

G.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 07/31/2009
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor-Party-in-Interest	)	ORDER on RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board’s decision in this case, *G.S. v. Marine Terminals Corp.*, 42 BRBS 100 (2008), with the suggestion of *en banc* review. 33 U.S.C §921(b)(5); 20 C.F.R. §802.407. Employer responds, opposing claimant’s motion.

Claimant contends, first, that the Board erred in stating that, after the Section 20(c) presumption is rebutted as in this case, claimant bears the burden of persuading the administrative law judge that intoxication was not the sole cause of his injury. 33 U.S.C. §§903(c), 920(c); *see G.S.*, 42 BRBS at 103-104. Claimant contends that employer bears the burden of persuasion on this issue as it is an affirmative defense.

After consideration of claimant’s contention, we modify the Board’s decision and delete the following passage: “Claimant bears the burden of persuading the administrative law judge that his intoxication was not the sole cause of his injury. *See, e.g., Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).” *G.S.*, slip op.

at 6, 42 BRBS at 103. In addition, the last two substantive paragraphs of the opinion are deleted, slip op. at 7-8, 42 BRBS at 103-104, and the following paragraph is substituted:

The administrative law judge further stated, assuming, *arguendo*, rebuttal was established, that upon weighing the record as a whole, she is “unable to find that Claimant’s intoxication was the sole cause of the accident” due to the absence of direct proof of claimant’s actions which caused his fall; the administrative law judge therefore stated that claimant’s injury is compensable. Decision and Order at 19. We cannot affirm this conclusion. The administrative law judge did not weigh the relevant evidence or assess the merits of the physicians’ opinions based on their credentials or the reasoning they provided. *See generally Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988). In addition, the administrative law judge did not weigh the testimony of Mr. Yockey. Moreover, the administrative law judge inappropriately speculated that the fall may have been due to claimant’s being distracted, careless, or in a hurry to relieve himself, without considering that such factors may have been directly related to claimant’s alcohol consumption. The administrative law judge may not infer without a basis in the record that some other factor caused claimant to fall. *See generally General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9<sup>th</sup> Cir. 1991) (administrative law judge permitted to draw reasonable inferences from the record evidence). As the administrative law judge did not properly address the record as a whole, and summarily stated that intoxication was not the sole cause of claimant injury, we must vacate this conclusion and remand the case for further findings. The administrative law judge must discuss and weigh the relevant evidence, including the degree of claimant’s intoxication, and explain the basis for her decision to credit particular evidence. *Del Vecchio*, 296 U.S. 280; *Walker*, 645 F.3d 170, 13 BRBS 257.

Claimant also contends that the Board erred in focusing on intoxication as the sole cause of claimant’s fall over the railing, rather than as the sole cause of claimant’s injury. 33 U.S.C. §903(c). We reject this contention. If intoxication was the sole cause of claimant’s fall, then intoxication also was the sole cause of claimant’s injury. *Shearer v. Niagara Falls Power Co.*, 150 N.E. 604 (N.Y. 1926).

Accordingly, claimant's motion for reconsideration is granted in part and the Board's decision is modified as stated herein.<sup>1</sup> 20 C.F.R. §§801.301, 802.409.

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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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>1</sup> As three judges have joined in this decision, claimant's request for *en banc* review is denied. 20 C.F.R. §§801.301(c), 802.407(d).