BRB No. 97-1157

JIM JACKSON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
STRACHAN SHIPPING COMPANY	)	
	)	
and	)	
	)	
SIGNAL ADMINISTRATION, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Jim Jackson, Jacksonville, Florida, *pro se.*

Richard P. Salloum (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Claimant, representing himself, appeals the Decision and Order (95-LHC-111) of Administrative Law Judge Stuart A. Levin denying 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). In reviewing this *pro se* appeal, the Board must affirm the administrative law judge's findings of fact and conclusions of law 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant worked for employer for approximately 23 years in various positions,

including van driver, truck driver, gear man, crane operator and forklift driver. On November 11, 1991, while driving a van in the course of his employment, claimant passed out, lost control of the van, and hit a guard shack. Claimant has been off work since this injury. Employer voluntarily paid compensation for temporary total disability from November 12, 1991 to November 29, 1993. 33 U.S.C. §908(b).

Prior to his November 11, 1991, work injury, claimant had been diagnosed with and treated for a seizure disorder by Dr. Rivas, a neurologist, after experiencing a *grand mal* seizure on April 24, 1988. Dr. Rivas stated that prior to his injury, he advised claimant of work restrictions necessitated by his seizure disorder, including no driving, no work in high places or near water, and no work with explosive or flammable materials. Claimant initially denied, and subsequently stated that he did not recall, being advised by Dr. Rivas of these restrictions prior to the injury, and he did not inform employer of his treatment for a seizure condition or of any restrictions. Claimant was treated for the injuries sustained in the van accident at St. Luke's Hospital; the hospital records report that claimant has a seizure disorder for which he takes Dilantin and that "wife states 3 seizures this AM and refused to stay home." EX 21 at 1, 5.

In his Decision and Order, the administrative law judge first determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his injury arose out of and in the course of his employment with employer. The administrative law judge further afforded claimant the benefit of the Section 20(d), 33 U.S.C. §920(d), presumption that the injury was not occasioned by the willful intention of claimant to injure himself. The administrative law judge found both of these presumptions rebutted, however, by evidence that claimant willfully engaged in driving, contrary to the restrictions imposed by Dr. Rivas, which led to the accident. The administrative law judge therefore concluded that the November 11, 1991, injury was solely caused by claimant's affirmative misconduct, thus barring the claim under Sections 2(2) and 3(c) of the Act, 33 U.S.C. §§902(2), 903(c).

On appeal, claimant, appearing *pro se,* challenges the administrative law

judge's denial of his claim.[1] Employer responds, urging affirmance.

Section 2(2) of the Act defines the term "injury" as follows:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2). Section 3(c) sets forth the following exclusion from coverage for an employee's disability resulting from an injury arising under the Act:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. §903(c)(1994)(formerly 33 U.S.C. §903(b)(1982)). In establishing that an injury arises out of his employment, a claimant is aided by the Section 20(a) presumption, which applies to the issue of whether an injury is causally related to his employment activities. *See, e.g., Perry v. Carolina Shipping Co.,* 20 BRBS 90 (1987). Finally, Section 20(d) of the Act affords a claimant the benefit of the

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[1]Claimant submitted additional medical evidence to the Board, apparently in support of his contention that any seizure problem he might have was caused by his employment and did not pre-exist his November 11, 1991, injury. By Order dated July 18, 1997, the Board returned this additional medical evidence, stating that the Board is empowered to consider only the record developed before the administrative law judge, and advising claimant that he could seek modification based on such evidence, pursuant to Section 22 of the Act, 33 U.S.C. §922 . There is no indication that claimant has requested modification before the Office of Administrative Law Judges.

presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. §920(d).

The Board has held that the "arising out of . . . the employment" requirement of Section 2(2)[2] is a separate issue from the Section 3(c) "willful intention to injure" inquiry. Thus, even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself. *See O'Connor v. Triple A Machine Shop,* 13 BRBS 473, 476-477 (1981) (Miller, J., concurring in part and dissenting in part); *Kielczweski v. The Washington Post Co.,* 8 BRBS 428, 431 (1978). Therefore, the Section 20(a) presumption applies to the Section 2(2) requirement that the injury arose out of claimant's employment, and the Section 20(d) presumption complements the Section 3(c) inquiry into whether the injury was occasioned by claimant's willful intention to injure himself. *See, e.g., Maddon v. Western Asbestos Co.,* 23 BRBS 55, 61 (1989).

The administrative law judge in the instant case found claimant entitled to invocation of the Section 20(a) presumption, a finding that is not challenged by employer and is therefore affirmed. Once claimant establishes his entitlement to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption by presenting specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Peterson v. General Dynamics Corp.,* 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied,* 113 S.Ct. 1253 (1993); *see also Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). 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 270 (1990).

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[2]The term "in the course of employment," as used in Section 2(2), relates to the time, place and circumstances of the accident while the term "arising out of employment" refers to the causal origin of the injury, *i.e.,* whether the injury was caused by the employment. *See Williams v. Healy-Ball-Greenfield,* 14 BRBS 490, 492 n.2 (1983); *Twyman v. Colorado Security,* 14 BRBS 829 (1982).

In the case at bar, the administrative law judge determined that the Section 20(a) presumption was rebutted based upon a showing by employer that claimant's employment injury and any resulting disability was attributable to an intervening event caused by claimant's own affirmative conduct. *See* Decision and Order at 12. The administrative law judge further stated that claimant's injuries were caused by his deliberate disregard of the physician's instruction. At no time, however, did he make a finding that they were caused by his willful intent, the clear language specified in Section 3(c). Thus, the administrative law judge's finding of rebuttal rests on a misapplication of the case law pertaining to intervening cause to the instant case. The cases cited by the administrative law judge in support of his rebuttal finding hold that where there is a subsequent non-work-related event following an initial work injury, the relevant inquiry is whether the second injury resulted naturally or unavoidably from the work injury; the claimant's actions must show a degree of due care in regard to his injury and the claimant must take reasonable precautions to guard against re-injury.[3] Thus, a claimant may not recover if the remote consequences of his work injury are the direct result of his intentional post-injury misconduct, and are only the indirect, unforeseeable result of the work-related injury. *See Bludworth Shipyard, Inc. v. Lira,* 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Grumbley v. Eastern Associated Terminals Co.,* 9 BRBS 650 (1979)(Miller, J., dissenting in part and concurring in part). These intervening cause cases involve the interpretation of the Section 2(2) term "or as naturally or unavoidably results from such accidental injury;" such term has been held to cover "injuries through accidents which happen subsequently to a primary injury." *Cyr,* 211 F.2d at 456.

The instant case, however, does not involve a second accident or event occurring subsequent to the work injury; the injury at issue here occurred at work on November 11, 1991. Thus, the intervening cause cases are inapposite. Moreover, the statute specifically excludes the consideration of fault in assessing the cause of the injury, as Section 4(b), 33 U.S.C. §904(b), states that "[c]ompensation shall be payable irrespective of fault as a cause for the injury." Thus, the courts and Board have explicitly rejected the suggestion that the duty of care required of a claimant to guard against a subsequent injury applies to the initial work injury. In *Cyr,* for example, the United States Courts of Appeals for the Ninth Circuit stated that Section 4(b) eliminates negligence or fault as a consideration with respect to "the happening on the job which caused the primary injury." 211 F.2d at 456, 457. In *Hallford v. Ingalls Shipbuilding Div.,* 15 BRBS 112, 114 (1982)(Ramsey, J.,

[3]Employer, in its response brief, also relies on the intervening cause cases cited by the administrative law judge in his Decision and Order.

dissenting), the Board similarly held that cases involving the causal link between an accident and the sequelae of the resulting injury were inapposite to a case involving a claimant alleged not to have used reasonable means to avoid the employment-related injury. *See also Bludworth,* 700 F.2d at 1050 n.2, 15 BRBS at 123 n.2 (CRT); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982), *aff'g* 13 BRBS 873 (1981). Thus, in the case at bar, we hold that the administrative law judge erred in finding the Section 20(a) presumption rebutted based on his finding that claimant's intentional misconduct was the cause of his injury. Accordingly, as employer presented no evidence sufficient to sever the causal connection between claimant's injury and his employment, the administrative law judge's finding of Section 20(a) rebuttal is reversed. *See Swinton,* 554 F.2d at 1075, 4 BRBS at 466.

The remaining issue on appeal is whether the administrative law judge properly denied the claim pursuant to Section 3(c) of the Act, 33 U.S.C. §903(c), on the basis that claimant's injury was occasioned by his willful intention to injure himself. *See O'Connor,* 13 BRBS at 476-477; *Kielczweski,* 8 BRBS at 431. In addressing this issue, the administrative law judge properly afforded claimant the Section 20(d), 33 U.S.C. §920(d), presumption that his injury was not occasioned by the willful intention to injure himself, a finding that is not challenged by employer. In order to rebut the Section 20(d) presumption, employer must present substantial countervailing evidence that claimant willfully intended to injure himself. *See Rogers v. Dalton Steamship Corp.,* 7 BRBS 207, 210 (1977); *see also Del Vecchio v. Bowers,* 296 U.S. 280, 284-287 (1935). The administrative law judge appears to have found the Section 20(d) presumption rebutted by evidence that claimant had pre-existing epilepsy with recurrent seizures, had experienced seizures on the day of the work accident, and was warned by Dr. Rivas not to drive or engage in other activities required by his employment. In discussing this issue, however, the administrative law judge committed the same legal error in his consideration of whether employer rebutted the Section 20(d) presumption as he committed in his analysis of Section 20(a) rebuttal. As previously discussed with respect to rebuttal under Section 20(a), the intervening cause cases cited by the administrative law judge are inapposite to the case at bar; specifically, the duty of using due care applies only to guarding against re-injury following an initial work-related injury and has no relevance to the inquiry into whether employer presented substantial evidence that claimant willfully intended to injure himself.

Neither the Board nor the courts has recently had occasion to address the requisite factors for establishing willful intent to injure oneself; recent cases construing Sections 3(c) and 20(d) involve either suicides or assaults on other

persons and, thus, are not directly on point to the case at bar.[4] Our review of decisions rendered by the United States Court of Appeals for the Fifth Circuit reveals that, under the law of that circuit,[5] willful intent to injure oneself requires a strict standard of proof. In *General Accident, Fire & Life Assur. Corp. v. Crowell,* 76 F.2d 341 (5th Cir. 1935), the court rejected the argument that a claimant, whose leg was broken during horseplay with a co-worker, was barred from recovery by Section 3(b) of the Act in effect at that time, now Section 3(c), as it was certain that the claimant had no intention to break his own leg. Similarly, in *Glen Falls Indemnity Co. v.*

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[4]The suicide cases involve the inquiry as to whether the employee's death stems from a "willful intent" to commit suicide or from an irresistible suicidal impulse resulting from an employment-related condition. *See, e.g., Konno v. Young Brothers, Ltd.,* 28 BRBS 57 (1994); *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989). The assault cases hold that the administrative law judge must determine whether the necessary willful intent to injure another person exists, considering such factors as the claimant's physical actions and speech at the time of the incident. *See, e.g., Williams v. Healy-Ball-Greenfield,* 22 BRBS 234 (1989)(Brown, J., dissenting); *Kielczewski v. The Washington Post Co.,* 8 BRBS 428 (1978).

[5]The instant case arises under the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, and that court has stated that decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, issued prior to and on that date, shall be binding as precedent in the Eleventh Circuit. *See Bonner v. City of Pritchard,* 661 F.2d 1206, 1207 (11th Cir. 1981).

Henderson, 212 F.2d 617 (5th Cir. 1954), the court rejected the argument that there should be no recovery where the deceased employee previously had been warned by his physician that engaging in strenuous work might prove harmful and cause his death. The court held that the fact that a physician had advised the employee that a harmful result might ensue if he engaged in such activities was insufficient to rebut the presumption that the employee did not intend to kill or injure himself. The court noted that the statute provides compensation "regardless of how negligent or inadvisable one's conduct may be, provided that there is no intention on the part of the employee to harm or injure himself or another." 212 F.2d at 618.

In light of these decisions, it is clear that a claimant's disregard of medical advice does not establish the willful intent to injure oneself required by Section 20(d). Thus, our review of the record in this case compels the conclusion that the record lacks substantial countervailing evidence to rebut the Section 20(d) presumption. *See generally Rogers,* 7 BRBS at 210. There is no record evidence that claimant deliberately intended to have the motor vehicle accident in which he was injured. Regardless of how negligent or inadvisable claimant's course of conduct may have been, he is entitled to compensation in the absence of substantial evidence of a specific intent to injure himself. *See Glen Falls,* 212 F.2d at 618. Under the facts of this case, we hold that claimant's disregard of medical advice is insufficient, in and of itself, to prove the requisite willful intent and rebut the Section 20(d) presumption.[6]

[6]In fact, the medical evidence regarding the advice given prior to the injury does not strongly support the administrative law judge's conclusion. Dr. Rivas discussed his advice in a report and deposition, given after the injury. In his deposition, Dr. Rivas stated that his advice about restrictions was given long ago. That could have gone as far back as the April 24, 1988 seizure. The record does not indicate when the advice was given or whether it was ever repeated. EX 23 at 37. Contrary to notions of "willful" disregard or intent, Dr. Rivas states that, even after the November 11, 1991, motor vehicle accident, claimant remained unconvinced that

As employer has presented no other evidence that could support a finding that claimant's injury was occasioned by his willful intention to injure himself, we reverse the administrative law judge's finding that the Section 20(d) presumption is rebutted. *See Glen Falls,* 212 F.2d at 617; *General Accident,* 76 F.2d at 341. We therefore reverse the administrative law judge's determination that the claim is barred by Section 3(c), and remand the case to the administrative law judge for consideration of all remaining issues.

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he experiences seizures, especially because all of his medical tests for seizure activity were negative. *See* EX 44 at 9. The administrative law judge found that claimant did not remember being advised of restrictions by Dr. Rivas, Decision and Order at 5; this finding goes against the conclusion that claimant willfully disregarded the advice.

Accordingly, we reverse the administrative law judge's findings that the injury did not arise out of claimant's employment under Section 2(2) and that the claim is barred by Section 3(c). The case is remanded for consideration of all remaining issues consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JAMES F. BROWN
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

Although I agree with my colleagues' decision to reverse the administrative law judge's finding that employer established rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption, I respectfully dissent from the decision to reverse the administrative law judge's finding that the Section 20(d), 33 U.S.C. §920(d), presumption was rebutted. Under the facts of this case, I would hold that the administrative law judge reasonably determined that claimant's reckless conduct rises to the level of willful intent to injure himself. Based on my review of the record in this case, I would uphold, as supported by substantial evidence, the administrative law judge's findings that claimant's injury was caused by his deliberate disregard of his treating physician's instruction not to drive and that such willful disregard of medical restrictions threatened not only the safety of claimant himself, but the general public. Claimant's conduct on the day of his work injury was particularly egregious in that, according to his wife's statements to St. Luke's Hospital personnel, claimant experienced three seizures that morning but refused to stay home from work. Such a course of conduct represents not mere negligence but, rather, a degree of recklessness that is legally sufficient to constitute the willful intent to injure oneself. Therefore, under the facts of this case, I would affirm the administrative law judge's finding that the Section 20(d) presumption was rebutted and that recovery is barred under Section 3(c) of the Act, 33 U.S.C. §903(c).

ROY P. SMITH

Administrative Appeals Judge