U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0384

JERRY A. JARRETT, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Dec. 18, 2017
	)	
C P & O, LLC	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
COOPER/T. SMITH STEVEDORING	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Compensation Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for Cooper/T. Smith Stevedoring and American Longshore Mutual Association, Limited.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Compensation Benefits (2013-LHC-01253) of Administrative Law Judge Alan L. Bergstrom 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 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 alleged that he injured his neck, shoulders and low back at work on March 6, 2013, when the shuttle truck he was driving was involved in a collision with another shuttle truck. Claimant was terminated by C P & O (employer) for a third driving accident within a four-year period.[1] EX 28 at 6. He sought compensation for temporary total disability from March 11, 2013 to March 3, 2014, temporary partial disability from March 4, 2014 to September 8, 2014, and ongoing permanent partial disability from September 9, 2014. Employer joined Cooper/T. Smith Stevedoring (Cooper) because claimant had sustained three prior work injuries with Cooper. Claimant injured his low back on October 28, 1998, his neck, back and left shoulder on December 9, 1999, and his low back on January 12, 2003. Decision and Order at 3.

In his decision, the administrative law judge addressed employer's contention that the claim is barred under Section 3(c) of the Act, 33 U.S.C. §903(c), because claimant intended to injure himself by placing his shuttle truck in a position to be struck by another truck. The administrative law judge found claimant entitled to the Section 20(d) presumption, 33 U.S.C. §920(d), that he did not intend to injure himself, but that employer rebutted the presumption. Decision and Order at 62-64. The administrative law judge concluded that claimant failed to establish by a preponderance of the evidence that his alleged injuries were not occasioned by his willful intent to injure himself. He found the claim barred under Section 3(c) and, therefore, did not address the remaining issues. *Id*.

[1] Claimant had prior accidents on August 1, 2012 and October 14, 2012. EX 28 at 1-2. Authorization to terminate claimant for cause was provided for in the Collective Bargaining Agreement between claimant's union and the employer. Decision and Order at 63.

On appeal, claimant challenges the denial of the claim under Section 3(c). Employer did not respond to this appeal.[2] Cooper responds, urging affirmance.

Section 3(c) of the Act provides in pertinent part:

> No compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. §903(c); *see O'Connor v. Triple A Machine* Shop, 13 BRBS 473 (1981) (Miller, J., concurring in part and dissenting in part); *Kielczweski v. The Washington Post Co.*, 8 BRBS 428 (1978); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977). Section 20(d) of the Act affords a claimant the benefit of a presumption "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(d); *see Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring and dissenting). To rebut the Section 20(d) presumption, employer must produce substantial evidence that claimant's injury was due to his willful intent to injure himself. *See generally Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013). Upon production of evidence sufficient to support a finding of intentional, self-inflicted injury, the presumption falls out of the case and the case must be decided on the record as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *see Schwirse*, 736 F.3d 1165, 47 BRBS 31(CRT).

The accident, which occurred at 4:30 a.m., was captured on video. Officer Paul Dallas, the port authority police officer who investigated it, described the accident: Ms. Oliver's shuttle truck was stopped in the proper place to await its turn at the crane; claimant attempted to drive his shuttle truck around Ms. Oliver's on the left, just as her truck started to slowly roll forward; claimant was driving at an excessive speed; the right back side of claimant's truck struck the left cab of Ms. Oliver's truck, as he was attempting to go around her; and the pavement was wet, as it had been raining. EX 11. The police officer wrote the incident up as an "accident" due to the fault of both drivers. *Id.*; *see* Tr. at 68-69. He testified that vehicle accidents occur frequently at the port. Tr. at 68. While initially denying injury, claimant sought treatment the following day, the same day his union president was notified by facsimile that claimant's employment was terminated for a third accident while operating a work vehicle.[3] *Id.* at 126-127; EX 28 at 6.

[2] By Order dated July 17, 2017, the Board granted employer an extension of time to file its response brief.

[3] Claimant remained eligible to work for the other employers at the Hampton Roads terminal. Tr. at 103, 180-181.

The administrative law judge gave claimant the benefit of the Section 20(d) presumption but found that employer rebutted it. He found that claimant had years of experience driving shuttle trucks without having a collision; he "deliberately and knowingly" cut off the truck driven by Ms. Oliver, which was in the proper position; and, he was driving at excessive speed. Decision and Order at 64. The administrative law judge found that claimant's intent to injure himself was further evident because the proper pick-up rotation among the three shuttle truck drivers assigned to the same crane had been observed throughout the shift. *Id*. The administrative law judge credited evidence that shuttle truck drivers receive extensive training and that practical operating procedures are prescribed, such as following behind the shuttle truck in front, making all turns at 90 degrees, looking in all directions before moving, and driving at a slow speed. *Id*.; *see* Tr. at 47-48, 80, 145-147, 160, 166-167. The administrative law judge credited claimant's testimony that he had received shuttle truck training, was cognizant of his work duties that day, and was aware that Ms. Oliver was waiting to pick up off-loaded containers. Decision and Order at 64; *see* Tr. at 80-81. The administrative law judge noted that claimant further testified that, instead of waiting behind Ms. Oliver's shuttle truck, he passed her truck at maximum speed and turned in front of her at a distance of five to eight feet and at less than a 90 degree angle. Decision and Order at 64; *see* Tr. at 120-122. The administrative law judge also relied on the fact that claimant was an "experienced" litigant, who had filed four previous claims under the Act and was aware that he could claim benefits based on the aggravation rule. Decision and Order at 63-64.

The administrative law judge's finding that employer rebutted the Section 20(d) presumption must be reversed as a matter of law. First, there is no direct evidence that claimant intended to injure himself. Second, the facts found by the administrative law judge may establish that claimant was negligent, but such conduct does not preclude recovery under the Act pursuant to Section 3(c). Indeed, pursuant to Section 4(b) of the Act, "Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. §904(b); *N.R.* [*Rogers*] *v. Halliburton Services*, 42 BRBS 56 (2008); *see generally Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982). Contributory negligence is not a defense to employer's liability. *Smoot Sand & Gravel Corp. v. Britton*, 152 F.2d 17 (D.C. Cir. 1945) (claimant injured while riding on a dump truck's running board covered). In *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940), the court observed that the Act "is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, [or] illegality." *Id.*, 112 F.2d at 17. Thus, claimant's knowledge of the rules for operating a shuttle truck, and negligent violation thereof, cannot establish he intended to injure himself.

Moreover, the other evidence on which the administrative law judge relied to find "intent" cannot support the inferences he drew. The administrative law judge's finding

that intent was demonstrated by claimant's years of prior operation of shuttle trucks without collision is belied by the evidence that claimant was terminated from further employment by employer due to his having a third vehicle accident within seven months.[4] EX 28 at 1-2, 6. In addition, the police report cannot support a finding that claimant intended to injure himself. Officer Dallas testified that Ms. Oliver's shuttle truck drifted forward prior to the accident, and he opined that both claimant and Ms. Oliver were at fault. Tr. at 68-69; *see also* EX 11. Ms. Oliver was also "written-up" by employer for the accident. Tr. at 39-42. Taken in isolation or as a whole, and in light of Section 4(b) of the Act, the record evidence cannot support a conclusion that employer offered substantial evidence that claimant willfully intended to injure himself.[5] *See generally Jackson*, 32 BRBS at 74. The administrative law judge's finding that employer rebutted the Section 20(d) presumption is reversed. Therefore, claimant's claim is not barred by Section 3(c) of the Act.

Accordingly, the administrative law judge's denial of the claim pursuant to Section 3(c) is reversed. The case is remanded for the administrative law judge to resolve the remaining issues.

SO ORDERED.

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

[4] The other accidents apparently did not involve shuttle trucks. In view of these accidents and the presumption afforded claimant, the absence of a prior accident while driving a shuttle truck cannot support the finding that claimant intended to injure himself.

[5] We reject the administrative law judge's reliance on the fact that claimant had filed prior claims under the Act to insinuate that claimant was aware of the "benefit" of sustaining an aggravating injury. Decision and Order at 63-64. The mere fact that claimant is aware of his right to seek compensation and exercised that right by filing claims is not evidence of intent to injure himself. The parties stipulated that claimant sustained work-related injuries in 1998, 1999 and 2003. Claimant filed a claim for medical benefits in 2008. The administrative law judge awarded medical benefits for claimant's back condition, finding it due to the natural progression of the 2003 injury with Cooper. *Id.* at 3, 63 n.25.

JONATHAN ROLFE
Administrative Appeals Judge