BRB No. 93-934

ALMA S. KONNO (Widow of ROY T. KONNO) Claimant-Respondent v. YOUNG BROTHERS, LTD. Self-Insured Employer-Petitioner	)))))))))))	 DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order of Nahum Litt, Chief Administrative Law Judge, United States Department of Labor.

Gerald T. Johnson and Meyer M. Ueoka (Ueoka & Ueoka), Wailuku, Hawaii, for claimant.

Kurt A. Gronau and Brian G.S. Choy, Honolulu, Hawaii, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order (90-LHC-3231) of Chief Administrative Law Judge Nahum Litt 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 if they 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 case involves an appeal by employer of an award of death benefits to the widow of a deceased employee (claimant) where the decedent's death was the result of suicide. Prior to his death, decedent, Roy Konno, worked for employer at its Maui marine terminal for 34 years. In August 1981, employer appointed John Medeiros as its foreman at the terminal. Upon learning that approximately $500,000 worth of cargo had been reported as missing from the terminal from 1978 to 1983, Mr. Medeiros initiated a theft investigation. Mr. Medeiros subsequently enlisted the assistance of the Maui police, who launched a criminal investigation. Pursuant to this investigation, every employee at the terminal received a subpoena to testify before a grand jury. On November 16, 1983, the day decedent was scheduled to testify, he committed suicide by ingesting Dalmane, a prescription drug. His suicide note stated, *inter alia*, "With all the pressure at work, work has

become a chore. I can't stand the pressure and will crack up." EX 22. Although several employees were eventually convicted of theft-related crimes, Mr. Konno was never implicated in any criminal activity. Claimant, decedent's widow, filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's death arose out of and in the course of his employment.

At the hearing, evidence was presented that decedent perceived a deterioration in his working conditions after Mr. Medeiros' appointment. Claimant and her brother-in-law, Mineo Murakami, who was a close friend of the decedent, testified that in the year prior to his death Mr. Konno was repeatedly upset by Mr. Medeiros' actions. They specifically testified regarding an instance in which Mr. Medeiros berated Mr. Konno for arriving three minutes late for work, an instance in which he refused to assist Mr. Konno in locating a shipment of cargo, and an instance in which he questioned Mr. Konno concerning a bill of lading indicating that cargo was missing. They also testified about an occasion in which Mr. Konno became infuriated because Mr. Medeiros delivered his pay check at home on a day when he had called-in sick because decedent believed that the check delivery was a pretense for determining the veracity of his illness. They further stated that decedent had been frustrated because Mr. Medeiros had increased his workload to the extent that he believed it lessened the quality of service he was providing his customers and that when Mr. Konno had expressed his concern to Mr. Medeiros, no additional help was provided. Mr. Murakami also testified that a customer had told Mr. Konno of co-employees who may have been involved in the theft of cargo and that Mr. Konno was distraught at the prospect of implicating his co-workers before the grand jury.

In his Decision and Order, the administrative law judge awarded claimant death benefits, finding that decedent's suicide was due to depression resulting from the grand jury investigation and other work-related pressures associated with Mr. Medeiros' management style which made decedent feel unappreciated and not trusted. The administrative law judge further determined that as decedent's death was caused by an irresistible suicidal impulse resulting from the cumulative pressures of his work and the grand jury investigation, and not by a willful intent to injure himself, the claim was not barred pursuant to Section 3(c) of the Act, 33 U.S.C. §903(c). The administrative law judge ordered the parties to stipulate to decedent's average weekly wage or submit relevant evidence within ten days. In a Supplemental Decision and Order, the administrative law judge accepted the parties' stipulation as to decedent's average weekly wage, and entered the award of benefits accordingly. Pursuant to Section 9(a), 33 U.S.C. §909(a), claimant was also awarded up to

$3,000 for funeral expenses and interest on accrued compensation. Employer timely appealed these decisions.[1]

On appeal, employer challenges the administrative law judge's findings that decedent's suicide was causally related to his employment and that the claim was not barred by decedent's willful intent to injure himself pursuant to Section 3(c). Employer also contends that the administrative law judge improperly applied the Section 20(a) and (d) presumptions of compensability, 33 U.S.C. §920(a), (d), and erred in finding that employer failed to rebut the Section 20(a) presumption. Employer states that if the Board should reverse the award of benefits, it is entitled to reimbursement of compensation previously paid to claimant. Claimant responds, urging affirmance.

In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. *Cairns v. Mason Terminals, Inc.*, 21 BRBS 248, 253 (1988).

In the instant case, the administrative law judge found that claimant was entitled to the benefit of the Section 20(a) presumption inasmuch as decedent's suicide was clearly an injury and claimant's testimony was sufficient to establish the existence of working conditions which could have caused decedent's suicide. The administrative law judge further determined that the grand jury investigation exacerbated decedent's condition, noting that a marked change occurred in his demeanor prior to the suicide in that he became more and more withdrawn both at home and at work. The administrative law judge also stated that the forensic psychiatric reports of Drs. Vishnevska and Licht, who found that the cumulative effects of decedent's general working conditions and the grand jury investigation precipitated his severe depression and lead to his suicide, provide evidentiary support for claimant's claim.

After review of the record, we affirm the administrative law judge's finding that claimant was entitled to the benefit of the Section 20(a) presumption. Contrary to employer's assertion, the administrative law judge properly determined that decedent's suicide was an injury meeting the first requirement for invoking Section 20(a) despite the fact that his depression had not been identified or treated prior to his suicide. *See*, *e.g.*, *Clauss v. Washington Post Co.*, 13 BRBS 525, 527 (1981). Accordingly, employer's argument that claimant failed to establish the "injury" element of his *prima facie* case is rejected.

Employer's assertion that claimant failed to establish that working conditions existed outside

[1]Employer moved that the Board hold oral argument or expedite its review of this case. By Order dated September 3, 1993, employer's request for oral argument was denied. The Board granted employer's motion for expedited review.

of the grand jury investigation which could have caused the alleged injury to decedent similarly must fail. Employer cites Dr. Furukawa's opinion for the proposition that decedent's general working conditions would not have caused him to commit suicide. The administrative law judge, however, reasonably concluded based on the medical reports of Drs. Vishnevska and Licht and the testimony of claimant and Mr. Murakami that the cumulative effects of decedent's general working conditions and the grand jury investigation constituted employment conditions sufficient to invoke the presumption. Employer maintains, however, that neither the working conditions other than the grand jury investigation nor the grand jury investigation itself establish the requisite working conditions necessary for invocation of the Section 20(a) presumption in light of *Marino v. Navy Exchange*, 20 BRBS 166 (1988), in that they involved legitimate business decisions.[2] We reject the contention that working conditions sufficient for invocation of Section 20(a) were not established.

The administrative law judge credited Dr. Vishnevska, who stated that pressures at work led to depression, which led to death.[3] Tr. at 28. Dr. Vishnevska opined that Mr. Konno would not have committed suicide but for stress at work, which, in addition to the subpoena related to the fraud investigation, includes work incidents that began over a year prior to the date of death. CX 6 at 15. In her report, Dr. Vishnevska specifically noted the increased workload, Mr. Medeiros' scolding Mr. Konno for being 3 minutes late when Mr. Konno had often worked overtime without pay, his checking on Mr. Konno when he was home ill, and "several other incidents," as contributing to his death. CX J:HT at 23-24, 33-34. Claimant testified to the above facts, as well as to an incident when Mr. Medeiros refused to assist Mr. Konno in locating a lost pallet of macadamia nuts, Tr. at 49, CX V at 25-26, and the administrative law judge credited this testimony.

The administrative law judge properly noted that while some of the work-related stress may seem relatively mild, the issue is the effect of these incidents on Mr. Konno. *See Cairns*, 21 BRBS

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[2]In *Marino*, claimant sustained a stress-induced psychological injury resulting from a reduction-in-force by employer. The Board held that a legitimate personnel action such as a reduction-in-force is not a working condition that can form the basis of a compensable injury. *Marino*, 20 BRBS at 168. The Board reasoned that to hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its business. *Id.* The administrative law judge herein found that *Marino* was not dispositive as it involved a reduction in force, an area where compensation has been limited by most courts. Decision and Order at 4, n.3

[3]We reject employer's arguments challenging the foundation for Dr. Vishnevska's opinion and her diagnosis of depression after the fact of decedent's death. All of the medical evidence in this case, including the opinion of employer's expert witness, was obtained after decedent's death, and it may be credited by the administrative law judge. *See Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988). In addition, Dr. Vishnevska's opinion was based on interviews with claimant and Mr. Murakami and review of the medical reports of Drs. Furukawa and Licht, the coroner's report, the suicide note, and claimant's deposition. The opinion thus had an adequate foundation. Finally, employer did not object to claimant's proffer of Dr. Vishnevska as an expert medical witness at the hearing.

at 256 (working conditions need not be unusually stressful). Consistent with Dr. Vishnevska's testimony, he found that these incidents made decedent feel unappreciated and untrusted. Since Dr. Vishnevska found claimant's depression linked to the totality of the conditions at work, even if legitimate actions involving the fraud investigation are not considered, nonetheless working conditions existed sufficient to invoke Section 20(a). This result is consistent with *Marino*, in that while the Board held that an injury due to a reduction in force is not compensable, it also remanded the case for the administrative law judge to address claimant's allegations that his injury was due as well to cumulative stress from supervising a number of locations, insufficient personnel to perform the job, working more than the required number of hours, and performing the duties of subordinates.[4] *Marino*, 20 BRBS at 168. An injury need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Insurance Co. of North America v. U.S. Dept. of Labor, OWCP,* 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). As claimant successfully established the existence of at least some working conditions which could have caused decedent's death irrespective of *Marino*, the administrative law judge's determination that claimant established a *prima facie* case under Section 20(a) is affirmed. *See generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).[5]

Employer next contends that the administrative law judge erred in finding Dr. Furukawa's opinion insufficient to establish rebuttal of the Section 20(a) presumption. Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption by producing substantial countervailing evidence that the employee's injury was not caused, aggravated, or accelerated by the conditions of his employment. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). If the presumption is rebutted, the administrative law judge must weigh all of the evidence in the record considered as a whole and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935). Moreover, the United States Court of Appeals for the Ninth Circuit, in which this case arises, has stated that even after substantial evidence is produced to rebut the Section 20(a) presumption, the employer still bears the ultimate burden of persuasion. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980), *aff'g Gunter v. Parsons Corp. of California*, 6 BRBS 607 (1977). Although Dr. Furukawa opined that decedent's general working conditions alone would not have led him to commit suicide and that the grand jury investigation was the major precipitating factor in his death, he also indicated that decedent's general working conditions could have been "aggravating" factors in decedent's depression and suicide. As Dr. Furukawa explicitly recognized that decedent's general work-related conditions may have played a contributing role in his depression and suicide, the administrative law

[4]On remand, the administrative law judge awarded benefits on this theory, finding claimant's general working conditions were a cause of his injury. This decision was affirmed on appeal. *Marino v. Navy Exchange*, BRB No. 88-1720 (Dec. 12, 1990)(unpublished).

[5]We thus need not address the administrative law judge's alternate conclusion that even if the grand jury investigation was the sole working condition at issue, it would be sufficient to establish a *prima facie* case.

judge properly found this opinion insufficient to rebut the presumed causal connection between decedent's death and his employment provided by Section 20(a). *See Peterson*, 25 BRBS at 78-79; *see also Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 95-96 (1993), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993). Accordingly, the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption based on Dr. Furukawa's opinion is also affirmed.

Employer's argument that the grand jury investigation was an intervening cause of decedent's death sufficient to relieve it of liability for the claim is similarly without merit. Citing *McNamara v. Mac's Pipe and Drum, Inc.,* 21 BRBS 111 (1988),[6] employer asserts that decedent's suicide did not occur in the course of his employment because it was motivated by his personal sense of obligation in not wanting to implicate his co-workers before the grand jury and that this willful concealment of pertinent information from employer was sufficient to sever the master-servant relationship. We disagree. Professor Larson has stated in order for death due to suicide to be compensable, the suicide must result from an injury arising out of and in the course of employment and must be directly traceable to it. *See* 1A Larson, *Workmen's Compensation Law*, §36.40 (1992). The initial injury may be a physical or mental work injury, and the filing of a claim under the Act for the first injury is not a necessary pre-condition for an award of death benefits due to suicide. *Id., citing Director, OWCP v. PEPCO [Brannon]*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979); *see also Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *rev'd on other grounds sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). In this case, the opinion of Dr. Vishnevska credited by the administrative law judge establishes that decedent suffered from depression, the initial injury arising out of and in the course of his employment. If decedent's suicide resulted from his depression, it is compensable. Employer argues, however, that the fraud investigation was an intervening cause of decedent's suicide severing the causal chain.

The United States Court of Appeals for the Ninth Circuit has held that where an employee suffering from a work-related injury suffers an additional injury off the job which is not the natural or unavoidable result of the work injury but is due to the employee's intentional or negligent conduct, the employee is not entitled to compensation, as the injury has not arisen from the employment. *Cyr v. Crescent Wharf & Wharehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954). *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, No. 92-70045 (9th Cir. Oct. 6, 1993). In cases involving death due to suicide, cases under the Act require a chain of causation, with the suicide resulting from an "irresistible impulse." Where there is

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[6]In *McNamara*, claimant, a bartender, assisted with the ejection of 5 unruly customers from employer's premises. When another customer left the premises to provoke a second altercation outside the premises with the ejected customers, claimant was injured when he came to the aid of the provocateur. The Board affirmed the administrative law judge's finding that claimant's injury did not arise in the course of his employment. The Board held that, on the facts presented, once claimant left employer's premises he acted voluntarily on behalf of the provocateur, not on behalf of employer.

a connection between the death and the employment, the causal effect attributable to the employment must not have been severed by an intervening cause originating entirely outside the employment. *See Voris v. Texas Employers Ins. Ass'n,* 190 F.2d 929 (5th Cir. 1951). *See also Terminal Shipping Co. v. Traynor*, 243 F.Supp. 915 (D. Md. 1965).

The evidence credited by the administrative law judge in the present case does not support employer's theory that the fraud investigation was an intervening cause severing the chain of causation. The administrative law judge credited the forensic psychiatric reports of Drs. Vishnevska and Licht, which indicate that the cumulative effects of decedent's working conditions and the investigation precipitated severe depression, *i.e.*, an injury arising out of decedent's employment, and that his suicide resulted directly from this condition. In addition, as Dr. Furukawa recognized that decedent's general working conditions may have been contributing factors in his depression and suicide, there is no record evidence attributing decedent's depression and suicide to the grand jury investigation alone. Moreover, as was noted by the administrative law judge in his causation analysis,[7] because the grand jury subpoena in the present case resulted from employer's theft investigation, it did not originate entirely outside of decedent's employment. Thus, it does not constitute an intervening cause of decedent's suicide sufficient to relieve employer of liability for decedent's death benefits. Accordingly, employer's intervening cause argument is rejected.

[7]In concluding that rebuttal had not been established, the administrative law judge noted that employer had not attempted to rebut causation by linking decedent's suicide solely to the grand jury investigation. He further indicated, however, that even assuming *arguendo* that the grand jury investigation was the sole reason for decedent's suicide, employer would nonetheless not escape liability because the grand jury investigation itself arose out of and in the course of decedent's employment. Decision and Order at 4.

We also reject employer's final argument that the administrative law judge erred in failing to conclude that claimant's death benefit claim is barred under Section 3(c) of the Act and that the administrative law judge improperly applied the presumption of Section 20(d) of the Act, 33 U.S.C. §920(d). Section 3(c) bars compensation under the Act if the injury is caused by the willful intention of the employee to kill himself or another.[8] Employer asserts that the claimant is not entitled to the Section 20(d) presumption that the injury was not occasioned by the willful intention of the employee to kill himself because it is uncontested that decedent committed suicide. *See Cooper,* 7 BRBS at 860-861. Where, as here, it is uncontested that the death was the result of suicide, the presumption applies but is rebutted; in this case the administrative law judge properly determined that Section 20(d) did not aid claimant in resolving this issue. *See Del Vecchio*, 296 U.S. at 280.

Where an employee's death is not due to a "willful intent" to commit suicide but results from an irresistible suicidal impulse resulting from a work-related condition, Section 3(c) does not bar the compensation claim. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). *See also Voris,* 190 F.2d at 934. The administrative law judge applied this legal standard, and found that decedent succumbed to an irresistible impulse. In so concluding, the administrative law judge credited the medical opinions of Drs. Vishnevska and Licht that decedent suffered tunnel vision as a result of severe depression which led him to view suicide as the only alternative and that decedent's suicide was an irrational act.[9] He also credited Dr. Vishnevska's direct testimony that decedent's suicide was the product of an irresistible impulse, noting that neither Dr. Licht and nor Dr. Furukawa offered a contrary opinion. Finally, he noted that although Dr. Furukawa's opinion as to whether decedent's suicide was a rational act was less than clear, his testimony seemed to reinforce Dr. Vishnevska's findings to the extent that Dr. Furukawa recognized that decedent was not able to control his actions.

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

> (c) 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.

[9]Dr. Vishnevska opined that decedent suffered from "Major Depressive Disorder" directly due to the cumulative pressures of work and the grand jury investigation and that this severe depression in turn created the "irresistible impulse" which caused him to commit suicide. CX 2. Although Dr. Vishnevska indicated that there may be instances in which a suicide may be seen as rational, she concluded that this was not such a case in so far as decedent had " tunnel vision " which precluded any rational view of his alternatives. CX 2, tab G. Dr. Licht indicated that decedent suffered from acute depression which was directly traceable to conflicts at work and that due to this depression it was not possible for him to see all possible alternatives, *i.e.*, he had narrow "tunnel vision. CX 2, tab F. Dr. Licht also testified that although decedent was not psychotic or emotionally disturbed, his suicide was an irrational act.

Employer argues on appeal that the administrative law judge erred in crediting Dr. Vishnevska's opinion because her diagnosis was based in large part on information provided by claimant who was not credible and because cross-examination revealed a number of omissions and mistaken assumptions underlying her opinion. The administrative law judge, however, found claimant credible, and his decision to credit her testimony is rational and within his authority as the factfinder. *See Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992). Employer also asserts that the administrative law judge erred in viewing Dr. Furukawa's testimony that Mr. Konno was not able to control his actions as corroborative of Dr. Vishnevska's opinion because Dr. Furukawa also testified that Mr. Konno's suicide was not sudden or impulsive but deliberate and that Mr. Konno understood the gravity of his act. We reject this argument, as the administrative law judge is free to make rational determinations about the medical evidence and may accept or reject all or any part of any medical testimony. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80 (CRT)(5th Cir. 1991), *rev'g in part*, 19 BRBS 15 (1986). Inasmuch as the administrative law judge's determination that decedent's suicide was not due to his willful intent to kill himself, is supported by substantial evidence and as employer has failed to raise any reversible error made by the administrative law judge in evaluating the medical evidence and making credibility determinations, his finding that the decedent's suicide was due to an irresistible impulse is affirmed. *See Maddon,* 23 BRBS at 61; *Cooper,* 7 BRBS at 853; *see generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91, 24 BRBS 46, 48 (CRT)(5th Cir. 1990). Accordingly, as Section 3(c) does not bar compensation where the employee's death is due to an irresistible suicidal impulse, the administrative law judge's award of death benefits is affirmed.[10]

[10]Since we affirm the award of benefits, we need not address employer's contention that it is entitled to reimbursement of compensation paid to date. We note, however, that the Act contains no authority for ordering such reimbursement. *See Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir. 1992).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Decision and Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge