

SHANNON HAMIL )  
(Deceased) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
DELTIDE FISHING AND RENTAL ) DATE ISSUED: Nov. 25, 2014  
TOOLS, INCORPORATED )  
 )  
and )  
 )  
SEABRIGHT INSURANCE COMPANY )  
 )  
Employer/Carrier- )  
Petitioners )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Remand 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 and Nichole Laborde Romero (LeBas Law Offices), Lafayette, Louisiana, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

;Before: HALL, Acting Chief Administrative Appeals Judge,  
McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

This case is on appeal for the second time. To recapitulate, on October 1, 2009, decedent was working for employer as a cutting operator on a fixed platform on the Outer Continental Shelf off the coast of Louisiana when he fractured his right fibula and ankle. He was treated that day by Dr. Bourgeois who gave decedent a prescription for 16 tablets of Lortab to relieve his pain. CX 7 at 7. Lortab is a narcotic pain reliever containing hydrocodone. Within three weeks of the injury, decedent received prescriptions for a total of 241 tablets of Lortab.

On the day after the injury, Dr. Bourgeois gave decedent a prescription for another 20 Lortab. CX 16 at 8. Decedent then sought care from Dr. Line, an orthopedist, who also prescribed Lortab for decedent's pain: 40 Lortab on October 5; 30 on October 7; 40 on October 15; 35 on October 19; and 30 on October 21. When Dr. Line was advised on October 16 that the Lortab was not helping decedent's pain, he prescribed 30 tablets of Soma, also known as carisoprodal, a narcotic medication intended to relax muscles. CX 8 at 10; CX 16 at 8-9; EX 17 at 33. On October 15, 2009, Dr. Line performed surgery on decedent's leg and ankle: an open reduction internal fixation of the right distal fibular fracture, repair of the distal syndesmosis disruption, and primary repair of the medial collateral ligament of the right ankle. CX 8 at 16. When decedent requested more pain medication on October 22, Dr. Line observed that decedent was not exhibiting significant pain and the doctor "had a discussion about his pain medication." *Id.* at 20. Nevertheless, Dr. Line gave decedent a prescription for another 30 Lortab, and cautioned that they would have to last him for two weeks. *Id.*; CX 16 at 9. Not until December 10, when Dr. Line surgically removed the screw he had placed in decedent's ankle, did Dr. Line prescribe more Lortab; he prescribed an additional 30 tablets. CX 8 at 28; CX 16 at 9.

However, between October 22 and December 10, while decedent was still under Dr. Line's care, decedent sought and obtained additional Lortab prescriptions from

another physician: he went to Dr. Jones on November 20 to refill a Lortab prescription and to have some diagnostic testing unrelated to his injury. Dr. Jones prescribed 36 Lortab. CX 9 at 2-3; CX 16 at 9. When decedent complained to Dr. Jones on December 2 of ankle pain and muscle pain in his back, the doctor prescribed 36 more Lortab for both back pain and ankle pain. CX 9 at 4; CX 15 at 3. Decedent returned to Dr. Jones complaining of neck and shoulder pain on January 19, 2010, and the doctor prescribed 26 more Lortab. When Decedent returned two days later with the same complaints and a request for more pain medication, Dr. Jones discussed the overuse of narcotics with him. CX 9 at 5-6.

Five days later, on January 26, 2010, decedent saw another physician, Dr. Tanious, with complaints of neck pain and stress following an altercation. CX 10 at 7. Dr. Tanious diagnosed a whiplash neck injury and prescribed 90 Lortab, 90 Soma, and 60 Xanax. The doctor also offered to conduct an MRI and spinal x-rays, but decedent declined. On February 25, decedent returned to Dr. Tanious with complaints of neck and back pain. The doctor diagnosed whiplash and chronic lower back pain, and again recommended an MRI. Although he was not working at that time, decedent stated that he was working out of state for several weeks at a time, and for that reason, he would have to check his schedule before making the appointment.<sup>1</sup> *Id.* at 10. Dr. Tanious prescribed an additional 90 Lortab, 90 Soma, 90 Xanax, and 90 Trazodone. *Id.* at 11.

Two days later, on February 27, 2010, decedent was found dead in his home. After examining the scene, and noting the numerous prescription bottles collected by the police, the coroner suspected an accidental overdose. CX 11 at 20. After receiving the toxicology report, which was positive for hydrocodone (Lortab) and carisoprodal (Soma), the coroner determined the immediate cause of death to be consistent with poly-pharmacy overdose. *Id.* at 33; *see also* CX 12 at 2; CX 13. She identified decedent's swollen ankle as a significant condition. The coroner's observation corroborated decedent's mother's deposition testimony that his right ankle was still swollen in February 2010, and required him to use a cane. CX 27 at 62.

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> Claimants asserted that in the course of treatment for his work-related ankle injury, decedent became addicted to narcotic prescription pain medication for the treatment of that injury and this addiction resulted in

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<sup>1</sup> Dr. Line had released decedent for work on February 15, 2010, but decedent had not yet returned to work.

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

his accidental death. In response, employer averred that decedent's death resulted from narcotic pain medication prescribed for subsequent, non-work-related conditions which severed the causal link between decedent's work-related ankle injury and his death.

In his initial 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; he found decedent's death to be work-related because the evidence established that the narcotic prescriptions given decedent for his ankle injury caused him to become dependent upon the medications and that this addiction led naturally and unavoidably 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), (c). Employer appealed this decision.

On appeal, the Board observed that because the standard for rebutting the Section 20(a) presumption had changed after the administrative law judge issued his decision, the decision must be vacated and the case remanded for the administrative law judge to consider employer's evidence that decedent's death was due to a supervening or independent cause. *Hamil v. Deltide Fishing & Rental Tools, Inc.*, BRB No. 12-0383 (Feb. 28, 2013) (citing *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012)).

In his Decision and Order on Remand, the administrative law judge found that employer rebutted the Section 20(a) presumption, and that, based on the record as a whole, claimants established that decedent's death was the natural and unavoidable result of his work-related ankle injury. The administrative law judge therefore awarded claimants death benefits and funeral expenses. 33 U.S.C. §909(a), (c).

On appeal, employer challenges the administrative law judge conclusion that decedent's death was causally related to his employment injury. Specifically, employer asserts that the administrative law judge's decision is based upon assumptions which are not supported by the record. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of the administrative law judge's award of death benefits. Employer has filed reply briefs in response to the briefs filed by claimants and the Director.

Once, as in this case, the Section 20(a), 33 U.S.C. §920(a), presumption has been invoked and 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 claimants bearing the burden of persuasion. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *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). Thus, it is claimants' burden to establish that decedent's death was caused by, or was the natural or unavoidable result of, his work injury. *Id.*; 33 U.S.C. §902(2).<sup>3</sup> If decedent's death is due to a supervening, independent cause, the death is not compensable. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983);<sup>4</sup> *see also Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir.), *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (1981) (original injury is compensable unless subsequent progression of the condition was shown to have been worsened by an independent cause); *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951) (original injury compensable unless the causal effect attributable to the employment was "overpowered and nullified by influences originating entirely outside the employment").<sup>5</sup> As the Board stated in its initial decision, the Fifth Circuit has cited with approval Larson's treatise on workers' compensation, which annotates state court

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<sup>3</sup> Section 2(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>4</sup> In *Lira*, the Fifth Circuit stated:

If the remote consequences are the direct result of the employee's unexcused, intentional misconduct, and are only the indirect, unforeseeable result of the work-related injury, the employee may not recover under the LHWCA. *See* 1 A. Larson, *The Law of Workmen's Compensation* § 1300 (1980) ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.").

*Lira*, 700 F.2d at 1051, 15 BRBS at 124(CRT).

<sup>5</sup> The Fifth Circuit has not resolved the apparent conflict between *Bosarge* and *Voris*. The court has addressed each subsequent case on its facts to determine if the alleged intervening cause was sufficient to sever the connection between the work injury and its remote consequences such that the consequences are not the "natural or unavoidable result" of the work injury. *See Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

decisions holding that “where drugs used in the treatment of a compensable injury lead to narcotic addiction or alcoholism, the ensuing consequences are compensable. . . .” *Hamil*, slip op. at 6 n.7 (citing *Lira*, 700 F.2d at 1051 n.3, 15 BRBS at 124 n.3(CRT) and 1 Lex K. Larson, *Larson’s Workers’ Compensation*, § 10.09[5] (Matthew Bender Rev. Ed.)).

On remand, the administrative law judge found that claimants established that decedent’s death was the natural or unavoidable result of his work-related ankle injury and was not, as argued by employer, due to an intervening cause, i.e., the result of his supervening treatment by Drs. Jones and Tanious for complaints of back and neck pain. *See* Decision and Order on Remand at 3. Specifically, the administrative law judge found that the evidence supports the findings that: decedent developed a dependency on the pain medications (Lortab and Soma) prescribed by Dr. Line for his work injury;<sup>6</sup> after Dr. Line counseled decedent on his use of pain medication and the doctor stated his intent to limit decedent’s Lortab prescriptions, decedent obtained a refill of his Lortab prescription for his ankle pain from Dr. Jones, even though decedent was still treating with Dr. Line; decedent returned to Dr. Jones three times with various complaints of neck and back pain and each time obtained a prescription for Lortab; a week after Dr. Jones gave decedent his last Lortab prescription, and five days after Dr. Jones refused decedent’s request for more pain medication and counseled him on narcotics abuse, decedent saw Dr. Tanious, alleging neck pain and stress, and received prescriptions for Lortab, Soma and Xanax; and decedent lied to Dr. Tanious about working to avoid an MRI which would not have supported his complaints of pain.<sup>7</sup> *Id.* As the prescription medications that caused decedent’s accidental death were hydrocodone (Lortab) and carisoprodol (Soma), which had originally been prescribed for decedent’s ankle injury, the administrative law judge concluded that decedent’s death resulted from the work injury.<sup>8</sup>

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<sup>6</sup> Pharmacy records show only one previous prescription for 10 tablets of Hydrocodone almost two years earlier, December 15, 2007, which does not appear to have been refilled. CXs 14-16.

<sup>7</sup> In his initial Decision and Order, the administrative law judge found that: based on pharmacy records, decedent had not been prescribed narcotic pain medication prior to his work injury; following his work injury decedent began to exhibit abusive tendencies; and Dr. Line discussed decedent’s drug use with him on October 22, 2009. *See* Decision and Order at 11. The administrative law judge concluded that his review of decedent’s medical history suggests that decedent’s decision to treat with Drs. Jones and Tanious was for the purpose of obtaining additional pain medication. *Id.* at 12.

<sup>8</sup> In finding decedent’s death to be related to the ankle injury, the administrative law judge also noted that Ms. Barnett, the coroner, stated that decedent’s ankle injury was a cause contributing to death, based on her observation of decedent’s swollen ankle and

We affirm the administrative law judge's conclusion that decedent's death was the natural or unavoidable result of his work-related ankle injury as it is rational, supported by substantial evidence, and in accordance with law. As stated above, employer remains liable for the consequences of drug addiction caused by the work injury. *See generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995) (employer liable for complications to other body parts caused by surgery for the work injury); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988) (employer liable for increased disability after unnecessary surgery); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987) (employer liable for back injury incurred during vocational testing for work injury); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986) (employer liable if neck injury occurred during medical examination for work-related hearing loss).

The facts found by the administrative law judge in this case are materially different than those in *Lira*. In *Lira*, the claim was not denied because the claimant became addicted to prescription narcotics and heroin after his work injury. Rather, the court held that employer was not liable for the cost of claimant's detoxification program because claimant had not informed anyone of his prior heroin addiction, which contributed to his re-addiction after the injury. The court held that the claimant intentionally misrepresented his prior condition and that this "unjustified, intentional misconduct" constituted an intervening cause of the claimant's subsequent re-addiction. *Lira*, 700 F.2d at 1052, 15 BRBS at 125(CRT).<sup>9</sup> In this case, the administrative law judge properly observed that decedent's pharmacy records prior to the work accident show "that there is no evidence in the record to suggest that [d]ecedent was habitually or casually using or being prescribed narcotic pain medication." Decision and Order at 11. CXs 14-16. After the work injury, decedent was prescribed vast quantities of narcotic and other prescription medications. *See* CXs 14-16. The administrative law judge thus was entitled to infer that decedent became dependent upon the medication prescribed for his work injury based on decedent's repeated efforts to obtain refills of his prescriptions and on comments made by decedent's physicians. In this regard, Dr. Line, who performed the ankle surgeries, wrote in his report on October 22, 2009:

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the information about the ankle injury she received from decedent's brother. CX 11 at 39-40; CX 12 at 2.

<sup>9</sup> The court continued: "Our holding stands for the limited proposition that an employee's unjustified, intentional misconduct may constitute an intervening cause in the circumstances presented here." *Lira*, 700 F.2d at 1052, 15 BRBS at 125(CRT).

Comments: At this point the patient is expecting more pain medication. However, at this point he has received 40 Lortab 7.5 mg at the time of surgery as well as an additional 30 Lortab 10 mg and now 30 Vicoprofen. At this point I told him he is not exhibiting any significant pain . . . and . . . we had a discussion about his pain medication. I told him I would give him an additional 30 Lortab 7.5 mg as well as an additional 15 Mobic 15 mg to use and at this point this is going to have to last him for 2 weeks.

CX 8 at 20. Decedent saw Dr. Jones on November 20 and December 2, 2009, prior to his second surgery. The chart note for November 20 states “refills” as “chief complaint.” CX 9 at 2. Dr. Jones diagnosed, *inter alia*, ankle pain, and prescribed Lortab. Similarly, on December 2, Dr. Jones saw decedent for his complaints of ankle pain and a pulled muscle in his back. Upon examination, Dr. Jones observed that decedent had a red, open, ankle wound, and he prescribed Soma and Lortab for decedent’s back and ankle pain. *Id.* at 4. On December 10, 2009, Dr. Line prescribed additional Lortab following the removal of the screw from decedent’s ankle. CX 16 at 10. Decedent returned to Dr. Jones on January 19, 2010, complaining of a “crick” in his neck; Dr. Jones prescribed more Lortab, noting decedent had muscle spasm. CX 9 at 5. Two days later, on January 21, 2010, when decedent sought a refill of his pain medications, Dr. Jones wrote, “narcotic overuse. Pt advised (illegible).” *Id.* at 6. Dr. Jones did not prescribe additional narcotics at that time.

Decedent then saw Dr. Tanious, a move the administrative law judge permissibly related to decedent’s desire to obtain additional narcotic prescriptions.<sup>10</sup> *See* Decision and Order at 12 n.4. Dr. Tanious diagnosed “whiplash neck injury” and “chronic low back pain” and prescribed Lortab, Soma, and Xanax. CX 10 at 7, 13. Decedent sought refills on February 23, 2010, which Dr. Tanious prescribed on February 25, 2010. *Id.* at 9. At this time, Dr. Tanious’s notes state: “No medication will be called in for [decedent]. He has to be here to get his medications.” *Id.* at 11. In concluding that decedent went to Dr. Tanious to obtain narcotic medication, the administrative law judge noted that decedent put off an MRI recommended by Dr. Tanious on the specious ground that he was working out of state, when, in fact, he was not working at all. *Id.* at 10. In sum, with the exception of a single prescription in 2007, the record reflects no narcotic drug use by decedent prior to the work injury, *see* n. 6, *supra*; he was prescribed for his work injury the same narcotic medication which caused his death less than five months later, and which he had repeatedly sought to obtain from his treating doctors and, thereafter, from two other doctors. In light of this evidence, the administrative law judge

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<sup>10</sup> Dr. Tanious’s initial report states that decedent was taking only Zoloft (depression, anxiety), Lisinopril (blood pressure), and Atenolol (blood pressure). CX 10 at 7.

reasonably determined that decedent's death was the result of his work injury, and not of an intervening cause. *See* Decision and Order at 12.

It is well-established that the administrative law judge is entitled to weigh the evidence and to draw his own inferences therefrom. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is impermissible for the Board to substitute its own interpretation of the evidence for that of the administrative law judge. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). "The [administrative law judge's] selection among inferences is conclusive if supported by the evidence and the law." *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80(CRT) (5th Cir. 1995); *see Louisiana Ins. Guar. Ass'n v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010); *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).<sup>11</sup> In this case, we agree with the Director in concluding that the administrative law judge drew rational inferences from the evidence of record, *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999);<sup>12</sup> that the administrative law judge properly applied the law, *Lira*, 700 F.2d 1046, 15 BRBS 120(CRT); and thus, that substantial evidence supports his conclusion that claimants met their burden of establishing that decedent's death was due to his work-related ankle injury, *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). The administrative law judge, within a reasonable exercise of his discretion, determined that decedent, who had no history of abusing narcotic medication prior to his work injury, yet died of an accidental drug overdose less than five months later, had developed a dependency on or addiction to narcotic medication as a result of his work injury, and that decedent's death was a natural and unavoidable result of the work injury and was not due to a supervening cause. Consequently, we affirm the administrative law judge's award of death benefits to claimants.

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<sup>11</sup> *See also Del Vecchio*, 296 U.S. at 287. In addressing a case of death due to suicide versus accidental death, the Supreme Court held that when the issue is to be "resolved upon the whole body of proof pro and con; and if [the evidence] permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court."

<sup>12</sup> None of the physicians was deposed; only Ms. Barnett, the coroner, was deposed. An oral hearing was not held in this case.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge