BRB No. 96-1218

MARIAN JANICH (Widow of PAUL JANICH)	)	
Claimant-Respondent	)	
v.	)	
AMERICAN GRAIN TRIMMERS	)	DATE ISSUED:
Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Claimant's and Employer's Motions for Reconsideration of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Robert T. Newman (Sweeney and Riman, Ltd.), Chicago, Illinois, for claimant.

Gregory P. Sujack and Kathleen M. Callahan (Garofalo, Hanson, Schreiber & Vandlik, Chtd.), Chicago, Illinois, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

DOLDER, Administrative Appeals Judge:

Employer appeals the Decision and Order and Decision and Order on Claimant's and Employer's Motion for Reconsideration (94-LHC-1922) of Administrative Law Judge Robert G. Mahony awarding benefits 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 if they 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 is the widow of the decedent, Paul Janich. Decedent was employed by

employer as a foreman or gang leader of a crew loading barges with grain. On the afternoon of August 12, 1992, a federal grain inspector ordered decedent to direct his crew to cease loading a barge due to the onset of heavy rain. Decedent left the office where he had been monitoring the loading and walked in the rain to the barge which was being loaded. After instructing the crew to cease loading and leave the barge, he sustained a fatal cardiac arrest. Claimant filed a claim for death benefits under the Act. 33 U.S.C. §909. Employer controverted the issues of causation and average weekly wage; alternatively, employer sought Section 8(f) relief from continuing liability for death benefits. *See* 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer did not rebut the presumption. Claimant was therefore awarded death benefits based on an average weekly wage of $296.92. Lastly, employer was found entitled to Section 8(f) relief based on decedent's pre-existing heart condition and diabetes mellitus. On reconsideration, the administrative law judge modified claimant's award to reflect an average weekly wage of $349.98.

On appeal, employer challenges the administrative law judge's finding that claimant established her *prima facie* case for invocation of the Section 20(a) presumption, and his finding that employer did not establish rebuttal of the presumption. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer argues that "[t]he medical evidence submitted by the Claimant did not meet the minimum standard necessary to establish with scientific certainty that the Decedent's heart attack arose out of and in the course of employment." *See* Employer's brief at 12. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd,* 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Contrary to employer's contention, however, claimant is not required to introduce affirmative medical evidence proving that the working conditions in fact caused decedent's death; rather, claimant must show only the existence of working conditions which could have conceivably caused decedent's death. *See generally U. S. Industries/Federal Sheet Metal, Inc.,* 455 U.S. at 608, 14 BRBS at 631. In this regard, the United States Court of Appeals for the Eighth Circuit has stated that the presumption clearly applies in cases where, as here, death occurs in the course of employment. *Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984); *see Wheatley v. Adler*, 407 F.2d

307 (D.C. Cir. 1968)(wherein the court stated that an injury need not involve an unusual strain or stress, and that it makes no difference that the injury might have occurred elsewhere).

In the instant case, it is uncontroverted that decedent sustained a fatal heart attack while working for employer; the administrative law judge stated the fact that a harm occurred is thus not in dispute. Employer contends that claimant failed to show that work activities could have aggravated decedent's pre-existing heart condition. However, it is undisputed that decedent, in the time immediately preceding his fatal heart attack, was instructed by a federal inspector to order his crew to cease loading a barge due to heavy rain, and that decedent walked to the barge which was then being loaded and instructed his crew to cease loading. The administrative law judge relied on these facts and explicitly credited Dr. Castor's opinion that either physical exertion (including walking and shouting),[1] or emotional stress could have precipitated decedent's death in finding that working conditions existed which could have caused decedent's death.[2] He also cited the Board's holding in *Cairns v. Matson Terminals,* 21 BRBS 252 (1988), that claimant is not required to show that decedent's working conditions were unusually stressful. Contrary to employer's assertion, the administrative law judge's finding that claimant established her *prima facie* case is supported by substantial evidence, including a medical opinion, and is consistent with law. Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Jacobs*, 746 F.2d at 1342, 17 BRBS at 13 (CRT); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to

[1]The administrative law judge stated that decedent instructed his crew "perhaps by shouting." Employer challenges this inference. We cannot, however, say it was unreasonable for the administrative law judge to consider the possibility that a man giving instruction from the dock, in a heavy downpour, to the crew on the boat might shout.

[2]The administrative law judge also credited evidence that decedent worked 29 to 33 of the 38 calender days preceding his death and descriptions of decedent's job provided by co-workers. *See* Decision and Order at 6 n.1.

sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury or death nor aggravated the pre-existing condition resulting in injury or death. *See, e.g., Cairns,* 21 BRBS at 257. If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In challenging the administrative law judge's findings on this issue, employer, citing the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994), initially contends that the administrative law judge erred in requiring "specific and comprehensive" evidence to rebut the Section 20(a) presumption. We disagree. Contrary to employer's contention, the decision of the Supreme Court in *Greenwich Collieries* did not discuss or affect the law regarding rebuttal of the Section 20(a) presumption. *See Holmes v. Universal Maritime Service Corp.,* 29 BRBS 18 (1995). Accordingly, we reject employer's assignment of error in this regard.

With regard to employer's assertion that the administrative law judge erred in finding that it failed to rebut the Section 20(a) presumption, we also affirm the administrative law judge. The administrative law judge's finding is supported by the record, as he rationally found the opinion of Dr. Carroll, upon whom employer relies in support of its contention, insufficient to rebut the presumption. Although the administrative law judge found Dr. Carroll to be a credible witness, he concluded that the doctor's testimony did not rebut the Section 20(a) presumption as his opinion was based on speculation and probabilities. Specifically, the administrative law judge found that his opinion that decedent most likely died as a result of an arrhythmia was based on probability, *i.e.*, the 50 percent mortality rate of patients with poor left ventricular function and the fact that those patients who die "often" do so as a result of arrhythmia. *See* Decision and Order at 13. The administrative law judge noted that Dr. Carroll stated that "[because] there was no autopsy available,...to say exactly what the cause of death is speculative at best," Carroll Deposition at 23, reasoning that, therefore, the conclusion that no causal relationship exists between decedent's death and his employment must also be speculative. In this regard, the administrative law judge also discussed Dr. Carroll's statement that he did not know if the cumulative effect of the amount of time decedent worked in the 38 days prior to his death could have been a precipitating factor. *Id.* at 61-62. Dr. Carroll also testified that he had no way of knowing the exact nature of decedent's activities on the day he died or the amount of physical stress on his job, but based his conclusions regarding work-relatedness on inferences drawn from the records provided him.[3] As the record supports the administrative law judge's

[3]Dr. Carroll agreed with Dr. Castor, claimant's treating cardiologist, that claimant most likely died of sudden cardiac death. Both doctors were asked hypotheticals in their testimony about the likelihood of work-relatedness based on stated facts about decedent's activities on the day of his death. Employer's attorney described the events testified to by Mr. Castillo, a co-worker of decedent, as involving decedent's being in the office for about

conclusion that Dr. Carroll's opinion did not unequivocally rule out a connection between decedent's employment and his death, he did not err in finding it insufficient to rebut Section 20(a).

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an hour prior to death and then coming out of the office with another man to stop the loading of the barge. In response to the question whether anything in the activities described by Mr. Castillo was "strenuous of stressful or likely to induce sudden cardiac death or cardiac arrhythmias," Dr. Carroll stated that since he was unfamiliar with "exactly what that activity entails, the best answer I can give is ...there did not seem to be anything in there that would precipitate an arrhythmia, but I have to say that I am unfamiliar with that activity specifically and I wasn't there at the time that it was performed, but from the report that you read there doesn't seem to be anything in there that would suggest that." Carroll Deposition at 27-28. Dr. Castor's opinion is similarly qualified, as he testified in response to claimant's attorney's hypothetical that "there's a lot of assumption on all those activities that this hypothetical man was doing. I think that it's just reasonable to say that if you have a heart condition and it you're doing a lot of strenuous exertion, there's the possibility that you can aggravate your heart condition." Castor Deposition at 27. With regard to descriptions of decedent as walking or shouting, he stated it would depend on how fast he was walking and how loud he was shouting. *Id.* at 58. In effect, since neither doctor knew how strenuous claimant's work was on the day in question, neither could give an unequivocal opinion. Under these circumstances, the administrative law judge did not err in finding Section 20(a) controlling.

Moreover, there is no other opinion sufficient to do so. The administrative law judge found that Dr. Castor's opinion that decedent died of sudden cardiac death also could not rebut Section 20(a) as Dr. Castor stated that decedent was susceptible to sudden cardiac death upon physical exertion or emotional stress. The administrative law judge properly found that this opinion did not sever the causal chain and thus did not rebut Section 20(a). Moreover, the administrative law judge also credited Dr. Castor's opinion that decedent's death could have been aggravated by his working conditions in conjunction with the testimony of co-workers regarding decedent's job responsibilities in general and working conditions of the day of his death.[4] He thus found causation established.

In this case, the administrative law judge thoroughly considered the evidence, and under our statutory standard of review, 33 U.S.C. §921(b)(3), we must affirm his decision if it is supported by substantial evidence and in accordance with law. We conclude that the administrative law judge properly applied the Section 20(a) presumption and the aggravation rule, holding that if working conditions played a role in decedent's death, it was compensable. As neither the opinion of Dr. Carroll nor any other medical evidence establishes that decedent's working conditions played no role in his death at work in August 1992, Section 20(a) is not rebutted. We thus affirm the administrative law judge's finding that decedent's death was causally related to his employment, and his consequent award of death benefits to claimant.

Accordingly, the Decision and Order and Decision and Order on Claimant's and Employer's Motions for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY

[4]The administrative law judge also gave little weight to the opinion of Dr. Greenberg, who stated decedent's occupation was a direct causative factor in his death, due to the absence of his qualifications from the record.

Administrative Appeals Judge

BROWN, Administrative Appeals Judge , concurring:

I concur in the result reached by my colleagues in this case.

JAMES F. BROWN
Administrative Appeals Judge