

SHANNON HAMIL	)	
(Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DELTIDE FISHING AND RENTAL	)	DATE ISSUED: 02/28/2013
TOOLS, INCORPORATED	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Gregory S. Unger (Workers' Compensation, L.L.C.), Metairie, Louisiana, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LHC-00964) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 1, 2009, decedent sustained a fracture of his right fibula while working for employer as a cutting operator. He sought treatment for his injury, and was prescribed Lortab, a narcotic medication containing hydrocodone, for his pain. On October 15, 2009, decedent underwent surgery on his right ankle. Prior to and immediately following his surgery, decedent sought and received additional prescription medication for his complaints of pain. Decedent underwent a second surgical procedure on December 10, 2009, at which time a syndesmosis screw was removed from his ankle. Decedent continued to receive prescription pain medication from Dr. Line, his treating physician, through December 10, 2009. Decedent last saw Dr. Line on December 28, 2009; on February 15, 2010, Dr. Line released decedent to return to work without restrictions. Between November 20, 2009 and February 25, 2010, decedent sought treatment of non-work-related complaints of back, neck and shoulder pain from two different physicians, each of whom also prescribed narcotic pain medication. On February 27, 2010, decedent died at home. Following the receipt of a toxicology report which detected the presence of hydrocodone, the coroner found decedent's death to be consistent with poly-pharmacy overdose.<sup>1</sup>

A claim was filed on behalf of decedent's four dependent children for death benefits under Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's death was related to his employment with employer.<sup>2</sup> In support of that claim, claimants asserted that while decedent had recovered from his work-related ankle injury, his use of narcotic prescription pain medication in the treatment of that injury resulted in his accidental death. In response to the claim, employer contended that decedent's use of narcotic pain medication prescribed for non-work-related conditions severed the causal link between decedent's work-related ankle injury and his death.

In his Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume a causal relationship between decedent's work-related ankle injury and his death. The administrative law judge found that employer failed to rebut the Section 20(a) presumption; thus, he found decedent's death to be work-related on the basis that his ankle injury caused him to become dependent upon the medications that led to his death. Decision and Order at 12. The administrative law judge therefore awarded claimants death benefits and funeral expenses. 33 U.S.C. §909(a), (b).

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<sup>1</sup>The administrative law judge found that between the date of the ankle injury and the date of death, decedent was prescribed 241 Lortab pills, which averages to 11 per day. Decision and Order at 11. In addition, during this time frame, decedent was prescribed Xanax, Soma and Trazodone. *Id.* at 6.

<sup>2</sup>Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909.

On appeal, employer challenges the administrative law judge's finding that decedent's death was causally related to his employment injury. Specifically, employer contends the administrative law judge erred in applying Section 20(a) to presume that decedent's death was related to the ankle injury. Alternatively, employer asserts that the administrative law judge erred in finding that employer failed to present evidence sufficient to rebut the Section 20(a) presumption. Claimants respond, urging affirmance of the administrative law judge's award of death benefits.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the Section 20(a) presumption, claimants must establish a prima facie case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5<sup>th</sup> Cir. 2000); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Decedent's death is compensable if it is due at least in part to a work-related injury. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). In his decision, the administrative law judge found that claimants are entitled to the benefit of the Section 20(a) presumption because decedent's death naturally and unavoidably resulted from his work-related ankle injury.<sup>3</sup> *See* Decision and Order at 8-12.

Employer first argues that decedent's death arose from a supervening and independent cause, *i.e.*, decedent's use of prescription medication for non-work-related conditions, and thus, that the administrative law judge erred in invoking the Section 20(a) presumption. We reject this contention, as the possibility that an employee's injury or death is due to an intervening cause does not bar invocation of the Section 20(a) presumption. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Similarly, we reject employer's contention that claimants must produce affirmative medical evidence linking decedent's death to his work-related ankle injury in order to avail themselves of the Section 20(a) presumption. Claimants are not required to introduce evidence establishing that decedent's employment injury in fact resulted in his death; rather, claimants' burden, in order to invoke the presumption, is to establish that decedent's employment injury *could have* resulted in his death. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

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<sup>3</sup>The administrative law judge inferred that, in the absence of evidence of prior drug misuse, decedent became dependent upon the medication prescribed for his ankle injury and that dependence led to addiction and death.

Employer next asserts that the administrative law judge erred in invoking the Section 20(a) presumption in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5<sup>th</sup> Cir. 2008). We reject employer's contention of error in this regard. In this case, unlike *Amerada Hess*, claimants specifically claimed that decedent's demise resulted from the treatment of decedent's work-related ankle injury.<sup>4</sup> See CX 2; *U.S. Industries*, 455 U.S. 608, 14 BRBS 631 (Section 20(a) presumption applies only to the claim made); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Consequently, unlike the factual situation presented in *Amerada Hess* where the employee's formal claim did not reference his heart condition, claimants in this case specifically made a claim for benefits for death related to decedent's employment injury with employer. Accordingly, as substantial evidence supports the administrative law judge's finding that claimants established that prescription narcotic treatment for decedent's ankle injury could have caused or contributed to decedent's death, we affirm the administrative law judge's invocation of the Section 20(a) presumption. See *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

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<sup>4</sup>In *Amerada Hess*, the claimant suffered a work-related back injury for which he underwent surgery and a series of steroid injections. At the hearing, the claimant testified that after the steroid treatments he began having heart problems and had had four heart attacks. He did not provide any medical documentation to support this allegation. The administrative law judge applied the Section 20(a) presumption to claimant's heart condition, found that employer did not rebut it, and found the heart condition compensable. The employer did not contest the administrative law judge's finding that the claimant suffered from a heart condition, but rather contested the administrative law judge's finding that claimant was entitled to the Section 20(a) presumption that this condition was related to his work-related back injury. The United States Court of Appeals for the Fifth Circuit agreed, holding that the Section 20(a) presumption applies only to the claim made. As claimant did not make a claim for a heart condition related to the back injury, but only for back and groin injuries, the administrative law judge erred in applying the Section 20(a) presumption to claimant's heart condition. *Amerada Hess*, 543 F.3d at 761, 42 BRBS at 49(CRT) (citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613, 14 BRBS 631, 632 (1982)) ("the presumption by its terms cannot apply to a claim that has never been made"). The court held that under these circumstances the claimant must establish by substantial evidence that his subsequent condition arose naturally or unavoidably from the treatment for his work-related injury in order for the subsequent condition to be compensable.

Once the Section 20(a) presumption applies, the burden shifts to employer to rebut it with substantial evidence that the employee's death was not caused or hastened by the work injury. See *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), cert. denied, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). Employer may rebut the presumption by presenting substantial evidence that decedent's death was due to a subsequent non-work-related event which was not the natural or unavoidable result of the decedent's original work injury. See generally *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James*, 22 BRBS 271.

In this case, the administrative law judge summarily found that employer "failed in its burden to rebut the presumption that decedent's death was caused by his employment." Decision and Order at 12. Employer contends that the administrative law judge erred in failing to address its evidence which, it asserts, establishes that decedent's death was due to a supervening or independent cause. We agree and, thus, we vacate the administrative law judge's finding that decedent's death was work-related and remand the case for further consideration.

In support of its contention that decedent's death was due to a supervening or independent cause, specifically that decedent's death was the result of an overdose of medication prescribed for his non-work-related neck and back pain, employer presented evidence that: 1) Dr. Line, who performed decedent's ankle surgery, last prescribed Lortab on December 10, 2009; Dr. Line released decedent to return to work without restrictions on February 15, 2010; see CX 16 at 9; CX 8 at 33; 2) both prior to and following his release to return to work, decedent sought medical care for non-work-related neck and back pain and received multiple prescriptions for his complaints;<sup>5</sup> see n.1, *supra*; CXs 10, 15; 3) medication bottles from these non-work-related prescriptions were found in the room where decedent expired; CX 27 at 20; and 4) the toxicology report noted that decedent's system contained the drugs he had been prescribed by Dr. Tanious for back and back pain two days prior to his death. EX 14. The administrative law judge did not address whether this evidence constitutes substantial evidence that decedent's death was not related to his ankle injury. In a case decided after the administrative law judge issued his decision, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, held that in order to rebut the Section 20(a) presumption, employer need not "prove the deficiency" in claimant's prima facie case; rather, "all it must do is advance evidence to throw factual doubt on the prima facie case." *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5<sup>th</sup> Cir. 2012). As the

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<sup>5</sup>At his visit to Dr. Tanious on January 26, 2010, decedent stated that he had been in an altercation resulting in neck pain. CX 10 at 7.

administrative law judge did not address the evidence offered by employer under this standard, we remand the case for him to do so.

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 Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In this respect, the administrative law judge properly recognized that claimants' burden is to establish that decedent's death was in fact the natural or unavoidable result of his work injury. 33 U.S.C. §902(2).<sup>6</sup> If, however, decedent's death is the result of a supervening, independent cause, the death is not compensable. *See Blutworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5<sup>th</sup> Cir. 1983);<sup>7</sup> *see also Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5<sup>th</sup> Cir. 1951).

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<sup>6</sup>Section (2) of the Act states that "injury" means a "death arising out of and in the course of employment . . . or as naturally or unavoidably results from such accidental injury...."

<sup>7</sup>We note that the Fifth Circuit has cited with approval Larson's treatise on worker's compensation stating that numerous state court decisions have held that "where drugs used in the treatment of a compensable injury lead to narcotic addiction or alcoholism, the ensuing consequences are compensable. . ." *See Lira*, 700 F.2d at 1051 n.3, 15 BRBS at 124 n.3(CRT). *See* 1 Lex K. Larson, *Larson's Workers' Compensation*, §10.09[5] (Matthew Bender Rev. Ed.).

Accordingly, the administrative law judge's award of death benefits is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge