circuit restated the issue as whether Congress meant what it plainly said in the ADEA—that plaintiffs shall file all charges of pay discrimination within 180 days of the occurrence of an alleged violation. The court reasoned that to apply the discovery rule would be to completely abandon the statute. The court found that the language of section 626(d) clearly stated that the period of 180 days commenced when "the alleged unlawful practice occurred," and not from the time that the employee discovered the practice's discriminatory nature. The court stated that to apply a discovery rule would make the 180 day filing period the exception rather than the rule, finding that an "occurrence" is a discrete event, whereas a plaintiff's acquisition of knowledge is a continuing process. Fearing that a discovery rule would substitute a vagueness standard for a definite time period, the court strictly construed the statute.

The Fourth Circuit supported its decision by looking to the United States Supreme Court's interpretation of a similar statute of limitations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1990). Title VII also requires plaintiffs to file charges with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), a

university denied a professor tenure and instead offered him a one year position. The professor brought a Title VII complaint against the university alleging discriminatory discharge. The Supreme Court held that the claim was time-barred under Title VII's 180 day statute of limitations as the statue begins to run when the alleged discriminatory act occurs, not when the plaintiff feels the consequences of such an act. The Fourth Circuit also looked to *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), in which a group of female employees who had been demoted during an economic slowdown challenged under Title VII a seniority system that had been in effect for four years. The Supreme Court first identified the discriminatory act as the employer's adoption of the seniority system. Then, because the alleged discriminatory act occurred with the adoption of the seniority system four years earlier, the Supreme Court held the employee's claim time-barred, even though the discriminatory effects were not evident until years afterward.

Looking particularly to the Supreme Court's analysis in *Lorance*, the *1st Source* court held that in applying the statute of limitations contained in section 626(d), courts must first identify the alleged unlawful act. The date of the act will mark the time from which the 180 day period is calculated. The Fourth Circuit determined that although notice does enter the statute of limitations analysis, it is notice of the employer's actions, not the notice of a discriminatory effect or motivation, that establishes the commencement of the 180 day filing period.

Because the Fourth Circuit cited numerous discriminatory discharge cases in support of the above analysis, Hamilton urged that a perceived difference exists between discriminatory discharge claims and discriminatory pay claims. The court curtly dismissed this claim, stating that it was a "distinction without a difference." The court refused to indulge in what it termed a subjective and speculative exercise of determining the exact degree of employee awareness of various categories of employer practices. The court preferred to invest the 180 day period with "the simplicity and predictability that serviceable legal rules require." The court further stated that the appropriate forum for recourse was the legislature itself, not the judicial system.

In analyzing Hamilton's claim, the court found that the last possible time that pay discrimination could have occurred was the date when Hamilton received his final paycheck. Because Hamilton did not bring his claim to the EEOC within 180 days of that event, the court held that his claim was time-barred. The Fourth Circuit remanded Hamilton's pay discrimination claim to the district court with direction to dismiss it as untimely filed.

In a lengthy dissent, Judge Sprouse, with whom three other judges concurred, argued that the discovery rule should apply in interpreting the 180 day statute of limitations. After distinguishing *1st Source* from both *Ricks* and *Lorance*, Judge Sprouse argued that the Bank's discriminatory act was not the delivery of Hamilton's paycheck to him, but instead was the bank's decision to pay him less than the younger employees. Thus, according to Judge Sprouse, the act of discrimination occurred during

pretrial discovery, when Hamilton became aware that younger employees received higher compensation than he did. Under this analysis, the statute of limitations would not have barred Hamilton's pay discrimination claim.

Two weeks prior to the Fourth Circuit's decision in *1st Source*, the Seventh Circuit interpreted the ADEA's 180 day statute of limitations in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 111 S.Ct 2926 (1991). In *Cada* the Seventh Circuit held that the 180 day statute of limitations under the ADEA was subject to the discovery rule, and that therefore the period of limitations begins to run the moment a plaintiff becomes aware that he is injured. Though the claim in *Cada* was one of discriminatory discharge and not of pay discrimination, the fact that the Fourth Circuit considers the different claims to be distinctions without differences indicates that the circuits are split over this issue. Because the Supreme Court denied certiorari to *Cada* and the Seventh Circuit is the only court system aside from the Fourth Circuit to consider the issue, it remains to be seen how other courts will interpret the 180 day limitations period. While the Fourth Circuit's interpretation of the statute of limitations appears to strictly honor the literal meaning of the language contained within section 626(d) of the ADEA, this interpretation drastically favors employers—perhaps unfairly so. The favoritism takes on an increased significance when applied to pay discrimination claims because many employers actively discourage their employees from sharing salary information.[45] The discovery rule, however, takes into consideration the underlying policy inherent to statutes of limitations that such limitations periods should not commence to run so soon that it becomes difficult for plaintiffs to adequately invoke their claims.[46] In the Fourth Circuit, however, plaintiffs will find it difficult to invoke age discrimination claims against their employers—especially pay discrimination claims—unless they file such charges immediately upon notice of discharge.

Section 13(a) of the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 913(a) (1988) (section 13(a)), sets forth the statute of limitations applicable to claims for disability due to traumatic injury.[47] In *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952), the

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45. *See* J.D. Hamilton v. 1st Source Bank, 928 F.2d 86, 89 n.3 (4th Cir. 1990). Footnote 3 in *1st Source* indicates that Hamilton argued to the Fourth Circuit that many employers discourage their employees from sharing salary information, but the *1st Source* court dismissed his argument in a cursory fashion by stating that Hamilton did not develop the existence of such a policy nor the extent of any adherence thereto. Furthermore, the court felt that the presence of such a policy was not relevant to the issue of when the alleged discriminatory act occurred. *Id.*

46. *See* Delaware State College v. Ricks, 449 U.S. 250, 262 n.16 (1980) (stating that limitations period should not be so construed so that it becomes difficult for layman to invoke protection of civil rights statutes).

47. The relevant part of § 13(a) reads:

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefore [sic] is filed within

Supreme Court held that the one year limitations period under section 13(a) commenced running on the date of injury rather than on the date of the impairment, due to the injury, of the worker's capacity to earn wages.[48] Eighteen years later, in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the District of Columbia Circuit Court of Appeals held that the one year statute of limitations does not begin to run until the employee reasonably believes he has suffered work-related harm which would diminish his earning capacity.[49] The *Stancil* court explained that its holding was not contrary to the Supreme Court's *Pillsbury* holding because the Supreme Court had not addressed a situation involving latent injury.

In 1972, Congress amended section 13(a) of the Act, adding language that the limitations period 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."[50] Following *Stancil* and the 1972 amendment, the Fourth Circuit did not address the issue of when the Act's statute of limitations for traumatic injuries commences to run, but other circuits uniformly applied the *Stancil* rule when faced with the issue.[51] In 1984, Congress again amended the Act, adding specific and different statute of limitations language for occupational diseases without making a corresponding change to the limitations period for traumatic injury.[52]

> one year after the injury or death. . . . 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.

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 913(a) (1988). The "aware, or . . . should have been aware" language was added by amendment in 1972. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, sec. 12(b), § 13(a), 86 Stat. 1251, 1259 (codified as amended at 33 U.S.C. § 913(a) (1988)).

48. Pillsbury v. United Eng'g Co. 342 U.S. 197, 200 (1952). The *Pillsbury* Court based its holding on a strict reading of the statute. At the time, the relevant portion of § 13(a) provided that "[t]he right to compensation for disability under the Act shall be barred unless a claim therefor is filed within one year after the injury." Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 13(a), 44 Stat. 1424, 1432 (1927) (amended 1972). The *Pillsbury* court stated that "[c]ongress meant what it said when it limited recovery to one year from the date of *injury*." *Pillsbury*, 342 U.S. at 200 (emphasis added).

49. Stancil v. Massey, 436 F.2d 274, 274 (D.C. Cir. 1970). In 1970, the text of § 13(a) of the Act read as it did when the Supreme Court decided *Pillsbury* in 1952. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 13(a), 44 Stat. 1424, 1432 (1927) (amended 1972); *see supra* note 2 (quoting pre-1972 language of § 13(a)).

50. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, sec. 12(b), § 13(a), 86 Stat. 1251, 1259 (codified as amended at 33 U.S.C. § 913(a) (1988)).

51. *See* Marathon Oil Co. v. Lundsford, 733 F.2d 1139, 1141 (5th Cir. 1984) (stating that 1972 amendment changed *Pillsbury* rule and holding employee must know, or should know, that his condition impairs his earning capacity before statute runs against him); Todd Shipyards Corp. v. Allen, 666 F.2d 399, 401-2 (9th Cir.) (upholding Board's application of *Stancil*), *cert. denied*, 459 U.S. 1034 (1982); Cooper Stevedoring, Inc. v. Washington, 556 F.2d 268, 274 (5th Cir. 1977) (describing *Stancil* rule and holding 1972 amendment made it

In *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit considered the validity of the *Stancil* rule in light of the 1984 amendment to the Act. The court considered whether the Act's statute of limitations for traumatic injuries commences to run when the claimant knows or should know that he has sustained a work-related injury or when he knows or should know of the likely impairment of his earning capacity. The court also addressed whether the Department of Labor Benefits Review Board (the Board) exceeded its scope of authority by overturning the administrative law judge's findings of fact and whether the doctrine of laches was available as a defense under the Act.

George Parker began working for Newport News Shipbuilding and Dry Dock (Newport News) on July 10, 1961, as a rigger. On October 31, 1962 Parker injured his right knee, resulting in a fractured patella. He was discharged from treatment on February 16, 1963 with no disability. Parker's knee pain continued, however, and he received periodic treatment at the shipyard clinic. A March 23, 1978 x-ray revealed that his pain was related to the 1962 fracture. In September 1978, Parker was referred to Dr. Rynder, an orthopedic surgeon, who diagnosed chondromalacia patella, an abnormal softening of ligaments in the knee.

Dr. Rynder wrote to Newport News on November 8, 1979, expressing his view that an arthrotomy and shaving of the patella may be necessary to solve the problem. No evidence was presented, however, that this information was ever revealed to Parker. Dr. Rynder continued to treat Parker until November 4, 1980, when he informed Parker that medication was controlling his symptoms and that no further appointments would be necessary.

Parker returned to the clinic with knee pain on May 13, 1987 and was referred to Dr. Nevins. Dr. Nevins diagnosed chondromalacia patella and restricted Parker's climbing. Upon a follow-up visit, Dr. Nevins recommended arthroscopic surgery. Dr. Nevins performed the surgery on July 6, 1987. On August 24, 1987, Parker returned to work.

Thereafter, Parker filed a claim against Newport News for compensation under the Act. He sought temporary total disability compensation for a seven week period, beginning on the date of his surgery and continuing to

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clear that limitations period commences only when employee knows or should know of relationship between injury and employment); Sun Shipbuilding & Dry Dock Co. v. Bowman, 507 F.2d 146, 150 & n.8a (3rd Cir. 1975) (expressing agreement with *Stancil* approach and noting that approach was adopted in 1972 amendment).

52. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, sec. 12, § 13(b), 98 Stat. 1639, 1649 (codified as amended at 33 U.S.C. § 913(b)(2) (1988)). The new section provides that a claim for compensation based on disability due to an occupational disease is timely if filed within two years of the time the employee becomes aware or should be aware of the relationship between his employment, the disease, and his disability. 33 U.S.C. § 913(b)(2) (1988). Congress made no corresponding change to § 13(a), the statute of limitations provision for traumatic injuries.

the time he returned to work. Prior to the surgery, Parker had lost no time from work as a result of the knee problems since recovering from the initial injury in 1962.

A hearing was held on August 3, 1988 before an administrative law judge (ALJ). The ALJ found that Parker tended to exaggerate his pain and that Parker's testimony that he had believed his doctors when they told him he would be alright was unreliable. The ALJ further determined that the many years of pain should have alerted Parker to the seriousness of his injury and to the likelihood of its leading to loss of earning capacity, even if the prognosis was favorable. The ALJ concluded that Parker should have known of the likelihood of loss of earning capacity by November 8, 1979, the date of Dr. Rynder's letter to Newport News.

After determining that the Act's one year statute of limitations begins to run when the claimant knows or has reason to know of the likely impairment of his earning capacity, the ALJ found that Parker's time for filing a claim expired on November 8, 1980. Because Parker did not file his claim until seven years after this date, the ALJ denied the claim. The ALJ also held that the doctrine of laches did not apply because the Act contained a specific statute of limitations. Parker appealed and Newport News cross-appealed to the Board.

Applying the interpretation of the Act's statute of limitations announced in *Stancil*, the Board affirmed the ALJ's determination that the limitations period commences to run when the claimant knows or has reason to know of the likely impairment of his earning capacity. However, the Board reversed the ALJ's finding that Parker should have known of the likely impairment by November 8, 1979. The Board determined that the statute did not begin to run until June of 1987 when Parker's surgery was scheduled. Consequently, the Board awarded Parker the temporary total disability benefits he sought. The Board affirmed the ALJ's ruling that laches does not apply under the Act. Newport News appealed to the Fourth Circuit.

Newport News first contended that the Act's statute of limitations begins to run when the claimant is aware or should be aware that he has experienced a serious work-related injury, rather than when the claimant knows or should know of the likely impairment of earning capacity. Newport News argued that the Board erred in applying the *Stancil* interpretation of section 13(a), because *Stancil* ignored the explicit language of the 1970 statute as well as the ruling of the United States Supreme Court in *Pillsbury*. Newport News also urged that the plain meaning of section 13(a) is that the statute begins to run when the employee knows or should know he has sustained an injury. Section 13(a) provides that a claim for compensation must be filed within one year after the injury. The section further provides that the time for filing shall not begin to run until the employee is aware or should be aware of the relationship between the injury and the employment.

Newport News further argued that by adding specific and different language to the statute of limitations for occupational diseases in the 1984 amendment and not making a corresponding change to Section 13(a),

Congress intended that the injury, rather than the awareness of loss of earning capacity, should commence the running of the statute of limitations for traumatic injuries. The 1984 amendment to the Act, in section 13(b)(2), provided that claims for disability compensation based on occupational disease shall be timely if filed within two years after the employee becomes aware or should have been aware of the relationship between the employment, the disease, and the disability. To support its claim, Newport News quoted portions of the Report of the House Committee on Education and Labor discussing the proposed changes to the Act. The quoted language stressed the Committee's belief that commencing the limitations period on the date of injury makes little sense in cases of occupational disease in which the disability does not immediately follow the injury. Based on this language, Newport News urged that by enacting the 1984 amendment Congress intended to return to the Supreme Court's *Pillsbury* interpretation.

The Fourth Circuit first discussed the *Pillsbury* and *Stancil* decisions. The Court commented that both *Pillsbury* and *Stancil* had been decided before the 1972 amendment added the "aware or should have been aware" language. The *Newport News* court noted that the Supreme Court in *Pillsbury* had acknowledged that none of the claimants had a latent injury or occupational disease. The Fourth Circuit then explained the reasoning behind the *Stancil* court's holding that the limitations period does not begin to run until the employee knows or should know of the likelihood his earning capacity would be diminished. In *Stancil*, the court construed the term "injury" to mean the harmful consequences of an accident, which need not occur simultaneously with the accident. The *Stancil* court held that until an employee knows or has reason to know of the likely impairment of earning capacity, there is no "injury" for purposes of filing a claim under the Act. The Fourth Circuit reiterated the *Stancil* court's explanation that its holding was not contrary to *Pillsbury* because *Pillsbury* had not construed the term "injury" for latent injury cases. The Fourth Circuit then cited a number of cases to support the position that after *Stancil* and the 1972 amendment, which added the "aware or should be aware" language, courts began to uniformly apply the *Stancil* rule in determining when the limitations period commences.

The Fourth Circuit next addressed Newport News' claim that Congress had intended by the 1984 amendments to return to the *Pillsbury* rule. The Court first noted that the D.C. Circuit, the Ninth Circuit, and the Eleventh Circuit, all of which had considered the issue after the 1984 amendment, continued to apply the well-established *Stancil* rule. The court then stated that Congress, by failing to make changes in section 13(a) corresponding to the new provision for occupational diseases in section 13(b)(2), could just as likely have been expressing its satisfaction with the existing decisional law as to traumatic injuries as it could have been expressing its intent to return to the *Pillsbury* rule. The court found it unlikely, given the policy considerations underlying the Act, that Congress intended to have latent traumatic injuries treated inconsistently with occupational diseases for purposes of the commencement of the limitations period. The court concluded

that the 1984 amendment could not fairly be interpreted as a congressional mandate to return to the *Pillsbury* rule. Consequently, the *Newport News* court held that the Board had not erred in applying *Stancil* and ruling that the statute of limitations did not begin to run until Parker knew or had reason to know that the 1962 injury was likely to impair his earning capacity.

Newport News also argued that the ALJ's finding that the statute commenced to run on November 8, 1979 was supported by substantial evidence and that the Board exceeded its scope of review in reversing the ALJ. The court noted that under the Act, the ALJ's findings of fact are deemed "conclusive if supported by substantial evidence on the record as a whole."[53] The court agreed with the Board, however, that the experiencing of pain is insufficient as a matter of law to establish the likely impairment of earning power.

The *Newport News* court stated that the only logical explanation for the ALJ's choice of November 8, 1979 as the date the limitations period commenced was Dr. Rynder's letter to Newport News on the same date indicating that future surgery might be necessary. The court stated, however, that Newport News presented no evidence to contradict Parker's testimony that the possibility of surgery was not conveyed to him. The court also noted that Dr. Rynder subsequently changed his prognosis by indicating Parker's symptoms were under control. The court thus agreed with the Board that no substantial evidence was presented to support the ALJ's finding and held that the Board did not exceed its scope of review in reversing the ALJ and substituting its own finding of the date on which the limitations period commenced.

Newport News' final argument was that the Board erred in holding that laches was not a defense under the Act. The court stated that the equitable doctrine of laches bars stale causes of action if the party bringing the action lacks diligence in pursuing his claim and the party asserting the defense has been prejudiced by the lack of diligence. The court held that it was not necessary to determine whether laches was available under the Act because it would not have changed the result in the instant case. The court stated that Parker's claim had not only been timely, but that Newport News could not claim it was prejudiced by any lack of diligence because it knew everything about the injury that Parker himself knew.

The greatest portion of the Fourth Circuit's opinion in *Newport News* was devoted to Newport News' first argument, that the Board erred in determining the statute of limitations commenced to run when the claimant knew or should have known his earning capacity had been impaired. In upholding the Board's determination, the Fourth Circuit is in line with the D.C. Circuit, the Ninth Circuit, and the Eleventh Circuit, all of which have addressed the issue in the aftermath of the 1984 amendment.[54]

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53. 33 U.S.C. § 921(b)(3) (1988).

54. *See* Abel v. Director of Office of Workers' Compensation Programs, 932 F.2d 819, 822 (9th Cir. 1991) (citing *Stancil* and holding that limitations period begins to run when