BRB No. 00-0812

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

Appeal of the Decision and Order - Denying Benefits and Order on Claimant's Petition for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

Patricia H. Wilton (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits and Order on Claimant's Petition for Reconsideration (99-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 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).

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. His widow thereafter sought death benefits and an award of funeral expenses under the Act. *See* 33 U.S.C. §909.

In his Decision and Order, the administrative law judge found that claimant is not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption as she did not establish that 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 based on the opinions of Drs. Eiswirth, Tamimie and Daniels. Based on a consideration of the record as a whole, the administrative law judge found that decedent's death was not work-related. Consequently, the administrative law judge denied claimant benefits under the Act. 33 U.S.C. §909. In denying claimant's subsequent petition for reconsideration, the administrative law judge reiterated his findings that there is no evidence of any strenuous activity or stressful situation associated with decedent's employment which could have caused, aggravated or accelerated his condition and that, in any event, employer rebutted the Section 20(a) presumption.

On appeal, claimant contends that the administrative law judge erred in finding that she did not establish invocation of the Section 20(a) presumption and that employer submitted evidence sufficient to rebut it. Employer responds in support of the administrative law judge's denial of benefits.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909. In establishing entitlement to benefits, claimant is aided by Section 20(a) of the Act, which presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., 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); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). In order to establish her *prima facie* case, and thus entitlement to invocation of the Section 20(a) presumption, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused decedent's death; rather, claimant must show only the existence of working conditions which could have caused decedent's death. *See, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In a case involving death benefits, the presumption applies where death occurs in the course of claimant's employment. *See Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342,

17 BRBS 13(CRT) (8th Cir. 1984).

Claimant initially contends that the administrative law judge erred in not giving her the benefit of the Section 20(a) presumption. We agree. In denying claimant the benefit of the Section 20(a) presumption, the administrative law judge erred in requiring that claimant present evidence that decedent experienced strenuous or stressful conditions at work sufficient to aggravate his underlying disease resulting in death or to cause or accelerate his ultimately fatal heart attack. It is well established that the employee need not be engaged in work activities involving unusual strain or stress, and it makes no difference that the injury might have occurred elsewhere.[1] *Wheatley v. Adler*, 407 F.2d 307, 311 (D.C. Cir. 1968) (*en banc*); *Jacobs*, 746 F.2d at 1344, 17 BRBS at 15(CRT); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Moreover, it is clear that decedent's death occurred during the course of his employment with employer. This fact alone entitles claimant to the Section 20(a) presumption. *Jacobs*, 746 F.2d at 1344, 17 BRBS at 15(CRT). Furthermore, the record contains uncontroverted evidence that decedent arrived at work on October 12, 1996, at 6:30 a.m., set up his painting equipment, donned a dust mask, and worked approximately 15 minutes painting a vessel with a 25 foot pole prior to his heart attack at 8:30 a.m. *See* JX 2 at 38. These work activities are sufficient to invoke the Section 20(a) presumption, particularly in view of the medical evidence that such work could have contributed to decedent's death. JX 2 at 36, 40. As the evidence is thus sufficient to establish working conditions which could have aggravated decedent's underlying condition or contributed to or hastened decedent's death, we reverse the administrative law judge's finding that claimant failed to establish her *prima facie* case and we hold that the Section 20(a) presumption is invoked. *See Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT); *Cairns*, 21 BRBS 252.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to

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[1]In this regard, we note that, in reciting the facts in *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990), the administrative law judge erred in relying on the exertional requirements of those claimants' positions for the legal proposition that the employee must be engaged in some objectively strenuous or stressful activity for his injury to be work-related. The *Donovan* court explicitly recognized that the relevant inquiry is the effect of the "required exertion producing the injury" on "the man undertaking the work." *Donovan*, 300 F.2d at 745, *quoting Southern Stevedoring Co. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949). *See* discussion, *infra*; *see also Konno v. Young Bros.,Ltd.*, 28 BRBS 57 (1994) (the proper focus is the effect of work-related stress on the claimant).

produce substantial evidence that decedent's death was not caused, contributed to or hastened by his employment. *Janich,* 181 F.3d 810, 33 BRBS 71(CRT); *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. 1999). An unequivocal 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); s*ee also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994). The presumption also must be considered in conjunction with the aggravation rule, which provides that where an employee's work aggravates, accelerates or combines with a pre-existing condition, the entire resultant condition is compensable. *See Wheatley,* 407 F.2d at 312. Moreover, the law is clear 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). Thus, in order to rebut the Section 20(a) presumption, employer must produce substantial evidence that decedent's work did not aggravate his underlying condition to result in death, or contribute to or hasten his death. *See, e.g., Prewitt,* 194 F.3d 684, 33 BRBS 187(CRT); *Gooden,* 135 F.3d 1066, 32 BRBS 59(CRT). The pertinent inquiry concerns whether decedent's death was due in part to his work, and not whether his underlying cardiac condition was caused by his work. *Id.*

In *Gooden*, the claimant experienced chest pains at work, sustaining an acute myocardial infarction which ultimately resulted in triple bypass surgery and total disability. The claimant had preexisting heart disease, and like the decedent herein, there was evidence that the onset of his pain on the day of the infarction may have been at home. Reiterating the rule that a longshore employer takes his employee as he finds him, the United States Court of Appeals for the Fifth Circuit vacated the administrative law judge's denial of benefits, finding that the judge erred in focusing on the cause of the claimant's underlying condition rather than on the ultimate injury, which in that case was the heart attack. The court cited its prior decision in *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949), quoting from that decision the holding that an accidental injury has occurred whenever a workman, with whatever limitations and frailties he may already have, exerts himself to the point of injury.

In *Henderson*, the claimant was in the hold of a ship stowing barrels when he had what was later diagnosed as a coronary thrombosis. The medical evidence indicated that his

death was not due to this event but to his climbing a ladder to get out of the hold. The court rejected the notion that the fact that climbing the ladder was the immediate cause of death removed the injury from compensability, noting medical evidence that this act hastened the death and stating the now well-settled rule that "to hasten death is to cause it." *Id.* at 866. In addressing the effect of the claimant's pre-existing conditions, the court relied on an English case, where an employee was found to have died of an aortic aneurism, "which might have burst while the man was asleep, but which in fact ruptured while, with slight effort, he was tightening a nut with a spanner wrench." *Id.* The court explained that an injury is compensable "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." *Id.* at 867. This case, recently cited in *Gooden* with approval by the Fifth Circuit, in whose jurisdiction the present case arises, establishes several pertinent principles applicable here: the fact that decedent may have experienced chest pains prior to work does not mean his heart attack was not work-related, no unusually stressful work is required for a compensable injury to occur, that the death might have occurred anyway, regardless of work, does not negate the fact that it happened at work, and that "to hasten death is to cause it." *See also Wheatley*, 407 U.S. at 311.

In addressing rebuttal of the Section 20(a) presumption, the administrative law judge summarily stated that the opinions of Drs. Eiswirth, Tamimie and Daniels are sufficient to rebut the Section 20(a) presumption. The administrative law judge, however, provided no detailed discussion of these opinions or any analysis as to how the doctors' conclusions rebut the presumption under the aggravation rule. As a review of the opinions reveals that none of these physicians opined to a reasonable degree of medical certainty that claimant's work activities did not contribute to or hasten his death, we must reverse the administrative law judge's finding that decedent's death was not work-related.

In his deposition testimony, Dr. Eiswirth, a board-certified cardiologist, stated his belief that decedent had a myocardial infarction and died of an arrhythmia. He noted that decedent was having chest pains the previous evening, that he stopped on the way to work to get something to help the pain, which he believed was due to indigestion, that he proceeded to work where he collapsed and that he came to the hospital in full arrest. Based on these events, he opined that decedent was having a heart attack when he went to work that morning, continued having the attack at work, and died from it. JX 6 at 7. He stated that without an autopsy, the exact cause of decedent's death is unknown, but that 70 percent of heart attacks are caused by coronary blockage and decedent had several risk factors associated with coronary artery disease. Dr. Eiswirth also stated that once a heart attack is in progress, if a person does not immediately seek medical attention, he has an increased risk of death; thus, when asked by employer's counsel if there was any connection between decedent's death and his employment other than the fact that he was working when his heart attack process concluded itself, Dr. Eiswirth responded that this was the only thing, since, in

his opinion, it would not have mattered if decedent had been at work or at home, as the fact that he was not in a hospital increased his risk of death. JX 6 at 11. On cross-examination, Dr. Eiswirth acknowledged that any physical activity such as the work performed by decedent on October 12, 1996, would increase the risk of death and that, therefore, he could not rule out the contribution of decedent's exertion at work to the fact that his heart attack was fatal. *Id.* at 11-13. Dr. Eiswirth also acknowledged that there were no records confirming his belief that decedent's chest pains were cardiac in nature, and without an autopsy, could not eliminate other possible causes, such as an aortic dissection or pulmonary embolism. *Id.*

In order to rebut the Section 20(a) presumption, a medical opinion does not have to rule out every possibility that the injury or death might be work-related. *See Prewitt*, 194 F.3d at 684, 33 BRBS 187(CRT); *see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). However, employer must produce substantial evidence that decedent's death was not related, even in part, to his employment. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5th Cir. 1999) ("the only legally relevant question is whether the [work] is *a cause* of the [death]," not whether it is the sole cause). While employer's burden of production is met by an expert opinion based on a reasonable degree of medical certainty, Dr. Eiswirth never stated his opinion in those terms. Based on decedent's risk factors and statistical data, he believed it was more probable than not that decedent had a heart attack which commenced before he went to work. These facts alone are not sufficient to rebut the Section 20(a) presumption, in view of *Henderson* and *Gooden*, as the pertinent inquiry is whether the death itself, which occurred at work, is work-related. Moreover, while Dr. Eiswirth opined that, based on his belief that the heart attack commenced before decedent went to work, death would have occurred whether he was at home or at work, the fact that that death could have occurred elsewhere does not render it non-compensable when, in fact, it occurred at work. *See Wheatley*, 407 F.2d at 311. Most significantly, Dr. Eiswirth did not affirmatively state that decedent's employment duties did not aggravate his underlying condition to result in death, or hasten decedent's death. In the absence of such evidence, the Section 20(a) presumption is not rebutted. *Id.* at 312-313.

The reports of the remaining doctors similarly are legally insufficient to rebut the Section 20(a) presumption. In his February 13, 1998 report, Dr. Tamimie stated, "[m]yocardial infarctions are not considered work-related unless the individual was participating in physical or strenuous activities above and beyond his usual and customary work." JX 2 at 40. This statement is more in the nature of a general legal conclusion than the expression of a medical opinion related specifically to decedent, and the legal conclusion is directly contrary to interpretations of the Act stating that unusual stress is not required for an injury, including a heart attack, to arise out of employment. *See Henderson,* 175 F.2d at

867; *see also Wheatley*, 407 F.2d at 311, 313. Similarly, the doctor stated that if decedent was performing his usual work on the day of his heart attack, the fact that the infarction occurred at that moment is not regarded as a work-related condition. Dr. Tamimie did acknowledge that the use of a respirator and increased activity requiring muscular function could have contributed to decedent's cardiac arrest, but then reiterated that if these were tasks decedent usually performed without difficulty, the cardiac arrest could not be attributed to them, but rather to the significant risk factors which the patient had and which are known to lead to heart disease and cardiac arrest. The doctor concluded with advice that the circumstances be reviewed by an attorney. Aside from the concern that this opinion is more legal than medical, no evidence is cited as to whether decedent in fact usually performed tasks such as he was performing the day he died without difficulty. Moreover, as with Dr. Eiswirth's opinion, Dr. Tamimie's opinion is silent as to whether decedent's work could have aggravated decedent's underlying condition, accelerated the cardiac event or hastened death.

Finally, Dr. Daniel, decedent's treating physician, initially opined that although decedent's heart disease was not work-related, his ultimately fatal heart attack "would be hard to defend as not work related" when decedent's work activities were taken into consideration. *See* JX 2 at 36. Thereafter, however, Dr. Daniels issued a single sentence letter indicating his "concurrence" with the opinion of Dr. Tamimie. *See* JX 2 at 50. Therefore, at best, his opinion suffers from the same defects as that of Dr. Tamimie.

Accordingly, while the opinions of Drs. Eiswirth, Tamimie and Daniels may support the proposition that neither decedent's heart disease nor the onset of his heart attack was work-related, none of these physicians unequivocally state that decedent's work activities on October 12, 1996, did not contribute to or accelerate his death; thus, these opinions are insufficient as a matter of law to establish rebuttal of the Section 20(a) presumption. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *see also Bunol*, 211 F.3d 294, 34 BRBS 29(CRT); *Bridier v. Alabama Dry Dock & Shipping Corp.*, 29 BRBS 84 (1995). A causal relationship between decedent's employment and his fatal heart attack is therefore established. *See generally Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). The denial of benefits is vacated, and the case is remanded to the administrative law judge for consideration of the remaining issues.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge