BRB No. 98-0223

LANNY L. MIDKIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRINCE CONSTRUCTION COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
Employer	)	
	)	
McLEAN CONTRACTING COMPANY	)	
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr. and Kevin W. Grierson (Jones, Blechman, Woltz, & Kelly, P.C.), Newport News, Virginia, for claimant.

Robert A. Rapaport (Knight, Clarke, Dolph & Rapaport, P.L.C.), Norfolk, Virginia, for McLean Contracting Co. and St. Paul Fire and Marine Insurance Co.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-LHC-794) of Administrative Law Judge Fletcher E. Campbell, 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.[1] *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To recapitulate the facts, claimant, an ironworker, was injured on June 12, 1992, during the course of his employment with Prince Construction Company, a subcontractor for McLean Contracting Company (employer), when he slipped off a ladder and cut his left shin. At the time of this accident, claimant was working aboard a floating mat while performing bridge repair work on the Lafayette River. Claimant treated his wound at home and did not see a doctor that day. The following day, claimant went to see his son, who was installing a pier in the James River. Claimant did not assist his son, but nevertheless spent much of the day wading in the water of the James River, possibly exposing himself to vibrio vulnificus, a harmful bacterium that is believed to exist in that river. That night, claimant's leg began to swell and the next morning he went to the hospital. Claimant was treated and released that day; however, the cut on his leg later became gangrenous, requiring extensive reconstructive surgery. In addition, subsequent to the leg injury and infection, claimant's diabetic condition became uncontrollable, causing a degeneration of his kidneys, the removal of his right eye, and legal blindness in his left eye.

In his initial Decision and Order, the administrative law judge first found that the status and situs requirements contained in Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a), had been satisfied; accordingly, the administrative law judge found that claimant established coverage under the Act. The administrative law judge then found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and, after determining that employer failed to rebut that presumption, found that claimant established causation under the Act. The administrative law judge next determined, however, that claimant was required to establish that his disability is the natural and unavoidable consequence of his injury. Concluding that claimant's act of wading into the James River on the day following his work injury constituted a subsequent intervening event, and that there was no evidence as to the cause of claimant's infection thereafter, the administrative law judge found that claimant failed to establish that his infection and its sequelae were a natural consequence of his June 12, 1992, work-related injury. He thus denied

[1]In an Order dated January 27, 1998, the Board granted employer's Motion to Expedite this case.

benefits. In an Order Denying Motion to Reconsider, issued on February 9, 1996, the administrative law judge declined to reopen the hearing, again finding that claimant failed to establish that his condition is a natural consequence of his work-related injury.

On appeal, the Board held that the administrative law judge, by placing on claimant the burden of demonstrating that his ailments were the natural consequence of his work-related injury, did not properly apply the Section 20(a) presumption. Initially, the Board held that the administrative law judge erred in relying on the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), to place the burden of proving his condition arose from his employment on claimant. The Board noted that in *Greenwich Collieries*, the Supreme Court did not discuss or affect the law regarding invocation and rebuttal of the Section 20(a) presumption; rather, the Court recognized that claimants benefit from specific "statutory presumptions easing their burden," citing Section 20(a) as an example. *See Greenwich Collieries,* 512 U.S. at 280, 28 BRBS at 47 (CRT). Thus, having affirmed the administrative law judge's finding that claimant established invocation of the Section 20(a) presumption, the Board stated that employer bore the burden on rebuttal of establishing that claimant's bacterial infection and its sequelae were not the natural and unavoidable result of his work-related injury. As the administrative law judge's finding that there was no evidence as to the cause of claimant's infection was supported by the record,[2] employer failed to rebut the Section 20(a) presumption; accordingly, the Board held, as a matter of law, that claimant established causation under the Act and remanded the case to the administrative law judge for consideration of the remaining issues. *Midkiff v. Prince Const. Co., Inc.,* BRB No. 96-0721 (Jan. 28, 1997)(unpublished).

On remand, the administrative law judge found that, pursuant to the Board's decision, it is the law of the case that employer failed to demonstrate that an intervening event caused claimant's infection and, thus, employer is liable for compensation under the Act. The administrative law judge further found that employer failed to adduce evidence that claimant acted negligently, and therefore, the chain of causation was still intact. *See* Decision and Order on Remand at 2. Accordingly, the administrative law judge found employer liable for claimant's permanent total disability compensation commencing on August 6, 1992 and

[2]The administrative law judge stated that an infection may well be a "'natural' consequence of a minor injury to a diabetic, but there is no medical opinion evidence of record on this issue either way. Decision and Order at 9.

continuing.[3] Employer, citing the holding of the United States Court of Appeals for the Fourth Circuit, wherein this case lies, in *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997), filed a motion for reconsideration which the administrative law judge denied.

On appeal, employer challenges the administrative law judge's Decision and Order on Remand, contending that claimant did not present sufficient evidence to invoke the Section 20(a) presumption and that, alternatively, the Board's initial decision in the instant case is no longer viable in light of the holding of the Fourth Circuit in *Universal Maritime.* Claimant responds, urging affirmance of the administrative law judge's decision; specifically, claimant contends that employer's reliance on the Fourth Circuit's holding in *Universal Maritime* is misplaced, as that case does not represent a change in law regarding the issue of Section 20(a) rebuttal, and therefore, the Board's previous holding in the instant case is binding.

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In the present case, the administrative law judge, in his initial decision, found that claimant is entitled to invocation of the Section 20(a) presumption since it is undisputed that he sustained a harm, *i.e.,* the multiple disabling physical ailments, and that an incident occurred on June 12, 1992, which could have caused the harm. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 59 (1994); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). In its initial decision, the Board affirmed the finding that these undisputed facts are sufficient for invocation of the Section 20(a) presumption. Thus, as this issue was fully resolved in the Board's first Decision and Order, and employer has failed to make any persuasive argument as to why this determination is in error, the Board's first decision constitutes the law of the case and must be followed. *See, e.g., McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

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[3]In his initial decision, the administrative law judge noted that the Director, Office of Workers' Compensation Programs, had conceded the liability of the Special Fund pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Thus, in his Decision and Order on Remand, the administrative law judge found that employer is entitled to Section 8(f) relief.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by the employment event. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). The Section 20(a) presumption applies to link claimant's disabling condition to his employment, placing the burden of rebuttal on employer where another cause, including a subsequent intervening event, is alleged. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Thus, employer may meet its rebuttal burden by producing substantial evidence that claimant's disabling condition was caused by a subsequent non work-related event. *See Plappert v. Marine Corps Exchange,* 31 BRBS 13, *aff'd on recon.,* 31 BRBS 109 (1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for the disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

In the instant case, employer contends that it conclusively established that the infection of claimant's cut occurred due to his negligent conduct of wading into the James River. Employer, however, has pointed to no evidence in the record that claimant knew or should have known that the James River was infested with bacteria and had reason to believe he was placing himself at risk by wading in the river.[4] *See Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987). Thus, employer's contention that claimant's disabling condition is the result of intentional misconduct or negligence on the part of claimant must be rejected. *See James*, 22 BRBS at 274. In addition, while all of the medical evidence of record relates claimant's current disabling condition to the infection of the cut on his left shin, there is no medical evidence that the infection was caused by claimant's wading into the James River; the medical opinions are either silent or equivocal as to how claimant contracted his infection.[5] *See* Cl. Exs. 9-11; Emp. Ex. 2. As employer failed to produce any medical or other evidence that the infection claimant sustained was the result of his wading into the James River, employer has not met its burden and rebutted the Section 20(a) presumption. *See, e.g., Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). Moreover, it is uncontested that the medical condition which precipitated claimant's infection, the laceration of claimant's left leg, was work-related. We therefore affirm the

[4]Claimant testified as to his belief that he contracted the bacteria from the James River. Tr. at 35, 47-48. This testimony, however, speaks to his awareness after he contracted his infection, not before, and he also testified that he had been in the water all his life without problems before this incident. *Id.* Thus, it cannot be said that claimant's entry into the water in this instance demonstrated a failure to take reasonable precautions. *See Cyr v. Crescent Wharf & Warehouse Co.,* 211 F.2d 454 (9th Cir. 1954).

[5]Dr. Shacochis stated in his reports that claimant's disabling condition was caused by the vibrio vulnificus infection of his left leg, which subsequently aggravated his pre-existing diabetes and caused deterioration of his vision. Cl. Ex. 9; Emp. Ex. 2. Dr. Waschler opined that claimant's disability is directly related to his infection and the change in his diabetic control. Cl. Ex. 10. Dr. Goudar related that claimant has diabetes with extensive complications. Cl. Exs. 11, 13. Dr. Wagner stated that the "correlation between his infection, hospitalization, loss of control of his blood sugars, and severe systematic compromise appears to be due to the change in his fundi and the development of severely progressive proliferative diabetic retinopathy." Cl. Ex. 12. Dr. Haggerty offered speculation that the brackish waters of the James River are ideal for the development of vibrio infections. *See* Emp. Ex. 2. There is thus no evidence that the James River actually contains the bacteria or that exposure to its water caused the infection.

administrative law judge's conclusion that claimant's disabling condition was causally related to his employment. *See, e.g., James*, 22 BRBS at 274.

In so doing, we note that employer's reliance on the Fourth Circuit's decision in *Universal Maritime* is misplaced. In that decision, the court was not presented with an allegation that the employee sustained a non-work-related event, *i.e.,* an intervening cause, subsequent to his work-related injury. Moreover, contrary to employer's argument, the Fourth Circuit in *Universal Maritime* did not alter the shifting burden scheme set forth in Section 20(a) of the Act. Rather, the court recognized that when an employer offers evidence "sufficient to justify denial of a claim," the statutory presumption at Section 20(a) "falls out of the case." *Universal Maritime*, 126 F.3d at 262, 31 BRBS at 123 (CRT). Indeed, the court recognized that when "an employer does not offer substantial evidence to rebut the presumption, it is true that the presumption provided by §20 will entitle a claimant to compensation." *Id.* Thus, once claimant establishes a *prima facie* case of causation under Section 20(a), it is employer's burden on rebuttal to present evidence sufficient to deny the claim. In the instant case, employer, after the presumption was properly invoked, failed to offer substantial evidence to establish that claimant's disabling condition was caused by a subsequent intervening event which bore no relationship to claimant's work-related injury. *See James*, 22 BRBS at 274; *Wheeler*, 21 BRBS at 36. Accordingly, as employer failed to meet its burden of proof on rebuttal, claimant established causation as a matter of law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge