ELLENOR DAVIS	)	
	)	
Claimant-Respondent	)	BRB No. 98-860
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
BRENDA SHAW McNEIL	)	BRB No. 98-861
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
JANNIE MAY LAWRENCE	)	BRB No. 98-862
	)	
Claimant	)	
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY	)	
	)	

and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), North Charleston, South Carolina, for claimants Ellenor Davis and Brenda Shaw McNeil.

Richard P. Salloum (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer/carrier appeals the Decision and Order (97-LHC-1504, 97-LHC-2608, 97-LHC-2609) of Administrative Law Judge Vivian Schreter-Murray rendered on claims 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).

The decedent was a dockman who was killed at work on January 20, 1996, after being run over by a tractor trailer truck as he was standing on the docks talking to a co-worker who was operating a forklift. Moments before hitting the decedent, the tractor trailer driver sounded his horn, which caused the forklift operator to move his forklift out of the way. The decedent did not move, and as the truck passed the decedent and the co-worker, the front edge of the trailer caught the decedent's safety vest and pulled him to the ground. The last two tires of the trailer ran over the decedent and caused his fatal injury.

In 1992 and 1993, the decedent had been diagnosed with a seizure disorder

secondary to alcohol abuse by Dr. Plyler, his neurologist, and was released to return to work in 1993 with the restriction that he not drive until he was seizure free for six months. By December 1994, however, the decedent was released to return to full duty work after reporting to Dr. Plyler that he had been seizure free for six months. In fact, the decedent had suffered a seizure in August 1994, four months prior to his return to full duty work. On January 1, 1996, just 19 days prior to his fatal injury, the decedent suffered another seizure.

Claims for death benefits were brought by Ellenor Davis and Brenda Shaw McNeil on behalf of the daughter and son of the decedent, April Davis and Jerome Shaw. Jannie May Lawrence, the mother of the decedent, also sought death benefits. In her Decision and Order, the administrative law judge awarded death benefits to the decedent's children, finding that the claims were not barred by Section 3(c) of the Act, 33 U.S.C. §903(c), and that the decedent's average weekly wage was $854.35 as stipulated. The administrative law judge denied Ms. Lawrence's claim for death benefits because she failed to establish her dependency upon the decedent at the time of his death. The administrative law judge also denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that the claims are not barred by Section 3(c) and that the decedent's average weekly wage was $854.35. Claimants Davis and McNeil filed a response brief, urging affirmance of the awards.[1]

Employer initially contends that the administrative law judge erred in awarding death benefits as Section 3(c) bars this claim, and that the decedent's own misconduct in concealing his January 1, 1996, seizure and failing to abide by standard seizure precautions constituted an intervening cause of the fatal accident which severs the connection between the accident and his employment. Section 3(c) states:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the

[1]Mr. Gibson, Ms. NcNeil's attorney, filed a response brief on behalf of both Ms. McNeil and Ms. Davis, and stated that Ms. Lawrence is not a participant in this appeal. Claimant's Response Br. at 1-2 and n. 3.

employee to injure or kill himself or another.

33 U.S.C. §903(c)(1994)(formerly 33 U.S.C. §903(b)(1982)). Section 20(d) of the Act, 33 U.S.C. §920(d), affords a claimant the benefit of the presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. §920(d). Thus, even if an injury has arisen out of and in the course of employment pursuant to Sections 2(2) and 20(a) of the Act, 33 U.S.C. §§902(2), 920(a), it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself. *See O'Connor v. Triple A Machine Shop*, 13 BRBS 473, 476-477 (1981)(Miller, J., concurring in part and dissenting in part); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428, 431 (1978).

In the instant case, the administrative law judge found that employer failed to establish that the decedent willfully intended to injure himself.[2] She found, moreover, that even if the decedent were negligent in failing to follow medical advice, the decedent's actions bore no relationship to his death, which was due to a crush injury. Consequently, the administrative law judge concluded that the claims were not barred by Section 3(c).

Initially, we reject employer's argument that the decedent's misconduct in concealing his most recent seizure and not abiding by proper seizure precautions constitutes an intervening cause sufficient to sever the causal link between the accident and his employment. Where there is a subsequent non-work-related event following an initial work injury, the relevant inquiry is whether the second injury resulted naturally or unavoidably from the work injury; the claimant's actions must show a degree of due care in regard to his injury and the claimant must take reasonable precautions to guard against re-injury. *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998)(Smith, J., concurring and dissenting). Thus, a claimant may not recover if the remote consequences of his work injury are the direct result of

[2] Employer attempted to rebut the Section 20(d) presumption through the opinions of Dr. Plyler, the decedent's neurologist, Ms. Favaloro, employer's vocational expert, and Mr. McKevlin, employer's head of stevedoring operations. Dr. Plyler's opinion was that the decedent should not drive unless he was seizure free for six months. Emp. Ex. 8. Ms. Favaloro testified that Dr. Plyler would have reinstated restrictions on the decedent's driving until he was seizure free for six months as well as restricted the decedent from working around hazardous machinery or along the water's edge based on Dr. Plyler's previous imposition of work restrictions and her knowledge of general seizure precautions. Tr. at 119-120. Mr. McKevlin stated in his affidavit that he would not have hired the decedent as a longshoreman had he known of all of his seizures. Emp. Ex. 35.

his intentional post-injury misconduct, and are only the indirect, unforeseeable result of the work-related injury. *Id., citing Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979)(Miller, J., dissenting in part and concurring in part).

The instant case does not involve a second, non-work-related accident or event occurring subsequent to the work injury; the only injury at issue here occurred at work on January 20, 1996. Thus, the cases relating to an intervening cause are inapposite. Moreover, as the Board stated in *Jackson*, the Act specifically excludes the consideration of fault in assessing the cause of injury, *see* 33 U.S.C. §904(b), and thus the courts and the Board have explicitly rejected the suggestion that the duty of care required of a claimant to guard against a subsequent injury applies to an initial work injury. *Jackson,* 32 BRBS at 73, *citing Bludworth*, 700 F.2d at 1050 n. 2, 15 BRBS at 123 n. 2 (CRT); *Cyr*, 211 F.2d at 454; *Hallford v. Ingalls Shipbuilding Div.*, 15 BRBS 112, 114 (1982)(Ramsey, J., dissenting); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982), *aff'g* 13 BRBS 873 (1981). Consequently, we hold that the decedent's conduct does not constitute an intervening cause severing the causal link between the work accident and his death.

Moreover, we affirm the administrative law judge's conclusion that these claims are not barred by Section 3(c) as the administrative law judge's finding that employer failed to establish that the decedent willfully intended to injure himself is in accordance with law and supported by substantial evidence. *See Jackson*, 32 BRBS at 71; Decision and Order at 2-4; Emp. Exs. 8, 35; Tr. at 119-120. We reject employer's contention that the decedent's concealment of his recent seizures and his failure to abide by proper seizure precautions constituted a *willful* intent to injure himself or others. In *Jackson*, a case similar to the facts of this case with the exception that the claimant in that case was engaged in the prohibited conduct of driving at the time of his work injury, the Board held that an employee's disregard of medical advice does not establish the willful intent to injure oneself required by Section 3(c). *Jackson*, 32 BRBS at 75, *citing Glen Falls Indemnity Co. v. Henderson,* 212 F.2d 617 (5th Cir. 1954), and *General Accident, Fire & Life Assur. Corp. v. Crowell,* 76 F.2d 341 (5th Cir. 1935). Furthermore, the Board held that there was no evidence that the claimant deliberately intended to have the motor vehicle accident in which he was injured. Likewise, we have reviewed the evidence that employer alleges establishes decedent's willful intent, but we agree with the administrative law judge that it does not do so.[3] Regardless of how negligent or

[3]Indeed, employer's vocational expert, Ms. Favaloro, testified that she did not

inadvisable decedent's course of conduct was in working as a longshoreman despite having had a seizure just 19 days prior to his fatal injury, concealing this seizure, and not following the seizure precautions of which he was aware, the claimants are entitled to compensation in the absence of substantial evidence of a specific intent by the decedent to injure himself. *Jackson,* 32 BRBS at 75; *Glen Falls,* 212 F.2d at 618. Employer's evidence does not establish that decedent intended to be struck and killed by a truck. We, therefore, hold that the decedent's disregard of medical advice is insufficient, in and of itself, to prove the requisite willful intent to rebut the Section 20(d) presumption. Consequently, the administrative law judge's determination that the claims are not barred by Section 3(c) is affirmed.

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recall seeing anything in the record that the decedent, on the date of his death, intended to injure or kill himself. Tr. at 127.

Employer lastly contends that the administrative law judge erred in finding that the decedent's average weekly wage was $854.35 as stipulated, since the decedent should not have been working as a longshoreman on the date of his fatal injury and that if he were employed elsewhere, he would be earning between $4.75 and $6 an hour according to Ms. Favaloro. In support of its contention, employer asserts that "wages" are defined in the Act as "the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury . . . ." 33 U.S.C. §902(13), and that claimant's contract prohibited an epileptic from working unless certain conditions were met.[4]

We affirm the administrative law judge's use of the stipulated average weekly wage. An employee's average weekly wage is to be determined as of the time of injury. *See generally Hastings v. Earth-Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pert. part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); 33 U.S.C. §910. An administrative law judge can rely on a voluntary stipulation as to average weekly wage which is based on a reasonable method of calculation under the Act. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). The administrative law judge rejected employer's argument that the decedent's average weekly wage should not be that of a longshoreman, because he arguably was working in violation of this contract. The administrative law judge rationally found that inasmuch as the decedent died in a work accident in the course of his employment as a longshoreman, his average weekly wage should be calculated in reference to his wages as a longshoreman. As the administrative law judge's use of decedent's actual weekly earnings of $854.35 calculated as of the time of injury is in accordance with law, it is affirmed. *See Thompson*, 26 BRBS at 53; Decision and Order at 4-5.

[4]The contract states that an epileptic will not be referred to work unless he obtains a physician's written certification that he is receiving medication to control his seizures, that he has not had and probably will not have a seizure while on his medication, and that his epilepsy will not otherwise impair his ability to work. Emp. Ex. 34.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge