

MANUEL DUPRE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TRICO MARINE OPERATORS,)	DATE ISSUED: <u>Nov. 21, 2000</u>
INCORPORATED)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Granting Motion for Reconsideration and Amending Previous Order, and Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Michael J. Samanie (Law Offices of Michael J. Samanie), Houma, Louisiana, for claimant.

Kaye N. Courington and Scott B. Kiefer (Duncan & Courington), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Order Granting Motion for Reconsideration and Amending Previous Order, and Supplemental Decision and Order Awarding Attorney Fees (98-LHC-2666) of Administrative Law Judge Richard D. Mills 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 Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was hired by employer as a night foreman to supervise repair work on various vessels. He alleges that he hurt his back sometime in April 1998 while lifting or carrying pipe when he and his crew were installing new mud lines aboard the M/V SUWANNEE. Claimant was reprimanded for various reasons and fired on May 26, 1998.

The administrative law judge awarded claimant temporary total disability benefits from May 26, 1998, to March 1, 1999, and permanent total disability benefits from March 1, 1999, to the present and continuing, based on an average weekly wage of \$1,176. The administrative law judge found that claimant gave timely notice of his injury under Section 12 of the Act and, alternatively, that employer did not establish prejudice under Section 12(d) of the Act, 33 U.S.C. §912(a),(d); that claimant's back condition is causally related to the work accident; that claimant established a *prima facie* case of total disability and that claimant's current work as a night watchman is sheltered employment, and that therefore employer did not establish the availability of suitable alternate employment. He then awarded benefits based on an average weekly wage of \$1,176 which he derived pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). On appeal, employer challenges the administrative law judge's findings with respect to all issues. Claimant responds, urging affirmance. Employer has filed a reply brief.

Employer first contends that claimant failed to give timely notice of the alleged injury. Employer maintains that if any incident occurred, it occurred prior to April 23, 1998, and that therefore the written report completed by claimant and his supervisor on May 23, 1998, was too late to be timely as it was more than 30 days following the incident. Employer asserts that there is no credible and specific testimony regarding the specific time when the injury occurred. In the alternative, employer argues that the administrative law judge erred in finding that it was not prejudiced by the late notice.

Under Section 12(a), 33 U.S.C. §912(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his injury and employment, and that the injury will affect his earning capacity. *See Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585, 10 BRBS 863, 865-66 (1st Cir. 1979). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice under Section 12. *See*

Kashuba v. Legion Insurance Co., 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir. 1998), *cert. denied*, 119 S.Ct. 866 (1999); *Lucas v. Louisiana Insurance Guaranty Association*, 28 BRBS 1 (1994). The administrative law judge found that claimant and other witnesses recalled that claimant injured himself while installing mud lines on the M/V SUWANNEE. The administrative law judge further found that employer's time sheets indicate only the vessel on which an employee worked, but not the type of work performed. The administrative law judge found that the time sheets in the record show that claimant worked on the M/V SUWANNEE on April 23, 1998, Cl. Exs. 6-9; Emp. Ex. 5, and that employer did not rebut the presumption that claimant's notice of injury, given on May 23, 1998, was timely, as it provided no evidence that the injury could not have occurred on April 23. As the administrative law judge's finding that claimant's notice of injury was timely is rational and supported by substantial evidence, it is affirmed.

We also affirm the administrative law judge's finding that the claim is not barred under Section 12, on the alternate ground that even if notice was not timely given, employer was not prejudiced by any delay in receiving notice. The failure to provide timely notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d)(1994). Section 12(d)(2) provides that failure to give timely written notice does not bar a claim if employer has not been prejudiced by the delay. *See Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). 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 the claim to determine the nature and extent of the injury or to provide medical services. *Kashuba*, 139 F.3d at 1275, 32 BRBS at 64(CRT); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 16 (1999); *see also I.T.O. Corp.*, 883 F.2d at 422, 22 BRBS at 126(CRT). The administrative law judge credited the statement of Mr. Martinez, employer's risk manager, who testified that the reporting delay caused concern, but did not cause any actual problems in the investigation of the accident, Tr. at 145-146, over that of Mr. Bergeron, who said there were problems because of the uncertainty over the date of the accident, the dispersal of the crew, and the fact that work on the mud lines was completed. The administrative law judge reasoned that carrier's investigator was able to perform an on-site investigation on June 10-17, 1998, and that the witnesses involved were available for interviews. Thus, employer's assertion that it could not investigate details surrounding the alleged injury is unpersuasive in view of the lack of evidence to support it. *Bustillo*, 33 BRBS at 17. Moreover, contrary to employer's assertion, the facts are distinguishable from those in *Kashuba*, where employer did not receive notice of the claim until four months after the alleged injury and nearly six weeks after claimant had surgery of which employer had no knowledge. *Kashuba*, 139 F.3d at 1276, 32 BRBS at 64 (CRT); *I.T.O. Corp.*, 883 F.2d at 422, 22 BRBS at 126(CRT). As employer failed to support its assertion of prejudice in this case, we affirm the administrative law judge's determination that even if claimant's failed to give timely notice, such failure is excused pursuant to Section

12(d)(2). Consequently, we affirm his determination that Section 12 does not bar claimant's claim.

Employer next contends that the administrative law judge erred in invoking the Section 20(a) presumption, 33 U.S.C. §920(a), linking claimant's condition to his employment, asserting that claimant's vague and inconsistent testimony is insufficient to establish the alleged work events in fact occurred. Employer alleges further that even if the presumption was invoked, it was rebutted. In order to be entitled to the Section 20(a) presumption that his condition arose out of employment, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The administrative law judge found that claimant established both elements of his *prima facie* case, inasmuch as he experienced back pain after lifting on the mud lines, and as a July 1998 MRI scan revealed a "protrusion" at the L4-5 level. Moreover, the administrative law judge found that claimant established that an accident occurred or conditions existed which could have caused his back pain, as Dr. Cenac stated that the protrusion had been caused or aggravated by the lifting of the pipes.

After addressing each of employer's arguments, the administrative law judge determined that claimant was an overall credible witness, especially as to the facts surrounding his injury, despite several inconsistencies between his deposition and hearing testimony. The administrative law judge found that any inconsistencies were due to poor memories or to the credibility of other witnesses. It is well-established that an administrative law judge is entitled to weigh the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge rationally considered the inconsistencies in the testimony of the various witnesses and medical reports and thereafter acted within his discretion in crediting claimant's account of the incident in finding that the alleged accident in fact occurred. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994). Such inconsistencies will not undermine automatically the relatively light burden of establishing a *prima facie* case. *See Conoco*, 194 F.3d at 33 BRBS at 191(CRT). Moreover, employer's contention that claimant contacted witnesses and possibly attempted to influence their testimony, even if true, is insufficient to negate the administrative law judge's conclusion that an accident occurred. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's finding that claimant established a *prima facie* case is therefore affirmed.

Upon invocation of the Section 20(a) 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*, 194 F.3d at 684, 33 BRBS at 187 (CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); see also *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. See, e.g., *Conoco*, 194 F.3d at 684, 33 BRBS at 187 (CRT). We affirm the administrative law judge's finding that Dr. Nutik's opinion that the "majority" of the MRI findings were attributable to degenerative changes, and that he "can't absolutely state that it is solely degenerative change," Emp. Ex. 10 at 14, is not substantial countervailing evidence sufficient to rebut the Section 20(a) presumption. See *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT)(5th Cir. 2000). Dr. Cenac's statement that claimant had pre-existing degenerative spinal changes, and that he could not say one way or another whether the disc protrusion pre-existed the April 1998 injury is insufficient to rebut the Section 20(a) presumption as it does not address the pivotal issue of whether the work event aggravated the underlying condition.¹ See *Quinones v. H.B. Zachry, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23 (CRT)(5th Cir. 2000). As it was within the administrative law judge's authority to conclude from the evidence that an accident occurred in the manner described by claimant and that the medical reports relied on by employer do not constitute substantial evidence sufficient to rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that claimant's back condition is causally related to his employment.

Employer next contends that the administrative law judge's finding that claimant is totally disabled is not supported by the weight of the evidence, and that even if claimant cannot return to his usual employment, his current employment as a night watchman demonstrates a level of wage-earning capacity. Claimant bears the initial burden of

¹Employer appears to argue that claimant's pre-existing degenerative back condition could have become symptomatic as a result of claimant's performing a simple task such as gardening or working around the house. Employer has not, however, established any event which might constitute an intervening cause. See, e.g., *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

demonstrating that he cannot return to his usual work in order to establish a *prima facie* case of total disability. See *Bunol*, 211 F.3d at 294, 34 BRBS at 29 (CRT). If he meets this burden, then employer must establish the availability of suitable alternate employment in order to avoid liability for total disability benefits. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). The administrative law judge's finding that claimant is not capable of returning to his usual employment as a welder foreman, based on Dr. Cenac's opinion that claimant is disabled and Dr. Nutik's restricting claimant to light to medium duty work, is supported by substantial evidence and is affirmed.² See *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); Cl. Ex. 16 at 11, 27; Emp. Ex. 10 at 22-23.

Employer next argues that the administrative law judge erred in finding that the night watchman position claimant was performing at the time of the hearing was sheltered employment, and that therefore claimant is totally disabled. A claimant may be found to be totally disabled if his post-injury employment is sheltered. An award of total disability compensation for a period when a claimant is working is the exception rather than the rule. See, e.g., *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Such an award is permitted, however, where claimant's post-injury employment is due solely to the beneficence of the employer and therefore is sheltered work. See, e.g., *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988).

²Employer's argument that the administrative law judge erroneously relied on Dr. Nutik's restrictions which were based not on the work-related injury, but rather on claimant's pre-existing degenerative condition, is irrelevant to a disability analysis and is relevant instead to causation. Once a work-related injury aggravates an underlying condition, the entire resultant condition is compensable. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). The only legally relevant question is whether the work injury is a cause of the disability, not whether it is the only cause. See *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65 (CRT)(5th Cir. 1999). Moreover, Dr. Nutik deposed that he could not say what kind of limitations the pre-existing condition warranted. Emp. Ex. 10 at 21-23.

Sheltered employment has been described as a job for which the employee is paid even if he cannot do the work or a job which is unnecessary to employer's operations and was created merely to place claimant on the payroll. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Sheltered employment does not exist where, for example, the employee is in a job which is necessary, he is capable of performing it, he is protected by a collective bargaining agreement, and he would have to be replaced if he left. *See Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412, 416 (1981).

We hold that the administrative law judge's finding on this issue is supported by the testimony of Mr. Portier, who employed claimant as a night watchman in his cruise-boat building business to watch the yard at night and to keep lists of supplies employees need for the morning. Cl. Ex. 10 at 13. Mr. Portier testified that he pays claimant \$5 per hour in cash, that claimant keeps track of his own hours, and that he has never watched him work. Mr. Portier stated that he and claimant have known each other for about 35 years and socialize several times per year. *Id.* at 8. He testified that the watchman position was a "made-up" job and that he was helping claimant out as a friend; that he does not need a night watchman, because there are people working at night, and that he never had one before and would probably let claimant go when work slacked off. *Id.* at 12. He said that there is no day watchman, but there are two foremen on duty during the day shift who are responsible for security. On the other hand, he did not feel he was paying claimant "for nothing," and feels he is receiving service from claimant and that claimant has helped reduce theft at night, which was previously a problem. He also said that he has two boats left to complete after which he will have to let claimant go because he has no funds to keep paying him. *Id.* at 27. As Mr. Portier's testimony establishes that the job for which claimant is paid is essentially unnecessary to employer's operations and was created to place claimant on the payroll, *see Harrod*, 12 BRBS at 10, it provides substantial evidence for the administrative law judge's finding that this position is sheltered employment. As employer did not present other evidence of suitable alternate employment, we affirm the award of total disability benefits.³

³The administrative law judge granted employer's motion for reconsideration and amended his previous Order granting claimant permanent total disability benefits to an award of temporary total disability benefits.

Employer next contends that the administrative law judge should have determined claimant's average weekly wage based on his earnings during the 52 weeks prior to his April 1998 injury, including claimant's wages as a self-employed shrimp-boat builder which he performed before working for North American, his employer prior to working for employer herein.⁴ Employer argues that the administrative law judge should have calculated claimant's average weekly wage under either Section 10(a) or Section 10(c) of the Act, by dividing by 52 claimant's 1997 and 1998 earnings of \$39,625.80, as reflected in the W-2 forms of record, which includes the time claimant was allegedly self-employed, resulting in an average weekly wage of \$762.19. The administrative law judge stated that he could not determine average weekly wage under Section 10(a) because of the paucity of evidence. We affirm the finding that Section 10(a) is inapplicable as its plain language limits its applicability to cases where an average daily wage can be determined.⁵ See *Browder v. Dillingham Ship Repair*,

⁴Employer does not specify the time period when it alleges claimant was thus employed.

⁵Section 10(a), provides in pertinent part:

(a) If the injured employee shall have worked in the employment in which he was working at the time of injury, ... his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker

33 U.S.C. §910(a). In *dictum*, the Board has noted that Section 10(a) is not applicable where

24 BRBS 216 (1991), *aff'd on recon.*, 25 BRBS 88 (1991); *see generally* *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999)(*decision on recon.*), *aff'd mem.*, 204 F.3d 616, 34 BRBS 12 (CRT) (5th Cir. 2000). 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(a), (b), can be reasonably and fairly applied.⁶ *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997, *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999); *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). The fact-finder has broad discretion in determining average weekly wage under Section 10(c). *See Bunol*, 211 F.3d at 294, 34 BRBS at 29(CRT).

claimant is self-employed in the year prior to injury. *See Roundtree v. Newport Shipbuilding & Repair*, 13 BRBS 863, 867 n.6 (1981), *rev'd and remanded*, 698 F.2d 743, 15 BRBS 94(CRT) (5th Cir. 1983), *rev'd on reh'g en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (1984), *cert. denied*, 469 U.S. 818 (1984).

⁶Neither employer nor claimant argues that Section 10(b) is applicable to the instant case.

In determining average weekly wage under Section 10(c), the administrative law judge relied on claimant's W-2 forms from his employment with employer, which he deemed the most reliable source of information, and which reflected that claimant earned \$22,700.18 from January 12, 1998, to May 26, 1998. The administrative law judge divided this sum by the 19.3 weeks claimant worked for employer, to find that claimant's average weekly wage is \$1,176. He explained that he excluded the time claimant was allegedly self-employed, as there was no evidence other than claimant's vague testimony as to how long he worked or how much he earned during this time in 1997. He also stated that despite claimant's assertion that he worked for 13 weeks for North American in 1997, there is nothing in the record to confirm this statement.⁷ As the administrative law judge has great discretion in determining annual earning capacity under Section 10(c), *Bunol*, 211 F.3d at 294, 34 BRBS at 29(CRT), we hold that the administrative law judge acted within his authority in basing claimant's average weekly wage on his earnings with employer, as reflected by the W-2 forms and dividing by the documented number of weeks those earnings reflect. 33 U.S.C. §910(c).⁸ Accordingly, we affirm the administrative law judge's average weekly wage determination.

Employer lastly appeals the administrative law judge's fee award. Claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of \$25,474.23, representing 93.25 hours of services at \$250 per hour, and \$2,161.73 in expenses. Employer filed objections to the fee petition, to which claimant's counsel filed a reply. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, addressing employer's challenges to specific items on claimant's fee petition, disallowed certain hours, reduced the hourly rate requested to \$175, and awarded a fee \$16,292.98, representing 80.75 hours at \$175 per hour, plus expenses.

Employer alleges that based on the lack of complexity of the case and the geographic

⁷Employer alleges that the administrative law judge erred in considering only claimant's 1998 employment at North American. In fact, the administrative law judge only considered claimant's 1998 employment with employer.

⁸As Section 10(c), 33 U.S.C. §910(c), does not have a "substantially the whole of the year" requirement, we do not address employer's arguments in this regard.

location, the hourly rate should be reduced to \$125. In finding that \$175 was a fair and reasonable hourly rate given counsel's experience and the geographic locality involved, the administrative law judge agreed that the requested hourly rate of \$250 was excessive, but rejected employer's suggested rate of \$125 as too low. The cases employer cites in which the Board affirmed different hourly rates for legal services performed in the New Orleans area are irrelevant to this case due to the discretion afforded the administrative law judge in matters concerning attorney's fees. Moreover, some of the cases are older and therefore do not accurately reflect hourly rates currently charged in the area. For this reason, we reject employer's arguments, as employer has not shown that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of \$175. See *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134 (CRT)(10th Cir. 1997); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). The administrative law judge's fee award is affirmed.

Claimant's counsel requests an attorney's fee of \$3,500, representing 20 hours of services at \$175 per hour, for defending his award against employer's appeal before the Board. Employer objects to the hourly rate and to an "excessive" number of hours, and asks Board to "reduce the attorneys' fees requested to reflect the reasonable and appropriate hourly rate in the New Orleans area and the excessive number of hours billed for responding to the appeal." We find the hourly rate requested to be reasonable for the New Orleans area, and as employer's objections are conclusory and unsupported, we award claimant's counsel the entire requested fee of \$3,500, as it reasonable for the necessary work done before the Board in defending against employer's appeal. 33 U.S.C. §928; 20 C.F.R. §802.203; *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); *see generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23 (CRT) (5th Cir. 2000); *Conoco*, 194 F.3d at 684, 33 BRBS at 187(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Granting Motion for Reconsideration and Amending Previous Order, and Supplemental Decision and Order Awarding Attorney Fees are affirmed. Claimant's counsel is awarded a fee of \$3,500 for work performed before the Board, to be paid directly to counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge