



BRB No. 15-0491

NORBERTO MUÑOZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BLACK AND VEATCH SPECIAL)	
PROJECTS GROUP)	DATE ISSUED: <u>May 11, 2016</u>
)	
and)	
)	
ALLIED WORLD ASSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Samuel S. Frankel, Jr. (Barnett, Lerner, Karsen & Frankel), Fort Lauderdale, Florida, for claimant.

Keith L. Flicker and Louis Belfiore (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-LDA-00355) of Administrative Law Judge Paul R. Almanza 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant, an inventory and parts specialist for employer, sustained a broken left leg on November 23, 2012, outside a recreational facility at Amtex Village, a compound in Kandahar, Afghanistan.¹ Claimant was injured when Mr. Geibel, manager of Amtex Village facilities, tackled claimant after claimant consumed alcohol, accused his wife and his friend, Mr. Patullo, both coworkers, of having an affair, and attacked them over the alleged affair. Finding that it was neither foreseeable nor reasonable for claimant to attack a coworker because he suspected infidelity, the administrative law judge determined that claimant’s injury fell outside the “zone of special danger,” and, therefore, was not covered by the Act. Decision and Order at 18. The administrative law judge further found that, even if claimant’s injury had arisen in the course of his employment, compensation was barred by Section 3(c), 33 U.S.C. §903(c), because the injury was occasioned by claimant’s willful intent to injure his wife and Mr. Patullo. *Id.* at 19. Accordingly, the administrative law judge denied benefits. *Id.* at 21.

On appeal, claimant contends the denial of benefits should be reversed because he was not injured as a result of his intent to harm another; rather, he claims he was injured while being restrained with excessive force by a third party (Mr. Geibel).² Because his injury resulted from Mr. Geibel’s intent to intervene and restrain him, and not directly from his intent to harm Mrs. Muñoz or Mr. Patullo, claimant alleges that his claim is not barred by Section 3(c). Claimant additionally contends the administrative law judge erred in finding that his injury did not arise within the “zone of special danger.” Employer responds, urging affirmance. Claimant filed a reply brief.

Section 3(c) of the Act provides, in relevant part, that “[n]o compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill . . . another.” 33 U.S.C. §903(c). The Act presumes, however, “in the absence of substantial evidence to the contrary . . . , that the injury was not occasioned by the willful intention of the injured employee to injure or kill . . . another.” 33 U.S.C. §920(d);

¹ Claimant testified that his wife, Mrs. Muñoz, who also worked for employer, lived and worked at Amtex Village. JX 10 at 20-21. Claimant testified that he lived at Amtex Village for two months but was sent to work at Sharandow Industrial Park, a forward operating base, after which time he only saw his wife “twice a month . . . at most,” when he would return to Amtex Village. *Id.* at 25-29.

² Claimant alleges that Mr. Geibel did not need to take him to the ground and sit atop him to restrain him. Claimant argues that, in so doing, Mr. Geibel used excessive force, which began a new sequence of events, resulting in claimant’s injury.

Williams v. Healy-Ball-Greenfield, 22 BRBS 234 (1989) (Brown, J., dissenting); *Green v. Atlantic & Gulf Stevedores*, 18 BRBS 116 (1986). In order to rebut this presumption, the employer must present substantial evidence that the claimant willfully intended to injure or kill another person. See *Arrar v. St. Louis Shipbuilding Co.*, 780 F.2d 19, 18 BRBS 37(CRT) (8th Cir. 1985); *Williams*, 22 BRBS at 236. If the Section 20(d) presumption is rebutted, claimant bears the burden of establishing by a preponderance of the evidence the compensability of his claim. *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013). In determining whether the necessary willful intent to injure or kill another person existed, relevant factors include the claimant's physical actions and speech at the time of the incident. See *Green*, 18 BRBS at 119; *O'Connor v. Triple A Machine Shop*, 13 BRBS 473 (1981) (Miller, J., concurring in part and dissenting in part); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977).

In finding that employer rebutted the Section 20(d) presumption and that claimant willfully intended to injure another person, the administrative law judge credited Mr. Geibel's version of events over those of claimant,³ his wife, and Mr. Patullo,⁴ finding that Mr. Geibel is an impartial witness who gave consistent statements.⁵ Decision and Order

³ Claimant stated on deposition that he located Mr. Patullo outside the bar and confronted him regarding an alleged affair with Mrs. Muñoz. JX 10 at 76, 80-81. Claimant stated that he punched Mr. Patullo “[o]ut of frustration” because he “felt betrayed,” but Mr. Patullo did not respond physically, and they continued to exchange words while outside the bar when, without his being aggressive toward anyone, Mr. Geibel threw him to the ground. *Id.* at 94, 99, 103-104. By contrast, in a statement he gave for employer's investigative report, claimant stated that “to the best of [his] knowledge,” he could recall that he had been socializing and the night was going well until he remembered lying in the grass outside the bar with a broken left leg. EX 20 at 6.

⁴ Mrs. Muñoz stated to employer's investigator that she did not witness the events leading to claimant's leg injury. EX 20 at 6, 7, 9; see n.6, *infra*. Employer terminated Mrs. Muñoz's employment due to her failure to cooperate with the investigation of the incident. JX 10 at 112. Mr. Patullo stated to employer's investigator that, after claimant punched him, Mr. Geibel approached the group and tried to calm claimant, claimant stumbled off the edge of the path, and Mr. Geibel grabbed him as he fell forward to the ground. EX 20 at 9.

⁵ Mr. Geibel testified on deposition that at some time after 1:00 a.m. on November 23, 2012, a security guard approached and asked for his assistance. JX 11 at 19, 25. Outside, Mr. Geibel observed claimant, Mrs. Muñoz, and Mr. Patullo “yelling, screaming, just nonsense.” *Id.* at 25. He stated that he intervened in the dispute, and that Mr. Patullo informed Mr. Geibel that claimant had hit him in the face sometime before

at 19. Consequently, the administrative law judge determined that two distinct altercations transpired. Specifically, the administrative law judge found that the first altercation between claimant and Mr. Patullo began verbally, climaxed with claimant's punching Mr. Patullo, and ended shortly after Mr. Patullo declined to retaliate, as Mr. Geibel was arriving on the scene.⁶ *Id.* at 20. Further as Mr. Geibel explained that claimant then struck his wife and swung at Mr. Patullo without provocation, and that he immediately restrained claimant in response to these attacks, the administrative law judge found claimant initiated a second altercation, thereby demonstrating a willful intent to renew the confrontation and to injure his wife and Mr. Patullo. *Id.* Therefore, the administrative law judge found claimant's injury resulted from his willful intent to injure another. *Id.*

We affirm the administrative law judge's finding. It is well established that the administrative law judge has the discretion to determine the weight to accord the evidence of record. The Board may not reweigh the evidence but must affirm findings of fact that are supported by substantial evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge rationally credited Mr. Geibel's impartial, consistent statements and made findings regarding the actions of claimant from these statements. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, ___ F.3d ___, 2016 WL 1077125, No. 15-60148 (5th Cir. Mar. 17, 2016). Moreover, despite asserting that the administrative law

his arrival. *Id.* at 26-27. Mr. Geibel stated that he calmed claimant down and the group began to exit the area when, without provocation, claimant hit his wife in the face and knocked her to the ground. *Id.* at 27-29. Mr. Geibel stated that claimant then tried to punch Mr. Patullo, but he dodged the blow, and claimant veered toward Mr. Geibel and lost his balance. *Id.* at 29. At that point, Mr. Geibel grabbed claimant by the shoulders, took him to the ground, and stayed on top of him. *Id.* at 29-35. A few minutes later, claimant started to complain that his leg was hurt. *Id.* at 29-30. Employer's internal investigative report contains a consistent statement by Mr. Geibel, with the additional statement that, upon his taking claimant to the ground, claimant "continued to be aggressive so I held him on the ground to prevent him from attacking [Mrs. Muñoz] or [Mr. Patullo] again." EX 20 at 30.

⁶ Claimant testified that Mrs. Muñoz arrived at the scene after he punched Mr. Patullo but before Mr. Geibel arrived. JX 10 at 94, 99, 103-104. The administrative law judge found this testimony contradicted Mrs. Muñoz's statement that she was not a witness to any of the events. Decision and Order at 19.

judge's decision is erroneous, claimant does not dispute the administrative law judge's findings that Mr. Geibel's version of events is the more credible one or that claimant initiated the second altercation and, in so doing, demonstrated an intent to harm his wife and Mr. Patullo. Further, to the extent claimant asserts that his actions, though manifesting an intent to harm, did not result in his injury, there is no requirement that the claimant's actions be the proximate cause of his injury or that the injury be inflicted by the person or persons claimant intended to injure. Rather, pursuant to Section 3(c), benefits are barred where claimant's actions leading to his injury manifested a willful intent to harm another. *Green*, 18 BRBS at 119;⁷ *O'Connor*, 13 BRBS 473.⁸ As substantial evidence supports the administrative law judge's finding that employer rebutted the Section 20(d) presumption and that claimant was injured when he willfully intended to harm Mrs. Muñoz and Mr. Patullo during the second altercation, we affirm the administrative law judge's conclusion that Section 3(c) forecloses claimant's entitlement to compensation for his injuries.⁹ *Green*, 18 BRBS 116.

⁷ In *Green*, 18 BRBS 116, the claimant engaged in a fist fight with another employee. After the fight ended, the claimant charged the other man with a pocket knife, who hit claimant in the eye with a board. The Board affirmed the administrative law judge's finding that the claimant's eye injury was caused during the second fight, which the claimant had initiated, and thus compensation was barred by Section 3(c).

⁸ In *O'Connor*, 13 BRBS 473, the Board affirmed the administrative law judge's finding that the claim was barred by Section 3(c) where the claimant was the initial aggressor, physically and verbally.

⁹ In light of our decision, we need not address claimant's challenge to the administrative law judge's finding that claimant's injury did not occur within the "zone of special danger" and thus did not occur within the course of his employment.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge