BRB No. 10-0125

CLYDE HENDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN MARINE CONSTRUCTION	)	DATE ISSUED: 05/25/2010
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Douglas L. Brown (Brady Radcliff & Brown LLP), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-LHC-1973) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for employer as a welder, sustained, *inter alia*, multiple fractures of his spine on October 8, 2005, when he fell approximately forty feet to the ground while removing a boom from a vessel. Although claimant has no clear memory as to how he fell, it is unchallenged that the boom began to move when the last bolt was cut by claimant's co-worker and that claimant's safety harness failed to keep him from falling to the ground. Claimant was taken to the hospital where a drug screen indicated a positive result for narcotics.[1] Claimant remained in the hospital for six months and is now a paraplegic confined to a wheelchair. Following this incident, OSHA performed an investigation of the accident site and thereafter issued multiple citations to employer. CX 5.

In his Decision and Order, the administrative law judge found that claimant's injury was work-related, and that employer did not establish that it was solely due to intoxication. 33 U.S.C. §§903(c), 920(c). As the parties stipulated that claimant has not yet reached maximum medical improvement and cannot return to his usual employment, the administrative law judge found claimant entitled to temporary total disability benefits commencing October 10, 2005, and continuing, based upon an average weekly wage of $829.24, and medical benefits. 33 U.S.C. §§908(b), 907.

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 20(c) presumption and that, therefore, claimant's entitlement to benefits is not barred by Section 3(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Section 3(c) of the Act states: "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee. . . ." 33 U.S.C. §903(c). Pursuant to Section 20(c) of the Act, it is presumed, in the absence of substantial evidence to the contrary, "that the injury was not occasioned solely by the intoxication of the injured employee." 33 U.S.C. §920(c). In light of the express statutory requirement that claimant's injury must be "solely" due to intoxication, employer bears the burden of producing substantial evidence that claimant's intoxication was the sole cause of injury. *See G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100, *modified on recon.* 43 BRBS 108 (2009); *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986). If employer proffers substantial evidence that intoxication was the sole cause of the claimant's injury, the presumption falls from the case. *Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170, 13 BRBS 257 (3d Cir. 1981). The administrative law judge must then weigh the evidence, pro and con, to determine whether intoxication was the sole cause of injury. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

[1] Claimant subsequently acknowledged taking an illegal substance two days before his work accident. Tr. at 47 – 48.

In *Sheridon*, 18 BRBS 57, the Board reversed the administrative law judge's denial of benefits, holding that proof of an employee's intoxication alone is insufficient to rebut the Section 20(c) presumption, even if intoxication is the primary cause of the employee's accident. "Although the employer need not negate every hypothetical cause. . .it must present evidence that permits no other rational conclusion but that claimant's intoxication was the sole cause of injury." *Sheridon*, 18 BRBS at 60. In *Birdwell*, 16 BRBS 321, the employee, a watchman for employer, was found dead in the water the morning after he had been drinking while performing his duties. In awarding benefits, the administrative law judge determined that the medical opinion addressing the effect of claimant's intoxication was based on speculation and was therefore less than credible. Moreover, the administrative law judge noted that walking on a mooring line, a task the employee was required to perform, was risky in any condition, and that bruises on the employee's forehead and chest suggested a reason other than drunkenness for his failure to swim to shore. The Board affirmed the administrative law judge's determination that the Section 20(c) presumption was not rebutted, as the relevant medical opinion stating that intoxication was the *primary* cause of death did not establish intoxication as the *sole* cause of death. *Birdwell*, 16 BRBS at 323 – 324.

We reject employer's contention that it rebutted the Section 20(c) presumption in this case. In support of its allegation that the administrative law judge erred in this regard, employer asserts that since claimant had undergone safety training, had been issued the appropriate safety equipment, and acknowledged using narcotics two days before his work accident, "the evidence in this case rules out all possible explanations of Claimant's fall other than he did not tie off his fall arrest equipment to a secure spot below the [boom] cut because of exhaustion and the fact that the methamphetamine he had taken two days earlier to increase his concentration had worn off." Employer's br. at 16. In addressing employer's contentions, the administrative law judge initially found that the finding of safety violations and issuance of citations to employer by OSHA following claimant's work accident establishes that claimant's job duties were not inherently safe but, rather, that claimant at the time of his injury was performing a dangerous task in unsafe conditions which were under the control of employer. Decision and Order at 19. Pursuant to these findings, the administrative law judge concluded that claimant's work duties in general could have been a reasonable cause of his accident and injury. *Id.*

The administrative law judge further found that, since Dr. McHan opined that claimant's drug screen results did not suggest that claimant was under the influence of narcotics at the time of his accident, and neither Dr. Robinson nor Dr. Barnhill offered an opinion as to whether claimant's intoxication was the sole cause of his accident and injury, the medical evidence of record does not provide substantial evidence to rebut the Section 20(c) presumption. Decision and Order at 20. *Compare Schwirse,* 42 BRBS at

103 (two doctors testified intoxication was the sole cause of claimant's fall). In addressing the lay testimony of record, the administrative law judge found that all of the statements of claimant's co-workers suggest that claimant was not acting under the influence of narcotics at the time of the accident, nor did claimant's co-workers suspect that claimant was under the influence of narcotics on the day of the accident. *Id.* The administrative law judge also found employer's contention that claimant was fatigued to be mere speculation since none of claimant's co-workers stated that claimant was fatigued and the record contains no evidence supporting this contention.[2] Based upon these findings, the administrative law judge concluded that employer did not produce substantial evidence that claimant's accident was due solely to his intoxication. Due to the lack of evidence that claimant's injury was due solely to narcotic intoxication, the administrative law judge properly found that employer did not rebut the Section 20(c) presumption. *Birdwell*, 16 BRBS 321. We therefore affirm the administrative law judge's finding that claimant's claim is not barred by Section 3(c), and the consequent award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2] Moreover, a finding that claimant's accident was caused, at least in part, by fatigue would actually undermine employer's position by supporting a conclusion that intoxication was not the sole cause of his accident.