

GILLIAN and KAREN HODGES)	
(Widow and Minor Daughter of ULEN)	
HODGES))	
)	
Claimant-Respondents)	DATE ISSUED:
)	
v.)	
)	
FLUOR DRILLING SERVICES)	
)	
and)	
)	
ITT HARTFORD INSURANCE)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James W. Kerr, Jr.,
Administrative Law Judge, United States Department of Labor.

Paul R. Miller and Lewis S. Fleishman (Richard Schechter, P.C.), Houston,
Texas, for claimants.

Marilyn T. Hebinck (Royston, Rayzor, Vickery & Williams), Houston, Texas,
for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (94-LHC-2664) of
Administrative Law Judge James W. Kerr, 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).

Decedent was a drilling supervisor on an offshore rig. He worked year-round for 14-
day tours, and alleged that he was exposed to hydrogen sulfide (H₂S) in the sleeping

chamber due to a faulty ventilation system. Decedent quit working due to chronic bronchitis in October 1986, and employer voluntarily paid temporary total disability benefits until his death. In 1991, decedent was diagnosed with bilateral lung cancer. He was treated for five months and died on August 19, 1991. The death certificate states that the cause of death is respiratory failure secondary to pulmonary metastasis and lung cancer. Claimants, decedent's widow and minor daughter, sought death benefits under the Act, alleging that decedent's chronic bronchitis hastened his death.¹

In his Decision and Order, the administrative law judge found that the claim was timely filed as claimants disclosed an intention to assert a right to compensation within two years from the date of decedent's death. In addition, the administrative law judge found that the evidence is sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was due, at least in part, to his chronic bronchitis, which the administrative law judge found was due to work-related H₂S exposure. He also found that the evidence was not sufficient to rebut this presumption, and thus awarded death benefits to claimants.

On appeal, employer contends that the administrative law judge erred in finding that the claim for death benefits was timely, as claimants did not prove that decedent had an "occupational disease." In addition, employer contends that the administrative law judge erred in invoking the Section 20(a) presumption and in finding that the presumption was not rebutted. Claimants respond, urging affirmance of the administrative law judge's decision.

Initially, we reject employer's contention that the administrative law judge erred in applying Section 13(b)(2), 33 U.S.C. §913(b)(2), to find that the claim was timely filed. Section 13(b)(2) provides that in the case of an occupational disease which does not immediately result in disability or death the claim is timely if filed within two years from the date of awareness of the relationship between the employment, the disease and the death.

See, e.g., *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996). The Act provides that an "injury" includes an occupational disease or infection that arises naturally out of employment or as naturally or unavoidably results from an accidental injury. 33 U.S.C. §902(2). An occupational disease is defined as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir. 1997), quoting *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176, 23 BRBS 13 (CRT) (2d Cir. 1989). In addition, an occupational disease includes only those diseases contracted through exposure to dangerous substances. *Id.*

¹It is not alleged that the lung cancer was due to decedent's employment.

The death in this case is allegedly due in part to chronic bronchitis caused by exposure to H₂S in the sleeping chamber at decedent's work site. Employer does not dispute that bronchitis is a disease rather than a traumatic injury. *Cf. LeBlanc*, 130 F.3d at 160. As claimants allege that the disease was caused by decedent's exposure to a dangerous substance in the sleeping chamber on the rig, we affirm the administrative law judge's application of the two year statute of limitations for occupational diseases, and his finding that the claim was timely filed.²

Employer also contends that the administrative law judge erred in his application of the Section 20(a) presumption. Section 20(a) applies to aid a claimant in proving that the decedent's death arose at least in part out of his employment. In order for Section 20(a) to apply claimant must first establish a *prima facie* case by proving that decedent suffered some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. See generally *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT)(5th Cir. 1986). If decedent had a work-related condition that hastened his death, the death is compensable. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

²To the extent employer argues that decedent did not have an occupational disease because there is no evidence he was exposed to H₂S or that it caused bronchitis, these issues are properly addressed in the context of causation. See discussion, *infra*.

We agree with employer that the administrative law judge's finding that decedent's death was work-related cannot be affirmed. Initially, we hold that the administrative law judge erred in invoking the Section 20(a) presumption without addressing the elements of claimants' *prima facie* case. Specifically, the administrative law judge found that "the injury to decedent on October 16, 1986, was exposure to H₂S causing chronic bronchitis" and "[t]here is no question that the decedent suffered a physical harm, exposure to H₂S, while with Employer and that working conditions existed that could have caused the harm." Decision and Order at 8. Employer contended, however, that there is no evidence that decedent was exposed to H₂S, or that H₂S could cause bronchitis. With regard to the issue of decedent's exposure to H₂S, decedent gave a history to his treating physician, Dr. Flick, of intermittent exposure to high levels of H₂S and CO₂ between July 18, 1984, and October 17, 1986, while at work with employer. However, the chemical test strips purporting to show the high levels of H₂S in the sleeping chamber were not admitted into the record and were not available for review by employer.³ Dr. Hale stated that the records she reviewed did not indicate exposure to high levels of H₂S. Tr. at 70. In a claim filed under the Texas Workers' Compensation law, decedent alleged injurious inhalation of "toxic fumes." RX 3. Decedent's widow also testified as to what her husband told her about his alleged exposure to H₂S. Tr. at 126-128. Thus, the administrative law judge must weigh this evidence to first determine whether decedent was exposed to H₂S and thus if claimants established the working conditions element of their *prima facie* case. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

Moreover, there is conflicting evidence regarding whether H₂S exposure can cause bronchitis. In this regard, claimant need not introduce medical evidence affirmatively establishing a causal relationship between the injury and the working conditions, but the theory as to how the injury occurred must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295, 15 BRBS 33, 41(CRT) (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Dr. Flick opined that the H₂S exposure contributed to decedent's respiratory condition, CX 6; CX 7 at 26-27, 38, 43, and that his bronchitis contributed to his death. CX 7 at 39-41, 44, 49. Dr. Hale, employer's reviewing physician, disagreed with the opinion that the gaseous exposure caused the chronic bronchitis as there is no precedent for that in the medical literature. Dr. Flick admitted that there is not much literature on chronic low dose exposure to H₂S, but nonetheless found a relationship between decedent's bronchitis and the exposure. CX 7 at 79. Dr. Hale stated that if someone survived exposure to H₂S, the only complication he would sustain is neurological damage, manifesting in decreased cognitive function, and she testified there is nothing in the medical records to indicate decedent had neurological problems. Tr. at 70, 72-74. As it is disputed whether decedent was exposed to H₂S, and whether H₂S exposure can cause bronchitis, and there is conflicting evidence that the administrative law

³Dr. Flick states that he looked at the test strips which decedent showed him and which decedent told him indicated "fairly intense H₂S exposures." Cl. Ex. 7 at 29. However, Dr. Flick testified that decedent retained custody of the strips and he has no idea how intensity was shown or measured on the tests strips. *Id.*

judge did not address, we vacate the administrative law judge's finding that the Section 20(a) presumption is invoked and remand the case to the administrative law judge to consider whether the claimants satisfied the elements of their *prima facie* case so that the Section 20(a) presumption is invoked.

If on remand the administrative law judge finds the presumption invoked, we hold that the administrative law judge must reconsider the opinion of Dr. Hale on rebuttal. Once invoked, Section 20(a) places the burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the death was caused or hastened by decedent's employment. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The administrative law judge found that employer did not establish rebuttal, as he stated it was undisputed that decedent had bronchitis as a result of exposure to H₂S, and the administrative law judge found that Dr. Hale admitted that a person who had some pre-existing lung condition would be susceptible to dying sooner from lung cancer than somebody who did not have the condition. Thus, the administrative law judge found that the evidence established that decedent's death was due to his work-related condition.

We hold that the administrative law judge did not properly account for the entirety of Dr. Hale's opinion. While Dr. Hale agreed that a person with a pre-existing lung condition would be susceptible to dying sooner from lung cancer, she concluded that decedent in this case did not have such a condition at the time he was diagnosed with cancer, as he had normal or near normal lung function in 1988.⁴ Tr. at 77. She stated that a person can have both bronchitis and normal lung function because bronchitis causes only coughing and the production of sputum. Tr. at 78. Moreover, Dr. Hale testified "there's absolutely no relationship between the bronchitis and the death," Tr. at 79, and that the bronchitis did not hasten his death or aggravate any condition that caused his death. Tr. at 86; RX 5. She opined that decedent's bronchitis did not prevent him from receiving treatment for lung cancer as the cancer was diagnosed in both lungs, precluding surgery. Tr. at 81. Therefore, if the administrative law judge finds on remand that decedent suffered from work-related chronic bronchitis, he is instructed to reconsider whether Dr. Hale's opinion is sufficient to establish rebuttal of the Section 20(a) presumption, and if so, to weigh all the relevant evidence as a whole with claimant bearing the burden of proving by a preponderance of the evidence that decedent's death was hastened by his work-related bronchitis. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

⁴Dr. Hale testified that decedent's lung function as revealed in a pulmonary function study was mildly impaired and was normal after a bronchodilator was administered. Tr. at 77. She stated this might indicate a mild case of asthma.

Accordingly, the Decision and Order of the administrative law judge finding that the claim was timely filed is affirmed. However, the award of benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge