BRB Nos. 07-0295
and 07-0295A

D.G.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 09/25/2007
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order–Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker, & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denying Benefits (2006-LHC-00816) of Administrative Law Judge Alan L. Bergstrom 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).

Claimant was hired by employer in 1979 as a pipefitter, a position which required her to wear steel-toed boots. Claimant testified that, beginning in 1998, she experienced pain in her right foot and sometime later in her left foot. She testified that she began attending classes at a technical institute in 1998 in order to change jobs to "relieve" her foot pain. In 1999, after she received her associate degree in computer-aided drafting, claimant applied for a transfer to a drafting job in employer's design department. Claimant received this transfer on June 12, 2000, and her status was converted from hourly to salaried. Her drafting position was performed in an office setting and allowed her to wear "comfortable" shoes. Because claimant's bilateral foot pain continued, she sought treatment from a podiatrist, Dr. Bava, in October 2002. Dr. Bava diagnosed a bunion deformity on both feet. Due to claimant's representation to Dr. Bava that conservative measures had not worked for her and she was interested only in surgery, Dr. Bava performed surgery in December 2002 on claimant's right foot, and in January 2004 on her left foot. Thereafter, in a report dated May 18, 2005, to claimant's counsel, Dr. Bava stated that claimant's shoe gear at work, "may have aggravated her pain and deformity." CX 2.

Claimant filed a claim for benefits under the Act on June 14, 2005. CXs 1, 2; EX 2. Claimant sought compensation for periods of total disability and medical benefits resulting from the surgeries. Employer controverted the claim, asserting that claimant failed to give it timely notice of her injury pursuant Section 12(a), 33 U.S.C. §912(a), and that the claim was untimely filed, pursuant to Section 13(a), 33 U.S.C. §913(a).

In his Decision and Order, the administrative law judge found that claimant was aware, or should have been aware, of the work-relatedness of her foot condition by October 2002, when she first sought medical treatment for her foot pain. The administrative law judge also found that claimant had reason to know of the impairment to her earning capacity at the time she saw Dr. Bava in October 2002 when the need for surgery and a period of recovery were addressed. Decision and Order at 19; CXs 1, 4 at 6; EX 1. The administrative law judge found that claimant's notice of injury and claim thus were untimely filed on June 14, 2005. Decision and Order at 19. Accordingly, the administrative law judge denied the claim for benefits. With regard to claimant's claim for medical benefits, the administrative law judge found that employer is not liable for claimant's treatment pursuant to Section 7, 33 U.S.C. §907, because she failed to seek employer's authorization for any medical treatment.

On appeal, claimant contends the administrative law judge erroneously concluded she was aware of the work-relatedness of her condition in October 2002 for purposes of Sections 12 and 13. Thus, claimant contends the administrative law judge erred in

finding her disability claim time-barred.[1] Employer responds, urging affirmance of the administrative law judge's findings in this regard. In its protective cross-appeal, employer asserts that claimant's bunions were not work-related and/or that claimant's injury did not occur on a maritime situs. Claimant has not responded to employer's cross-appeal.

Claimant contends the administrative law judge erred in finding that she was aware of the work-relatedness of her foot condition in October 2002. She contends she did not have knowledge of the causal relationship between her wearing of steel-toed work boots and her bunions until May 18, 2005, when Dr. Bava so opined, and she filed her claim within thirty days of this date. Cl. Br. at 3-4. In this regard, claimant notes that she testified, as corroborated by Dr. Bava, that they never discussed the work-relatedness of her condition in October 2002. Claimant also contends that the fact that her work made her feet more painful is insufficient to attribute to her knowledge of a causal relationship between her condition and her work.

In a traumatic injury case, Section 12(a) provides that claimant must give employer notice of her injury within 30 days, and Section 13(a) provides that a claimant must file a claim for compensation for her injury within one year of the date she 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 her employment.[2] 33 U.S.C. §§912(a), 913(a). 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 notice of the injury and the claim were timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). "Awareness" for purposes of Sections 12 and 13 occurs when claimant is aware or should have been aware, of the relationship between the injury, the employment, and the disability. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1999); *accord Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 16 BRBS 100(CRT) (5th Cir. 1984); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). A claimant's awareness of the

[1] As claimant does not challenge the administrative law judge's denial of medical benefits based on her failure to request prior authorization for treatment, 33 U.S.C. §907(d), it is affirmed.

[2] We affirm the administrative law judge's finding that claimant's bilateral foot problems did not constitute an occupational disease subject to the one-year notice provision and the two-year statute of limitations as the finding is unchallenged on appeal.

work-relatedness of her injury can arise prior to her being so informed by a physician. *Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *Wendler v. American Red Cross*, 23 BRBS 408 (1990)(McGranery, J., concurring and dissenting); *Pryor v. James McHugh Constr. Co*., 18 BRBS 273 (1986).

We reject claimant's contentions of error. The only issue raised on appeal is the date claimant became aware or should have been aware of the relationship between her foot condition and her work. Claimant concedes she was aware in 1998 or 1999 that her steel-toed work boots caused pain in the same area of her feet that required surgery in 2002 and 2003, *see* Cl. Br. at 3-4; Tr. at 37-38, but avers that this knowledge does not establish she was aware of an actual causal relationship between her bunions and her work until Dr. Bava suggested such a link in 2005. The administrative law judge found that claimant's foot pain, which claimant related to her work boots, *see* Tr. at 27, 37; EX 9 at 21, motivated claimant to seek training for a different type of work in the shipyard that permitted "comfortable" footwear.[3] *Id.* The administrative law judge concluded from this action that claimant exhibited a lack of diligence in failing to tell Dr. Bava in 2002 about the pain caused by her work footwear. He thus concluded that claimant should have been aware, in the exercise of reasonable diligence, of a relationship between her foot pain and her employment no later than her first visit to Dr. Bava in October 2002.

We affirm the administrative law judge's finding as it is rational, supported by substantial evidence, and in accordance with law. Claimant was not merely aware that her feet hurt while she was at work. She testified that the work boots caused pain and that she changed jobs because of this problem. *Cf. Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979) (insufficient for "awareness" merely to experience pain at work). Thus, the administrative law judge rationally found that claimant should have been aware that her foot pain was related to her employment by the time she sought medical treatment. *Stark v. Washington Star Co*., 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987). That claimant and Dr. Bava did not discuss the possible work-relatedness of claimant's condition until 2005 is not significant in this case, as a claimant can be aware of the work-relatedness of her condition before she is so informed by her physician. *Ceres Gulf*, 111 F.3d 17, 31 BRBS 21(CRT). Moreover, there was no other diagnosis provided to claimant that could have cast doubt on the nature of her condition. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *see also Stark*, 833 F.2d 1025, 20 BRBS 40(CRT). As claimant has not raised any error in the findings of fact and inferences drawn by the administrative law judge, we affirm the finding that the notice

[3] Claimant testified on deposition that "the steel-toed shoe hurt my foot at that time." EX 9 at 21.

given and claim filed in 2005 were untimely. 33 U.S.C. §§912, 913.[4] Therefore, we affirm the denial of benefits.[5]

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[4] Although it is immaterial given our affirmance of the finding that claimant's claim was untimely filed, we note that claimant does not challenge the administrative law judge's findings, pursuant to Section 12(d), that employer did not have knowledge of claimant's injury and was prejudiced by the late notice.

[5] Thus, we need not address the issues raised in employer's cross-appeal.