BRB No. 00-0775

JOHN W. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING & TERMINAL COMPANY	)	DATE ISSUED: April 6, 2001
	)	
and	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Medical Treatment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Edward S. Mallow, Jacksonville, Florida, for claimant.

Mary Nelson Morgan (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McATEER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer/Carrier appeals the Decision and Order Awarding Compensation and Medical Treatment (99-LHC-2376) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The parties stipulated that claimant sustained a work-related injury to his knee on

September 11, 1998, when he slipped off the steps of the hustler he was exiting. Within two hours following his injury, claimant was tested for illegal drugs. This test was positive for marijuana and cocaine. Dr. Chapa stated that claimant's drug levels were two times the threshold level for marijuana and 11 times the threshold level for cocaine, Tr. at 38-39, and he therefore judged that claimant had ingested the drugs within 12 to 24 hours. *Id.* at 45. He stated that the cocaine result was especially significant in that cocaine is virtually undetectable 48 to 72 hours after ingestion/inhalation, whereas marijuana can be detected for many days after inhalation. *Id.* Dr. Chapa stated he is "certain" that the level of drugs in claimant's system was at least a "substantial" factor in claimant's accident, as the drugs would have impaired claimant's judgment and balance. *Id.* at 46. He could not state, however, within a reasonable degree of medical certainty, that the drugs were the sole cause of claimant's accident. *Id.* at 58. Claimant admitted smoking marijuana rolled in cocaine, but testified the last time he had done so was two nights before the injury. *Id*. at 21.

The administrative law judge found that employer did not establish that intoxication was the sole cause of claimant's injury, pursuant to Sections 3(c) and 20(c) of the Act, 33 U.S.C. §§903(c), 920(c). He therefore held employer liable for compensation and medical benefits.[1] Employer appeals, contending 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).

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

[1]The administrative law judge did not enter a specific award to claimant, as the parties agreed to limit the hearing to the intoxication issue. Tr. at 29. Claimant's counsel stated at the hearing that if the claim is not barred by Section 3(c), then employer would pay benefits due. *Id.* Technically, employer's appeal is of an interlocutory order, as the administrative law judge's decision does not specifically award benefits. *See* 33 U.S.C. §919(c); 20 C.F.R. §702.348. Nonetheless, we will decide the appeal. *See Huff v. Mike Fink Restaurant*, 33 BRBS 179, 181 n.3. (1999).

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 proving that no other cause contributed to the injury; thus, the intoxication defense will defeat a claim when the evidence and reasonable inferences flowing therefrom allow for no other rational conclusion than that the claimant's intoxication was the sole cause of his injury. *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986). Where employer proffers substantial rebuttal evidence, the presumption falls from the case. *See Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170, 173, 13 BRBS 257, 262 (3d Cir. 1981). At this point, Section 3(c) may apply to bar recovery if the administrative law judge, based on the record as a whole, finds that the intoxication defense is proven. *See Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984).

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 of the employer's tugs and barges, 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. The mere fact that it established that claimant was intoxicated is insufficient to establish that intoxication was the sole cause of the accident. *Sheridon*, 18 BRBS at 60. Moreover, contrary to employer's contention, Dr. Chapa's opinion is insufficient to rebut the Section 20(c) presumption. While employer is correct that it need not negate every hypothetical cause of an accident, *Walker,* 645 F.2d 170, 13 BRBS 257,[2] under Section 20(c), employer bears the

[2]In *Walker,* 645 F.2d 170, 13 BRBS 257, the employer presented medical evidence which eliminated a rational basis for attributing the employee's death due to asphyxiation to anything except intoxication. In *Walker*, there were only two

burden of presenting substantial evidence that permits no other rational conclusion for the accident but intoxication. *Sheridon*, 18 BRBS at 60. In the instant case, Dr. Chapa stated that he is "certain" that the level of drugs in claimant's system was at least a "substantial" factor in claimant's accident, as the drugs would have impaired claimant's judgment and balance. Tr. at 46. He stated, however, that the drugs were not the sole cause of claimant's accident. *Id*. at 58. Thus, Dr. Chapa's opinion is insufficient on its face to rebut the Section 20(c) presumption. *Birdwell*, 16 BRBS at 323-324.

Furthermore, the administrative law judge rationally inferred that there could have been other causes of the accident, and that employer did not establish that claimant's intoxication was the sole cause of the accident. The administrative law judge stated that claimant was on the job for over 10 hours at the time the accident occurred, apparently inferring that fatigue could have played a factor in the accident. The administrative law judge noted claimant's testimony that the step was wet when he fell.[3] He also relied on claimant's testimony that he saw his supervisor frequently on the day of the accident, and the absence of evidence from employer that anyone observed signs of intoxication in claimant. Employer bore the burden of proving that the facts surrounding the fall demonstrate it occurred only because claimant was intoxicated; since employees can fall or suffer other accidents in the absence of hazardous conditions intoxication cannot be presumed to be the sole cause simply because working conditions were "routine," as employer suggests in this case. Employer, however, offered no evidence of the circumstances surrounding the fall; employer presented no employees who witnessed either the accident or claimant's conduct prior to the accident. Thus, employer presented no evidence of circumstances at the time of the accident which could show that claimant's

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plausible theories as to what triggered the employee's vomiting and asphyxiation: trauma or intoxication. The United States Court of Appeals for the Third Circuit affirmed the administrative law judge's finding of rebuttal of the Section 20(c) presumption based on a medical opinion interpreting autopsy reports as showing no evidence of trauma. Since the administrative law judge, in weighing the evidence, rationally credited the medical evidence that intoxication was the cause of the vomiting, and rejected the medical opinion suggesting trauma, the court affirmed the administrative law judge's conclusion that the employee's death was occasioned solely by intoxication. *Walker*, 645 F.2d at 176-177, 13 BRBS at 266-268.

[3]At the hearing, claimant testified that the step was wet, and he slipped as he was exiting the hustler to go to the bathroom. Tr. at 16. At his deposition, part of which employer's counsel read to claimant as part of cross-examination, claimant stated he fell when he was going down the steps too fast to get to the bathroom. *Id.* Employer's inference is that claimant did not mention a wet step in his deposition. This difference in claimant's version of the events is irrelevant, as it does not establish that claimant fell solely due to intoxication.

intoxication was its sole cause, and the administrative law judge therefore properly found that employer did not rebut the Section 20(c) presumption. 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 Compensation and Medical Treatment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge