BRB No. 02-0115

LYNETTE CHARPENTIER (Widow of ZEBY CHARPENTIER, JR.) Claimant-Respondent v. ORTCO CONTRACTORS, INCORPORATED and LOUISIANA WORKERS' COMPENSATION CORPORATION Employer/Carrier-Petitioners	)	DATE ISSUED: April 17, 2002 DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian), Metairie, Louisiana, for claimant.

Ted Williams (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-LHC-2216) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time that this case is before the Board. Claimant's husband (the decedent) went into cardiac arrest while working for employer as a painter on October 12,

1996; efforts to revive him failed. Thereafter, claimant sought death benefits and an award of funeral expenses under the Act. *See* 33 U.S.C. §909.

In his initial Decision and Order, the administrative law judge determined that claimant was not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption as she did not establish that the decedent was exposed to any strenuous activity or stressful situation at work which could have caused, aggravated or accelerated his condition. Assuming, *arguendo*, that claimant established invocation of the Section 20(a) presumption, the administrative law judge found the presumption rebutted. Thereafter, based upon a consideration of the record as a whole, the administrative law judge found that the decedent's death was not work-related and he consequently denied claimant benefits under the Act. Claimant's motion for reconsideration was subsequently denied by the administrative law judge.

On appeal, the Board discussed the "working conditions" element necessary for invocation of the Section 20(a) presumption in cases involving the death of an employee and concluded that the evidence of record is sufficient to establish the existence of working conditions which could have aggravated the decedent's underlying condition or contributed to or hastened his death. Accordingly, the Board reversed the administrative law judge's finding that claimant failed to establish her *prima facie* case and held that the Section 20(a) presumption was invoked. Next, the Board addressed at length the standard for rebuttal of the Section 20(a) presumption and concluded that the opinions of Drs. Eiswirth, Tamimie and Daniels were insufficient as a matter of law to establish rebuttal of that presumption. Accordingly, as employer failed to rebut the invoked statutory presumption, the Board concluded that a casual relationship between decedent's employment and his fatal heart attack was established, vacated the administrative law judge's denial of benefits, and remanded the case for the administrative law judge to consider the remaining issues. *See Charpentier v. Ortco Contractors, Inc.*, BRB No. 00-0812 (May 9, 2001)(unpub.).

In his Decision and Order on Remand, the administrative law judge awarded claimant and the decedent's children death benefits, funeral expenses, and interest.

Employer now appeals, arguing that the Board erred in its prior determination that employer failed to rebut the invoked Section 20(a) presumption. Claimant responds, asserting that the Board's prior decision on the issue of causation is the law of the case; alternatively, claimant avers that the Board properly determined that employer failed to offer evidence sufficient to establish rebuttal of the invoked presumption.

Where, as in the instant case, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that the decedent's death was not caused, contributed to or hastened by his employment. *See American Grain Trimmers v. Director,*

OWCP [Janich], 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied,* 120 S.Ct. 1239 (2000); *see also Louisiana Ins. Guaranty Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT)(5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1000). Moreover, in light of the aggravation rule, employer must establish that the decedent's work did not aggravate his underlying condition to result in death[1]. *See, e.g., Prewitt*, 194 F.3d 684, 33 BRBS 187 (CRT); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). An opinion given to a reasonable degree of medical certainty that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

In the instant case, employer has raised no issues with regard to the administrative law judge's decision on remand; rather, employer challenges the Board's initial decision wherein the Board determined that employer failed to rebut the invoked Section 20(a) presumption. Specifically, employer contends that the opinions of Drs. Eiswirth and Tamimie are sufficient to establish rebuttal of the presumption, and that the Board applied an incorrect standard in addressing employer's evidence on this issue. The issue of causation, however, was throughly considered and addressed by the Board in its previous decision and its prior determination that the opinions of Drs. Eiswirth and Tamimie are insufficient as a matter of

[1]The aggravation rule provides that where an employee's work aggravates, accelerates, or combines with a pre-existing condition, the entire resultant condition is compensable. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc)*. In this regard, the courts and the Board have held that "to hasten death is to cause it." *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (CRT)(4th Cir. 1998); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), *cert. denied,* 350 U.S. 836 (1955); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

law to establish rebuttal of the statutory presumption of causation constitutes the law of the

case.[2] *See Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Employer has raised no basis for the Board to depart from this doctrine, which holds

[2]As the Board wrote at length in its previous decision, the opinions of Drs. Eiswirth and Tamimie do not establish rebuttal of the presumption. Dr. Eiswirth did not affirmatively state that the decedent's employment duties did not aggravate his underlying condition to result in death, or hasten the decedent's death; rather, Dr. Eiswirth acknowledged during his deposition testimony that any physical activity such as the work performed by the decedent on the day of his demise would increase the risk of death. *See* JX 6 at 11-13. Contrary to employer's assertion on appeal, the Board did not impose upon employer a "ruling out" standard when discussing the testimony of Dr. Eiswirth; rather, the Board's use of the term "rule out" in its initial decision recognized the terminology utilized by counsel when Dr. Eiswirth was cross-examined regarding the potential relationship between the decedent's employment and his demise. *See id.*; *Charpentier*, slip op. at 6. Similarly, the Board stated that Dr. Tamimie's opinion is silent as to whether the decedent's work could have aggravated his underlying condition, accelerated his cardiac event, or hastened his death. *See* JX 2. Accordingly, the Board held that, as these medical opinions do not unequivocally state that the decedent's work activities did not contribute to or accelerate his death, these opinions are insufficient as a matter of law to establish rebuttal of the Section 20(a) presumption. *See Charpentier*, slip op. at 7.

that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Employer's contention is therefore rejected and, as employer does not raise any issue with regard to the administrative law judge's decision on remand, that decision is affirmed.[3]

[3]Pursuant to our decision in this case, claimant's Motion to Dismiss employer's appeal is denied.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge