BRB No. 05-0918

ANTHONY REIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P & O PORTS NORTH AMERICA, INCORPORATED	)	DATE ISSUED: 08/14/2006
	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (2003-LHC-00925) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 is the second time that this case is before the Board. Claimant, a heavy equipment operator and instructor for employer, alleges that a specific work incident occurred on December 10, 2001, which caused his current back and leg conditions. Specifically, claimant testified that, while working in employer's control room on the day in question, he was shoved by a co-worker, Mr. Salerno, and that as a result of this

physical contact he hit the edge of a desk, fell to the floor, struck his back, buttocks and head, and lost consciousness. *See* Tr. at 29-31. In contrast to this version of events, Mr. Salerno testified that claimant on his own accord fell to the floor after Mr. Salerno had walked away from him. *Id.* at 115-119. An employee who witnessed this incident, Mr. Grace, testified that Mr. Salerno pushed claimant across the control room, but that claimant fell after Mr. Salerno turned and stepped away from claimant. *Id.* at 153-162. Following this incident, claimant was transported by ambulance to Trinitas Hospital, where he complained of lower back pain, Clt. Ex. 2; the following day, December 11, 2001, claimant was diagnosed with a head contusion and back pain. Clt. Ex. 3. Employer voluntarily paid claimant temporary total disability benefits from December 11, 2001, to April 30, 2002, May 2, 2002 to August 21, 2002, and September 5, 2002 to September 18, 2002, 33 U.S.C. §908(b), as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

In his initial Decision and Order, the administrative law judge determined that while claimant established that he sustained a harm on December 10, 2001, he failed to preponderantly demonstrate whether working conditions, an accident, or the intentional act of a third party caused, aggravated or accelerated this harm. Decision and Order at 7. Accordingly, having found that claimant failed to establish a *prima facie* case sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption, the administrative law judge denied claimant's claim for benefits under the Act.

On appeal, the Board reversed the administrative law judge's finding that claimant failed to establish the working conditions element of his *prima facie* case. Specifically, the Board held that as the record establishes that claimant fell while working for employer, claimant established the existence of an accident or working conditions which could have caused his present physical complaints, thus invoking the Section 20(a) presumption as a matter of law. As employer identified no evidence severing the presumed causal connection between claimant's fall at work on December 10, 2001, and his back and leg complaints, Section 20(a) was not rebutted and consequently, claimant's back and leg conditions are work-related as a matter of law. Since a claim for benefits may be denied on the basis that the claimant's injury was occasioned by his willful intention to injure himself, the Board remanded the case for the administrative law judge to address this issue pursuant to Sections 3(c) and 20(d), 33 U.S.C. §§903(c), 920(d), of the Act. *Reis v. P & O Ports North America*, BRB 04-425 (Jan. 25, 2005)(unpub.)

In his Decision and Order on Remand, the administrative law judge found that employer rebutted the Section 20(d) presumption that claimant's injury was not occasioned by a willful intention to injure himself. The administrative law judge, after addressing the evidence of record on this issue, concluded that claimant willfully intended to injure himself when he intentionally fell to the floor, thus barring the claim under Section 3(c) of the Act.

On appeal, claimant challenges the administrative law judge's denial of his claim, averring that the administrative law judge erred in concluding that employer produced

substantial evidence that claimant willfully intended to injure himself on December 10, 2001. Employer responds, urging affirmance.

Section 3(c) of the Act provides:

> 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)(1994)(formerly 33 U.S.C. §903(b)(1982)). *See O'Connor v. Triple A Machine* Shop, 13 BRBS 473 (1981)(Miller, J., concurring in part and dissenting in part); *Kielczweski v. The Washington Post Co.*, 8 BRBS 428 (1978); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977). Section 20(d) of the Act affords a claimant the benefit of the presumption "that 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). *See Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998)(Smith, J., concurring and dissenting). The Section 20(d) presumption complements the Section 3(c) inquiry into whether the injury was occasioned by claimant's willful intention to injure himself.[1] *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Under Section 20(d) employer must produce evidence that claimant's injury was due to his willful intent to injure himself. Once employer offers "testimony sufficient to justify a finding of [intentional, self-inflicted injury], the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor." *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

In the instant case, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(d) presumption. Crediting the testimony of Mr. Salerno and Mr. Grace that claimant was not pushed to the floor by Mr. Salerno but rather that claimant fell to the ground of his own volition after Mr. Salerno had walked away from him, the administrative law judge found that employer successfully rebutted the presumption. Decision and Order on Remand at 3. We reject claimant's contentions and affirm the administrative law judge's determination that employer produced substantial evidence sufficient to rebut the Section 20(d) presumption.

The administrative law judge next considered the totality of the evidence before him in addressing whether claimant's claim for benefits was barred pursuant to Section 3(c) of the Act. Having previously declined to credit claimant's version of events relating to his fall to the floor, the administrative law judge initially found that claimant intended to fall onto the floor. Decision and Order on Remand at 4. The administrative relied upon his prior decision to credit the testimony of Mr. Salerno and Mr. Grace in

[1] Thus, contrary to the statement contained in employer's response brief, the Board committed no error in its initial decision when it addressed the application of Section 20(d). Since Section 20(d) complements Section 3(c), the applicability of which was raised by employer, it must be addressed as a matter of law for the case to be correctly decided. *See Reis*, slip op. at 5.

inferring that claimant intended to fall and willfully injure himself while in employer's control room on the day in question.[2] Consequently, the administrative law judge denied the claimant's claim pursuant to Section 3(c) of the Act on the basis that claimant's injury was occasioned by his willful intention to injure himself.

Once employer rebutted the Section 20(d) presumption, it fell from the case, and the administrative law judge was required to resolve the issue upon the whole body of evidence before him, with claimant bearing the burden of persuasion. *Del Vecchio*, 296 U.S. at 286; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In so doing, it is well established that the administrative law judge may draw his own inferences from the evidence of record, *Del Vecchio*, 296 U.S. at 286; *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and it is impermissible for the Board to substitute its own views for those of the administrative law judge on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). In the instant case, claimant has not established error by the administrative law judge when, after considering the totality of the record before him, he declined to credit claimant's testimony regarding the events culminating in his fall on December 10, 2001, and inferred from the testimony of Mr. Salerno and Mr. Grace that claimant intended to injure himself when he fell to the floor on his own volition. We therefore affirm the administrative law judge's conclusion that the claim is barred by Section 3(c) of the Act.

Accordingly, the Decision and Order on Remand denying claimant's claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, J., concurring:

[2] We note that Mr. Salerno additionally testified that claimant had previously threatened to sue both himself and employer, that claimant's conduct on the morning of his fall was "nasty," and that claimant looked around the room prior to his fall as if avoiding anything. *See* Tr. at 113-115, 118-119, 121-123, 138, 143; Emp. Ex. 19.

I agree with the majority that the administrative law judge's decision denying benefits should be affirmed. I write separately, however, because neither the administrative law judge, nor the majority, has clearly stated the allocation of burdens between the parties in a case involving the Section 20(d) presumption of the Longshore and Harbor Workers' Compensation Act.[1]

As the Supreme Court made clear in *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935), the only purpose of the Section 20(d) presumption is to control the result when competent evidence is lacking. The Court explained that to rebut the presumption it is necessary to submit only sufficient evidence to justify a finding that the injury is self-inflicted. *Id.* at 286. In the case at bar, claimant had testified: "[Mr. Salerno] pushed me and that's when the accident happened." Tr. at 31. But the administrative law judge credited the testimony of Mr. Salerno and an eye witness: "that Mr. Salerno did not push claimant to the floor and that claimant fell to the floor a considerable amount of time after Mr. Salerno had walked away from him. Tr. at 118-119, 152-153." Decision and Order on Remand at 3. Because the administrative law judge properly determined that this evidence was sufficient to rebut the presumption, it falls out of the case and "the issue must be resolved upon the whole body of proof pro and con." *Del Vecchio*, 296 U.S. at 287.

In weighing the evidence together, it appears that the administrative law judge believed it was necessary to determine whether or not the evidence affirmatively established that claimant's work-related injury was occasioned by his willful intention to injure himself,[2] and that if it were, he would lose, otherwise, he would win. The administrative law judge stated that he found claimant's account of the accident incredible and he believed employer's witnesses. Decision and Order on Remand at 3-4.

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[1] Section 20(d) of the Act, 33 U.S.C. §920, provides in relevant part:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
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> . . .
>
> (d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

[2] It may be that the administrative law judge was misled by loose language in the Board's decision: "[W]e remand this case for the administrative law judge to address the issue of whether employer has presented sufficient evidence to support a finding that claimant's December 10, 2001 work-related injury was occasioned by his willful intention to injure himself, thus barring his claim for compensation pursuant to Section 3(c) of the Act." Decision and Order at 5.

He continued: "whether claimant willfully intended to injure himself is a more difficult question." *Id.* at 4. The administrative law judge analyzed the evidence and concluded: "I therefore reasonably infer that claimant intended to fall, and further, that he therefore willfully intended to injure himself, since one who intentionally commits an act also intends the natural consequences of the act." *Id*.

The administrative law judge's discussion does not reflect awareness that under the Administrative Procedure Act, a longshore claimant bears the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In *Greenwich Collieries*, the Supreme Court affirmed the Third Circuit's decision in *Maher Terminal, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1(CRT) (3d Cir. 1993), holding that when employer has offered sufficient evidence to rebut the Section 20(d) presumption, claimant must prove entitlement to benefits by a preponderance of the evidence. Applying this teaching to the case at bar, claimant was required to prove that his injury was not occasioned by his willful intention to injure himself, pursuant to 33 U.S.C. §903(c).[3] The burden of proof was not on employer, as the administrative law judge appears to have believed, to prove that claimant willfully injured himself. The administrative law judge's decision may nevertheless be affirmed because his determination that claimant intended to injure himself is supported by evidence in the record and that determination necessarily implies that claimant failed to prove that he did not intend to injure himself.

In sum, when claimant established his *prima facie* case, he became entitled to the Section 20(d) presumption; employer rebutted the Section 20(d) presumption by going forward with evidence that claimant's injury was self-inflicted; claimant was then required to prove entitlement by a preponderance of the evidence, without benefit of

[3] Section 3(c) of the Act, 33 U.S.C. §903(c), provides:

> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

the statutory presumption. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio*, 296 U.S. 280. Because the administrative law judge's decision is properly understood as finding that claimant failed to prove that his injury was not self-inflicted, his decision denying benefits should be affirmed.

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REGINA C. McGRANERY
Administrative Appeals Judge