BRB No. 00-0654

QUINTON A. NEAL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: March 27, 2001
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-0504) of Administrative Law Judge Daniel A. Sarno, 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 sought benefits for an injury to his back which he asserted was related to his employment as a crane operator for employer. As a result of his back condition, claimant, who underwent surgery for a herniated disc on February 4, 1999, sought temporary total disability benefits from June 9, 1998, through April 30, 1999, when he returned to his usual employment duties.

In his decision, the administrative law judge determined that the claim is not barred by

Section 12, 33 U.S.C. §912, inasmuch as employer failed to establish that it was prejudiced by claimant's failure to provide timely notice of his injury. 33 U.S.C. §§912(d)(2), 920(b). Next, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to the cause of his back condition and that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from June 9, 1998, through April 30, 1999, and held employer responsible for related and necessary medical expenses incurred after March 14, 1996, under Section 7 of the Act, 33 U.S.C. §907. In his Order Denying Motions for Reconsideration, the administrative law judge denied employer's request to delete the order for payment of medical bills from March 14, 1996.

On appeal, employer challenges the administrative law judge's finding that the instant claim is not barred under Section 12 of the Act; alternatively, employer avers that the administrative law judge erred in determining that claimant is entitled to invocation of the Section 20(a) presumption and that it failed to establish rebuttal of that presumption. Claimant has not responded to this appeal.

We first, address employer's contention that the administrative law judge erred in determining that claimant's claim was not barred by Section 12. In the absence of evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the notice of injury and the filing of the claim were timely. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.,* 23 BRBS 140 (1989). In the instant case, the administrative law judge found that claimant was "aware" for purposes of Section 12 on June 8, 1998. A claim dated August 7, 1998, was subsequently filed, and this claim was the first notice of injury received by employer. Accordingly, claimant did not provide employer with formal notice of his injury within 30 days as required by Section 12(a).[1]

Claimant's failure to give employer timely notice of his injury pursuant to Section 12(a) of the Act is excused if employer had knowledge of the injury or employer was not

[1]In a traumatic injury case such as this one, claimant must give employer notice within 30 days after the date of injury or the time when he was aware, or in the exercise of reasonable diligence or by reason of medical evidence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §912(a); *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

prejudiced by the failure to give proper notice. 33 U.S.C. §912(d)(1), (2). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence 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 illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT)(9th Cir. 1998), *cert. denied*, 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

In addressing this issue in his decision, the administrative law judge specifically found that employer offered no substantial evidence of prejudice to it by claimant's failure to give timely notice of his injury; the administrative law judge concluded, therefore, that employer failed to meet its burden of proving that it was prejudiced by claimant's failure to provide timely notice. Similarly, on appeal, employer summarily asserts that it could not investigate the cause of claimant's alleged injury due to claimant's untimely notice. We reject employer's argument and affirm the administrative law judge's determination that employer was not prejudiced by claimant's failure to provide timely notice. *See Kashuba*, 139 F.3d 1273, 32 BRBS 62 (CRT); *Bustillo*, 33 BRBS 15.

Employer next contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption with regard to claimant's back condition; specifically, employer avers that claimant presented no evidence that bending over can cause or aggravate a herniated disc. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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). Claimant is not, however, required to prove that the working conditions in fact caused the harm; rather, claimant must show only the existence of working conditions which could have conceivably caused the harm alleged.[2] *See Sinclair v. United Food and Commercial*

[2]Employer's argument that the presumption can only be applied to the date listed, *i.e.*,

Workers, 23 BRBS 148 (1989).

June 8, 1998, is misplaced because that is the date upon which claimant's performance of his job duties resulted in his condition becoming disabling; claimant has always contended that he suffered a cumulative injury arising over several months, a contention supported by the medical records.

In the instant case, it is uncontested that claimant suffered a harm, specifically back pain corroborated by a diagnosis of a herniated disc. With regard to the second element of his *prima facie* case, the administrative law judge credited claimant's testimony regarding both the physical requirements of his job[3] and the onset of his back discomfort. The administrative law judge also relied on the records of Drs. Deaton, Grant, Datyner and Kerner, finding they corroborated claimant's description of his job and agreed claimant's work as a crane operator at least aggravated his back condition. 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*, 372 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). As the administrative law judge thus credited ample evidence that claimant's work could have caused his back condition, we affirm the administrative law judge's determination that claimant established his *prima facie* case. Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Sinclair*, 23 BRBS 148.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, aggravated, or rendered symptomatic by his employment. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present substantial evidence sufficient to support the denial of the claim. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir.1997); *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). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the issue of causation based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 270 (1990); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, employer alleges that the opinions of Drs. Skidmore and Nevins constitute evidence sufficient to establish rebuttal of the Section 20(a) presumption. Regarding the testimony of Dr. Skidmore, the administrative law judge found that this

[3]Claimant testified that crane operators, during the course of loading and unloading a vessel, are required to sit in a bent over position for two to four hours so that they can concentrate on the individuals and equipment directly below their crane. HT 33-37.

physician's opinion did not establish rebuttal since it failed to address whether claimant's working conditions aggravated his pre-existing back condition. *See* Emp. Ex. 9. As the administrative law judge's finding accurately depicts this opinion, we affirm the administrative law judge's determination that Dr. Skidmore's opinion is insufficient to establish rebuttal of the Section 20(a) presumption.

Employer next challenges the administrative law judge's determination that the Section 20(a) presumption is not rebutted by the opinion of Dr. Nevins. Specifically, employer avers that the administrative law judge erred in evaluating the credibility of Dr. Nevins' opinion on rebuttal; rather, employer asserts that the administrative law judge should have found the presumption rebutted and proceeded to weigh the evidence of record as a whole. We reject employer's contention of error. The administrative law judge found Dr. Nevins' opinion to be unreliable, and thus insufficient to rebut the presumption that claimant's employment duties aggravated a pre-existing back condition, because that opinion was based on the assumption that claimant's employment was, *inter alia*, slightly less stressful than sitting at home watching television. The administrative law judge, however, credited claimant's testimony regarding the rigors of his job as a crane operator; specifically, that crane operators work two to four consecutive hours bent over, looking through their legs, at the loading and unloading process occurring 200 feet below their cab.[4] We hold that the administrative law judge rationally, and within his authority as trier-of-fact, found Dr. Nevins' opinion to be unreliable because that opinion lacks a proper foundation, specifically, a correct understanding of claimant's employment duties as a crane operator. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *see also Calbeck*, 306 F.2d 693; *John W. McGrath Corp.*, 289 F.2d 403. Given the administrative law judge's finding regarding this opinion, it is not substantial evidence sufficient to support the denial of the claim and thus cannot rebut Section 20(a). All of the remaining medical opinions of record support the administrative law judge's ultimate finding that, at a minimum, claimant's employment duties aggravated his pre-existing back condition.[5] Accordingly, in the absence of any other evidence demonstrating the absence of a causal connection between claimant's back

[4]Moreover, the administrative law judge found that claimant described these employment duties to virtually every physician who examined him.

[5]In this regard, the record reflects that Dr. Deaton, claimant's family doctor, initially diagnosed a chronic lumbosacral back strain due to the sitting position required to operate the crane. CX 15. Dr. Datyner, a physician at the Spine Center to which claimant was referred, opined that claimant's job increased the risk of recurrent herniation and chronic back pain. CX 12. Dr. Grant, a neurosurgeon, opined that claimant's crouching forward for extended periods of time puts added progressive strain on claimant's back. CX 8. Finally, Dr. Kerner, the board certified orthopedic surgeon who performed claimant's laminotomy and discectonmy, testified by deposition that claimant's bent over position at work would either "cause a disc herniation or, if one was present and was otherwise asymptomatic, cause it to become symptomatic." CX 13.

condition and his employment duties as a crane operator for employer, we affirm the administrative law judge's determination that claimant's back condition was work-related. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge