TOPIC 20 PRESUMPTIONS

20.1 GENERALLY

Section 20 of the LHWCA provides:

> **In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--**
>
> **(a)That the claim comes within the provisions of this Act.**
> **(b)That sufficient notice of such claim has been given.**
> **(c)That the injury was not occasioned solely by the intoxication of the injured employee.**
> **(d)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.

20.2 SECTION 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-- (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920.

20.2.1 *Prima Facie* Case

The Section 20(a) **presumption does not apply to aid the claimant in establishing his *prima facie* case**. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain, Murphy v. SCA/Shayne Brothers, 7 BRBS 309 (1977), aff'd mem., 600 F.2d 280 (**D.C. Cir.** 1979), and that an accident occurred or working conditions existed which could have caused the harm. Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981). See U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley), 455 **U.S.** 608, 14 BRBS 631, 633 (1982), rev'g Riley v. U.S. Industries/Federal Sheet Metal, 627 F.2d 455, 12 BRBS 237 (**D.C. Cir.** 1980); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (**5th Cir.** 1998); Bolden v. G.A..T.X. Terminals Corp., 30 BRBS 71 (1996); Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1993). It is the 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). In presenting his case, the claimant is not require to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. See generally U.S. Industries/Federal Sheet Metal, Inc., 455 **U.S.** at 608, 14 BRBS at 631.

In, U.S. Industries, the **United States Supreme Court** declined to address the scope of the Section 20(a) presumption, but noted that a *prima facie* claim must at least allege an injury that arises out of and in the course of employment and that the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. Thus, U.S. Industries is consistent with the Board's holding that a claimant must establish a *prima facie* case before the Section 20(a) presumption is invoked. See Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 280 (1990); Cairns v. Matson Terminals, 21 BRBS 252 (1988).

In U.S. Industries, the **United States Supreme Court** stated, "[a] prima facie 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." 455 **U.S.** at 615, 14 BRBS at 633. This holding is consistent with those in Kelaita, 13 BRBS 326, and Darnell v. Bell Helicopter International, 16 BRBS 98 (1984), aff'd sub nom. Bell Helicopter International v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (**8th Cir.** 1984). See Noble Drilling Co. v. Drake, 795 F.2d 478, 19 BRBS 6 (CRT) (**5th Cir.** 1986).

In U.S. Industries, the **Supreme Court** held that Section 20(a) may only be invoked with regard to a *prima facie* claim by a claimant alleging an injury both arising out of and in the course of employment. The **Supreme Court** did not hold that such a claim must be stated in the claimant's initial notice of injury to be considered, but prohibited consideration of the claim never made by the claimant at any stage of the proceedings.

In Cairns v. Matson Terminals, 21 BRBS 252 (1988), the Board interpreted U.S. Industries and found that the **Supreme Court** did not say that pain is not a compensable injury or that claimant must prove an injury arising out of and in the course of employment without the benefit of the Section 20(a) presumption. Moreover, the Board stated that the **Supreme Court** stated only that a *prima facie* claim must at least allege an injury that arose in the course of employment as well as out of employment.

In Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104 (1989), the claimant did not allege a low back injury in her initial report of injury, but she was subsequently treated by several physicians for a low back injury, and she clearly sought benefits for a low back injury arising from her fall at work. In this case, the Board found that the claimant satisfied the requirement of U.S. Industries that claimant allege an injury arising out of and in the course of employment by asserting that she sustained a low back injury which was caused by the fall at work.

In Larkin v. Navy Exchange Service Command, (BRB No. 99-01666) (Jan. 22, 1999)(Unpublished), the Board affirmed the ALJ's denial of benefits where a claimant suffered from tuberculosis and the evidence showed that a number of the claimant's co-workers tested positive for tuberculosis but none was shown to have active TB. The Board agreed that the fact that 27 co-workers, who were tested and did not return for a reading of the test, was insufficient to raise the Section 20(a) presumption.

20.2.2 Injury

The Board has consistently found that the presumption does not apply to the issue of whether a physical or psychological harm or injury occurred. See Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15 (1990); Murphy v. SCA/Shayne Bros., 7 BRBS 309 (1977), aff'd mem., 600 F.2d 280 (**D.C. Cir.** 1979).

Claimant has sustained an "injury" where he has some harm or pain, or if "something unexpectedly goes wrong within the human frame." Wheatley v. Adler, 407 F.2d 307, 313 (**D.C. Cir.** 1968) (en banc). The claimant's burden does not, however, include establishing an injury as defined in Section 2(2) of the LHWCA. In Kelaita, the Board noted that to place such a burden on the claimant would be contrary to the well-established rule that the Section 20 presumption applies to the issue of whether an injury arose out of and in the course of employment. Kelaita, 13 BRBS at 329. See Topic 2(2) for additional case citations, supra.

An injury need not be traceable to a definite time, but can occur gradually over a period of time. See Pittman v. Jeffboat, Inc., 18 BRBS 212 (1986); Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (**1st Cir.** 1981).

In Volpe v. Northeast Marine Terminals, 671 F.2d 697, 14 BRBS 538 (**2d Cir.** 1982), rev'g 14 BRBS 1 (1981), the court held that the ALJ erred in failing to shift the burden of proof to the employee where he clearly sustained an injury in the form of chest pain at work. Instead, the judge improperly focused on whether the employee proved he suffered a myocardial infarction on the day in question. The court further noted that in affirming the judge, the Board exceeded its scope of review by supplementing an inadequate decision.

In Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989), the Board held that the Section 20(a) presumption applied as a matter of law because it had held that pleural plaques constitute a harm, i.e. an injury, and the parties agreed that the pleural plaques were caused by claimant's exposure to asbestos while employed with employer. No medical opinions existed in the record to sever the relationship between the pleural plaques and the claimant's asbestos exposure. Thus, the Board held that the employer failed to rebut the Section 20(a) presumption and reversed the judge's finding that the claimant failed to establish the existence of a work-related injury.

In Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988), the Board affirmed the judge's finding of no causation regarding the claimant's complaints of visual difficulties and an alleged injury to his right eye. Although the reports of two doctors contained objective evidence of an injury to the claimant's right eye, they rejected a causal connection between the incident in which the plastic lens on the tractor was broken and the claimant's symptoms and/or corneal scarring. Also, the ALJ properly discredited the credibility of the claimant's testimony and concluded there was no objective evidence to establish the occurrence of an injury.

In Perry v. Carolina Shipping Co., 20 BRBS 90 (1987), the claimant suffered an **on-the-job seizure** which caused him to fall and sustain an injury to his head and hands. The judge properly found that the claimant's injury to his head and hands was a "harm," and that his fall constituted an accident that could have caused the harm. It has already been held that a seizure may produce an injury which becomes compensable. See President & Directors of Georgetown College v. Stone, 59 F.2d 875 (**D.C. Cir.** 1932).

Also, it is a well-established principle that a compensable injury need not involve unusually dangerous employment conditions. Bell Helicopter Int'l v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (**8th Cir.** 1984), aff'g Darnell v. Bell Helicopter Int'l, 16 BRBS 98 (1984). Furthermore, the Board affirmed that the Section 20(a) presumption was not rebutted and therefore causation was established.

If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (**9th Cir.** 1966); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work which is followed by the occurrence of a **subsequent injury or aggravation outside work**, employer is liable for the entire disability if that subsequent injury is the **natural, unavoidable result of the initial work injury**. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (**5th Cir.** 1983); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981).

An aggravation to an initial asbestos-related injury by further exposure to pulmonary irritants can be a new injury. Bath Iron Works Corp. v. Director, U.S. Dept. of Labor, (Jones),193 F.3d 27 (**1st Cir.** 1999)(Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a "new" injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

In a **heart attack** case, the Board found that chest pains can constitute an injury under the LHWCA. Cairns v. Matson Terminals, 21 BRBS 252 (1988). The **Fifth Circuit** held that while the claimant's work may not have caused or aggravated his cardiovascular disease, a heart attack suffered by him at work is compensable since it was suffered in the course and scope of his employment. It is erroneous to focus on the origins of the underlying condition rather than on the ultimate heart attack. The court held that the LHWCA provides compensation for accidental injury or death arising out of and during the course of employment and not merely those conditions caused by the employment. Gooden v. Director, OWCP, 135 F.3d 1066 (**5th Cir.** 1998). Compare Gooden with American Grain Trimmers, Inc. v. OWCP (Janich), 181 F3d 810, (**7th Cir.** 1999), cert. denied 120 **S.Ct.** 1239 (2000)(Rebuttal burden is one of production, not persuasion), another heart attack case where the employer rebutted the presumption but failed to provide substantial evidence supporting a finding that this was not a work-related injury and death.

The ALJ can properly discredit the credibility of a claimant's testimony and conclude that the evidence fails to establish the occurrence of an injury. Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988).

Where a physician testified that there was no evidence of asbestosis, that testimony constituted substantial evidence to support a finding that a claimant's lung disease was not caused by his working conditions. Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 280 (1990). Thus, the Board affirmed the ALJ's finding that the Section 20(a) presumption was rebutted. The Board also affirmed the judge's finding after considering the evidence as a whole that credited the testimony of the physician who believed there was no causal relationship because his opinion resulted from a more extensive analysis of claimant's condition. Accordingly, the Board agreed with the judge's finding that claimant's lung disease was not work-related.

20.2.3 Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident

The Section 20 presumption also does not aid a claimant in establishing the occurrence of an accident or the existence of working conditions which could have caused the accident. Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981); Jones v. J. F. Shea Co., 14 BRBS 207 (1981); Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336 (1981). In Bartelle v. McLean Trucking Co., 14 BRBS 166 (1981), aff'd, 687 F.2d 34, 15 BRBS 1 (CRT) (**4th Cir.** 1982), the Board affirmed the ALJ's finding that an alleged fall did not occur where the judge discredited the claimant's testimony. Accord Jones, 14 BRBS 207. See Lacy v. Four Corners Pipe Line, 17 BRBS 139 (1985) (remand to determine whether claimant met her burden of establishing exposure to potentially toxic chemicals which could have caused the harm).

The Section 20(a) presumption, however, is applicable to the issue of **course of employment**. Compton v. Avondale Industries, Inc., 33 BRBS 174 (1999).

Where aggravation or contribution to a pre-existing condition is alleged, employer must establish that a claimant's condition was not caused or aggravated by his employment. Cairns v. Matson Terminals, 21 BRBS 252 (1988). In Cairns, the claimant alleged that work-related pains constituted part of his injury and the Board held that the claimant established the first element of a *prima facie* case because the judge found that the claimant did experience chest pains at work.

The claimant is not required to show that his working conditions were unusually stressful. Cairns, 21 BRBS 252. Since the claimant's ordinary working conditions could have caused his chest pains as claimant was particularly vulnerable to activities involving physical exertion, the Board held that the claimant established a *prima facie* case that his chest pains arose out of and in the course of employment. Furthermore, under the **aggravation rule**, if a claimant's work played any role in the manifestation of his underlying arteriosclerosis, then the non-work-relatedness of the disease and the fact that his chest pains could have appeared anywhere are irrelevant; the entire resulting disability is compensable.

[ED. NOTE: *For more on stress-related injuries, see Topic 20.2.4 "ALJ's Proper Invocation of Section 20(a)" infra, and specifically the case of Sewell v. Noncommissioned Officers' Open Mess, 32 BRBS 127 (1997), reconsideration denied en banc, 32 BRBS 127 (1998).**]***

In Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988), the Board affirmed the ALJ's finding that a claimant's condition was work-related, as the doctor on whom the judge relied to find causation provided substantial evidence to support the finding of the judge. Specifically, the doctor was unable to identify the specific chemicals which produced the claimant's hypersensitivity, but the judge indicated that the claimant's symptoms were due to the cumulative effects of chemical exposures over many years and that any or all the chemicals to which he was exposed could have played a part in his symptomatology.

The fact that an **activity is not authorized** is not sufficient alone to remove an injury from the course of employment. Pursuant to Section 20(a), the employer bears the burden of proof that a claimant's activity at the time of the injury was unrelated to his employment. Willis v. Titan Contractors, 20 BRBS 11 (1987). See also, Jackson v. Strachan Shipping Co., 32 BRBS 71 (1998) (Presumption applied to issue of industrial causation of claimant's 1991 injury, when claimant passed out while driving van and hit a guard stake, and had been diagnosed with a seizure disorder and told not to drive by his treating doctor.).

Since no evidence directly controverted the Section 20(a) presumption in Willis, the ALJ's finding that the claimant's injury did not occur in the course of employment was reversed.

The Board reversed and remanded an ALJ's decision to consider whether a claimant's psychological injury was the product of cumulative stress from the job. Marino v. Navy Exchange, 20 BRBS 166 (1988).

Discrepancies in a claimant's accounts of the manner in which the accident occurred were "within the expected range" and insignificant. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). The ALJ's conclusion that the claimant sustained an industrial injury to his back was supported by the medical histories and the claimant's testimony.

As noted previously, a claimant is not required to show that his working conditions were unusually stressful. Cairns v. Matson Terminals, 21 BRBS 252 (1988). Where a claimant had an on-the-job seizure causing him to fall and sustain an injury to his head and hands, the ALJ properly found that the claimant's injury was work-related, pursuant to Section 20(a), even though the seizure was not induced by a condition of his employment. Perry v. Carolina Shipping Co., 20 BRBS 90 (1987).

In Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990), the Board affirmed the judge's finding that an accident occurred at work where a claimant notified her instructor and various physicians of its occurrence. Therefore, the Section 20(a) presumption was correctly applied. Furthermore, the ALJ acted within his discretion as trier-of-fact in discrediting a physician's opinion

that the claimant's carpal tunnel syndrome was not work-related because the doctor assumed that the claimant suffered no work-related accident. This testimony by the doctor could not rebut the Section 20(a) presumption as no other evidence was available to sever the causal connection, thereby showing that the claimant established a work-related injury.

While the side effects of a prescribed pain medication arguably are a work-related injury in and of themselves, in Hand v. Marine Port Terminals, (BRB No. 01-0320) (November 29, 2001) (Unpublished), the Board found it unnecessary to decide whether the ALJ had failed to invoke the Section 20(a) presumption. In hand, the claimant had been prescribed vicodin and endocet for pain for shoulder surgeries. The leaflet claimant received from the pharmacy with his prescriptions stated that tinnitus (ringing or buzzing) in the ears is a less common side effect of the medications claimant was prescribed. Claimant alleged that his tinnitus was therefor work-related and that he had presented a prima facie case. Noting that claimant's physician found that claimant's hearing loss was caused by noise-induced high frequency hearing loss and that there was evidence that gunshot exposure from years of hunting may have caused the hearing loss, the Board found that there was sufficient evidence to rebut the presumption had it been invoked and that a weighing of the evidence in its entirety supported the ALJ's conclusion that the tinnitus was not a work-related injury. (The Physician's Desk Reference and the product information sheet obtained from the drugs' manufacturers did not list tinnitus as a possible side effect.

20.2.4 ALJ's Proper Invocation of Section 20(a)

The Board has affirmed a judge's invocation of Section 20(a) after finding that the claimant established a *prima facie* case.

In O'Kelley v. Dept. of the Army/NAF, 34 BRBS 39 (2000), the employer did not dispute that the claimant had suffered a harm, i.e., a neurological condition, and that the claimant had presented evidence of his exposure to pesticide fumes during his employment with the employer. Rather, the employer challenged the ALJ's invocation of the Section 20(a) presumption on the ground that no credible evidence existed that the claimant's exposure to pesticides could have caused his current neurological condition. The Board upheld the ALJ's invocation of the presumption. However, in doing so it noted that the ALJ specifically set forth medical testimony that opined that the claimant's chemical exposures aggravated his neurological condition. The Board further pointed out that the ALJ noted that the employer's expert conceded that the claimant had been exposed to some pesticides and chemicals that can cause some symptoms similar to those which the claimant described. Specifically, the Board stated:

> Given this evidence, we reject employer's argument that claimant did not establish a prima facie case and affirm the administrative law judge's invocation of the Section 20(a) presumption, as claimant has established a harm and the existence of working conditions which could have caused or aggravated that harm. See Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989).

[ED. NOTE: *It is submitted that the medical evidence noted by the Board above was not necessary for invocation of the Section 20(a) presumption, but rather should have been noted during the rebuttal analysis and the weighing of the evidence in its totality. As the* ***Fifth Circuit*** *noted in* Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (**5th Cir.** 1998), Section 20(a) provides the claimant with a presumption that the injury he sustained is casually related to his employment if he establishes a prima facie case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. Once the claimant has invoked the presumption, the burden shifts to the employer to rebut it with substantial countervailing evidence.* Peterson v. General Dynamics Corp.*, 25 BRBS 14 (CRT) (**2d Cir.** 1992),* cert. denied*, 507 **U.S.** 909 (1993);* Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the ALJ finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with the claimant bearing the burden of persuasion.* See*,* e.g. Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT) (**8th Cir.** 1997),* cert. denied*, 523 **U.S.** 1020 (1998);* see also Director, OWCP v. Greenwich Collieries*, 512 **U.S.** 267 (1994).**]***

In Marinelli v. American Stevedoring, Ltd, 34 BRBS 112 (2000), the Board held that the ALJ had properly invoked the Section 20(a) presumption when the judge found that the claimant's work-place stress could have precipitated a cardiac incident. The Board specifically found that the ALJ acted within his discretion in crediting the claimant's testimony concerning his stressful working conditions, as corroborated by other testimony. Also noted was the fact that the claimant had passed out at work, striking his head, after engaging in a dispute with some workers, experiencing chest pain and taking nitroglycerin tablets; and that he had to be rushed to the hospital. Additionally the Board noted medical opinions that stress may cause such a cardiac incident.

In Carlisle v. Bunge Corp., 33 BRBS 133 (1999), the Board also found that medical evidence supported the ALJ's decision that the presumption had been invoked. The Board noted that the evidence established that the claimant sustained a harm, i.e., carpel tunnel and cubital tunnel syndromes, as diagnosed by two doctors; and that the ALJ had found that the requisite working conditions existed. See generally Donnell v. Bath Iron Works Corp., 22 BRBS 136 (1989).

Again, in Everson v. Stevedoring Services of America, 33 BRBS 149 (1999), the Board again upheld the ALJ's finding that the presumption was invoked based on the claimant's testimony that his work environment exposed him to loud noise and a doctor's opinion that the noise exposure likely caused some of the claimant's hearing loss. In Flanagan v. McAllister Brothers, Inc., 33 BRBS 209 (1999), the Board also found that the ALJ had properly relied on the claimant's testimony when invoking the presumption. In Flanagan, the ALJ found that the evidence was sufficient to invoke the presumption of a work-related respiratory condition based on a doctor's diagnosis of asbestosis and the claimant's credible and uncontroverted testimony that he was exposed to asbestos at the employer's work place.

The **Fifth Circuit** has also addressed the issue of credible/incredible testimony used by a claimant to invoke the presumption. Conoco, Inc. v. Director, OWCP, 33 BRBS 187 (CRT) (1999).

In Conoco, the **Fifth Circuit** found that the claimant had made a prima facie case by proving "(1) a harm and (2) a condition of work or workplace injury that could have caused the harm, even if her testimony was inconsistent at times." The **Fifth Circuit** explained:

> The ALJ, as affirmed by the BRB, was within his discretion to discount Conoco's attacks on [the claimant's] credibility based on her inconsistent statements regarding the exact location of the impact of the turnbuckle on her body, particulars about the accident scene, and description of symptoms to various medical professionals. Such inconsistencies will not undermine automatically the relatively light burden of establishing a prima facie case.

In Quinones v. H.B. Zachery, Inc. 32 BRBS 6 (1998), the Board found that the ALJ properly invoked the presumption after the judge credited the claimant's testimony regarding the requirements of his job. Specifically, the ALJ found that the claimant was engaged in labor which involved lifting and moving heavy materials. In Quinones, it was uncontested that the claimant suffered a "harm," i..e., back pain. Thus, the focus of the case was the wether the second prong of the prima facie case had been met.

The "working conditions" prong of a prima facie case necessary to invoke Section 20(a) requires that the ALJ determine whether the employment events claimed as a cause of the harm sustained by the claimant in fact occurred. Sewell v. Noncommissioned Officers' Open Mess, 32 BRBS 127 (1997), reconsideration denied en banc, 32 BRBS 127 (1998), (Presumption invoked by showing that working conditions resulted in stress which could have caused industrial psychological injury.). Importantly in Sewell, the Board found that in a case involving allegations of stressful working conditions, the claimant is not required to show unusually stressful conditions in order to establish a prima facie case. Rather, even where stress may seem relatively mild, the claimant may recover if an injury results. Sewell; see Konno v. Young Brothers, Ltd., 28 BRBS 57 (1994); see generally, Wheatley v. Adler, 407 **U.S.** 307 (**D.C. Cir**. 1968); 1B Larson, Workmen's Compensation Law, § 42.25(f), (g) (1996). The issue in such situations is the effect of this stress on the claimant.

In reversing the ALJ to find that the presumption had been invoked., the Board first noted the ALJ's findings. The ALJ had found that the evidence of record failed to establish that the claimant's overall working conditions were so stressful, even cumulatively, that they gave rise to her psychological injury, and concluded that the stress involved in bartending at the club were not outside the realm of ordinary work place experiences. Instead, the ALJ found that the club experienced a natural transition with the new management, and thus, the ALJ concluded that the claimant had failed to establish a prima facie case.

However, the Board found:

> In reviewing the administrative law judge's analysis of the evidence on remand, it is clear that the administrative law judge considered whether employer's daily interactions with claimant,..., were legitimate or justified. However, when

> considering a claim based on stressful work conditions, the issue is not whether employer's actions were justified but whether irrespective of the disciplinary and termination procedures, claimant's working conditions were stressful, i.e., whether claimant experienced cumulative stress in her general working conditions which could have caused or aggravated her psychological injury.
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> ***
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> In this case, claimant alleged stressful working conditions and the evidence credited by the administrative law judge establishes that stressful conditions existed. While employer's action in placing its bartenders under greater scrutiny may have been well-justified by business considerations, this change created stressful working conditions. More significantly, specific instances, including [the supervisor]'s use of an angry tone with claimant in the presence of bar patrons, as well as his unwelcome touching of claimant, clearly were stressful. The administrative law judge did not find these events, which were the basis for claimant's claim, did not occur. As these incidents involve day-to-day working conditions rather than personnel actions, such as the disciplinary and termination proceedings, they can establish working conditions sufficient to demonstrate a prima facie case.... . Moreover, in the opinion of claimant's treating psychologist, claimant's work-related stress contributed greatly to her major depression.

[ED. NOTE: *A legitimate personnel action, however, does not provide a proper basis for finding a compensable psychological injury.* Marino v. Navy Exchange*, 20 BRBS 166 (1988).**]***

Manship v. Norfolk & Western Railway Co., 30 BRBS 175 (1996) is another case where the presumption was invoked for a claimed psychological injury. The presumption was first invoked for a physical injury. During his employment, claimant injured his back, was taken to the hospital and diagnosed with a lower back strain. The next day he was treated by employer's physician who diagnosed lumbosacaral and sacroilliac strain with sciatica and was authorized to return to work a week later. However, the next day, the claimant received a letter from his employer advising him that they were conducting an investigation regarding his "alleged," injury and "false" statements about his back condition. Three days after claimant filed his LHWCA claim he was terminated. On the day of his formal termination, the claimant underwent a psychological evaluation where he complained that he feared losing his job, felt overwhelmed with stress, and had little outside support. He was diagnosed with adjustment disorder with mixed emotional features.

In Manship, the Board found that the ALJ had properly invoked the presumption based on the treating physician's opinion that the claimant's emotional disorder was caused in part by the work-related injury. Employer had argued that employer's discharge of the claimant was the sole cause of the claimant's psychological problem. In agreeing with the ALJ, the Board noted that in fact, there was no medical evidence in the record suggesting that the claimant's emotional disorder was not related to his back injury.

Damiano v. Global Terminal & Container Service, 32 BRBS 261 (1998) is another case where the presumption was invoked because the ALJ rationally credited the claimant's testimony. Here, the noise from the machinery around which the claimant worked was so loud that it often required the employees to raise their voices to be heard. The ALJ credited this testimony from the claimant over the contrary testimony of employer's assistant terminal manager, since the claimant's greatest exposure to injurious noise levels occurred prior to the time the assistant terminal manager began working for employer and there was medical evidence of record that the claimant's hearing loss is attributable to noise exposure.

In Rochester v. George Washington University, 30 BRBS 233 (1997), the presumption was invoked to apply to the claimant's contention that his dystonia condition was related to his industrial back injury. The claimant had introduced medical literature regarding the possibility that dystonia may devolve from trauma. However, the presumption was rebutted when the employer introduced "specific and comprehensive evidence" that this condition in this instance was not related to the claimant's work related injury.

In Lacy v. Four Corners Pipe Line, 17 BRBS 139 (1985), the Board held that the ALJ erred in finding no causation without considering the application of Section 20(a). The claimant had established that she suffered a physical harm (hepatitis) and there was conflicting evidence as to whether the claimant met her burden of establishing exposure to potentially toxic chemicals which could have caused the harm. If the claimant was exposed to toxic chemicals during the incubation period for hepatitis, then her *prima facie* case was established. The case was remanded to the judge for fact-finding.

In Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984), the judge properly invoked the Section 20(a) presumption where the claimant suffered from cancer (a harm) and claimant alleged that exposure to asbestos caused the disease (conditions existed which could have caused the harm).

In Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985), the Board affirmed a judge's finding that the decedent was exposed to asbestos in his job with the employer and that the decedent suffered from a pulmonary impairment, as the assertions were supported by the medical evidence and testimony and sufficient to raise the Section 20(a) presumption.

A claimant can meet his burden of showing the existence of an injury through medical evidence. In Fortier v. General Dynamics Corp., 15 BRBS 4 (1982), the claimant met this burden by showing that he had a lung condition which resulted in symptoms of chest pain and shortness of breath. The claimant also established exposure to asbestos. This evidence was sufficient to invoke the Section 20(a) presumption.

In Woodside v. Bethlehem Steel Corp., 14 BRBS 601 (1982), the Board held that the ALJ erred in failing to apply the presumption where the employee had chronic obstructive pulmonary disease (a harm or injury) and where it was undisputed that the employee was exposed to various

substances at work which could have caused his lung problems. The case was remanded for further fact-finding because the ALJ failed to properly apply the presumption.

An ALJ properly invoked the presumption where he reasonably inferred from the employee's testimony and general information regarding the chemical composition of petroleum products that the employee was exposed to benzene and where there was substantial evidence that benzene has been implicated as a carcinogen. Compton v. Pennsylvania Ave. Gulf Serv. Center, 14 BRBS 472 (1981) (ALJ properly invoked presumption since conditions existed which could have caused the injury, myelomonocytic leukemia).

The Board has held that it is error to hold that the Section 20(a) presumption does not apply where it is undisputed that a claimant has a work-related accident and suffers a disabling back condition. Novak v. I.T.O. Corp. of Baltimore, 12 BRBS 127 (1979). Error is harmless, however, where there is substantial evidence to rebut the presumption.

Similarly, in Frye v. Potomac Electric Power Co., 21 BRBS 194 (1988), the Board found that the ALJ erred in determining whether the claimant's back problems and chronic pain syndrome were causally related to his employment. As it was undisputed that the claimant suffered from back pain and chronic pain syndrome and that a work accident occurred, the claimant was entitled to the Section 20(a) presumption that these conditions were causally related to his employment. Since the record contained conflicting evidence as to the cause of the claimant's back problems and his chronic pain syndrome, the Board remanded the claim because the judge failed to consider the conflicting evidence in concluding that these conditions were not work-related.

20.2.5 Failure to Properly Apply Section 20(a)

It is an error of law if the ALJ fails to consider the Section 20(a) presumption where it is applicable. Adams v. General Dynamics Corp., 17 BRBS 258 (1985); Dower v. General Dynamics Corp., 14 BRBS 324 (1981); Kielczewski v. Washington Post Co., 8 BRBS 428 (1978).

If the ALJ fails to properly apply the presumption, however, the Board will consider whether there is substantial evidence to support the judge's ultimate conclusion. If there is such evidence, the judge's failure to consider the presumption is harmless. Fortier, 15 BRBS 4; Reed v. Macke Co., 14 BRBS 568 (1981); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981); Roberts v. Bath Iron Works Corp., 13 BRBS 503 (1981); Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Novak v. I.I.O. Corp, 12 BRBS 127 (1979). But cf. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 14 BRBS 538 (**2d Cir.** 1982) (reversing Board decision affirming ALJ where ALJ failed to apply presumption and Board engaged in fact-finding to supplement his decision).

Failing to find the presumption rebutted is harmless where there is substantial evidence to support the judge's conclusion that a causal connection existed between the claimant's injury and employment. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Seaman v. Jacksonville

Shipyards, 14 BRBS 148.9 (1981); Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141 (1980).

Similarly, the Board has also held that a judge's error in applying the presumption is harmless where there is substantial evidence to support the judge's finding that no causal relationship existed. See Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336 (1981).

Where the ALJ's finding of no causation is based, however, on an improper application of Section 20(a) and the record lacks evidence rebutting the presumption, the Board has reversed the judge's decision. Adams, 17 BRBS 258; Dower, 14 BRBS 324.

In Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986), the Board remanded the claim for reconsideration of the evidence regarding causation because the judge failed to apply the Section 20(a) presumption and the claimant clearly established that his lung disease could have been caused or aggravated by asbestos exposure at work. In Hargrove v. Strachan Shipping Co., 32 BRBS 11 (1998), the Board also remanded the matter for the ALJ to make a determination as to whether the presumption is rebutted and, if so, as to whether a causal relationship is established based on the record as a whole. In Hargrove, the Board had found that the ALJ had erred in placing the burden of proof on the claimant to prove that his psychological condition was work-related. It is well-settled that a psychological impairment which is work-related is compensable under the LHWCA, and that Section 20(a) applies to such injuries. Sanders v. Alabama Dry Dock & Shipbuilding Co., 22 BRBS 340 (1989); Turner v. The Potomac Electric Chesapeake & Potomac Telephone Co., 16 BRBS 255 (1984).

In Hargrove, the evidence showed that the claimant had ongoing psychiatric problems, including numerous stays in mental hospitals, suicide attempts, electroshock therapy and diagnoses of major depression and schizophrenic reaction. The record contained medical reports/opinions that if the claimant had chronic pain as a result of his work-related injury, such chronic pain would definitely have been a contributing factor to his depression. The Board stated, "As there is evidence of record that claimant suffers from a psychiatric condition that could have been caused, at least in part, by the loss of working capacity due to his injury, we hold that the [ALJ] erred in failing to invoke the Section 20(a) presumption."

In Universal Maritime Corp. v. Moore, 31 BRBS 119 (CRT), the **Fourth Circuit** found that while the ALJ did was entitled to credit the claimant's testimony that back pain resulted from his work-related accident, the ALJ erred in continuing to treat the presumption as substantive evidence. The **Fourth Circuit** found that the statutory presumption created by the LHWCA functions similarly to the presumption created by Rule 301 of the Federal Rules of Evidence and the proof scheme under Title VII of the Civil Rights Act of 1964 as described in Texas Dep't of Community Affairs v. Burdine, 450 **U.S.** 248 (1981).

In Thompson v. Lockhead Shipbuilding & Construction Co., 21 BRBS 94 (1988), the judge did not err in applying the Section 20(a) presumption to link the claimant's back condition to his

work-related ankle injury. Although the ALJ failed to go through the prescribed analysis for the application of Section 20(a), the judge considered all relevant evidence prior to making his finding.

Likewise, in Oliver v. Murry's Steaks, 21 BRBS 348 (1988), the Board held the ALJ's failure to apply the section 20(a) presumption was harmless as his finding of no causation was supported by substantial evidence.

In O'Berry v. Jacksonville Shipyards, 21 BRBS 355, 360 n.3 (1988), the claimant was entitled to the benefit of the Section 20(a) presumption in that he established a harm, a lung condition, and he testified that he was exposed to asbestos at work. Although the judge did not apply the Section 20(a) presumption, the Board held that any error is harmless in this case because the judge's ultimate finding that the claimant's lung condition was **siderosis and not asbestosis** is supported by substantial evidence and is sufficient to rebut the presumption.

20.3 EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE

The Section 20(a) presumption is not affirmative evidence giving weight to the claimant's evidence, but rather is a procedural tool. Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11 (CRT) (**1st Cir.** 1982), aff'g Sprague v. Bath Iron Works Corp., 13 BRBS 1083 (1981); Novak v. I.T.O. Corp. of Baltimore, 12 BRBS 127 (1979).

Section 20(a) places the **burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment**. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082, 4 BRBS 466, 475 (**D.C. Cir.**), cert. denied, 429 **U.S.** 820 (1976). When aggravation of or contribution to a pre-existing condition is alleged, the presumption also applies, and in order to rebut it, employer must establish that the claimant's condition was not caused or aggravated by his employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); LaPlante v. General Dynamics Corp./Elec. Boat Div., 15 BRBS 83 (1982); Seaman v. Jacksonville Shipyards, 14 BRBS 148.9 (1981). See Hensley v. Washington Metro. Area Transit Auth., 655 F.2d 264, 13 BRBS 182 (**D.C. Cir.** 1981), cert. denied, 456 **U.S.** 904 (1982), rev'g 11 BRBS 468 (1979) (employer must establish that aggravation did not arise even in part from employment).

[ED. NOTE: *Compare this, however, to the non-LHWCA civil rights case, St. Mary's Honor Center v. Hicks, 509* ***U.S.*** *502 (1993) (as in the case of all presumptions, see Fed. Rule Evid. 301, the ultimate burden of persuasion remains at all times with the moving party). Fed. Rule Evid. 301 states:*

> *In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.**]***

Thus, once the Section 20(a) presumption applies, the relevant inquiry is whether employer succeeded in establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). Employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20(a). Dearing v. Director, OWCP, 27 BRBS 72 (CRT) (**4th Cir.** 1993)(Unpublished) (medical evidence constituted substantial evidence to support employer's rebuttal and sole medical evidence on claimant's behalf was equivocal); Steele v. Adler, 269 F. Supp. 376 (**D.D.C.** 1967). See Smith v. Sealand Terminal, 14 BRBS 844 (1982); Dixon v. John J. McMullen & Assocs., 13 BRBS 707 (1981). **Highly equivocal evidence** is not substantial and will not rebut the presumption. Dewberry v. Southern Stevedoring Corp., 7 BRBS 322 (1977), aff'd mem., 590 F.2d 331, 9 BRBS 436 (**4th Cir.** 1978).

When there has been a work-related accident followed by an injury, however, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption. Stevens v. Todd Pac. Shipyards, 14 BRBS 626 (1982), aff'd mem., 722 F.2d 747 (**9th Cir.** 1983), cert. denied, 467 **U.S.** 1243 (1984); Champion v. S & M Traylor Bros., 14 BRBS 251 (1981), rev'd and remanded, 690 F.2d 285, 15 BRBS 33 (CRT) (**D.C. Cir.** 1982).

The presumption may be rebutted by negative evidence if it is specific and comprehensive enough to sever the potential connection between the particular injury and the job-related accident. Swinton, 554 F.2d 1075, 4 BRBS 466. Although in Swinton, the evidence adduced was insufficient to meet the requirements of this test, the Board has held that a **combination** of medical testimony, a credibility determination, and negative evidence (no medical record in union clinic or hospital books of claimant slipping or suffering pain) constituted sufficient evidence to rebut the presumption of causation. Craig v. Maher Terminal, 11 BRBS 400 (1979). A noise survey showing that a workplace is in conformance with **OSHA noise standard is not, in itself, sufficient to rebut the Section 20(a) presumption**. Global Terminal & Container, Inc. v. Forman, 187 F.3d 625 (Table) (**3rd Cir.** 1999)(Noise survey was not representative of noise exposure during claimant's entire employment history at employer, but was instead, only indicative of the noise exposure during the limited times the survey was actually performed.).

The **"ruling out" standard** (employer must "rule out" the possibility of a causal relationship between a claimant's employment and injury) recently adopted by the Board, see Brown v. Jacksonville Shipyards, Inc, 893 F.2d 294 (**11th Cir.** 1990); Quinones v. H.B. Zachery, Inc., 32 BRBS 6 (1998); Plappert v. Marine Corps Exchange, 31 BRBS 13 (1997), has been **rejected by the Fifth Circuit.** Conoco, Inc. v. Director, OWCP, [Prewitt], 194 F.3d 684, (**5th Cir.** 1999)(the plain language of the statute uses the phrase **"substantial evidence to the contrary,"** and placing a higher "ruling out" standard on the employer is contrary to statue and case law; "We therefore unequivocally reject the 'ruling out' standard applied by the Board."). The **Eleventh Circuit** in Brown, had stated that "None of the physicians expressed an opinion *ruling out* the possibility that there was a causal connection between the accident and [claimant's] disability. Therefore, there was not direct concrete evidence sufficient to rebut the statutory presumption." (Emphasis added.)

However, according to the **Fifth Circuit** in Conoco, the Board had purported to rely on the **Fifth Circuit's** decision in Noble Drilling v. Drake, 795 F.2d 478 (**5th Cir.** 1986) to formulate its "ruling out standard." As the **Fifth Circuit** noted, Noble Drilling does not support a "ruling out" standard. In Noble Drilling, to rebut the presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. The **Fifth Circuit** reiterated, "When an employer offers sufficient evidence to rebut the presumption–the kind of evidence a reasonable mind might accept as adequate to support a conclusion–only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case. Noble Drilling at 481. "The language does not require a 'ruling out standard;' indeed, the hurdle is far lower. " See also Lennon v. Waterfront Transport, 20 F.3d 658, 662 (**5th Cir.** 1994); see also American Grain Trimmers, Inc. v. OWCP, 181 F.3d 810 (**7th Cir.** 1999)("substantial evidence"

burden requires introducing "specific and comprehensible evidence, not speculation, before the § 20(a) presumption would be defeated.).

However, lately even the Board has begun to whittle away at its strict ruling out standard. In O'Kelley v. Department of the Army/NAF, 34 BRBS 39 (2000), the Board noted that an employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. In O'Kelley, the Board found that a doctor's admission on cross-examination of a possible causal connection between the claimant's employment and his present medical condition reflects his opinion that in the medical profession there is no absolute certainty. This acknowledgment, according to the Board, does not render his opinion equivocal, as he repeatedly expressed his opinion that no causal relationship exists between the claimant's present condition and his employment with employer. Thus the Board held that the employer had produced evidence sufficient to server the causal relationship between the claimant's employment and his harm. "To hold otherwise,..., would raise the standard regarding rebuttal of the presumption to an unreasonable level since, [the doctor] implied during his hearing testimony, 'absolute certainty' is a difficult concept in the medical profession."

[ED. NOTE: *For a good discussion of "substantial evidence" and "preponderance of the evidence" and production burden versus persuasion burden, see American Grain Trimmers, Inc. v. OWCP (Janich), 181 F.3d 810 (7th* ***Cir.*** *1999), cert. denied ___* ***U.S.*** *___, 120* ***S.Ct.*** *1239 (2000).**]***

Once an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome and it no longer controls the result. Travelers Ins. Co. v. Belair, 412 F.2d 297 (**1st Cir.** 1969); John W. McGrath Corp. v. Hughes, 264 F.2d 314 (**2d Cir.**), cert. denied, 360 **U.S.** 931 (1959); see also Greenwood v. Army & Air Force Exch. Serv., 6 BRBS 365 (1977), aff'd, 585 F.2d 791, 9 BRBS 394 (**5th Cir.** 1978); Gifford v. John T. Clark & Son, Inc., 4 BRBS 210 (1976); Norat v. Universal Terminal & Stevedoring Corp., 3 BRBS 151 (1976). But cf. Maher Terminals v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (**3d Cir.** 1993), cert. granted sub nom. Director, OWCP v. Greenwich Colleries, 510 **U.S.** 1068 (1994).

Once the Section 20(a) presumption is rebutted, it falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. Swinton, 554 F.2d 1075, 4 BRBS 466; Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982). This rule is an application of the **"bursting bubble" theory of evidentiary presumptions**, derived from the **Supreme Court's** interpretation of Section 20(d) in Del Vecchio v. Bowers, 296 **U.S.** 280 (1935). See Brennan v. Bethlehem Steel Corp., 7 BRBS 947 (1978) (applying Del Vecchio to Section 20(a)).

Occasionally there may be more than one causation issue (particularly when there is a psychological component to the injury), in which case the employer must address all possible elements. For instance, in the Nonappropriated Fund Instrumentalities Act case of Zeigler v. Dept. of the Army/NAF, (BRB No. 99-0122) (Oct. 7, 1999) (Unpublished) (Claimant and doctor's good faith belief that treatment for Lyme disease was necessary, is a reasonable, compensable medical

expense), the claimant was a Stars and Stripes reporter, who while on assignment in the Black Forest, was bitten by a tick. The claimant alleged Lyme disease as well as multi-symptom total disability and presented prima facie cases sufficient to invoke the presumption that he developed early stage Lyme disease as well as late stage or chronic Lyme disease. The ALJ found that the employer only presented evidence sufficient to rebut late stage Lyme disease. When the evidence was weighed in its entirety, the ALJ found that the claimant never had late stage, chronic Lyme disease, but had early stage Lyme disease that resolved at some point. However, the ALJ went on to next address whether the claimant had suffered from any compensable injuries as a result of the tick bite injury. He found that the claimant had additionally invoked the presumption by presenting a prima facie case that his early stage Lyme disease had caused, aggravated, or accelerated his depression and psychosomatic symptoms which prevented him from working. Alternatively, the ALJ found that the claimant had presented a prima facie case sufficient to invoke a Section 20(a) presumption that the tick bite itself, combined with multiple diagnoses and treatment for Lyme disease, caused, aggravated, or accelerated his depression and psychosomatic symptoms that prevented him from working. The ALJ concluded that there was no compelling evidence presented by employer to rebut the Section 20(a) presumption that the claimant suffered a psychological injury from a work related event that prevented him from performing his job.

20.3.1 Failure to Rebut

In a number of cases, the Board's holding that Section 20(a) was rebutted has been reversed. In Champion, 14 BRBS 251, the Board affirmed an ALJ's decision that an employer had rebutted the presumption with evidence showing that, following a temporary period of work-related asthma, the claimant's asthma was not work-related. Finding that the Board failed to give full scope to Section 20(a), the court held that the record lacked evidence to rebut the presumption that emotional trauma caused by the claimant's original period of asthma was a contributing cause of his persistent and disabling asthma. Champion v. S & M Traylor Bros., 690 F.2d 285, 15 BRBS 33 (CRT) (**D.C. Cir.** 1982), rev'g and remanding 14 BRBS 251 (1981).

Similarly in Hensley v. Washington Metropolitan Area Transit Authority, 655 F.2d 264, 13 BRBS 182 (**D.C. Cir.** 1981), rev'g 11 BRBS 468 (1979), cert. denied, 456 **U.S.** 904 (1982), the **District of Columbia Circuit** reversed the Board's decision and held that the judge and the Board failed to properly apply the Section 20(a) presumption. The court emphasized that, in order to rebut the presumption, the employer must establish that the condition was not aggravated by the employment and found that the testimony of the employer's physician was insufficient to establish that the claimant's psoriasis was not aggravated by bus driving as it was based on unsupported assumptions regarding the claimant's work conditions.

In Bath Iron Works v. Brown, 194F.3d 1, (**1st Cir.** 1999), the court held that the employer failed to rebut causation. The court noted that the employer could have rebutted the presumption by showing either that exposure to injurious stimuli [noise] did not cause the harm [hearing loss] or that

the claimant was exposed to injurious stimuli while performing work covered under the LHWCA for a subsequent employer.

In Bell Helicopter Int'l v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (**8th Cir.** 1984), aff'g Darnell v. Bell Helicopter Int'l, 16 BRBS 98 (1984), the court affirmed the Board's holding that Section 20(a) was not rebutted where the decedent sustained a **fatal heart attack at work** and employer offered no evidence that it did not arise out of and in the course of employment. Accord Smith v. Sealand Terminal, 14 BRBS 844 (1982) (fatal heart attack in the course of employment).

Mere hypothetical probabilities are insufficient to rebut Section 20(a). See id.; see also Dower v. General Dynamics Corp., 14 BRBS 324 (1981) (evidence which is inconclusive regarding causal connection between asbestos exposure and rectal cancer is insufficient to rebut); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981) (where it is uncontested that claimant suffered some disabling pain, the evidence was insufficient to rebut the presumption that claimant's pain was due to his work-related fall where a doctor testified that there was no way to say that any current problems could not possibly be related to the fall and there was no way of ruling out the fall in any current pain).

The presumption was not rebutted where the employer did not provide concrete evidence but merely suggested alternate ways that a claimant's injury might have occurred, where there was no evidence of another cause, and where the medical evidence was inconclusive as to causation. Williams v. Chevron U.S.A., Inc., 12 BRBS 95 (1980). See Eller & Co. v. Golden, 620 F.2d 71, 12 BRBS 348 (**5th Cir.** 1980), aff'g 8 BRBS 846 (1978); Owens v. Newport News Shipbuilding & Dry Dock Co., 11 BRBS 409 (1979); Gunter v. Parsons Corp., 6 BRBS 607 (1977), aff'd sub nom. Parsons Corp. v. Director, OWCP, 619 F.2d 38, 12 BRBS 234 (**9th Cir.** 1980).

While the employer in Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter, 227 F.3d 285 (**5th Cir.** 2000) posited a plausible theory that a hydraulic forklift was incapable of the "kick back" the claimant described as the cause of his work-related injury, the **Fifth Circuit** found that the **employer's evidence was not so forceful that it successfully rebutted the presumption.** Additionally, the court noted that the testimony of the employer's expert was undercut by the employer's failure to produce evidence establishing the precise type of forklift the claimant was operating when he was injured.

In Compton v. Pennsylvania Avenue Gulf Service Center, 9 BRBS 625 (1979), the Board held that the presumption that a claimant's disease, myelofibrosis with myeloid metaplasia, had been caused by exposure to benzene at work had been rebutted, noting that employer need not disprove every possible theory of causation but must only prove the condition is not caused by employment. On remand, finding the employee has subsequently developed leukemia, the judge admitted additional evidence and invoked Section 20(a) to link his leukemia and benzene exposure.

The Board affirmed its finding of causation, holding employer failed to meet its burden of providing substantial evidence to rebut the presumption where its doctor had inadequate information

on the amount of the employee's past exposure to benzene and employer failed to show that the employee's level of exposure to benzene could not or did not cause the employee's leukemia. Compton v. Pennsylvania Ave. Gulf Service Center, 14 BRBS 472 (1981).

Although negative evidence may rebut Section 20(a), it must be specific and comprehensive. Swinton, 554 F.2d 1075, 4 BRBS 466; Adams v. General Dynamics Corp., 17 BRBS 258 (1985) (pathologist's report silent for asbestosis is inadequate rebuttal evidence).

In Stevens v. Todd Pacific Shipyards, 14 BRBS 626 (1982), the Board affirmed the judge's finding that there was insufficient evidence to rebut the presumption that sarcoidosis (disease of unknown etiology) was related to the claimant's employment. Although proof that employment was not a cause is sufficient in appropriate cases, even though actual cause cannot be identified, the employer's negative evidence here did not rise to the necessary level. But cf. Champion, 14 BRBS 251 (presumption that sarcoidosis related to employment exposure to dust rebutted by evidence that, although exact cause is unknown, dust is not a factor).

Similarly, in Webb v. Corson & Gruman, 14 BRBS 444 (1981), the Board reversed an ALJ's finding that the presumption was rebutted where no direct, positive evidence was presented in the record. The judge relied on the claimant's testimony which he discredited to rebut the presumption. The claimant's testimony did not constitute substantial evidence in rebuttal because it did not sever the potential connection between injury and employment.

Also, the Board noted in Webb, **inaccurate medical histories** did not serve as substantial rebuttal evidence. The Board did not, however, foreclose the possibility that negative credibility determinations alone could constitute substantial evidence to rebut the presumption. Webb, 14 BRBS 444.

In Jones v. Aluminum Co. of America [JonesII], 35 BRBS 37 (2001), the Board distinguished the fact that the employer's physician had never affirmatively stated that the decedent's cancer was not caused by asbestos exposure. It held that because this finding was not included in the medical report, the doctor's opinion was insufficient under either the "ruling out" standard or the "substantial evidence" standard to rebut the Section 20(a) presumption. It further held that the absence of diagnostic evidence of asbestosis did not constitute substantial evidence to rebut the Section 20(a) presumption.

Where an employer did not offer direct evidence to rebut the Section 20(a) presumption but only relied on the **speculative testimony of a medical witness**, the judge erred in finding the presumption was rebutted. Dixon v. John J. McMullen & Assocs., 13 BRBS 707 (1981). In Craig v. Maher Terminal, 11 BRBS 400 (1979), however, the Board held that a **combination** of medical evidence, a credibility determination adverse to claimant, and negative evidence was sufficient. See also Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981) (discussing use of negative evidence in establishing that alleged accident did not occur).

Where a claimant **suffers from a non-work-related disease** which could have caused his lung symptoms, **as well as work-related asbestosis**, and was exposed to conditions at work which could also have caused the problem, it is employer's burden to establish that it was the non-work-related condition which caused the injury. Fortier v. General Dynamics Corp., 15 BRBS 4 (1982). As employer failed to produce specific and comprehensive evidence that the lung condition was not caused at least in part by asbestos exposure, the presumption was not rebutted. See id.; LaPlante v. General Dynamics Corp./Elec. Boat Div., 15 BRBS 83 (1982).

The **failure to follow prescribed medical treatment** is insufficient to rebut. Ogundele v. American Sec. & Trust Bank, 15 BRBS 96 (1980). Further, the fact that a claimant's **applications for health insurance benefits certified that his injury was not work-related** was insufficient to rebut the presumption especially because, in this case, claimant had agreed to termination should he sustain another occupational injury. Muse v. Pollard Delivery Serv., 15 BRBS 56 (1981).

Where a claimant was injured by another employee during an altercation at work and there was **no evidence that the claimant had social or personal contacts with his assailant outside of their employment**, the Section 20(a) presumption that his injury arose out of employment was not rebutted. Wiliams v. Healy-Ball-Greenfield, 15 BRBS 489 (1983). Accord Twyman v. Colorado Sec., 14 BRBS 829 (1982).

In a course of employment case, the Board reversed a judge's finding that a claimant's injury (which occurred when his hand was caught in a planning machine) did not occur in the course of his employment. Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981). The Board concluded that the employer failed to produce specific and comprehensive evidence sufficient to rebut Section 20(a).

In Leone v. Sealand Terminal Corp., 19 BRBS 100 (1986), the Board vacated the ALJ's summary finding that a medical opinion was "unpersuasive" and therefore could not establish rebuttal of the Section 20(a) presumption, and accordingly remanded the claim for the judge to weigh all the relevant evidence without the benefit of the presumption. The Board noted that if the judge discredits any opinions on remand, he must provide a rationale for doing so.

In Neely v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986), the Board held that the judge erred in finding no Section 20(a) rebuttal on grounds that the reporting physicians' opinions were unsupported by a definite scientific study.

In Cairns v. Matson Terminals, 21 BRBS 252 (1988), the Board stated that if the evidence relied on to find no causal connection is not sufficient to rebut, and no other evidence in the record is sufficient, causation is established as a matter of law. The Board held that the employer failed to rebut the presumption afforded by Section 20(a) and that the employee's non-work-related pre-existing disability, when combined with his work-related lung disease, produced a fully compensable permanent total disability. Employer failed to offer any general evidence that the employee's non-

work-related condition did not pre-exist or occur simultaneously with his work-related lung disease. See id.; Bechtel Assocs., P. C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT) (**D.C. Cir.** 1987).

In Alexander v. Ryan-Walsh Stevedoring Co., 23 BRBS 185 (1990), medical reports which were prepared up to nineteen months after the work accident did not mention the pain of which claimant is presently complaining. The Board affirmed, however, that this evidence was insufficient to establish rebuttal of the Section 20(a) presumption. Also, one doctor stated that he would have difficulty relating claimant's neck problems to the accident in which the claimant was struck on the hand. This testimony was found to be insufficient to preclude the possibility that aspects of claimant's accident, other than the striking of his hand, caused or aggravated his neck condition. Accordingly, the Board found that employer did not successfully rebut the Section 20(a) presumption and affirmed the judge's finding of causation as to the claimant's cervical condition.

In Leone v. Sealand Terminal Corp., 19 BRBS 100 (1986), the Board affirmed the ALJ's utilization of the Section 20(a) presumption to link the claimant's present disability to his pre-existing back condition. The employer conceded that the claimant's pre-existing back condition was aggravated by the accident and the Board affirmed the judge's application of the Section 20(a) presumption in deciding the claim. The Board held, however, that the judge erred in failing to find rebuttal, based on the opinion of one of the doctors. The Board noted that the judge gave no reason for concluding that a doctor's testimony was insufficient to support rebuttal and found that even if the ALJ discredits any opinions on remand, he must provide a rationale for doing so.

20.3.2 Successful Rebuttal

Section 20(a) is rebutted where an employer produces evidence proving no causation. Thus, the Board held that the judge erred in stating a doctor's testimony was not sufficient to rebut the presumption where he testified unequivocally that there was no relationship between the claimant's exposure to asbestos and cancer. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

The Board held in Kier, however, that the judge's error was harmless as he properly relied on the testimony of two other physicians who treated the claimant to establish a causal relationship. See Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11 (CRT) (**1st Cir.** 1982), aff'g Sprague v. Bath Iron Works Corp., 13 BRBS 1083 (1981) (Section 20(a) rebutted by medical evidence that osteotongelitis caused by staph infection and not by alleged work-related leg wounds); Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982) (medical report sufficient to establish heart attack did not arise out of exposure to carbon monoxide at work rebutted presumption); Orkisz v. U.S. Army Tank Automotive Command, 13 BRBS 948 (1981), aff'd, 708 F.2d 726 (**6th Cir.** 1982) (medical evidence sufficient to establish that the claimant did not sustain a compensable injury as a result of a slip and fall at work rebutted Section 20(a)); Clymer v. E-Systems, 13 BRBS 1067 (1981), rev'd mem., 694 F.2d 720 (**5th Cir.** 1982), cert. denied, 464 **U.S.** 956 (1983) (physician's testimony that claimant's hypertension and diabetes mellitus would have occurred regardless of employment and were not aggravated by his work environment sufficient to rebut).

In Sistrunk v. Ingalls Shipbuilding, Inc., ___ BRBS ___ (BRB No. 01-298) (Nov. 26, 2001), a *prima facie* case (lung cancer plus the presence of asbestos at the shipyard) did not result in recovery once the Section 20(a) presumption fell out and the medical evidence showed that there was no asbestosis. In Sistrunk, the ALJ found that the decedent's death was not caused, contributed to, or aggravated by his exposure to asbestos at the employer's facility, but was caused by carcinoma, cancer, related to his history of cigarette smoking. Of particular importance was a medical opinion stating that in the absence of asbestosis, lung cancer cannot be attributable to exposure to asbestos and that there was no lung parenchyma available for the evaluation of the presence or absence of asbestosis.

Where there is evidence that the claimant suffered chest pain after a 1973 auto accident up until one month before he was involved in a work-related shoving match in 1976, and x-rays taken after the work accident do not reveal any evidence of trauma, there is substantial evidence to support the judge's findings that the presumption was rebutted. Yarbough v. C & P Tel. Co., 12 BRBS 104 (1980).

The testimony of a claimant's two former co-workers indicating that the claimant had a noticeable tremor in his hand even prior to his fall at work was sufficient to rebut the presumption of causation where the claimant never raised an aggravation theory. Sinnott v. Pinkerton's, Inc., 14 BRBS 959 (1982), rev'd and remanded mem., 744 F.2d 878 (**D.C. Cir.** 1984).

The **Eighth Circuit** affirmed an ALJ's determination that an employer introduced substantial evidence to rebut the Section 20(a) presumption where the claimant's injured eyes and ears were examined at the time of the injury and found to be functioning normally, although three years after the job-related incident problems arose. Arrar v. St. Louis Shipbuilding Co., 837 F.2d 334, 20 BRBS 79 (CRT) (**8th Cir.** 1988).

Section 20(a) presumption was rebutted in a claim for asbestosis where the judge's finding that the claimant's lung condition is siderosis and not asbestosis is supported by substantial evidence. O'Berry v. Jacksonville Shipyards, 21 BRBS 355 (1988).

In Cairns v. Matson Terminals, 21 BRBS 252 (1988), the Board affirmed that an employer is required to come forward with substantial evidence to rebut the presumption that the claim comes within the provisions of the LHWCA.

The Board vacated a judge's determination that an employer failed to rebut the presumption because three doctors maintained that the claimant's **cancer was due solely to smoking and not asbestos exposure**. These opinions were specific and comprehensive and thereby severed the connection between the claimant's injury and his employment. Therefore, the Section 20(a) presumption was rebutted. The case was remanded to the judge to determine whether the claimant's employment caused his injury based on the evidence as a whole. Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986).

20.4 IF SUCCESSFUL, PRESUMPTION NO LONGER AFFECTS OUTCOME

Once the presumption is overcome by the introduction of substantial evidence, the fact-finder must evaluate all of the evidence and reach a decision based on the record as a whole. Del Vecchio v. Bowers, 296 **U.S.** 280 (1935); Swinton, 554 F.2d 1075, 4 BRBS 466; Glover v. Aerojet-General Shipyard, 6 BRBS 559 (1977); Norat v. Universal Terminal & Stevedoring Corp., 3 BRBS 151 (1976).

When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case. Noble Drilling Co. v. Drake, 795 F.2d 478 (**5th Cir.** 1986). In Drake, the **Fifth Circuit** agreed with the Board's finding that the employer rebutted the presumption of causation between the job-related stress and the claimant's **aneurysm**, as two physicians opined that **claimant's intracranial hemorrhage was unrelated to his work**. Id. at 481.

If the **evidence** is **in equipoise**, then the presumption has been rebutted and does not control the result. Brennan v. Bethlehem Steel Corp., 7 BRBS 947 (1978). The presumption is not affirmative but, consistent with the "bursting bubble" theory, is merely a procedure tool. Del Vecchio, 296 **U.S.** 280; Sprague, 688 F.2d 862, 15 BRBS 11 (CRT).

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (**5th Cir.** 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. Perini Corp. v. Heyde, 306 F. Supp. 1321 (**D.R.I.** 1969). See Poole v. National Steel & Shipbuilding Co., 11 BRBS 390 (1979); Grimes v. George Hyman Constr. Co., 8 BRBS 483 (1978), aff'd mem., 600 F.2d 280 (**D.C. Cir.** 1979); Tyson v. John C. Grimberg Co., 8 BRBS 413 (1978).

The **Ninth Circuit**, affirming a Board holding that the presumption of causation was not overcome stated, "[e]ven after the substantial evidence is produced to rebut the statutory presumption, the employer still bears the ultimate burden of persuasion." Parsons Corp. of California v. Director, OWCP, 619 F.2d 38, 12 BRBS 234 (**9th Cir.** 1980), aff'g Gunter v. Parsons Corp. of California, 6 BRBS 607 (1977). The **District of Columbia Circuit** reserved judgment on this issue in Hensley, 655 F.2d 264, 13 BRBS 182.

The Board has held that an ALJ's failure to explicitly apply Section 20(a) is harmless error where he weighs all the evidence and his decision is supported by substantial evidence. See Reed v. Macke Co., 14 BRBS 568 (1981); Seaman v. Jacksonville Shipyards, 14 BRBS 148.9 (1981); Roberts v. Bath Iron Works Corp., 13 BRBS 503 (1981). The Board is not authorized to make findings of fact, however, and it has been reprimanded for supplementing an inadequate decision. Volpe, 671 F.2d 697, 14 BRBS 538. See Sprague, 688 F.2d at 868 n.11, 15 BRBS at 18 n.11 (CRT).

For cases involving an analysis after the Section 20(a) was rebutted, see Kier, 16 BRBS 128; Seaman, 14 BRBS 148.9; Reed, 14 BRBS 568; Hislop, 14 BRBS 927; Roberts, 13 BRBS 503.

20.4.1 Evidence Based on Record as a Whole

If the presumption of compensability is successfully rebutted, the presumption no longer affects the outcome of the case. The fact-finder must then weigh all the evidence in the record and resolve the fact at issue based on the evidence. Noble Drilling Co. v. Drake, 795 F.2d 478 (**5th Cir.** 1986).

In Phillips v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 94 (1988), the Board affirmed the judge's determination that a claimant's permanently totally disabling breathing disorder was not causally related to his exposure to asbestos where the judge credited medical evidence indicating that the claimant had a severe **chronic obstructive pulmonary disease**, which was caused by **prolonged cigarette smoking**, and is not a restrictive lung disease which is symptomatic of asbestosis. This evidence was sufficient to rebut the Section 20(a) presumption and to establish the lack of causation based on the record as a whole.

In Sistrunk v. Ingalls Shipbuilding, Inc., ___ BRBS ___ (BRB No. 01-298) (Nov. 26, 2001), a prima facie case (lung cancer plus the presence of asbestos at the shipyard) did not result in recovery once the Section 20(a) presumption fell out and the medical evidence showed that there was no asbestosis. In Sistrunk, the ALJ found that the decedent's death was not caused, contributed to, or aggravated by his exposure to asbestos at the employer's facility, but was caused by carcinoma, cancer, related to his history of cigarette smoking. Of particular importance was a medical opinion stating that in the absence of asbestosis, lung cancer cannot be attributable to exposure to asbestos and that there was no lung parenchyma available for the evaluation of the presence or absence of asbestosis.

20.4.2 Doubts Resolved in Employee's Favor

In considering the evidence, the fact-finder operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee, because the intent of the statute is to place the burden of possible error on those best able to bear it. Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (**5th Cir.** 1986); Young & Co. v. Shea, 397 F.2d 185 (**5th Cir.** 1968), cert. denied, 395 **U.S.** 920 (1969). But cf. Maher Terminals v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (**3d Cir.** 1993), cert. granted sub nom. Director, OWCP v. Greenwich Colleries, 510 **U.S.** 1068 (1994) (APA prohibits application of the true doubt rule to the LHWCA).

This statutory policy places a less stringent burden of proof on the claimant than the preponderance of the evidence standard which is applicable in a civil suit. Drake, 795 F.2d 478. In Drake, the **Fifth Circuit** found that the required causal connection is established by substantial evidence under the LHWCA. Id. at 481; see Mid-Gulf Stevedores v. Neuman, 462 F.2d 185 (**5th Cir**. 1972).

Under the **"true doubt" rule**, if doubt exists in the administrative law judge's mind about the proper resolution of evidentiary conflicts, that doubt must be resolved in claimant's favor. Heckstall v. General Port Serv. Corp., 12 BRBS 298, 303 (1980); Melendez v. Bethlehem Steel Corp., 2 BRBS 395 (1975). This statutory policy places a less stringent burden of proof on the claimant than the "preponderance of the evidence" standard which is applicable in a civil suit. Strachan Shipping Co. v. Shea, 406 F.2d 521 (**5th Cir.**), cert. denied, 395 **U.S.** 921 (1969). But cf. Maher Terminals, 992 F.2d 1277, 27 BRBS 1 (CRT).

The mere presence, however, of conflicting evidence does not require a conclusion that there are doubts which must be resolved in the claimant's favor. Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982); Heckstall, 12 BRBS 298; Bielo v. Navy Resale Sys., 7 BRBS 1030 (1978). Before applying the true doubt rule, the judge should attempt to evaluate the conflicting evidence. See Betz v. Arthur Snowden Co., 14 BRBS 805 (1981).

Although an ALJ errs in applying the "true doubt" rule in his analysis of causation, this error is harmless as a claimant is entitled to the Section 20(a) presumption and there was not sufficient evidence of rebuttal. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988) (Board affirms ALJ's determination that claimant's lung impairment was due to asbestos exposure while working for employer, rather than a pre-existing obstructive condition).

The circuits are now split on the application of the **"true doubt" rule**. Under the true doubt rule, if doubt exists in the judge's mind about the proper resolution of evidentiary conflicts, that doubt must be resolved in the claimant's favor; however, the mere presence of conflicting evidence does not require a conclusion in favor of the claimant. Thompson v. Northwest Enviro Servs., 26 BRBS 53 (1992). See Wright v. Connolly-Pacific Co., 25 BRBS 161, 168 (1991); see also Heckstall v. General Port Serv. Corp., 12 BRBS 298, 303 (1980).

The **Third Circuit** in Maher Terminals, 992 F.2d 1277, 27 BRBS 1 (CRT), has held that the Administrative Procedure Act (APA) prohibits application of the true doubt rule to the LHWCA. In Maher Terminals, the **Third Circuit** held that the claimant must prove that her husband's death was related to his work injury by a **preponderance of the evidence**. In Avondale Shipyards v. Kennel, 914 F.2d 88 (**5th Cir.** 1990), however, the **Fifth Circuit** affirmed the judge's use of the true doubt rule in favor of the claimant. In Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (**5th Cir.** 1986), the **Fifth Circuit** stated that the judge is required to resolve all doubts, factual as well as legal, in favor of the injured worker in order to place the burden of possible error on those best able to bear it. See Jones v. Director, OWCP, 977 F.2d 1106 (**7th Cir.** 1992).

The **Ninth Circuit** has cogently stated the logical consequence of the established rule of doubt-resolution:

> Even after the substantial evidence is produced to rebut the statutory presumption [of liability] the employer still bears the ultimate burden

> of persuasion. This rule does not follow from the presumption in 33 U.S.C. § 920(a), although the presumption reflects the overall policy of the Act. The rule follows from the overall humanitarian statutory policy that all doubtful questions of fact be resolved in favor of the injured employee.

Parsons Corp. of California v. Director, OWCP, 619 F.2d 38, 41 (**9th Cir**. 1980).

20.5 APPLICATION OF SECTION 20(a)

20.5.1 Causal Relationship of Injury to Employment

The Section 20(a) presumption also applies to the issue of whether an injury arose in the **course of employment**. Travelers Ins. Co. v. Donovan, 221 F.2d 886 (**D.C. Cir.** 1955) (citing O'Leary v. Brown-Pacific-Maxon, Inc., 340 **U.S.** 504 (1951)); see Oliver v. Murry's Steaks, 17 BRBS 105 (1985); Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981). Moreover, if an injury or death occurs during the course of employment, the presumption that the injury arises out of the employment is strengthened. Wheatley v. Adler, 407 F.2d 307 (**D.C. Cir.** 1968) (en banc); Butler v. District Parking Management Co., 363 F.2d 682 (**D.C. Cir.** 1966). Substantial evidence supported the finding of a causal connection between employment and intracranial hemorrhage. The **Fifth Circuit** approved of the Board's standard regarding the Section 20(a) presumption enunciated in Kelaita. Noble Drilling Co. v. Drake, 795 F.2d 478, 19 BRBS 6 (CRT) (**5th Cir.** 1986).

In Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988), the Board would not address the issue regarding subsequent supervening injury because the employer did not raise the issue before the judge. The employer asserted the issue was raised during the formal hearing, but the record revealed that the parties merely offered evidence relevant to the issue.

Under the **aggravation rule**, if a claimant's work played any role in the manifestation of his underlying arteriosclerosis, then the non-work relatedness of the disease and the fact that his chest pains could have appeared anywhere are irrelevant--the entire resulting disability is compensable. Cairns v. Matson Terminals, 21 BRBS 252 (1988).

In Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), a physician testified that the claimant's prior cervical condition "did not play a significant role in his current difficulties." The Board held that this testimony did not sever the potential causal connection between the claimant's harm and his employment because the physician did not state that the claimant's work-related injury and prior surgery played **no** role in causing his present condition. Thus, the Board affirmed the judge's finding that the employer failed to establish rebuttal of the Section 20(a) presumption, and further held that causation was established.

The weight of the evidence supported a ALJ's finding in Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991) that a claimant aggravated his chronic back condition which began due to his work injury. One physician opined that the subsequent incident was a new injury; this opinion was accorded little weight, however, where that physician did not establish that the claimant's disability was unrelated to his earlier work injury. Accordingly, the Board affirmed the judge's finding that the claimant's condition was causally related to his employment and therefore compensable.

In Uglesich v. Stevedoring Services of America, 24 BRBS 180 (1991), the claimant's treating physician testified that the claimant's right knee condition was the natural unavoidable result of the

previous injury to his left knee. Specifically, the claimant's treating physician testified that although the claimant had pre-existing arthritis of the right knee, the fact that the claimant favored his left leg and favored his right knee exacerbated the symptoms of his right knee. The Board affirmed the judge's finding that causation existed for the condition of the claimant's right knee condition as it resulted from the claimant's previous left knee injury. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (**9th Cir.** 1966).

20.5.2 Arising Out of and in the Course of Employment

It is reasonable for a judge to find medical evidence that a claimant's injury was unrelated to employment to be inconclusive where the physician acknowledges that a relationship between injury and employment was a possibility. MacDonald v. Trailer Maine Transp. Corp., 18 BRBS 259 (1986). Moreover, any error was harmless where the judge properly weighed all of the medical evidence and concluded that causation was established.

Where a claimant embarks on a **personal mission**, he severs the employment nexus. Oliver v. Murry's Steaks, 21 BRBS 348 (1988). In Oliver, the Board affirmed the ALJ's determination that a claimant's injury did not arise in the course of employment.

A *prima facie* claim must allege an injury arising out of and in the course of employment; mere existence of a physical impairment is plainly insufficient. Once the presumption applies to link the injury to the employment, the employer must produce substantial countervailing evidence to rebut the work-relatedness of an injury. If the presumption is rebutted, the judge must weigh all the evidence and resolve the causation issue on the record as a whole. Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988). But cf. Maher Terminals, 992 F.2d 1277, 27 BRBS 1 (CRT) (APA prohibits application of true doubt rule to LHWCA).

In Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988), the Board rejected the employer's argument that no causation was established, where that argument hinged on the fact that the doctor on whom the judge relied to find causation was unable to identify the specific chemicals which produced the claimant's chemical hypersensitivity. Instead, the Board found that causation was established because the doctor had indicated that the claimant's symptoms were due to the cumulative effect of chemical exposures over many years and that any or all of the chemicals to which he was exposed could have played a part in his symptomatology.

In Willis v. Titan Contractors, 20 BRBS 11 (1987), the Board reversed the finding of the judge that the claimant's injury did not occur in the course of his employment. The judge found that the claimant's use of the work equipment on which he was injured was unauthorized and therefore concluded that the claimant was not acting in the course of his employment when he was injured.

The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment. **The fact that an activity is not authorized is not sufficient alone to sever the connection between the injury and the employment.** Willis, 20 BRBS 11. In Willis, the

employer did not present any evidence that the claimant's work activity at the time of his injury was unrelated to his employment. Since there was no evidence of record directly controverting the presumption, the claimant's injury arose in the course of his employment as a matter of law. Willis, 20 BRBS 11.

In Mattera v. M/V Mary Antoinette, Pacific King, Inc., 20 BRBS 43 (1987), the Board held that an injured employee who suffered a back injury while undergoing rehabilitation testing in connection with his work-related arm injury, had an injury which arose in the course of his employment.

20.5.3 Medical Bills

The Board has held that Section 20(a) is applicable to medical bills. Jenkins v. Maryland Shipbuilding & Dry Dock Co., 6 BRBS 550 (1977), rev'd on other grounds, 594 F.2d 404, 10 BRBS 1 (**4th Cir.** 1979).

When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire resultant disability and for medical expenses due to both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. If the subsequent progression of the condition, however, is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer is relieved of liability for disability attributable to the intervening cause. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

The **Fourth Circuit** has held that the presumption does not relieve the claimant of his burden of proving the elements of his claim for medical benefits and reversed the Board's requirement that the employer prove with substantial evidence that the claimant's private physician did not file a report within Section 7(d). Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (**4th Cir.** 1979), rev'g 6 BRBS 550 (1977). See Shahady v. Atlas Tire & Marble, 13 BRBS 1007, 1014 (1981), rev'd on other grounds, 682 F.2d 968 (**D.C. Cir.** 1982), cert. denied, 459 **U.S.** 1146 (1983) (Section 20(a) does not apply to Section 7).

20.6 SECTION 20(a) DOES NOT APPLY

20.6.1 Fact of Injury

(See Topic 20.2.2, supra.)

20.6.2 Jurisdiction

The case law is divided as to whether the Section 20(a) presumption applies to "jurisdiction."

Courts which apply the Section 20(a) presumption to the Issue of Jurisdiction.

In Cardillo v. Liberty Mutual. Ins. Co., 330 **U.S.** 469 (1947), the **Supreme Court** stated:

> We are aided here, of course, by the provision of § 20 of the [LHWCA] that, in proceedings under that Act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary'– a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. ... His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record. The jurisdiction of the Deputy commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it 'shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs, ...

In its actual holding the **Court** stated, "And since the Deputy Commissioner had jurisdiction over the case, the resulting award of compensation should have been sustained."

[ED. NOTE: *There is often confusion between "coverage" (also referred to as "jurisdiction in this work.) and "subject matter jurisdiction." To some extent this is apparent in Cardillo. See also Employers Mutual Liability Insurance Co. v. Arrien, 244 F. Supp. 110 (**N.D.N.Y.** 1965) (distinction between presumption of coverage and presumption of jurisdiction); Atlantic Stevedoring Co. v. O'Keeffe, 220 F. Supp. 881 (**S.D. Ga.** 1963), rev'd on other grounds, 354 F.2d 48 (**5th Cir.** 1965). In O'Keeffe, the district court judge stated: "[He was] ... inclined to the belief that there is a distinction between presumption of coverage and presumption of jurisdiction. Jurisdiction must be first established, and when once shown, then, and only then, does the coverage presumption become effective. ... [I]f the Deputy Commissioner assumed jurisdiction of a case over which, from the facts in the record, he obviously had no jurisdiction, no presumption in the statute could create or confer jurisdiction."). "Subject matter jurisdiction" is a court's authority to hear a claim pursuant to Congressional authority. "Coverage," rather, refers to issues of situs and status. For more on this, see Topic 1.2 "Subject Matter Jurisdiction."**]*

Subsequently some courts began to cite Cardillo for the proposition that the Section 20(a) presumption applies to jurisdiction. See e.g., Edgerton v. Washington Metropolitan Area Transit Authority (WMATA), 925 F.2d 422 (**D.C. Cir.** 1991); George v. Director, OWCP, 86 F.3d 1162 (**9th Cir.** 1996) (Table) (Applied § 20(a) presumption and placed burden on employer to show that river was not navigable.).

***[ED. NOTE:** The George case is a prime example of the confusion in this area. In George, an unreported decision, the **Ninth Circuit** stated:*

> *Believing the question of navigability to be jurisdictional, the BRB found that this presumption did not apply. In fact, because traditional admiralty jurisdiction is broader than jurisdiction under the LHWCA, there is admiralty jurisdiction in a case involving an accident on the American River even if it is not navigable for the purposes of the LHWCA. Therefore, the presumption of § 20 applies to navigability.**]***

In Edgerton v. WMATA, the **District of Columbia Circuit** reversed a Board decision that upheld the ALJ decision that the claimant had failed to establish jurisdiction under the District of Columbia Workers' Compensation Act (DCWCA) where neither party presented evidence on jurisdiction. The circuit court stated, that the "ALJ failed to recognize that the burden of disapproving the jurisdiction of the [DCWCA] rests upon the party opposing the claim...This presumption of jurisdiction 'applies with equal force to proceedings under the [DCWCA]." The circuit court noted that the employer probably "possessed records indicating precisely what routes [the claimant] drove at the relevant times; WMATA's failure to introduce any such evidence, therefore, supports an inference pursuant to the 20(a) presumption that the actual facts bolstered [his] claim of frequent work-related District contacts."

In Davis v. Department of Labor and Industries of Washington, 317 **U.S.** 249 (1942), a case addressing state versus federal workers compensation selection, the **Court**, in dicta had stated, "... we are aided by the provision of the federal act,...Section 20, which provides that in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.'"

Other courts have indicated a presumption may apply to jurisdiction. For example, in Travelers Ins. Co. v. Shea, 382 F.2d 344 (**5th Cir.** 1967), the **Fifth Circuit** stated, "In the absence of substantial evidence to the contrary, we must presume that the claim is covered by the Act. 33 U.S.C.A. § 920." The **Fifth Circuit** then cited O'Leary v. Puget Sound Bridge & Dry Dock Co., 349 F.2d 571 (**9th Cir.** 1965), for this pronouncement. However, when one reads O'Leary, that case states, "The statutory presumption of § 20 (33 U.S.C. § 920(a)) cannot, as appellant urges, bring an injury within the coverage of the Act under the admitted facts involved here... ."

In New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (**5th Cir.** 1981), that court stated, "The Act itself contains a statutory presumption that in the absence of substantial evidence to the contrary, the claim is within the provisions of the Act. 33 U.S.C.A. § 920. This presumption

of coverage was first used in connection with the issue of jurisdiction, but has been extended to include the nature and extent of the injury." See also, Army Air Force Exchange v. Greenwood, 585 F. 2d 791 (**5th Cir.** 1978) (" The judicial policy has long been to resolve all doubts in favor of the employee and his family and to construe the Act in favor of the employee for whose benefits it is primarily intended."); Tampa Ship Repair v. Director, 535 F.2d 936, 938 (**5th Cir.** 1976) (The policy of the LHWCA has been "to resolve doubtful questions of coverage in the Claimant's favor."); Mungia v. Chevron U.S.A. Inc, 999 F.2d 808, n. 2 (**5th Cir.** 1993)("It should be noted that jurisdiction is presumed under the Act. The presumption is, of course, rebuttable, but the burden of establishing jurisdiction (or the lack thereof) does not lie with the claimant."); Saipan Stevedore Co. Inc. v. Director, OWCP, 133 F.3d 717 **(9th Cir.** 1997) (Notes with approval Fifth Circuit holding in Turner that presumption of coverage applies to jurisdictional issues and that this reasoning is consistent with the concerns that led to the passage of the LHWCA.); Director, OWCP v. National Van Lines (Riley), 613 F.2d 972, 11 BRBS 298 (**D.C. Cir.** 1979), aff'g Riley v. Eureka Van & Storage Co., 1 BRBS 449 (1975), cert. denied, 448 **U.S.** 907 (1980) (D.C. circuit court stated that it was "bound by the congressionally mandated presumption of jurisdiction ... which applies with equal force to proceedings under the District of Columbia Act.").

[ED. NOTE: *In Watkins v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 01-0538) (March 5, 2002), the Board stated, "We need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provisions. See Fleischmann v. Director, OWCP, 137 F.3d 131, 32 BRBS 28 (CRT) (**2d Cir.** 1998), cert. denied, 525 **U.S.** 981 (1998); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 6 BRBS 229 (**5th Cir.**), cert. denied, 434 **U.S.** 903 (1977); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 264, 4 BRBS 304 (**1st Cir.** 1976), cert. denied, 433 **U.S.** 908 (1977)." See also, Morrissey v. Kiewit-Atkinson-Kenny, ___ BRBS ___ (BRB No. 01-0465) (February 8, 2002), wherein the Board found that it did not need to address the claimant's contention that the Section 20(a) presumption aids him in establishing that the Act's coverage provisions are met. It is clear that the material facts in this case are undisbuted and that the coverage determination presents a legal issue."**]**

Courts which do not apply Section 20(a) to the Issue of Jurisdiction

However, all courts do not apply the Section 20(a) presumption to jurisdiction. See Fusco v. Perini N. River Assocs., 622 F.2d 1111, 12 BRBS 328 (**2d Cir.** 1980), cert. denied, 449 **U.S.** 1131 (1981). The situs requirement must also be met without the benefit of the presumption. Boughman v. Boise Cascade Corp., 14 BRBS 173 (1981). See Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 4 BRBS 156 (**2d Cir.** 1976), aff'd sub nom. Northeast Marine Terminal Co. v. Caputo, 432 **U.S.** 249, 6 BRBS 150 (1977) (In order to be covered under the LHWCA, claimant must satisfy both the status requirement of § 2(3) and the situs requirement of § 3(a).); Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 4 BRBS 304 (**1st Cir.** 1976), cert. denied, 433 **U.S.** 908 (1977) (presumption does not apply to questions of legal interpretation such as coverage under the LHWCA).

With rare exception, Dorn v. Safeway Stores, Inc., 18 BRBS 178 (1986), the Board has consistently held that the Section 20(a) presumption that a claim comes within the provisions of the LHWCA is **inapplicable** to the threshold issues of jurisdiction. See Sedmak v. Perini North River Associates, 9 BRBS 378 (1978); aff'd sub nom. Fusco v. Perini North River Associates, 601 F.2d 1111 (**2d Cir.** 1980) (decision on remand); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 1111 (**2d Cir.** 1976), aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo, 432 **U.S.** 249 (1977); George v. Lucas Marine Construction, 28 BRBS 230 (1994) ("the Board has determined that claimants must satisfy both the status and situs tests without benefit of the [20(a)] presumption."), overruled at 86 F.3d 1162 (**9th Cir.** 1996) (Table) (Applied § 20(a) presumption and placed burden on employer to show that river was not navigable.); Wynn v. Newport News Shipbuilding and Dry Dock Company, 16 BRBS 31 (1983); Boughman v. Boise Cascade Corporation, 14 BRBS 173 (1981); Holmes v. Seafood Specialist Boat Works, 14 BRBS 141 (1981); Palma v. California Cartage Co., 18 BRBS 119 (1986); Sheridon v. Petro-Drive, Inc., 18 BRBS 57 (1986).

In holding Section 20(a) inapplicable to status as a maritime employee, the Board has reasoned that jurisdiction is a threshold issue which must be settled before the presumption of coverage applies. In order to find jurisdiction, the evidence must establish that the claimant was engaged in "maritime employment" in accordance with Section 2(3) of the LHWCA (status) and that he was injured "upon navigable waters" in accordance with Section 3(a) (situs). Fusco v. Perini N. River Assocs., 622 F.2d 1111, 12 BRBS 328 (**2d Cir.** 1980), cert. denied, 449 **U.S.** 1131 (1981). The situs requirement must also be met without the benefit of the presumption. Boughman v. Boise Cascade Corp., 14 BRBS 173 (1981). See Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 4 BRBS 156 (**2d Cir.** 1976), aff'd sub nom. Northeast Marine Terminal Co. v. Caputo, 432 **U.S.** 249, 6 BRBS 150 (1977) (In order to be covered under the LHWCA, claimant must satisfy both the status requirement of § 2(3) and the situs requirement of § 3(a).); Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 4 BRBS 304 (**1st Cir.** 1976), cert. denied, 433 **U.S.** 908 (1977) (presumption does not apply to questions of legal interpretation such as coverage under the LHWCA).

The Board in Sedmak distinguished and rejected a contrary holding in Overseas African Construction Corp. v. McMullen, 500 F.2d 1291 (**2d Cir.** 1974), and followed the later **Second Circuit** case, Dellaventura, 544 F.2d 35. The Board also determined that in McMullen the **Second Circuit** had held that a *prima facie* case of jurisdiction had been made. Thus, the court did not totally rely on the Section 20(a) presumption.

[ED. NOTE: *The conflicting case law in this area poses a dilemma. On the one hand is the jurisprudence holding that the Section 20(a) presumption does apply to "jurisdiction." It draws its strength from the wording of Section 20(a) itself, although that section does not specifically mention "jurisdiction." On the other hand, there is jurisprudence that recognizes "jurisdiction as an issue that may be raised at any time, even sua sponte. That line of thought argues that a tribunal of limited jurisdiction such as that involving a longshore case, must have an affirmative basis for asserting jurisdiction, and thus the burden of proof should rest on the parties seeking to invoke the proceeding. For support, it notes Northeast Marine Terminal, Inc. v. Caputo, 432* ***U.S.*** *249 (1977) wherein the* ***Supreme Court*** *held that in order to invoke jurisdiction under the LHWCA, the claimant*

must meet both a status and situs requirement. Where the middle ground will be determined between substantive Sections 2 and 3 of the LHWCA, and procedural Section 20, remains to be determined.]

20.6.3 Nature and Extent of Injury

The Section 20(a) presumption does not aid the claimant in establishing the nature and extent of disability. Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp., 12 BRBS 112 (1979). The Board noted that a claimant is fully able to muster evidence on this point. See Brocato v. Universal Maritime Serv. Corp., 9 BRBS 1073 (1978); Davis v. George Hyman Constr. Co., 9 BRBS 127 (1978), aff'd in relevant part sub nom. Davis v. U.S. Dep't of Labor, 646 F.2d 609 (**D.C. Cir.** 1980); Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978).

20.6.4 Loss of Wage-Earning Capacity

The Board has found no authority or case law to support a presumption in favor of the claimant with respect to the issue of loss of wage-earning capacity. Leach v. Thompson's Dairy, Inc., 6 BRBS 184 (1977). Therefore, the Section 20(a) presumption is not applicable to the issue of the claimant's loss of wage-earning capacity. Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

20.7 SECTION 20(b) PRESUMPTION THAT NOTICE OF CLAIM HAS BEEN GIVEN

Section 20(b) provides:

> **In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary --**
> **(b) that sufficient notice of the claim was given.**

33 U.S.C. § 920(b).

The Board has taken the position that Section 20(b) applies to Section 13, which sets forth the requirements for filing of the notice of injury with the employer. See Jackson v. Ingalls Shipbuilding Div., Litton Sys., 15 BRBS 299 (1983); Carlow v. General Dynamics Corp., 15 BRBS 115 (1982), overruling Kirkland v. Air America, Inc., 13 BRBS 1108 (1981); Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982).

In Horton v. General Dynamics Corp., 20 BRBS 99 (1987), the Board found that the presumption of Section 20(b) is applicable to Section 13, as it refers to notice of the claim. Therefore, the employer must establish that the claim was filed more than two years after awareness. The Board also stated, however, that the Section 20(b) presumption does not apply with regard to Section 12. Thus, claimant has the burden of establishing sufficient notice of the injury. In Horton, no credible evidence of record established the claimant's date of awareness, thereby giving the claimant the benefit of Section 20(b). Thus, the ALJ's denial of benefits pursuant to Section 13 must be reversed, as employer did not establish that the claim was filed more than two years after awareness.

Several of the circuit courts, however, disagree with this position and have held Section 20(b) applicable to Section 12. See, e.g., Stevenson v. Linens of the Week, 688 F.2d 93 (**D.C. Cir.** 1982), rev'g 14 BRBS 304 (1981); United Brands Co. v. Melson, 594 F.2d 1068, 1072, 10 BRBS 494 (**5th Cir.** 1979), aff'g 6 BRBS 503 (1977). See Janusziewicz v. Sun Shipbuilding & Dry Dock Co., 677 F.2d 286, 14 BRBS 705 (**3d Cir.** 1982), rev'g 13 BRBS 1052 (1981), where the **Third Circuit**, assuming without deciding that the Section 20(b) presumption was applicable to Section 12 notice of injury, stated that the claimant's prior application for non-occupational sickness benefits was sufficient to rebut the presumption.

The Board affirmed the ALJ's application of the Section 20(b) presumption to the issue of the employer's knowledge under Section 12 in a DCW Act case and his finding that the presumption was not rebutted. Forlong v. American Sec. & Trust Co., 21 BRBS 155 (1988).

Under the Section 20(b) presumption, part of the employer's burden is to establish that it filed in compliance with Section 30 before it can prevail pursuant to Section 13(a). McQuillen v. Horne

Bros., Inc., 16 BRBS 10 (1983); Fortier, 15 BRBS 4; Peterson v. Washington Metro. Area Transit Auth., 13 BRBS 891 (1981). An exception to this rule has been recognized, however, in those instances where the Section 13 limitation period has run prior to the time that the employer gains knowledge of the injury for Section 30 purposes. Speedy v. General Dynamics Corp., 15 BRBS 352, 354 n.4 (1983); Keatts v. Horne Bros., Inc., 14 BRBS 605, 607 (1982).

Section 20(b) affords a claimant with the presumption that, in the absence of substantial evidence to the contrary, sufficient notice of the injury and the claim have been given to the employer. This section is used in determining whether a claimant has complied with the filing requirements of Sections 12 and 13. See Shaller v. Cramp Shipbuilding & Drydock Co., 23 BRBS 140 (1989) (Section 20(b) applies to Section 12); Horton v. General Dynamics Corp., 20 BRBS 99, 102 (1987) (Section 20(b) applies to Section 13). In Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990), the Board noted in a footnote that to the extent Horton holds that Section 20(b) is inapplicable to Section 12, it has been overruled by Shaller.

In Kulick v. Continental Baking Corp., 19 BRBS 115 (1986), a DCW Act claim, the Board, governed by the pre-1984 Amendment LHWCA, affirmed the judge's finding that the employer rebutted the Section 20(b) presumption that the employer had knowledge of the injury. The Board noted its position that it only applies Section 20(b) to Section 13, but as the case arose in the **District of Columbia Circuit**, the Board applied the holding of the **District of Columbia Circuit** in Stevenson v. Linens of the Week, 688 F.2d 93 (**D.C. Cir.** 1982), which found that the Section 20(b) presumption applies to Section 12.

20.8 SECTION 20(c) PRESUMPTION THAT EMPLOYEE WAS NOT INTOXICATED

(See Topic 3.2, supra.)

20.9 SECTION 20(d) PRESUMPTION THAT EMPLOYEE DID NOT INTENTIONALLY INJURE SELF OR OTHER

(See Topic 3.2, supra.)