BRB Nos. 92-1162 and
92-1162A

ESTEL L. NORFLEET	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
AMERICAN BUREAU OF SHIPPING	)	
	)	
and	)	DATE ISSUED:
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits, Decision on Motion for Reconsideration, Supplemental Decision and Order Granting Attorney Fees and Decision on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Ed W. Barton, Orange, Texas, for claimant.

Charles F. Herd, Jr. (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and the Decision on Motion for Reconsideration, and employer cross-appeals the Supplemental Decision and Order Granting Attorney Fees and the Decision on Motion for Reconsideration (90-LHC-2614) of Administrative Law Judge Rudolf L. Jansen 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 if they 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 injured on February 5, 1986, while working for employer as a marine surveyor. The injury occurred while claimant was on a ship inspecting the inside of a tank, and the scaffolding claimant was standing on collapsed, causing claimant to fall into the tank and land on his hip. Claimant testified that he told his superintendent that he had fallen, that he did not know if he was hurt, but that he thought he was okay, and that he did not believe that he had broken any bones. Claimant also testified that the day after the injury, when he reported to work, he told his immediate supervisor, Mr. Conell, about the accident, and stated he had some bruises and soreness. Claimant testified that he had constant pain in his hip since the February 1986 fall but it was not until October 22, 1986 that claimant felt compelled to seek medical help due to the pain, and he began to receive regular medical treatment for his hip in January 1987. Claimant underwent a hip replacement on June 17, 1987, returned to work for employer with restrictions in September 1987, and retired on June 1, 1988. Claimant testified that he first informed employer in writing that his hip problem might be work-related on January 5, 1988 in a letter addressing his retirement options. Claimant filed a claim for compensation on August 4, 1988.

In the Decision and Order - Awarding Benefits, the administrative law judge found that claimant's hip condition was work-related but that claimant did not give employer timely notice of his injury pursuant to Section 12 of the Act, 33 U.S.C. §912, and therefore was not entitled to disability benefits. The administrative law judge found, however, that claimant is entitled to past and future medical expenses. Claimant filed a Motion for Reconsideration which the administrative law judge summarily denied. In a Supplemental Decision and Order Granting Attorney Fees, which he amended in a Decision on Motion for Reconsideration, the administrative law judge awarded claimant an attorney's fee of $12,333.75 representing 74.75 hours of services at an hourly rate of $165 and $1,983.12 in costs.

On appeal, claimant contends that the administrative law judge erred in finding that he did not give timely notice pursuant to Section 12. BRB No. 92-1162. Employer responds, urging affirmance. Employer cross-appeals, contending that the administrative law judge's attorney's fee award is excessive given that claimant obtained only medical benefits. BRB No. 92-1162A. Claimant responds, urging affirmance.

The administrative law judge found that claimant's notice of injury was untimely pursuant to Section 12 because claimant did not give written notice to employer of his injury until August 1988, nearly two and one-half years after the accident occurred. The administrative law judge found that claimant's testimony that he informed his superintendent and Mr. Conell of his fall was credible, but found that because claimant merely informed employer that he suffered bruises and did not inform him of the extent of the injury or that he required medical treatment, employer had no knowledge of the extent of claimant's injury within 30 days of the date of the accident. The administrative law judge further noted that claimant sought coverage for medical treatment of his hip from his group health insurance thereby precluding employer from having knowledge of the work-relatedness of claimant's hip condition. 33 U.S.C. §912(d)(1) (1988). The administrative law judge also stated that there is no evidence that employer was not prejudiced by receiving late notice. 33 U.S.C. §912(d)(2)

(1988). Accordingly, the administrative law judge denied claimant disability benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not meet the filing requirements of Section 12 as he verbally gave employer notice the day after the injury, and since the seriousness of the injury did not manifest itself for several months, he could not be expected to impart any more notice or knowledge to employer than he possessed at the time. Claimant also contends that there is no evidence that employer was prejudiced by his failure to give timely written notice.

Under Section 12(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 the employment and the disability. Under this standard, it has been held that an employee is not injured for the purposes of the statute of limitations until he knows or should know "the true nature of his condition, *i.e.*, that it interferes with his employment by impairing his capacity to work, and its causal relationship with his employment." *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141, 16 BRBS 100, 101(CRT) (5th Cir. 1984).[1] Thus, claimant need not give notice of his injury until he is aware that his work-related injury is impairing his earning capacity. *See Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). In the absence of 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 Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Claimant's failure to give timely notice is excused if employer had knowledge of the injury or employer was not prejudiced by the failure to give proper notice. 33 U.S.C. §912(d) (1988).

In the instant case, the administrative law judge erroneously calculated the timeliness of claimant's notice of injury from the date of the February 1986 accident when the standard to be applied is whether claimant gave timely notice within 30 days of the date he became aware that his hip injury was impairing his earning capacity. Because the date of awareness and the timeliness of claimant's notice from that date are questions of fact, we must remand the case for the administrative law judge to make the appropriate determinations under the correct criteria. If, on remand, the administrative law judge again finds that claimant's notice of his injury was untimely, he must determine whether the untimely notice is excused either because employer had knowledge of the work-related injury following claimant's awareness thereof or was not prejudiced by claimant's

[1]Although the statement in *Lunsford* was made in reference to the filing requirements of Section 13 of the Act, 33 U.S.C. §913, the United States Court of Appeals for the Ninth Circuit has noted that the language of Section 12 mirrors that of Section 13. *See, e.g., Abel v. Director, OWCP*, 932 F.2d 819, 821 n.4, 24 BRBS 130, 135 n.4 (CRT) (9th Cir. 1991). *See also Stancil v. Massey*, 436 F.2d 724 (D.C. Cir. 1970).

failure to give timely notice bearing in mind employer's burden of proof.[2] *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1992); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1992).

In its appeal, employer contests the attorney's fee awarded to claimant's counsel. Claimant's attorney filed a fee petition for 77 hours of services at a rate of $165 an hour for a total of $12,705 and $1,983.13 in costs. In the Supplemental Decision and Order Granting Attorney Fees, the administrative law judge noted that claimant had obtained medical expenses, and was therefore entitled to an attorney's fee. The administrative law judge granted claimant the amount requested.

Subsequently, the administrative law judge, in a Decision on Motion for Reconsideration amended the fee award. He noted that employer had requested additional time to respond to claimant's fee petition pending the ruling on claimant's Motion for Reconsideration. Employer filed objections to the fee petition after the administrative law judge denied claimant's motion for reconsideration. The administrative law judge found, in retrospect, that employer's request for additional time to file its objections was appropriate, and therefore it was necessary to address employer's objections. Among employer's objections were that the fee award was excessive given that claimant succeeded only in obtaining medical expenses; that claimant's past medical expenses, which were covered mostly by claimant's group health insurer, only came to a few hundred dollars; and that claimant's need for future medical expenses was speculative in that claimant's treating physician, Dr. Weiner, opined that claimant might need another hip replacement in ten or twenty years, or, being in his mid-sixties, might never need one. Employer also objected to the amount of certain services as excessive and contended that the hourly rate should be reduced from $165 to $100.

[2]A mere assertion by employer that it could not investigate the claim when it was fresh is insufficient to establish that it is prejudiced by untimely notice. *See I.T.O. Corp. v. Director, OWCP*, 993 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

In the Decision on Motion for Reconsideration, the administrative law judge disallowed 2.25 hours of services, and awarded a fee of $12,333.75 representing 74.75 hours at an hourly rate of $165, and $1,983.12 in costs. In making his award, the administrative law judge noted that while claimant's need for future surgery is uncertain, if needed, it could be very substantial. Further, the administrative law judge found that claimant's counsel could not have properly represented his client unless he had prepared his case in the fashion that he did, and that the large number of hours devoted to the case were reasonable considering its complexity. The administrative law judge stated that there is no requirement that the amount of the fee awarded be commensurate with claimant's award of benefits.

On appeal, in challenging the attorney's fee award, employer's sole contention is that the amount of the attorney's fee is excessive in view of the fact that claimant's past medical expenses were nominal and his need for future medical expenses is speculative.[3] Employer notes that claimant's past medical expenses were covered by his group health insurance and that claimant never filed a claim for past medical expenses.[4] Additionally, employer notes that Dr. Weiner testified that claimant required only annual examinations and possibly might need a hip replacement within ten years but might never need one. Employer contends that the attorney's fee awarded should not exceed $1,500, which approximately represents the cost of deposing Dr. Weiner and some trial costs.

In the time since the administrative law judge entered his fee award, the United States Court of Appeals for the Fifth Circuit has held that an award of an attorney's fee must be commensurate with the degree of claimant's success. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). *See also Hensley v. Eckhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). In *Baker*, a case in which the claimant had no compensable disability, but was awarded medical benefits, the court vacated the award of future medical benefits for lack of an evidentiary foundation. The court stated that if on remand medical benefits were awarded, the attorney's fee award must be tailored to reflect claimant's limited success, *i.e.*, the denial of his claim for disability benefits and the grant of medical expenses. *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT). In light of this case law, we vacate the administrative law judge's fee award. On remand, if the administrative law judge again finds that the claim is barred by Section 12, he should reconsider the attorney's fee petition pursuant to *Baker* and award a fee commensurate with the degree of claimant's success and the other relevant factors as set forth in 20 C.F.R. §702.132(a).

Accordingly, the Decision and Order - Awarding Benefits and the Decision on Motion for Reconsideration are vacated with respect to the administrative law judge's findings under Section 12 and the case is remanded for further consideration in a manner consistent with this opinion. In all other respects, they are affirmed. The Supplemental Decision and Order Granting Attorney Fees and

[3]Employer specifically states that it does not challenge the award of medical benefits.

[4]Claimant concedes that he did not request reimbursement for past expenses.

Decision on Motion for Reconsideration are vacated and the case is remanded for further consideration of the attorney's fee consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge