**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0276

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| WILLIAM B. KEALOHA<br><br>Claimant-Respondent<br><br>v.<br><br>LEEWARD MARINE, INCORPORATED<br><br>and<br><br>HAWAII EMPLOYERS MUTUAL INSURANCE COMPANY<br><br>Employer/Carrier-Petitioners | ) | DATE ISSUED: May 4, 2016<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand Awarding Benefits and the Order Denying Respondent's Motion for Reconsideration 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 (Schouest, Bamdas, Soshea & BenMaier P.L.L.C.), Houston, Texas, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits and the Order Denying Respondent's Motion for Reconsideration (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 rational, supported by substantial evidence, and

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 third time.

Claimant, as a result of a fall occurring during the course of his employment on September 4, 2001, sustained injuries consisting of a fracture of his tenth rib, a right scapula fracture, a scalp laceration, and an abrasion on his left flank area. Claimant also experienced pain in his thoracic spine, lumbar spine, and left knee. Claimant was hospitalized for three days following this incident. Employer voluntarily paid claimant temporary total disability benefits from September 4, 2001, until claimant's return to full-duty work on September 24, 2001. EX 23. Claimant filed a claim for benefits under the Act. EX 10.

Claimant 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). HT at 396-397. In September and October 30, 2002, claimant reported to Drs. Mathews and Yee that he had persistent knee pain. EXs 106, 110, 111. Dr. Yee took claimant off work pending further medical tests. An MRI showed degenerative changes, but no fractures or meniscus tear; Dr. Yee stated there was no surgical option for claimant. EX 53 at 12-13. Dr. Yee released claimant to full-duty work on December 11, 2002.[1] CX 7 at 26. Claimant took personal leave from Abe's during January 2003, but returned to his position at Abe's at the beginning of February 2003. CX 19 at 61-62. On February 8, 2003, claimant attempted to take his own life by shooting himself in the head, causing extensive injuries. EXs 115, 120. Claimant's deposition in his longshore claim had been scheduled for February 10, 2003. HT at 149-150. In late March or early April 2003, claimant was discharged from the hospital. EXs 186-188. Claimant subsequently sought benefits under the Act for the injuries resulting from his suicide attempt, alleging he had a psychological condition related to the September 4, 2001 work injury that caused him to try to kill himself.

The administrative law judge found the record replete with evidence of claimant's pre-existing lack of impulse control and violent temperament. After the shooting, claimant was evaluated on July 23, 2003 and August 26, 2003, by Dr. Roth, a psychiatrist. Dr. Roth diagnosed claimant with major depressive disorder, chronic post-traumatic stress disorder (PTSD), and a cognitive disorder due to the 2001 work accident, which caused claimant to feel hopelessness and despair and led to his suicide attempt. EX 41 at 98-99. A second psychiatrist, Dr. Bussey, evaluated claimant on October 23, 2003, and opined that claimant's suicide attempt "was not causally related to his

[1]Employer voluntarily paid claimant temporary total disability benefits from October 27, 2002 until December 11, 2002. EX 23.

September 4, 2001, industrial injury," but rather was due to "a significant number of other more primary stressors in [claimant's] life." CX 13 at 33.

In her initial decision, the administrative law judge found that claimant's suicide attempt was not a natural or unavoidable result of the September 4, 2001 work injury and, 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), barred his claim for benefits. Both parties appealed this 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 an incorrect legal standard in addressing whether claimant's suicide attempt was due at least in part to the work injury, pursuant to Section 20(a), 33 U.S.C. §920(a). *Kealoha v. Leeward Marine, Inc.*, BRB Nos. 05-0731/A (May 31, 2006), slip op. at 4-5. Moreover, the Board vacated the administrative law judge's finding that the claim is barred pursuant to Section 3(c) and remanded the case for the administrative law judge to give claimant the benefit of the Section 20(d) presumption, 33 U.S.C. §920(d), that he did not willfully intend to kill himself.

On remand, the administrative law judge found that claimant's pre-existing psychological condition was aggravated by the work injury, but she nevertheless concluded that the claim for injuries due to claimant's failed suicide attempt is not compensable because the attempt was intentional and not the result of an "irresistible impulse" caused by the work injury. Again, both parties appealed the administrative law judge's decision. The Board affirmed the administrative law judge's findings that claimant exhibited a willful intent to kill himself throughout the day of his suicide attempt, that his suicide attempt was not the result of an irresistible impulse due to his work injury and, thus, that the compensation claim is barred pursuant to Section 3(c). *Kealoha v. Leeward Marine, Inc.*, BRB Nos. 10-0468/A (April 4, 2011).

Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. In its decision, the Ninth Circuit rejected the long-standing "irresistible impulse test," finding its premise was no longer good science and that it had no bearing on whether a work-related injury caused the attempted suicide. The court, instead, held that a suicide or injuries from a suicide attempt are compensable under the Act when there is "a direct and unbroken chain of causation" between a work-related injury and the suicide attempt. *Kealoha v. Director, OWCP*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013). Specifically, the Ninth Circuit stated that if the suicide or attempted suicide is the product of the work-related injury, it is not "willful" under Section 3(c). The court, therefore, vacated the administrative law judge's denial of benefits and remanded the

case for a determination of whether there was a chain of causation between claimant's September 4, 2001 work injury and his February 8, 2003 suicide attempt. *Id.*

On remand, the administrative law judge, applying the Ninth Circuit's chain of causation test, found that although claimant's September 4, 2001 work injury did not cause a new mental condition that resulted in claimant's becoming devoid of his normal judgment, the record establishes that the work accident exacerbated claimant's already weak impulse control. Specifically, the administrative law judge found that the added stressors resulting from the work accident, coupled with claimant's low IQ, aggravated his pre-existing poor impulse control and led to his suicide attempt. The administrative law judge thus found there was a chain of causation between the work injury and claimant's suicide attempt. Accordingly, the administrative law judge found claimant entitled to continuing temporary total disability benefits from February 8, 2003, as well as medical benefits for the injuries resulting from the suicide attempt. The administrative law judge denied employer's motion for reconsideration, specifically rejecting its contention that the chain of causation was "broken" by non-work-related causes.

On appeal, employer challenges the administrative law judge's finding that there was a chain of causation between claimant's September 2001 work injury and his February 2003 suicide attempt.[2]

Employer contends the administrative law judge's decision is not in accordance with the "direct and unbroken chain of causation" test espoused by the Ninth Circuit because the administrative law judge did not make any findings which meet this test. Employer avers the administrative law judge erred in applying the "now-discarded [aggravation] standard," to find the suicide attempt compensable on the ground that the work injury "aggravated" claimant's pre-existing condition. In this respect, employer also contends that the administrative law judge erred in finding aggravation, because her findings of fact are contrary to those she made in her earlier decisions. Employer further contends that while the administrative law judge noted all of the post-injury, non-work-related stresses and events that also contributed to claimant's suicide attempt, she did not sufficiently address whether these events severed any chain of causation that may have existed between the work-related injuries and the suicide attempt. Employer thus contends that any "chain of causation" is "broken."

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[2]Claimant filed a response brief on January 22, 2016, accompanied by a motion to accept the brief out of time. Employer filed a motion to strike claimant's late pleading. By Order dated April 5, 2016, the Board granted employer's motion to strike the pleading.

Section 3(c) of the Act states, " 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); *see also Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Section 3(c) works in conjunction with Section 20(d), 33 U.S.C. §920(d), which provides the presumption that "the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." To rebut the presumption, the employer must present "substantial evidence to the contrary." *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *see generally Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012). If the presumption is rebutted, the burden is on claimant to prove his claim by a preponderance of the evidence, i.e., that the injury or death was not due to the employee's willful intent to kill himself. *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013); *Dill v. Serv. Employees Int'l, Inc.*, 48 BRBS 31 (2014).

In rejecting the "irresistible impulse" test, the Ninth Circuit held that:

> suicide or injuries from a suicide attempt are compensable under the Longshore Act when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt. The claimant need not demonstrate that the suicide or attempt stemmed from an irresistible suicidal impulse. The chain of causation rule accords with our modern understanding of psychiatry. It also better reflects the Longshore Act's focus on causation, rather than fault.

*Kealoha*, 713 F.3d at 524-525, 47 BRBS at 3(CRT). It is "where the injury and its consequences directly result in the workman's loss of normal judgment and domination by a disturbance of the mind, causing the suicide," that the suicide compensable. *Id.*; *see Terminal Shipping Co. v. Traynor*, 243 F.Supp. 915 (D. Md. 1965).

Some states apply a chain of causation test to assess the compensability of suicides under their workers' compensation statutes.[3] *See* 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, §38.03-04 (2015); *see also* Leslie A. Bradshaw, Annotation, *Suicide as compensable under workmen's compensation act,* 15 A.L.R.3d 616 §§3(a), 5(a) (1967) (Supp. 2015). "According to the 'chain-of-causation' rule, a suicide is compensable if the injury and its consequences directly cause the employee to

[3] In adopting the "chain of causation" test, the Ninth Circuit noted that state cases are relevant to determining the appropriate test. *Kealoha*, 713 F.3d at 523 n.2, 47 BRBS at 2 n.2(CRT).

become devoid of normal judgment and dominated by a disturbance of the mind which leads to the suicide." Bradshaw, *supra*, §3(a). "A suicide attempted under these circumstances cannot be held to be intentional even though the act itself may be volitional." *Matter of Death of Stroer*, 672 P.2d 1158, 1161 (Okla. 1983); *see also Kahle v. Plochman,* 428 A.2d 913 (N.J. 1981); *Petty v. Associated Transport, Inc.*, 173 S.E.2d 32 (N.C. 1972).

In *Wells v. Harrell*, 714 S.W.2d 498 (Ky. Ct. App. 1986), a case involving claimants seeking benefits under Kentucky's Workers' Compensation Act for an alleged work-related suicide, the Court of Appeals of Kentucky held that a work-related aggravation of a pre-existing mental condition may satisfy the chain of causation test. *See also Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (continued employment around "energized equipment" following electrical shock at work aggravated claimant's psychological problems, leading to suicide). Indeed, "[b]enefits under the Act are not limited to employees who happen to enjoy good health; rather, employers accept with their employees the frailties that predispose them to bodily hurt." *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *see also Pacific Employers' Ins. Co. v. Pillsbury*, 61 F.2d 101 (9th Cir. 1932). Thus, the employer is liable under the aggravation rule if the work accident "aggravated, accelerated, or combined with the [pre-existing] disease or infirmity to produce the death or disability for which compensation is sought." *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966) (internal quotations omitted); *see Sullivan v. Banister Pipeline AM,* 739 P.2d 597, 599 (Or. Ct. App. 1987), *review denied,* 744 P.2d 1004 (Or. 1987) ("claimant's industrial injury was a material cause of his depression and suicide attempt. The depression was an 'aggravation' of his compensable injury."); *City of Tampa v. Scott,* 397 So.2d 1220 (Fla. Dist. Ct. App. 1981) (employee, with preexisting psychological problems became more violent after work injury to his back; injury was a triggering factor in suicide which thus was compensable). As employer has not provided any legal basis for its suggestion that the aggravation rule is not applicable to a suicide or an attempt thereof, we reject employer's contention in this regard.[4]

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[4]The Board, in its initial decision in this case, recognized the relevance of the aggravation rule, noting that the appropriate legal standard in determining causation is "whether claimant's work was 'a' cause of the psychological condition which led to the suicide attempt, not 'the' cause of the condition. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994)." *Kealoha,* BRB Nos. 05-0731/A, slip op. at 4-5. For this reason, the Board vacated the administrative law judge's initial finding in this case that claimant's suicide attempt was not related to the work injury and remanded the case for further consideration of this issue. *Id.* In her second decision, the administrative law judge found that employer did not rebut the Section 20(a) presumption of compensability because both Dr. Roth and Dr. Bussey stated that stressors relating to the work injury

We turn next to employer's contention that substantial evidence does not support the administrative law judge's finding that there was a chain of causation between the 2001 work accident and claimant's 2003 suicide attempt. On the facts of this case and at this stage of the litigation, claimant bears the burden of proving that the injuries resulting from his suicide attempt are compensable. *Dill*, 48 BRBS 35-36. That personal problems also played a role in the worker's suicide does not preclude compensation so long as substantial evidence supports the finding that there is a chain of causation between the work injury and the suicide attempt. *See Sullivan,* 739 P.2d at 599 (Although physical and family problems unrelated to the injury were also factors, substantial evidence supported the finding that work injury caused depression due to financial concerns and exacerbated the employee's drinking problem); *Hammons v. City of Highland Park Police Dep't*, 364 N.W.2d 575, 577 (Mich. 1984) ("The existence of those non-work-related difficulties does not negate the compensability of the work-related factors.").

On remand, the administrative law judge discussed the parties' contentions concerning the pre- and post-injury events in claimant's life. *See* Decision and Order on Remand at 13-14. She addressed the opinions of Drs. Roth and Bussey and found aspects in each to support her conclusion that added stressors arising from the September 2001 work accident, coupled with claimant's low IQ, further diminished and aggravated his pre-existing poor impulse control and led to his February 2003 suicide attempt. Specifically, while the administrative law judge rejected Dr. Roth's diagnoses of PTSD and a depressive disorder as a direct result of claimant's work injury,[5] she nevertheless found "evidence in Dr. Roth's findings and report to establish" that claimant's pre-existing poor impulse control was adversely affected by the work accident. Decision and Order on Remand at 15. Claimant and his wife testified that claimant had continuing knee pain after the work accident. HT at 217-218; CX 20 at 84. Claimant told Dr. Roth he was increasingly sad and disinterested in activities following the work accident. CX 12 at 7. Claimant's wife testified that claimant was very depressed after the accident and that his anxiety, irritability and anger worsened. HT at 135-136; CX 20 at 57-58, 73. The administrative law judge found that these statements concerning knee pain and depression were consistent with those symptoms reported by claimant and his wife to Dr. Roth and Dr. Bussey. *See* CX 12 at 7; CX 13 at 7. Claimant's wife testified that

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decreased claimant's already weak impulse control. The Board did not review this finding in its second decision due to the applicability of Section 3(c).

[5]Having rejected Dr. Roth's diagnoses, the administrative law judge concluded, in the absence of any other credible evidence, that the work injury did not cause claimant to suffer from a *new* mental condition that caused him "to be devoid of his normal judgment." Decision and Order on Remand at 15.

claimant increased his use of alcohol and marijuana to get relief from his knee pain. HT at 139-140. The administrative law judge relied on Dr. Bussey's testimony that: 1) claimant's low IQ meant he would have a harder "time restraining [himself] from sometimes spontaneous actions" adverse to his own interests and that he would have "less mental flexibility and adaptability" resulting in his arriving at "less than optimal decisions about what to do;" and 2) that additional stressors after the September 2001 work injury would have decreased claimant's ability to handle stress. HT at 284-285, 357.

The administrative law judge concluded that although some of the post-accident stressors claimant experienced were of his own making and were not due to the work accident, *see* Decision and Order on Remand at 19, the continued knee pain resulting from the work injury and claimant's perception that he could not obtain adequate medical care and medication for that work injury were related to the work accident.[6] The administrative law judge concluded that added stressors resulting from the September 2001 work injury, coupled with claimant's low IQ, aggravated his pre-existing poor impulse control and led to his suicide attempt. The administrative law judge, therefore, concluded that there was a "chain of causation" between claimant's September 2001 work injury and his February 2003 suicide attempt. *Id.* at 20; Order Denying Recon. at 2.

We reject employer's contentions of error. The administrative law judge was not bound by any of her previous findings of fact because the Ninth Circuit remanded the case for consideration of the evidence under a new legal standard. *See, e.g., Visa Int'l Serv. Ass'n v. JSL Corp.*, 590 F.Supp. 2d 1306 (D. Nev. 2008), *aff'd*, 610 F.3d 1088 (9th Cir. 2010) (court not bound by law of the case doctrine when there has been a change in law). As the administrative law judge rationally stated, her first two decisions addressed whether claimant's suicide attempt was the result of an "irresistible impulse" or his willful intent to kill himself, and not whether claimant's work injury started or contributed to a chain of events leading to his suicide attempt. *See* Order Denying Recon. at 1-2. Thus, the mere fact that the administrative law judge previously reached different conclusions from the evidence does not demonstrate error in her current decision. *See generally Hicks v. Gates Rubber Co.*, 928 F.2d 966 (10th Cir. 1991) (on remand, trial court is free to decide anything not foreclosed by the mandate).

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[6]The administrative law judge stated that claimant's inability to get adequate care "appears to be due to his unfamiliarity with the health care system and confusion on the part of both Kealohas about what was available to him." Decision and Order on Remand at 19.

Moreover, the administrative law judge's decision is supported by substantial evidence of record.[7] The administrative law judge rationally accorded weight to statements of claimant and his wife about his having persistent knee pain after the accident, which claimant reported to both Drs. Roth and Bussey, and which resulted in increased alcohol and marijuana use.[8] *See* Decision and Order on Remand at 19-20; *see also* HT at 217-218, 312; CX 12; CX 20 at 84. The administrative law judge also reasonably inferred that the stress caused by claimant's perceived inability to get adequate medication for his work-related knee injury related back to the September 2001 work accident. *See, e.g., Lopucki v. Ford Motor Co*., 311 N.W.2d 338 (Mich. Ct. App. 1981) (suicide compensable where claimant's honest, subjective belief was that work injury caused or aggravated his state of mind); HT at 113-116, 200-201, 361-363; EX 108. Based on these findings, the administrative law judge concluded that the added stressors resulting from the work injury, coupled with Dr. Bussey's testimony confirming claimant's low IQ, further diminished claimant's pre-existing poor impulse control and created a chain of events that led to his suicide attempt. *See generally J.V. Vozzolo, Inc.,* 377 F.2d at 147-148.

The administrative law judge is entitled to weigh the evidence and to draw reasonable inferences therefrom, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), and to determine the credibility of witnesses. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). The Board may not reweigh the evidence on the ground that other findings and inferences could have been drawn from the evidence, *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), or disturb the administrative law judge's credibility determinations unless they are "inherently

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[7]The administrative law judge also noted that claimant was very disappointed in the lack of a settlement in his longshore claim. Decision and Order on Remand at 19. In her prior decisions, the administrative law judge noted that Dr. Roth stated claimant had raised his hopes for a lump sum settlement that was not achieved. CX 12 at 7-8; EX 35 at 2-3. The administrative law judge further noted the stress claimant experienced due to the pending litigation of his longshore claim, especially his deposition, which was scheduled for two days after the suicide attempt. Decision and Order on Remand at 19-20. Generally, however, stress caused by voluntary litigation is not compensable absent wrongful behavior by the defendant. *See, e.g., Rodriguez v. Workers' Comp. Appeals Bd.,* 27 Cal. Rptr. 2d 93 (Cal. Ct. App. 1994); *see generally Pedroza v. Benefits Review Board,* 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010).

[8]Claimant's complaints of pain are corroborated by his statements to orthopedists Dr. Mathews and Dr. Yee in the September to December 2002 period. CX 7 at 23-26; EXs 104-105.

incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We are unable to state that the administrative law judge's decision is not supported by substantial evidence. *See Rhine v. Stevedoring Services of America,* 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). The administrative law judge applied the "chain of causation" test to the evidence in this case, rationally concluded that claimant met his burden of establishing that the work injury aggravated his pre-existing condition and thus was a cause of claimant's suicide attempt, and that the injuries resulting from that attempt are compensable under the Act. *Sullivan,* 739 P.2d 597; *City of Tampa,* 397 So.2d 1220. As the administrative law judge found there is a "chain of causation between the work injury and the suicide attempt, the award of benefits is in accordance with law. *Kealoha*, 713 F.3d at 524-525, 47 BRBS at 3(CRT). Therefore, we affirm the award of temporary total disability benefits commencing February 8, 2003, and the award of medical benefits for injuries sustained as a result of the suicide attempt.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Denying Respondent's Motion for Reconsideration are affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge