SECTION 2(2) - INJURY

Introduction

Under Section 2(2) of the Act, 33 U.S.C. §902(2), the term "injury" means

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

This definition comprises two primary requirements: the accidental injury or death must arise (1) out of employment and (2) in the course of employment. The definition also includes an occupational disease or infection which arises naturally out of employment or which naturally or unavoidably results from an accidental injury. The section also includes injury due to the willful act of a third person directed against an employee due to his employment.

Thus, the cases focus on whether the injury or occupational disease arises out of and in the course of employment. Whether an injury is classified as an accidental injury or an occupational disease is not determinative of this inquiry, as both are included in the statutory definition. An injury need not be traceable to one definite time to be "accidental," and there is no requirement that the employment cause an acceleration of the underlying disease process rather than merely the manifestation of symptoms; whether the employment caused an attack of symptoms severe enough to incapacitate the employee or aggravated the underlying disease process is not significant as in either event, the disability is work-related. *See Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), and cases cited, *infra.*

In determining whether an injury arises out of and in the course of employment, claimant is aided by the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), which states that in the absence of substantial evidence to the contrary, the claim comes within the provisions of the Act. Specific application of the presumption is discussed, *infra,* in this section of the deskbook as well as in Section 20.

The Board has held that that the term "injury" in Section 2(2) encompasses a work-related death and that the word "injury" in Section 9(f) is given its meaning by reference to Section 2(2). Thus, issues of dependency are to be determined with reference to the time of the work-related death and not to the time of the injury that caused the death. *Henderson v. Kiewit Shea*, 39 BRBS 119 (2006).

Digests

The "arising out of employment" requirement of Section 2(2) is a separate issue from the Section 3(c) "willful intention to injure" inquiry. Thus, even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself or another. The Section 20(a) presumption applies to the Section 2(2) requirement that the injury arise out of claimant's employment, and the Section 20(d) presumption complements the Section 3(c) inquiry. *Jackson v. Strachan Shipping Co.,* 32 BRBS 71 (1998) (Smith, J., concurring & dissenting).

The Board affirmed the administrative law judge's finding that claimant's breaking of a company rule against drinking on the job did not take him out of the course of his employment. Claimant's injury occurred within the time and space boundaries of his employment. Claimant's violation of the rule implicates fault, which is irrelevant under the Act unless Section 3(c) applies. Moreover, case precedent in state workers' compensation schemes establishes that a violation of a rule on how an employee should perform his work (sober) does not take the employee out of the course of his employment. *G.S. [Schwirse] v. Marine Terminals Corp.,* 42 BRBS 100 (2008), *modified on other grounds on recon.,* 43 BRBS 108 (2009).

The definition of "injury" under the Act, 33 U.S.C. §902(2), includes both "primary" injuries – which arise out of and in the course of employment – and "secondary" injuries – which are the natural or unavoidable result of the primary injury. *Metro Machine Corp. v. Director, OWCP [Stephenson]*, ___ F.3d ___, __ BRBS __(CRT), No. 15-2525, 2017 WL 242986 (4th Cir. Jan. 20, 2017).

In this psychological injury case, employer argued that recovery was precluded by the "zone of danger" test, which limits recovery to those plaintiffs who sustain an actual physical injury or are placed in immediate risk of physical injury as a result of a defendant's negligent conduct. The Board affirmed the administrative law judge's rejection of employer's contention that the "zone of danger" test precludes an award of compensation under the Act, holding that the test is a tort concept which does not apply to the workers' compensation provisions of the Longshore Act. Similarly, the Board held that employer's reliance on the holdings in the Section 5(b) cases was misplaced, as the fault and negligence concepts that may be applicable to negligence actions brought under Section 5(b) have no application to workers' compensation claims under the Act, absent the applicability of Section 3(c), 33 U.S.C. § 903(c). The Board stated in this regard that it is well established that a work-related psychological impairment, with or without an underlying physical harm, may be compensable under the Act. *Jackson v. Ceres Marine Terminals, Inc.,* 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, ___ F.3d ___, __ BRBS ___(CRT), No. 15-1041, 2017 WL 386480 (4th Cir. March 24, 2016).

In affirming the Board's decision, the Fourth Circuit rejected employer's contention that claimant can recover for a psychological injury only if he also sustains a physical injury or was placed in immediate risk of physical harm. The court held that such a limitation is inconsistent with the express terms of 33 U.S.C. §902(2), which does not distinguish between physical and psychological injuries, as well with case precedent interpreting Section 2(2). Moreover, the "zone of danger" test is a tort concept which is not applicable in a workers' compensation claim. As substantial evidence supported the administrative law judge's conclusion that claimant has PTSD related to the work accident, in which claimant ran over and killed a co-worker with a forklift, the court affirmed the award of benefits. *Ceres Marine Terminals, Inc. v. Director, OWCP*, ___ F.3d ___, __ BRBS ___(CRT), No. 15-1041, 2017 WL 386480 (4th Cir. March 24, 2016).

Causation: Arising Out of Employment

Burden of Proof

In proving that the injury arises out of employment, a claimant is aided by the presumption of Section 20(a) which states that, "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within the provisions of this Act." 33 U.S.C. §920(a).

Pursuant to Section 20(a), a claimant does not have the initial burden of establishing a causal relationship between his injury and employment. Rather, claimant must show that (1) the worker sustained physical harm, *i.e*., an injury, and (2) an accident occurred or working conditions existed at claimant's job which could have caused the harm. Once these two elements are established, a claimant has proven his *prima facie* case and is entitled to a presumption that his injury arises out of his employment. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); s*ee Adams v. General Dynamics Corp*., 17 BRBS 258 (1985); *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985) ("the Section 20(a) presumption applies to link the harm or pain with claimant's employment."); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Darnell v. Bell Helicopter Int'l Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Jones v. J.F. Shea Co., Inc*., 14 BRBS 207 (1981). In *Jones*, the Board held that claimant has the burden of persuasion in proving the accident/working conditions element in order to establish a *prima facie* case. It is not sufficient for claimant to produce supporting evidence; the administrative law judge must be convinced, after weighing the relevant evidence, that the accident occurred or working conditions existed. *Jones*, 14 BRBS at 210-211.

In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the Supreme Court reversed a decision of the United States Court of Appeals for the District of Columbia Circuit which held that to establish a *prima facie* case, a claimant need only show that he suffered a harm. *See Riley v. U.S. Industries/Federal Sheet Metal, Inc*., 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980), *rev'g* 9 BRBS 936 (1979) (Miller, dissenting). The Board had affirmed an administrative law judge's finding that claimant had the burden to prove the claimed accident occurred and did not do so as supported by substantial evidence. In reversing this decision, the D.C. Circuit held that the administrative law judge and Board erred in requiring claimant to prove that a work-related accident did in fact occur, reasoning that since claimant clearly had an "injury" when he suffered a neck injury at home, the presumption arose that this injury was "employment bred."

The Supreme Court held that the D.C. Circuit erred in two respects: 1) it overlooked the language of Section 20(a) relating the presumption to the employee's claim, and 2) it did

not apply the statutory definition of the term "injury." The Court stated that the D.C. Circuit's first error was in invoking the presumption in support of a claim that was not made—the claim asserted an injury at work on a specific date when he was lifting duct work; the administrative law judge found that this specific accident did not occur, a finding which was no longer contested. The lower court, however, invoked the presumption on the theory that claimant suffered an injury at home in bed and was entitled to a presumption that it was "employment-bred," but no such claim had been made. The Court held that the presumption attaches to the claim filed by claimant. In a footnote, the Court noted the informal nature of workers' compensation proceedings and that "considerable liberality" is allowed in amending claims, but claimant did not avail himself of these liberal pleading rules. 455 U.S. at 613, n.7, 14 BRBS at 633, n.7.

The Court also held that the D.C. Circuit erred in disregarding the statutory definition of injury, which requires an injury "arising out of and in the course of employment." Stating that "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to employer," the Court held that a *prima facie* claim must at least allege an injury arising out of and in the course of employment. *Id.*, 435 U.S. at 616, 14 BRBS at 633. The claim filed by Riley had made a *prima facie* case; however, the administrative law judge did not believe claimant's allegations, and the administrative law judge supported his findings with substantial evidence. The statutory presumption did not require him to adjudicate a claim that was not made.

The Board has interpreted *U.S. Industries* as consistent with its holdings that a claimant must prove the two elements of his *prima* facie case. *Darnell*, 16 BRBS at 101, n.1; *Kelaita*, 13 BRBS at 330-31, n.8.

Thus, the presumption attaches only to the claim made by claimant. However, based on the language in *U.S. Industries* regarding the liberal amendment of pleadings in workers' compensation proceedings, claimant is not limited to his initial filings, but allegations raised in the LS-18, at the formal hearing, in briefs to the administrative law judge, or in other filings sufficient to put employer on notice of the injury claimed may be considered. *See Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Hartman v. Avondale Shipyard, Inc.*, 24 BRBS 63 (1990), *vacating in pert. part on recon.* 23 BRBS 201 (1990); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

Thus, in order to be entitled to the Section 20(a) presumption linking his injuries to his employment, claimant must prove both 1) that he has sustained harm and 2) that the alleged accident occurred or working conditions existed which could have caused or aggravated the harm. *See, e.g. Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Brown v. I.T.T/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If claimant proves the elements of a *prima facie* case, the Section 20(a)

presumption applies to connect claimant's harm with his established accident or working conditions. In order to rebut the Section 20(a) presumption, the party opposing entitlement must produce substantial evidence that the injury was not caused or aggravated by the employment. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *Swinton v. J. Frank Kelly Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Once such evidence is produced, the presumption disappears and no longer controls the outcome of the case; the presumption is not, in and of itself, affirmative evidence. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

This interpretation of the Section 20(a) presumption, known as the "bursting bubble" theory of presumptions, is derived from the Supreme Court's analysis of the presumption of Section 20(d) of the Act, which presumes that "the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another," in *Del Vecchio*, 296 U.S. 280. *See U.S. Industries*, 455 U.S. at 612 n.5, 14 BRBS at 632 n. 5. ("It seems fair to assume...that the §20(a) presumption is of the same nature as the presumption created by §20(d) of the Act...as construed in *Del Vecchio*…"); *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978) (applying *Del Vecchio* to Section 20(a)).

Once the presumption is rebutted, the administrative law judge must weigh the competing evidence in the record as a whole and render a decision supported by substantial evidence. *See, e.g., Universal Maritime*, 126 F.3d 256, 31 BRBS 119(CRT); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982*); Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Hensley*, 655 F.2d 264, 13 BRBS 182**;** *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984)**.** Claimant bears the burden of persuasion at this juncture, and must establish that his condition is work-related by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Older cases under the Act often referenced the "true doubt" rule, stating that doubtful questions of fact were to be resolved in favor of claimant. In *Greenwich Collieries*, the Supreme Court held that the "true doubt" rule violates Section 7(c) of the APA, which states that "except as otherwise provided by statute the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). The Court construed "burden of proof" as the burden of persuasion as opposed to the burden of production. Thus, it is clear that once Section 20(a) drops out of the case, claimant must prove his claim by a preponderance of the evidence, and cases indicating that claimant bears a lesser burden at this point are no

longer good law. *See, e.g., Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986) (where Section 20(a) is rebutted, the true doubt rule applies, and claimant bears a less stringent burden than the preponderance of evidence standard applicable in a civil suit); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (based on the true doubt rule, even if the presumption is rebutted, the party opposing entitlement still bears the burden of persuasion); *Hensley*, 655 F.2d at 267, 13 BRBS at 185 (D.C. Circuit "has not decided whether...the ultimate burden of persuasion as to work-relatedness rests with the employer or employee").

Digests

The Fifth Circuit stated, pursuant to *U.S. Industries*, that the Section 20(a) presumption attaches only to the claim made, which here is only the formal claim that claimant injured his back and groin at work. Thus, the administrative law judge and Board erred in applying the Section 20(a) presumption to the allegation that claimant's heart condition was due to steroids taken for his work-related back injury because this allegation was based on claimant's hearing testimony as to what he was told by a doctor. Claimant must establish that the heart condition "naturally or unavoidably" resulted from his back injury without reference to the Section 20(a) presumption. *Amerada Hess Corp. v. Director, OWCP*, 543 F. 3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

The Fifth Circuit reversed the Board's/district court's affirmance of the administrative law judge's award of benefits. Following *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, and *Amerada Hess Corp.*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), the court held that the Section 20(a) presumption does not apply to claimant's claim for benefits for his CIPD, as that disease was not an injury for which a "claim" was made. Specifically, the court held that claimant's CIPD was a "secondary" injury, allegedly related to claimant's work-related arm injury, surgeries and gastritis, and that claimant's request for benefits for "other . . . problems associated with [his arm] injury and working conditions in Iraq" was insufficient to convert the secondary condition into a primary claim. As CIPD was not a primary claim, the Section 20(a) presumption did not apply to it, and the compensability of claimant's CIPD must be assessed by determining whether it was the natural or unavoidable result of his arm injury pursuant to Section 2(2). Thus, the court remanded the case for the administrative law judge to reconsider the issue under the proper standard. *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013).

In a case where claimant filed a claim for compensation form that included only his lung injury, but asserted a claim for both his lung (primary) and vertebra (secondary) injuries before the district director and the administrative law judge, the Fourth Circuit concluded that a claim had been made for the vertebra injury and that the Section 20(a) presumption applied. In so holding, the Fourth Circuit rejected the holdings in *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir.

2013), and *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), wherein the Fifth Circuit concluded that the Section 20(a) presumption does not apply to secondary injuries. The Fourth Circuit noted that the Fifth Circuit's split decisions appeared to have been based on the fact that the secondary injuries were not included in the claimants' claims, and, to the extent there were other reasons, the Fourth Circuit was unclear on what those reasons might be. Thus, relying on the Supreme Court's decision in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), which stands for the two propositions that the Section 20(a) presumption applies only to claims actually made and that a claim must include a primary injury which occurred at work, the court held that the administrative law judge properly found that claimant claimed a work-related primary injury and that a claim was made for the work-related secondary injury; thus, the Section 20(a) presumption applies to both. *Metro Machine Corp. v. Director, OWCP [Stephenson]*, ___ F.3d ___, __ BRBS __(CRT), No. 15-2525, 2017 WL 242986 (4th Cir. Jan. 20, 2017).

See Section 20 of this deskbook for additional cases regarding invocation and rebuttal of Section 20(a).

Establishing Injury

The claimant has the burden of proof to establish the existence of an injury in order to establish a *prima facie* case; Section 20 contains no presumption that claimant suffered an injury. *Volpe v. Northeast Marine Terminals*, 14 BRBS 17, 20 (1981), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Young & Co. v. Shea*, 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969).

It is necessary that there be some physical harm. *Luna v. General Dynamics Corp.*, 12 BRBS 511 (1980) (breaking of safety glasses not sufficient); *Shoener v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 630 (1978) (transfer resulting in wage loss is not a new injury).

An injury occurs "if something unexpectedly goes wrong within the human frame." *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc)*. *See Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949). An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. In *Wheatley*, a heart attack precipitated by the act of urinating in the cold during the course of employment was compensable. *See Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984) (heart attack at work). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. *Darnell v. Bell Helicopter Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984) (chest pain at work); *Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981) (back pain while moving heavy object); *Volpe*, 14 BRBS at 20 (sharp chest pain at work); *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513 (1977) (back pain while stocking goods). In this regard, in holding a death was compensable where the decedent suffered a coronary thrombosis in the hold of a ship and then climbed a 30-foot ladder to the deck, where he died, in *Henderson*, 175 F.2d at 869 (citation omitted), the court stated that decedent had a compensable accidental injury

> even though there was no strain or exertion out of the ordinary when the injury occurred. It is sufficient if the particular strain was too great for the individual employee in his singular condition. It is the unexpected and unintentional effect of the strain or exertion, not its external or internal character, that is covered by the compensation law, regardless of how negligent or inadvisable one's conduct may be; but there must be no intention on the part of the employee to injure himself or another. The fact that the result would have been expected by a physician if he had diagnosed the case is nothing to the purpose. An occurrence is unexpected if it is not expected by the man who suffers it.

Thus, an injury suffered in the course of employment may be compensable despite the fact that the employee may have suffered a related pre-existing condition. *Id.; see Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The "aggravation rule" embodying these concepts is discussed in more detail *infra.*

The fact that an injury is not unexpected, in that a claimant is aware his pre-existing condition may worsen with continued employment, does not preclude a finding that the injury is "accidental" within the meaning of Section 2(2), in the absence of proof that the employee intentionally harmed himself. *See* 33 U.S.C. §903(c). Claimant's negligent or inadvisable conduct does not affect the "accidental" nature of the injury. *See* 33 U.S.C. §904(b) (compensation is payable irrespective of fault). Also, an injury need not be traceable to one definite time to be "accidental." *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In affirming the Board's decision in *Gardner*, 640 F.2d 1385, 13 BRBS 101, the court rejected employer's attempted distinction between the acceleration of the underlying disease process and a mere manifestation of symptoms, stating that whether the employment caused an attack of symptoms severe enough to incapacitate the employee or aggravated the underlying disease process is not significant as in either event, the disability is work-related. The court also agreed that claimant's condition was an "accidental" injury, rejecting employer's attempt to inject "foreseeability" into the inquiry as it suggested an element of a contributory negligence defense, which is not available to the employer, and stating that "a hiatus in coverage for foreseeable injuries that cannot be characterized as occupational diseases is inconsistent with the structure and purpose of the Act." The D.C. Circuit reached a similar conclusion in holding claimant's angina was compensable in *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir.1984). In *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986), the Board reiterated that compensable injuries are not limited to those which occur suddenly, as opposed to those which occur over a long period of time, and that it is sufficient for purposes of causation if claimant's employment "aggravates the symptoms of the process." *Id.* at 214.

The Board defined an occupational disease under the Act in *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989), as characterized by two factors: 1) unexpectedness, *i.e.*, an inherent hazard of continued exposure to conditions of a particular employment; and 2) gradual, rather than sudden, onset. The Board held that claimant's chronic synovitis of the knee, an arthritic condition aggravated by repeated bending, stooping and climbing on the job, was not an occupational disease as there was no evidence that it was an inherent hazard to others in employment similar to that of claimant but rather was unique to him. The Board also noted that an injury may occur over a gradual period and still be construed as an accidental injury, citing *Gardner*, 640 F.2d 1385, 13 BRBS 101. Affirming the Board's decision, the Second Circuit identified three elements that must be present: 1) claimant

must suffer from a disease; 2) hazardous conditions of employment must be the cause of the disease; and 3) the hazardous conditions must be "peculiar to" claimant's employment as opposed to employment generally. The court found that claimant's condition failed to meet the third requirement, as his job activities were not peculiar to his employment as a maintenance man. *See also Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985) (arthritic condition can be occupational disease, but here no evidence that osteoarthritis was a "peculiar hazard" of employment; evidence establishes it was due to traumatic injury).

Credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

A psychological impairment can be an injury under the Act. *Brannon v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury results in psychological problems, leading to suicide); *Butler v. District Parking Management*, 363 F.2d 682 (D.C. Cir. 1966) (employment caused mental breakdown); *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964) (work environment precipitates acute schizophrenia reaction); *Urban Land Institute v. Garrell*, 346 F.Supp. 699 (D.D.C. 1972) (nervous reaction precipitated by stressful pressures of job**;** no one physical or external cause of psychological injury necessary); *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984) (Ramsey, dissenting) (benefits allowed for depression due to work-related disability); *Whittington v. The National Bank of Washington*, 12 BRBS 439 (1980) (S. Smith, dissenting) (remand to determine whether stress and pressure at work aggravated psychiatric condition); *Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428 (1979) (S. Smith, dissenting) (although claimant's anxiety condition is not an occupational disease, it is compensable as an accidental injury).

Digests

The Board held that claimant's chronic synovitis, an arthritic condition aggravated by claimant's repeated bending, stooping and climbing at work, is an accidental injury and not an occupational disease, as there is no evidence that claimant's employment caused his pre-existing arthritic condition or that synovitis is an inherent hazard to persons in employment similar to claimant. The Board noted that an injury may occur over a gradual period of employment and still be construed as accidental. The Board thus held that the Section 13(b)(2) expanded statute of limitations for occupational diseases does not apply and the disability claim was barred by Section 13. As medicals are never time-barred, however, the Board addressed the administrative law judge's finding that causation was not established, holding that he erred in finding Section 20(a) rebutted on the bases that no forthright medical opinion linked claimant's knee condition to his employment and claimant did not complain of knee pain for several years after he ceased work. As Section 20(a) requires that employer produce substantial evidence that claimant's condition was not caused or aggravated by the employment, the administrative law judge erred in placing the burden on claimant. Moreover, there is no medical evidence sufficient to rebut the presumption and the three year gap alone is not sufficient to rebut. Claimant is thus entitled to medical benefits for his work-related condition. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Causation was not at issue on the appeal of the occupational disease definition before the Second Circuit.

The Board reversed the administrative law judge's finding that the work-related aggravation of claimant's lumbar stenosis constitutes an occupational disease and held that claimant sustained a gradual work-related accidental injury. The evidence established that the stenosis was aggravated by the walking and standing required by claimant's employment. As these conditions are not peculiar to claimant's employment and as there is no evidence that others with work duties similar to those of claimant' develop lumbar stenosis, the condition is not an occupational disease. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

Where the administrative law judge denied benefits based on findings that claimant's angina was not an injury under the Act and that claimant's disability was due to his underlying coronary artery disease, which was not work-related, the Board reversed the decision and held claimant had a work-related injury. Chest pains constitute an "injury" within the meaning of the Act. The underlying disease need not have been caused by the employment, as an aggravation of a pre-existing condition is an injury. Moreover, an injury may occur gradually as a result of continuing exposure to conditions of employment. As claimant thus established the "injury" element of his *prima facie* case and working conditions, *i.e.*, job-related stress, which could have caused it, Section 20(a) is invoked. As all three doctors agreed that claimant's chest pains were at least in part

related to stress in his job, the presumption is not rebutted. *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

In a heart-attack case, the Board remanded for the administrative law judge to make explicit findings on whether claimant suffered a myocardial infarction and reiterated that chest pains can constitute an injury under the Act; thus, even if claimant did not have a myocardial infarction, he may nonetheless be compensated for work-related chest pains. The Board discussed *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, stating that the Court did *not* hold that pain is not a compensable injury or that claimant must prove an injury arising out of and in the course of employment without benefit of the Section 20(a) presumption. The Court held that a *prima facie* claim must at least allege an injury that arises in the course of employment as well as out of employment, and since the administrative law judge found that claimant did experience chest pains at work, he established this element of his *prima facie* case. *Cairns v. Matson Terminals, Inc*., 21 BRBS 252 (1988).

Where the Board had previously remanded the case, holding claimant entitled to the Section 20(a) presumption as claimant's chest pains constitute an injury within the meaning of the Act and he established working conditions which could have caused them, the administrative law judge erred in failing to follow the Board's instructions. *U.S. Industries* does not stand for the proposition that pain alone is not an injury, but established that the presumption applies only to the claim made by claimant and the presumption does not apply if claimant establishes only a harm and does not prove the existence of working conditions which could have caused it. As claimant met both elements here, the administrative law judge's finding that Section 20(a) does not apply was reversed. As there is no rebuttal evidence, the chest pains are work-related as a matter of law, and the case was remanded for consideration of disability. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990).

Where claimant established that he had pleural plaques due to asbestos exposure and sought medical benefits to monitor his condition, the Board reversed the administrative law judge's finding that claimant did not suffer an injury under the Act. The administrative law judge erred in requiring that claimant not only establish that he suffered from "the wound or physical harm" but also from a measurable impairment. Claimant need not show that he has a specific illness or disease in order to establish an injury, but need only establish some physical harm. As the record demonstrated that claimant suffered from a physical harm, pleural plaques, he established that something had gone wrong within his frame. As he was exposed to asbestos, the Section 20(a) presumption was invoked, and it was not rebutted. Claimant need not have a loss in wage-earning capacity in order to be entitled to medical benefits. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

The Second Circuit remanded the case to the Board for consideration of whether claimant sustained an injury under the Act where the doctor credited by the administrative law judge stated claimant had pleural thickening and calcification. The court cited the Board's decision in *Romeike*, 22 BRBS 57 (1989), a case with similar facts, wherein the Board held that claimant need not show he has a specific illness or disease in order to establish he has suffered an injury under the Act, but need only establish some physical harm, *i.e*., that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991).

The Board rejected employer's argument that claimant failed to establish a psychological injury because his doctors did not analyze his condition using the *Diagnostic & Statistical Manual of Mental Disorders*. The Board stated that the Act does not require the use of this manual in assessing whether a claimant has any particular psychological injury either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. As all the doctors, including employer's expert, reported that claimant suffers from some psychological injury, the Board affirmed the administrative law judge's determination that claimant established the "harm" element of his *prima facie* case. *S.K. [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011).

In this case arising under the DBA, where claimant alleged that a physical harm to his face caused a psychological injury, and the administrative law judge found there was no physical harm, the Board reversed the administrative law judge's determination that there was no injury/harm in this case, as the doctor's reports are uncontradicted that claimant suffered a psychological injury. The administrative law judge was incorrect in requiring claimant to initially establish a physical harm, as a psychological injury can constitute harm under the Act with or without an underlying physical harm. Although the Board reversed the administrative law judge's finding, it affirmed her denial of benefits, as the Board held that the zone of special danger did not apply and that claimant failed to establish the working conditions element of his *prima facie* case. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).

In this psychological injury case, employer argued that recovery was precluded by the "zone of danger" test, which limits recovery to those plaintiffs who sustain an actual physical injury or are placed in immediate risk of physical injury as a result of a defendant's negligent conduct. The Board affirmed the administrative law judge's rejection of employer's contention that the "zone of danger" test precludes an award of compensation under the Act, holding that the test is a tort concept which does not apply to the workers' compensation provisions of the Longshore Act. Similarly, the Board held that employer's reliance on the holdings in the Section 5(b) cases was misplaced, as the fault and negligence concepts that may be applicable to negligence actions brought under Section 5(b) have no application to workers' compensation claims under the Act, absent

the applicability of Section 3(c), 33 U.S.C. § 903(c). The Board stated in this regard that it is well established that a work-related psychological impairment, with or without an underlying physical harm, may be compensable under the Act. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, ___ F.3d ___, __ BRBS ___(CRT), No. 15-1041, 2017 WL 386481 (4th Cir. March 24, 2016).

In affirming the Board's decision, the Fourth Circuit rejected employer's contention that claimant can recover for a psychological injury only if he also sustains a physical injury or was placed in immediate risk of physical harm. The court held that such a limitation is inconsistent with the express terms of 33 U.S.C. § 902(2), which does not distinguish between physical and psychological injuries, as well with case precedent interpreting Section 2(2). Moreover, the "zone of danger" test is a tort concept which is not applicable in a workers' compensation claim. As substantial evidence supported the administrative law judge's conclusion that claimant has PTSD related to the work accident, in which claimant ran over and killed a co-worker with a forklift, the court affirmed the award of benefits. *Ceres Marine Terminals, Inc. v. Director, OWCP*, ___ F.3d ___, __ BRBS ___(CRT), No. 15-1041, 2017 WL 386480 (4th Cir. March 24, 2016).

In affirming the Board's decision holding that employer's evidence was legally insufficient to rebut the Section 20(a) presumption because it did not address the question of whether claimant's disabling back pain was related to his working conditions, the First Circuit reiterated its holding in *Gardner*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), that a claim may be based on a work-related activation or aggravation of symptoms, even if the underlying condition itself is not work-related. Although the doctor stated that claimant's underlying osteoarthritis was wholly related to non-work factors, he did not state that the back pain claimant experienced was unrelated to employment. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010).

Additional cases are digested under Section 20(a) of this deskbook.

Establishing an Accident or Working Conditions

It is claimant's burden to demonstrate the occurrence of an accident or the existence of working conditions which could have caused the injury; the Section 20(a) presumption does not aid claimant in establishing this aspect of his *prima facie* case. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275 (1981); *Jones v. J.F. Shea Co., Inc.*, 14 BRBS 207 (1981). *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982) (administrative law judge discredits claimant's testimony and finds that fall at work did not occur); *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985) (remand to determine whether claimant has met her burden of establishing exposure to potentially toxic chemicals which could have caused the harm). In *Adams v. General Dynamics Corp*., 17 BRBS 258 (1985), the Board held that claimant met his burden by establishing workplace asbestos exposure; the administrative law judge erred in further requiring claimant to prove lung damage due to asbestos to invoke the Section 20(a) presumption.

An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc)*. *See Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949). An external, unforeseen incident is also not necessary for claimant to have an accidental injury. *Id.*

Digests

An injury sustained during the course of medical examination scheduled at employer's request on a work-related hearing loss claim is covered under the Act, as such an injury necessarily arises out of and in the course of employment. The Board remanded the case for the administrative law judge to determine whether claimant's neck injury was sustained during the course of medical treatment. *Weber v. Seattle Crescent Container Corp*., 19 BRBS 146 (1986).

Where claimant injured his back while undergoing vocational testing in connection with his work-related arm injury, his back injury necessarily arises out of and in the course of employment. *Mattera v. M/V Mary Antoinette, Pacific King, Inc*., 20 BRBS 43 (1987).

A psychological injury resulting from a legitimate personnel action, as the reduction-in-force in this case, is not compensable, as such an act is not a working condition which can form the basis for a compensable injury under the Act. However, because claimant argued alternative working conditions existed which could have caused the harm alleged, the case was remanded for the administrative law judge to consider whether claimant's

psychological injury was the product of cumulative stress from the job. *Marino v. Navy Exchange*, 20 BRBS 166 (1988).

The Board affirmed the administrative law judge's reliance on the absence of direct impeaching evidence, the corroborating testimony of a co-worker, and claimant's direct testimony to find that a work-related accident occurred. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

Claimant is not required to show that his working conditions were unusually stressful in order to establish working conditions sufficient to invoke Section 20(a). *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

The Board affirmed the administrative law judge's conclusion that claimant failed to establish his *prima facie* case where his conclusion that claimant failed to establish the working conditions that he alleged caused his harm was supported by substantial evidence. Claimant had argued that his job as a labor relations assistant was a high pressure job, that he had been threatened on the job and that his job was extremely stressful. The Board rejected claimant's and Director's arguments that the administrative law judge erred in focusing on whether the workplace was dangerous or stressful beyond the norm, finding that the administrative law judge's decision was based not on an erroneous legal standard, but on factual findings indicating the conditions claimant alleged were not in fact present. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989), *on remand from* 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988), *rev'g* 20 BRBS 104 (1987).

In a claim for death benefits where the employee committed suicide, the Board affirmed the administrative law judge's invocation of the Section 20(a) presumption as he properly found that the issue was the effect of the work-related stress on the employee and not whether the stress was "mild" in the abstract. Thus, the Board did not need to address whether a grand jury investigation involving co-workers is sufficient to establish the "working conditions" element. *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994).

The Board affirmed an administrative law judge’s decision to credit claimant’s account of an accident where he rationally found that discrepancies in claimant's accounts of the manner in which the accident occurred were "within the expected range" and insignificant. The administrative law judge's conclusion that claimant sustained an industrial injury to his back on December 27, 1982, is supported by the medical histories and claimant's testimony. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

The Ninth Circuit affirmed the Board’s decision affirming an administrative law judge’s finding that claimant failed to establish the alleged accident occurred. The administrative law judge found claimant’s testimony incredible due to inconsistencies in his reports to

physicians and his testimony. The court rejected claimant's arguments that his diagnosed low mental capacity, psychological problems and other factors explained the inconsistencies and affirmed the administrative law judge's decision as supported by substantial evidence. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

The Board affirmed the administrative law judge's finding that claimant failed to establish that the work-related accident on January 17, 1989, alleged by claimant in fact occurred. The administrative law judge relied on inconsistencies in claimant's testimony regarding the date of the alleged work accident, claimant's failure to report a work connection to Dr. Grimes on January 19, 1989, the report of that examination indicated that claimant stated he had experienced pain for two weeks, and claimant failed to report the work accident. The administrative law judge also rejected the testimony of two co-workers and claimant's wife. As the administrative law judge's finding was supported by substantial evidence and demonstrates that claimant failed to establish an essential element of his *prima facie* case, the Board affirmed the administrative law judge's denial of the claim. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

In a case where it was undisputed that claimant has a work-related hearing loss involving two potentially responsible employers, the Ninth Circuit held that the administrative law judge erred in denying benefits because claimant did not establish injurious stimuli at the last employer. The court held that claimant's testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. As employers failed to present rebuttal evidence, the presumption controls and the last employer is liable for claimant's work-related hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The Board affirmed the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case as he rationally credited claimant's testimony that he engaged in lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

In this psychological injury case, the Board held that the administrative law judge erred in holding that claimant was not entitled to the Section 20(a) presumption. In his analysis, the administrative law judge erred in considering whether employer's interactions with claimant, including claimant's treatment by her supervisor, were legitimate or justified. The Board held that under *Marino v. Navy Exchange*, 20 BRBS 166 (1988), the administrative law judge should have considered whether, irrespective of disciplinary and termination procedures, the cumulative stress in claimant's working conditions could have caused or aggravated her psychological injury. Since the record contained incidents of day-to-day working conditions, rather than personnel actions

which could have caused or aggravated claimant's psychological injury, the Board held that claimant established working conditions sufficient to demonstrate a *prima facie* case, and therefore was entitled to invocation of the Section 20(a) presumption. *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997)(McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998)(Brown and McGranery, JJ., dissenting).

The Ninth Circuit adopted the Board's decision in *Marino*, 20 BRBS 166 (1988), holding that psychological injuries resulting from legitimate personnel actions are not compensable, as opposed to injuries arising from general working conditions such as harassment, which are compensable, *see Sewell*, 32 BRBS 127 (1997), *on recon.*, 32 BRBS 134 (1998). The court stated that this rule strikes an appropriate balance between the needs of employers and employees. The court rejected claimant's contention that such a holding runs afoul of the no-fault scheme of Section 4(b). In this case, claimant conceded that substantial evidence supported the finding that his psychological injuries were caused by legitimate personnel actions, namely disciplinary actions and reprimands. Thus, the court affirmed the denial of benefits. *Pedroza v. BRB*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010).

The Board rejected claimant's assertion that the *Marino-Sewell* line of cases encompasses only those actions which culminate in an employee's loss of employment. The personnel action taken in this case permitted employer to continue claimant's employment, and it was reasonable for the administrative law judge to consider it a "legitimate personnel action" covered by *Marino*. *Raiford v. Huntington Ingalls Industries, Inc.*, 49 BRBS 61 (2015).

Claimant worked for employer for nearly 30 years in the paint shop on the first shift. Upon the closing of the paint shop, employer reassigned claimant to painting on ships and, thereafter, changed his shift from the first to the second. Claimant subsequently was hospitalized and was told he had suffered a stroke and had depression and anxiety. Claimant contended the conditions were due to his change of shift and he filed a claim for disability and medical benefits. The administrative law judge denied benefits because, inter alia, the working conditions on which claimant relied were "legitimate personnel actions;" therefore, claimant failed to demonstrate "working conditions" that could have caused his harm. As claimant alleged only that the cause of his medical conditions was the change of shift itself, the Board affirmed the denial of benefits, holding the administrative law judge properly found the shift change was a legitimate personnel action which cannot establish the working conditions element of a prima facie case. As claimant's condition is not work-related as a matter of law, he is not entitled to disability or medical benefits. *Raiford v. Huntington Ingalls Industries, Inc.*, 49 BRBS 61 (2015).

The Board affirmed the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case, as he rationally credited claimant's

testimony regarding the level of noise to which he was exposed over the contrary testimony of one of employer's witnesses. *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998).

The Board affirmed the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case, as he rationally credited claimant's testimony regarding his stressful work environment. Moreover, the administrative law judge credited medical opinions that claimant suffered angina while working for employer, and that stress may cause such a cardiac event. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Board held that in order for the injury to decedent to be compensable, his exposure to asbestos must have occurred, at least in part, on a covered situs, that is, a covered portion of employer's facility. Thus, while it is neither necessary that the last exposure nor the majority of the exposure comes from the covered areas, *some* exposure must have occurred within a covered area for employer to be held liable. Where there is conflicting testimony as to whether decedent was exposed to asbestos while working on the covered portions of employer's facility, the case must be remanded for a determination by the administrative law judge of where decedent's injury occurred and, thus, whether the injury is compensable. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

The Board affirmed the administrative law judge's finding that the decedent had work-induced stress associated with unreasonable expectations for the vessel's completion and delivery based on the testimony of decedent's fellow employees and his family members. In addition, the administrative law judge found that decedent was required to work long hours and endure further stress associated with interference from the shipyard's superintendent. Work events need not be unusually strenuous to establish a compensable injury. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert denied*, 540 U.S. 814 (2003).

Where claimant testified regarding his job duties as a slingman and that videotapes submitted by carrier do not accurately portray all aspects of this work, and a physician testified that claimant described his job duties to him, the Board affirmed the administrative law judge's finding that the testimony of claimant and the physician establish that claimant's working conditions could have caused or aggravated claimant's degenerative back condition. Therefore, claimant established a *prima facie* case for invocation of the Section 20(a) presumption. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd, vacated and remanded, and reversed on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004) and No. 02-71207, WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *cert. denied*, 544 U.S. 960 (2005).

Where the Board remanded the case for the administrative law judge to consider whether claimant established the alleged working conditions, the First Circuit affirmed the decision after remand, as substantial evidence supported the administrative law judge's decision that stressful working conditions existed which could have aggravated claimant's pre-existing neurological condition. The administrative law judge found that claimant was teased incessantly about his medical condition which exacerbated his condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

In this DBA case, claimant alleged a physical harm to his face as the result of his use of a cosmetic chemical peel while in Kuwait. The administrative law judge found that the "zone of special danger" would bring any injury claimant may have suffered into the course of his employment, but found that claimant did not suffer a physical harm, and therefore no psychological harm as a result of the physical harm. The Board reversed the latter findings and held there was uncontradicted evidence of a psychological harm. However, as the psychological harm was the result of the perceived injury claimant believed he suffered related to the chemical peel, and as use of a chemical peel was a personal act, was not rooted in the obligations of his employment, and was not related to the fact that claimant worked in Kuwait, the Board held that any psychological injury related to that use did not have its genesis in claimant's employment. Accordingly, the Board held that the zone of special danger did not apply to bring claimant's actions/injury within the course of his employment. As claimant did not establish the working conditions element of his *prima facie* case, the Board affirmed the administrative law judge's denial of benefits. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).

Additional cases are digested under Section 20(a) of this deskbook.

The Aggravation Rule

Benefits are not limited to employees in good health; employers accept their employees with the frailties that predispose them to bodily hurt. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949). *See Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979) (not relevant that claimant's obesity makes it difficult for his hernia to heal). In *Gooden*, the Fifth Circuit held that an administrative law judge erred in focusing on the origins of claimant's underlying heart condition rather than on the ultimate heart attack, stating that the focus in properly on the ultimate injury and not the preexisting condition.

In *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT), the Fifth Circuit relied on the court's 1949 decision in *Henderson* in holding that the administrative law judge erred in focusing on claimant's pre-existing underlying heart disease rather than on his heart attack. In *Henderson*, in finding a heart attack at work covered despite the fact that the employee had a pre-existing heart condition, the court stated:

> The Act gives compensation for accidental injury or death arising out of and in the course of employment; it does not say caused by the employment. There is no standard of normal man who alone is entitled to workmen's compensation. Whatever the state of health of the employee may be, if the conditions of his employment constitute the precipitating cause of his death, such death is compensable as having resulted from an accidental injury arising out of and in the course of his employment. If the workman overstrains his powers, slight though they be, or if something goes wrong within the human frame, such as the straining of a muscle or the rupture of a blood vessel, an accident arises out of the employment when the required exertion producing the injury is too great for the man undertaking the work; and the source of the force producing the injury need not be external.

175 F.2d at 866. *Accord Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc)*.

Thus, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984) (Ramsey, dissenting); *Haynes v. Washington Metropolitan Area Transit Authority*, 7 BRBS 891 (1978). In workers' compensation, it has long been held that an award is justified if the accident is only a concurrent cause; it is enough it the employment aggravates, accelerates or combines with a prior disease or infirmity to result in disability. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Thus, under the "aggravation rule," where an employment-related injury contributes to,

combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable; the relative contributions of the work-related injury and the prior condition are not weighed to determine claimant's entitlement. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc), aff'g* 15 BRBS 386 (1983) (Ramsey, dissenting); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982), *aff'g* 14 BRBS 520 (1981) (aggravation rule applied to hearing loss); *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982) (driving bus aggravates pre-existing psoriasis);*Wheatley*, 407 F.2d 307 (work activities aggravate pre-existing arteriosclerosis); *J.V. Vozzolo, Inc. v. Britton* , 377 F.2d 144 (D.C. Cir. 1967) (same); *O'Leary*, 357 F.2d 812 (back injury and resulting surgery combined with pre-existing osteoarthritic changes results in total disability); *LaPlante v. General Dynamics Corporation/Electric Boat Division*, 15 BRBS 83 (1982*)* (work-related asbestosis combines with heart condition to produce total disability); *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983) (combination of asbestosis and connective tissue disease to produce total disability).

In its *en banc* decision in *Strachan Shipping*, 782 F. 2d at 518, 18 BRBS at 49(CRT), the Fifth Circuit stated that "the aggravation rule is a doctrine of general workers' compensation law which provides that, where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." The court found the rule well-grounded in its prior precedent and the provisions of the Longshore Act. While the aggravation rule requires an employer to compensate the full extent of the employee's disability, the court agreed with the Board's holding that it is complemented by an extra-statutory credit doctrine under which the employer may receive a credit for any portion of a scheduled disability for which the employee has already actually received compensation under the Act. For additional cases on the credit doctrine, see Sections 3(e), 14(j) and 8(f).

Where Section 20(a) is invoked, employer bears the burden of producing substantial evidence that claimant's condition was not caused or aggravated by his employment. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *LaPlante*, 15 BRBS 83 (affirming an administrative law judge's award based on the aggravation rule where medical evidence indicated claimant's cardiac condition combined with his work-related asbestosis to result in his disabling condition and there was no evidence that claimant's heart condition did not pre-exist his work-related asbestosis; thus, Section 20(a) was not rebutted).

A *de minimis* rule in aggravation cases has been rejected by the Fifth Circuit, establishing that the brevity of exposure is not relevant. *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d

1008, 12 BRBS 975 (5th Cir. 1981) (compensation awarded based on two months of silica exposure which aggravated prior respiratory condition). Moreover, that the work-related contribution is relatively small or can be measured is also not relevant. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982) (employer liable for entire hearing loss of 31.25 percent despite evidence of pre-employment loss of 25.3 percent).

Aggravation of a prior injury constitutes a new injury and liability must be assumed by the employer for whom claimant was working when the aggravation occurred. *See, e.g., Abbott v. Dillingham Marine & Manufacturing Co.*, 14 3RBS 453 (1981)**,** *aff'd mem.*, No. 81-7801 (9th Cir. 1982) (first employer not liable where second injury with second employer aggravated condition); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd*, No. 80-3166 (5th Cir. 1981). Cases on the responsible employer are further addressed in that section of the deskbook.

The hastening or acceleration of death or disability which would have happened anyway is compensable. *O'Leary*, 357 F.2d at 81***;*** *Henderson*, 175 F.2d 863; *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, dissenting). In *Woodside*, the majority quoted the maxim that "to hasten death is to cause it." *Id.* at 603. The Board followed *Woodside* in *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). *See also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BRBS 2-90 (4th Cir.1992), *cert. denied*, 506 U.S. 1050 (1993) (applying hastening in a Black Lung case).

An "accidental injury" includes one occurring gradually as a result of continuing exposure to conditions of employment, and it is sufficient if employment "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). An aggravation or progression of the underlying pre-existing disease is not necessary for there to be a compensable injury; an increase in symptoms resulting in disability is sufficient. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) (work conditions aggravate varicose veins condition in legs, resulting in swelling of legs at work; no residual impairment once symptoms subsided). *Accord Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984), *rev'g in part* 12 BRBS 458 (1980) and 16 BRBS 101 (1983); *Lindsay v. Owens Corning Fiberglass Sales*, 13 BRBS 922 (1981).

In its decision in *Gardner*, the Board also held that where claimant suffers a temporarily disabling aggravation of the symptoms of a pre-existing non work-related injury, precipitated by the conditions of employment, the claimant is entitled to temporary disability compensation for the duration of those symptoms; claimant is not entitled to permanent disability benefits if, once the disabling symptoms cease, there is no progression or aggravation of the underlying disease. *Gardner*, 11 BRBS 556 (allowing temporary total award, but reversing permanent partial award); *Sylvester v. Bethlehem*

Steel Corp., 14 BRBS 234 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982) (same); *Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981). However, in *Crum*, while the D.C. Circuit agreed with the Board that claimant's angina was a compensable injury and it rejected employer's challenge to the Board's holding that claimant was totally disabled as his symptoms precluded his performing his usual work, it reversed the determination that claimant's disability was not permanent. *Crum*, 783 F.2d 474, 16 BRBS 115(CRT). The court held that the Board erred in focusing on the abatement of claimant's chest pains when he left employment and the improvement in his overall health instead of reviewing the issue under the substantial evidence standard and the legal test for permanency. The court held that substantial evidence supported the administrative law judge's conclusion that claimant's condition was permanent as the medical evidence established that it was of indefinite duration. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988).

Additional aggravation rule cases decided prior to 1986 include: *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982) (remand to determine if lifting mail bags aggravated pre-existing heart condition, resulting in angina pains and myocardial infarction); *Morgan v. General Dynamics Corp.*, 15 BRBS 107 (1982) (employer is liable for all of claimant's hearing loss when a work-related acoustic trauma aggravates or combines with a prior hearing impairment); *Fortier*, 15 BRBS 4 (total disability due to a combination of work-related asbestosis and non work-related connective tissue disease); *Seaman v. Jacksonville Shipyards, Inc.*, 14 BRBS 148.9 (1981) (where ankle injury aggravates pre-existing flatfoot condition, entire resultant foot condition is compensable); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812, 820-22 (1981) (remand to determine if increased pressure on left leg following right leg surgery aggravated pre-existing degenerative left knee condition); *Cody v. Sun Shipbuilding & Dry Dock Co.*, 13 BRBS 1096.3 (1981) (remand to determine whether work-related myocardial infarction aggravated or combined with underlying atherosclerotic condition to produce permanent total disability); *Whittington v. National Bank of Washington*, 12 BRBS 439 (1980) (aggravation rule applies to mental as well as physical conditions).

Digests

Where employer contended that claimant's disability is due to a pre-injury history of repeated arm trauma and post-injury aggravation but did not contest the employment-related injury, its causation arguments fail. The Board reiterated its holding that if an employment-related injury contributes to, combines with or aggravates a pre-existing condition the entire resultant disability is compensable. Further, when claimant sustains a work injury which is followed by the occurrence of a subsequent injury outside work which is the natural or unavoidable result of the initial work injury, employer is still liable. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (court held Board erred in

remanding case for reconsideration of disability and reinstated the original permanent total disability award).

Claimant established that he sustained chest pains at work. Under the aggravation rule, if claimant's work played any role in the manifestation of symptoms of his underlying arteriosclerosis, then the non-work-relatedness of the underlying disease and the fact that his chest pains could have appeared anywhere are irrelevant--the entire resulting disability is compensable. As the Section 20(a) presumption was not rebutted with regard to claimant's chest pains, the administrative law judge's finding that causation was not established is reversed and the case remanded for consideration of the remaining issues. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

The administrative law judge's finding that carrier was liable for the payment of compensation to claimant for his 1980 and 1983 injuries is correct as carrier was on the risk at the time of the 1983 injury, which combined with the effects of the 1980 injury to produce claimant's present disability. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

Where claimant is unable to return to his usual work because of a combination of his work-related hernias and his pre-existing heart condition, employer is liable for his entire resulting permanent total disability pursuant to the aggravation rule. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

Additional aggravation of a hearing loss which occurs after termination of covered longshore employment is not compensable. Thus, where claimant worked at a covered facility and transferred to a situs outside the scope of Section 3(a), any additional hearing loss sustained after the transfer is not compensable. *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989).

In the case of a retiree with an occupational hearing loss whose covered employment is followed by a period of non-covered employment, the Board held that *Brown*, 22 BRBS 384 (1989), does not require a claimant to recreate the precise extent of his hearing loss at the date his covered employment terminated. In light of the last covered employer rule, and in the absence of credible evidence regarding the extent of claimant's hearing loss at the time he leaves covered employment, the administrative law judge may rely on the most credible evidence in determining the extent of claimant's work-related loss. In this case, claimant left covered employment in 1963, and the administrative law judge rationally credited the results of a 1986 audiogram. *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1990). *See also Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991)(following *Labbe* for non-retirees; administrative law judge rationally credited 1988 audiogram where last covered employment was in 1971*); Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991)(administrative law judge rationally denied benefits where

claimant left covered employment in 1953 and he could not project results of equivocal 1968 audiogram back to 1953).

The Board rejected employer's argument that its liability in hearing loss cases should be reduced to account for the effects of presbycusis, as the noise-induced loss had no effect on the underlying age-induced loss and the aggravation rule should not be applied in an additive manner. Under the aggravation rule, employer is properly liable for claimant's entire combined hearing loss. *Ronne v. Jones Oregon Stevedoring Co*., 22 BRBS 344 (1989), *aff'd in pert. part and rev'd in part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). While the court reversed the Board's responsible employer holding, it affirmed the decision that claimant was entitled to compensation for his entire hearing loss without a deduction for the portion due to presbycusis. The court reasoned that the aggravation rule does not require that the employment injury interact with the underlying condition itself to produce a worsening of the underlying impairment; under the aggravation rule, claimant is not required to prove that his disabilities combined in more than an additive way. *Port of Portland v. Director*, OWCP, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991*)*.

When claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. If the injury aggravates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. In this case, substantial evidence supports a finding of aggravation. Claimant was able to work until the second injury with increased wages, and the medical evidence supports a finding of a distinct aggravation. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Employer is liable for benefits for claimant's carpal tunnel syndrome regardless of whether it is the result of the natural progression of an earlier injury or the result of a work-related aggravation, which it concedes, as it was the employer at all relevant times. The Board also affirmed a finding that claimant's neck condition was work-related. *Alexander v. Ryan-Walsh Stevedoring Co. Inc.*, 23 BRBS 185 (1990), *vacated and remanded mem*., 927 F.2d 599 (5th Cir.1991) (court vacated the causation finding on the neck injury and remanded for further consideration).

The Ninth Circuit rejected employer's argument that the aggravation rule should not apply to retired workers. The court holds that the rehabilitation of injured workers is only one purpose of the aggravation rule, and that, as the Act is to be liberally construed, the rule therefore applies to working and retired employees equally. The court also rejected employer's argument that the AMA *Guides* overrule the aggravation rule and require that respiratory disabilities be apportioned between environmental causes and tobacco use. The court held that the *Guides* simply provide instructions on how an apportionment might be made, and further noted that the doctors relied upon by the administrative law judge were unable to determine what portion of claimant's disability was attributable

solely to asbestos exposure and what portion was attributable to other causes. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990).

Where the medical evidence established that claimant's chest pains were due at least in part to exertional stress at work, Section 20(a) was not rebutted and the administrative law judge's finding of no causation is reversed. That the underlying disease is not work related and that the chest pains could have occurred anywhere are irrelevant; the entire resulting disability is compensable. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

In a case arising in the Fourth Circuit, where decedent had an 18 percent permanent partial disability due to asbestosis and died from a cerebella hemorrhage, with interstitial lung disease and asbestosis listed as "other significant conditions," the Board followed the holding in *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1981), that "to hasten death is to cause it." The Board noted that in a black lung case, *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BRBS 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993), the court adopted this rule. The Board rejected employer's attempts to have the rule abandoned or narrowed. Thus, as asbestosis played some role in decedent's death, the administrative law judge's award of death benefits was affirmed. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

The Board rejected employer's contention that claimant's disability was not caused by his injury with the Redskins but was due instead to a temporary aggravation of a previous injury that occurred while claimant was playing college football. The Board noted that employer cannot be relieved of liability because under the aggravation rule, where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer remains liable for the entire resultant condition. In addition, the record is devoid of evidence supporting employer's position. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

As the unequivocal evidence of record established that the 100 percent hearing impairment of the left ear is solely the result of a non work-related subsequent intervening cause, the aggravation rule is not applicable. As claimant's right ear impairment measures zero percent under the AMA *Guides* and the left ear loss is not work-related, claimant is not entitled to disability compensation. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

The Sixth Circuit affirmed the finding that claimant is permanently totally disabled, and that employer is liable for medical benefits, as substantial evidence supports the finding that the work accident aggravated claimant's pre-existing back problems and phlebitis/chronic venous insufficiency to result in his inability to perform his usual employment. As employer failed to demonstrate suitable alternate employment, the administrative law judge's finding that the work accident aggravated claimant's

conditions to the point of permanent total disability was affirmed. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998).

The Fifth Circuit rejected employer's argument that substantial evidence does not support the finding that the 1992 accident contributed to claimant's disability. The treating physician stated that while he could not determine how much the prior condition and the current injury each contributed to claimant's permanent total disability, both were factors and employer's physician stated only that the 1992 injury was not the *sole* cause of claimant's disability. "The only legally relevant question is whether the work injury is *a cause* of the disability," not whether it is the sole cause. The medical evidence, along with claimant's credible testimony that his present pain is greater than before the work injury, supported a finding that claimant's current disability is due at least in part to the work injury. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

Where claimant sustained a back injury in 1996 with one employer and a more serious "flare-up" in 1998 with another employer, who had taken over the first employer's facility, the Third Circuit held that the Board properly reversed the administrative law judge's determination that the first employer was liable for claimant's disability benefits. It stated that the administrative law judge's conclusion was not supported by substantial evidence where the record established that claimant's work in early 1998 aggravated his condition to the degree that even the administrative law judge acknowledged there was an aggravation. The court held that the Board properly determined that the administrative law judge erred in addressing whether the earlier injury was the "precipitant injury" rather than ascertaining whether the subsequent work aggravated or exacerbated claimant's condition. Accordingly, the court affirmed the Board's determination that claimant's second employer is liable for claimant's benefits as a matter of law. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

In this case, claimant sustained two work-related injuries. Claimant and the second employer settled the claim for benefits due to the second injury, thus precluding any further recovery from the last employer. The Second Circuit initially affirmed the Board's finding that there was no evidence that claimant had fully recovered from the first injury before the second injury, and it stated it was clear that each injury caused a wage-earning decrease to some degree, but it was unclear to what extent the earlier disability affected the current overall disability. The court rejected the first employer's argument that it was not liable for benefits on the basis that claimant's second injury with another employer aggravated the first injury, holding that the aggravation rule is not a defense to be used by first or earlier employers as a shield from liability. The court then addressed the effect of claimant's settlement with the second employer, holding that claimant may recover from an earlier employer when he cannot recover from the last employer. However, the court stated that in order to hold the first employer liable,

claimant bears the burden of showing that his current disability can be attributed to the first injury, reasoning that as there is less proximity between the current condition and the first injury, the normal shifting burdens applicable in establishing disability do not apply. The court remanded the case for the administrative law judge to determine whether, and to what extent, the first injury contributed to claimant's disability. In so doing, the administrative law judge must consider whether claimant acted in good faith in entering into the settlement and whether he attempted to manipulate the aggravation rule. *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003).

The Board affirmed the administrative law judge's finding that claimant's light-duty work aggravated his back condition that had been caused by a previous work injury. All three doctors of record opined that claimant's work activity aggravated or could have aggravated his condition. As there is no evidence contradicting claimant's testimony regarding the work he performed, the administrative law judge properly found that the Section 20(a) presumption was invoked and that employer did not present substantial evidence rebutting the presumption. Accordingly, the Board affirmed the finding that claimant's back condition is work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In 1999, claimant settled a claim under the Act for scheduled permanent partial disability benefits for injuries to his hands sustained in the course of his employment with a previous employer. In his subsequent employment with another longshore employer, claimant sustained further injuries to his right hand in 2011, for which he underwent surgery. The administrative law judge denied the claim for scheduled benefits for right carpal tunnel syndrome, having found that claimant did not make out his prima facie case under Section 20(a). The Board held, as a matter of law, that claimant satisfied both elements of his prima facie case, and stated that, contrary to the administrative law judge's reasoning, the fact that claimant may have a lower impairment rating after his recovery from carpal tunnel surgery in 2012 than the rating assigned by a physician in 1999 does not establish the absence of a work injury occurring in 2011. The Board remanded the case for the administrative law judge to address, consistent with the Section 20(a) presumption and the aggravation rule, whether claimant has a disabling right hand condition that is causally related to his employment with employer. *Myshka v. Electric Boat Corp*., 48 BRBS 79 (2015).

Natural Progression/Intervening Cause

When claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980); *Haynes v. Washington Metropolitan Area Transit Authority*, 7 BRBS 891 (1978). If, however, the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983), *rev'g* 14 BRBS 682 (1982); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Marsala v. Triple A South*, 14 BRBS 39 **(**1981) (Miller, dissenting).

The possibility of an intervening cause does not affect invocation of the Section 20(a) presumption. Thus, employer must produce substantial evidence that claimant's disability is the result of an intervening cause. *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989).

Even if the subsequent injury occurred as a result of impairment due to the first injury, where the subsequent injury is the result of the employee's or a third party's intentional or negligent conduct, this conduct may be an intervening cause relieving employer of liability. In *Cyr*, 211 F.2d 454, claimant injured his left leg at work. Two months later, he fell from a stepladder while at home. The deputy commissioner found that the second injury occurred because of the instability of claimant's leg and was thus compensable as it was related to the first injury. The district court reversed, finding the second injury occurred due to claimant's conduct in choosing to climb the ladder with his injured leg and was thus the result of an intervening cause and not the natural and unavoidable result of the work injury. The Ninth Circuit discussed the development of workers' compensation laws and the elimination of fault and negligence as considerations. The court stated that Section 2(2) does not limit recovery for subsequent injury to only disease or infection, but also covers accidental injuries which happen subsequent to the primary injury. *Id.* at 456. The court stated that an additional injury off the job which results from the employee's own intention or carelessness is not compensable; by using the word "unavoidable" the Act places upon the injured worker a duty of due care applicable to injuries outside the employment and limiting the exclusion of negligence to on the job injuries. However, the facts could establish that claimant had been walking without his leg buckling and that stepping on the ladder, without more, would thus not necessarily amount to negligence. The case was remanded for further findings as to whether the second injury was the natural or unavoidable result of the first injury.

The Board followed *Cyr* in *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979) (Miller, dissenting), where a claimant who had injured his right knee at work injured his left leg when his injured knee buckled and he fell off the roof while repairing an antenna. Reversing the administrative law judge's award, the Board noted that the evidence established that claimant's knee had buckled on numerous occasions and concluded that claimant failed to take reasonable precautions to guard himself against re-injury after the initial work-related leg injury. *See also Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993) (disability due to supervening car accident not compensable); *Marsala*, 14 BRBS at 43 (case remanded for administrative law judge to determine whether a subsequent fall from a bus was due to claimant's work-related back injury or caused by third-party negligence; any disability due to non work-related intervening cause is not compensable). *But see Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979) (claimant's disability due to work-related lung condition remains compensable despite injuries sustained in subsequent non work-related motorcycle accident), and cases cited therein.

The Fifth Circuit has applied two standards in determining whether an event constitutes a supervening cause. In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), the court held that a supervening cause is an influence originating entirely outside of employment that overpowered and nullified the initial injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the court stated that a supervening cause is one that causes the condition to worsen. In *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983), the Fifth Circuit held that where a prior drug addict who injured his back at work intentionally failed to inform treating physicians of his prior addiction, and the resulting drug treatment led to readdiction, the employer was not liable for medical expenses incurred as a result of the readdiction. The employee's intentional failure to inform his doctors constituted a supervening independent cause which nullified the connection between the back injury and the subsequent readdiction. 700 F.2d at 1051-52; 15 BRBS at 123-24(CRT). In *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), the court declined to decide which of these tests is operative as the facts in the record did not meet either standard. The administrative law judge rationally found no supervening cause and there was no evidence of intentional misconduct on claimant's part. *See Jones v. Director, OCWP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992) (court applies the Fifth Circuit's "overpowered and nullified" test in finding that aggravation of claimant's work-related back injury in subsequent employment as delivery man involving heavy lifting was not a supervening cause relieving employer of liability).

If the subsequent injury is not work-related, then, in a claim for the prior work-related injury, only the portion of disability due to the work-related injury is compensable. The aggravation rule does not apply where the work injury is the pre-existing injury. In *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981), the Board held that the

administrative law judge erred in awarding total disability based on the combination of claimant's back and heart problems; as the heart attack was a subsequent non work-related injury, its effects must be factored out in determining the extent of claimant's disability. *See Marsala*, 14 BRBS at 43 (case remanded for administrative law judge to determine whether a subsequent fall from a bus was related to claimant's work-related back injury or caused by third-party negligence; any disability due to non work-related intervening cause is not compensable).

The entire disability was found to naturally and unavoidably result from the original work injury in the following cases decided prior to 1986: *Mississippi Coast Marine v. Bosarge*, 632 F.2d 994, 12 BRBS 969 (5th Cir. 1981), *modified*, 657 F.2d 665, 13 BRBS 851 (1981) (work-related, non-disabling heart attack followed by second disabling heart attack; second attack found related to first); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980) (back injury at work in 1973, and heart attack just before 1977 back surgery; employer held liable for heart-related medical expenses because back surgery precipitated heart attack; pre-existing arteriosclerosis is not a supervening cause); *Vozzolo*, 377 F.2d 144 (disabling 1963 myocardial infarction was a consequence of work-related 1958 infarction); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986) (claimant's surgery is not an intervening cause); *Hicks*, 14 BRBS 549 (worsening of knee at work found due to 1973 knee injury at work and not to 1977 auto accident; auto accident therefore not intervening cause); *Pakech*, 12 BRBS 47 (where claimant's back gave way both at home while rising from a chair and on the job with another employer one year after a work injury, the condition was the result of a natural progression of the work injury); *Vandenberg*, 11 BRBS 164 (work-related hernia increased claimant's susceptibility to 1976 hernia); *Dennis v. Detroit Harbor Terminals*, 3 BRBS 480 (1976) (disabling 1972 epileptic seizure related to 1969 work accident).

Digests

The Board reversed an administrative law judge's finding that subsequent injury outside work was not related to initial work-related injury. Where claimant had been released by his doctors to return to his usual work, which involved heavy labor, the administrative law judge erred in finding that claimant's conduct in stepping into a pickup truck was negligent so as to sever the link between the subsequent injury and the employment. Since it was uncontested that claimant's condition due to his work injury led to his fall from the truck, the second injury was the natural and unavoidable result of the first and employer is liable for the entire disability and for medical expenses due to the second injury. *Bailey v. Bethlehem Steel Corp*., 20 BRBS 14 (1987), *aff'd mem*., 901 F.2d 1112 (5th Cir. 1990).

The Board affirmed the administrative law judge's reliance on a medical opinion relating claimant's subsequent injury to his initial work-related injury, relying on the rule that when a claimant sustains an injury at work which is followed by the occurrence of a

subsequent injury or aggravation outside work, employer is liable for the entire resultant disability and for medical expenses due to both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. However, if the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Colburn v. General Dynamics Corp*., 21 BRBS 219 (1988).

The Board reversed the administrative law judge's finding that the work claimant performed after his 1976 injury constituted an intervening cause which led to claimant's 1984 surgery and additional disability where the only two medical reports of record both stated that the worsening of claimant's condition between his return to work in 1979 and his most recent surgery in 1984 were related to the original (1976) injury. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

The possibility of an intervening cause does not affect invocation of the Section 20(a) presumption. Where a second non work-related injury follows a work-related injury, employer is liable for the entire resulting condition if the second injury was the natural and unavoidable consequence of the first; provided that even if the two injuries are related, employer can escape liability by showing that the second injury was caused by the negligence of claimant or a third party. Where claimant's second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury. In this case, employer did not produce any evidence that claimant’s disability was due to the subsequent incident when he stepped in a hole in his yard. Employer thus did not rebut the Section 20(a) presumption, and the second injury was properly held related to the initial work injury. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

Employer is liable for benefits for claimant's carpal tunnel syndrome if the natural progression of his condition resulted in an increase of symptoms in January 1987, when claimant sought treatment, because employer does not dispute that the original carpal tunnel syndrome is work-related. *Alexander v. Ryan-Walsh Stevedoring Co*., 23 BRBS 185 (1990), *vacated and remanded mem.*, 927 F.2d 599 (5th Cir. 1991) (court remanded for further consideration of the cause of a neck injury also at issue).

The Board affirmed the administrative law judge's finding that claimant's disability was due to a supervening car accident, which was not the natural and unavoidable result of the initial work injury, as it was supported by substantial evidence. The Board rejected the contention that the Act requires employer to establish that the effects of the work injury are "overpowered and nullified" by the subsequent traumatic events in order the rebut the Section 20(a) presumption, noting that the Ninth Circuit held in *Cyr*, 211 F.2d 454, that a subsequent injury is compensable if it was the natural and unavoidable result of a

compensable work injury. *Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

The Seventh Circuit held that aggravation of claimant's work-related back injury in subsequent employment as delivery man involving heavy lifting was not a supervening cause relieving employer of liability. Applying the Fifth Circuit's test, the court stated that the causal effect attributable to the work injury must not have been overpowered and nullified by non-employment-related influences. The court determined that claimant's action in seeking employment for which he was most qualified even if there might be a risk of aggravating an injury was easily foreseeable. Noting that the Section 2(2) definition of "injury" uses "unavoidably" in the disjunctive with "naturally," the court ruled that claimant's aggravation of his symptoms was a "natural" if not "unavoidable" result of the work accident. *Jones v. Director, OCWP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992).

The Board rejected employer's contention that a fraud investigation culminating in a grand jury is an intervening cause of employee's suicide. In this case, the doctor credited by the administrative law judge diagnosed the employee with depression arising out of the employment. Where there is a connection between the death and the employment, the causal effect attributable to the employment must not have been severed by an intervening cause originating entirely outside the employment. In this case, the grand jury investigation had its origins in the employment, and thus is not an intervening cause relieving employer of liability. *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994).

Where claimant injured her back in 1986 while working for employer, and again in 1992 while working for a different, non-maritime, employer, the Board held that employer was liable for benefits because the evidence indicated that the current disability was caused by both injuries, and neither doctor credited by the administrative law judge attributed the current disability to the 1992 injury alone. Therefore, as the current disability was caused, at least in part, by the 1986 injury, and because there was no evidence which apportioned the disability between the two injuries, the Board affirmed the administrative law judge’s finding that employer did not rebut the Section 20(a) presumption as well as his decision holding employer liable for the entire disability. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff’d on recon. en banc*, 31 BRBS 109 (1997). On *en banc* reconsideration, the Board distinguished this case from several other subsequent injury/natural progression cases. It held that, while it is true claimant’s 1992 herniation, which occurred subsequent to her covered employment, was not the natural result of her 1986 work-related back injury, employer is liable for benefits for claimant’s entire 1992-1994 disability, as it was the result of combination of the 1992 herniation and the natural progression of the chronic osteophytic and spondylitic changes claimant suffers due to her 1986 work injury. As no doctor apportioned the disability between the two injuries, the Board reaffirmed the panel’s conclusion that employer is liable for the entire

disability. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

The Board affirmed the administrative law judge's finding that employer established the availability of alternate employment which met claimant's physical restrictions related to his work-related upper extremity injury. The Board rejected claimant's assertion that the administrative law judge erred in excluding the physical restrictions related to claimant's heart condition, as the heart condition constituted a subsequent non-covered event and the restrictions related thereto are severable from the work-related restrictions. The restriction to sedentary work relates only to the subsequent heart condition. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013).

In a case in which, subsequent to his work-related knee injury, claimant was diagnosed with cancer unrelated to his work injury, any disability attributable to his cancer is not compensable. However, the subsequent unrelated medical condition does not cut off employer's liability for disability benefits attributable to the work-related knee injury and to the flare-up, or natural progression, of that injury. Thus, that claimant was totally disabled due to his cancer for a period of time does not foreclose his entitlement to disability benefits for his knee injury during the same period if his knee-related work restrictions, considered alone, rendered him totally or partially disabled. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012).

The Fifth Circuit declined to articulate which of its differing standards as to what constitutes a supervening cause is operative as the facts in the record do not meet either standard. In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), the court held that a supervening cause is an influence originating entirely outside of employment that overpowered and nullified the initial injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the court stated that a supervening cause is one that causes the condition to worsen. In this case, the administrative law judge rationally found no supervening cause and there is no evidence of intentional misconduct on claimant's part. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

The Board reversed an administrative law judge's finding that the Section 20(a) presumption was rebutted where claimant was injured while driving a van at work, in "deliberate disregard" of his doctor's instructions that he not drive due to a seizure disorder. The administrative law judge erred in relying on case law pertaining to intervening cause, as it rests on an interpretation of the Section 2(2) term "or as naturally or unavoidably results from such accidental injury," and requires that an employee show a degree of due care following a work injury and take reasonable precautions to guard against re-injury. The duty of care required of an employee to guard against a *subsequent*

injury does not apply to the *initial* work injury; Section 4(b) of the Act eliminates negligence or fault as a consideration with respect to the work event which caused the primary injury. Thus, as there is no evidence that claimant's injury did not arise out of the work accident, the Board reversed the administrative law judge's finding that the Section 20(a) presumption was rebutted. *Jackson v. Strachan Shipping Co.,* 32 BRBS 71 (1998) (Smith, J., concurring & dissenting).

The Fourth Circuit affirmed the administrative law judge's finding that claimant's current back problems were the result of the natural progression of his initial injury with employer, and that his subsequent employment did not give rise to a supervening cause, as supported by substantial evidence. The court noted that there was no second trauma, but, rather, an onset of complications from the first trauma. Stating that the "aggravation rule" is usually applied on behalf of claimants for the purpose of holding their current employer liable for benefits, the court declined to decide whether an employer may invoke the rule as a shield against liability; the court noted, however, that the Ninth Circuit approved the defensive use of the aggravation rule by employers in *Kelaita*, 799 F.2d 1308 (9th Cir. 1986). *Admiralty Coatings Corp. v. Emery,* 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

The Fifth Circuit stated, pursuant to *U.S. Industries*, that the Section 20(a) presumption attaches only to the claim made, which here is only the formal claim that claimant injured his back and groin at work. Thus, the administrative law judge and Board erred in applying the Section 20(a) presumption to the allegation that claimant's heart condition was due to steroids taken for the back injury because this allegation was based on claimant's hearing testimony as to what he was told by a doctor. Claimant must establish that the heart condition "naturally or unavoidably" resulted from his back injury without reference to the Section 20(a) presumption. *Amerada Hess Corp. v. Director, OWCP*, 543 F. 3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

The Fifth Circuit reversed the Board's/district court's affirmance of the administrative law judge's award of benefits. Following *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, and *Amerada Hess Corp.*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), the court held that the Section 20(a) presumption does not apply to claimant's claim for benefits for his CIPD, as that disease was not an injury for which a "claim" was made. Specifically, the court held that claimant's CIPD was a "secondary" injury, allegedly related to claimant's work-related arm injury, surgeries and gastritis, and that claimant's request for benefits for "other . . . problems associated with [his arm] injury and working conditions in Iraq" was insufficient to convert the secondary condition into a primary claim. As CIPD was not a primary claim, the Section 20(a) presumption did not apply to it, and the compensability of claimant's CIPD must be assessed by determining whether it was the natural or unavoidable result of his arm injury pursuant to Section 2(2). Thus, the court remanded the case for the administrative law judge to reconsider the issue under

the proper standard. *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013).

In a case where claimant filed a claim for compensation form that included only his lung injury, but asserted a claim for both his lung (primary) and vertebra (secondary) injuries before the district director and the administrative law judge, the Fourth Circuit concluded that a claim had been made for the vertebra injury and that the Section 20(a) presumption applied. In so holding, the Fourth Circuit rejected the holdings in *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013), and *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), wherein the Fifth Circuit concluded that the Section 20(a) presumption does not apply to secondary injuries. The Fourth Circuit noted that the Fifth Circuit's split decisions appeared to have been based on the fact that the secondary injuries were not included in the claimants' claims, and, to the extent there were other reasons, the Fourth Circuit was unclear on what those reasons might be. Thus, relying on the Supreme Court's decision in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), which stands for the two propositions that the Section 20(a) presumption applies only to claims actually made and that a claim must include a primary injury which occurred at work, the court held that the administrative law judge properly found that claimant claimed a work-related primary injury and that a claim was made for the work-related secondary injury; thus, the Section 20(a) presumption applies to both. *Metro Machine Corp. v. Director, OWCP [Stephenson]*, ___ F.3d ___, __ BRBS __(CRT), No. 15-2525, 2017 WL 242986 (4th Cir. Jan. 20, 2017).

The Board affirmed the administrative law judge's finding that claimant's work-related back condition had resolved by October 22, 1997, as the administrative law judge rationally credited medical evidence and found that any further back problems were attributable to a fight claimant was involved in on February 22, 1998. While the administrative law judge addressed this issue in determining the extent of disability, the Board noted that if it were viewed in the context of causation, the result would be the same, as while Section 20(a) would apply, the evidence is sufficient to rebut the presumption. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002).

The Board held that a physician's treatment of a claimant's work injury, even if it was unnecessary and the result of malpractice, does not sever the causal relationship between the injury and the employment. The treatment does not constitute an "intervening cause" because there is no evidence that the doctor's treatment was intentional misconduct or negligent conduct *unrelated* to the work injury. Moreover, if claimant's choice of physician and treatment are reasonable, claimant may receive disability benefits for any increased disability due to failed treatment. The Board therefore reversed the administrative law judge's finding that employer is not liable for disability benefits

following surgery and remanded the case. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *see also White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Mattera v. M/V Mary Antoinette, Pacific King, Inc*., 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp*., 19 BRBS 146 (1986).

In this case where decedent worked in Iraq, returned home on multiple visits, and killed himself after he returned home for the last time in June/July 2006, the Board vacated the administrative law judge's award of death benefits to claimant (decedent's widow). The Board held that, in light of the Ninth Circuit's recent decision in *Kealoha*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), the administrative law judge applied incorrect law in determining whether decedent's suicide was compensable. In applying the court's "chain of causation" rule, the administrative law judge must determine whether there is an unbroken chain of events leading from decedent's work injury to his suicide. The administrative law judge erred in addressing "intervening cause" by requiring it to be the result of decedent's own actions or carelessness. An "intervening cause" can be due to the actions of a third party. As the administrative law judge did not take into account the full extent of the events that occurred at home in June and July 2006, the Board remanded the case for the administrative law judge to reconsider whether there was an unbroken chain of causation between decedent's work and his suicide. *Dill v. Serv. Employees Int'l, Inc.*, 48 BRBS 31 (2014).

COURSE OF EMPLOYMENT

The general rule applied by the Board is that an injury occurs in 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. *Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73 (1984); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981)**.** In contrast, "arises out of employment" refers to the cause or source of injury. *Id.* at 595.

The Board has held that the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), that the claim comes within the provisions of the Act, applies to the issue of whether an injury arises in the course of employment. *Wilson*, 16 BRBS 73; *Mulvaney*, 14 BRBS 593 (administrative law judge erred in not applying presumption). Employer, therefore, has the burden to produce evidence to the contrary. *See Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95 (CRT) (D.C. Cir. 1985), *rev'g* 16 BRBS 333 (1984); *Oliver v. Murry's Steaks*, 17 BRBS 105 (1985); *Mulvaney*, 14 BRBS 593. As a practical matter, in many cases the outcome is not affected by the presumption as the evidence establishes the time and place of claimant's injury and his activities at that time; thus, the dispute generally involves a legal determination as to whether the facts place claimant in the course of employment.

Generally, employees who, within the time and space limits of their employment, act to accommodate personal comforts do not thereby leave the course of employment. *Durrah*, 760 F.2d 322, 17 BRBS 95(CRT). Injuries have been found to be compensable where the employee was urinating, *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc)*; examining a personal handgun during a work break, *Evening Star Newspaper v. Kemp*, 533 F.2d 1224, 3 BRBS 379 (D.C. Cir. 1976), *aff'g* 1 BRBS 195 (1974); taking a soda break, *Durrah*, 760 F.2d 322, 17 BRBS 95 (CRT); and taking a lunch break, *O'Leary v. Southeast Stevedore Co.*, 1 BRBS 298 (1975). *Cf. Carchedi v. Beau Bogan, Inc.*, 11 BRBS 359 (1979) (benefits denied where employee injured by purse-snatcher outside work during lunch break).

An injury can be compensable if it occurs during off-duty hours, so long as claimant is on the work premises for a work-related reason. *Wilson*, 16 BRBS 73 (obtaining authorization form to purchase uniform); *Kielczewski*, 8 BRBS 428 (employee remaining on premises after work hours to speak to foreman about promotion). *See also Preskey v. Cargill, Inc.*, 12 BRBS 916 (1980), *rev'd mem.*, 14 BRBS 340 (9th Cir. 1981) (Board held employee who stepped into a pigeon trap when arriving before start of work to pick up his check and drink coffee was not in the course of employment, but the Ninth Circuit summarily reversed this decision).

The employment nexus may be severed if the employee violates an express prohibition, acts without authorization, acts for purely personal reasons, or has abandoned his

employment-related duties and status and has embarked on a personal mission of his own. *Durrah v. Washington Metropolitan Area Transit Authority*, 16 BRBS 333, 335 (1984), *rev'd*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Oliver*, 17 BRBS 108; *Mulvaney*, 14 BRBS 595. In *Durrah*, the Board affirmed a denial where the employee was injured when getting a soda in violation of a rule against leaving his post without permission. In reversing, the D.C. Circuit initially noted that employer did not produce evidence that this rule was posted or that claimant had notice of it, an omission the court found significant in light of Section 20(a). However, the court also disagreed with the conclusion that claimant's leaving the guard station disconnected him from his employment, stating that "the asserted violation did not place Durrah in the path of new risks not inherent in his employment situation." 760 F.2d at 326, 17 BRBS at 100(CRT).

In *Mulvaney*, 14 BRBS 595, the Board reversed an administrative law judge's finding that claimant's injury which occurred when his hand was caught in a planer was outside the scope of employment because he was attempting to use equipment he was not authorized to operate. The Board held that the Section 20(a) presumption was not rebutted where employer's evidence could, at most, provide only a basis for speculation as to how the machine was turned on and how claimant's arm was caught in it.

Injuries sustained during physical altercations at work have been regarded as sustained in the course of employment so long as they occur within the time and space boundaries of work. *Williams v. Healy-Ball-Greenfield*, 15 BRBS 489, 492 n.2 (1983); *Kielczewski*, 8 BRBS at 431; *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940). Such injuries, however, do not arise out of employment, if the dispute giving rise to the physical altercation has its origins in the employee's domestic or personal life. *Figuero v. National Steel & Shipbuilding Co.*, 8 BRBS 852 (1978), *aff'd mem.*, No. 78-3345 (9th Cir. 1980) (benefits denied where employee is assaulted by a co-worker's former boyfriend). Injuries caused by fights with co-workers have been found to be compensable where employer presented no evidence that the injured employee had any personal or social contacts with the assailant outside of work. *Twyman v. Colorado Security*, 14 BRBS 829 (1982), *on remand from* 670 F.2d 1235 (D.C. Cir. 1981), *vacating and remanding* 12 BRBS 863 (1980) (Miller, dissenting); *Williams*, 15 BRBS at 492. *See also* 33 U.S.C §§903(b), 920(d) (compensation not payable where an injury is occasioned solely by the willful intention of the employee to injure or kill himself or another).

Injuries sustained by employees on their way to and from work are generally not considered to arise in the course of employment. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947); *Foster v. Massey*, 407 F. 2d 343 (D.C. Cir. 1968); *Owens v. Family and Homes Services, Inc.*, 2 BRBS 240 (1975). In *Foster*, benefits were denied when the injury occurred while the employee was driving to work in his personal automobile. *See also King v. Unique Temporaries, Inc.*, 15 BRBS 94 (1981) (no coverage where employee slips on ice before entering work building); *Palumbo v. Port Houston*

Terminal, Inc., 18 BRBS 33 (1986) (claimant injured when he slipped and fell on his way from a parking area to employer's premises was not covered as he had not yet arrived at work); *Lasky v. Todd Shipyards Corp*., 8 BRBS 263 (1978) (two member opinion, with Judge Miller affirming denial of benefits where worker was assaulted while walking to work; Chief Judge Smith concurs on ground that situs test was not met).

Several exceptions to this general rule have been recognized in situations where "the hazards of the journey may fairly be regarded as the hazards of the service." *Cardillo*, 330 U.S. at 479. These exceptions include situations where: (1) the employer pays for the employee's travel expenses, or furnishes the transportation, (2) the employer controls the journey, or (3) the employee is on a special errand for the employer. *Cardillo*, 330 U.S. at 480; *Foster*, 407 F.2d 343; *Perkins v. Marine Terminals Corp*., 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982), *rev'g* 12 BRBS 219 (1980) (Miller, dissenting).

In several cases, the first exception, the trip-payment exception, has been applied. *See Cardillo*, 330 U. S. 469 (accident while leaving work in personal car where employer pays expenses); *Perkins*, 673 F.2d 1097, 14 BRBS 771 (accident while driving home in personal car, where employer paid wages for travel time); *Sawyer v. Tideland Welding Service*, 16 BRBS 344 (1984) (travel expenses paid; injury on road which is an access road to marine facilities); *Owens*, 2 BRBS 240 (after leaving work, employee is hit by automobile while walking to bus stop; employer paid transportation expenses). The Board also applied the "employer conveyance" exception in *Oliver*, 17 BRBS at 107, stating that an accident of an on-call employee while driving home in van provided by employer in order to serve its special business needs would be covered under this exception; following remand for findings regarding whether claimant was in fact on his way from work to home, however, the Board affirmed the conclusion that claimant was on a personal deviation. *Oliver v. Murry's Steaks*, 21 BRBS 348 (1988). The Board has found the exception did not apply where the employer merely allowed claimant to use a truck but had no business need that he do so and claimant was injured on his way home, *Smith v. Fruin-Colnon*, 18 BRBS 216 (1986); and where a personal deviation broke the employment nexus. *Bobier v. The Macke Co*., 18 BRBS 135 (1986), *aff'd mem*., 808 F.2d 834, 19 BRBS 58(CRT) (4th Cir. 1986).

In two cases arising under the Defense Base Act, 42 U.S.C. §1651 *et seq*., the Supreme Court allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951), the employee, while spending the afternoon in employer's recreational facility near the shoreline in Guam, drowned when attempting to rescue two men in a dangerous channel. The Court indicated that it is not always necessary that the particular act or event which causes the injury be itself a part of the work done for the employer, or be an activity for the employer's benefit, stating "[a]ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." *O'Leary*, 340 U.S. at 507. An activity is

no longer in the course of employment, however, if the employee goes so far from his employment and becomes so thoroughly disconnected from the service of his employer that it would be entirely unreasonable t o say that his injury arose out of and in the course of employment. *Id.* In *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965), the employee drowned in a lake in South Korea during a weekend outing away from the job; in holding he was entitled to benefits, the Court noted that the employee had to work "under the exacting and dangerous conditions of Korea." *O'Keeffe*, 380 U.S. at 364. *See also Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (heart attack while off duty in barracks provided by employer in Thule, Greenland, is covered under zone of special danger test). Additional Defense Base Act cases are cited in the deskbook section on "Extensions" to the Longshore Act.

In a case reversed by the Ninth Circuit without opinion, the Board held that the "zone of special danger" doctrine only applies to the peculiar risks arising in foreign settings under the Defense Base Act. *Preskey v. Cargill, Inc.*, 12 BRBS 916 (1980), *rev'd mem.*, No. 80-7638, 14 BRBS 340 (9th Cir. 1981). *See Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch*, 23 BRBS 175 (1990) (doctrine is not applicable to NFIA); *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989) (same). The Board has applied the doctrine in cases arising in the District of Columbia, following holdings of the Court of Appeals for that Circuit applying it to cases arising under the 1928 D.C. Workmen's Compensation Act, *Durrah*, 760 F.2d at 322, 17 BRBS 95(CRT) (guard who left his post to get a soda was not so thoroughly disconnected from his employment that it would be entirely unreasonable to find his injury arose out of and in the course of employment); *Delinski v. Brandt Airflex Corp.*, 645 F.2d 1053, 13 BRBS 133 (D.C. Cir. 1981) (employee injured while walking up 9 flights of stairs to work; general coming and going rule not applicable because the stairway constitutes a zone of special danger). *See Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978).

Digests

An injury sustained during the course of medical examination scheduled at employer's request on a work-related hearing loss claim is covered under the Act, as such an injury necessarily arises out of and in the course of employment. The Board remanded the case for the administrative law judge to determine whether claimant's neck injury was sustained during the course of medical treatment. *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).

Where claimant injured his back while undergoing vocational testing in connection with his work-related arm injury, his back injury necessarily arose out of and in the course of employment. *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987).

In a D.C. Act case, claimant was injured in employer's parking lot after work; the administrative law judge's findings indicated that she was socializing with co-workers prior to going out to dinner. Vacating the administrative law judge's finding that claimant's activities were reasonably incidental to her employment, the Board held that claimant's mere presence on employer's parking lot at the time of her injury is insufficient to establish that her injury arose in the course of her employment if she was participating in an unsanctioned social activity at the time and remanded to reconsider whether claimant's social activities severed the link with her employment.. In a footnote, the Board rejected employer's argument that the coming and going rule should have been applied, as the parking lot was part of employer's premises. *Alston v. Safeway Stores, Inc*., 19 BRBS 86 (1986).

The Board reversed the finding that an injury incurred in after-hours softball game occurred in the course of employment. Even if the purpose of an activity is not related to employment, social or athletic activity is within the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs and practices of the particular employment, the activity is an inherent part of the conditions of that employment. In cases of voluntary social or recreational activity, the Board set forth six factors that are generally relevant to a determination as to whether an injury during a voluntary social or recreational activity arose in the course of employment, but noted that no single factor is determinative and that the enumerated factors are not exclusive. In this case, the Board reversed the administrative law judge's findings of employer sponsorship, employer encouragement, and tangible benefit to employer as not supported by substantial evidence. In so concluding, the Board noted that the administrative law judge was correct in applying the Section 20(a) presumption. Finally, the Board held that the administrative law judge's finding that the injury occurred on employer's premises is not consistent with prior Board case law arising under the Nonappropriated Fund Instrumentalities Act. *See* cases discussed, *infra*. Assuming, *arguendo*, that the injury occurred on employer's premises, the Board found that, under the facts of this case, this factor alone could not support a finding that claimant's injury occurred in the course of employment. *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992).

After extensive consideration of the Larson treatise, the Board affirmed the administrative law judge's conclusion that claimant's injury, sustained while participating in a recreational activity during his lunch hour, occurred in the course of his employment. The Board specifically held that claimant's recreational activity of playing ping-pong on employer's premises during his lunch break occurred as a regular incident of his employment. The administrative law judge found that the credible evidence establishes that employees regularly engaged in this activity on employer's premises within the period of employment with employer's acquiescence (*i.e*., employer provided the equipment and site for the activity). Employer need not derive a benefit from the activity for it to arise in the course of employment under the applicable test for coverage of

recreational activities on employer's premises. *Sheerer v. Bath Iron Works Corp.*, 35 BRBS 45 (2001).

The Board reversed the administrative law judge's finding that claimant's injury did not occur in the course of his employment. The administrative law judge found that claimant's use of the work equipment on which he was injured was unauthorized and therefore concluded that claimant was not acting in the course of his employment when injured. The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment. The fact that an activity is not authorized is not sufficient alone to sever the connection between the injury and the employment. Employer did not present any evidence that claimant's work activity at the time of his injury was unrelated to his employment. Since there was no evidence of record directly controverting the presumption, claimant's injury arose in the course of his employment as a matter of law. *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987).

The Board affirmed the administrative law judge's finding that claimant's breaking of a company rule against drinking on the job did not take him out of the course of his employment. Claimant's injury occurred within the time and space boundaries of his employment. Claimant's violation of the rule implicates fault, which is irrelevant under the Act unless Section 3(c) applies. Moreover, case precedent in state workers' compensation schemes establishes that a violation of a rule on how an employee should perform his work (sober) does not take the employee out of the course of his employment. The Board further held that the administrative law judge erred in finding that Section 3(c) was inapplicable, stating that the Section 20(c) presumption was rebutted and remanding for the administrative law judge to weigh the evidence as a whole on the issue of whether intoxication was the sole cause of claimant's injury *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009).

In a case where claimant satisfied the time and space boundaries of employment, the Board affirmed the administrative law judge's finding that claimant, a forklift driver, was acting within the course of his employment when he paused momentarily on the way to his forklift to help an off-duty co-worker start his car. Claimant was burned when the gasoline ignited, and the administrative law judge found that this injury occurred while claimant was indirectly advancing the interests of his employer by maintaining an amiable relationship with a known hostile employee. The Board also found that this activity would have been considered in the course of employment had the administrative law judge used an alternate test which considers the degree to which claimant deviated from his duties to aid a co-employee in some matter that is entirely personal to the co-employee. Under this alternate test, the Board held that claimant's deviation from his job responsibilities was insubstantial, as the car was in the direct path between the locker room and the forklift and the aid should have taken just a few seconds. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1996).

The Board affirmed the administrative law judge's determination that claimant's injury did not occur within the course of his employment. The Board held that, although claimant was injured during the time and space boundaries of his employment because he was injured on a vessel under construction on employer's premises during the work day, his injury happened while he was engaged in an activity which did not have a purpose related to his employment. Specifically, claimant was injured when he was on a detour to a remote area of the ship for the purpose of smoking a marijuana cigarette, and the Board agreed with the administrative law judge's conclusion that this was a personal frolic which severed the employment nexus. Although there are personal activities which occur during the course of the workday that do not sever the nexus, the Board could not equate claimant's activities here with those types of activities, as employer could not have expected its employee to venture into a closed area of the ship to commit a crime. Therefore, the Board affirmed the administrative law judge's denial of benefits. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

The Board affirmed the administrative law judge's determination that claimant's injury did not arise in the course of employment where claimant severed the employment nexus by embarking on a personal mission. The Board's prior holding that the trip-payment exception to the coming and going rule would apply *if* claimant was returning from work when the accident occurred constitutes the law of the case. The Board, therefore, rejected claimant's argument that even if he was not returning from work when the accident occurred, other factors establish that the accident occurred in the course of his employment. *Oliver v. Murry's Steaks*, 21 BRBS 348 (1988).

The Board affirmed the administrative law judge's finding that claimant's injury, sustained in a van pool accident on I-95 on the way home from work, occurred in the course of his employment. Under the "employer's conveyance" exception to the "coming and going rule," employer is liable for injuries sustained in a vehicle under the control of employer, as the risks of employment are extended under such circumstances. In this case, substantial evidence supported the finding that the van pool was under employer's control: it had payroll deductions for the participants, set the rates for participation, screened drivers, leased or owned the vans, and provided the insurance, maintenance and repair for the vans. The program also benefited employer. The facts that employer was not contractually obligated to provide the program and that the employees paid to participate do not detract from the applicability of the "employer's conveyance" rule. The Board noted that employer did not raise any coverage issues in this case, *i.e.*, situs. *Broderick v. Electric Boat Corp.*, 35 BRBS 33 (2001).

The Board rejected employer's contention that claimant's injury, sustained in an automobile accident while traveling from his home to a designated pick-up area on a dock for further transport to a rig on the OCS, did not occur in the course and scope of his employment. Specifically, the Board noted that substantial evidence supported the administrative law judge's findings that claimant was compensated by the mile and for

his travel time to the job site on the OCS on the date of injury. The Board, therefore, held that the scope of claimant's on-OCS employment is, by virtue of the trip-payment exception to the coming-and-going rule, extended to cover his travel time. *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (2015).

Where claimant, an employee covered under the Nonappropriated Funds Instrumentalities Act, was injured on the base prior to her arrival at employer's facility, the administrative law judge's finding that the "coming and going" rule applied and that she was not injured in the course of her employment was affirmed. The zone of special danger rule is limited to cases arising under the Defense Base Act and the District of Columbia Workmen's Compensation Act, and the finding that the circumstances of employment did not create a zone of special danger was rational and supported by substantial evidence. *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989).

For an injury to arise in the course of employment, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. Injuries sustained on the way to and from work are generally not within the scope of employment. Where claimant was injured in a parking lot on the air force base where employer was located, the Board held that the parking lot was not part of employer's premises and that the injury is not compensable. Despite its location on the base, employer is a separate entity operating on nonappropriated funds. Employer thus lacks any control over or responsibility for the condition of the area surrounding the building it occupies, including the parking lot. In addition, the injury did not occur during the "time boundaries" of claimant's employment. Finally, the administrative law judge erred by relying on the "zone of special danger" doctrine, as it is inapplicable to the Nonappropriated Funds Instrumentalities Act. *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch*, 23 BRBS 175 (1990).

The Fourth Circuit held that even though the parking lot where claimant was injured on her way to work was not owned by employer, the lot was part of employer's "premises" for purposes of the Act's course of employment requirement as the parking lot was designated for the exclusive use of employees, employees were prohibited from parking elsewhere unless the lot was full, employer enforced the parking rules, and employer directed employees to do certain upkeep on the lot, such as trash and ice removal (but did not perform major structural repairs). As the injury occurred on employer's premises, the "coming and going" rule is inapplicable. The holding was specifically limited -- it does not suggest worker's compensation coverage for all injuries suffered in parking lots used by employees. *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998).

Where claimant injured herself on an ice-covered sidewalk adjacent to the employee-designated entrance door of employer's facility, the Board distinguished *Harris*, 23 BRBS 175 (1990), and *Cantrell*, 22 BRBS 372 (1989), and held that since employer exercised control over the area where claimant was injured, claimant's injury arose in the course of her employment. Specifically, employer designated the parking lot its employees were to use, and the administrative law judge credited testimony that employer maintained the sidewalk. In so holding, the Board applied the rationale of the Fourth Circuit in *Shivers*, 144 F.3d 322, 32 BRBS 99(CRT). *Trimble v. Army & Air Force Exchange Service*, 32 BRBS 239 (1998).

In another NFIA case where the claimant was injured on the base outside of employer's building, the Board held that claimant's injury occurred on employer's "premises" and thus, reversed the administrative law judge's denial of benefits on the ground that claimant's injury on her way to work did not occur in the course of her employment. Specifically, the Board held that although employer may not be responsible for the maintenance of the area surrounding its building as there is no evidence of record on this issue either way, it is nevertheless responsible for the deteriorated condition of that area, as moving trucks used by employer to relocate its operation caused the destruction of the sidewalk and the ruts in the surrounding grass area where claimant's injury occurred. The instant case involves an affirmative act on the part of employer in operating its business, which created a risk of employment not shared with the public. This establishes that employer exercised sufficient control over the area where claimant's injury occurred so that the area in question is to be considered part of employer's premises. Consequently, the coming and going rule is not applicable to the instant case. *Sharib v. Navy Exchange Service*, 32 BRBS 281 (1998).

The Board affirmed the administrative law judge's finding that claimant's injury which occurred in a private home in Peru when claimant fell after a party arose in the course of employment based on: 1) application of the "zone of special danger" theory in this D.C. Act case; 2) the determination that where entertainment is part of an employee's duties, it is necessary to provide such services in private homes, and where there is an evening curfew, it is reasonably foreseeable that an employee could suffer an injury in a private home after his employment duties were completed; and 3) the conclusion that as claimant's presence in the house was not for purely personal reasons, he had not severed the employment nexus. *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

In a D.C. Act case, the Board affirmed the administrative law judge's finding that the injury to claimant, an off-duty bartender injured during a fight which began on employer's premises, did not arise out of or in the course of his employment and that there was substantial evidence to rebut the Section 20(a) presumption. The Board noted that although claimant may have initially responded to employer's request to protect patrons and property in the event of an altercation, so that he was theoretically on duty, claimant acted voluntarily and beyond the scope of that request by going across the street

with a two-by-four to assist a patron who had left the bar. The Board thus affirmed the administrative law judge's finding that claimant was thoroughly disconnected from employer's service when he was injured, and that therefore the obligations or conditions of employment did not create any zone of special danger out of which the injury arose. *McNamara v. Mac's Pipe and Drum, Inc.*, 21 BRBS 111 (1988).

Claimant's participation in the murder of her spouse effectively severed any causal relationship which may have existed between the conditions created by his job and his death. Also, the policy that a wrongdoer should not be allowed to benefit from his or her own wrong is applicable in this case arising under the Defense Base Act, where a claimant, whom the administrative law judge rationally found had participated in the criminal activity leading to her husband's murder, attempted to secure death benefits arising from his death. *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), *aff'd mem. sub nom. Kirkland v. Director*, OWCP, 925 F.2d 489 (D.C. Cir. 1991).

Where the employee's death occurred as a result of asphyxiation during an autoerotic activity, the Board reversed the administrative law judge's finding that the death was related to employment. As there was no evidence that this activity was related to conditions created by his overseas job, and where the circumstances surrounding the employee's death did not in themselves suggest that the death was work-related, the Board held that, as a matter of law, the "zone of special danger" tests was not met. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989).

In this case arising under the Defense Base Act, claimant, while working for employer on the Johnston Atoll, sustained an injury during an altercation at a social club following his work shift. The administrative law judge found, based on claimant's credible testimony, that the conditions of claimant's employment on the atoll, *i.e.*, the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol, created a "zone of special danger" out of which claimant's injury arose. Specifically, the administrative law judge found that employment conditions were such that it was clearly foreseeable by both the military authority and employer that "risky horseplay" or scuffles such as the one which injured claimant would occur from time to time. The Board held that the administrative law judge properly applied the "zone of special danger" doctrine and that his findings of fact and conclusions of law were rational, supported by substantial evidence and in accordance with the appropriate standards. Accordingly, the Board affirmed the finding that claimant sustained a compensable injury under the Act. The Board factually distinguished other "zone of special danger" cases finding claimant outside the zone, *i.e.*, *McNamara*, 21 BRBS 111; *Gillespie*, 21 BRBS 56, and *Kirkland*, 23 BRBS 348. *Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub nom. Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004). In affirming, the Ninth Circuit held that where claimant was injured at a social club to which

he went after work on Johnston Atoll, a remote island that offers few recreational opportunities, an injury during horseplay of the type that occurred here is a foreseeable incident of employment.

In this DBA case, claimant was employed as a contractor in Afghanistan where he sustained injuries as a result of passively resisting MPs during a dispute. The Board held that the administrative law judge's denial of benefits based on his findings that claimant was at fault or that the injury-causing incident did not directly involve employer or its personnel was erroneous. Consideration of fault is directly contrary to the plain language of Section 4(b). Moreover, the Board held that an employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger. The limits of the zone of special danger are defined by whether the injury occurred within the zone created by the obligations and conditions of that employment. The Board agreed that claimant was at fault in causing the altercation, but concluded that once fault is eliminated from consideration, all that remains is an injury on a base in Afghanistan that is rooted in the conditions and obligations of claimant's employment. Consequently, the Board reversed the administrative law judge's conclusion that claimant's behavior removed him from the zone of special danger created by his employment, held that the injury was work-related, and therefore remanded the case for consideration as to the merits of claimant's claim. *N.R. [Rogers] v. Halliburton Services,* 42 BRBS 56 (2008) (McGranery, J., dissenting).

In this DBA case, claimant alleged a physical harm to his face as the result of his use of a cosmetic chemical peel while in Kuwait. The administrative law judge found that the "zone of special danger" would bring any injury claimant may have suffered into the course of his employment, but found that claimant did not suffer a physical harm, and therefore no psychological harm as a result of the physical harm. The Board reversed the latter findings and held there was uncontradicted evidence of a psychological harm. However, as the psychological harm was the result of the perceived injury claimant believed he suffered related to the chemical peel, and as use of a chemical peel was a personal act, was not rooted in the obligations of his employment, and was not related to the fact that claimant worked in Kuwait, the Board held that any psychological injury related to that use did not have its genesis in claimant's employment. Accordingly, the Board held that the zone of special danger did not apply to bring claimant's actions/injury within the course of his employment. As claimant did not establish the working conditions element of his *prima facie* case, the Board affirmed the administrative law judge's denial of benefits. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).

The claimant in this case was injured by another employee while on a rest break aboard an oil rig. The Board held that the administrative law judge erred in placing the burden on claimant to establish that he was on an authorized break, as Section 20(a) places the burden on employer to establish that the break was unauthorized and subjected claimant to risks unrelated to his employment. Moreover, the fact that claimant's break may have

been unauthorized does not alone rebut the Section 20(a) presumption. The incident occurred in a place where the claimant would reasonably expect to be in the course of his work and not in an "unanticipated path of new risks not inherent in his employment situation." The administrative law judge also erred in finding that claimant was not injured in the course of his employment due to his characterization of the assault as horseplay. Injuries caused by fights between co-workers are compensable where employer presents no evidence that the injured employee had any personal or social contacts with the assailant outside of work. In this case there is no evidence that this incident was horseplay and it occurred based on contacts the two men had at work. *Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010).

Although employer's cross-appeal was not timely filed, the Board nonetheless noted that the administrative law judge had properly applied the "zone of special danger" doctrine in this case. Decedent's decision to get a tattoo while employed overseas was a foreseeable activity for a paramilitary worker and thus was not an activity that was "thoroughly disconnected" from his employment. In addition, the self-administration of legally obtained pain medications, with the possibility of misuse, is a reasonably foreseeable activity. Thus, the Board affirmed the administrative law judge's finding that the decedent's death was related to the peculiar dangers of overseas employment. *Urso v. MVM, Inc.*, 44 BRBS 53 (2010).

In this DBA case, the First Circuit rejected claimant's reliance on the "zone of special danger" doctrine, holding that claimant failed to establish that the employee's death in Saudi Arabia derived from his presence in a "zone of special danger." In this case where decedent was found dead due to asphyxiation by hanging inside his villa, the court stated that, based on the evidence, there were two plausible explanation for decedent's death: Suicide or accidental strangulation in the course of autoerotic activity. The court held that neither suicide in the ordinary case nor harm resulting from recreational activities that are neither reasonable nor foreseeable fall within the scope of the "zone of special danger." *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012).

In this DBA case, employer provided decedent with taxi vouchers to be used with essentially no restrictions, and decedent was involved in a fatal accident while being transported via taxi to a grocery store in Tbilisi, Georgia. Decedent lived and worked in a dangerous locale as evidenced by employer's payment of a hardship allowance/danger pay, and it was foreseeable that an employee would need to purchase groceries and take a taxi to the grocery store. Thus, the Board affirmed the administrative law judge's finding that the "zone of special danger" doctrine was applicable and that the death was compensable. *DiCecca v. Battelle Mem'l Inst.*, 48 BRBS 19 (2014), *aff'd*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015).

The First Circuit affirmed the Board's holding that the administrative law judge correctly applied the zone of special danger doctrine to find that decedent's death while being transported via taxi to a grocery store in Tbilisi, Georgia was compensable under the DBA because it arose out of foreseeable risks associated with employment abroad. Claimant was an on-call employee and employer provided taxi vouchers for any purposes, limited only by geographical area. The court expressly rejected employer's position that the zone of special danger doctrine applies only: 1) where the injury occurred during a reasonable recreational or social activity; or 2) where the foreign location presented conditions increasing the risk of injury beyond the domestic norm. The court held that the relevant inquiry is whether the injury falls within foreseeable risks occasioned by or associated with the employment abroad, and this factual determination turns on the totality of circumstances. The court stated that the zone of special danger doctrine is not limited to enhanced risks or risks peculiar to the foreign location, but also includes risks that might occur anywhere; however, the doctrine does not encompass "astonishing risks" that are not reasonably associated with the employee's employment. *Battelle Memorial Institute v. DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015).

In this DBA case involving an employee who was a citizen and resident of the Republic of the Marshall Islands, the Board affirmed the administrative law judge's application of the "zone of special danger" doctrine to find that claimant sustained a compensable injury. Claimant, who had been sent by employer along with two co-workers to work for a four-day period on an uninhabited, restricted access island, lacerated his foot while engaged in fishing on a coral reef after work hours. The Board rejected employer's primary argument that, as a matter of law, the zone of special danger doctrine may never apply to determine the compensability of an injury sustained by a non-U.S. citizen/resident working in his home country (a local national). Specifically, the Board rejected employer's contentions that application of the doctrine to local nationals contravenes the legislative intent underlying the DBA and is foreclosed by the U.S. Supreme Court's decision in *O'Leary*, 340 U.S. 504, and its progeny. Rather, the Board held that the question of whether the zone of special danger doctrine is applicable to a claim filed by a local national involves a factual determination and is dependent on the specific circumstances presented by the individual case. In this case, claimant's presence on the isolated island where he was injured was due solely to the obligations and conditions of his employment, and the administrative law judge rationally found that it was foreseeable that he would engage in reef fishing during his four-day stay on the island. That he may have engaged in reef fishing on his home island is not dispositive of the compensability of the claim. *Jetnil v. Chugach Mgmt. Services*, 49 BRBS 55 (2015).

The Board affirmed the administrative law judge's application of the zone of special danger doctrine to find that claimant sustained a compensable injury when he slipped on a wet floor after getting out of the bathtub in his employer-assigned apartment in Israel. The Board rejected employer's argument that the showering activity that resulted in claimant's injury was purely personal in nature and was thoroughly disconnected from

his employment; in this regard, the Board factually distinguished this case from its decision in *Fear*, 43 BRBS 139. Citing the First Circuit's decision in *DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT), the Board also rejected employer's argument that for the zone of special danger to apply, the bathroom in which claimant was injured must have presented unique risks. The Board held that the administrative law judge rationally found that the conditions and obligations of claimant's employment created a zone of special danger based on substantial evidence, *i.e.*, claimant's 24-7 on-call status; the requirement that he live in the furnished apartment provided by employer; the hot, dirty environment in which he worked; and the employment contract provision requiring him to maintain a professional appearance, including his personal hygiene. The administrative law judge reasonably concluded that, as these employment conditions and obligations made bathing a necessity, slipping while exiting the shower was a foreseeable risk of claimant's employment. *Ritzheimer v. Triple Canopy, Inc.*, 50 BRBS 1 (2016), *aff'd sub nom. Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 2017 WL 176933 (M.D. Fla. Jan. 17, 2017).

The Board rejected claimant's contention that the administrative law judge erred in failing to find that the DBA does not apply because employer intended to harm decedent. Although the Act's exclusive compensation remedy does not apply if employer intended to injure the employee (as the employer is not a third person and the harm was not accidental), this exception is very narrow. Wanton and reckless misconduct is not sufficient to show intent to harm. In this case, the administrative law judge drew all inferences in claimant's favor, and rationally found that claimant's allegations did not give rise to a triable issue of fact as to whether employer intended to injure decedent. The Board thus affirmed the administrative law judge's finding that if DBA coverage otherwise exists, the Act is the claimant's exclusive remedy. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

In a case where insurgents attacked a convoy and decedent, a truck driver, was killed, the Fifth Circuit held that the Defense Base Act precludes the plaintiffs' tort claims, as it is the exclusive remedy for compensation for the employee's death. Specifically, the court held that the death was "caused by the willful act of a third person directed against [decedent] because of his employment" pursuant to Section 2(2). That is, the attacks directly caused the death, and the attacks were not personal, but were "because of" decedent's employment driving in a supply convoy. Because the DBA is the exclusive remedy for an injury or death covered by the DBA, the court rejected the argument that the plaintiffs should, nevertheless, be permitted to proceed with the tort claims under the "substantially certain" theory of intentional tort liability, as the DBA provides no exceptions to the exclusivity rule. The court explicitly declined to address any other scenarios which could potentially permit injured employees to file tort claims, such as where the employer assaulted the employee or the employer conspired with a third party to do so. Additionally, the Fifth Circuit held that the plaintiffs' fraud claim was barred because they were not seeking to rescind the employment contract but, rather, to obtain

damages for a death that is exclusively compensable under the DBA. The court vacated the district court's order and remanded for the district court to dismiss the tort claims. *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir. 2012), *cert. denied*, 133 S.Ct. 427 (2012).