

BRB No. 96-0721

LANNY L. MIDKIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PRINCE CONSTRUCTION COMPANY,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Employer	)	
	)	
McLEAN CONTRACTING COMPANY	)	
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion to Reconsider of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr. and Kevin W. Grierson (Jones, Blechman, Woltz, & Kelly, P.C.), Newport News, Virginia, for claimant.

Robert A. Rapaport and Lynne M. Ferris (Knight, Dudley, Clarke & Dolph), Norfolk, Virginia, for McLean Contracting Co. and St. Paul Fire and Marine Insurance Co.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion to Reconsider (95-LHC-794) of Administrative Law Judge Fletcher E. Campbell, Jr., 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, an ironworker, was injured on June 12, 1992, during the course of his employment with Prince Construction Company, a subcontractor for McLean Contracting Co. (hereinafter employer), when he slipped off a ladder and cut his left shin. At the time of this accident, claimant was working aboard a floating mat while performing bridge repair work on the Lafayette River. Claimant treated his wound at home and did not see a doctor that day. The following day, claimant went to see his son, who was installing a pier in the James River. Claimant did not assist his son, but nevertheless spent much of the day wading in the water of the James River, possibly exposing himself to vibrio vulnificus, a harmful bacteria that is believed to exist in that river. That night, claimant's leg began to swell and the next morning he went to the hospital. Claimant was treated and released that day; however, the cut on his leg later became gangrenous, requiring extensive reconstructive surgery.

Prior to this work-related injury, claimant had a controlled diabetic condition. Subsequent to the leg injury and infection, claimant's diabetes became uncontrollable, and he is now required to have four shots of insulin a day. Moreover, claimant's uncontrolled diabetic condition has caused a degeneration of the kidneys, and it is likely that he will be required to use a dialysis machine. Claimant's diabetes has additionally caused severe eye problems, resulting in the removal of his right eye and legal blindness in his left eye. Claimant filed a claim under the Act seeking permanent total disability compensation.

In his Decision and Order, the administrative law judge first found that the status and situs requirements under Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a), had been satisfied; accordingly, the administrative law judge found that claimant established coverage under the Act. The administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and, after determining that employer failed to rebut the presumption, found that claimant established causation under the Act. The administrative law judge then found, however, that claimant was required to establish that his disability is the natural and unavailable consequence of his injury. Concluding that claimant's act of wading into the James River on the day following his work injury constituted a subsequent intervening event, and that there was no evidence as to the cause of claimant's infection thereafter, the administrative law judge found that claimant failed to establish that his infection and its sequelae were a natural consequence of his June 12, 1992, work-related injury. He thus, denied benefits.<sup>1</sup> In an Order Denying Motion to Reconsider, issued on February 9, 1996, the administrative law judge declined to reopen the hearing,

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<sup>1</sup>Having concluded that claimant is not entitled to the relief that he sought, the administrative law judge determined that he need not decide the remaining issues before him. As "an aid to the parties," however, the administrative law judge made the following "comments:" 1) since Prince Construction Company, claimant's employer and employer's sub-contractor, failed to secure insurance coverage under the Act, employer, pursuant to Section 4(a), 33 U.S.C. §904(a), is the statutory employer of claimant and is thus liable for any benefits due claimant, and 2) since the Director, Office of Workers' Compensation Programs, has contingently conceded the liability of the Special Fund, had he reached the question, he would have concluded that employer was entitled to partial relief under Section 8(f), 33 U.S.C. §908(f), of the Act. *See* Decision and Order at 8-10.

again finding that claimant failed to establish that his condition is a natural consequence of his work-related injury.

On appeal, claimant contends that the administrative law judge erred in denying his claim for benefits. Specifically, claimant asserts that the administrative law judge erroneously placed the burden of proof on him to establish that his condition was the natural consequence of his work-related injury. Employer responds, urging affirmance.

In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In the present case, the administrative law judge properly found that claimant is entitled to invocation of the Section 20(a) presumption, as it is undisputed that he sustained a harm, *i.e.*, the multiple disabling physical ailments sustained by claimant, and that an incident occurred on June 12, 1992, which could have caused the harm. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 59 (1994); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by the employment event. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). The Section 20(a) presumption applies to link claimant's disabling condition to his employment, placing the burden of rebuttal on employer where another cause, including a subsequent intervening event, is alleged. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Thus, employer may meet its rebuttal burden by producing substantial evidence that claimant's disabling condition was caused by a subsequent non work-related event. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for the disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 164 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

In the instant case, the administrative law judge invoked the Section 20(a) presumption, relying on the opinion of Dr. Shacochis who stated that while claimant's diabetes pre-existed his leg injury and subsequent gangrene, these conditions accelerated his eye problems such that claimant's continued disability is a result of that aggravation.<sup>2</sup> The administrative law judge next found that the

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<sup>2</sup>We note, however, that the Board and the courts have not required a claimant to introduce medical evidence establishing that the conditions to which he was exposed in fact caused his disability in order to invoke the Section 20(a) presumption; rather, a claimant's burden has always been defined as establishing the existence of working conditions which could have caused the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In this case, the parties stipulated that claimant sustained an injury arising out of his employment on June 12, 1992; furthermore, it was uncontroverted that claimant subsequently developed multiple physical ailments. These undisputed facts are sufficient for invocation of the Section 20(a) presumption. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

record contained no evidence of rebuttal, medical or otherwise, and thus determined that claimant established causation under the Act. *See* Decision and Order at 8. However, the administrative law judge thereafter denied compensation to claimant, finding that claimant's bacterial infection and the catastrophic consequences of that infection constituted a subsequent intervening cause which bars claimant's recovery. Specifically, citing *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), the administrative law judge initially found that the burden of proof is on claimant to demonstrate that his ailments are the natural consequence of his injury. Next, the administrative law judge found that there is no medical opinion evidence of record on this issue either way; thus, the administrative law judge concluded that claimant failed to sustain his burden of proof that his infection and its sequelae were the natural consequence of the June 12, 1992 injury and accordingly denied the claim.

Contrary to the administrative law judge's finding, the decision of the Supreme Court of the United States in *Greenwich Collieries* does not affect the application of the Section 20(a) presumption under the Act. In *Greenwich Collieries*, the Supreme Court held that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which places the "burden of proof" on a proponent of a rule or order, applies to cases arising under the Act. *Greenwich Collieries*, 114 S.Ct. at 2254-2255, 28 BRBS at 44-45 (CRT). Thereafter, the Court held that application of the "true doubt" rule under the Act violates the APA by easing the claimant's burden of proving the validity of his claim. *Id.*, 114 S.Ct. at 2257, 2259, 28 BRBS at 46, 48 (CRT). The Supreme Court's decision in *Greenwich Collieries* did not discuss or affect the law regarding invocation and rebuttal of the Section 20(a) presumption; in fact, the Court noted that claimants benefit from specific "statutory presumptions easing their burden," citing Section 20(a) as an example. *Id.*, 114 S.Ct. at 2259, 28 BRBS at 47 (CRT). Claimant bears the burden of demonstrating a *prima facie* case prior to invoking Section 20(a), consistent with *Greenwich Collieries*. Once claimant proves his *prima facie* case, Section 20(a) shifts the burden of proof to employer. As an employer may rebut the Section 20(a) presumption only upon the production of specific and comprehensive evidence severing the presumed casual connection, its burden is unchanged by the decision in *Greenwich Collieries*. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995).

Since claimant produced sufficient evidence to invoke Section 20(a), it applies to link claimant's leg injury and resulting sequelae to the accident at work, and employer bears the burden of proving that claimant's disabling condition was not the natural or unavoidable result of the June 12, 1992 injury. *See Kubin v. Pro-Football, Inc. d/b/a Washington Redskins*, 29 BRBS 117, 119 (1995); *White*, 29 BRBS at 9. According to the administrative law judge, employer "does not contest the causal relationship that arose partially as a result of claimant's exposure to waters of the James River." Decision and Order at 8. Based on the testimony of Dr. Schacochis that claimant's subsequent medical conditions are linked to the infection which arose on the cut leg, the administrative law judge found Section 20(a) invoked but not rebutted. He then went on to discuss the cause of claimant's leg infection, finding that it resulted from the intervening cause of claimant's having entered the polluted waters of the James River. This finding was not, however, based on

medical evidence as to the cause of the infection,<sup>3</sup> but on the administrative law judge's conclusion that claimant was required to bear the additional burden of proving his ailments are the natural result of the work injury. The administrative law judge specifically stated that an infection may well be a "natural" consequence of a minor injury to a diabetic, but there is no medical opinion evidence on this record either way." Decision and Order at 9. Since, however, Section 20(a) applies to the entire causal chain, employer bore the burden of proof on this issue. As the finding that there is no evidence as to the cause of the infection is supported by the record, employer has not shown that claimant's leg condition and subsequent ailments are due to an intervening cause. As employer did not rebut the Section 20(a) presumption, we hold, as a matter of law, that claimant has established causation under the Act. Therefore, the case is remanded to the administrative law judge for consideration of the remaining issues raised by the parties.

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<sup>3</sup>The medical opinions of record all relate claimant's current disabling condition to the infection of the cut on claimant's left shin, the injury he received during the course of his employment with employer on June 12, 1992. *See* Cl. Exs. 9-11; Emp. Ex. 2. The opinions are silent as to the cause of the infection.

Accordingly, the administrative law judge's determination that claimant's recovery under the Act must be barred as a result of the occurrence of an intervening event is reversed, and the case is remanded for consideration of the remaining issues raised by the parties. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge