BRB No. 95-1401

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

Appeal of the Decision and Order On Remand - Awarding Benefits, 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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Awarding Benefits, Supplemental Decision and Order Granting Attorney Fees, and 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).[1] 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).

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[1]For purposes of the one year period referenced in Public Laws 104-134 and 104-208, the Board considers the date the last appeal was filed to be controlling. In this case, claimant's appeal of the administrative law judge's fee award, BRB No. 95-1401S, was filed on February 2, 1996.

This case is on appeal to the Board for the second time. On February 5, 1986, claimant, a marine surveyor, injured his left hip after he fell 12 to 14 feet from a scaffold while inspecting a ship. Claimant subsequently underwent hip replacement surgery on June 17, 1987. In his initial Decision and Order dated October 22, 1991, 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, however, found that claimant is entitled to past and future medical expenses. The administrative law judge summarily denied claimant's Motion for Reconsideration. Subsequently, the administrative law judge issued a Supplemental Decision and Order Granting Attorney Fees and a Decision on Motion for Reconsideration which awarded claimant's counsel an attorney's fee of $12,333.75, representing 74.75 hours of legal services at an hourly rate of $165 and $1,983.12 in expenses.

In *Norfleet v. American Bureau of Shipping*, BRB Nos. 92-1162/A (June 22, 1994)(unpublished), the Board vacated the administrative law judge's Section 12 findings as the administrative law judge erroneously calculated the timeliness of claimant's notice of injury from the date of the 1986 accident instead of from the date of claimant's awareness that his work-related hip injury was impairing his earning capacity. The Board remanded the case to the administrative law judge to determine claimant's date of awareness and whether claimant's notice of injury was timely. If, on remand, the administrative law judge again found that claimant's notice of injury was untimely, the administrative law judge was instructed to determine whether the untimely notice is excused either because employer had knowledge of the work-related injury or was not prejudiced by claimant's failure to give timely notice. *See* 33 U.S.C. §912(d)(1988). With regard to the attorney's fee, the Board vacated the administrative law judge's award in light of *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993)(holding that an award of an attorney's fee must be commensurate with the degree of claimant's success); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983). On remand, the administrative law judge was instructed to award a fee commensurate with the degree of claimant's limited success and the other relevant factors set forth in 20 C.F.R. §702.132(a) if the administrative law judge again found that the claim is barred by Section 12.

In the Decision and Order on Remand - Awarding Benefits dated March 21, 1995, the administrative law judge held that the notice of injury and claim for benefits were untimely pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, after initially finding that claimant's date of awareness was January 23, 1987, the date claimant first sought chiropractic help from Dr. Rosenbaum for his left hip pain. Pursuant to Section 12(d)(1) and (2) of the Act, 33 U.S.C. §912(d)(1), (2), the administrative law judge found that claimant's failure to give timely notice of his injury was not excused as employer did not have knowledge that the injury is work-related and was prejudiced by the lack of timely notice. The administrative law judge also found that claimant's claim for benefits under Section 13 was untimely filed on July 27, 1988, based on his date of awareness finding of January 23, 1987. Consequently, the administrative law judge denied disability benefits but again awarded reasonable and necessary medical expenses due to the work-related

accident. The administrative law judge ordered claimant's counsel to submit an amended fee petition taking into account claimant's limited success on remand.

In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge awarded $3,000 in legal services and $1,983.13 in expenses to claimant's counsel. Because employer had previously paid the attorney's fee of $14,316.87 to claimant's counsel, claimant's counsel was ordered to pay employer the difference of $9,333.74. The administrative law judge denied claimant's Motion for Reconsideration of the attorney's fee award in a Decision on Motion for Reconsideration.[2]

In the current appeal, claimant challenges the administrative law judge's denial of disability benefits and contends that the administrative law judge erred in finding that claimant's notice of his injury and claim for benefits were untimely pursuant to Sections 12 and 13. Claimant also challenges the administrative law judge's award of an attorney's fee.[3] Employer responds in support of the administrative law judge's denial of disability benefits and award of an attorney's fee.

We first address claimant's challenges to the administrative law judge's denial of disability benefits. Sections 12 and 13 provide that in the case of a traumatic injury, as here, the notice of injury and claim for benefits must be given and filed within 30 days and one year, respectively, after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware that his work-related injury impairs his earning capacity. *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141, 16 BRBS 100, 101 (CRT)(5th Cir. 1984). Under Section 20(b) of the Act, 33 U.S.C. §920(b), there is a presumption that the notice of injury and claim for benefits were timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Claimant's failure to give timely notice of his injury 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)(1), (2)(1988). Mere knowledge of a fall cannot confer knowledge of a work-related injury when employer was told claimant was not injured, as knowledge under Section 12(d)(1) requires that employer have knowledge of the work-relatedness of the injury, or sufficient facts such that a reasonable person would conclude that compensation liability was possible. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978); *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986). Prejudice under Section 12(d)(2) is established where employer demonstrates 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 alleged illness or to provide medical services. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). A general, conclusory claim of prejudice is

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[2]The administrative law judge also issued an Erratum to his Supplemental Decision and Order Granting Attorney Fees which corrected a typographical error concluding that his award was for $3,000 in legal fees and not $2,000 as stated in the first full paragraph of page 6 of his attorney's fee award.

[3]Claimant, however, does not challenge the administrative law judge's award of expenses in the amount of $1,983.13.

insufficient. *I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

Claimant initially contends that his failure to give timely notice of his work-related injury is excused as his conversation with his supervisor, Mr. Conell, the day after the accident is sufficient to establish that employer had knowledge of claimant's work-related injury pursuant to Section 12(d)(1). We disagree. In determining whether claimant's February 6, 1986, conversation with Mr. Conell conferred knowledge on employer, the administrative law judge discussed claimant's testimony with respect to this issue. Decision and Order on Remand at 6, 8. Claimant testified that he talked to Mr. Conell the day after the accident. Claimant told him that he had fallen on a vessel, but thought that he was okay and continued to work. Emp. Ex. 17 at 66-67; Tr. of February 14, 1991 at 136. Claimant may have indicated to Mr. Conell that he did not need any medical treatment from the accident. Emp. Ex. 17 at 69-70. Based on this testimony, the administrative law judge rationally concluded that claimant's conversation with Mr. Conell on February 6, 1986 did not confer knowledge of a work-related injury to employer such that employer should further investigate.[4] *See Davis*, 571 F.2d at 968, 8 BRBS at 161; *Kulick*, 19 BRBS at 115; *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986). Consequently, we affirm the administrative law judge's finding pursuant to Section 12(d)(1) that claimant was not excused from his failure to give employer timely notice of his injury because employer did not have knowledge of the work-related injury.

Claimant next contends that the administrative law judge erred in finding that employer was prejudiced, pursuant to Section 12(d)(2), by claimant's failure to provide timely notice of his injury. Claimant's contention has merit. With respect to this issue, the administrative law judge found that prejudice had been demonstrated based on employer's problems in locating witnesses[5] and on the fact that employer did not have the opportunity to have claimant examined prior to his surgery to determine the nature of claimant's hip problem and whether there was a relationship between his condition and his earlier fall. Decision and Order on Remand at 8-9. Contrary to the administrative law judge's findings, however, employer's problems in locating witnesses to the accident are not relevant to establishing prejudice in this case as the fact that an accident occurred is not disputed. Therefore, we cannot affirm the administrative law judge's finding of prejudice based on employer's problems in locating witnesses. *Williams*, 19 BRBS at 73.

Neither can we affirm the administrative law judge's finding that prejudice was established because employer did not have the opportunity to examine claimant prior to his surgery on June 17, 1987. The issue of whether employer was prejudiced is inextricably linked to claimant's date of awareness, as employer must demonstrate it was prejudiced by the lack of timely notice, and notice is untimely if not received within 30 days of awareness. In this case, employer's claim that the

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[4]Moreover, the administrative law judge also noted that claimant certified on his group health insurance form that his injury was not work-related. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989).

[5]In fact, Mr. Conell died prior to the hearing in this case. Decision and Order on Remand at 9.

passage of time interfered with its rights to have claimant examined prior to his June 1987 surgery thus requires a determination as to whether the administrative law judge's finding that claimant's awareness occurred on January 23, 1987, can be affirmed.

Upon review of the evidence of record under the standard of when claimant became aware that the work-related injury impaired his earning capacity, *see Lunsford*, 733 F.2d at 1139, 16 BRBS at 100 (CRT), the administrative law judge's finding that claimant's date of awareness occurred on January 23, 1987 cannot be affirmed. As a result, we must vacate the administrative law judge's finding that employer was prejudiced by the lack of timely notice, and we remand the case for further findings.

The records from Dr. Rosenbaum, claimant's chiropractor, upon which the administrative law judge relied, do not establish that claimant was aware that the work-related injury impaired his earning capacity but rather establish that there was no relationship. In response to the question on a health history form, "Are symptoms a result of a specific incident . . . .?", claimant answered, "Remembers no specific incident - gradually happened. Fall about [a] year ago - sees no relation to this problem - sore and bruises." Emp. Ex. 6. On April 29, 1987, claimant first saw Dr. Weiner, an orthopedic surgeon, who opined that claimant's fall accelerated and/or aggravated his osteoarthritic condition. Emp. Ex. 14. From the date of the work-related hip injury on February 5, 1986, until the date of his hip replacement surgery on June 17, 1987, claimant continued to work at his regular surveying position with employer. Thus, until that date, claimant had no impairment of his earning capacity. Contrary to the administrative law judge's finding, it appears more likely that claimant was aware that his work-related injury impaired his earning capacity as early as June 17, 1987, at the time of his hip replacement surgery, or as late as September 8, 1987, when Dr. Weiner returned him to work with restrictions. *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT)(9th Cir. 1991); Emp. Exs. 14 at 10, 15 at 56-57.

Although the administrative law judge's error in finding the date of awareness to be January 23, 1987 is harmless as to the fact that claimant did not give employer timely notice of the injury within 30 days,[6] it is not harmless as to the administrative law judge's finding that employer was prejudiced by claimant's failure to give timely notice as employer could not have been prejudiced by being unable to examine claimant pre-surgery if claimant was not aware that his work-related injury impaired his earning capacity until at least the date of his hip replacement surgery on June 17, 1987. We, therefore, vacate the administrative law judge's findings with respect to the date of awareness. On remand, the administrative law judge must discuss the evidence in determining the date claimant became aware that his work-related injury impaired his earning capacity. After determining the date of claimant's awareness, the administrative law judge must also reconsider whether employer was prejudiced by claimant's failure to provide timely notice of his injury.

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[6]The administrative law judge found that employer received formal written notice of claimant's work-related hip injury on January 5, 1988. Decision and Order on Remand at 3-4; Cl. Ex. 3 at 1-2.

In light of our remand for further findings concerning Section 12(d)(2) and claimant's date of awareness, we also vacate the administrative law judge's findings pursuant to Section 13 which are based on his Section 12 findings. *See* Decision and Order at Remand at 9-10. On remand, the administrative law judge must additionally determine whether claimant's claim for benefits is timely in light of his date of awareness findings. If, on remand, the administrative law judge finds that the claim is not barred by Section 12, this claim for benefits may be timely filed depending on the administrative law judge's date of awareness finding.[7]

We next address claimant's challenge to the administrative law judge's award of an attorney's fee. Claimant contends that the administrative law judge erred in awarding a fee of $3,000 because the administrative law judge offered no explanation for this amount and failed to recognize that the right to medical benefits is substantial. We disagree. In awarding a fee of $3,000, the administrative law judge considered the factors enumerated in 20 C.F.R. §702.132 and the fact of claimant's limited success on remand, as instructed by the Board in its Decision and Order. *Norfleet*, slip op. at 5; Supplemental Decision and Order at 3-6. The administrative law judge acted within his discretion in disallowing all time after the initial award of medical benefits on December 19, 1991, as claimant did not obtain any further benefits after that date. Supplemental Decision and Order at 3. Contrary to claimant's contentions, the administrative law judge realized that the right to medical benefits was a substantial right and acted in accordance with *Hensley* and *Baker* in awarding a reasonable fee without computing the number of hours by an hourly rate. *See Baker*, 991 F.2d at 163, 27 BRBS at 14 (CRT); *see also Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566 (1992); *Hensley*, 461 U.S. at 424; *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); Supplemental Decision and Order at 3-6. Consequently, we affirm the administrative law judge's award of an attorney's fee if the administrative law judge on remand again finds that the claim is barred by either Section 12 or Section 13. However, if the administrative law judge awards disability benefits on remand, he must reconsider the award of an attorney's fee in light of claimant's improved success.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is vacated with respect to the administrative law judge's findings under Sections 12(d)(2) and 13, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's findings with respect to Section 12(d)(1) are affirmed. The Supplemental Decision and Order Granting Attorney Fees and Decision on Motion for Reconsideration are affirmed if the administrative law judge again finds on remand that the claim is barred.

SO ORDERED.

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[7]Based on our affirmance of the administrative law judge's finding that employer did not have knowledge of the work-related injury under Section 12(d)(1), we reject claimant's argument that his claim was timely filed because no report was filed by employer pursuant to Section 30(a) of the Act, 33 U.S.C. §930(a). *See* 33 U.S.C. §930(f). Employer could not file a Section 30(a) report if it did not have knowledge of the work-related injury. *See Steed v. Container Stevedoring Co.*, 25 BRBS 210, 218 (1991).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge