

ROBERT B. OVERTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MARMAC CORPORATION)	DATE ISSUED: 03/28/2007
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order On Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Charlsey Wolff (Wolff & Wolff), New Orleans, Louisiana, and Arthur J. Brewster, Metairie, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order On Remand (2002-LHC-1978) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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). This is the second time that this case is before the Board.

Claimant, who was employed as an assistant yard manager, performed employment duties for employer which included overseeing employer's employees,

checking barges and the dry dock area, and maintaining the Red Fox Sewage Unit which serviced employer's facility. Claimant testified that these later duties involved checking the sewage system daily for obstructions caused by toilet paper or other materials coming through the system, clearing the obstruction if one was found to be present, and testing the system for compliance with the appropriate state regulations. In August 2000, after experiencing stomach complaints, claimant underwent a blood test and was subsequently diagnosed with hepatitis C.

In the initial Decision and Order, the administrative law judge found claimant entitled to the presumption at Section 20(a), 33 U.S.C. §920(a), linking his present medical condition, specifically hepatitis C, to his employment with employer. The administrative law judge then determined that the presumption was rebutted by the testimony of Drs. Hill and Rabito. Based upon his review of the record, the administrative law judge concluded that claimant failed to carry his burden of persuasion on the issue of causation. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption to link claimant's diagnosed condition of hepatitis C to his employment with employer, since claimant's hepatitis C constituted a harm and claimant's work-related contact with raw and untreated sewage could have caused this medical condition. With regard to rebuttal, the Board concluded that, as neither Dr. Hill nor Dr. Rabito at any point in their respective reports or deposition testimony stated that claimant's hepatitis C was not caused by his exposure to untreated sewerage, their opinions were insufficient as a matter of law to rebut the Section 20(a) presumption. As these two opinions constituted the only relevant evidence proffered by employer on rebuttal, the Board reversed the administrative law judge's determination that the Section 20(a) presumption was rebutted with regard to claimant's diagnosed condition of hepatitis C, held causation with regard to this condition established as a matter of law, and remanded the case for the administrative law judge to consider the remaining issues relating to claimant's claim for benefits. *Overton v. Marmac Corp.*, BRB No. 04-0553 (Feb. 18, 2005)(unpub.).

On remand, the administrative law judge determined that claimant did not sustain a loss of wage-earning capacity as a result of his work-related condition; however, the administrative law judge found claimant to be entitled to a *de minimis* award based upon his having established a significant possibility of a loss of future wage-earning capacity. Accordingly, the administrative law judge awarded claimant compensation in the amount of one dollar per week and medical benefits.

Employer now appeals the administrative law judge's award of benefits to claimant. Claimant responds, urging affirmance.

In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm

and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the 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); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). In presenting his case, claimant is not required to prove that the working conditions in fact caused his harm; rather, claimant must show the existence of an accident or working conditions which could potentially cause the harm alleged. See generally *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Upon invocation of the presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment conditions. See *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), cert. denied, 540 U.S. 1056 (2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), cert. denied, 528 U.S. 1187 (2000); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). In establishing rebuttal of the presumption, proof of another agency of causation is not necessary as long as employer introduces substantial evidence that the injury is not related to the employment. Employer cannot rebut the Section 20(a) presumption merely by demonstrating that the cause of the condition cannot be medically determined. See *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984). If the presumption is rebutted by employer, it drops from the case, and the administrative law judge must then weigh all the evidence and resolve the causation issue on the record as a whole with claimant bearing the burden of persuasion. See *Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, employer challenges the administrative law judge's determination that claimant established his *prima facie* case, thus entitling him to the benefit of the Section 20(a) presumption, and the Board's holding that employer did not rebut that presumption. The administrative law judge's determination regarding claimant's entitlement to invocation of the Section 20(a) presumption was considered and addressed by the Board in its previous decision and its prior determination that claimant established a harm, as well as the existence of working conditions which could have caused that harm, constitutes the law of the case. Similarly, the Board considered and addressed the issue

of whether employer rebutted the invoked presumption.¹ See *Lewis v. Sunnen Crane Serv., Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Employer has raised no basis for the Board to depart from the law of the case doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. See *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Employer's contention is therefore rejected and the determination that claimant has established a causal connection between his condition and his employment with employer as a matter of law is affirmed.

Employer also challenges the administrative law judge's *de minimis* award of benefits to claimant, averring that claimant has failed to establish any potential future wage loss. Aside from this bare allegation, employer has failed to brief this issue. The circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address the decision and demonstrate why substantial evidence does not support the result reached. See *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986). As employer has not adequately briefed this issue, nor the issue of claimant's entitlement to medical benefits, the administrative law judge's award to claimant is affirmed.

¹ Contrary to employer's assertion on appeal, the Board did not "overlook" the decision of the United States Court of Appeals for the Fifth Circuit in *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003), when rendering its decision. See Employer's br. at 9. Rather, the Board's decision unequivocally took into consideration the court's decision in *Ortco* when discussing employer's burden of production in attempting to establish rebuttal of the Section 20(a) presumption. See *Overton*, slip op. at 3-4. Employer here did not rebut the presumption because it did not produce substantial evidence that claimant's hepatitis C was not related to his sewage exposure.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge