BRB No. 92-2657

JOHNNY W. MATTHEWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: _____
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis M. McElwee (Schechter & Eisenman), Houston, Texas, for claimant.

Kenneth G. Engerrand and John R. Walker (Brown, Sims, Wise & White), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (91-LHC-909) of Administrative Law Judge Lee J. Romero, Jr., 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This appeal concerns injuries sustained by claimant on May 20, 1990, while employed by employer. As background, on August 26, 1988, claimant and Charles Colburn were working for the Port of Houston when an altercation ensued in which claimant severely beat Mr. Colburn with his fists and a pistol. Mr. Colburn missed work for one year as the result of the injuries he sustained in this incident. Claimant later pleaded guilty to aggravated assault and was placed on seven years probation, as a condition of which he was to avoid any further contact with Mr. Colburn. Except for one occasion at a union meeting, claimant and Mr. Colburn agree that they had no contact with each other between August 26, 1988 and May 30, 1990.

On May 30, 1990, during the course of his employment as a truckdriver for employer, claimant was instructed to drive to J.J. Flanagan Stevedores (Flanagan) to deliver containers.

Claimant acknowledged that he knew Mr. Colburn was an employee of Flanagan, but indicated that he was not aware that Mr. Colburn would be there on that particular day. Although claimant's first delivery went without incident, during his second trip, Mr. Colburn was the operator assigned to remove the container.

A dispute exists as to what happened next. Mr. Colburn testified that claimant made threatening gestures, an assertion which claimant vehemently denies. According to the claimant, Mr. Colburn appeared at the driver's door, and started shooting claimant without any provocation. Claimant blocked the first shot with his left arm, breaking it. Claimant then fled the truck, with Mr. Colburn in pursuit firing the gun; its bullets hit claimant a total of three times, including once in the abdomen. When the gun ran out of bullets, a struggle ensued between the two. Eventually, a security guard called an ambulance, which transported claimant to the hospital. Although Mr. Colburn was charged with attempted murder, a grand jury failed to indict him on this charge.

Claimant was treated for gunshot wounds to his arm and abdomen. He returned to light duty work on February 11, 1991, and to regular duty on May 20, 1991. Claimant sought compensation for his May 30, 1990, injuries. Prior to the hearing, the parties stipulated that claimant was temporarily totally disabled from May 30, 1990 until May 13, 1991, and permanently disabled thereafter, the extent of which was in dispute. In addition, the parties stipulated that claimant's average weekly wage at the time of his injury was $618.73. The issues pending for adjudication before the administrative law judge included whether claimant's injury arose out of his employment and whether claimant was precluded from obtaining compensation based on his willful intent to harm himself or another. *See* 33 U.S.C. §§902(2), 903(c), 920(a), (d).

Crediting the testimony of claimant over that provided by Mr. Colburn, which the administrative law judge characterized as contradictory, self-serving, and strictly structured to avoid any pending or potential criminal and/or civil actions, the administrative law judge found that claimant did nothing to provoke the altercation with Mr. Colburn on May 30, 1990. He therefore determined that any injuries incurred by claimant were not occasioned by claimant's willful intention to injure or kill himself or another. *See* 33 U.S.C. §903(c). The administrative law judge then stated that the presumption set forth in Section 20(d) had been rebutted. The administrative law judge further determined that given the lack of any other plausible reason for the May 30, 1990, attack, he was constrained to find that Mr. Colburn's motive for the attack was personal and that claimant accordingly failed to establish that he suffered an injury which arose out of his employment under Section 2(2) of the Act.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in finding that claimant's injury did not arise out of his employment in concluding that employer had rebutted the presumption afforded to him under Section 20(d). Employer, responds, asserting that the administrative law judge rationally found that claimant failed to establish an injury as defined in Section 2(2) and that employer introduced substantial evidence that claimant's actions evidenced a willful intent to injure another.

Compensable injuries under the Act are restricted to: "the accidental injury or death arising out of and in the course of employment . . . including an injury caused by the willful act of a third person directed against an employee because of his employment." 33 U.S.C. §902(2). The Supreme Court held in *U.S. Industries/Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 631, 14 BRBS 608 (1982), that "arising out of" and "in the course of" are separate elements that refer, respectively, to the cause of the injury and to the time, place and circumstances of the injury. 455 U.S. at 615; 14 BRBS at 633. Inasmuch as the administrative law judge found, and it is not disputed, that claimant's injuries occurred during the course of his employment with employer, we direct our attention to the issue of whether the administrative law judge properly found that claimant's injuries did not arise out of his employment.

The Section 20(a) presumption aids the claimant in proving that his injuries arose out of his employment. *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). In the present case the administrative law judge properly found that claimant was entitled to invocation of the Section 20(a) presumption as claimant established physical harm and an accident at work which could have caused this harm. Accordingly, the burden shifted to employer to prove by specific and comprehensive evidence that claimant's injuries did not arise out of his employment. *Mulvaney*, 14 BRBS at 597.

In this case, after considering the relevant evidence and essentially finding it to be inconclusive, the administrative law judge stated that given the lack of any other credible plausible reason for the attack of May, 1990, he was constrained to find that Mr. Colburn was motivated to "even the score and retaliated against Matthews" for the August 1988 incident, and that therefore the resulting harm was based upon personal matters, rather than claimant's employment. Decision and Order at 12. The administrative law judge accordingly found that employer had rebutted the Section 20(a) presumption. In so concluding, the administrative law judge erroneously placed the burden on claimant to establish the work-relatedness of the incident, when in fact it was incumbent upon employer to disprove the presumed causal connection. See *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Inasmuch as the administrative law judge's discussion of the evidence found no conclusive cause of the altercation, and employer failed to introduce any evidence of any contacts between the parties with the exception of the prior work-related incident and a union meeting, there is no evidence to rebut the Section 20(a) presumption. We therefore reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption and hold that claimant's injuries arose out of his employment as a matter of law. *See Twyman v. Colorado Security*, 14 BRBS 829 (1982), *on remand from* 670 F.2d 1235 (D.C.Cir. 1981), *vacating* 12 BRBS 863 (1980) (Miller, J., dissenting).

We are also unable to uphold the administrative law judge's denial of benefits based on application of Section 3(c) of the Act. Section 3(c) bars compensation under the Act if claimant's injury was occasioned by his willful intention to injure or kill himself or another. Section 20(d), 33 U.S.C. §920(d), provides a presumption that claimant's injury was not occasioned by his willful intention to injure or kill another. *See also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J., dissenting); *Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986). In order to rebut this presumption, employer must present substantial countervailing evidence that claimant

intended to injure another employee at the time of the incident. *Williams*, 22 BRBS at 236; *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978). Claimant's actions toward Mr. Colburn during the prior incident in 1988 are not relevant to this inquiry.

In the present case, the administrative law judge specifically found that the injury incurred by claimant was not occasioned by any willful intention on his part to injure or kill himself or another. He nonetheless stated that the Section 20(d) presumption had been rebutted. If claimant did not intend to injure Mr. Colburn and Mr. Colburn was the aggressor as the administrative law judge appears to have found, the Section 20(d) presumption is not rebutted. *See Williams*, 22 BRBS at 237. Accordingly, we vacate the administrative law judge's finding in this regard and remand for him to reconcile this discrepancy.

Accordingly, the administrative law judge's finding that claimant's injury did not arise out of employment is reversed. His finding regarding Section 3(c) is vacated, and the case is remanded for further consideration consistent with this opinion. If, on remand, the administrative law judge finds that claimant's right to compensation was not barred by his willful intent to injure himself or another under Section 3(c), all remaining issues must be addressed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge