BRB No. 08-0611

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| G.S. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| MARINE TERMINALS CORPORATION | ) | |
| | ) | |
| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | DATE ISSUED: 12/19/2008 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| ILWU-PMA WELFARE PLAN | ) | |
| | ) | |
| Intervenor-Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and Amended Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Robert E. Babcock (Babcock/Haynes LLP), Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Amended Decision and Order Awarding Benefits (2006-LHC-1829) of Administrative Law Judge Anne Beytin Torkington 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an A-registered longshoreman, was working as a cone man on January 8, 2006; he had been consuming beer and whiskey throughout the morning, at lunch and in the early afternoon. Although claimant has no clear memory of the incident, he believes that upon completing his job, he was sitting in a parked van drinking when he exited the vehicle to relieve himself over the bull rail at employer's dock. Claimant fell over the rail onto a concrete and steel ledge approximately six feet below. CX 3. Claimant suffered a severe scalp laceration to his right temple.[1] EX 3.

In her Decision and Order Awarding Benefits, the administrative law judge found that claimant's injury occurred in the course of his employment and that compensation is not barred by application of Section 3(c) of the Act, 33 U.S.C. §903(c). Accordingly, she awarded claimant compensation for temporary total disability from January 9 through May 15, 2006, the stipulated date of maximum medical improvement, as well as compensation for facial disfigurement, 33 U.S.C. §908(c)(20), and medical benefits.

Employer appeals, contending the administrative law judge erred in finding that claimant's injury occurred in the course of his employment, that employer failed to rebut the Section 20(c) presumption, and that claimant's entitlement to compensation is not barred pursuant to Section 3(c). Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief.

We first address employer's contention that claimant's injury did not occur in the course of his employment because claimant's conduct (drinking) was an express violation of a company rule. Employer's Rule 509 states:

> No employee shall be present on the job while under the influence of intoxicating liquor, or drugs of a stimulating or depressive nature which affect his ability to carry out his obligations as required under the Pacific Coast Longshore and Clerks' agreement.

[1] Claimant was taken by ambulance to the hospital where he was also diagnosed with acute alcohol intoxication and cannabis ingestion. EX 3.

EX 2 (emphasis added). The administrative law judge found, in a short discussion, that the injury arose in the course of claimant's employment because "the fact that an activity is not authorized is not sufficient alone to remove an injury from the course of employment. *Willis v. Titan Contractors,* 20 BRBS 11 (1987)." Decision and Order at 5. The administrative law judge found that employer did not put forth any evidence other than the rule violation to support its contention that the injury was not in the course of claimant's employment. *Id.*

Under the Act, an injury occurs in the course of employment if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Durrah v. Washington Metropolitan Area Transit Authority,* 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Boyd v. Ceres Terminals,* 30 BRBS 218 (1997). The Section 20(a), 33 U.S.C. §920(a), presumption applies to this question, and thus, the administrative law judge properly put the burden on employer to produce substantial evidence that claimant's injury did not occur in the course of employment. *See, e.g., Wilson v. Washington Metropolitan Area Transit Authority,* 16 BRBS 73 (1984).

It is undisputed that claimant's injury occurred within the time and space boundaries of his employment as claimant's accident occurred on employer's premises during the work day. *See Mulvaney v. Bethlehem Steel Corp*., 14 BRBS 593 (1981). Claimant had finished his work, but the work day was not over. Claimant had been drinking during the work day, and continued to drink while he was sitting in a van near the docks; this van is used to transport employees around the docks and to the employee parking lot. The van was parked next to the bull rail. Claimant's injury occurred when he fell over the bull rail at employer's dock while urinating. HT at 29.

Generally, employees who, within the time and space limits of their employment, act to accommodate personal comforts do not thereby leave the course of employment. In *Durrah,* 760 F.2d 322, 17 BRBS 95(CRT), the United States Court of Appeals for the District of Columbia Circuit held that the claimant, who had left his guard booth unattended contrary to an employment rule to get a soda and who fell on the stairs, was injured in the course of his employment. Thus, in this case, the mere fact that claimant was injured while urinating does not take the injury outside the course of his employment. *See Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968).

In *Willis*, 20 BRBS 11, cited by the administrative law judge, the claimant's injury occurred during work hours while he was boarding employer's crew boat from a barge moored in the ship channel. The administrative law judge, however, credited testimony that the claimant was neither authorized nor employed to use the crew boat for work, had no work duties associated with the crew boat or the barge, and was employed solely to

operate heavy equipment on the mainland. The Board held that the administrative law judge erred in relying on these facts to sever the connection between the claimant's injury and his employment. The Board stated that the testimony indicated only that claimant was not authorized by employer to use the crew boat and did not establish that the claimant was engaged in personal business at the time of his injury. The Board concluded, "The fact that an activity is not authorized is not sufficient alone to remove an injury from the course of employment." *Willis*, 20 BRBS at 13; *see also Mulvaney*, 14 BRBS at 597-598 (employer did not rebut Section 20(a) presumption where there was no evidence: (1) why claimant was using the planer he was unauthorized to use; (2) who turned the planer on; (3) how claimant's arm got caught in the planer).

The administrative law judge's finding that claimant's violation of the alcohol rule did not, *per se*, remove him from the course of his employment is in accordance with law. Violations of rules implicate "fault," and the statute explicitly states that "Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. §904(b). In a case arising under the New York workers' compensation law, the New York Court of Appeals addressed the issue of rules violations in the context of "course of employment." In *Merchant v. Pinkerton's Inc.*, 407 N.E.2d 443 (N.Y. 1980), the employee was a security guard. He was found dead on the employment premises of an accidentally self-inflicted gunshot wound. One of employer's rules prohibited employees from carrying personal firearms on the job. A lower tribunal denied death benefits because of the decedent's unauthorized carrying of a gun. In holding the death compensable, the Court of Appeals discussed the "work rule" cases. The court stated,

> there is a crucial distinction between the job the claimant has been hired to perform and the manner in which the employee is to accomplish that task. Where the disobedience of a work rule results in the employee overstepping the boundaries defining the ultimate work to be done, the prohibited act is outside the course of employment and any claim for compensation arising therefrom will be denied. But when the misconduct involves a violation of the employer's regulations or prohibitions relating to the method of accomplishing the ultimate work, however strictly enforced those regulations may be, the act remains within the course of employment. In such a case, disobedience of the prohibition does nothing more than establish fault on the part of the injured employee. Since fault concepts generally are immaterial to compensation law, violation of a work rule relating to the manner in which the job is to be accomplished does not result in an injured employee forfeiting the right to compensation. . . .

*Merchant*, 407 N.E.2d at 446 (internal citations omitted). This concept was illuminated in an Arizona case dealing with an intoxicated employee. *Ortiz v. Clinton*, 928 P.2d 718 (Ariz. Ct. App. 1996). The court stated,

> [U]nder workers' compensation law, if the employee's misconduct violates a rule relating to how the employee should perform his duties, the violation does not remove the employee from the course of his employment. . . Only if the rule limits the "scope, ambit, or sphere of work which the employee is authorized to do," does the violation take the employee outside the course of his employment. . . .
>
> [Employer's] rules against drinking prohibited employees from working in an impaired or intoxicated condition. These rules did not change the scope of [the claimant's] employment--his job duties--but instead dictated the manner--sober--in which he was to perform his duties. Under these principles, [claimant] remained within the scope of his employment even though his conduct violated [employer's] rules.

*Ortiz*, 928 P.2d at 723. *Ortiz* is similar to the present case. Employer's rule prohibits an employee from being present on the job while under the influence of intoxicating liquor. The rule does not change the scope of claimant's employment, but dictates that he was to be sober when he performed his job. Thus, his violation of the "sober rule" alone does not take him out of the course of his employment. *Id.*

However, notwithstanding the general principle that fault is irrelevant in determining the compensability of an injury, the Act bars recovery if "the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(c); *see* 33 U.S.C. §920(c). The *Larson* treatise states that if a workers' compensation statute bars the recovery of compensation due to the employee's intoxication, a finding that the bar is applicable removes the employee from the course of his employment. *See* A. Larson and L. Larson, *Larson's Workers' Compensation Law*, ch. 36 (2008).[2] Analogously, the compensability of injuries due to fights between co-workers are not analyzed in terms of "course of employment," but in terms of the Act's exclusion at Section 3(c) for injuries due to the

[2] Statutory variations on a compensation bar due to intoxication include: (1) injury due to or caused by intoxication; (2) injury occasioned by intoxication; (3) intoxication is proximate cause of injury; (4) intoxication is sole cause of injury; (5) intoxication is primary cause of injury; (6) intoxication is partial cause of injury. A. Larson and L. Larson, *Larson's Workers' Compensation Law*, §36.03.

willful intention of the injured employee to injure or kill another. *See, e.g., Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J., dissenting); *Green v. Atlantic & Gulf Stevedores, Inc*., 18 BRBS 116 (1986); *O'Connor v. Triple A Machine Shop*, 13 BRBS 473 (1981); *see also* 33 U.S.C. §920(d). Thus, in this case, we reject employer's contention that the administrative law judge erred in finding that claimant's violation of employer's rule alone did not remove him from the course of his employment. *Durrah,* 760 F.2d 322, 17 BRBS 95(CRT). The compensability of claimant's injury turns on the applicability of Section 3(c).

Therefore, we next address employer's contention that the administrative law judge erred in finding employer failed to rebut the presumption at Section 20(c) of the Act and that Section 3(c) is inapplicable. Section 3(c) of the Act, 33 U.S.C. §903(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), 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. 33 U.S.C. §920(c). 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. Claimant bears the burden of persuading the administrative law judge that his intoxication was not the sole cause of his injury. *See, e.g., Sistrunk v. Ingalls Shipbuilding, Inc.,* 35 BRBS 171 (2001); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, claimant conceded he had been consuming alcohol throughout the day and was intoxicated at the time of the accident.[3] HT at 30-31, 38-39. Claimant did not recall any conditions which may have caused his fall, nor did he even recall the fall itself.[4] HT at 58. Drs. Burton and Jacobsen stated that claimant's intoxication was the sole cause of his fall. HT at 109; RX 1 at 37-38. Dr. Brady testified that claimant was impaired though still functional at the time of his fall and that he could not conclude that claimant's intoxication was the sole cause of the accident because workers trip and fall

[3] An estimate of claimant's blood alcohol level at the time of the accident was a minimum of .22. HT at 78, 101; RX 1.

[4] Claimant testified that he did not remember there being any hazardous conditions in the area other than a cone, the existence of which was not fully established. HT at 57-58.

for any of a number of reasons. HT at 85, 90, 92. Dr. Brady noted that claimant had worked all day without incident. *Id.* at 87. Dr. Brady stated he could not rule out other causes of the fall. *Id.* at 89.

We agree with employer that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 20(c) presumption. The administrative law judge found that employer failed to rebut the presumption because the medical evidence provided was based on mere speculation. This finding cannot be affirmed. Dr. Burton, a Board-certified specialist in occupational medicine and toxicology, testified that "alcohol and alcohol alone" was responsible for claimant's fall. HT at 109. Dr. Jacobsen, a specialist Board-certified in addiction medicine, testified that intoxication was the sole cause of claimant's fall. RX 1 at 37-38. Dr. Jacobsen noted that claimant fell from a level surface and that there was no rain or other adverse condition at the time of the fall. The opinions of these physicians, moreover, is based on the results of claimant's blood tests at the time of his admission to the hospital and supported by claimant's own testimony that he was inebriated to the point of being unable to remember the incident at all. In addition, the testimony of Brian Yockey, Marine Manager at the terminal supports the physicians' opinions. Mr. Yockey presented photographs of the area and testified that there were no slippery substances or surfaces in the area, that the asphalt was in good condition, and that he had received no reports of tripping hazards or any dangerous conditions that day. HT at 133-136. This evidence that alcohol intoxication was the sole cause of claimant's fall is sufficient to establish rebuttal of the Section 20(c) presumption as a matter of law. *See O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). We, therefore, reverse the administrative law judge's finding that rebuttal was not established. *Walker*, 645 F.2d 170, 13 BRBS 257 (Section 20(c) presumption rebutted where doctor stated alcohol consumption was sole cause of death and that an alleged trauma could not have been a cause of death).

The administrative law judge further stated, assuming, *arguendo*, rebuttal was established, that upon weighing the record as a whole, she is "unable to find that Claimant's intoxication was the sole cause of the accident" due to the absence of direct proof of claimant's actions which caused his fall; the administrative law judge therefore stated that claimant's injury is compensable. Decision and Order at 19. We cannot affirm this conclusion. The administrative law judge did not acknowledge that, once the Section 20(c) presumption is rebutted, the presumption falls from the case, and claimant bears the burden of proving that his intoxication was not the sole cause of his injury. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). It is not employer's burden to prove on the record as a whole that intoxication was the sole cause of claimant's injury. *Id.* The administrative law judge also did not weigh the relevant evidence or assess the merits of the physicians' opinions based on their credentials or the reasoning they provided. *See generally Whitmore v. AFIA*

*Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988). In addition, the administrative law judge did not weigh the testimony of Mr. Yockey. Moreover, the administrative law judge inappropriately speculated that the fall may have been due to claimant's being distracted, careless, or in a hurry to relieve himself, without considering that such factors may have been directly related to claimant's alcohol consumption. Claimant bears the burden of establishing that his intoxication was not the sole cause of his injury and the administrative law judge may not infer without a basis in the record that some other factor caused claimant to fall. *See generally General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991) (administrative law judge permitted to draw reasonable inferences from the record evidence).

As the administrative law judge did not properly address the record as a whole, placing the burden of proof on claimant, and summarily stated that intoxication was not the sole cause of claimant injury, we must vacate this conclusion and remand the case for further findings. The administrative law judge must discuss and weigh the relevant evidence, including the degree of claimant's intoxication, and explain the basis for her decision to credit particular evidence, bearing in mind claimant's burden of establishing with substantial evidence that, more likely than not, his fall was not due solely to his intoxication.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded for reconsideration consistent 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

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JUDITH S. BOGGS
Administrative Appeals Judge