BRB No. 98-0642

TROY A. BORNE	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
McDERMOTT, INCORPORATED	)	
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Denise A. Vinet (Vinet & Vinet), Baton Rouge, Louisiana, for claimant.

Dennis R. Stevens (Gibbens, Blackwell & Stevens), New Iberia, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-2286) of Administrative Law Judge Lee J. Romero, Jr., 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).

Claimant, who was employed by employer as a shipfitter, alleged that he

suffered a work-related back injury on November 1, 1994, when he sneezed while bending down to lift his 40 pound tool bucket out of his tool box. Claimant testified that he immediately informed his supervisor, Mr. Casteigne, of his injury, and handed him his time card prior to leaving work and going to see his family physician, Dr. Magee. Claimant, who has not worked since the time of the alleged accident, sought total disability compensation under the Act. Employer made no voluntary payments of disability compensation or medical benefits.

In his Decision and Order, the administrative law judge found that claimant established a *prima facie* case under Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not introduce evidence sufficient to establish rebuttal. Accordingly, he found causation established. The administrative law judge further determined that, although claimant did not file a timely notice of injury pursuant to Section 12(a), 33 U.S.C. §912(a), the failure to file such a notice was excused under Section 12(d), 33 U.S.C. §912(d). Accordingly, based on his determination that claimant could not perform his usual work and that employer failed to establish the availability of suitable alternate employment, the administrative law judge awarded claimant temporary total disability compensation from November 1, 1994 until May 31, 1996, the stipulated date of maximum medical improvement, and permanent total disability compensation thereafter. In addition, claimant was awarded medical benefits, interest, a Section 14(e) penalty, 33 U.S.C. §914(e), and adjustments under Section 10(f), 33 U.S.C. §910(f).

On appeal, employer contends that the administrative law judge erred in finding that claimant sustained a back injury arising out of the course and scope of his employment, and in failing to find that the claim was barred by Section 12. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer initially challenges the administrative law judge's determination that claimant established the existence of a work-related accident or injury which could have caused his present back condition. Employer does not dispute that claimant suffered a harm, *i.e.*, back pain, but argues that he did not incur this harm in an accident arising during the course and scope of his employment, as claimant's injury occurred when he sneezed, and the act of sneezing is not a risk involved in, or incidental to, his work duties. Employer further asserts that the administrative law judge erred in finding that claimant sustained a work-related injury based on claimant's testimony that his sneezing could have been caused by the dusty conditions of his employment given that claimant also testified that the accident alleged occurred prior to the time he actually started working. Finally, employer points out that the record reflects that claimant had pre-existing back problems due to a 1992 auto accident, and argues that claimant's testimony attributing his back problems to the alleged work accident is not worthy of belief because it is contradicted by that of his supervisor, Mr. Casteigne, and by the fact that he initially

asserted on a November 8, 1994, claim form for group health benefits, CX-8, that his back had been injured at home.

We reject employer's argument that the administrative law judge erred in finding that claimant injured his back while performing work within the course and scope of his employment. Although employer contends on appeal that the administrative law judge's finding is irrational and not supported by substantial evidence, cites relevant evidence to support its theory, and characterizes claimant's testimony as suspicious and unworthy of belief, the specific arguments it raises amount to no more than an impermissible request for the Board to reweigh the relevant evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

It is well-established that for an injury to be considered to arise in the course of employment, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2). *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95 (CRT)(D.C. Cir. 1985). The Section 20(a), 33 U.S.C. §920(a), presumption applies to this question. *See, e.g., Boyd v. Ceres Terminals*, 30 BRBS 218 (1996); *Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73, 75 (1984). Before the presumption may properly be applied, claimant must establish a *prima facie* case by showing that he suffered some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the present case, in addressing whether claimant sustained a work-related back injury, the administrative law judge noted initially that it was undisputed that claimant suffered from pre-existing back problems. Crediting claimant's testimony that he began experiencing sharp pain in his back on November 1, 1994, when he sneezed while bending down to lift his 40 pound tool bucket out of his tool box, as corroborated by that of his co-worker, Barren Johnson,[1] the administrative law judge

[1]Employer argues on appeal that Barren Johnson's testimony on the key issues does not support claimant's testimony in that he did not recall claimant being hunched over while talking to Carl Casteigne as claimant had claimed. However, the administrative law judge rationally determined that Mr. Johnson's overall testimony corroborates the lifting, sneezing, and complaints of pain by claimant. Decision and Order at 11.

found that claimant had established both the harm and working condition elements of his *prima case,* entitling him to invocation of the Section 20(a) presumption. Although employer argues that the administrative law judge erred in so concluding because claimant's testimony regarding the occurrence of the alleged accident is refuted by that of its foreman, Mr. Casteigne, we disagree. In finding that claimant had sustained the alleged work-related back injury, the administrative law judge specifically considered Mr. Casteigne's testimony that he did not recall claimant's reporting an accident or injury, and that if he had, claimant would have been sent to employer's dispensary and an investigation conducted immediately, neither of which took place. Acting within his discretionary authority, however, the administrative law judge rationally discredited this testimony, finding it vague and characterized by poor recollection. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

The administrative law judge also fully considered and rationally rejected employer's argument that claimant's injury did not arise during the course and scope of his employment because it occurred when he sneezed. In so concluding, he credited claimant's testimony that he had sneezed because of dusty working conditions at employer's facility, and further noted that at the time of the alleged

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Employer also argues that Barren Johnson's testimony should have been disregarded as biased because he was claimant's personal friend, and it makes much ado about the fact that although Mr Johnson testified that he believed that claimant was in severe pain, he did nothing to help him. The administrative law judge, however, acting within his discretionary authority specifically considered and rejected employer's attacks on Mr. Johnson's credibility, finding his testimony to be straightforward and convincing. Decision and Order at 11, n. 2; *see generally Pimpinella v. Universal Maritime Service Inc.,* 27 BRBS 154 (1993).

work accident, claimant was also involved in the exertion of lifting his tool bucket, an action which could have been an independent cause of his injury. In any event, contrary to employer's assertion, the fact that claimant may have been injured when he sneezed would not, in itself, take his injury outside the course of his employment. Employees who act to accommodate personal comforts are not acting outside the course of employment. *See Durrah,* 760 F.2d at 322, 17 BRBS at 95 (CRT); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) .

In addition, the administrative law judge also fully considered, but rejected, employer's argument that the alleged accident is not work related because at the time claimant was merely preparing to go to work. Injuries during off-duty hours are compensable so long as claimant is on the premises for a work-related purpose. *See Wilson,* 16 BRBS at 73. In this case, the administrative law judge found that although claimant reported to work at 6:30 a.m. on the day of the alleged accident and was not scheduled to actually begin working until 6:50, the alleged accident nonetheless occurred during the course of his employment because claimant arrived at employer's facility early that day for the work-related purpose of being present at employer's supervisory lay-out meeting. In addition, the administrative law judge further determined that although claimant initially indicated in his November 8, 1994, claim for weekly indemnity benefits through employer's group health care plan, CX-8, that his injury occurred at home when he awoke, this did not undermine his credibility regarding the occurrence of the alleged accident inasmuch as thereafter on the same claim form he described his work injury in detail and has since done so consistently.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the present case, the administrative law judge considered each of employer's concerns in light of the relevant evidence but nonetheless credited evidence sufficient to establish that the events alleged by claimant did, in fact, occur. As the administrative law judge's findings are supported by substantial evidence, claimant established his *prima facie* case and is entitled to the benefit of the Section 20(a) presumption. As employer does not contest the administrative law judge's determination that it failed to introduce evidence sufficient to establish that claimant's employment did not cause, contribute to, or aggravate his condition, his finding that claimant's back condition is causally related to his employment with

employer is also affirmed.[2] *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 8 (1998).

Employer additionally argues that the administrative law judge erred in finding that the claim was not barred pursuant to Section 12 of the Act. Employer specifically asserts that claimant's failure to file timely notice within 30 days is not excused pursuant to Section 12(d) because it had no actual knowledge of claimant's injury, and it was prejudiced in that it was unable to timely investigate the alleged occurrence.

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. *See Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). 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), which provides alternative bases for

[2]In finding that claimant sustained a work-related back injury, the administrative law judge correctly noted that employer did not introduce any medical evidence that claimant's injury had an etiology other than the event at work. Although the administrative law judge considered employer's evidence refuting the occurrence of the alleged work injury in the context of rebuttal, whereas such evidence should have been considered in determining whether claimant established his *prima facie* case, any error in this regard is harmless, as he weighed the relevant evidence and his ultimate conclusion that claimant sustained a work-related back injury on November 1, 1994, is rational and supported by substantial evidence. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

excuse, including cases where employer had knowledge of the injury or was not prejudiced by the failure to give timely notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). 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 Lucas v. Louisiana Insurance Guaranty Association*, 28 BRBS 1 (1994).

The administrative law judge's finding that this claim is not barred under Section 12 is affirmed because it is rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe*, 380 U.S. at 359. The administrative law judge did not make a determination as to when claimant had the requisite awareness necessary to trigger his duty to provide notice to employer under Section 12(a). Nonetheless, based on his crediting of claimant's testimony that he informed his acting supervisor, Carl Casteigne, of his accident immediately and telephoned Pat Borne, employer's safety representative, to report the accident on either that or the following day, the administrative law judge rationally found that claimant's failure to file timely notice was excused under Section 12(d)(1) inasmuch as employer had actual knowledge of claimant's injury.[3] *Boyd,* 30 BRBS at 221-222. Moreover, inasmuch as the record reflects that employer initiated its investigation of the accident within 45 days of its occurrence, EX-20, the administrative law judge also rationally found that employer failed to introduce any evidence sufficient to establish that it was prejudiced by claimant's failure to provide timely formal notice. *See Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). Inasmuch as the implementing regulation, 20 C.F.R. §702.216, states that "actual knowledge" of the injury is deemed to exist where, as here, claimant's immediate supervisor is made aware of the injury, and a conclusory allegation of an inability to investigate the claim is insufficient to establish prejudice, the administrative law judge's conclusion that Section 12 does not bar claimant's entitlement to benefits in this case is affirmed. *See I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989); *Boyd,* 30 BRBS at 221-222.

Accordingly, the administrative law judge's Decision and Order awarding

[3]The administrative law judge found this conclusion buttressed by the fact that employer had not taken any action against claimant for failing to call-in his absence within 3 days, and inferred that employer obviously had knowledge of the injury by as early as November 8, 1994, at which time, in connection with his claim for indemnity benefits, claimant checked a box on a form indicating that his injury occurred at home, but in the narrative described the injury as occurring when he sneezed at work. EX-8.

benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge