

Secondary Injuries: Fourth Circuit Applies Section 20(a) Presumption

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On January 20, 2017, the United States Court of Appeals for the Fourth Circuit issued a published decision in *Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017), pet. for reh'g pending.

Stephenson involves a claim for what the decision describes as a “secondary” injury under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C.S. § 901 *et seq.* (“LHWCA” or “Act”).¹ The Fourth Circuit held that the Act’s § 20(a) presumption, 33 U.S.C.S. § 920(a), applies, because of its plain language, to all claims regardless of whether they concern “secondary” injuries. The court explicitly rejected Metro Machine’s arguments that the presumption did not, as a matter of law, apply to a “secondary” injury and that the court should adopt what Metro argued was the Fifth Circuit’s position on that question. Metro is currently seeking rehearing, contending *Stephenson* conflicts with two decisions in the Fifth Circuit and the United States Supreme Court’s decision in *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 71 L. Ed. 2d 495, 102 S. Ct. 1312, 14 BRBS 631 (1982).

The Facts

The injured worker, John Stephenson, was a pipe fitter for Metro Machine from August 1983 until he voluntarily retired at age 68 in August 2011. Three and a half years before he retired, on February 18, 2008, he suffered a pulmonary injury as a result of a specific episode in which he inhaled fumes from welding, burning, and the application of epoxy paint in the superstructure of a ship where he worked a longer-than-eight-hour shift. He experienced severe breathing difficulties that night and early the next morning went to the emergency room, where he was hospitalized and treated as an in-patient from February 19 through February 26, 2008. He was diagnosed with an exacerbation of chronic obstructive pulmonary disease (“COPD”), bronchitis, and hypoxic respiratory insufficiency. He was treated with supplemental oxygen and steroid therapy. Upon discharge he was advised to avoid working around welding fumes in the future and was prescribed a nebulizer and oxygen concentrator, which he had not used before being hospitalized.

In addition to paying for the hospitalization and related medical treatment, Metro paid Stephenson temporary total disability benefits under the LHWCA from February 19, 2008, through August 3, 2008, and two weeks of temporary partial disability benefits in September 2009.

¹ The *Stephenson* court defines “primary” injuries as compensable injuries that arise out of, and occur in the course of, employment and “secondary” injuries as other injuries that develop later as the result of a primary injury. 846 F.3d at 689. Other authorities refer to “secondary” injuries as “consequential,” “subsequent,” or “sequela” injuries. *See, e.g.,* Arthur Larson & Lex K. Larson, 2 Larson’s Workers’ Compensation Law § 14-0425, n. 5 (2016).

Prior to the February 18, 2008, incident, Stephenson experienced a long history of pulmonary problems. As a child he had asthma, regularly suffered from bronchitis during the winter, was hospitalized due to COPD in 1996, and was diagnosed with emphysema in 2001. Starting in 1986, he took steroids for his wheezing and coughing. After his 2011 retirement, he continued to take steroids but increased his dosage and began using his oxygen concentrator more frequently. His shortness of breath worsened and led to another hospitalization in October 2011. During that stay, he was found to have a fractured thoracic vertebra, which his treating physician found to be due to excessive coughing and long-term intake of steroids to manage his pulmonary problems.

The Claim

Stephenson sought to have Metro pay for the treatment required for his ongoing COPD and the thoracic fracture. Metro declined, contending that neither condition was related to his employment-related exposures. On March 30, 2012, he filed a United States Department of Labor (DOL) Form LS-203 Claim with DOL's Office of Workers' Compensation seeking payment of the disputed medical benefits. He argued the COPD was aggravated, though admittedly not caused by, his February 2008 exposure to fumes and the fractured vertebra was caused by coughing combined with medications (particularly the steroids) he took to treat his COPD. In the Form LS-203 paragraph designated for "date of the injury," he inserted "2/18/2008"; in the space seeking a description of the accident, he stated "exposure to fumes"; and in the space to name the part of the body affected, he stated "lungs." A DOL claims examiner recommended after an informal conference that Metro pay for the medical treatment of both the COPD and the thoracic fracture.

The ALJ Decisions

Following a hearing, an ALJ issued a decision and order granting benefits that addressed only the claim for COPD. The ALJ found that Stephenson's COPD was permanently aggravated by his February 18, 2008, workplace exposure and ordered Metro to pay for continued medical treatment of that condition.

Stephenson moved for reconsideration, complaining that the ALJ failed to address the thoracic fracture. In its opposition to the reconsideration motion, Metro contended Stephenson had to demonstrate that the fracture naturally or unavoidably arose from the original injury without the benefit of the § 20(a) presumption.

The ALJ's reconsideration decision recognized that during the hearing, Stephenson's counsel specifically asked the ALJ to address the compensability of the thoracic fracture and the initial decision failed to do so. The ALJ further found that, at the informal conference preceding referral of the case to OALJ, Stephenson expressly requested that Metro pay for medical treatment of his thoracic fracture. Without explicitly addressing Metro's contention that the fracture had to naturally or unavoidably arise from the February 2008 toxic exposure, the ALJ found that Stephenson established a prima facie case with regard to the thoracic fracture by linking it to his use of prescription steroids and excessive coughing stemming from his work-related COPD. He found increased steroid use and increased COPD symptoms to be "a

consequence of' the 2008 exposure. The ALJ repeated his finding from the initial decision that the February 2008 exposure permanently aggravated Stephenson's COPD and found for the first time that the exposure could also have caused, aggravated, or accelerated the thoracic fracture. Having found that Stephenson invoked the presumption with regard to the fracture, the ALJ found that Metro failed to rebut it. The ALJ rejected Metro's "observation" that Stephenson had also used steroids before the 2008 work incident as insufficient to rebut the presumption that the fracture was causally related to the 2008 event.

The Board Decision

The Board affirmed both ALJ decisions. With regard to the COPD aggravation, the Board held that the ALJ properly found that Stephenson established both elements of his prima facie case, i.e., that he suffered a harm and that working conditions existed that could have caused the harm. Making out a prima facie case triggered the § 20(a) presumption. In assessing whether Metro produced substantial evidence to rebut the presumption, the Board rejected Metro's reliance on the testimony and reports of a physician who changed his mind about the etiology of Stephenson's COPD three times and whose opinions were therefore contradictory and equivocal.

With respect to the thoracic fracture, the Board held that the ALJ also properly "applied the section 20(a) presumption to this secondary injury." The Board rejected Metro's arguments that the ALJ erroneously failed to require Stephenson to show that the fracture was the "natural or unavoidable" result of the 2008 exposure and, because he failed to include the thoracic fracture on his original claim form, he was required to establish its work-relatedness without the benefit of the § 20(a) presumption. Specifically, Metro asserted that the ALJ should have relied on two Fifth Circuit cases to find that the presumption does not apply to secondary injuries like Stephenson's fracture. The Board rejected this argument, describing the Fifth Circuit decisions as turning on the failure of the claimants in those cases to make sufficiently specific claims for the "sequela" injuries at issue there. Relying on *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., OWCP*, 455 U.S. 608, 615 (1982), as establishing a low threshold for what constitutes a claim under the LHWCA, the Board held that Stephenson, in contrast to the claimants in the Fifth Circuit cases, clearly articulated his claims for "secondary" injuries before both the district director and the ALJ. Finally, the Board approved the ALJ's application of the § 20(a) presumption to "secondary" conditions.

The Fifth Circuit Decisions Regarding Application of The Section 20(a) Presumption to Secondary Injuries

Metro relied on *Amerada Hess Corp. v. Director, OWCP [Dover]*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008) and *Insurance Co. of State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013). Each analyzed the application of LHWCA § 20(a), which states: "In any proceeding for the enforcement of a claim for compensation under this Chapter it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Chapter." 33 U.S.C.S. § 920(a). Section 20(a) rebuttably presumes a claim is compensable under the LHWCA if the employee establishes a prima facie case that he or she suffered a harm and workplace conditions existed that could have caused the harm.

In *Dover*, an ALJ determined that the claimant was totally and permanently disabled by a heart condition resulting from medical treatment of claimant's work-related back injury. The claimant received steroid injections and also took steroids orally as part of his treatment for his back. He alleged that one of his doctors told him that steroids caused his disabling heart condition. However, the initial claim did not reference a work-related heart injury and the claimant introduced no medical evidence supporting the theory that the medical treatment for the claimed injury caused the consequential heart problems. The BRB affirmed the ALJ award. The Fifth Circuit reversed and remanded the case, determining that the claimant had not demonstrated that the heart condition "naturally or unavoidably" resulted from the back injury as required by § 2(2). The Fifth Circuit held that the ALJ incorrectly relied on the § 20(a) presumption to support the award. The court held that the presumption applied to the back injury but could not supply the necessary link between the back injury and the heart condition. The claimant needed evidence, probably including medical expert testimony, on that point. Thus, under *Dover*: (1) the § 20(a) presumption applies only to the specific work-related injury identified in the initial claim (the "primary" injury) and not to any alleged consequential injury (the "secondary" injury); and (2) a secondary injury is compensable under the LHWCA only if the claimant presents substantial evidence that it "naturally or unavoidably" resulted from the covered primary injury.

The Fifth Circuit stated:

[W]e hold that the statute does not support a presumption that any medical condition that an injured claimant suffers after a work-related injury is caused by the work-related injury. Furthermore, not all "secondary" injuries are covered under the LHWCA simply because the claimant demonstrates a subsequent harm that could have stemmed from the covered injury. Instead, to receive benefits under the LHWCA, for a subsequent injury, the claimant must present substantial evidence that the secondary condition "naturally or unavoidably" resulted from the first covered injury, as is required by the statute.

Dover, 543 F.3d at 763-64.

Vickers reiterated *Dover's* holding. In *Vickers*, the employee suffered a crushed left arm in an explosion while working in Iraq. After returning to the United States, he underwent multiple surgeries on the arm. Roughly 16 months later, he experienced a brief bout of gastrointestinal illness and, subsequently, widespread numbness throughout his body. A neurophysiologist eventually diagnosed a rare, acquired, immune-mediated inflammatory disorder of the peripheral nervous system called chronic inflammatory demyelinating polyneuropathy (CIDP). The injured worker filed a claim for compensation for his left arm injury and for injuries to "other parts of [his] body [and] other related problems associated with [his] injury and working conditions in Iraq." The *Vickers* opinion initially referred to the left arm injury as "the original claim." 713 F.3d at 784. Thereafter it used the language of "primary claim." *Id.* at 785.

The ALJ applied the § 20(a) presumption to both the primary arm injury and the CIDP, found the employer did not rebut the presumption as to either injury, and awarded total disability benefits. The Board distinguished *Dover*, finding that the worker made a claim for the CIDP injury

because his claim included other “related problems.” Accordingly, the Board affirmed the ALJ’s decision, as did a district court.² The Fifth Circuit reversed. The Fifth Circuit panel emphasized that the language of § 20(a) restricts the presumption to a “claim,” and it concluded that the language in the claim referring to “other related problems” did not suffice to make the CIDP a part of the claimant’s “primary” or “original” claim for the left arm injury; instead, the CIDP was a “secondary condition.” The panel majority held that the injured worker’s initial claim included only a vague catch-all reference to unidentified sequelae of the employee’s arm-injury, which did not make either the CIDP or the gastrointestinal illness primary injuries. The panel was unpersuaded that the catch-all clause for “other related problems associated with [this] injury and working conditions in Iraq” could be reconciled with the requisite standard for a claim under *U.S. Industries/Federal Sheet Metal, Inc. v. Dir., OWCP*, 455 U.S. 608, 615 (1982). Rather, the panel stated:

This statement [of injury] must be more than a mere declaration that the employee has received an injury or is suffering from an illness that is related to his employment; it must contain enough details about the nature and extent of the injury or disease to allow the employer to conduct a prompt and complete investigation of the claim so that no prejudice will ensue.

Dover, 713 F.3d at 785 (quoting *U.S. Industries*, 455 U.S. at 613 n.6 (internal quotations and citations omitted)).

And, Vickers’ catch-all clause was, in the panel’s view, exactly the sort of vague declaration that the Supreme Court in *U.S. Industries* deemed insufficient to constitute a “claim” to which the § 20(a) presumption applies. Because the CIDP allegedly arose from some combination of the gastrointestinal illness and complications from his arm surgery, the majority held that it constituted a secondary injury to which the “naturally or unavoidably” causation standard applied. Because the ALJ erroneously applied the § 20(a) presumption to the CIDP, the majority remanded the case for factual findings under the correct causation standard.

A concurring judge agreed that *Dover* required reversal in this case, but wrote separately to highlight his belief that it was wrongly decided and that the § 20(a) presumption should apply to secondary injuries. In fact, in both *Dover* and *Vickers* one member of the divided panels wrote a separate concurring opinion to express disagreement with the majority’s conclusion that the presumption did not apply to secondary injuries.

The Fourth Circuit Decision

Before the Fourth Circuit, Metro made two arguments regarding the § 20(a) presumption. First, the ALJ should not have applied it to the part of the claim based on Stephenson’s thoracic

² *Vickers* arose under the Defense Base Act, 42 U.S.C.S. § 1651 *et seq.* (“DBA”), and the Fifth Circuit has held that initial judicial review of a DBA case should take place in district court rather than the court of appeals. *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir.1991).

fracture. And second, the ALJ improperly applied the presumption in evaluating Stephenson's COPD claim.

The Director argued that the ALJ correctly found that the presumption attached to Stephenson's claim for medical benefits related to his fracture, because the presumption attaches to any claim for compensation. The Director urged the Fourth Circuit not to adopt the contrary reasoning employed by the Fifth Circuit in *Dover* and *Vickers*. The Director suggested that those cases were distinguishable on their facts because the claimants in those cases did not make specific enough effective claims for the secondary injuries in issue there. In the alternative, the Director, joined by Stephenson, suggested that *Dove* and *Vickers* were wrongly decided. The Director contended that the Fifth Circuit erred to the extent it ruled that the presumption applies to claims based on direct injuries arising out of and in the course of a worker's employment, but not to those based on secondary injuries that naturally or unavoidably result from a primary injury. The Director based his position on the plain text of the Act generally, and § 20(a) in particular, whose language provides no basis to withhold the presumption based on the type of injury the claimant alleges in the claim. The Director also explained that the Supreme Court's decision in *U.S. Industries* was not applicable either because it did not involve a consequential injury at all. In fact, the ALJ in *U.S. Industries* found that the claimant there never even sustained a primary injury, so there could not have been a consequential injury resulting from a nonexistent primary injury. Thus, *U.S. Industries* held only that a non-work injury—one that did not occur in the course of employment and could not be traced to one that had—was not entitled to the § 20(a) presumption. Finally, the Director contended that the ALJ also correctly applied the § 20(a) presumption in evaluating Stephenson's COPD claim. Contrary to Metro's suggestion, the ALJ did not find the medical expert opinion sufficiently credible to invoke the presumption but not to rebut it. In fact, he did not rely on the expert opinion at all for invocation, but on other substantial evidence.

The court agreed with the Director and Stephenson that the presumption applies to cases regardless of whether they concern secondary injuries. The Fourth Circuit reasoned that the text of the presumption speaks in terms of "claims" and does not even mention injuries; thus, it certainly does not distinguish between primary and secondary injuries. Finding no ambiguity to § 20(a), the court held that it applies to all types of claims. The court noted that it could not imagine any reason why Congress would have relieved claimant of the initial burden to produce evidence of causation in some cases but not others and cited *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280, 129 L. Ed. 2d 221, 114 S. Ct. 2251, 28 BRBS 43(CRT) (1994), for the proposition that the very purpose of the § 20(a) presumption was Congress' recognition that claims such as those involved here would be difficult to prove. 846 F.3d at 690 n.3.

Insofar as *Dover* and *Vickers* could be read to hold that the presumption applies only to claims for primary injury, and not also to claims for secondary injury, the Fourth Circuit found those decisions were distinguishable. 846 F.3d at 691 n.4. The court read the Fifth Circuit decisions as primarily turning on the courts' conclusions that the claims in those cases did not sufficiently allege the secondary injuries for which compensation was eventually sought. The Fourth Circuit also noted that "to the extent" the Fifth Circuit suggested that a secondary injury that was properly and specifically claimed in the injured worker's claim was ineligible for the benefit of

the § 20(a) presumption, the reasoning of the Fifth Circuit decisions was not clear to the Fourth Circuit. *Id.*

The Fourth Circuit further “respectfully disagreed” with Metro’s understanding of *U.S. Industries*. It explained that Metro was mistaken in contending that the attack of pain suffered by the *U.S. Industries* claimant at home the morning after he left work without reporting an injury was in essence a secondary injury to which the presumption did not apply. The Fourth Circuit held that *U.S. Industries* stood for two simple propositions: (1) the § 20(a) presumption applies only to claims of injuries that are actually made; and (2) a claim must include a primary injury that arises out of and in the course of employment. 846 F.3d at 691. Therefore, nothing in *U.S. Industries* hampered Stephenson’s claim so long as his claim included the thoracic fracture. And, relying on language in *U.S. Industries* itself, the Fourth Circuit held that a person making a claim under the Act “need not even make claims on claim forms and that ‘an informal substitute ... may be acceptable if it identifies the claimant, indicates that a compensable injury has occurred, and conveys the idea that compensation is expected.’” *Id.* Rather, the key was whether Metro was prejudiced in its ability to defend itself by Stephenson’s failure to identify the fracture in his original claim form. The court held that it was not. On the facts here, where Stephenson explicitly sought medical benefits for the thoracic fracture at the informal conference and before the ALJ, it was proper for the ALJ and Board to treat the claim as including the fracture. *Id.* Because the evidence supported the ALJ’s conclusion that Stephenson established a prima facie case with respect to the fracture, the presumption applied.

The Fourth Circuit also found that, although the ALJ had not specifically found that the secondary injury in this case arose “naturally or unavoidably” from the primary injury, the facts supported such a finding, and remanding for him to make such a finding was unnecessary, as it would be futile. Having found that the claimant invoked the presumption with regard to his secondary injury, the court also found that the employer had not rebutted the presumption. Finally, the court held that the ALJ, in applying the presumption to the employee’s primary injury, had done so correctly.

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