BRB No. 13-0262

BARBARA DILL (widow of WADE DILL, deceased)	)	
Claimant-Respondent	)	
v.	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: March 11, 2014
and	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Scott J. Bloch (The Law Offices of Scott J. Bloch, P.A.), Washington, D.C., and Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Michael W. Thomas and Lara Merrigan (Thomas, Quinn & Krieger, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-LDA-00259) of Administrative Law Judge Steven B. Berlin 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 Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with

law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. To recapitulate, decedent began working for employer in Iraq in December 2004 as a pest control specialist. He returned home on visits in March/April 2005, in the fall of 2005, in December 2005, and in June 2006. According to claimant, his widow, decedent's visits got progressively worse as she felt he was becoming more aggressive, mean, and angry. When he returned in June 2006, he learned, *inter alia*, about his wife's adultery and his daughter's drug problem. On July 16, 2006, while at a hotel near his home, decedent shot and killed himself. Claimant filed a claim for death benefits contending decedent's suicide was related to stressors associated with his employment.

The administrative law judge found that claimant established a prima facie case relating decedent's death to his employment, as she established a harm (suicide) and "evidence of conditions" in "the zone of special danger that could have been a cause of [decedent's] suicide, including the separation from his family and the exposure to traumatic wartime dangers." Decision and Order at 27. Specifically, the administrative law judge mentioned decedent's exposure to a mortar attack, a hazardous waste spill, a clean-up after a suicide on base, and a colleague's injury/death due to an explosion. The administrative law judge also found that decedent's "physical separation" from his family fell within the zone of special danger. *Id.*[1] The administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption, and that the suicide was not a willful act, but was an impulsive one, making Section 3(c), 33 U.S.C. §903(c), inapplicable. Decision and Order at 36, 42. Employer appealed this decision.

On appeal, the Board affirmed the administrative law judge's application of the Section 20(a) presumption, stating "claimant established the existence of working conditions which could have caused stress, aggravated decedent's underlying psychological condition and thus contributed to decedent's death[.]" *Dill v. Service Employees Int'l, Inc.*, BRB 11-0395 (Feb. 28, 2012), slip op. at 5.[2] However, as the Board found that the administrative law judge had incorrectly excluded Dr. Whyman's report from the record, the Board vacated the administrative law judge's finding that

[1] Specifically, the administrative law judge discussed cases bringing recreational activities within the zone of special danger because of employment at remote locations; he found it self-evident that such employment requires isolation from family and that such isolation could result in psychological problems. Decision and Order at 27-28.

[2] The Board noted that, while employer challenged the invocation of the Section 20(a) presumption, it conceded the existence of "war zone stressors." *Dill*, slip op. at 5.

employer did not rebut the presumption and remanded the case for him to address whether employer presented substantial evidence to rebut the Section 20(a) presumption and, if so, to weigh the record as a whole on the cause of decedent's death. The Board also ordered the administrative law judge to address whether, based on the totality of the evidence, the events that occurred state-side in June/July 2006 constituted an intervening cause of the suicide. *Dill*, slip op. at 9. In this same regard, in part because he had not previously addressed Dr. Whyman's opinion, the Board stated that the administrative law judge must reconsider the applicability of Section 3(c) based on the totality of the evidence, "including the written statements authored by decedent prior to his demise."[3] *Id.* at 11. Finally, the Board modified the award of funeral expenses, contingent upon the decision on remand, limiting them to the amount actually paid and not to the statutory maximum. *Id.* at 12.

On remand, the administrative law judge awarded compensation as before, albeit for different reasons, and awarded the actual amount of funeral expenses incurred. Decision and Order on Rem. at 2, 24. Initially, the administrative law judge found that employer rebutted the Section 20(a) presumption with Dr. Whyman's opinion that decedent's work in Iraq did not affect him psychologically, that any effect of the physical separation from his family was speculative, and that decedent's suicide was the result of his pre-existing personality defects and non-work-related stressors. Decision and Order on Rem. at 3-5. On weighing the evidence as a whole, the administrative law judge found that decedent had had no previous psychological treatment but that both experts believed decedent had some sort of pre-existing psychological problems.[4] *Id.* at 5, 16. However, the administrative law judge credited claimant's expert, Dr. Seaman, concluding that his opinion better fit the facts, is rational, and is supported by an Army study.[5] *Id.* at 16. Therefore, the administrative law judge gave most weight to Dr. Seaman's opinion that decedent's "work-related separation from his family significantly

[3] Decedent left one long note, called the "Aloha letter," and shorter notes on five pieces of hotel stationary. Cl. Ex. 3; Emp. Exs. 25-26. All are undated. He also left a hand-written "Last Will and Testament," that appears to be dated July 10, 2006. Emp. Ex. 23.

[4] Dr. Whyman believed decedent had long-term emotional problems, probably a mild dysthymic disorder and depression, developmental difficulties which resulted in relationship deficiencies and deficient coping resources, and control issues. Emp. Ex. 44. Dr. Seaman concluded that decedent may have had an obsessive-compulsive personality disorder. Cl. Ex. 34.

[5] The Army Study, according to Dr. Seaman, discussed separation from family as a factor in military suicides. *See* Decision and Order on Rem. at 8-9, 16; ALJ Ex. 11.

intensified the dysfunction in his marriage."[6] *Id.* at 19. The administrative law judge accepted claimant's testimony that decedent started work in Iraq as a caring but controlling husband and father but deteriorated into someone who was angry and threatening and who behaved bizarrely in his last three weeks of life. *Id.* Because decedent's work required him to be overseas, the administrative law judge found this separation from his family, and any work-related stressors that occurred overseas, came within the zone of special danger. Accordingly, the administrative law judge found:

> Employer's mandated working conditions required [decedent] to work thousands of miles from his wife, daughter, and home. I conclude this caused, contributed to, or accelerated [decedent's] suicide by aggravating whatever pre-existing marital dysfunction there was and by stressing [decedent] further with wartime experiences in Iraq.

Decision and Order on Rem. at 20. In a footnote, the administrative law judge stated that this case does not involve an intervening causal event, and he found that decedent's suicide was an irresistible impulse, and not an intentional act, as he had been behaving erratically when he returned from Iraq. *Id.* at 23-24. Thus, the administrative law judge found decedent's death was work-related and the claim was not barred by Section 3(c), and he awarded death benefits to claimant. 33 U.S.C. §909. Employer appeals the award, and claimant responds, urging affirmance. For the reasons that follow, we again remand this case.

Employer contends the administrative law judge erred in finding that decedent's suicide was work-related. Specifically, employer contends the administrative law judge erred in crediting Dr. Seaman's opinion to conclude that the physical separation from family, required by the job, as well as other work stressors, led to decedent's demise. It argues that decedent willfully intended to commit suicide, thereby barring benefits under Section 3(c), and that the stateside events occurring after decedent returned home caused his death.

After the administrative law judge issued his decision on remand, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, issued *Kealoha v. Director, OWCP*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), a case addressing the compensability of disability due to an attempted suicide. Employer asserts that this law does not apply because *Kealoha* was issued after the administrative

[6] Dr. Seaman concluded that decedent had an "adjustment disorder" associated with "a clearly identifiable stressor, his marital dysfunction." Cl. Ex. 34 at 14. He opined that the marital dysfunction was "predominantly caused by the physical separation associated with his assignment to work in Iraq." *Id.*

law judge's decision or because the Ninth Circuit specifically declined to address the fact pattern in this case.

Section 3(c) states:

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

33 U.S.C. §903(c); *see also Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Section 3(c) works in conjunction with Section 20(d), 33 U.S.C. §920(d). Section 20(d) provides the presumption that "the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." *Id.* To rebut the presumption, an employer must present "substantial evidence to the contrary." *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *see generally Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012). If an employer does so, the presumption falls from the case. *Id*. Until *Kealoha*, in cases where an injured employee committed suicide, case precedent held that the central issue of compensability was whether the employee had the "willful intention" to commit suicide.[7] *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Where the decedent's death was caused by an "irresistible suicidal impulse" resulting from an employment-related condition, Section 3(c) did not bar compensation. *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pert. part sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979) (death due to suicidal impulse related to stress of work); *see also Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951) (work injury resulted in manic-depressive insanity and suicide that was not voluntary and willful);[8] *Terminal Shipping Co. v. Traynor*, 243

[7] The Board previously stated that Section 3(c) is an affirmative defense; therefore, the burden rested on the employer to establish that, based on the record as a whole, Section 3(c) applies to the case. *Dill*, slip op. at 10. However, in another recent opinion, the Ninth Circuit in *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013), held that as error and stated, after the presumption is rebutted, the burden is on the claimant to prove by a preponderance of the evidence that the injury or death was not due to the employee's willful intent.

[8] The United States Court of Appeals for the Fifth Circuit explained that death benefits are allowed if a work injury results "naturally and unavoidably in disease and the disease causes death. This is so if the injury causes insanity from gangrenous poisoning or otherwise, and the insanity directly causes suicide[.]" *Voris*, 190 F.2d at 932. If the death is the result of "brain derangement[,]" death is "the proximate and direct result of the accident" and an award may be made. *Id.* However, if the suicide is the result of a willful choice, "a new and independent agency breaks the chain of causation." *Id.* at 933. There must be "some connection between the death and the employment, and the causal

F.Supp. 915 (D. Md. 1965) (cerebral hemorrhage led to physical difficulties and depression until decedent took his own life; suicide was not willful).[9] The administrative law judge applied the irresistible impulse test to the present case and found that decedent's death was the result of an irresistible impulse and not a willful act. He based his finding on Dr. Seaman's opinion and the testimony regarding decedent's bizarre behavior during the last weeks of his life.[10] Decision and Order on Rem. at 20-24; ALJ Ex. 11.

Shortly after the administrative law judge issued his decision on remand in February 2013, the Ninth Circuit issued its decision in *Kealoha*, 713 F.3d 521, 47 BRBS 1(CRT), in April 2013. In *Kealoha*, a ship laborer fell and sustained serious physical injuries in 2001. The claimant's pre-existing psychological problems were aggravated as a result of his work-related injuries, and, in 2003, he shot himself in the head and sustained additional injuries. The administrative law judge found that the claimant's attempted suicide was "intentional" under Section 3(c), was not the result of an irresistible impulse, and was not compensable; the Board affirmed the decision. The Ninth Circuit rejected the analysis used by the administrative law judge and the Board in view of what it called a more recent understanding of mental illness. The court held that the appropriate issue is whether the claimant's work injury caused his suicide attempt rather than whether the suicide attempt was the result of an irresistible impulse. Specifically, the court held:

> suicide or injuries from a suicide attempt are compensable under the Longshore Act when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt. The

---

effect attributable to the employment must not have been overpowered and nullified by influences originating entirely outside the employment." *Id.* at 934.

[9] The Maryland court discussed *Voris* and concluded the Fifth Circuit did not really adopt a standard but appeared to conclude that the decedent's faculties were "so far impaired that his act of self-destruction was not voluntary and willful within the meaning of" the Act. *Traynor*, 243 F.Supp. 916. The court determined that the suicide note indicated intent, but that the evidence is not conclusive on willfulness, as there were contrary opinions. As substantial evidence supported the deputy commissioner's opinion that the physical work injury caused a mental impairment which caused the suicide, and as the district director applied the facts to the proper legal test, the court affirmed the award of benefits.

[10] Claimant, decedent and claimant's daughter, and their daughter's boyfriend all testified before the administrative law judge.

> claimant need not demonstrate that the suicide or attempt stemmed from an irresistible suicidal impulse. The chain of causation rule accords with our modern understanding of psychiatry. It also better reflects the Longshore Act's focus on causation, rather than fault.

Kealoha, 713 F.3d at 524-525, 47 BRBS at 3(CRT). The court explained that the chain of causation rule requires an "unbroken chain of causation from the injury to the suicide." *Id.* 713 F.3d at 524, 47 BRBS at 3(CRT). It is "where the injury and its consequences directly result in the workman's loss of normal judgment and domination by a disturbance of the mind, causing the suicide," making the suicide compensable.[11] *Id.*

Employer argues that this law does not apply because *Kealoha* was issued after the administrative law judge's decision and because claimant did not raise its applicability in a cross-appeal. We reject these arguments. The Ninth Circuit has issued intervening controlling authority, which demonstrates that the Board's prior decision and the administrative law judge's decision on remand may be erroneous, as they did not address the compensability of decedent's death under the standard set forth by the court. *See Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). As the Ninth Circuit's law is controlling in this case, the Board is bound to apply it to the case now before it. Moreover, claimant need not have filed a cross-appeal for the Board to apply the appropriate law, as the issues related to the law were raised on appeal by employer. Accordingly, we hold that the Ninth Circuit's chain of causation rule, and not the irresistible impulse rule, applies to this case involving a suicide.[12]

As the Ninth Circuit has stated that the proper inquiry is whether there is an "unbroken chain of causation from the injury to the suicide," and as the administrative law judge did not apply this standard to this case, we vacate the administrative law judge's decision on remand, and we remand the case for application of the appropriate law. *Kealoha*, 713 F.3d 521, 47 BRBS 1(CRT). As stated above, the administrative law judge invoked the Section 20(a) presumption, and found it rebutted; therefore, he must

---

[11] The court did not explain the role of Section 3(c) or Section 20(d) in relationship to its holding.

[12] We also reject employer's assertion that *Kealoha* does not apply because the court declined to address fact patterns involving suicides without a primary physical injury, as here. *See Kealoha*, 713 F.3d at 523 n.1, 47 BRBS at 2 n.1(CRT). As the Act compensates psychological injuries even absent a primary physical injury, there is no basis to conclude that *Kealoha* is inapplicable here.

weigh the evidence as a whole under the *Kealoha* standard.[13] *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013). Claimant bears the burden of establishing the work-relatedness of the death. *Id.* Thus, on remand, the administrative law judge should address employer's evidence that the "chain" was broken - effectively, that there was a non-work-related cause of decedent's death. Although the administrative law judge purported to address intervening cause in a footnote, his discussion does not take into consideration the full extent of the events that occurred in June and July 2006; therefore, we also vacate his "intervening cause" findings.

Employer asserts that the events which occurred in June and July 2006 while decedent was not in Iraq were the cause of his death. When decedent arrived home unexpectedly in June 2006, he learned: he had been locked out of his home; his wife appeared to be committing adultery; his daughter was seeing someone 10 years older than she; and, she was taking drugs and had been expelled from school for doing so. Thus, employer asserts, while there may have been previous family strife and decedent may have been troubled by being separated from his family, the true stressor that caused him to actually commit suicide was his familial situation once he arrived home.

The Board remanded this case for the administrative law judge to fully address "whether the events occurring between decedent and his wife and daughter upon his return in June 2006 constituted an intervening cause of decedent's suicide. . . ." *Dill*, slip op. at 9. On remand, the administrative law judge, in a footnote, stated that this case "does not involve an independent intervening causal event." Decision and Order on Rem. at 20 n.19. He stated that the "continuing marital dysfunction" during decedent's last three weeks was "not separate and independent of the ongoing mechanism that Dr. Seaman described; it was, at least in part, the natural and unavoidable result of [decedent's] work-related absence from home." *Id.* Rather, he stated, it was a "single continuing injury and mechanism of injury - separation causing marital dysfunction, stress, and ultimately suicide[.] . . . It was a single chain of causation." *Id.* He then stated that, even if the dysfunction while decedent was home was separate from the dysfunction generated while he was away "the extent of the end-level dysfunction would be the natural result of the dysfunction that arose while [decedent] was in Iraq. . . ." He also found that the dysfunction decedent encountered "cannot be said to have resulted from [decedent's] own intent or carelessness, a *required showing* to relieve an employer of liability based on an independent intervening cause." *Id.* (emphasis added). Thus, the administrative law judge concluded "the causal effect of the physical separation of [claimant and decedent] as a result of the employment produced what [decedent] found

[13] Because the presumption of compensability has been rebutted and claimant bears the burden of establishing the work-relatedness of decedent's death, we need not address employer's contentions regarding invocation of the Section 20(a) presumption.

when he returned in June 2006; it was not overpowered or nullified by any extraneous influence."[14] *Id.*

Initially, employer correctly asserts that the administrative law judge erred in stating that an intervening cause must be the result of decedent's intent or carelessness. While an event resulting from an employee's own intentions or carelessness would not be compensable, *see Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954),[15] an "intervening" event could also be caused by someone else. *See, e.g., Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993) (supervening car accident); *Marsala v. Triple A South*, 14 BRBS 39 (1981) (Miller, dissenting) (case remanded for administrative law judge to determine whether a subsequent fall from a bus was due to claimant's work-related back injury or caused by third-party negligence). Therefore, to the extent the administrative law judge found that the marital dysfunction in decedent's last three weeks had to have been the result of decedent's intentions or carelessness in order for it to constitute an intervening event relieving employer of liability, the administrative law judge is incorrect.

On remand, the administrative law judge must address whether claimant established an unbroken chain between decedent's work and his suicide. *Kealoha*, 713 F.3d 521, 47 BRBS 1(CRT). He must fully address all relevant evidence, including

[14] Effectively, the administrative law judge found that the behavior of claimant and her daughter was the natural or unavoidable result of decedent's having been away from home, the fighting and breakup were the natural next result, and the suicide was the natural final result. The administrative law judge should readdress this line of reasoning under the "chain of causation" test enunciated by the Ninth Circuit. In this regard, the court quoted this statement: "The 'chain-of-causation rule,' succinctly stated, is that where the injury and its consequences directly result in the workman's loss of normal judgment and domination by a disturbance of the mind, causing the suicide, his suicide is compensable." *Kealoha*, 713 F.3d at 524, 47 BRBS at 3(CRT) (quoting Leslie A. Bradshaw, Annotation, *Suicide as compensable under workmen's compensation act*, 15 A.L.R.3d 616, §3(a) (1967)).

[15] In *Cyr*, an employee injured his knee at work. Shortly thereafter, he injured it at home while standing on a stepladder. The Ninth Circuit held that the proper inquiry was whether the second injury was the natural and unavoidable result of the first injury, making the second injury "part" of the first injury, or whether there was an intervening cause that separated the two events. *Cyr*, 211 F.2d at 456, 458.

decedent's suicide notes.[16] Claimant bears the burden of establishing that decedent's suicide was due to his employment.[17] *Schwirse*, 736 F.3d 1165, 47 BRBS 31(CRT); *Kealoha*, 713 F.3d 521, 47 BRBS 1(CRT).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated. The case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[16] The administrative law judge rejected Dr. Whyman's opinion that Dr. Seaman's opinion on causation was speculative, and stated that Dr. Whyman's opinion that decedent would have committed suicide eventually even if he had not gone to Iraq was speculative itself. Decision and Order on Rem. at 16, 18. Although Dr. Seaman's opinion supports the administrative law judge's finding that decedent's physical separation from his family aggravated their marital dysfunction, Dr. Seaman was unaware of, or did not discuss, all the events that transpired upon decedent's return, including the discovery that his wife had been unfaithful. The administrative law judge should address whether Dr. Seaman's opinion is sufficient to meet claimant's burden of establishing an unbroken chain leading to decedent's death.

[17] In *Cyr*, the Ninth Circuit gave the example that, if the second injury to the claimant's knee was caused by someone shoving the stepladder, something over which the claimant and the employer had no control, the shove would be an intervening cause, and the results of the second injury would not be work-related. *Cyr*, 211 F.2d at 457.