BRB No. 04-0285

JAY L. DARLING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 12/17/04
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Decision on Motion for Reconsideration Amending Decision and Order Awarding Benefits, and the Second Decision and Order on Motion for Reconsideration Reinstating the Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.), Topsham, Maine, for claimant.

John H. King (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Decision on Motion for Reconsideration Amending Decision and Order Awarding Benefits, and the Second Decision and Order on Motion for Reconsideration Reinstating the Decision and Order Awarding Benefits (03-LHC-0337) of Administrative Law Judge Ralph A. Romano 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).

Claimant allegedly sustained a psychological injury as a result of cumulative job stress incurred over the course of his more than 17 years of supervisory work as a "lead man" for employer. As a lead man, claimant was initially responsible for supervising crane and rigger crews of up to 15-20 people. Claimant's duties, however, grew to include managing the movement, by crane, of 200 to 300 ton ship components at a "fast" pace, which, he alleged, raised significant safety concerns for him. Hearing Transcript (HT) at 70-73. Claimant further testified that there were "always" things under his simultaneous supervision in different parts of the shipyard. HT at 68.

In the summer of 2001, claimant began to experience symptoms of insomnia and vomiting, and he was troubled by numerous dreams about work safety. His primary care physician, Dr. Miller, recommended that claimant pursue stress management and counseling. Because of financial concerns, claimant continued to work without any specific treatment. A subsequent work mishap for which claimant bore the ultimate responsibility prompted a return visit to Dr. Miller, who, on May 16, 2002, diagnosed claimant with stress/anxiety, immediately removed him from work, and recommended that he undergo counseling. Claimant began monthly counseling sessions with Charles May in June 2002. Meanwhile, Dr. Miller continued claimant's out-of-work status through January 17, 2003, at which time he released claimant to perform work other than "his job of supervision."

Claimant described a general improvement in his condition since leaving employer but indicated that he feels ill when he thinks about employer such that he could never return to work for them. On January 29, 2003, claimant found alternate employment driving a school van for Bath Bus Service for approximately 30 hours per week. Claimant filed a claim for benefits under the Act alleging that work stress, and in particular his concerns regarding work safety, caused a psychological injury.

In his decision, the administrative law judge found that claimant established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer did not establish rebuttal thereof. He thus concluded that claimant's psychological injury is work-related. The administrative law judge awarded claimant temporary total disability benefits from May 16, 2002, through January 28, 2003, continuing temporary partial disability benefits from June 29, 2003, based on claimant's earnings in his alternate work, and medical benefits. Employer moved for reconsideration, and by Order dated November 4, 2003, the administrative law judge amended his original decision to reflect that employer is entitled to a credit for "all wage payments, salary payments, and previous compensation payments" made to claimant. Claimant then moved for reconsideration, prompting the issuance of a Second Decision and Order on Motion for Reconsideration, wherein the administrative law judge found that employer is not entitled to any credit for post-injury wages paid to claimant. Consequently, the administrative law judge reinstated his original award of benefits.

On appeal, employer challenges the administrative law judge's award of benefits, and the determination that it is not entitled to any credit. Claimant responds, urging affirmance.

Employer first contends that claimant should have been held to a higher standard of proof in establishing the work-relatedness of his psychological injury than the one utilized by the administrative law judge and articulated by the Board in *Sewell v. Noncommissioned Officers Open Mess*, 32 BRBS 134 (1998)(on recon. *en banc*) (Brown and McGranery, JJ., dissenting). Employer contends that public policy considerations dictate that psychological injury cases be subjected to a higher degree of scrutiny. In particular, employer urges the Board to implement the "clear and convincing evidence" standard adopted by the state of Maine in psychological injury claims, *see* 39-A M.R.S.A. §201(3) (2001), as the Board's standard makes this an indefensible claim.

It is well settled that a psychological impairment that is work-related, even in part, is compensable under the Act. *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). The Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing not only that he has a psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused the condition. 33 U.S.C. §920(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In a case involving allegations of stressful working conditions, moreover, claimant is not required to show unusually stressful conditions in order to establish a *prima facie* case. *See Konno*, 28 BRBS at 61. *See generally Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); 3 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* §56 *et seq.* (2004). Thus, the administrative law judge must determine whether employment events, which could have caused the harm sustained by claimant, in fact occurred. *See Preston*, 380 F.3d at 606, 38 BRBS at 65(CRT).

With regard to psychological injury cases, the Board has held that a legitimate personnel action, such as a reduction-in-force, is not a working condition that can form the basis of a compensable injury. *Marino v. Navy Exchange*, 20 BRBS 166, 168 (1988). The Board reasoned that to hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its business. *Id.* The Board, however,

has also held that, irrespective of disciplinary actions, stressful general working conditions, if alleged and established by the claimant, can satisfy the "working conditions" element of a *prima facie* case. In such instances, the administrative law judge must consider the facts, excluding the legitimate personnel actions, to determine whether conditions existed that could have caused or contributed to claimant's injury. *See Sewell*, 32 BRBS 134.

Initially, we reject employer's suggestion that we adopt the "clear and convincing" standard codified by the Maine legislature. 39-A M.R.S.A. §201(3) (2001).[1] First, the fact that the Act, itself, does not articulate a separate specific standard for causation in psychological injury cases is not grounds for the adoption of a statutory provision adopted by a state legislature, including that in effect in Maine. *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281, 14 BRBS 363, 368 (1980); *Voris v. Eikel*, 346 U.S. 328 (1953). It is axiomatic that the provisions of the Longshore Act, rather than state law, apply.[2] Under the Act, a work-related injury is one which

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[1]39-A M.R.S.A. §201(3) (2001), states:

3. Mental injury caused by mental stress. Mental injury resulting from work-related stress does not arise out of and in the course of employment unless it is demonstrated by clear and convincing evidence that:

> A. The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and
>
> B. The work stress, and not some other source of stress, was the predominant cause of the mental injury.

The amount of work stress must be measured by objective standards and actual events rather than any misperceptions by the employee.

A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer.

[2]Even though, as employer asserts, the state of Maine may have had concurrent jurisdiction over claimant's claim, once claimant elected to pursue his claim under the Act, the parties are bound by those provisions. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717-719 (1980) (reviewing history of concurrent jurisdiction of state workers' compensation systems and the Act); *see also Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). The *Sun Ship* court explicitly

"arises out of and in the course of employment." 33 U.S.C. §902(2). As Congress has not chosen to alter this provision in cases of psychological injuries, we are not at liberty to do so.

Second, the general standard for establishing a *prima facie* case of causation pursuant to Section 20(a) is longstanding and well recognized,[3] and the Board's decisions in *Marino*, 20 BRBS 166, and *Sewell*, 32 BRBS 134, merely represent application of that judicially accepted standard. Likewise, it is important to note that psychological injury claims under the Act have been long recognized as compensable. *Hagen*, 327 F.2d 559. In *Hagen*, the claimant, who suffered an acute schizophrenic reaction which he alleged was due, in part, to stressful working conditions while as a Red Cross employee assigned to duty with troops stationed in Japan, filed a claim seeking compensation under the Act. In response, employer asserted, among other things, that claimant's schizophrenic reaction did not arise out of and in the course of his employment. The district director determined that claimant suffered from an acute schizophrenic reaction that was triggered and precipitated by working conditions, in

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stated that "[w]hen laborers file claims under the LHWCA, they are compensated under federal standards." *Id.*

[3]*U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Marinelli v. American Stevedoring, Ltd.*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); s*ee Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990).

particular the condition of "abnormal stress,"[4] immediately preceding its onset, and thus determined that the injury arose in the course of his employment. *Id.* at 560. The United States Court of Appeals for the Seventh Circuit held that the district director's award of benefits was supported by substantial evidence. In particular, the Seventh Circuit affirmed the district director's findings that claimant's schizophrenic reaction was precipitated by stressful working conditions and thus that the condition was work-related. *Id.* at 560-61. In addition, the United States Court of Appeals for the First Circuit, within whose jurisdiction the instant case arises, has applied the same standards in claims based on stressful working conditions as in other cases. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT). In *Preston*, the First Circuit held that the Board in its initial decision appropriately remanded the case to the administrative law judge where he did not make sufficient findings regarding whether the stressful working conditions alleged to have aggravated claimant's neurological disorder existed. *Id.* The First Circuit ultimately affirmed an award of benefits, as the administrative law judge on remand found that claimant was subject to stressful working conditions which aggravated and exacerbated his pre-existing neurological disorder. *Id.*

A claimant, in any claim arising under the Act, is required to affirmatively establish that he sustained a harm and that a work-related accident occurred or that working conditions existed which could have caused the condition. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Brown*, 194 F.3d 1, 33 BRBS 162(CRT). In contrast to employer's position, the imposition of this standard does not render psychological injury claims indefensible. *See, e.g.*, *Sanders*, 22 BRBS 340 (Board affirms the administrative

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[4]The Seventh Circuit stated:

> The condition of 'abnormal stress' was the product of accumulated disturbances in the claimant's work environment, which included: a conflict between the claimant and a navy chaplain with respect to responsibility for the delivery to servicemen of death messages; the fact that from August 1, 1960 to October 1, 1960, the claimant herein had been required, because of his official superior's illness, to take over the duties of his official superior in addition to his own duties; that during this period he was confronted with a difficult personnel problem which involved a matter of questionable conduct on the part of his secretary, necessitating her transfer and the training of an inexperienced replacement; that during the same period and prior to the appointment of a replacement for the official superior, the claimant was subject to call twenty-four hours a day.

Hagen, 327 F.2d at 560. These "disturbances" are akin to those faced by claimant herein, *e.g.*, both individuals were given additional job responsibilities and faced conflict in performing their work.

law judge's finding that claimant did not establish the "working conditions" element as he rejected claimant's testimony about the allegedly stressful working conditions, finding it non-specific, uncorroborated and contradicted by the testimony of co-workers). First, employer's position misinterprets the standard, which requires claimant to affirmatively establish both elements of his *prima facie* case. In most instances, alleging a psychological injury requires claimant to have a medical diagnosis of a psychological condition, as well as to put forth credible evidence of stressful working conditions which could have caused the injury. In addition, employer may, as in this case, attempt to show that the stressful working conditions amounted merely to a legitimate personnel action which is insufficient under *Marino*, 20 BRBS 168.

Employer has the opportunity to establish rebuttal of the Section 20(a) presumption by producing medical evidence that claimant did not suffer from any psychological injury and/or that any psychological injury is unrelated to his working conditions. Employer's attempt to establish rebuttal in this case falls short, as its only evidence in support of rebuttal is the opinion of Dr. Attfield, which the administrative law judge properly found does not provide substantial evidence that claimant's condition was not work-related. Employer did not put forth any other evidence to show that claimant's anxiety disorder is not related to his work for employer. Accordingly, for the aforementioned reasons, we reject employer's assertions for the application of the "clear and convincing" standard codified by the Maine legislature and hold that the standards for determining causation under Sections 2(2) and 20(a) are applicable to psychological injury cases.

Employer also argues that the administrative law judge's finding that claimant's psychological condition is work-related is not supported by substantial evidence. In particular, employer contends that under the facts of this case, claimant is not entitled to a recovery for his alleged psychological injury as his testimony regarding his safety concerns is, at best, vague and insufficient to establish the requisite link between his work and his psychological condition. In addition, employer maintains that the record establishes that other legitimate work issues, such as the facts that claimant was placed on a performance improvement program and that his overtime was limited, significantly contributed to claimant's condition thereby making it non-compensable pursuant to *Marino*.

In the instant case, the administrative law judge acted within his discretion in crediting claimant's testimony concerning his stressful working conditions, as corroborated by that of Mr. Gilley,[5] over employer's evidence of its alleged legitimate

[5]Claimant and a co-worker, Mr. Gilley, each stated that claimant was sometimes caught in the middle between the conflicting expectations of the day-shift supervisors and his second-shift supervisor, Mr. Medeiros. HT at 124-125; CX 11 at 12-13. In particular,

business actions to find that, in significant part, claimant's supervisory duties could have caused or aggravated his stress and anxiety. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 470 U.S. 911 (1979); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Cairns v. Mason Terminals, Inc.*, 21 BRBS 252 (1988). Moreover, it is undisputed that at the time claimant was working for employer, he suffered from a psychological injury, namely an anxiety disorder. In this regard, the administrative law judge credited the opinions of Drs. Miller, Johnstone and Newcomb, who documented claimant's existing psychological injury. The administrative law judge also found that Dr. Newcomb diagnosed an anxiety disorder "causally related to his work activities at Bath Iron Works." EX 17 at 90. As the administrative law judge's findings that claimant sustained a stress/anxiety disorder, and that his supervisory duties with employer could have caused or aggravated said condition, are supported by substantial evidence, his conclusion that claimant is entitled to invocation of the 20(a) presumption is affirmed. *See Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *see also Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Bath Iron Works Corp. v. Director, OWCP*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). The administrative law judge found employer's evidence, consisting solely of Dr. Attfield's opinion that claimant did not have a psychological diagnosis and could return to work for employer, insufficient to rebut the Section 20(a) presumption as it involved an incomplete consideration of claimant's psychological state of debilitation due to the stressors attendant in his work for employer. In particular, the administrative law judge found that Dr. Attfield's opinion of claimant's psychological health, based on a single examination which took place six months after claimant had been removed from his stressful work environment with

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both men stated that claimant would receive one set of directions from the first shift bosses at the time he reported to work, and then be given contrary and inconsistent directions from his second-shift supervisor while he was actually working. *Id.* These inconsistencies would invariably lead to questions by the day shift as to why the original work directions had not been followed. *Id.* Claimant further stated, as corroborated by Mr. Gilley, that he had significant safety concerns with his work. HT at 70-73, 93-94; CX 11 at 13-17. Mr. Gilley further added that he witnessed the manifestation of these problems in that he would see claimant "in the parking lot ready to go [into employer's facility] and he'd be choking and puking because he really didn't want to go into [employer's facility]." CX 11 at 10-11.

employer, arguably confirms that claimant's previous psychological state was caused by the stress of his work for employer. Moreover, while Dr. Attfield stated that claimant "has no specific psychological condition to discuss at this time [November 7, 2002]," he nevertheless acknowledged that claimant "had been diagnosed with an anxiety disorder." EX 18. Dr. Attfield, however, did not state that this condition was not work-related. *Id.* Consequently, the administrative law judge rationally concluded that Dr. Attfield's opinion does not establish rebuttal of the Section 20(a) presumption and therefore that claimant's psychological injury, specifically his anxiety disorder, is work-related. As the administrative law judge's finding is supported by substantial evidence, it is affirmed. *See generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Accordingly, the administrative law judge's conclusion that claimant sustained a work-related psychological injury is affirmed.

Alternatively, employer asserts that the administrative law judge erred in finding that it is not entitled to a credit for the wages claimant received for the six-month period between May 16, 2002, and November 14, 2002, during which claimant received full pay from employer. Employer maintains that since claimant suffered no loss in wage-earning capacity during that six-month period, the payment of compensation benefits is inappropriate and incorrect as a matter of law. Employer therefore requests that the Board order a credit to employer for the wages it paid to claimant post-injury.

It is well established that in order for an employer's payments of salary to be credited against its liability for benefits under the Act pursuant to Section 14(j), it must establish that those payments were "advance payments of compensation." 33 U.S.C. §914(j); *SEACO v. Richardson*, 136 F.3d 1290, 32 BRBS 56(CRT) (11th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978); *Luker v. Ingalls Shipbuilding*, 3 BRBS 321 (1976). One method of establishing that the payments were "advance payments of compensation" is to notify the district director that compensation payments had begun. 33 U.S.C. §914(c); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Breen v. Olympic Steamship Co.*, 10 BRBS 334 (1979).

Employer rests its argument on claimant's testimony, when asked whether he "started getting disability benefits" at the time he went out of work with employer, that "I got six months full pay from the time I left." HT at 87. In follow-up, claimant was asked whether the payments were "for short term disability," to which claimant replied "[S]hort term." *Id.* While this testimony may indicate claimant's perception as to the nature of these payments, it does not establish employer's intent. For one, claimant repeatedly refers to the payments as "pay," and not disability compensation. HT at 87. In addition,

the Memorandum of Informal Conference reflects that the parties indicated that employer has paid compensation in the amount of "$0" with regard to this claim. EX 6. This evidence supports the administrative law judge's determination, in his third decision, that employer's post-injury payments were not intended as compensation. EX 6. Consequently, as the administrative law judge properly determined, the record does not contain any evidence that employer intended for these payments to serve as advance compensation. We therefore affirm the administrative law judge's rejection of a credit to employer for these payments as it is supported by substantial evidence and in accordance with law.

Accordingly, the administrative law judge's award of benefits to claimant and denial of a credit to employer for post-injury wages paid to claimant are 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