BRB Nos. 96-526
and 96-526A

WILLIE BOYD	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES TERMINALS	)	DATE ISSUED:_____
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (95-LHC-182) of Administrative Law Judge Robert L. Hillyard 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 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).

[1]In cases such as this one involving multiple appeals, the Board considers the one-year period referenced in Public Laws 104-134 and 104-208 to commence on the date of the last appeal. Claimant's cross-appeal in this case was filed on January 5, 1996.

Claimant worked as a forklift driver for employer. According to the facts found by the administrative law judge, on the day of his injury, October 1, 1992, claimant spent time on his break watching television in the locker room. When he noticed a truck waiting to be unloaded, he walked to his forklift which he had parked in Warehouse B. While traversing the short distance, an off-duty co-worker asked him to help start the co-worker's car which was parked on employer's premises. At first reluctant, claimant consented to help because he believed it would take just a few seconds to pour gasoline into the carburetor, aid his fellow employee and avoid a conflict with the employee, who had been exhibiting belligerent behavior. As claimant performed this task, the co-worker, Richard Slawnikowski, started the car. The gas ignited and claimant's upper body was burned. Tr. at 36-37.

While Mr. Slawnikowski got the supervisor, claimant rolled on the ground, put the fire out, and two barge workers helped him sit down on a pallet. The paramedics arrived shortly after claimant's supervisor, Phillip Kvasnicka, and took claimant to the hospital. Tr. at 109-110, 115. Mr. Kvasnicka then questioned claimant's co-workers and filed a written report of the incident the next day. Tr. at 129-130. Claimant suffered second and third degree burns over 15 percent of his total body surface (face, neck, back, right extremity). Cl. Ex. 3; Emp. Ex. 2. He was hospitalized for nearly one month, during the course of which he underwent a skin graft to save his right ear. Claimant returned to his usual job and seniority level approximately six weeks after the incident. Tr. at 38, 124. On June 30, 1993, claimant filed a claim for health benefits, certifying that the injury was not an occupational injury. Cl. Exs. 4, 5. In September 1993, claimant filed a claim under the Act for temporary total disability benefits, medical benefits, and disfigurement benefits. Emp. Ex. 2.

The administrative law judge found that claimant's injury occurred within the course and scope of his employment, as employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. He concluded that claimant's injury occurred within the time and space boundaries of employment and that the injury occurred during an activity which indirectly advanced employer's interest of maintaining amiable working relationships. Decision and Order at 9-12. The administrative law judge also determined that, although claimant did not file a notice of injury pursuant to Section 12(a) of the Act, 33 U.S.C. §912(a), the failure to file such a notice was excused because employer had actual knowledge of the injury and was not prejudiced by the inaction. *Id.* at 13-14. Thus, the administrative law judge awarded claimant temporary total disability and medical benefits. The administrative law judge, however, denied claimant disfigurement benefits, as he found claimant did not have a serious disfigurement. *Id.* at 15. Employer appeals and claimant cross-appeals the administrative law judge's decision.

Employer first contends the administrative law judge erred in concluding that claimant's injury occurred during the course of his employment. Specifically, employer asserts that claimant deviated from his job duties and that the administrative law judge utilized an inappropriate test for determining whether the incident occurred within the course of claimant's employment. Under the Act, an injury occurs within the course of employment if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS

95 (CRT)(D.C. Cir. 1985). The Section 20(a) presumption applies to this question. *Id.; Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73 (1984). If an employee deviates from his work for personal reasons, the activity may not have occurred in the course of employment. *Bobier v. The Macke Co.*, 18 BRBS 135 (1986), *aff'd mem.*, 808 F.2d 834, 19 BRBS 58 (CRT) (4th Cir. 1986). In ascertaining whether claimant's injury occurred within the course of his employment, the administrative law judge applied the general test set forth in the Larson treatise, *The Law of Workmen's Compensation* at §20.00, which provides: "[a]n activity is related to the employment if it carries out the employer's purposes or advances [its] interests directly or indirectly." *See* Decision and Order at 9-10; 1A Arthur Larson, *The Law of Workmen's Compensation*, §20.00 (1996). The administrative law judge found that claimant aided his co-worker so as to avoid a conflict with him and to keep "working peace" which indirectly benefited employer.[2] *Id.* at 12.

Contrary to employer's assertions, the test selected by the administrative law judge for determining whether claimant's injury occurred during the course of his employment is appropriate for use under the Act because it considers the relevant factors. The administrative law judge rationally found that the incident in which claimant was injured satisfied the test's requirements. Specifically, he determined that claimant undertook to aid Mr. Slawnikowski for professional instead of personal reasons because claimant sought to maintain an amiable working relationship, in view of Mr. Slawnikowski's hostile behavior. This conclusion is borne out by the evidence of record credited by the administrative law judge. Tr. at 36, 70; *see also* n.2, *supra*. In fact, Mr. Slawnikowski displayed belligerent behavior to claimant as claimant was returning to his forklift after his break, and claimant testified that for this reason, he stopped to assist Mr. Slawnikowski.

Employer suggests the administrative law judge should have used either the "recreational and social activities" test set forth in Section 22.00 of Larson's treatise or the test relating to acts outside an employee's regular duties which can be found in Section 27.00 of the treatise. Larson, *supra* at §§22.00, 27.00. We reject the suggested use of the Section 22.00 test, as claimant herein was not participating in either a recreational or a social activity. *See, e.g., Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992). The Section 27.00 test, however, pertains to acts outside an employee's regular duties which are undertaken in good faith to advance the employer's interests. It states that unless those acts are positively prohibited, whether or not they are the employee's own assigned work, they are considered within the course of employment. However, "[i]f the aid takes the form of merely helping the co-employee with some matter entirely personal to the co-employee, it is outside the course of employment, unless the deviation involved is insubstantial." Larson, *supra* at §27.15.

[2]As extensively discussed by the administrative law judge, the evidence of record reflects that Mr. Slawnikowski, known to claimant and his co-workers for over twenty years, had recently developed personal problems which made him belligerent to those around him. *See* Decision and Order at 9-12; Tr. at 27-29, 73, 76-78, 87-88, 99-100. The administrative law judge specifically found that employer was aware of Mr. Slawnikowski's disruptive behavior, but nevertheless hired him on an as-needed basis, and that employer, through Mr. Kvasnicka, had heard that Mr. Slawnikowski was in fact living in the locker room.

Although the Section 27.00 test is arguably more precise and appropriate to the situation herein, it does not defeat claimant's recovery of benefits. Application of this test to the facts found by the administrative law judge results in the conclusion that claimant's injury occurred in the course of his employment. While the act of pouring the gasoline into the carburetor to start the car may have been a "personal" activity designed to benefit Mr. Slawnikowski, the deviation from claimant's duties was at most minimal. The car was in the direct path from the locker room to claimant's forklift, and the aid, according to claimant's credited testimony, should have taken no more than a few seconds. Therefore, any deviation from his employment was insubstantial. *See Olsen v. State Accident Ins. Fund*, 562 P.2d 1234 (Or. 1977) (employee fixing co-worker's bicycle injured on employer's premises during his lunch break when he test-rode the vehicle entitled to compensation); *Rice v. Pharmaceuticals, Inc.*, 168 A.2d 201 (N.J. 1961) (employee injured immediately after work on return to building to get item for co-worker to take home entitled to compensation); *D'Anofrio v. Hatten*, 206 N.Y.S.2d 494 (1960) (employee injured while observing repair of co-worker's car may have been entitled to compensation). Thus, the administrative law judge's conclusion that claimant's injury in this case occurred during the course of his employment is supported by the application of either test. Therefore, we affirm the administrative law judge's finding that claimant's injury occurred within the course of his employment.[3] *See Olsen*, 562 P.2d at 1234; *Rice*, 168 A.2d at 201.

Employer next contends the administrative law judge erred in finding that the claim is not barred pursuant to Section 12 of the Act. Specifically, employer argues it did not have knowledge of the injury and it was prejudiced by claimant's failure to file the proper notice form. *See* 33 U.S.C. §912(d)(1988). With regard to the former, as claimant filed a claim for health benefits on June 30, 1993, on which he certified that the injury was not work-related, employer argues that it was not aware of an industrial injury.

[3]That claimant's injury occurred within the time and space boundaries, *i.e.*, during working hours and on employer's premises, is not disputed. Therefore, we affirm the administrative law judge's findings that employer failed to rebut the Section 20(a) presumption and that claimant's injury is work-related as a matter of law. *See Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987).

Claimant concedes he did not file a written notice of the injury with employer or the district director pursuant to Section 12(a). Nonetheless Section 12(d) of the Act, 33 U.S.C. §912(d)(1988), provides in pertinent part:

> Failure to give such notice required by Section 12(a) shall not bar any claim under this chapter (1) if the employer . . . or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure [for one of the enumerated reasons]. . . .

Because Section 12(d) is written in the disjunctive, claimant's failure to file a notice of injury may be excused for any of three reasons: employer had actual knowledge, employer was not prejudiced by the failure to file, or the district director excused the failure to file. *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). The implementing regulation permits an administrative law judge to determine whether an employer has been prejudiced, and it states that "actual knowledge" of the injury is deemed to exist if claimant's immediate supervisor is aware of the injury. 20 C.F.R. §702.216. This imputed knowledge under Section 12(d)(1) requires knowledge of the fact of injury, as well as knowledge of its work-relatedness. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). The Section 12(d)(1) knowledge exception may be precluded where a claimant previously certified the non-industrial nature of the injury on his group health insurance claim form. *Id.* at 35. We agree with claimant that the administrative law judge rationally determined that his failure to file a Section 12(a) notice is excused by Section 12(d), and we find employer's arguments on this issue unpersuasive.

In *Addison*, upon which employer relies, the claimant injured his chest, shoulder, neck and arm in a work-related accident. The employer voluntarily paid temporary total disability benefits, and the parties reached a settlement on permanent partial disability benefits. Two years later, the claimant filed a claim for benefits for a back injury which he alleged occurred in the same work incident. *Addison*, 22 BRBS at 33. The Board affirmed the administrative law judge's conclusion that Section 12 barred recovery, as the employer was first made aware of a work-related back condition two years after the injury occurred, and as the claimant previously filed a claim for treatment of his back condition with his group health insurance carrier, certifying the condition as not work-related. *Id.* at 35. Moreover, the Board affirmed the administrative law judge's determination that the employer was prejudiced by the claimant's untimely notice and as a result was unable to effectively investigate the circumstances surrounding the back injury. *Id.*

Unlike the situation in *Addison*, employer here knew of the accident and the full extent of claimant's injuries prior to receiving information on the health insurance form indicating the injury was non-industrial. Under these circumstances, the Board has held that later receipt of conflicting information does not bar a claimant from obtaining benefits because the employer was put on notice that the injury was probably employment-related, as there was either an apparent connection or enough information to conduct an investigation. *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981).

In the instant case, the administrative law judge found that employer had actual knowledge of claimant's injury as of the date of the incident. In particular, the administrative law judge relied on testimony which placed Mr. Kvasnicka, claimant's supervisor, at the scene immediately after the accident, and revealed that he questioned witnesses, investigated the incident as if it were industrial in nature, and filed a report the next day. Despite arguments to the contrary, the administrative law judge rationally determined that employer knew of claimant's injury and was put on notice of its relationship to his employment long before he filed the claim for health benefits containing the conflicting information. *Id.* at 125. Consequently, we reject employer's argument and affirm the administrative law judge's finding that employer had actual knowledge of the injury.

Employer also argues it was prejudiced by claimant's failure to file the proper notice because the delay resulted in two important witnesses being unavailable for trial. Under the Act, prejudice is established when an employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate the injury or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1970); *Addison*, 22 BRBS at 35. A conclusory allegation of an inability to investigate the claim when it was fresh is insufficient to establish prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989).

In the case at bar, the administrative law judge found that employer was not prejudiced by claimant's failure to give timely written notice of the injury because employer had sufficient information, as of the date of the injury, with which to conduct an investigation, and, indeed, Mr. Kvasnicka proceeded to do so. Moreover, the administrative law judge found that the two witnesses who were unavailable for trial were available for questioning until November 1993, two months after claimant filed his claim, and December 1994, fifteen months after claimant filed his claim, respectively. The administrative law judge rationally concluded that employer could have deposed or obtained affidavits from these witnesses, thus making their testimony available at the hearing. Decision and Order at 13-14. As employer has not shown that it was unable to effectively investigate the injury or to provide medical services to claimant, we reject its argument on the matter, and we affirm the administrative law judge's finding that employer was not prejudiced by claimant's failure to file a Section 12 notice of injury. *See generally Sheek*, 18 BRBS at 154. Although it need only be established that employer either had actual knowledge or was not prejudiced by claimant's delayed notice, we affirm the administrative law judge's findings on both counts. Consequently, we affirm his conclusion that Section 12 does not bar claimant's entitlement to benefits.

Employer next argues that claimant did not properly or timely file a request for medical benefits pursuant to Section 7, 33 U.S.C. §907. As claimant asserts, this issue was not raised before the administrative law judge. Employer's objection to the medical bills before the administrative law judge extended only to the relevance of the admission of the medical bills into evidence. The administrative law judge overruled employer's objection and admitted the bills into evidence because claimant filed a claim for medical benefits. Because employer did not raise the Section 7 procedural

issue before the administrative law judge, it cannot be raised for the first time on appeal. *Maples v. Texports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991). Therefore, we affirm the administrative law judge's award of medical benefits.

In his cross-appeal, claimant contends the administrative law judge erred in denying him disfigurement benefits under Section 8(c)(20) of the Act, 33 U.S.C. §908(c)(20). Specifically, he argues that, as his injury involved his head, neck and face, he is automatically entitled to disfigurement benefits. Section 8(c)(20) of the Act provides:

> Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

Thus, benefits under this section may only be awarded for head, neck and face disfigurement if the disfigurement is "serious." *Schreck v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 611 (1978). To obtain benefits for disfigurement to other normally exposed parts of the body, a claimant must show that the disfigurement is a handicap to securing or maintaining employment. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). While claimant is correct in asserting that he need not show that a disfigurement to his head, neck or face impeded his employability, he is incorrect in asserting an automatic right to disfigurement benefits. Only "serious" disfigurement is compensable.

The administrative law judge found that claimant's disfigurement was not serious. Decision and Order at 15. The administrative law judge was given the opportunity to view claimant's scars at the hearing. Tr. at 40-41. He noticed no disfigurement. Decision and Order at 15. He noted that Dr. Jejurikar stated that claimant's skin graft to save the right ear was 100 percent successful and that no other surgery was needed. Claimant testified that he has no physical complications and is not currently on medication. Tr. at 39. His supervisor testified that he returned to his usual work with no reduction in seniority. Tr. at 124. Moreover, we note that claimant placed no pictures in evidence to demonstrate the extent of claimant's scarring or differences in his appearance resulting from the accident. As the administrative law judge rationally found that claimant has not established serious disfigurement, we affirm the administrative law judge's denial of disfigurement benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge