BRB No. 11-0119

GARY SCHWIRSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: 09/22/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand 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 (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (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).

This case is before the Board for the second time. To recapitulate, 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 was taken by ambulance to the hospital where he was diagnosed with a severe scalp laceration to his right temple, as well as with acute alcohol intoxication and cannabis ingestion. EX 3.

In her initial decision, 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, 33 U.S.C. §908(b), 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 appealed the award of benefits to the Board.

In its decision, the Board affirmed the administrative law judge's finding that claimant's violation of employer's "no alcohol" rule did not, *per se*, remove him from the course of his employment. *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009). However, the Board determined that the administrative law judge erred in finding employer failed to rebut the presumption at Section 20(c), 33 U.S.C. §920(c), that claimant's injury was not occasioned solely by his intoxication. Based on the evidence submitted by employer, the Board reversed this finding as a matter of law. *Schwirse*, 42 BRBS at 103. The Board also held that it could not affirm the administrative law judge's finding, assuming, *arguendo*, rebuttal was established, that claimant's intoxication was not the sole cause of his injury accident, based upon the record as a whole. *Schwirse*, 42 BRBS at 103-104. The Board remanded the case for the administrative law judge to discuss and weigh the relevant evidence concerning whether intoxication was the sole cause of claimant's injury. *Schwirse*, 43 BRBS at 108-109. The Board also rejected claimant's contention that the Board erred in focusing on intoxication as the sole cause of claimant's fall over the railing, rather than as the sole cause of claimant's injury. The Board stated that if intoxication was the sole cause of claimant's fall, then intoxication also was the sole cause of claimant's injury. *Id*. at 109.

On remand, the administrative law judge found that employer produced sufficient evidence, in the form of the opinions of Drs. Burton and Jacobsen, the testimony of Mr. Yockey, and photographs of the accident site, to establish that claimant's injury was due solely to his intoxication. Decision and Order on Remand at 6-7. The administrative law judge also noted the testimony of claimant's medical witness, Dr. Brady, who could not find any factor other than alcohol that possibly contributed to the fall. The administrative law judge concluded that the preponderance of the evidence establishes that claimant's injury was caused solely by his intoxicated condition and that claimant, therefore, is not entitled to compensation pursuant to Section 3(c).

On appeal, claimant contends that, pursuant to *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986), employer must "rule out" all other possible causes of injury before the intoxication defense of Section 3(c) is proven, based on the record as a whole, and that, under this "ruling out" standard, employer did not present substantial evidence to support the administrative law judge's conclusion that compensation is barred under Section 3(c). Claimant also submits that the Board should re-address its rejection of his argument that the Board erred in focusing on intoxication as the sole cause of claimant's fall over the railing, rather than also considering the impact of the fall itself as causing his injuries. Employer responds in support of the administrative law judge's decision.

Section 3(c) of the Act 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. Once, as here, 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). Because Section 3(c) is an affirmative defense to the claim, the burden of proof is on employer to establish, based on the record as a whole, that the injury was occasioned solely by the intoxication of the employee. *See Schwirse*, 43 BRBS 108-109; *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994) (burden of proof is on the proponent of a rule or order).

We reject claimant's contention that employer's burden, after establishing rebuttal of the Section 20(c) presumption, is to "rule out" all other possible causes of injury other than intoxication.[1] In *Greenwich Collieries*, 512 U.S. at 278, 28 BRBS at 47(CRT), the

[1]As claimant notes, the Board, in *Sheridon*, stated that "employer has the heavy burden of virtually ruling out all other possible causes of injury before the intoxication defense is proven." *Sheridon*, 18 BRBS at 59. The Board stated that "intoxication will

United States Supreme Court concluded that the burden of proof provision in the Administrative Procedure Act (APA), 5 U.S.C. §556(d), applies to claims arising under the Act, that the APA's reference to "burden of proof" means the burden of persuasion, and that the APA requires that the party with the burden of proof prove its case by a preponderance of the evidence. In *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 174 (1996), after remand from the Supreme Court, the Board stated that the preponderance of the evidence standard requires that the party having the burden of persuasion prove its position by more convincing evidence than the opposing party's evidence. *See also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9, 31 BRBS 54, 61 n.9(CRT) (1997) (the preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact may be found, but does not determine what facts must be proven as a substantive part of a claim or defense). With rebuttal having been established in this case as a matter of law, *Schwirse*, 42 BRBS at 103, employer, at this juncture, bore the burden of persuading the administrative law judge, under the preponderance of the evidence standard, that its evidence is the more convincing. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT); *Schwirse*, 43 BRBS 108; *Santoro*, 30 BRBS 171.

Employer, in this case, must prove, by more convincing evidence than claimant's evidence, that claimant's injury was "occasioned solely" by his intoxication. *See* 33 U.S.C. §§903(c), 920(c). The administrative law judge found that employer presented evidence through medical opinions and records, photographs, and the testimony of its marine manager, Mr. Yockey, that claimant was not only severely intoxicated at the time of his fall, but that the route to the rail was free of any tripping or slipping hazards. The administrative law judge acknowledged that claimant put forth, in contrast to employer's evidence, the testimony of his expert witness, Dr. Brady, that trip and fall accidents occur even where intoxication is not a contributing factor, and that claimant argued that Dr. Brady's opinion, in conjunction with Mr. Yockey's general testimony that there were "a lot of orange cones around the dock," HT at 135, establishes that there is no direct proof that claimant's injury was "occasioned solely" by his intoxication. Addressing this evidence, the administrative law judge instead credited the testimony of Drs. Burton and

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defeat a claim only when all the evidence and reasonable inferences flowing therefrom allow no other rational conclusion than that the intoxication was the sole cause" of the injury. *Id.* at 60. However, the Board added that employer "need not negate every hypothetical cause." *Id.*; *see also Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170, 13 BRBS 257 (3d Cir. 1981). The dispositive issue in *Sheridon*, moreover, was whether the employer offered substantial evidence to rebut the Section 20(c) presumption as the administrative law judge had failed to give claimant the benefit of that presumption.

Jacobson that intoxication was the sole cause of claimant's fall,[2] HT at 109; EX 1 at 37-38, as well as Mr. Yockey's specific testimony 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.[3] HT at 58, 78, 101, 133-136.

It is well-established that, in arriving at her decision, the administrative law judge is entitled to evaluate the credibility of all witnesses, to weigh the evidence, and to draw her own inferences and conclusions from the evidence, and that the Board is not empowered to reweigh the evidence. *See Hawaii Stevedores, Inc. v. Ogawa,* 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge rationally found employer's evidence more convincing than claimant's evidence and that employer therefore established, by a preponderance of the evidence, that claimant's injury was occasioned solely by his intoxication. *Walker,* 645 F.2d at 177, 13 BRBS at 267. As it is supported by substantial evidence, is rational, and is in accordance with law, we affirm the administrative law judge's finding that claimant's compensation is barred pursuant to Section 3(c) of the Act. *Id.*

We also again reject claimant's contention that the focus was misplaced on intoxication as the sole cause of claimant's fall over the railing, rather than as the sole cause of claimant's injury. The Board stated that if intoxication was the sole cause of claimant's fall, then intoxication also was the sole cause of claimant's injury.[4] *Schwirse*,

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[2]The administrative law judge observed that, in contrast to the specific opinions of Drs. Jacobsen and Burton that intoxication was the only cause of claimant's fall and resulting injury, claimant's expert, Dr. Brady, could not provide an opinion on whether alcohol was the sole cause of injury. Dr. Jacobsen testified on deposition that claimant had a blood alcohol level of .22, a level which causes one to have difficulty walking a straight line and impairment of depth perception. Dr. Jacobsen opined that as claimant fell from a level surface and as it was not raining, claimant's intoxication was the sole cause of his fall over the rail. EX 1 at 20, 25, 37-38. Dr. Burton testified that claimant's level of intoxication "significantly impairs" one and that "alcohol, and alcohol alone" caused claimant's fall. HT at 104, 109-110.

[3]The administrative law judge rationally found that the totality of Mr. Yockey's testimony undermines rather than supports claimant's argument that he may have tripped over a safety cone, slipped on the pavement, or stumbled over the rail.

[4]Claimant does not assert that any event other than the fall caused his injuries nor does the record support any such conclusion.

43 BRBS at 109, *citing Shearer v. Niagara Falls Power Co.*, 150 N.E. 604 (N.Y. 1926). As the Board fully addressed this contention, and claimant has not cited any intervening case law suggesting that the Board's decision was in error, nor has claimant established that the Board's decision was "clearly erroneous," the Board's decision on this issue constitutes the law of the case, and we decline to further address claimant's contention in this regard. *See, e.g., Irby v. Blackwater Security Consulting*, 44 BRBS 17, 20 (2010).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

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