BRB Nos. 07-0326
and 07-0404

S.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HALTER MARINE	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	DATE ISSUED: 12/19/2007
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, and the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Ron M. Feder (Davis & Feder, P.A.), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fee (2005-LHC-00613, 00614, 00615) of Administrative Law Judge Lee J. Romero, Jr., and the Compensation Order Award of Attorney's Fees (Case Nos. 07-154067, 07-154094, 07-154095) of District Director David A. Duhon rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary, and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant alleged he sustained injuries arising from his employment for employer as a welder. Specifically, claimant filed claims on August 10, 1999, alleging: (1) that his left knee became imbedded with metal shavings leading to infection in January 1999, CX 1; (2) that he injured his back, right shoulder and right knee in April 1999 in a slip and fall at work, *id.*, and; (3) that he injured his left knee in June 1999 while crawling through small spaces in the course of his welding work. *Id.* Claimant amended the last claim in April 2000 to allege that he injured his right shoulder in June 1999 as well as his left knee. EX 3. Claimant asserted that he first was unable to work from June 15 to July 21, 1999, and from August 12 to November 9, 1999, due to his injuries. Claimant returned to work, but underwent right shoulder surgery on March 30, 2000. A second shoulder surgery to debride scar tissue was performed on August 29, 2000. Claimant underwent a third shoulder surgery on June 19, 2001, at which time a subacromial bursectomy and ligament excision was performed. Claimant was released to work in December 2001. Employer did not voluntarily pay any compensation or medical benefits for claimant's alleged work-related injuries.

In his decision, the administrative law judge found that while claimant is not untruthful, claimant's testimony is only partially credible due to his limited ability to communicate effectively, especially with respect to dates and to sequences of events. The administrative law judge discussed evidence that claimant has a limited education, a learning disability, and poor cognitive function. The administrative law judge therefore found claimant's testimony credible only to the extent that it is corroborated by other evidence. Decision and Order at 20-21. The administrative law judge found that claimant failed to establish a *prima facie* case of compensable injuries in January and April 1999 because there are no contemporaneous medical records documenting claimant's assertions of harm on or about these dates. *Id.* at 24. The administrative law judge found that claimant's left knee, right shoulder, and back injuries are compensable as these injuries arose from claimant's working in and crawling through tight spaces. *Id.*

at 32. The administrative law judge further rejected employer's contention that an aggravation of claimant's shoulder condition in May 2000 while claimant was in a swimming pool constituted an intervening cause relieving employer of liability for any disability attributable to the shoulder condition. The administrative law judge also rejected employer's contention that claimant's claim is barred pursuant to Section 12, 33 U.S.C. §912.

The administrative law judge found that claimant's disabling shoulder injury reached maximum medical improvement on December 12, 2001. The administrative law judge found that claimant is unable to return to his usual employment as a welder, and that employer established the availability of suitable alternate employment as of the date of employer's labor market survey on May 9, 2003. Claimant was awarded compensation for temporary total disability, 33 U.S.C. §908(b), from June 15 through July 21, 1999, from August 12 through November 9, 1999, and from March 30, 2000, through December 11, 2001. Claimant was awarded compensation for permanent total disability, 33 U.S.C. §908(a), from December 12, 2001, through May 8, 2003, and continuing compensation for permanent partial disability, 33 U.S.C. §908(c)(21), (h), from May 9, 2003, based on a weekly loss of wage-earning capacity of $321.30. The administrative law judge rejected employer's contention that claimant never sought authorization for medical treatment of his work injuries, and he found claimant entitled to medical care for his left knee, back, and right shoulder injuries as of August 18, 1999, when employer denied claimant's request for medical care. Employer's application for Section 8(f) relief, 33 U.S.C. §908(f), was denied.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of $12,160.87, representing 57.75 hours of attorney time at $200 per hour and costs of $610.87. In his Supplemental Order Awarding Attorney's Fee, the administrative law judge addressed employer's objections to the fee petition, and awarded claimant's counsel a fee of $9,077.15, representing 46.50 hours of attorney time at $185 per hour and costs of $474.65.

Claimant's counsel also submitted a fee petition for work performed before the district director, in which he requested an attorney's fee of $10,044.56, representing 47.50 hours of attorney time at $200 per hour, plus costs of $544.56. In his Compensation Order Award of Attorney's Fees, the district director addressed employer's objections and awarded claimant's counsel a fee of $8,354.60, representing 39.125 hours of attorney time at $200 per hour and costs of $529.60.

On appeal, employer challenges the administrative law judge's finding that claimant established he sustained work-related left knee, back, and shoulder injuries. Employer contends the administrative law judge erred in finding claimant's knee injury disabling from June 15 to July 21, 1999, and that the aggravation of claimant's shoulder

injury in the swimming pool incident did not constitute an intervening cause of claimant's ongoing shoulder disability. Employer also challenges the administrative law judge's finding that claimant's failure to provide timely notice of his injuries was excused pursuant to Section 12(d). Employer further contends that the administrative law judge erred by not finding that it established the availability of suitable alternate employment as of the date of maximum medical improvement on December 12, 2001, and in finding it liable for claimant's medical care as of August 18, 1999. Finally, employer appeals the fee awards of the administrative law judge and the district director. Claimant responds, urging affirmance of the administrative law judge's decision; he has not responded to employer's appeals of the fee awards. Employer has filed a reply brief.

Employer first contends that there is no credible factual basis or medical evidence to support the administrative law judge's finding that claimant sustained work-related injuries to his left knee, back, and shoulder. Claimant has 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 bring the claim within the scope of Section 20(a). *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see also Bolden v. G.A.T.X. Terminals*, 30 BRBS 71 (1996). Once claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his injuries are causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injuries were neither caused nor aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999)*; Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.2d. 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.; see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In regard to the June 1999 knee injury, the administrative law judge credited the transcript of a telephone conversation on June 21, 1999, between claimant and Sheila Taylor, a claims adjuster for employer, medical records that claimant sought knee treatment on June 9, 1999, and employer's filing an LS-202 First Report of Injury Form on June 22, 1999, reporting a left knee injury on June 9, 1999, to find that claimant established a *prima facie* case. CX 3 at 15-18; EXs 1 at 2; 10 at 5. The administrative law judge found that employer did not rebut the presumption of a work-related knee injury, and he rejected employer's contention that the record contains no objective evidence of a knee injury. Decision and Order at 29. Specifically, the administrative law judge relied on claimant's obtaining medical treatment for a knee injury, the imposition

of work restrictions from June 15 to July 21, 1999, and the medical and vocational record thereafter documenting complaints of knee pain through April 2003. CXs 3 at 16; 4 at 47-48; 9 at 50; 15 at 78-104; EXs 5 at 18-19; 10 at 5; 12 at 11.

The administrative law judge credited substantial evidence of record to find claimant entitled to the benefit of the Section 20(a) presumption with regard to the left knee injury, and we affirm the administrative law judge's findings in this regard. *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998); *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Moreover, we reject employer's assertion that claimant's inconsistent statements concerning the occurrence of his knee injury are sufficient to rebut the Section 20(a) presumption in this case. The administrative law judge found that claimant's credibility is limited to instances where there is corroborating evidence. Decision and Order at 20-21. With regard to this issue, the administrative law judge credited corroborating evidence, and employer did not offer any medical evidence to rebut the presumption. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). Accordingly, we affirm the administrative law judge's finding that a causal relationship exists between claimant's left knee condition and his employment.

Employer next challenges the administrative law judge's finding that claimant sustained work-related back and shoulder injuries. Employer contends that the administrative law judge erred in finding that these injuries occurred in August 1999 since claimant did not file a claim alleging an injury to these body parts occurring in August 1999.

We reject employer's contention as it relates to claimant's shoulder injury. Claimant specifically amended his claim on April 11, 2000, to allege that he injured his shoulder as well as his left knee in June 1999, EX 3, and employer controverted this claim three days later. EX 2 at 4. Thus, contrary to employer's contention, it was not required to defend a claim created by the administrative law judge but only the claim made by claimant. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Moreover, despite the administrative law judge's discussion of claimant's working conditions in August 1999, *see* Decision and Order at 28-29, the administrative law judge clearly found that the delayed manifestation of claimant's shoulder symptoms in August 1999 is insufficient to rebut the Section 20(a) presumption that the symptoms arose from claimant's work in June. *Id.* at 30. Assuming, *arguendo*, that employer rebutted the Section 20(a) presumption, the administrative law judge weighed the evidence as a whole and found the medical reports supportive of claimant's testimony that he injured his shoulder in June 1999 as alleged. *Id.* at 32; EX 11. In addition, the administrative law judge correctly stated that employer did not offer any medical evidence to support its contention that claimant's shoulder

injury is not work-related, and the administrative law judge fully addressed employer's contentions concerning claimant's credibility by requiring corroborating evidence. Decision and Order at 20-21, 32; *see Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's shoulder injury is work-related.

We must remand the case, however, for further findings regarding the compensability of claimant's back injury, which involves only a claim for medical benefits. *See, e.g.*, Tr. at 11. The only formal claim filed for a back injury stated that claimant "popped his lower back" on April 26, 1999. CX 1; *see also* Tr. at 11. When claimant sought medical treatment for back pain on August 12, 1999, he related that he injured his back at work "four months ago" and on June 6, 1999, while working in tight spaces. EX 11 at 2, 3, 7. The administrative law judge found that claimant is not entitled to invocation of the Section 20(a) presumption with regard to any April incident as there is no corroboration of claimant's testimony that he hurt himself at that time. Decision and Order at 24. The administrative law judge nonetheless addressed whether claimant sustained a back injury in June 1999 which became symptomatic in August 1999, and found that claimant's back injury is related to his working conditions in June 1999. *Id.* at 25-30. In view of employer's contention that such a claim was not made by claimant, we vacate the administrative law judge's findings in this regard. On remand, the administrative law judge must address whether the pleadings and/or other documents in this case provided employer with sufficient notice that claimant was making a claim for a back injury arising of his working in tight spaces in June 1999. *See Meehan Seaway Serv., Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). In addition, as the record contains evidence that claimant's back condition could be related to conditions of claimant's employment other than those claimed, the administrative law judge has the authority to raise and address a new issue, so long as prior notice is provided to the parties. 20 C.F.R. §702.336; *see Cornell Univ. v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *c.f. U.S. Industries/Federal Sheet Metal*, 455 U.S. at 612-614, 14 BRBS at 632 (Section 20(a) presumption cannot attach absent allegation that harm arose from employment).

Employer next challenges the administrative law judge's finding that the shoulder injury claimant sustained in May 2000 is not an intervening cause of claimant's disability, thus severing employer's liability for claimant's shoulder injury. Claimant underwent his initial right shoulder surgery on March 30, 2000. Claimant's treating physician, Dr. Rodriguez, performed an arthroscopic evaluation and a decompression to treat a shoulder impingement. EX 16 at 9-11. Claimant testified that he aggravated his shoulder condition performing physical therapy exercises for his shoulder in his swimming pool when he struck another person's hand in May 2000. Tr. at 40.

Thereafter, claimant developed adhesive capsulitis. EX 16 at 12-13, 26-27. Dr. Rodriguez opined that claimant developed this condition as a result of the pool incident, and that, but for this incident, claimant would have been able to return to work without restrictions. EX 16 at 19-21, 28-30.

In his decision, the administrative law judge credited claimant's description of the incident as he related it to his physical therapist within one week of its occurrence and it is supported by other evidence of record. Specifically, physical therapy records prior to the incident note that claimant had been instructed to perform Codman's exercises at home and that claimant had been swimming at home. CX 15 at 38, 40, 62. The administrative law judge also credited Dr. Rodriguez's deposition testimony that claimant was not under post-surgery restrictions regarding shoulder movement, but was encouraged to exercise it. EX 16 at 23. The administrative law judge inferred from this evidence that claimant was performing Codman's exercises in the pool when he aggravated his shoulder condition or he was performing activity at least impliedly endorsed by his physical therapist. Decision and Order at 34. The administrative law judge further inferred that physical contact with another family member in the pool was reasonably foreseeable and that a warning from the physical therapist was warranted if such contact was believed harmful. The administrative law judge found that the absence of any such warning indicates that the physical therapist encouraged pool therapy at home. The administrative law judge concluded that claimant sustained an aggravating shoulder injury in his pool between May 27 and May 29, 2000, incidental to the medical treatment of his initial shoulder injury. *Id*. at 35. Alternatively, the administrative law judge found that that the incident was a reasonably foreseeable event under the medical instructions given to claimant by Dr. Rodriguez and by his physical therapist; therefore, the incident was a natural and unavoidable result of the first injury. Accordingly, the administrative law judge found that the pool incident does not sever employer's liability for claimant's work-related shoulder condition. *Id*. at 37.

It is well established that, in the absence of negligent or intentional misconduct by claimant, an employer may be held liable for disability occurring during the treatment of a work injury. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Such an injury necessarily arises out of and in the course of employment. *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *see also White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). In this case, the administrative law judge's finding that claimant aggravated his shoulder during the course of performing rehabilitative activity prescribed, or at least impliedly endorsed, by his physical therapist and by Dr. Rodriguez, is rational. We reject employer's contention that the evidence establishes that claimant was playing in the pool with his son when he injured his shoulder. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of the administrative law judge. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS

78(CRT) (5th Cir. 1991). As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's aggravating shoulder injury in May 2000 arose incidental to the medical treatment of his work-related shoulder injury, and that employer is therefore liable for any disability attributable to this incident. *See Mattera*, 20 BRBS 43; *Weber*, 19 BRBS 146.

Employer next challenges the administrative law judge's finding that claimant's claims are not barred for non-compliance with Section 12 of the Act. Section 12(a) of the Act requires that claimant must, in a traumatic injury case, give employer written notice of his injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and his employment.[1] *See Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978). In this case, claimant filed his claim on August 10, 1999, more than 30 days after the date the injury occurred in June 1999. CX 1.

Section 12(d) of the Act, 33 U.S.C. §912(d), provides in pertinent part:

> Failure to give such notice required by Section 12(a) shall not bar any claim under this chapter (1) if the employer . . . or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure [for one of the enumerated reasons]. . . .

Because Section 12(d) is written in the disjunctive, claimant's failure to file a timely notice of injury will not bar a claim if any of three bases is met: employer had actual knowledge of the injury, employer was not prejudiced by the failure to give formal notice, or the district director excused the failure to file. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying*

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[1] Section 12(a), 33 U.S.C. §912(a), states:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . .

on recon. 18 BRBS 1 (1985). Pursuant to Section 20(b), which presumes that claimant timely gave employer notice of his injuries, employer bears the burden of producing substantial evidence that none of these bases applies. 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In this case, the administrative law judge found that employer had actual knowledge of claimant's left knee injury within 30 days of its occurrence on June 9, 1999. The administrative law judge credited medical records showing that claimant presented to UrgiCare on June 9, 1999, complaining of knee pain, and employer's filing on June 22, 1999, of an LS-202 Employer's First Report of Injury Form, which stated that employer first knew of the accident on June 15, 1999. EXs 1 at 2; 10 at 5. The record also contains the transcript of the June 21, 1999, phone conversation between claimant and Ms. Taylor, which discussed claimant's injuring his knee on June 9, 1999. CX 3 at 15-21. Based on this evidence, we hold that the administrative law judge rationally determined that claimant's failure to timely file written notice of the June 9, 1999, knee injury is excused under Section 12(d)(1) inasmuch as employer had actual knowledge of the injury within 30 days of its occurrence.[2] *See Boyd*, 30 BRBS at 218.

We also reject employer's contention that the administrative law judge erred in finding employer was not prejudiced by claimant's filing in August 1999 his notice of his shoulder injury.[3] Prejudice is established when an employer demonstrates that, due to the claimant's failure to provide it with timely written notice of his injury, it was unable to effectively investigate the injury or to provide medical services. *Davis*, 571 F.2d 968, 8 BRBS 161; *Boyd*, 30 BRBS at 218. Conclusory allegations of an inability to investigate the claim while it is fresh will not meet employer's burden. *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). The administrative law judge rationally found that employer had the opportunity to investigate the circumstances of claimant's employment, *i.e.*, the working in tight spaces, as a result of Ms. Taylor's June 21, 1999, interview with claimant. Decision and Order at 38. Moreover, the administrative law judge rationally found that employer had

[2] The administrative law judge did not make a finding as to the date claimant was aware of the relationship between his injury and his employment, which requires that claimant be aware of the effect of his injury on his wage-earning capacity. *See Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984). On June 15, 1999, Dr. Hopper stated claimant could return to his usual work with "minimal knee work" for four weeks. EX 5 at 25. Claimant's notice of injury was not timely as to this date.

[3] Claimant's claim for the back injury is for medical benefits. Claims for medical benefits are never time-barred. *See, e.g., Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on reconsideration *en banc*). Therefore we need not address any contentions concerning the administrative law judge's findings in this regard.

access to claimant's medical records from its own clinic and from OccuMed. EX 11; CX 7. The administrative law judge concluded from this evidence that employer was not hindered in its investigation of claimant's shoulder injury, as it "stemmed from the same incident" as the knee injury. Decision and Order at 39. Employer's allegation on appeal that claimant's inconsistent attribution of his injuries to various incidents does not constitute substantial evidence that it was unable to investigate claimant's injuries or to provide medical services. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer was not prejudiced by claimant's lack of timely written notice of his claim for a shoulder injury. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989). Therefore, claimant's claims are not barred by operation of Section 12.[4]

Employer next challenges the administrative law judge's award of compensation for temporary total disability for claimant's left knee injury from June 15 to July 21, 1999. Employer asserts that claimant was never restricted from returning to work during this period. The administrative law judge credited Dr. Hopper's imposition of work restrictions on June 15 and his referring claimant for physical therapy. Decision and Order at 21. The administrative law judge credited claimant's testimony that employer did not provide work within Dr. Hopper's restrictions, payroll records showing limited employment from June 18 to July 23, 1999, Dr. Hopper's releasing claimant to return to work on July 21, 1999, and claimant's returning to work the next day. Decision and Order at 30-31; *see* Tr. at 26-28; CXs 3 at 18; 5 at 3; 15 at 78-103; EXs 5 at 18-20; 10 at 5. The administrative law judge therefore rationally found that claimant was unable to work from June 15 to July 21, 1999, due to his work-related knee injury. *See Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); see *generally Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). We affirm the administrative law judge's award for temporary total disability during this period as it is supported by substantial evidence.

Employer next argues that the administrative law judge erred by not finding that it established the availability of suitable alternate employment retroactive to the date of maximum medical improvement on December 12, 2001. In his decision, the administrative law judge credited the labor market survey conducted by employer's

[4] Thus, any error in the administrative law judge's failure to determine claimant's "date of awareness" for purposes of Section 12(a) is harmless. We note, however, that the administrative law judge's finding that claimant's shoulder symptoms became symptomatic in August 1999 could lead to the conclusion that claimant's notice of injury was timely filed on August 10, 1999, as the specific date of an accident or event is not necessarily the claimant's date of awareness. *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 16 BRBS 100(CRT) (5th Cir. 1984).

vocational consultant, Joe Walker, on May 9, 2003, to find that employer established the availability of suitable alternate employment at that time. It is well established that a showing of suitable alternate employment at a later date may not be applied retroactively to the date the injured employee reached maximum medical improvement; an injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on reconsideration). However, an employer may retroactively establish that suitable alternate employment was actually available on the date the injured employee reached maximum medical improvement. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002). In this case, the administrative law judge found suitable jobs identified in the labor market survey as a buffet server, housekeeper, and two positions as a kitchen helper. Decision and Order at 44-45. The labor market survey indicates that some of these positions may have been available as of the date of maximum medical improvement on December 12, 2001. EX 12 at 26-28. As this evidence could establish the availability of suitable alternate employment at that time, we vacate the administrative law judge's award of compensation for permanent total disability from December 12, 2001, to May 8, 2003. On remand, the administrative law judge should address employer's labor market survey and determine whether employer retroactively established the availability of suitable alternate employment.

Employer challenges the administrative law judge's finding that it must provide medical treatment for claimant's knee, back and shoulder injuries as of August 18, 1999. Specifically, employer asserts that the administrative law judge erred by finding that employer refused claimant's request for medical treatment of his back condition at that time. Alternatively, employer argues that the administrative law judge erred by finding it liable for medical treatment related to claimant's shoulder and knee injuries based on its denying treatment for claimant's back injury.

Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical services necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. Section 7(d) of the Act, 33 U.S.C. §907(d), states the prerequisites for employer's liability for payment or reimbursement of medical expenses incurred by claimant. Specifically, in order to be entitled to payment for medical treatment, claimant must first request employer's authorization for the medical services performed by any physician, including claimant's initial choice. *See Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Under Section 7(d), an employee is entitled to recover medical expenses if he requests employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary for treatment of the work injury. *See Schoen v. U.S. Chamber of Commerce*,

30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also 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); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

The administrative law judge found that claimant presented to employer's first aid station on August 6, August 11, and August 12, 1999, complaining of back, shoulder and bilateral knee pain. CX 7 at 2-4. The administrative law judge summarized medical records from OccuMed where claimant was examined on August 12 and August 18, 1999. EX 11. Specifically, these records note that employer's claims representative, Ms. Taylor, would not authorize further medical treatment until she reviewed their medical notes, Dr. Cunningham's informing claimant there was no authorization for additional treatment that day, claimant's requesting consultation with a neurologist, and Dr. Cunningham's informing claimant that he would have to pay for any treatment provided by a neurologist. EX 11 at 6. The administrative law judge found that these records establish that authorization for medical treatment was requested, but denied by Ms. Taylor, and that this denial was communicated to claimant. Accordingly, the administrative law judge concluded that claimant is entitled to medical care for his work-related left knee, back and shoulder injuries from August 18, 1999 when employer denied claimant's request for such care. Decision and Order at 48.

The administrative law judge rationally found that that employer refused to authorize treatment for claimant's back and shoulder injuries. The administrative law judge found that employer referred claimant to OccuMed on August 12, 1999, after he reported injury to his back, right shoulder and knees that morning at employer's on-site first aid clinic. Decision and Order at 7; *see* CX 7 at 1, 4, 6. The medical records from OccuMed credited by the administrative law judge further note claimant's complaint of back pain radiating to his right shoulder and right leg, and the initial diagnosis of a back strain. EX 11 at 2. Claimant returned to OccuMed on August 18, 1999, with the same complaints. Claimant also reported that the radiating back pain had progressed down his arm from his right shoulder, and caused his right hand to become numb. EX 11 at 5. The note of the conversation between a representative of OccuMed and Ms. Taylor further states that OccuMed requested authorization for more x-rays and an MRI, and Ms. Taylor responded by requesting their medical records, by directing OccuMed to send claimant home, and by informing OccuMed she would let them know if they could continue to treat claimant. *Id*. at 6. Based on this evidence rationally credited by the administrative law judge, we reject employer's argument that claimant sought treatment only for his back condition, as claimant also reported right shoulder and arm symptomatology. Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant requested and employer refused authorization for treatment of claimant's back and shoulder conditions. *See Pozos*, 31 BRBS 173. Thus, we affirm the finding that employer is liable for medical benefits for

claimant's shoulder injury, as well as for his back injury contingent upon a finding on remand of a causal relationship between claimant's back injury and his employment.

However, we agree with employer's contention that the administrative law judge must reconsider employer's liability for the treatment claimant obtained for his left knee injury. The medical records from OccuMed on August 18, 1999, note a request to employer to authorize x-rays and an MRI related to claimant's shoulder and back complaints. There is no specific request for treatment for claimant's left knee injury at this time. EX 11 at 5, 7. Employer's mere knowledge of claimant's pain does not create an obligation to pay for medical care in the absence of a request for treatment. *See Shahady v. Atlas Tire & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982). On remand, the administrative law judge should make findings as to whether claimant requested treatment for his knee injury and/or whether employer's denial of treatment for claimant's back and shoulder injuries renders it liable for the treatment claimant obtained for knee injury.

Employer's only contention on appeal regarding the fee awards of the administrative law judge and district director is that they should be stayed pending the outcome of its appeal on the merits. It is well established that a fee award is not "final" for purposes of payment until all appeals are exhausted. *See generally Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982). In view of the Board's remanding this case for reconsideration on several issues, the administrative law judge and the district director should consider whether their fee awards are reasonable in view of any decrease in the award of benefits. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, we vacate the administrative law judge's finding that employer is liable for medical benefits for claimant's left knee and back injuries, and the case is remanded for further findings consistent with this decision. The case also is remanded for further findings as to the date employer established the availability of suitable alternate employment. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge and the district director should reconsider the amount of their attorney's fee awards if claimant obtains a lower award on remand. In all other respects, the fee awards are affirmed.

SO ORDERED

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge