BRB Nos. 99-1183
and 99-1183A

JAMES L. WHITFORD	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BUSCH OCEANOGRAPHIC	)	
EQUIPMENT COMPANY	)	DATE ISSUED: 08/18/2000
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Order Denying Claimant's Motion for Reconsideration and Supplemental Decision and Order Granting Attorney Fees of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Judith A. Schornack-Smith (The Jaques Admiralty Law Firm), Detroit, Michigan, for claimant.

John D.L. Humphreys (Lippert, Humphreys, Campbell, Dust & Humphreys, P.C.), Saginaw, Michigan, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Granting Attorney Fees, and claimant cross-appeals the Decision and Order and Order Denying Claimant's Motion for Reconsideration (92-LHC-3641) of Administrative Law Judge Daniel J. Roketenetz rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

§921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shuipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Employer, which owns a tugboat and barge, is in the business of transporting materials across Lake Michigan from April to December each year. From approximately January to March, the tugboat is docked on the Saginaw River for winter maintenance, but is available to assist vessels in distress and engage in ice-breaking. Claimant began working for employer in August 1987 as an engineer on the tugboat, caring for the engine room, and serving occasionally as deckhand or cook. During the shipping season, claimant worked, ate and slept aboard the tugboat, and received a weekly salary. Claimant worked aboard the tugboat during the shipping season of 1988 until December 1988, when he was laid off along with the rest of the crew. In January 1989, claimant was re-hired to perform winter maintenance on the tugboat and barge; during this period, claimant was paid an hourly wage and slept and ate on shore.

Claimant alleges that he suffered two work-related injuries during the winter lay-up. In early February 1989, claimant alleges that while performing repairs on the barge, he injured his arm when the drill he was using twisted in his hand. Claimant continued to work despite complaints of pain. On March 9, 1989, claimant was diagnosed with myositis secondary to excessive and repetitive use of his right forearm, and was treated with medication and advised to rest. Claimant contends that a second work-related injury occurred on March 6, 1989, when he slipped on the gangplank and fell on his lower back. He did not return to work for employer, and in April 1989, claimant was notified by employer that his employment had been terminated. Claimant, who suffered from pre-existing back problems, underwent a spinal fusion at the L3-S1 level on April 3, 1990.[1]

In May 1989, claimant filed a claim under the Michigan workers' compensation scheme. This claim was withdrawn in October 1989, and in March 1991, claimant filed a civil action against employer under the Jones Act, 46 U.S.C. §688. Pursuant to an order granting summary judgment, claimant's civil action was dismissed on February 14, 1992. Claimant filed a claim for total disability benefits under the Act on May 29, 1992.

In his Decision and Order, the administrative law judge initially determined that claimant was not a "member of a crew" under Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), and thus claimant was not excluded from coverage under the Act. The

[1]In 1983, claimant underwent a laminectomy and fusion at the L4-S1 level.

administrative law judge next found that claimant filed a timely claim for benefits under Section 13(a) of the Act, 33 U.S.C. §913(a), as claimant's filing of a state workers' compensation claim and a civil action tolled the statute of limitations pursuant to Section 13(d) of the Act, 33 U.S.C. §913(d). The administrative law judge determined that although claimant did not file a notice of injury pursuant to Section 12(a) of the Act, 33 U.S.C. §912(a), the failure to file such notice was excused because employer received actual knowledge of claimant's arm injury on March 8, 1989, and was not prejudiced by the inaction. The administrative law judge further found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to claimant's arm injury, and that employer did not establish rebuttal of that presumption. However, the administrative law judge determined that claimant failed to establish that the alleged traumatic accident to his back occurred, and thus failed to establish a *prima facie* case sufficient to invoke the Section 20(a) presumption with regard to the back condition. Having found that claimant established a *prima facie* case of total disability due to his work-related arm injury and that employer failed to establish the availability of suitable alternate employment, the administrative law judge awarded claimant temporary total disability compensation, 33 U.S.C. §908(b), at an average weekly wage of $26.92. The administrative law judge, in a subsequent order, denied claimant's request for reconsideration regarding his denial of benefits for the alleged back injury and the calculation of claimant's average weekly wage. In a Supplemental Decision and Order Granting Attorney Fees, the administrative law judge, finding that employer did not file any objections to counsel's fee petition, awarded claimant's counsel an attorney's fee of $31,265.55, payable by employer.

On appeal, employer challenges the administrative law judge's determination that claimant was not excluded from coverage under the Act. Specifically, employer contends that the administrative law judge erred in finding that employer's tugboat was not in navigation at the time of claimant's injury, and therefore erred in finding that claimant was not a "member of a crew" pursuant to Section 2(3)(G) of the Act. Employer further challenges the administrative law judge's determination that claimant's claim is not barred pursuant to Sections 12 and 13. Employer also contests the administrative law judge's award of temporary total disability compensation, asserting that the administrative law judge erred in finding that claimant is unable to perform his usual employment and in finding that it failed to establish the availability of suitable alternate employment. Lastly, employer avers that the amount of the administrative law judge's attorney's fee award was excessive, and that if it prevails on appeal, claimant's counsel should not be entitled to an attorney's fee payable by employer. Claimant responds, urging affirmace of the challenged findings by the administrative law judge. Claimant has filed a cross-appeal of the administrative law judge's Decision and Order, contending that the administrative law judge erred in calculating claimant's average weekly wage and in finding that he did not sustain a work-related back injury. Employer responds, urging affirmance of these determinations.

The threshold issue presented by the instant appeal is whether the administrative law judge erred in finding that claimant was not a "member of a crew" of a vessel, and thus was not excluded from coverage under the Act. Section 2(3)(G) of the Act excludes from coverage "a master or member of a crew of any vessel." 33 U.S.C. §902(3)(G). The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or member of a crew of any vessel" under the Longshore Act. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991)*; see also Chandris v. Latsis*, 515 U.S. 347 (1995). An employee is a member of a crew if: (1) he was permanently assigned or performed a substantial part of his work on a vessel or fleet of vessels; and (2) his duties contributed to the vessel's function or operation. *See Harbor Tug & Barge Co. v. Papai,* 520 U.S. 548, 31 BRBS 34 (CRT)(1997); *Hansen v. Caldwell Diving Co.*, 33 BRBS 129 (1999). "The key to seaman status is an employment-related connection to a vessel in navigation . . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Wilander*, 498 U.S. at 354, 26 BRBS at 83 (CRT). The employee must have a connection to a vessel that is substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). In *Chandris*, the United States Supreme Court ruled that the seaman status inquiry is not limited to an examination of the overall course of an employee's service with an employer. Rather, where "a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." *Chandris*, 515 U.S. at 372.

In analyzing whether claimant was a member of a crew, the administrative law judge first determined that claimant's general maintenance work on employer's tugboat and barge in February and March of 1989 constituted duties which contributed to the function of the vessel. The administrative law judge found that claimant's connection to employer's vessel was substantial in both nature and duration. These findings are uncontested on appeal. The administrative law judge then considered whether employer's vessel was "in navigation" at the time of claimant's injury. In this regard, the administrative law judge found that employer's tugboat and barge underwent only cosmetic repairs during the winter season of 1989, and accepted the testimony of Captain Greg Busch, employer's owner, that employer's vessel could have been put to sea in one half hour if necessary. *See* Decision and Order at 13. Nevertheless, the administrative law judge determined that employer's vessel was "laid-up" for the winter, as it did not in fact depart from the dock during the winter season and the crew was discharged for the season. Thus, relying on two decisions by the United States Court of Appeals for the Sixth Circuit, in whose jurisdiction the instant case arises, *Nelson v. Greene Line Steamers, Inc.*, 255 F.2d 31 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958), and

Boyd v. Ford Motor Co., 948 F.2d 283 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992), the administrative law judge concluded that the vessel was not "in navigation" at the time of claimant's injury, and therefore, claimant was not excluded from coverage under Section 2(3)(G).

We agree with employer that this decision cannot be affirmed as the administrative law judge did not consider the decision of the Supreme Court in *Chandris* in determining whether employer's vessel was "in navigation." In *Chandris*, the Supreme Court held that, for purposes of coverage under the Jones Act, a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside, and is "in navigation," although moored to a dock, if it remains in readiness for another voyage. *Chandris*, 515 U.S. at 374. The Court acknowledged that extensive and prolonged repair work might take a ship out of navigation, noting the general rule that vessels undergoing repairs or spending a relatively short period of time in dry dock are still considered to be "in navigation," whereas vessels being transformed through major renovations are not. *Id*. at 374. In an earlier decision relevant to the instant case, *Senko v. La Cross Dredging Corp.*, 352 U.S. 370 (1957), the Supreme Court considered a case in which the petitioner was employed as a handyman to assist with dredging operations being conducted in the Mississippi River. The dredge was anchored to the shore at the time of petitioner's injury and during all the time petitioner worked for respondent. The injury occurred in a shed on land. The Supreme Court held that the fact that petitioner's injury occurred on land is not material as "coverage of the Jones Act depends only on a finding that the injured was 'an employee of the vessel, engaged in the course of his employment' at the time of his injury," and stated that "there can be no doubt that a member of [the vessel's] crew would be covered by the Jones Act . . . even though the ship was never in transit during [the] employment." The Court concluded that "the duties of a man during a vessel's travel are relevant in determining whether he is a 'member of a crew' while the vessel is anchored." *Senko*, 352 U.S. at 372. Thus, the Court upheld a jury verdict in the employee's favor.[2] Following the teachings of *Senko* and *Chandris*, the Board, in *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997), affirmed the administrative law judge's finding that a dredge that was "wintered over" at the time of the claimant's injury was still "in navigation" during this period, as it was capable of sailing again in the spring.

[2]The *Nelson* court distinguished *Senko*, noting that the Supreme Court in *Senko* did not hold that the employee therein was a seaman as a matter of law, but only that the evidence was sufficient to take to the jury. *See Nelson*, 255 F.2d at 35.

In the instant case, the determinative factor in the administrative law judge's analysis of the issue of whether employer's vessel was "in navigation" was whether the vessel was "laid-up" for the winter. In determining that the vessel was "laid-up" for the winter, the administrative law judge relied on the fact that when the shipping season ended claimant went from sleeping on board the tugboat to sleeping on shore, that claimant's pay rate changed from salary to hourly, and that the tugboat had not in fact been called for ice-breaking duties but had remained docked on the Saginaw River. Thus, the administrative law judge found that since employer's vessel was "laid-up" for the winter, it was not "in navigation" during claimant's alleged injuries. *See* Decision and Order at 17. However, the administrative law judge, in his analysis, did not consider the fact that the maintenance and repairs to employer's tugboat and barge were not major overhauls or renovations, a fact claimant does not dispute, or his earlier finding that employer's tugboat was capable of sailing in less than one half hour's notice during the winter "lay-up." *See* Decision and Order at 15. These factors must be taken into consideration pursuant to *Chandris*.[3]

[3]Claimant's arm injury occurred on board the barge, which, based on the testimony of several witnesses, was tied to the tugboat and not independently navigable. However, the question of whether the barge itself was "a vessel" is not determinative of the coverage issue, as the administrative law judge's finding that claimant had a substantial connection to "employer's vessel" clearly refers to the tugboat, which is undoubtedly a vessel. Under *Senko* and two other pre-*Wilander* Supreme Court decisions, Jones Act jurisdiction does not depend on the place of injury, but on the nature of the seaman's service, his status as a member of a vessel, his relationship to the vessel and its operation in navigable waters. *See Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *O'Donnell v. Great Lakes Dredge & Dry Dock Co.*, 318 U.S. 36 (1943). Thus, the only issue in this regard is whether the tugboat was "in navigation" during the winter lay-up.

In this regard, we hold that the facts in *Boyd* are distinguishable from those in the instant case. In *Boyd*, the employee was an engineer on a vessel who injured himself during the winter lay-up, when he was employed to supervise lay-up activities and repairs. The court held that the vessel was not in navigation during the lay-up, relying heavily on the fact that the vessel did not have its United States Coast Guard certification to sail during this period and the main engine was disassembled and not in operating condition at the time of the injury. In contrast to the vessel in *Boyd*, employer's tugboat was in operating conditions and ready to be put to sea in one-half hour's notice. In his decision, the administrative law judge relied on another Sixth Circuit decision, *Nelson*, a case in which the employee was a member of a crew of a vessel whose classification changed to laborer when the vessel was tied up for the winter, such that he was not required to sleep on the boat and his pay was changed from a daily rate to an hourly rate. While performing maintenance on the vessel, the employee fell into the Ohio River and drowned. The Sixth Circuit affirmed the lower court's finding that since the vessel was tied up for the winter, it was not in navigation at the time of the employee's death.[4] *See Nelson*, 255 F.2d at 34-35. Nevertheless, inasmuch as the administrative law judge did not consider the standard espoused by the Supreme Court in *Chandris*, we are compelled to vacate the administrative law judge's determination that claimant was not a "member of a crew" under Section 2(3)(G) of the Act, and remand the case for the administrative law judge to reconsider whether employer's vessel was "in navigation" at the time of claimant's injuries in light of *Chandris*.[5]

---

[4]The *Nelson* decision pre-dates a subsequent Supreme Court decision, *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 191 (1952), where the Court ruled that a crew member who was re-employed for winter repair work on a fleet of vessels was not a seaman because the vessels were "laid up for the winter" at the time of the lethal accident. Emphasizing the fact that no vessel was engaged in navigation at the time of the employee's death, the Court cited an earlier Sixth Circuit decision, *Antus v. Interocean S.S. Co.*, 108 F.2d 185 (6th Cir. 1939), for the proposition that "one who had been a member of a ship's crew and was injured while preparing it for winter quarters could not maintain a Jones Act suit for his injuries . . . ." *Desper*, 342 U.S. at 191.

[5]In addition to asserting he was not a member of the crew, claimant argued before the administrative law judge that employer is estopped from asserting that claimant is a Jones Act seaman based on its assertion to the contrary in seeking summary judgment in the Jones Act case. This argument was not addressed by the administrative law judge and should be considered on remand, as the principle of judicial estoppel precludes employer's taking such inconsistent positions in the Jones Act and Longshore proceedings. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997). Moreover, any findings of fact by the Michigan court may be entitled to collateral estoppel effect. *See Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109 (CRT)(1st Cir. 1997). If the facts asserted by claimant on brief are supported by evidence, *see* footnote 6, *infra*, then employer has changed positions on this

We next address whether the administrative law judge erred in finding that claimant's claim for benefits under the Act was timely under Section 13 of the Act. In this regard, employer contends that claimant's failure to file a claim under the Act within one year of the voluntary withdrawal of his state workers' compensation claim bars the instant claim under Section 13 of the Act. Employer further argues that the tolling provisions under Section 13(d) of the Act are inapplicable, as the dismissal of claimant's Jones Act case was not based on a finding that claimant and employer are covered under the Act.

Section 13(a) of the Act permits a claimant one year after the date he becomes aware or should have been aware of the relationship between his injury and his employment to file a claim. 33 U.S.C. §913(a). Section 13(d) of the Act, however, provides:

> 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). Section 702.222(b) of the regulations provides much the same, stating:

> Where a person brings a suit at law or in admiralty to recover damages in respect of an injury or death, or files a claim under a State workers' compensation act because such person is excluded from this Act's coverage by reason of section 2(3) or 3(d) of the Act [citations omitted], and recovery is denied because the person was an employee and defendant was an employer within the meaning of the Act, and such employer had secured compensation to such employee under the Act, the time limitation in §702.221 shall not begin to run until the date of the termination of such suit or proceeding.

20 C.F.R. §702.222(b). Thus, if the provisions of Section 13(d) apply, the one-year statute of limitations in Section 13(a) is tolled and the time does not begin to run until the completion of the other claim.

The Board has held that the filing of an action under the Jones Act or the filing of a third-party suit for damages within one year of the date of the dismissal of that suit is

---

issue depending on the forum in which benefits are sought.

sufficient to toll the statute of limitations pursuant to Section 13(d) of the Act. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Calloway v. Zigler Shipyards, Inc.*, 16 BRBS 175 (1984). The Sixth Circuit has not ruled on whether state workers' compensation claims toll the one-year statute of limitations pursuant to Section 13(d). The United States Court of Appeals for the Fifth Circuit has held that the filing of a state workers' compensation claim tolls the one-year statute of limitations of Section 13(a) pursuant to Section 13(d), reasoning that a state compensation claim is one for "damages" under that term's accepted legal definition. *See Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978); *Wilson v. Donovan*, 218 F.Supp. 944 (E.D. La. 1963), *aff'd per curiam sub nom. T. Smith & Son, Inc. v. Wilson*, 328 F.2d 313 (5th Cir.), *cert. denied*, 379 U.S. 816 (1964). *Cf. Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109 (CRT)(1st Cir. 1997)(in *dicta*, court stated it is doubtful that state compensation claims are actions for damages). The Board subsequently held that the grounds upon which recovery in the claim for damages is denied is irrelevant because it is the filing of the action which tolls the time limits. *Calloway*, 16 BRBS at 177. The Board's holding was based on *Hollinhead*, wherein the court did not consider reasons for dismissal of the state claim due to the withdrawal of the claim, yet it proceeded to toll the time period for filing a claim under the Act. *Id.*; *see Hollinhead*, 571 F.2d at 272-274, 8 BRBS at 159-160; *see generally Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184 (CRT)(5th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (2000)(untimely state claim does not toll time for filing claim under Act).

Applying these principles to the instant case, we reject employer's contention that claimant's claim under the Act is untimely as he did not file his claim within one year after he withdrew his state workers' compensation claim in October 1989. Rather, we agree with the administrative law judge that the timely filing of claimant's Jones Act action pursuant to that Act's statute of limitations requirements tolled the Section 13(a) filing requirements pursuant to Section 13(d) until that action's completion. *See generally Hill*, 32 BRBS at 191-192. Moreover, adopting the reasoning of *Hollinhead* and *Calloway*, we hold that the grounds upon which recovery was denied under claimant's state workers' compensation claim and his Jones Act action are not controlling as the filing of these actions tolls the time limits under the Act.[6] Accordingly, as claimant filed his claim under the Act within one year

[6]In this regard, however, claimant asserts that the state claim was withdrawn because employer agreed he was a seaman, and the Jones Act case was dismissed upon employer's motion for summary judgment, with the Michigan court granting the motion and finding that claimant was not a seaman at the time of injury. Employer does not directly contravene these arguments. In reference to the Jones Act suit it states that its "assertion was not that the Longshore and Harbor Workers' Compensation Act did apply to the employer and employee but rather that the Jones Act *did not* apply." Employer's Brief at 6 (emphasis in original).

of the termination of the Jones Act action, pursuant to Section 13(d), we affirm the administrative law judge's determination that claimant satisfied the statute of limitations under Section 13(a).

Employer further challenges the administrative law judge's finding that claimant's claim was not barred pursuant to Section 12 of the Act. Specifically, employer contends that the administrative law judge erred in finding that it was not prejudiced by claimant's failure to comply with the written notification provisions of Section 12. We disagree. In a traumatic injury case such as this one, claimant must give employer notice of his injury within 30 days of his awareness of the relationship between the injury and the employment. 33 U.S.C. §912(a). Failure to give employer timely notice of his injury is excused if employer had actual knowledge of the injury or employer was not prejudiced by the failure to give proper notice. 33 U.S.C. §912(d)(1), (2). Prejudice under Section 12(d)(2) may be established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it is fresh is insufficient to meet employer's burden of proof. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT)(9th Cir. 1998), *cert. denied*, 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

In the instant case, the administrative law judge credited claimant's testimony, and the

---

This characterization is entirely specious if the dismissal was based on claimant's seaman status, as there is no contention that any other coverage provision of the Longshore Act would exclude claimant. We are unable to discern the basis for the court's dismissal on the current record, as only the decision is in the record, and it states that employer's motion for summary decision is granted "for the reasons stated on the record by the court and the court having made findings of fact." Cl. Ex. 1. Thus, if in fact summary judgment was granted on the basis that claimant was not a member of a crew, then that is tantamount to a finding that he is an employee under the Longshore Act on the facts presented here.

testimony of Linda Busch, Captain Busch's wife and an employee of employer, that he telephoned Ms. Busch on March 8, 1989 to complain about his arm injury, which the administrative law judge found occurred on February 3, 1989. Based on these facts, we reject employer's assertion that it could not conduct an effective investigation to determine the nature and extent of the injury. As claimant notified employer soon after he was treated for his arm injury, we affirm the administrative law judge's determination that claimant's claim was not barred by his failure to give timely notice of his injury under Section 12(a) as employer failed to meet its burden of establishing that it was prejudiced by claimant's untimely notice under Section 12(d). *See, e.g., Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

We next address claimant's challenge to the administrative law judge's determination that he was not entitled to invocation of the Section 20(a) presumption with regard to his alleged work-related back injury. Specifically, claimant contends that the administrative law judge erred in not crediting claimant's testimony in this regard, arguing that the testimony of Greg and Linda Busch lacked credibility. For the reasons set forth below, we affirm the administrative law judge's determination.

It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof.[7] *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a)

[7]Contrary to claimant's assertion, Section 20(a) of the Act does not apply to the determination of whether an accident occurred. Thus, if claimant alleges that an accident caused his injury, he must establish that the alleged accident did in fact occur. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In rendering his decision, the administrative law judge analyzed claimant's testimony and determined that claimant's allegation of a traumatic injury to his back on March 6, 1989, lacked credibility. Claimant alleged that he was instructed by Captain Busch to remove frozen oil from the tugboat and dump it on the shore and that he slipped and fell on the gangplank while performing this task. Captain Busch testified that he never instructed claimant to do this and that claimant is fabricating this incident. The administrative law judge accepted Captain Busch's testimony that the bilges on the tugboat did not need to have oil removed from them because they were emptied and cleaned in December, and the tugboat had not operated since December. *See* Tr. at 844, 942. The administrative law judge discredited claimant's testimony, finding Captain Busch's depiction of what happened on March 6, 1989, to be more plausible. *See* Decision and Order at 21. Additionally, the administrative law judge was persuaded that this alleged incident never occurred by the absence of any mention of such an incident in the medical records until May 19, 1989. *See* Cl. Ex. 8. Thus, the administrative law judge found that claimant did not sustain a work-related back injury on March 6, 1989.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, the administrative law judge may discredit a claimant's testimony to find that an alleged accident arising out of the course of claimant's employment did not occur. *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981)(Miller, J., dissenting), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982).

On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant and credit Captain Busch's testimony is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's determination that claimant failed to establish that the alleged accident on March 6, 1989, occurred. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997). As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits arising out of the alleged work-related back injury was properly denied. *See U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631.

With regard to the extent of claimant's disability arising out his work-related injury to

his arm, employer challenges the administrative law judge's finding that claimant is totally disabled, essentially asking the Board to reverse the administrative law judge's weighing of the evidence. We decline to do so. Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In the event of an injury to a scheduled member, a claimant's permanent partial disability under Section 8(c) is confined to the schedule, and any loss in wage-earning capacity is irrelevant. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). If claimant establishes that he is permanently or temporarily totally disabled, however, he may receive benefits under either Section 8(a) or (b) of the Act, 33 U.S.C. §908(a), (b). If claimant establishes that he is incapable of resuming his usual employment duties with employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant, by virtue of his age, background and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In rendering his determination in this regard, the administrative law judge considered only the physical requirements of claimant's usual work during the winter lay-up. The administrative law judge determined that his usual work consisted of general maintenance work, including drilling and hanging of sheet metal. After crediting claimant's testimony that he has trouble performing drilling activities around the house, the administrative law judge gave greater weight to the opinion of Dr. Newman that claimant suffers from residual tendinitis in his right arm and should be restricted from using this arm, than to that of Dr. Wolf, who found no work disability as a result of claimant's right arm injury. Thus, the administrative law judge found that claimant established a *prima facie* case of total disability. As the administrative law judge acted within his discretion in crediting the assessment of claimant's physical condition, and in crediting Dr. Newman's opinion over the contrary opinion of Dr. Wolf, we affirm the administrative law judge's finding that claimant is unable to perform the work he was doing at the time of injury. *See Calbeck*, 306 F.2d at 693; *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

The administrative law judge then found that employer failed to establish the availability of suitable alternate employment, as the unskilled jobs listed in its job market survey did not address the nature and terms of the occupations. We affirm the administrative law judge's finding in this regard. While employer submitted a job market survey listing unskilled jobs, the report, which is a computer printout of jobs, does not show the nature, terms and availability of the positions listed. *See* Emp. Ex. 17. Thus, there is insufficient

evidence to allow the administrative law judge to compare the jobs' duties with claimant's medical restrictions. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Accordingly, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment as it is rational, supported by substantial evidence, and in accordance with law.

Claimant, in his cross-appeal, challenges the administrative law judge's determination of his average weekly wage. In rendering his decision, the administrative law judge determined that claimant's average weekly wage should be calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). The administrative law judge next found that claimant's position during the winter lay-up and his seaman position were distinct, and that claimant was totally disabled from performing only his winter employment. The administrative law judge then credited claimant with seven weeks of covered maritime employment, which represented three weeks he worked prior to his arm injury and four subsequent weeks he would have performed this employment during the winter lay-up. Finding that claimant's annual covered maritime earnings totaled $1,400, the administrative law judge divided this amount by 52 weeks pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), and found that claimant's average weekly wage was $26.92. In his subsequent Order Denying Claimant's Motion for Reconsideration, the administrative law judge reaffirmed his finding that since it was determined that claimant is totally disabled only from his covered maritime employment, earnings from other forms of employment, including his seaman work, should not be included in the calculation of claimant's average weekly wage.

The administrative law judge's calculation of claimant's average weekly wage cannot be affirmed. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied. *See Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). All sources of income are to be included in determining claimant's average weekly wage. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson*, 14 BRBS at 855.

In the instant case, the administrative law judge did not make a determination as to whether claimant could perform his seaman job based on his physical limitations. *See Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998)(calculation of average weekly wage

included income derived from part-time job claimant could no longer perform). Excluding this income, however, does not result in the average weekly wage calculated by the administrative law judge. Under Section 10(c) the administrative law judge must determine claimant's annual earning capacity, and this figure is then divided by 52 under Section 10(d). In the instant case, the administrative law judge simply divided claimant's actual earnings during the weeks of his winter job by 52, to arrive at a average weekly wage of $26.92. However, a few weeks of earnings totally $1,400 does not represent claimant's annual earning capacity even if only these actually earnings are used in his average weekly wage calculation. The administrative law judge should have extrapolated these earnings over the year to arrive at claimant's annual earning capacity, and then divided by 52.[8] This method, as opposed to the one the administrative law judge applied, would adequately represent one fifty-second part of claimant's average annual earnings. *See Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990). Accordingly, on remand, if claimant is again awarded benefits, the administrative law judge must reconsider the calculation of claimant's average weekly wage.

[8]For example, the administrative law judge can divide the actual earnings by the actual days or weeks worked, or use the actual hourly rate, and then extrapolate that figure over the entire year.

Lastly, on appeal, employer contends that if claimant is denied benefits, it would not be liable for claimant's counsel's attorney's fee. We agree with employer that if the administrative law judge determines on remand that claimant is excluded from coverage as a "member of a crew," counsel would not have achieved any success in his prosecution of claimant's claim, and thus, employer would not be liable for counsel's fee. *See* 33 U.S.C. §928(a), (b); *Hensley v. Eckerhart*, 461 U.S. 421 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). However, if the administrative law judge reaffirms his award of benefits, the amount of an attorney's fee awarded by the administrative law judge is affirmed, as employer filed no objections to claimant's counsel's fee petition before the administrative law judge and contentions not raised below will not be addressed for the first time on appeal.[9] *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, we vacate the administrative law judge's finding that claimant is not excluded from coverage under Section 2(3)(G) of the Act, and his calculation of claimant's average weekly wage, and remand the case for reconsideration in accordance with this opinion. In all other respects, the Decision and Order and Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[9]Claimant, in his petition for review, requests costs and fees in connection with the instant appeals. As no fee petition for work performed before the Board has been filed, we cannot consider claimant's request. Moreover, we cannot consider a forthcoming attorney's fee petition until the success of claimant's counsel's prosecution of the claim is determined. *See* 20 C.F.R. §802.203(c).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge