

BRB No. 10-0153

RAY HAYDEL, JR.)
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 Claimant-Petitioner)
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 v.)
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 GRAMERCY ALUMINA, LLC) DATE ISSUED: 09/08/2010
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 and)
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 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Susan A. Repasky, Metairie, Louisiana, for claimant.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-1604) of Administrative Law Judge Patrick M. Rosenow 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 which 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, a gantry operator for employer, sought compensation for injuries to his shoulder and neck allegedly incurred as a result of a physical altercation with his supervisor, David Comeaux, which occurred on February 16, 2006. Claimant contends that following a verbal argument with Mr. Comeaux regarding a job assignment that involved moving a gantry crane, Mr. Comeaux initiated a physical confrontation. Claimant stated that, during this confrontation, he did not touch, push or initiate physical contact with Mr. Comeaux. *See* Tr. at 109, 121-122, 132-133; CX 13 at 57. Rather, claimant testified that Mr. Comeaux grabbed him by the shirt and right arm, picked him off the ground and shook him for 8 to 10 seconds. According to claimant, Mr. Comeaux then released or pushed him and he fell backward onto the dock; claimant testified that he then ran away.¹ *See* Tr. at 61-64, 67, 92-97; CX 13 at 34-35, 48-50, 58-65, 73-74, 108-110. Employer presented evidence that disputed claimant's version of the incident. Specifically, Mr. Comeaux testified that claimant, after screaming at him regarding the assigned task, pushed him several times and taunted him, daring him to hit claimant. Mr. Comeaux stated that he then grabbed claimant by the shirt and held him back, or stiff-armed him, at which point claimant walked away. *See* Tr. at 196-199, 203-209, 234; CX 7 at 23-26, 40-48, 59. Mr. Comeaux testified that he did not lift or shake claimant, that he did not push claimant with his stomach or touch claimant's right arm, and that claimant did not fall. *See* Tr. at 197-198, 209-211, 226; CX 7 at 27-29, 40-41, 44-45. The altercation between claimant and Mr. Comeaux was witnessed by Mr. Nevgod, a Ukrainian officer who was onboard a ship at the dock where the incident occurred. Although there were some variations in the accounts Mr. Nevgod provided in his statement to the local sheriff's department, which investigated this incident after claimant filed charges against Mr. Comeaux, and in his subsequent deposition testimony, Mr. Nevgod consistently stated that claimant pushed Mr. Comeaux, that claimant was not lifted into the air by Mr. Comeaux, and that claimant did not fall onto the dock but, rather, remained standing during the incident.² *See* CX 21; EXs 4, 11.

In his decision, the administrative law judge found that claimant's conduct reflected a willful intention to injure Mr. Comeaux and thus his claim is barred pursuant to Section 3(c) of the Act, 33 U.S.C. §903(c). Therefore, the administrative law judge denied benefits under the Act.

¹ Claimant testified that he felt pain in his right arm, right shoulder and neck when Mr. Comeaux grabbed him and that he heard a pop in his neck and shoulder when he was up in the air. *See* Tr. at 65, 112; CX 13 at 35, 62, 64-65, 106-108. Following the incident, claimant received medical treatment for shoulder and neck injuries. *See* CXs 3, 4. Claimant had pre-existing shoulder problems.

² Mr. Nevgod referred to claimant as the small man and to Mr. Comeaux as the tall man. CX 21; EXs 4, 11.

On appeal, claimant challenges the administrative law judge's determination that claimant instigated the physical altercation with Mr. Comeaux; claimant avers in this regard that the totality of the evidence supports claimant's version of the incident. Employer responds, urging affirmance.

Section 3(c) of the Act provides, in relevant part, that no compensation is payable if the injury was the result of the willful intention of the employee to injure or kill himself or another. 33 U.S.C. §903(c). Section 20(d) of the Act states that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, 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 himself or another." 33 U.S.C. §920(d); *see 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, employer must present substantial evidence that claimant intended to injure himself or another. *See Arrar v. St. Louis Shipbuilding Co.*, 780 F.2d 19, 18 BRBS 37(CRT) (8th Cir. 1985); *Williams*, 22 BRBS at 236. In a case under Section 3(c), the administrative law judge must determine whether the necessary willful intent to injure oneself or another person exists, considering such factors as the claimant's physical actions and speech at the time of the incident. *See Green*, 18 BRBS at 119; *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977).

In this case, the administrative law judge found that employer rebutted the Section 20(d) presumption with the testimony of Mr. Comeaux that claimant repeatedly physically pushed him and verbally taunted him in an attempt to provoke him to strike back at claimant. Decision and Order at 25. The administrative law judge then weighed the relevant evidence of record and determined that the testimony of Mr. Nevgod, who the administrative law judge noted has no reason to favor one side or the other, corroborates Mr. Comeaux's account of the incident and contradicts claimant's version of the altercation. *Id.* at 23-25. The administrative law judge accorded greater weight to the testimony of Mr. Comeaux and Mr. Nevgod than to claimant's testimony and thus found that the weight of the evidence establishes that claimant initiated a physical confrontation with Mr. Comeaux, repeatedly pushed into him and attempted to provoke Mr. Comeaux to strike him. *Id.* at 25. The administrative law judge concluded that these actions on the part of claimant demonstrate a willful intention to injure Mr. Comeaux and that the claim is therefore barred by Section 3(c). *Id.*; *see also id.* at 4, 25 n.50.

We affirm the administrative law judge's finding that there is substantial evidence in the record to rebut the Section 20(d) presumption and to support the denial of benefits pursuant to Section 3(c). The administrative law judge rationally relied on the testimony of Mr. Comeaux and Mr. Nevgod to find that claimant initiated the physical

confrontation with Mr. Comeaux, that he physically pushed Mr. Comeaux, and that he verbally taunted Mr. Comeaux in an effort to provoke Mr. Comeaux to retaliate. Claimant's disagreement with the administrative law judge's weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the administrative law judge's decision. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). It is well-established that the administrative law judge has the authority to address questions of witness credibility and is entitled to draw his own inferences from the evidence; that other inferences could have been drawn does not establish error in the administrative law judge's conclusion. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995). In this case, the administrative law judge rationally made credibility determinations and drew inferences from the record evidence regarding claimant's actions in the altercation with Mr. Comeaux. *See, e.g., Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT). The credited testimony provides substantial evidence for the administrative law judge's finding that claimant acted willfully and with intent to harm Mr. Comeaux.³ Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not entitled to compensation for his injuries pursuant to Section 3(c) as he willfully intended to injure another.⁴ *See Green*, 18 BRBS 116.

³ Claimant contends that the administrative law judge did not fully address evidence favorable to claimant's contention that Mr. Comeaux instigated the altercation. We reject the contention that this constitutes reversible error. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has declined to adopt a rule that an administrative law judge must specifically discuss the evidence that is being rejected where substantial evidence otherwise supports the decision. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Falco v. Shalala*, 27 F.3d 160, 163 (5th Cir. 1994).

⁴ In light of his finding that the claim is barred by Section 3(c), the administrative law judge did not reach the issue of whether the evidence was sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption that the injury was work-related. *See* Decision and Order at 24-25; *see also id.* at 3-4. In view of our affirmance of the administrative law judge's finding that the claim is barred by Section 3(c), we need not address claimant's arguments on appeal regarding the Section 20(a) presumption.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge