BRB No. 07-0962

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| E.A.<br>(on behalf of C.A. and J.A., children of C.A.)<br><br>and<br><br>C.T.<br>(on behalf of C.T., child of C.A.)<br><br>Claimants-Petitioners<br><br>v.<br><br>NORTHROP GRUMMAN SHIP SYSTEMS, AVONDALE DIVISION<br><br>Self-Insured<br>Employer-Respondent | ) | DATE ISSUED: 05/28/2008<br><br>DECISION and ORDER |

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Darryl J. Carimi, Covington, Louisiana, for claimants.

Richard S. Vale and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimants appeal the Decision and Order and the Order Denying Motion for Reconsideration (2005-LHC-00185) of Administrative Law Judge C. Richard Avery 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).[1] We must

[1] Claimants are the acknowledged minor children of the decedent.

affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

C.A., decedent, worked for employer as a hydraulic mechanic. On May 27, 2005, he was assigned to mop water that had overflowed from a bathroom onto an office floor. When the decedent reported to work the following day, he informed his shift supervisor, Alvin Holder, that his back hurt and he needed to go to the first aid department. The decedent attributed his back pain to mopping the previous day. The decedent returned home after his examination by Dr. Corcoran at employer's first aid department. The decedent went to the emergency room at the Medical Center of Louisiana on May 30, 2005, for treatment of a headache and back pain. He underwent a CT scan of his head and was given medication. The decedent returned to the emergency room the next day where he died. An autopsy was performed by Dr. McGarry, who attributed the death to a spinal injury; specifically, damage to the spinal cord due to subluxation of the spine. EX 12 at 17. The decedent's three minor children filed claims for death benefits under the Act. 33 U.S.C. §909.

In his decision, the administrative law judge found that claimants established that the decedent sustained a harm manifested as back pain, and that he died from complications due to this injury. The administrative law judge credited the testimony of the decedent's relatives that he told them he injured his back at work, and the testimony of Dr. Wood that the decedent sustained a cauda equina injury, which can occur gradually, to find that claimants established that the mopping could have caused the harm.[2] Accordingly, the administrative law judge found claimants entitled to the Section 20(a) presumption linking the death to the decedent's employment. 33 U.S.C. §920(a). The administrative law judge found that the testimony of Drs. Katz, Corcoran, and McGarry, as well as the lay testimony of Jose Cabrero, Pedro Gonzales, and Alvin Holder, rebutted the presumption. The administrative law judge found that the weight of the evidence does not establish that an injury resulting in death occurred while the decedent was working for employer, and that, at most, the evidence is in equipoise, which is insufficient to fulfill claimants' burden of proof. Specifically, the administrative law judge found that claimants failed to establish that the decedent sustained a fall or severe trauma at work, and the testimony of Drs. Katz, Corcoran, and McGarry establishes that such trauma necessarily precedes a cauda equina injury. Thus, the administrative law judge found that the decedent's death was not work-related. Claimants' motion for reconsideration was denied.

[2] The cauda equina are the collection of spinal roots that descend from the lower part of the spinal cord and occupy the vertebral canal below the cord. *Dorland's Illustrated Medical Dictionary* 275 (25th ed. 1974).

On appeal, claimants challenge the administrative law judge's finding, based on the record as a whole, that the decedent's death was not caused by his employment. Employer responds, urging affirmance.

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, the claimants are 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*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Once the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that the decedent's death was not caused by his employment. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). 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 the claimants 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).

In weighing the evidence as a whole, the administrative law judge gave greater weight to Dr. Katz's opinion because he is an orthopedist and has direct experience with subluxations, as opposed to Dr. Wood, who has experience diagnosing subluxations but refers patients for treatment to either a neurologist or orthopedist. *Compare* CX 35 at 23-25 *with* EX 11 at 6, 13. Dr. Katz opined that the mopping activity, even assuming a slip and fall, was not sufficient to cause the subluxation revealed by the decedent's autopsy. EX 11 at 18. Dr. McGarry, the autopsy prosector, described the decedent's subluxation as a separation between the tenth and eleventh vertebrae, separation of the adjacent rib heads, torn and hemorrhaged ligaments, and increased mobility of the joint but no spinal displacement. EX 12 at 17. Dr. Katz opined that this injury would have caused immediate symptoms, including severe pain, such that the decedent would have sought emergency attention. EX 11 at 12-15. Moreover, he testified at his deposition that the injury would have been obvious to co-workers and to Dr. Corcoran, who examined the decedent the day following his mopping and found no objective findings of injury. Tr. at 102-105; EXs 7, 11 at 18-20. The administrative law judge found that Dr. Katz's opinion is supported by the opinion of Dr. Corcoran, who also has experience with this type of injury. Tr. at 107-108. Specifically, Dr. Corcoran testified that the decedent did not exhibit an abnormal gait at his examination and could get on and off the examining table by himself. Tr. at 102-103. Dr. Corcoran and Dr. Katz agreed that an individual with the subluxation injury described in the autopsy report would not have been able to perform

such maneuvers. Tr. at 109-110; EX 11 at 26-29. Moreover, Dr. Corcoran agreed with Dr. Katz that a subluxation is caused by a severe trauma with the immediate onset of symptoms, and that mopping could not cause such an injury. Tr. at 108-11; EX 11 at 12-16.

The administrative law judge also found that there is insufficient evidence to establish that the decedent fell at work. The decedent's supervisor, Alvin Holder, and co-workers, Jose Cabrero and Pedro Gonzales, testified that they did not witness an accident while the decedent was mopping. Tr. at 59-62; CX 4 at 12, 15; EX 13 at 12-13, 15-16. Mr. Holder also testified that he asked the decedent if he fell while mopping, and decedent answered "no." Tr. at 61. Moreover, in contrast to the medical testimony of Drs. Katz, Corcoran, and McGarry (EX 12 at 20-22) that the decedent would have experienced severe pain and other symptoms at the time of his injury, the administrative law judge noted Mr. Holder's testimony that the decedent and his co-workers sat and talked in the shop room for approximately 45 minutes after mopping, and that the decedent did not appear to be in any pain. Tr. at 65-66. Mr. Holder further testified that the decedent was able to walk normally and he did not appear to be in distress the following day when he requested an examination at employer's first aid department. Tr. at 63-64.

The administrative law judge acknowledged that Dr. Wood testified that a subluxation leading to cauda equine can occur gradually following an activity such as mopping. Decision and Order at 9. The administrative law judge found, however, that Dr. Katz's opinion that the decedent was not injured at work while mopping more credible than Dr. Wood's opinion, based on his greater experience in treating subluxations. The administrative law judge also relied on the opinions of Drs. Corcoran, and McGarry, which support Dr. Katz's opinion.

Claimants contend that the tissue evidence and deposition testimony of Dr. McGarry establish the gradual onset of spinal cord damage resulting in death, and that, based on this evidence, the Board should reverse the administrative law judge's finding that the decedent was not injured in the course of his employment. The Board, however, is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge is entitled to determine the weight to be accorded to the evidence of record. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). In this case, the claimants have not demonstrated any error in the administrative law judge's weighing of the evidence. The administrative law judge properly found that Dr. McGarry concurred with Drs. Katz and Corcoran that an individual who suffered an injury such as the decedent's would experience sudden low back pain and know that something serious had happened. EX 12 at 20-22, 30-31.

Because the testimony of Dr. Katz, and the absence of any evidence that the decedent sustained a sudden injury following the mopping incident constitutes substantial evidence in support of the conclusion that the decedent's death was not related to his employment, and as the administrative law judge's decision to credit this evidence is within his discretion as the fact-finder, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that the decedent's death was not work-related.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration denying benefits are affirmed.

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