BRB No. 09-0493

WILLIAM WARE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PARTNERS GET, INCORPORATED	)	DATE ISSUED: 02/26/2010
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

John D. Gibbons (The Gardner Firm), Mobile, Alabama, for claimant.

Allen E. Graham (Lyons, Pipes & Cook, P.C.), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-00726) of Administrative Law Judge Lee J. Romero 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On October 17, 2005, claimant slipped and fell about 8 to 10 feet while attempting to exit the hold of a ship at the Alabama State Docks. Claimant sustained injuries to his neck, back, and left forearm. Claimant underwent fusion surgery of the T2-T5 vertebrae

on October 28, 2005. Claimant's treating physician, Dr. Martino, opined on July 25, 2006, that claimant's back had reached maximum medical improvement. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from October 18, 2005 to July 30, 2006. Claimant sought continuing compensation for permanent total disability. 33 U.S.C. §908(a). Employer controverted the claim arguing, *inter alia*, that the claim is barred pursuant to Section 3(c) of the Act, 33 U.S.C. §903(c). Employer contended that the work accident was solely due to claimant's intoxication from marijuana. Following the accident, claimant was tested at the University of South Alabama Medical Center for drugs. The drug test was positive for marijuana metabolites. EX 4.

In his decision, the administrative law judge stated he would draw an adverse inference against claimant on questions of fact due to claimant's failure to appear at the hearing. The administrative law judge found that employer rebutted the Section 20(c) presumption, 33 U.S.C. §920(c), that the work accident was not occasioned solely by claimant's intoxication. Regarding the specific circumstances of the accident, claimant attempted to exit the hold of a ship at lunchtime, not by the approved route, but by climbing a ladder 8 to 10 feet, and then crossing over a non-work area under which there was the open space of the hold. *See* EXs 1 at 4; 22 at 47, 109. Claimant fell while attempting this crossing and landed in the hold. The administrative law judge found, based on his weighing of the entire record, that claimant's intoxication was the sole cause of the work accident. The administrative law judge relied on the circumstances of the accident in that claimant chose to exit the hold via this "extremely dangerous route," and he drew an adverse inference from claimant's failure to attend the hearing to find that there is no other reasonable explanation for the fall other than claimant's intoxication. Decision and Order at 19. Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's denial of the claim. Specifically, claimant contends that the administrative law judge erred in finding that employer rebutted the Section 20(c) presumption. Employer responds, urging affirmance of the administrative law judge's denial of the claim.

Section 3(c) provides that "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee...." This provision must be applied in conjunction with Section 20(c) of the Act, which states that, in the absence of substantial evidence to the contrary, it is presumed that the injury was not occasioned solely by the intoxication of the injured employee. Establishing rebuttal of the Section 20(c) presumption is a two-prong inquiry: employer must produce substantial evidence both that claimant was intoxicated and that the injury was solely caused by intoxication. *Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984). Proof of intoxication alone is not sufficient to rebut the presumption. *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57

(1986). If employer produces 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); *see also Del Vecchio v. Bowers,* 296 U.S. 280 (1935). The administrative law judge must then weigh the relevant evidence, pro and con, to determine if intoxication was the sole cause of the claimant's injury. *Del Vecchio,* 296 U.S. at 286-287; *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009).

The administrative law judge found that employer produced substantial evidence that claimant was intoxicated by marijuana at the time of his October 17, 2005 work injury. The administrative law judge credited the positive drug test for marijuana metabolites taken the day of the work accident and relied on claimant's inability to recall at his deposition whether or not he had smoked marijuana on the morning of the accident, drawing an adverse inference to find that claimant did smoke marijuana that morning. Decision and Order at 15-16, 18. The administrative law judge's finding that employer established that claimant was intoxicated on the day of his work injury is affirmed as it is supported by substantial evidence. *See Walker*, 645 F.2d at 174-176, 13 BRBS at 264-267; *see also Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

The administrative law judge next found that employer produced substantial evidence sufficient to rebut the Section 20(c) presumption that claimant's work injury was not occasioned solely by his marijuana intoxication. The administrative law judge relied on the circumstances of claimant's attempt to exit the hold via a dangerous route as opposed to taking the approved route. The administrative law judge found incredible claimant's explanation that using the hatch was "too strenuous" given the physical requirements of claimant's chosen route. The administrative law judge also relied on the absence of evidence indicating that the fall was the result of any mechanism or working condition other than intoxication, and he drew an adverse inference against claimant in this regard. Decision and Order at 18-19.

We agree with claimant that the administrative law judge erred by concluding that employer produced substantial evidence sufficient to rebut the Section 20(c) presumption that claimant's work injury was not occasioned solely by marijuana intoxication. The administrative law judge's reliance on the absence of evidence indicating that the fall was the result of any mechanism or working condition other than intoxication improperly placed the burden on claimant to produce evidence that intoxication was not the sole cause of the fall rather than on employer to show that it was. *See Shelton v. Pacific Architects & Engineers, Inc.*, 1 BRBS 306 (1975). In *Shelton*, the Board held that in the absence of direct evidence that the claimant's intoxication caused him to fall from a third floor window, the administrative law judge could not draw an inference that the intoxication was the sole cause of the fall. In *Sheridon*, 18 BRBS at 57, the Board held

that the administrative law judge erred in finding Section 20(c) rebutted based on proof of intoxication alone. The Board held that, even if drunkenness is the primary cause of the accident, employer must present evidence that discredits other possible contributory causes and permits no other rational conclusion but that claimant's intoxication was the sole cause of injury.[1] *Sheridon*, 18 BRBS at 60.

Thus, the administrative law judge erred in relying on an adverse inference against claimant based on his failure to testify as support for his conclusion that employer met its burden of producing substantial evidence to rebut the presumption that intoxication was not the sole cause of the work accident. The adverse inference rule is an evidentiary rule providing that when a party has relevant evidence within his control that he fails to provide, that failure gives rise to an inference that the evidence is unfavorable to him. *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516 (6th Cir. 2008); *Singh v. Gonzales*, 491 F.3d 1019 (9th Cir. 2007). This rule, therefore, is limited to findings of fact related to evidence within a party's control. It is not applicable to conclusions of law. *See BNSF Ry. Co. v. Brotherhood of Maintenance*, 550 F.3d 418, 424 (5th Cir. 2008). In this case, the administrative law judge erred by applying the adverse inference rule to support the legal conclusion that employer produced substantial evidence to rebut the Section 20(c) presumption that intoxication was not the sole cause of claimant's work accident; claimant's failure to present evidence cannot meet employer's burden of production. In this case, employer offered no medical or other evidence that marijuana use was solely responsible for the work accident, no evidence interpreting the drug test results to show the extent of claimant's marijuana intoxication, and no evidence that marijuana intoxication was responsible for claimant's poor judgment in exiting the hold via a dangerous route. As employer thus failed to produce any evidence that claimant's marijuana use was the sole cause of his accident, it failed to rebut the Section 20(c) presumption. As the presumption that intoxication was not the sole cause of claimant's work accident has not been rebutted, the denial of benefits premised on application of Section 3(c) must be reversed. The denial of benefits is therefore vacated, and the case is remanded for the administrative law judge to address the remaining issues in dispute.

[1] The record shows that claimant is receiving disability benefits from Social Security for paranoid schizophrenia and is prescribed Stellazine for this condition. CX 4 at 3-4; EXs 2 at 81, 10 at 2, 11; 22 at 23-24, 79. Employer presented no evidence that this pre-existing condition did not contribute to claimant's decision to exit the hold by an unsafe route. *Cf. Schwirse*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009) (employer produced substantial evidence in the form of doctors' opinions that intoxication was the sole cause of claimant's fall and testimony that the area where claimant fell was free from hazards).

Accordingly, the administrative law judge's denial of the claim is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge