U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0384

JERRY A. JARRETT, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: June 29, 2018
	)	
CP&O, LLC	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
COOPER/T. SMITH STEVEDORING	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order – Denying Compensation Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Christopher R. Hedrick and Bradley D. Reeser (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for CP&O and Ports Insurance Company.

Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for Cooper/T. Smith Stevedoring and American Longshore Mutual Association.

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

PER CURIAM:

CP&O (employer) has timely filed a motion for reconsideration of the Board's Decision and Order in *Jarrett v. CP&O, LLC*, 51 BRBS 41 (2017). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. In its decision, the Board stated that employer had not responded to claimant's appeal. *Jarrett*, 51 BRBS at 42. With its motion for reconsideration, employer submitted exhibits showing that it timely filed a response to claimant's appeal, which was not docketed due to a clerical error by the Board. Mot. for Recon. at exs. G, H, I. Accordingly, we grant employer's motion for reconsideration, 20 C.F.R. §802.407, and vacate our prior decision. We will address claimant's appeal, employer's response and its substantive contentions on reconsideration, and the response of Cooper/T. Smith Stevedoring. 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).

Claimant alleged that he injured his neck, shoulders and low back at work on March 6, 2013, when the shuttle truck he was driving was involved in a collision with another shuttle truck. Employer terminated claimant for his third driving accident within a four-year period.[1] EX 28 at 6. Claimant sought compensation for temporary total disability from March 11, 2013 to March 3, 2014, temporary partial disability from March 4 to September 8, 2014, and ongoing permanent partial disability from September 9, 2014. Employer joined Cooper/T. Smith Stevedoring (Cooper) because claimant had sustained three prior work injuries with Cooper. Claimant injured his low back on October 28, 1998, his neck, back and left shoulder on December 9, 1999, and his low back on January 12, 2003. Decision and Order at 3.

In his decision, the administrative law judge addressed employer's contention that the claim is barred under Section 3(c) of the Act, 33 U.S.C. §903(c), because claimant intended to injure himself by placing his shuttle truck in a position to be struck by another truck. The administrative law judge found claimant entitled to the Section 20(d) presumption, 33 U.S.C. §920(d), that he did not intend to injure himself, but that employer rebutted the presumption. Decision and Order at 62-64. The administrative law judge concluded that claimant failed to establish by a preponderance of the evidence that his

[1] Claimant had prior accidents on August 1, 2012 and October 14, 2012. EX 28 at 1-2. Authorization to terminate claimant for cause was provided for in the Collective Bargaining Agreement between claimant's union and employer. Decision and Order at 63.

alleged injuries were not occasioned by his willful intent to injure himself. He found the claim barred under Section 3(c) and, therefore, did not address the remaining issues. *Id*.

On appeal, claimant challenges the denial of the claim under Section 3(c). Employer and Cooper filed separate response briefs, urging affirmance.[2]

Section 3(c) of the Act provides in pertinent part:

> 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 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 a 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). To rebut the Section 20(d) presumption, employer must produce substantial evidence that claimant's injury was due to his willful intent to injure himself. *See Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013). Upon production of evidence sufficient to support a finding of an intentional, self-inflicted injury, the presumption falls out of the case and the case must be decided on the record as a whole, with claimant bearing the burden of persuasion "that the injury is covered under the . . . statute." *Truczinskas*, 699 F.3d at 680, 46 BRBS at 89(CRT); *see Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Schwirse*, 736 F.3d 1165, 47 BRBS 31(CRT).

Claimant's work accident occurred at 4:30 a.m. and was captured on video. Officer Paul Dallas, the port authority police officer who investigated the accident, found: Ms. Oliver's shuttle truck was stopped in the proper place to await its turn at the crane; claimant

[2] In its response brief, employer asserts that claimant waived any contentions concerning Section 20(d) for failure to raise the issue on appeal. *See* n.4, *infra*. Employer also contends the administrative law judge properly applied the Act's burden shifting scheme and that his conclusion that claimant willfully intended to injure himself is supported by substantial evidence. In its motion for reconsideration, employer reiterates these contentions and further contends the Board improperly overturned the administrative law judge's findings that were based on circumstantial evidence. In its response brief, Cooper contends the administrative law judge's findings under Sections 20(d) and 3(c) are supported by substantial evidence and should be affirmed.

attempted to drive his shuttle truck around Ms. Oliver's on the left, just as her truck started to slowly roll forward; claimant was driving at an excessive speed; the right back side of claimant's truck struck the left cab of Ms. Oliver's truck as he was attempting to go around her; and the pavement was wet, as it had been raining. EX 11. The police officer wrote the incident up as an "accident" due to the fault of both drivers. *Id*.; *see* Tr. at 68-69. He testified that vehicular accidents occur frequently at the port. Tr. at 68. While initially denying injury, claimant sought treatment the following day, the same day employer notified his union president that his employment was terminated for a third accident while operating a work vehicle.[3] *Id.* at 126-127; EX 28 at 6.

The administrative law judge gave claimant the benefit of the Section 20(d) presumption but found that employer rebutted it. He then concluded that the evidence as a whole establishes that claimant willfully intended to injure himself such that Section 3(c) bars the claim. Both conclusions rest on his evaluation of the same evidence. The administrative law judge found: claimant had years of experience driving shuttle trucks without having a collision; he "deliberately and knowingly" cut off the truck driven by Ms. Oliver, which was in the proper position; and, he was driving at an excessive speed. Decision and Order at 64. The administrative law judge found that claimant's intent to injure himself was further evident because the proper pick-up rotation among the three shuttle truck drivers assigned to the same crane had been observed throughout the shift. *Id*. He credited evidence that shuttle truck drivers receive extensive training and that practical operating procedures are prescribed, such as following behind the shuttle truck in front, making all turns at 90 degrees, looking in all directions before moving, and driving at a slow speed. *Id*.; *see* Tr. at 47-48, 80, 145-147, 160, 166-167. He also credited claimant's testimony that he had received shuttle truck training, was cognizant of his work duties that day, and was aware that Ms. Oliver was waiting to pick up off-loaded containers. Decision and Order at 64; *see* Tr. at 80-81. He noted that claimant further testified that, instead of waiting his turn behind Ms. Oliver's shuttle truck, he passed her and turned in front of her at a distance of five to eight feet and at less than a 90 degree angle. Decision and Order at 64; *see* Tr. at 120-122. The administrative law judge also relied on the fact that claimant was an "experienced" litigant, who had filed four previous claims under the Act and was aware that he could claim benefits based on the aggravation rule. Decision and Order at 63-64.

We reverse the administrative law judge's findings that employer rebutted the Section 20(d) presumption and that the claim is barred by Section 3(c).[4] First, there is no

[3] Claimant remained eligible to work for the other employers at the Hampton Roads terminal. Tr. at 103, 180-181.

[4] We reject employer's contention that the issue of rebuttal of the Section 20(d) presumption is waived because it was not raised on appeal by claimant. The brief filed by

direct evidence that claimant intended to injure himself. Second, the facts found by the administrative law judge may establish that claimant was negligent, but such conduct does not preclude recovery under the Act pursuant to Section 3(c). Indeed, pursuant to Section 4(b) of the Act, "Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. §904(b); *N.R.* [*Rogers*] *v. Halliburton Services*, 42 BRBS 56 (2008); *see generally Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982). Contributory negligence is not a defense to employer's liability. *Smoot Sand & Gravel Corp. v. Britton*, 152 F.2d 17 (D.C. Cir. 1945) (claimant injured while riding on a dump truck's running board covered). In *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940), the court observed that the Act "is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, [or] illegality." *Id.*, 112 F.2d at 17. "Violations of rules implicate fault," contrary to Section 4(b) of the Act. *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100, 101 (2008), *modified in part on recon.*, 43 BRBS 108 (2009). Thus, claimant's knowledge of the rules for operating a shuttle truck, and negligent violation thereof, do not establish an intent to injure himself.

Moreover, the other evidence on which the administrative law judge relied to find "intent" do not support the inferences he drew. The administrative law judge's finding that intent was demonstrated by claimant's years of prior operation of shuttle trucks without collision is belied by the evidence that claimant was terminated from further employment by employer due to his having a third vehicle accident within seven months.[5] EX 28 at 1-2, 6. In addition, the police report does not support a finding that claimant intended to injure himself, as Officer Dallas testified that Ms. Oliver's shuttle truck drifted forward prior to the accident and opined that both claimant and Ms. Oliver were at fault. Tr. at 68-69; *see also* EX 11. Ms. Oliver was also "written-up" by employer for the accident. Tr. at 39-42. Taken in isolation or as a whole, and in light of Section 4(b) of the Act, the record evidence does not support a conclusion that claimant willfully intended to injure himself.[6]

---

claimant's lay representative is inartful. Nevertheless, he correctly states that there are no cases associating "contributory negligence" with "willful intent." Cl. Br. at 10. The evidence the administrative law judge found sufficient to rebut the Section 20(d) presumption is the same as that on which he relied to find the claim barred by Section 3(c). The legal sufficiency of this evidence to establish willful intent has been raised by claimant.

[5] The other accidents apparently did not involve shuttle trucks. In view of these accidents and the presumption afforded claimant, the absence of a prior accident while driving a shuttle truck cannot support the finding that claimant intended to injure himself.

[6] We reject the administrative law judge's reliance on the fact that claimant had filed prior claims under the Act to insinuate that claimant was aware of the "benefit" of

See generally Jackson, 32 BRBS at 74; *see also Arrar v. St. Louis Shipbuilding Co.*, 780 F.2d 19, 18 BRBS 37(CRT) (8th Cir. 1985); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J., dissenting). The administrative law judge's findings that employer rebutted the Section 20(d) presumption and Section 3(c) bars the claim are reversed.[7] The case is remanded for the administrative law judge to address any remaining issues.

Accordingly, employer's motion for reconsideration is granted. 20 C.F.R. §802.409. The Board's December 18, 2017 published decision at 51 BRBS 41 (2017) is vacated, and this opinion is substituted therefor. The administrative law judge's denial of the claim pursuant to Section 3(c) is reversed. The case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

sustaining an aggravating injury. Decision and Order at 63-64. The mere fact that claimant previously exercised his right to file claims is not evidence of subjective intent to injure himself. The parties stipulated that claimant sustained work-related injuries in 1998, 1999 and 2003. Claimant filed a claim for medical benefits in 2008. The administrative law judge awarded medical benefits for claimant's back condition, finding it due to the natural progression of the 2003 injury with Cooper. *Id.* at 3, 63 n.25.

[7] We reject employer's assertion that the Board has required "confessional" level of proof before willful intent can be found. *See, e.g., Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986); *O'Conner v. Triple A Machine Shop*, 13 BRBS 473 (1981).