BRB No. 05-0419

JOSE PEDROZA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: 08/10/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree, San Diego, California, and Jack H. Swift, Grants Pass, Oregon, for claimant.

Roy D. Axelrod, Solana Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2001-LHC-1871) of Administrative Law Judge Thomas M. Burke 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 is the second time this case has been appealed to the Board. Claimant began working for employer in the 1970's. On August 24, 1999, while loading and unloading material from the *USS Boxer*, claimant drove his Grade-All into a 440-volt cable on the ship, causing an explosion. Claimant did not suffer any physical injuries, but he claims he began to feel anxious and afraid after this incident. Although he continued to work, he contends he developed psychological injuries as a result of this accident and that these

injuries worsened after being reprimanded and demoted for poor work performance. On August 21, 2000, claimant filed a claim for injuries due to the electrical shock and for sequela to his head, neck, stomach, eyes and psyche. Emp. Ex. 2.

The administrative law judge denied benefits, finding that claimant's psychological ill health is not related to the August 24, 1999, accident. Decision and Order at 24, 30. On appeal, claimant contended the administrative law judge erred in failing to address whether claimant's condition was caused by "prolonged and cumulative stress" at the workplace. The Board agreed with claimant and held that both the "general working conditions" issue and the issue of whether claimant's psychological condition was the result of personnel actions were raised before the administrative law judge; however, he addressed only whether claimant's condition was the result of his 1999 forklift accident. *Pedroza v. National Steel & Shipbuilding Co.*, BRB No. 02-747 (July 28, 2003), *aff'd on recon. en banc*, Feb. 25, 2004 (McGranery, J., dissenting). Consequently, the Board vacated the denial of benefits and ordered:

> On remand, in this case, the administrative law judge must address whether claimant has established the existence of working conditions, aside from the explosion, that could have caused claimant's psychological condition, taking into account the holding in *Marino* [*v. Navy Exchange*, 20 BRBS 166 (1988)]. Claimant contends his condition resulted in part from prolonged and cumulative stress, deriving from working in a dangerous environment. The administrative law judge must determine whether claimant demonstrated that stressful conditions, apart from employer's formal personnel actions, existed which could have caused his psychological injury based on the evidence of record.

Pedroza, slip op. at 5.[1]

On remand, the administrative law judge reconsidered the evidence claimant offered to establish that stressful working conditions caused his psychological problems, and he determined that the evidence was sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption. Decision and Order on Remand at 2. He also found that employer presented substantial evidence to rebut the presumption, and, based on the record as a whole, the administrative law judge determined that claimant's psychological injury was not caused by general, stressful, working conditions, but was caused by employer's

[1]The Board affirmed as unchallenged on appeal the finding that claimant's condition is not related to his 1999 forklift accident/explosion.

legitimate personnel actions and, therefore, is not compensable pursuant to *Marino*, 20 BRBS 166.[2] *Id.* at 2-5.

Claimant appeals the decision on remand. He contends the decision in *Marino*, upon which the denial of benefits is based, does not legitimately establish the principle for which it is being used.[3] Claimant also argues that *Marino* is limited to termination proceedings and does not apply here. Cl. Brief at 2. Claimant does not challenge the administrative law judge's factual findings that general stressful working conditions did not cause claimant's psychological injuries. Employer responds, arguing that claimant waived his right to challenge the *Marino* decision because he did not raise this argument before the administrative law judge or Board the first time this case was decided and appealed. It alternatively argues that claimant's challenges to *Marino* lack merit and should be rejected.

We reject employer's assertion that claimant waived his right to challenge *Marino*. Before the administrative law judge in the first proceeding, claimant argued that *Marino* is not applicable to his case. The administrative law judge acknowledged employer's citation to *Marino* in defense of its position that claimant's injuries are not compensable, but he did not address whether *Marino* is applicable to this case. Decision and Order at 24-30. On appeal to the Board, claimant contended *Marino* was decided incorrectly and without legal basis and that the *Marino* holding should not be extended to cover the situation herein, despite it being controlling law. Claimant also argued that the

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[2]The administrative law judge found that there are no medical records to support the allegation of generally stressful working conditions, that the first time claimant sought treatment for psychological injury he attributed his feelings of stress and depression to employer's personnel actions, and that there is no evidence or testimony to support claimant's allegations of harassment or tight work schedules. Decision and Order on Remand at 2-3. Indeed, the administrative law judge found that managers determined claimant lacked initiative and they would often have to look for him to get him to continue working. Thus, the administrative law judge concluded that the written and oral exchanges between claimant and his supervisor, including the possibility of demotion, were designed to improve claimant's job performance. The administrative law judge found that these activities, as well as the actual demotion, were legitimate personnel actions and that they are non-compensable. *Id.* at 3-5.

[3]Specifically, claimant asserts that the Board does not have the authority to establish "classes of legal exemptions" to the application of the Act, that the *Marino* "exemption" introduces a "tort-like legitimate-illegitimate element" to stress claims, and that the Board's expansive interpretation of *Marino* frustrates the congressional intent of holding employers strictly liable for injuries to their employees.

administrative law judge failed to discuss whether *Marino* applies to the facts of this case. Cl. Appeal Brief at 6-7, 9. Because the administrative law judge did not discuss the applicability of *Marino*, the Board did not address claimant's arguments and, instead, remanded the case to the administrative law judge with instructions to address the issue. On remand, the administrative law judge found that *Marino* applies and precludes claimant's recovery in this case. Decision and Order on Remand at 4-5.[4] In the present appeal, claimant again challenges the validity and the applicability of the *Marino* decision. On these facts, claimant has timely raised the *Marino* argument. Claimant raised the issue in his first appeal, but the Board did not address it, as the findings necessary for application of *Marino* had not been made by the administrative law judge. Because the administrative law judge first applied *Marino* to deny the claim in the decision on remand, the current appeal is the first which requires that the Board address the *Marino* issue. Consequently, we reject employer's assertion that this issue is not properly before the Board.

As the issue is properly before us, we shall next address claimant's contentions that *Marino* was incorrectly decided. We reject claimant's assertions in this regard. To be entitled to benefits under the Act, a claimant must have sustained an injury within the meaning of the Act. Section 2(2) of the Act, 33 U.S.C. §902(2), provides:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. The case law establishes that the Section 20(a) presumption applies where claimant establishes a *prima facie* case that his injury arose out of and occurred in the course of his employment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director,*

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[4]In addition to citing *Marino*, the administrative law judge cited two unpublished circuit court decisions which upheld the *Marino* principle. *Army & Air Force Exchange Service v. Drake*, 172 F.3d 47, No. 96-4229 (6th Cir. Dec. 3, 1998) (table) (employer's actions were legitimate personnel actions; claimant cannot recover for psychological injuries arising from these acts); *Turner v. Todd Pacific Shipyards Corp.*, 990 F.2d 1261, No. 91-70524 (9th Cir. April 8, 1993) (table) (psychological injuries were the result of stress from legitimate personnel decisions: demotion, transfer, pay cut, and termination). *See* n.5, *infra*.

OWCP, 455 U.S. 608, 14 BRBS 631 (1982). To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

The law defining a *prima facie* case under the Act involves judicial interpretation of Sections 2(2) and 20(a) of the Act. The Board and the courts have exercised their review authority to interpret the Act and determine when and how the Section 20(a) presumption is to apply. *Id.*; *see also Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). In addition, pursuant to Section 21(b) of the Act, 33 U.S.C. §921(b), the Board has the authority to decide questions of "law or fact" raised in appeals. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). It follows then that the Board has the authority to decide whether certain events constitute "working conditions" for purposes of a *prima facie* case. Accordingly, we reject claimant's assertion that the Board exceeded its authority in *Marino* by creating an exemption to coverage for psychological injuries due to personnel actions without a statutory basis. Rather, when presented with a novel argument regarding "working conditions" in *Marino*, the Board acted within its authority in holding "that a psychological injury resulting from a legitimate personnel action, as the reduction-in-force here, is not compensable under the Act. *Such an event is not a working condition* which can form the basis for a compensable injury." *Marino*, 20 BRBS at 168 (emphasis added). Personnel actions such as the reduction in force in *Marino* are not part of the employee's daily work environment or conditions of his job.

Moreover, contrary to claimant's contention, the Board explained that *Marino* is not limited to actual termination proceedings but that "disciplinary actions may involve personnel actions such as counseling, training, and warnings." *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 134, 136 n.3 (1998) (Brown and McGranery, JJ., dissenting), *aff'g on recon. en banc* 32 BRBS 127 (1997) (McGranery, J., dissenting).

As a policy consideration, the Board explained:

> A legitimate personnel action or termination is not the type of activity intended to give rise to a workers' compensation claim. To hold otherwise would unfairly hinder employer in making legitimate personnel decisions

> and in conducting business. Employer must be able to make decisions regarding layoffs without the concern that it will involve workmen's compensation remedies. If the reduction-in-force was improper, claimant has other remedies.

Marino, 20 BRBS at 168. The determination that injuries resulting from legitimate personnel actions do not arise from claimant's working conditions is based on sound policy considerations, and the rule has been practiced in areas outside longshore law.[5] *See, e.g.*, West's Ann. Cal. Labor Code §3208.3 (good faith personnel exemption from California workers' compensation law).

We therefore reaffirm the *Marino* holding that personnel actions are not "working conditions" under the Act, and consequently affirm the denial of benefits. In this case, there is no dispute that claimant has a psychological injury. The administrative law judge found that claimant's forklift accident did not cause his psychological injury, and the Board affirmed this finding as unchallenged. *Pedroza*, slip op. at 5. The administrative law judge also found that claimant's psychological injury was not due to generally stressful working conditions, Decision and Order on Remand at 5, and claimant has not appealed that finding. Finally, the administrative law judge found that claimant's condition was caused by claimant's warnings and demotion, which are legitimate personnel actions, Decision and Order on Remand at 4-5, and claimant has not appealed these findings, Cl. Brief at 6. As the administrative law judge rationally concluded that claimant's warnings and demotion are legitimate personnel actions, and they are the only cause of claimant's psychological injuries, *Marino* applies to preclude claimant's recovery of benefits. *Sewell*, 32 BRBS at 136 n.3; *Marino*, 20 BRBS at 168; *see also City of Oakland v. Workers' Compensation Appeals Board*, 99 Cal. App. 4th 261 (1st Dist., Div. 2 Cal. 2002) (psychiatric benefits denied because injury was caused by demotion); *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998) (personnel decision must be one which the employer undertakes in good faith).

[5]While we recognize the lack of precedential value of unpublished decisions under the applicable rules, 6th Cir. R. 28; 9th Cir. R. 36-3, we note that these courts have issued such decisions upholding decisions following *Marino*. *Army & Air Force Exchange Service v. Drake*, 172 F.3d 47, No. 96-4229 (6th Cir. Dec. 3, 1998) (table); *Turner v. Todd Pacific Shipyards Corp.*, 990 F.2d 1261, No. 91-70524 (9th Cir. April 8, 1993) (table).

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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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BETTY JEAN HALL
Administrative Appeals Judge