BRB Nos. 10-0468
and 10-0468A

WILLIAM B. KEALOHA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LEEWARD MARINE, INCORPORATED	)	DATE ISSUED: 04/04/2011
	)	
and	)	
	)	
HAWAII EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Thomas C. Fitzhugh III and Nicholas W. Earles (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (2003-LHC-2564) of Administrative Law Judge Jennifer Gee 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).

This case is before the Board for a second time. To recapitulate, claimant fell approximately 25 to 50 feet while working for employer on September 4, 2001. He was diagnosed with a rib fracture of his tenth rib, a right scapula fracture, a scalp laceration, and an abrasion on his left flank area, as well as pain in his thoracic spine, lumbar spine and left knee. Dr. Yu released claimant to return to light-duty work as of September 17, 2001, and then to his regular duty as of September 23, 2001. Employer, however, did not have any light-duty work available; employer voluntarily paid claimant temporary total disability benefits from September 4, 2001, until claimant's return to full-duty work on September 24, 2001.

Upon his return, claimant began working more hours, including overtime, and he thus earned more money than he had prior to his September 4, 2001, accident. He continued to work for employer until November 27, 2001, when he left because work "got slow" for a steady position as a parts assembler with Abe's Auto Recycling (Abe's). Tr. at 390, 396-97. Dr. Yee subsequently took claimant off work on October 27, 2002, but released him to return to full-duty work on December 11, 2002, concluding that "apparently the patient's injuries have healed."[1] CX 7. Claimant returned to his position at Abe's until February 8, 2003. CX 19. On that date, he attempted to take his own life by shooting himself in the head, causing extensive injuries. EX 172. Claimant subsequently sought disability and medical benefits related to his suicide attempt and resulting injuries. Claimant alleged he has a psychological condition related to the work injury that caused him to try to kill himself.

In her initial decision, the administrative law judge found that claimant's suicide attempt did not constitute a natural and unavoidable result of the September 4, 2001, work injury, and that, therefore, claimant's resulting injuries are not work-related. In the alternative, the administrative law judge determined that as claimant willfully intended to take his own life on February 8, 2003, Section 3(c), 33 U.S.C. §903(c), bars his claim for benefits. The administrative law judge found claimant entitled to medical treatment for his work-related left knee condition, including payment of certain unpaid medical bills related to such treatment. The administrative law judge also found that employer is not liable for an additional ten percent assessment on the temporary total disability benefits, pursuant to Section 14(e), 33 U.S.C. §914(e).

On appeal, claimant challenged the administrative law judge's denial of benefits for the injuries resulting from his February 8, 2003, suicide attempt. Claimant also challenged the administrative law judge's calculation of his average weekly wage and the denial of a Section 14(e) assessment. BRB No. 05-0731. In its cross-appeal, employer

[1]Employer voluntarily paid temporary total disability benefits from October 27, 2002, until December 11, 2002.

challenged the administrative law judge's findings that it is liable for a medical bill and an attorney's fee to claimant's counsel. BRB No. 05-0731A.

In its decision, the Board vacated the administrative law judge's finding that claimant's suicide attempt was not work-related because the administrative law judge applied incorrect legal standards in addressing whether claimant's suicide attempt was due at least in part to the work injury. *Kealoha v. Leaward Marine, Inc.*, BRB Nos. 05-0731/A (May 31, 2006) (unpub.), slip op. at 4-5. Moreover, the Board vacated the administrative law judge's finding that the claim is barred under Section 3(c) and remanded for the administrative law judge to give claimant the benefit of the Section 20(d) presumption, 33 U.S.C. §920(d). The Board also stated that the administrative law judge mischaracterized Dr. Roth's opinion. *Id*. at 7. The Board vacated the administrative law judge's average weekly wage determination and remanded for consideration of whether claimant's post-injury increase in earnings based on an opportunity to work overtime should be included in calculating claimant's average weekly wage. The Board affirmed the administrative law judge's denial of a Section 14(e) assessment for the period claimant was entitled to total disability benefits from October 27 to December 11, 2002. The Board rejected employer's cross-appeal that it is not liable for medical treatment rendered on September 10, 2001, and for an attorney's fee.

On remand, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his suicide attempt was related to the work accident, based on the opinion of Dr. Roth. The administrative law judge found that employer failed to rebut the presumption, as Dr. Bussey agreed with Dr. Roth that claimant has long had poor impulse control, that an upcoming deposition related to the claim for the original injury was a contributing factor to the stress claimant was experiencing when he attempted suicide, and that additional stress decreases claimant's impulse control. Thus, the administrative law judge found that claimant's pre-existing psychological condition was aggravated by the work injury. The administrative law judge next applied Section 3(c) and concluded that the claim for injuries due to claimant's failed suicide attempt are not compensable since the attempt was intentional and not the result of an irresistible impulse caused by the work injury.

The administrative law judge re-calculated claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c). The administrative law judge included claimant's pre-injury and post-injury earnings for employer to derive an average weekly wage of $336.70, which entitled claimant to the minimum compensation rate in effect on the date of claimant's work injury, September 4, 2001, $224.47. This compensation rate is the same as the rate she awarded in her initial decision. 33 U.S.C. §906(b)(2).

On appeal, claimant challenges the administrative law judge's finding that his claim is barred pursuant to Section 3(c). Claimant also argues that, under Section 6(b)(2), the administrative law judge erred by finding that claimant's compensation rate

for periods of temporary total disability resulting from the original injury is payable at the minimum rate in effect at the time of the initial disability rather than being governed by the minimum rate in effect at the time the administrative law judge issued her initial decision in April 2005. BRB No. 10-0468. Employer responds, urging affirmance of the administrative law judge's finding that the claim is barred pursuant to Section 3(c) and that the Board reject claimant's contention regarding the applicable minimum compensation rate. Employer cross-appeals, contending that the administrative law judge erred by applying the Section 20(a) presumption to the suicide attempt. Employer also contends that the stress the administrative law judge found claimant experienced due to the pending deposition prior to the suicide attempt is not a "working condition" that could entitle claimant to compensation under the Act. BRB No. 10-0468A. Claimant responds, urging the Board to reject employer's contentions.

We first address claimant's appeal of the administrative law judge's finding on remand that compensation for the injuries caused by the suicide attempt is barred pursuant to Section 3(c). Even if claimant's suicide attempt was due, in part, to a work-related condition,[2] Section 3(c) sets forth the following exclusion from coverage for an employee's disability resulting from an injury arising under the Act:

> 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). Section 20(d) of the Act affords claimant the benefit of the presumption that, in the absence of substantial evidence to the contrary, "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). Where, as here, it is uncontested that claimant attempted to kill himself, the presumption applies, but is rebutted.[3] *Del Vecchio v. Bowers*, 296 U.S. 280 (1935)(Section 20(d) presumes death was accidental); *Salmon Bay Sand & Gravel Co., Inc. v. Marshall*, 93 F.2d 1 (9th Cir. 1937); *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *see also O'Leary v. Dielschnieder*, 204 F.2d 810 (9th Cir. 1953). 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 by the willful intent of the employee to injure or kill himself. *See G.S. [Schwirse] v. Marine Terminals Corp.*, 43 BRBS 108 (2009), *modifying on recon.*, 42 BRBS 100 (2008); *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). Cases have held that, when a suicide is the result of an irresistible suicidal impulse due to a work-related condition, it is

[2]We assume, for purposes of this discussion only, that claimant's psychological condition was aggravated by the work injury.

[3]Accordingly, we reject claimant's contention that the administrative law judge erred on remand by not applying the Section 20(d) presumption.

not due to "willful intent" on the part of the employee because he lacked the ability to stop himself from taking his own life.[4] *See Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951); *Terminal Shipping Co. v. Traynor*, 243 F.Supp. 915 (D.Md. 1965); *Konno*, 28 BRBS at 64-65; *Maddon v. Western Asbestos Co.*, 23 BRBS 234 (1989). Employer, however, is not required to show that the claimant did not have an "irresistible impulse" to kill himself. Employer need only establish that the claimant had a "willful intent to injure or kill" himself.

In the early evening of February 8, 2003, claimant and his cousins were in a field shooting bottles with a rifle. At some point, the rifle was passed to claimant whereupon he put the barrel under his chin, stated "see you later," and pulled the trigger. Decision and Order on Remand at 10; Tr. at 82-83. Claimant alleged that he was driven to attempt suicide due to physical and psychological problems related to the work injury, and to stress from an impending deposition due to the original claim for benefits. Decision and Order on Remand at 15-16. The administrative law judge found the claim barred pursuant to Section 3(c). She credited the opinion of Dr. Bussey that claimant's attempted suicide was not due to an irresistible impulse from the work injury and that claimant willfully intended to kill himself. Claimant argues that, on remand, the administrative law judge erred by not following the Board's instructions that she address whether claimant was capable of forming the willful intent to commit suicide given his psychological condition.

On remand, the administrative law judge separately considered whether claimant exhibited the intent to commit suicide and, having found such intent based on claimant's behavior on the day of the suicide attempt, whether this intent was willful. Pursuant to the Board's remand instructions, the administrative law judge discussed in great detail the opinions of Drs. Roth and Bussey to determine whether claimant, on the day he attempted suicide, had formed an intention to shoot himself or whether this act was the product of a spontaneous irresistible impulse due the work injury. Decision and Order on Remand at 17-28. In this regard, the administrative law judge reviewed the specific events of the day of the suicide attempt,[5] and the conclusions that Drs. Bussey and Roth had drawn

[4]Employer submitted a letter to the Board on September 3, 2010, to which it appended the Fifth's Circuit's unpublished opinion in *Eysselinck v. Director, OWCP*, No. 09-20847, 2010 WL 3257778 (5th Cir. Aug. 18, 2010). In this case, the court affirmed as supported by substantial evidence the administrative law judge's denial of benefits under Section 3(c) for a death due to suicide. We accept employer's submission but find the decision of little probative value as it is an unpublished decision of a court within whose jurisdiction this case does not arise.

[5]As noted by the administrative law judge, claimant, on February 8, 2003, initially told his wife, "goodbye . . . you got what you wanted. Gerald will take care of you." Tr. at 153; CX 13; EXs 42, 118. Next, he asked his cousin Gerald to hike up Old Smokey with him and when they reached the top, he threatened to jump to his death, only to be

from those events. Specifically, the administrative law judge credited the opinion of Dr. Bussey that claimant's actions on February 8, 2003, including his special goodbye to his wife and threat of suicide on top of Old Smokey, indicated that claimant "certainly contemplated ending his life," and established that "his intent [in shooting the rifle] was to kill himself." Tr. at 259, 343. The administrative law judge next addressed whether claimant's intention was "willful" or the product of an "irresistible impulse" due to the work injury. The administrative law judge found that claimant's pre-existing poor impulse control had not worsened since the September 2001 work injury. The administrative law judge also found there is ample evidence of claimant's acting violently toward others prior to the work injury. EX 223. The administrative law judge credited Dr. Bussey's testimony that there was no change in claimant's pattern of impulsive behavior after the work injury. Tr. at 308. The administrative law judge credited the evidence that, the night before, and from the early morning of the day he attempted suicide at 6:41 p.m., claimant exhibited a "thought pattern" of an intention to kill himself that the administrative law judge found "could not be deemed an impulsive action and the result of an 'instantaneous intent.'" Decision and Order on Remand at 27; *see* EXs 42 at 5; 212. The administrative law judge also found that the record indicates that the February 8, 2003, attempt was not claimant's first thought of suicide. EX 45. She noted that hospital records dated February 14, 2003, indicated that claimant "has been talking about killing self for ~ 2 months," EX 136, and that claimant talked about jumping off Old Smokey earlier in the day he shot himself. The administrative law judge concluded that, based on this evidence, claimant's suicide attempt was not the result of an irresistible impulse due to the work injury, and that the attempted suicide was willful. Decision and Order on Remand at 28.

The administrative law judge is entitled to weigh the evidence and to draw reasonable inferences therefrom. The Board is not empowered to reweigh the evidence or to substitute its judgment for that of the administrative law judge. *See Duhagon v. Metropolitan Stevedore Co*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The administrative law judge's finding, based on Dr. Bussey's opinion that claimant exhibited a willful intent to kill himself throughout the day before he attempted suicide in the early evening of February 8, 2003, is supported by substantial evidence and is therefore affirmed. We reject claimant's contention that the administrative law judge did not address whether claimant was capable of forming the willful intent to commit suicide given his work-related psychological condition. On remand, the administrative law judge credited

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talked out of it by Gerald. Claimant then agreed to join his cousins in shooting bottles with a rifle. When claimant's cousin John passed him the rifle, claimant put the barrel under his chin and said, "see you later, cuz" or "okay cousins, see you later," and pulled the trigger.

evidence that claimant's pre-existing poor impulse control had not worsened since the work injury and that claimant had both attempted and stated an intent to commit suicide prior to the day he shot himself. Based on the evidence rationally credited by the administrative law judge and claimant's planning activities during the day of the suicide attempt, the administrative law judge acted within her discretion in concluding that claimant's shooting himself was not due to an irresistible impulse from the work injury, but was due to a willful intent to kill himself. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *rev'd on other grounds sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the compensation claim is barred pursuant to Section 3(c).[6]

Claimant also asserts the administrative law judge erred by finding that he is entitled to compensation based on the minimum compensation rate in effect at the time his initial disability commenced in September 2001. *See* 33 U.S.C. §906(b)(2). Claimant argues that the applicable minimum rate is the one in effect when compensation is awarded by the administrative law judge.[7] In *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that benefits for temporary total disability should be governed by the maximum rate in effect at the time the disability commenced, and not at the time the administrative law judge entered the award. *See* 33 U.S.C. §906(b)(1). The holding in *Roberts* is analogous to the applicable minimum compensation rate, as claimant acknowledges. *See* Cl. Br. at 15. Therefore, we affirm the administrative law judge's award of compensation for temporary total disability based on the minimum compensation rate in effect when claimant's disability commenced in September 2001.

[6]Given our affirmance of the administrative law judge's finding that the claim is barred by Section 3(c), we need not address employer's contention on cross-appeal that the administrative law judge erred in giving claimant the benefit of the Section 20(a) presumption that his pre-existing psychological condition was aggravated by the scheduled deposition on the original claim. *See* n. 2, *supra*.

[7]The minimum rate is the 50 percent of the applicable National Average Weekly Wage, unless the claimant's average weekly wage is less than 50 percent of the National Average Weekly Wage, in which case he is to receive his actual average weekly wage as his compensation.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge