

BRB No. 93-1163

BENJAMIN WILBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES TERMINALS	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

Lawrence E. Dube, Jr. (Dube & Goodgal), Baltimore, Maryland, for claimant.

Patrick A. Roberson (Smith, Somerville & Case), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (92-LHC-2159) of Administrative Law Judge Julius A. Johnson 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

While working for employer as a groundman on March 1, 1991, claimant alleged he was injured by a co-worker, Augustine Mack, when a dispute arose between them. Claimant alleged that Mr. Mack grabbed the chain claimant was holding causing the chain to hit claimant in his right knee, top of his foot, and his back. Claimant sought disability and medical benefits under the Act.<sup>1</sup> The administrative law judge denied the claim as he found that claimant's injury occurred because of his willful intent to injure Mr. Mack. 33 U.S.C. §903(c).

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<sup>1</sup>Claimant's claim form states he missed 29 full days and 33 half days of work due to the injury.

Claimant testified that the dispute arose because Mr. Mack was going to perform work claimant felt it was his sole responsibility to perform. Claimant also testified that he was afraid that if he let a non-bargaining unit employee such as Mr. Mack perform the work, he could be subject to disciplinary action. Claimant testified that he did not touch Mr. Mack during the dispute.

The administrative law judge found that Mr. Mack's version of the incident differed from claimant's version. In a post-hearing deposition, Mr. Mack stated that he came on the scene to instruct some men to do their work. Claimant was not working and others had stopped working to gather around him. Mr. Mack picked up the chain to hook it to a container, and claimant snatched the chain from him, causing the chain to hit Mr. Mack's left knee. Mr. Mack then went to the police, accusing claimant of assault. The police reported that Mr. Mack told them that, during a verbal confrontation, claimant pushed him and grabbed the chain bringing it in a "downward motion striking him [Mr. Mack] on his left knee area." Emp. Ex. 1 at 2. The police reported that claimant stated that Mr. Mack pulled the chain from him, causing the chain to strike claimant's right knee and shin. The police observed that Mr. Mack had a little swelling around the left knee and claimant had no apparent injuries. *Id.*

A criminal trial was held in Baltimore District Court in May 1991. At the trial, Mr. Mack testified that claimant grabbed him, pushed him backwards and grabbed the chain out of his hands. A witness, Warren Molton, testified that he saw claimant push Mr. Mack, then grab the chain. Claimant testified that after Mr. Mack took the chain from him, he grabbed it back and then Mr. Mack snatched the chain from him. The court issued a probation before judgment sentence (*i.e.*, four months' probation) against claimant, and as a result there was no recording of a guilty verdict. Emp. Ex. 6.

In finding that claimant had a willful intent to injure Mr. Mack, the administrative law judge credited the version of the incident presented in Mr. Mack's post-hearing deposition, *i.e.*, that claimant grabbed the chain from Mr. Mack, over claimant's version that Mr. Mack grabbed the chain from him. The administrative law judge found that Mr. Mack was more credible than claimant in that Mr. Mack's testimony that the chain hit his left knee was corroborated by the police report. The administrative law judge found that Mr. Mack's version had less internal variation than claimant's, and that Mr. Mack's testimony at his deposition, to the police, and at the criminal trial was substantially similar while claimant's version given at the longshore hearing, to the police, and at the criminal trial varied.<sup>2</sup> The administrative law judge specifically noted that in the criminal context, claimant indicated that he was trying to grab the chain from Mr. Mack, while in the compensatory context he stated that Mr. Mack grabbed the chain from him.<sup>3</sup>

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<sup>2</sup>We note, however, that Mr. Mack informed the police and testified at the criminal trial that claimant pushed him, but in his deposition he did not state that claimant pushed him. The administrative law judge found that this was not inconsistent, but that one version was merely more detailed than another. Decision and Order at 5 n.4.

<sup>3</sup>Actually, in the criminal context, claimant stated he grabbed the chain from Mr. Mack, and then Mr. Mack grabbed the chain from him.

The administrative law judge found that claimant was not entitled to benefits because employer presented un rebutted, substantial countervailing evidence that claimant clearly exhibited a willful intent to injure Mr. Mack. The administrative law judge stated:

Claimant heatedly tried to dissuade Mr. Mack from performing a task claimant felt Mr. Mack should not do, and in the course of so doing, attempted to grab the steel chain from Mr. Mack. The act of grabbing this chain, while engaged in a tense verbal confrontation, was an act of provocation, demonstrating a willingness to inflict injury upon the other party. This willingness to inflict harm constitutes a "willful intent to injure" under the Act.

Decision and Order at 7. The administrative law judge further found that although claimant may not have intended to injure Mr. Mack with the steel chain, his behavior clearly indicated that he fully intended to prevent Mr. Mack from performing a task that claimant felt was exclusively within his job duties, perhaps by whatever means were necessary. The administrative law judge found that claimant engaged in his preventive actions knowingly and purposely, and therefore claimant's conduct under the Act was willful.

On appeal, claimant contends that the administrative law judge erred in finding that he had a willful intent to injure Mr. Mack. Claimant contends that the administrative law judge misapplied Section 3(c) in finding that claimant's intent to prevent Mr. Mack from performing his job equates to an intent to injure Mr. Mack. Claimant also contends that the administrative law judge erred in admitting the post-hearing deposition of Mr. Mack into evidence without allowing either claimant's counsel to cross-examine, or the administrative law judge to examine, Mr. Mack at the hearing. Employer responds, urging affirmance.

Section 3(c), 33 U.S.C. §903(c), of the Act prohibits payment of compensation if a claimant's injury was occasioned by his willful intention to injure or kill another. Section 20(d), 33 U.S.C. §920(d), provides a presumption that a claimant's injury was not occasioned by his willful intention to injure or kill another. In order to rebut this presumption, employer must present substantial countervailing evidence that claimant intended to injure another employee at the time of the incident. *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); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1978).

We affirm the administrative law judge's decision to credit the version of events supplied by Mr. Mack over the version furnished by claimant, as he has the discretion to credit the testimony of one witness over that of another. As the administrative law judge found, the police report corroborated Mr. Mack's deposition testimony that he injured his left knee, there were some discrepancies in claimant's account of the nature of the injuries he suffered, and claimant initially denied having a prior knee injury at the hearing when, on cross-examination, he admitted he had a prior knee injury. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978),

*cert. denied*, 440 U.S. 911 (1979). Further, the administrative law judge properly admitted Mr. Mack's post-hearing deposition into evidence as claimant's counsel had the opportunity to cross-examine Mr. Mack at the deposition. *See* 20 C.F.R. §702.338; *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1991).

We agree with claimant, however, that the administrative law judge's specific finding that claimant's act of grabbing the chain from Mr. Mack with the intent of preventing him from performing his job during a verbal altercation showed a willful intent to injure Mr. Mack cannot be affirmed. *See Arrar*, 780 F.2d at 20, 18 BRBS at 39 (CRT) (evidence does not establish claimant's subjective intent to injure another). The administrative law judge did not find that claimant's speech and physical activity included any threatening gestures or touching at the time of the incident. *See* Decision and Order at 7; *Rogers*, 7 BRBS at 212. Moreover, verbal harassment alone is insufficient to show willful intent. *Kielczewski*, 8 BRBS at 432. There is, however, evidence of record which the administrative law judge did not discuss in finding that claimant willfully intended to injure Mr. Mack. Specifically, the administrative law judge did not discuss the police report and the testimony of Mr. Mack and Mr. Molton at the criminal trial to the effect that claimant grabbed or pushed Mr. Mack prior to grabbing the chain. The administrative law judge must consider this evidence and determine whether it supports a finding that claimant showed a willful intent to injure Mr. Mack.

We therefore vacate the administrative law judge's finding that claimant's act of grabbing the chain from Mr. Mack during a verbal altercation establishes that claimant had a willful intent to injure Mr. Mack. We remand the case for the administrative law judge to discuss all relevant evidence of record to determine if claimant willfully intended to injure Mr. Mack through any threatening gestures or touching. If the administrative law judge finds that claimant did not have a willful intent to injure Mr. Mack, he should address any remaining issues.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration in a manner consistent with this opinion.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge