BRB No. 01-0399

THELMA J. SWANIGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAERSK PACIFIC, LIMITED	)	DATE ISSUED: JUN 17, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Thelma J. Swanigan, Wilmington, California, *pro se*.

William N. Brooks (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order - Denying Benefits (2000-LHC-0021) of Administrative Law Judge David W. Di Nardi 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).[1] In an appeal by

[1] By Order dated January 4, 2002, the Board dismissed claimant's appeal and remanded this case to the district director for reconstruction of the record. Following receipt of the original case record on September 23, 2003, the Board reinstated the appeal on its docket. Order of October 8, 2003.

claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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). If they are, they must be affirmed.

Claimant, an UTR operator, alleges that she suffered disabling physical and emotional injuries as the result of an altercation with a fellow employee, Norman Palmer, on May 17, 1999. Employer contends that it is not liable for any resulting injury or disability as claimant initiated and intensified the confrontation which resulted in the alleged injuries. *See* 33 U.S.C. §903(c). In his Decision and Order, the administrative law judge reviewed the testimony and concluded, under the most plausible scenario, that claimant acted with willful intention to injure another, resulting in her physical injuries,[2] and that any psychological injuries are unrelated to the incident. Accordingly, he denied benefits.

Claimant, representing herself, appeals, contending that the administrative law judge erred in both accepting employer's version of the precipitating events and in denying her benefits. Employer responds, urging affirmance.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's cervical and lumbar injuries arose out of the May 17, 1999, incident. The administrative law judge then considered whether the claim is barred by Section 3(c) of the Act, 33 U.S.C. §903(c), and if employer introduced substantial evidence to rebut the Section 20(d) presumption, 33 U.S.C. §920(d). 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 another employee. *See Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935). 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). We hold the administrative law judge properly analyzed the evidence and that his decision to deny the claim pursuant to Section 3(c) of the Act is supported by substantial evidence.

[2] Claimant alleges injuries to her cervical and lumbar spine and right shoulder, as well as psychological problems. The administrative law judge found no medical support for claimant's claim of a right shoulder injury; he, therefore, concluded that claimant suffered no compensable injury to her shoulder. Decision and Order at 23. As our review of the record reveals no objective support for a harm to claimant's right shoulder, we affirm the administrative law judge's finding in this regard. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

In reaching his decision, the administrative law judge addressed claimant's contention that collateral estoppel effect should be given to the findings of the arbitrator who heard the grievances filed by employer and the parties to the altercation, and that employer was barred from asserting that it rebutted the Section 20(d) presumption by virtue of its assertions at the arbitration proceeding arising from the same incident.[3] EX 21. In that proceeding, employer had argued that both claimant and Mr. Palmer were guilty of a contract violation, but employer did not consider that claimant was guilty of physically assaulting Mr. Palmer by bumping him with her chest. *Id*. at 164. The administrative law judge found that collateral estoppel does not apply because the purposes of the two proceedings are not identical. Decision and Order at 22. The administrative law judge also summarily found that the doctrine of judicial estoppel is not applicable because parties often change their positions between the district director and administrative law judge levels. *Id.* Although the administrative law judge's analysis of the collateral and judicial estoppel issues is incomplete, we affirm his conclusion that employer is not pre-empted from raising its defense under Section 20(d).

The application of collateral estoppel to earlier arbitral findings is discretionary. *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131 (5th Cir. 1991). Under California law, the party asserting the applicability of collateral estoppel must show: that the arbitral proceeding was adjudicatory in nature; the issue decided in the proceeding was identical to that presented in the present action; the issue was actually litigated and necessarily decided in the proceeding; there was final judgment on the merits in the proceeding; and the party against whom collateral estoppel is asserted was party to or in privity with a party in the proceeding. *Jacobs v. CBS Broadcasting, Inc.*, 291 F.3d 1173 (9th Cir. 2002).

The administrative law judge did not identify the findings of the arbitrator to which claimant sought to give collateral estoppel effect. The record reflects that the arbitration arose out of the filing of complaints by employer and by both claimant and Mr. Palmer through their respective unions, alleging improper physical contact between the parties.[4] CX 6; EX 8. Ultimately, the arbitrator upheld the complaints against Mr.

[3] The administrative law judge addressed the issue of collateral estoppel even though the issue was untimely raised for the first time at the hearing, as the parties had fully argued the issue. Decision and Order at 21.

[4] Employer filed complaints against both parties based upon its knowledge that the confrontation involved physical contact between the parties, although employer's superintendent had not witnessed it. CX 6. The allegations of assault were reduced to charges of improper conduct.

Palmer and dismissed the complaints against claimant. EX 12.[5] The administrative law judge, however, identified the purpose of the arbitration as determining compliance with or violation of the collective bargaining agreement and to determine appropriate disciplinary action, if any, against the individuals involved in the incident. As the arbitral proceedings did not address the same issue as that present in this case, *i.e.*, willful *intent* to injure another, as opposed to improper physical contact, the administrative law judge found that collateral estoppel does not apply. As the identity of issues is a prerequisite to the application of collateral estoppel and the administrative law judge rationally found that the issues in the two proceedings are different, we affirm his finding that collateral estoppel effect should not be given the arbitrator's decision. *See generally Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

Moreover, we hold that the doctrine of judicial estoppel does not bar the administrative law judge's consideration of employer's defense to claimant's claim under the Act. Judicial estoppel is most commonly applied to bar a party from gaining an advantage by making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. *Russell v. Rolgs*, 893 F.2d 1033 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991); *see also Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996); *Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996). Because of its purpose and equitable nature, invocation of the doctrine of judicial estoppel is discretionary. *Russell*, 893 F.2d 1033. In the instant case, claimant argued that employer could not contend before the administrative law judge that she had a willful intent to cause injury because during the union arbitration employer had argued that claimant's conduct fell short of physical assault. Although the administrative law judge did not apply the principles of judicial estoppel other than to advance the theory,[6] we hold that there is no inconsistency in employer's assertions in the two proceedings. A close reading of employer's statements before the arbitrator reflects that employer's acknowledgement that it is difficult to comprehend claimant's use of her chest as an "assault weapon" is not a concession that claimant did not act with willful intent to harm,

[5] The arbitrator stated that, "[a]pparently, Ms. Swanigan took Mr. Palmer's remarks personally, and did get into Mr. Palmer's face." He stated that there was a verbal confrontation and there may have been some body contact. The arbitrator concluded that Mr. Palmer pushed or shoved Ms. Swanigan. EX 12 at 294.

[6] There is no support for the administrative law judge's statement that judicial estoppel is inapplicable because parties "often" change the positions they take before the district director when the case comes before an administrative law judge. The reason that proceedings before the district director cannot provide the basis for application of the doctrine of judicial estoppel is that the positions of the parties are not recorded; conferences held by the district director are not transcribed, and the district director's memorandum of informal conference is not transmitted to the administrative law judge. 20 C.F.R. §§702.314, 702.317-318.

especially in light of its further statement that claimant acted willfully to take issue with Mr. Palmer and continued the confrontation despite her ability to disassociate herself from it at any time. HT at 148-150; EX 21 at 164. Thus, judicial estoppel does not apply because employer did not take a position at the arbitration hearing that is at odds with the position advanced before the administrative law judge; in both proceedings employer contended that claimant acted with willful intention to initiate and prolong the confrontation. Whether claimant physically touched Mr. Palmer with her chest is not determinative of the issue, raised by employer in both proceedings, which involves whether claimant was the aggressor in the incident which resulted in her injuries. Accordingly, albeit on different grounds, we affirm the administrative law judge's determination that the doctrine of judicial estoppel does not bar his reaching the merits of this case.

In addressing the merits of the claim, the administrative law judge determined that employer rebutted the Section 20(d) presumption by presenting substantial evidence that claimant willfully intended to injure another. After review of the record in this case, we affirm the administrative law judge's conclusion 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).

In a case such at this, the administrative law judge must determine whether the necessary willful intent to injure another person exists, considering such factors as the claimant's physical actions and speech at the time of the incident. *See, e.g., Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978). The events in this case occurred on May 17, 1999. Both parties initially agreed that on that date, claimant was present in the marine clerk's office when the supervisor began to call out names to assign jobs. Claimant, believing that those standing outside could not hear the supervisor, began repeating the names. When she repeated the name of Norman Palmer, he confronted her, objecting to her repeating the names in front of an open window. HT at 165-169. From that point on, claimant's version of what happened differs significantly from that of employer's.

Claimant contends that she tried to explain to Mr. Palmer that she was trying only to assist in the process and that the two thereafter participated in a shouting match outside the office. Claimant testified that Mr. Palmer threatened her and finally pushed her to the ground, causing her to fall backwards on the sidewalk, striking her back against the tires of a truck. She testified that she did not remember ever touching Mr. Palmer prior to his pushing her down. HT at 171-173. Claimant offered no evidence supporting her version of the events, claiming that as soon as Mr. Palmer began yelling, everyone else who had been there vanished. HT at 204.

Employer countered claimant's version with statements of Mr. Palmer, John Taylor, Paul O'Donnell, Walter Woodworth, and Mario D'Ambrosi.[7] These co-workers stated that at the point that claimant left the clerk's office and confronted Mr. Palmer, she began chest bumping Mr. Palmer, eventually backing him up against a wall. EX 21 at 59-61, 91-92, 99-102, 110-114; HT at 312-314; Dep. of Woodworth at 10-13. When claimant continued to bump Mr. Palmer he responded by pushing her on the shoulders, at which point she lost her balance, tripped on the curb, and landed on her rear end. Claimant had to be physically restrained from approaching Mr. Palmer again after she had gotten off the ground.

The administrative law judge accepted employer's version of the events as supported by the statements of the witnesses who had no interest in the outcome of the litigation. Moreover, he found claimant herself to be less than a credible witness based on inconsistencies in her testimony and her behavior at the hearing. Decision and Order at 18. The administrative law judge concluded that claimant was the initial aggressor, that she failed to yield to Mr. Palmer's warnings, that she verbally and physically assaulted him, and that she had to be physically restrained from again assaulting Mr. Palmer after her fall. *Id.* at 16. Based on the statements of the eyewitnesses, the administrative law judge concluded that claimant willfully intended the confrontation, aggravating a tense situation, and thereby brought her injury upon herself. *Id.* at 17.

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. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (199). It is well established that the administrative law judge has the authority to address questions of witness credibility and to weigh the evidence. As the administrative law judge's determinations concerning claimant's testimony and behavior are not inherently incredible or patently unreasonable, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and as the statements of four other witnesses as well as that of Mr. Palmer constitutes substantial evidence for the administrative law judge's finding that claimant acted willfully and with the intent to harm Mr. Palmer, we affirm the administrative law judge's finding that claimant is not entitled to compensation for her injuries pursuant to Section 3(c). *Williams*, 22 BRBS 234; *Kielczewski*, 8 BRBS 428. Because we affirm the administrative law judge's findings under Section 3(c), we need not address his determinations as to the nature and extent of claimant's disability, if any, or of claimant's average weekly wage at the time of the incident.

[7] Only Mr. D'Ambrosi testified before the administrative law judge. Employer submitted a record of the testimony of Messrs. Palmer, Taylor and O'Donnell at the arbitration hearing and Mr. Woodworth's account given at the arbitration hearing and by post-trial deposition.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge