

BRB No. 11-0319

VALERIE MIDDLETON)
(Widow of HAROLD R. MIDDLETON))
)
 Claimant-Respondent)
)
 v.)
)
 GONZALES ELECTRICAL SYSTEMS) DATE ISSUED: 12/22/2011
)
 and)
)
 AMERICAN INTERSTATE INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Charles A. Mouton (Mahtook & Lafleur, L.L.C.), Lafayette, Louisiana, for claimant.

Henry H. LeBas (LeBas Law Offices), Lafayette, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2009-LHC-00247) of Administrative Law Judge Patrick M. Rosenow 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 if they 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).

Decedent, who worked for employer as an electrician on an oil rig fabrication project at the LeTourneau Technology yard in Vicksburg, Mississippi, sustained a fatal heart attack during the course of his employment on January 3, 2007. In a decision issued on August 13, 2009, the administrative law judge addressed only the issue of whether a \$50 per diem decedent received for food and lodging should be included in the calculation of his average weekly wage. Employer did not contest the work-relatedness of decedent's death, and the parties agreed that, absent the per diem, decedent had an average weekly wage of \$1,376.28. *See* 33 U.S.C. §910. After addressing the evidence, the administrative law judge concluded that the per diem is properly included in decedent's average weekly wage, and he found that employer shall pay death benefits to claimant, decedent's widow, 33 U.S.C. §909, based on an average weekly wage of \$1,426.28.

Claimant filed a motion for reconsideration contending that the administrative law judge made a mathematical error by adding only one day's per diem of \$50 to decedent's average weekly wage, rather than \$350 as decedent worked seven days a week. Employer disputed that \$350 was the proper figure. Moreover, employer averred that it disagreed with the inclusion of the per diem in decedent's average weekly wage and that it would no longer stipulate to the work-relatedness of decedent's death. Accordingly, the administrative law judge vacated his decision by order issued on August 27, 2009.

The parties agreed to waive their right to a hearing and instead submitted exhibits and filed written briefs to resolve the causation and per diem issues. With respect to the per diem, the administrative law judge found that since decedent worked seven days a week, \$350 should be added to decedent's stipulated average weekly wage of \$1,376.28, which yielded an average weekly wage of \$1,726.28.¹ Decision and Order at 20. Regarding the cause of decedent's death, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking decedent's fatal heart attack to his employment. In the absence of any evidence sufficient to rebut the presumption, the administrative law judge concluded that decedent's death was related to his employment.² The administrative law judge therefore awarded claimant death

¹In a footnote, the administrative law judge incorporated the per diem findings from his prior decision; he stated that nothing the parties offered subsequently would change his conclusion that decedent's per diem should be included in his average weekly wage. Decision and Order at 19 n. 67.

²The administrative law judge noted that, had he found the presumption rebutted, the preponderance of the evidence establishes that the death was work-related. Decision and Order at 19 n. 66.

benefits commencing January 3, 2007, based on an average weekly wage of \$1,726.28. 33 U.S.C. §909.

On appeal, employer challenges the administrative law judge's causation and average weekly wage findings. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in finding invocation of the Section 20(a) presumption based on the opinion of Dr. Mallavarapu. Employer argues that the administrative law judge erred by admitting Dr. Mallavarapu's deposition testimony and report into evidence and by crediting his opinion since Dr. Mallavarapu acknowledged that he did not have enough information to determine whether or not decedent's working conditions could have caused his heart attack.³

Addressing employer's objection that Dr. Mallavarapu is not an expert, the administrative law judge found that the physician has a medical degree from the State University of New York, completed three fellowships, and is Board-certified in internal medicine, cardiovascular disease and interventional cardiology, is certified by the Council of Nuclear Cardiology, and has never had his license suspended or revoked or denied admission as an expert by any court. *See* CXs 25 at 6-10; 26 at 1-3. In view of this finding, employer has not shown that the administrative law judge abused his discretion in accepting Dr. Mallavarapu as an expert witness. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Champion v. S & M Traylor Bros.*, 14 BRBS 251 (1981). Accordingly, we affirm the administrative law judge's overruling of employer's objection that Dr. Mallavarapu is not an expert witness.

With regard to employer's contention that the administrative law judge erred in invoking the Section 20(a) presumption, Section 9 of the Act provides for death benefits

³Employer also contends that Dr. Mallavarapu admitted he had no evidence that decedent had arterial plaque buildup or that decedent experienced emotional stress. In this regard, employer cites Dr. Mallavarapu's deposition testimony. Employer attached this testimony to his Petition for Review. Petition at EX C. However, the specific page numbers, EX C at 37, 62, are not contained in the excerpts from Dr. Mallavarapu's deposition testimony that employer and claimant admitted into evidence. *See* EX C; CX 25. Since this testimony was not admitted into evidence, we cannot address on appeal employer's argument based on this testimony as the Board may not consider new evidence. 33 U.S.C. §921(b)(3); *Hansley v. Bethlehem Steel Corp.*, 9 BRBS 498.2 (1978); *see* 20 C.F.R. §802.301.

to certain survivors “if the injury causes death.” 33 U.S.C. §909. In establishing entitlement to benefits, claimant is aided by Section 20(a) of the Act, which presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Under the aggravation rule, where an employment-related injury aggravates, accelerates or combines with an underlying condition, employer is liable for the entire resultant condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In order to establish her *prima facie* case, and thus entitlement to invocation of the Section 20(a) presumption, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused, contributed to or accelerated decedent’s death; rather, claimant must show only the existence of working conditions which could have caused, contributed to or hastened death. *See, e.g., Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is well-established that the employee need not be engaged in work activities involving unusual strain or stress, and it makes no difference that the injury might have occurred elsewhere.⁴ *Wheatley v. Adler*, 407 F.2d 307, 311 (D.C. Cir. 1968) (*en banc*); *Bell Helicopter Int’l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984), *aff’g Darnell v. Bell Helicopter, Int’l*, 16 BRBS 98 (1984); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

In finding the Section 20(a) presumption invoked, the administrative law judge credited the deposition testimony of decedent’s co-workers that, prior to the onset of his fatal heart attack, decedent carried equipment weighing up to 15 pounds from the ground to the top of the living quarters on the oil rig, after which decedent complained of chest pain. CX 5; EX B at 16-17, 23-25, 34. The administrative law judge also credited the opinion of Dr. Mallavarapu that psychosocial and physical stress from decedent’s working conditions, “more probably than not,” contributed to his heart attack and death. CX 27 at 2. Dr. Mallavarapu testified that stress is the third leading cause of heart attacks after smoking and hyperlipidemia. CX 25 at 18. He opined that the physical stress of decedent’s climbing a 50-foot gangplank and 40 to 50 feet of stairways carrying equipment prior to the onset of the heart attack and his working 12-hour days away from home and family for weeks at a time are physical and emotional stressors that contributed

⁴In *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, explicitly recognized that the relevant inquiry is the effect of the “required exertion producing the injury” on “the man undertaking the work.” *Id.* at 745 (quoting *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949)).

to his heart attack and death. CX 25 at 20-22, 72-73. Specifically, these stressors contributed to the rupture of arterial plaque that clotted; the clot in turn caused a heart attack and the resulting death. *Id.*

We reject employer's contention that the administrative law judge erred in finding invocation of the Section 20(a) presumption based on the opinion of Dr. Mallavarapu. In this case, the administrative law judge acted within his discretion in crediting the deposition testimony of decedent's co-workers regarding decedent's physical exertion prior to the onset of the heart attack and Dr. Mallavarapu's opinion regarding the contribution of work-related physical and emotional stressors to the fatal heart attack to find that claimant established the working conditions element of her *prima facie* case. See generally *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Brown v. I.T.T. Continental Baking Co.*, 921 F.2d 289, 21 BRBS 75(CRT) (D.C. Cir. 1990). This evidence is sufficient to establish that decedent's working conditions could have caused or contributed to his death. *Wheatley*, 407 F.2d at 313; see also *Jacobs*, 746 F.2d at 1344, 17 BRBS at 15(CRT); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Moreover, while Dr. Malavarapu admitted that, since he was not there, he did not know whether decedent awoke with chest pain on the day of his death, he declined to acknowledge employer's counsel's contention that it was "sheer speculation" as to what caused decedent's heart attack. EX C at 69. Rather, Dr. Mallavarapu opined that it was "more probable than not" that decedent's working conditions contributed to his heart attack and death. CX 27 at 2. Accordingly, as his finding is supported by substantial evidence of record, we affirm the administrative law judge's invocation of the Section 20(a) presumption that decedent's heart attack was related to his employment. See *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 745 (5th Cir. 1962).

As employer does not challenge the administrative law judge's finding that it did not present any evidence to rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that decedent's fatal heart attack was related to his work for employer as it is rational, supported by substantial evidence and in accordance with law. See generally *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). Accordingly, the administrative law judge's award of death benefits is affirmed.

Employer next contends that the administrative law judge erred by adding to decedent's stipulated average weekly wage of \$1,376.28 the \$50 per diem he received for

food and lodging.⁵ Employer asserts that the administrative law judge erred by relying on *B&D Contracting v. Pearley*, 548 F.3d 338, 42 BRBS 60(CRT) (5th Cir. 2008), as support for the inclusion of the per diem.

Section 2(13) of the Act defines “wages” as:

the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee’s or dependent’s benefit, or any other employees dependent entitlement.

33 U.S.C. §902(13). In *Pearley*, the Fifth Circuit affirmed the finding that the per diem payments to the claimant of \$9 per hour worked constituted “wages” within the meaning of Section 2(13) for purposes of calculating the claimant’s average weekly wage. The court rejected employer’s argument that the per diem payments were not “wages” because they were not taxable. The court restated its holding from *Quinones*, 206 F.3d at 477-479, 34 BRBS at 25-27(CRT), that “wages” are “the money rate at which the employee is compensated,” as well as any taxable advantages. The “money rate” prong does not require taxability. *Pearley*, 548 F.3d at 342, 42 BRBS at 62(CRT). The per diem in *Pearley* was monetary compensation paid in the same paycheck as salary and based solely on the number of hours worked. The per diem payments were not directly tied to the claimant’s actual expenses, as the same per diem structure applied to every employee regardless of where he lived. Moreover, the payments were designed to maximize the employees’ take home pay, provide tax benefits to the employer, and keep up with the employer’s competitors who paid employees in a similar manner. *Pearley*, 548 F.3d at 342-343, 42 BRBS at 62-63(CRT). Thus, the court held that the per diem payments “played the role of wages” and were includable in the claimant’s average weekly wage.

⁵Employer does not challenge the administrative law judge’s finding that decedent’s weekly per diem was \$350, based on his being a seven-day per week employee. *See* CX 17.

In this case, most of employer's workers lived in the area of Beaumont, Texas. When its workers were employed outside this area, employer provided lodging and paid a meal allowance of \$200 for the first week on the job. Thereafter, employer paid a per diem of \$25 for food and \$25 for lodging on days the employee actually worked outside the Beaumont area. August 13, 2009 Decision and Order at 2. In his August 2009 decision, the administrative law judge listed the factors he found most compelling for finding that the per diem was intended as "wages": (1) the per diem was paid on a regular basis at the same time wages were paid; (2) the per diem was paid without any regard for where the employee actually lived or any actual expenses incurred and employees did not have to account for their expenses or return overpayments; and, (3) it was paid based not on days away from home, but on days worked. *Id.* at 3-4; *see* CXs 20; 24 at 5-7, 10-12, 15; EX A at 10-11. The administrative law judge found that, while some employees may have had additional expenses related to working at the Vicksburg site, the \$50 per diem "appears to be a higher wage supplement to make taking the job more attractive, rather than an allowance specifically designed to cover expenses." *Id.* at 4. In his subsequent decision, the administrative law judge incorporated his prior conclusion that decedent's per diem should be included in his average weekly wage; he reiterated that the per diem was paid for days the employee actually worked and not for days he was away from home and added that employer subsequently increased the per diem to \$60 to attract better employees rather than account for a specific increase in expenses. Decision and Order at 19 n. 67; *see* CXs 20; 24 at 9, 13-15.

We affirm the administrative law judge's conclusion that the \$50 per diem paid to decedent on the days he actually worked for employer in Vicksburg is properly construed as "wages" under Section 2(13), pursuant to *Pearley*. Similar to the per diem in *Pearley*, decedent's per diem was based solely on the number of days per week he worked. The per diem payments were not directly tied to decedent's actual expenses; decedent was not required to present receipts to employer for his food and lodging expenses. CX 24 at 7-8. The same per diem structure applied to every employee regardless of where he lived. Mr. Gonzalez, the owner of the company, testified that the per diem was intended, in part, to attract better employees. CX 24 at 13-15. Thus, the administrative law judge properly found that per diem payments had the indicia of regular wages, as they correlated to the number of days per week worked and were not tied to any actual expenses incurred for room and board. *See Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 520 U.S. 1188 (2003); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). In this case, the \$50 per diem is clearly a "wage" under Section 2(13) and employer's contention that this case is distinguishable from *Pearley*, therefore, is meritless. Consequently, as the administrative law judge's finding is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's inclusion of the \$350 weekly per diem in calculating decedent's average weekly wage, and his resulting conclusion that claimant is entitled to death benefits based on an average weekly wage of \$1,726.28. *Pearley*, 548 F.3d 338,

42 BRBS 60(CRT); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Roberts*, 300 F.3d 510, 36 BRBS 51(CRT).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge