BRB No. 07-0810

N.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALLIBURTON SERVICES	)	DATE ISSUED: 06/30/2008
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

Michael D. Murphy (Hays, McConn, Rice & Pickering), Houston, Texas, for employer/carrier.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2006-LDA-53) of Administrative Law Judge Lee J. Romero, Jr., denying benefits 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 supported by substantial evidence, are rational, and are 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 was hired by employer to work as an electrician, and was deployed for Camp Eggers, a military base located in Kabul, Afghanistan, on August 25, 2005. Once on the job, claimant developed concerns regarding certain aspects of his work situation, which he raised with employer.[1] Believing that his grievances would not be satisfactorily addressed, claimant decided, on or about November 1, 2005, to leave Afghanistan around the end of 2005. He thereafter e-mailed a resignation letter, dated November 9, 2005, in which he outlined his concerns and requested that employer arrange transportation for him from Kabul International Airport (KIA) to Houston, Texas, on December 25, 2005.

Claimant was subsequently informed that employer was not authorized to fly its personnel home or reimburse employees for fares from KIA, and that his return flight from Afghanistan would have to be, as was his flight into that country, by military transport from Bagram Air Base (BAB). Dissatisfied with employer's response, claimant sought to arrange his own travel itinerary, culminating in an unauthorized trip from Camp Eggers, on November 20, 2005, to a travel agent located in Kabul, Afghanistan. Upon his return to Camp Eggers that day, claimant was detained by United States Military Police (MPs), and informed by employer's security personnel that he should pack his bags immediately as he was to leave for BAB, via convoy, at 4 p.m.

Claimant then discussed the issue of his leaving the base with his immediate supervisor, Mr. Martinez; the military liaison officer for employer, Major Spencer; the Camp's Inspector General, Lieutenant Colonel Sefren (IG); and the garrison commander, Major Gobbeloff. Upon leaving his meeting with Major Gobbeloff, claimant stated that he was instructed by employer's security personnel to get into a military vehicle. Claimant stated that he refused to do as instructed because he did not think the trip to BAB was safe. After two MPs arrived, the IG intervened but ultimately turned the situation back over to them, leading to repeated requests that claimant get into the vehicle.

Claimant's continued refusal to do as asked prompted the MPs to take action. As one MP handcuffed claimant's hands behind his back, the second attempted to put claimant into body armor. Claimant repeatedly resisted the MP's efforts, and stated that before he knew it, he was on the ground. The MPs then pulled claimant up from the ground, placed him into the vest, and put him into the vehicle. At that time, he was driven to Camp Phoenix, where he immediately informed the MPs that his neck, shoulder and wrist were hurting. He was treated at employer's clinic for these injuries and

[1] Claimant raised concerns regarding the computation of his pay, the adequacy of the employer-provided living quarters, and safety issues involving the manner in which electrical work was being performed.

prescribed medication, ice packs and ointment. Two days later, claimant was transported to BAB, where his return trip home began via military transport.

Claimant arrived in Houston, Texas, on November 24, 2005, and shortly thereafter sought treatment from Dr. Thomas for his lower back, right shoulder, neck and wrist. Dr. Thomas diagnosed a strain of claimant's upper extremity, back and neck, and concluded that claimant was totally disabled from December 2, 2005, to January 2, 2006. During that time, claimant underwent physical therapy, which, he said, did not alleviate his pain, particularly that associated with his neck. On February 6, 2006, Dr. Etminan performed surgery on claimant's neck to treat his cervical radiculopathy.

Meanwhile, claimant restarted his business, Sinewave Electric, on December 22, 2005, and worked one or two jobs before his neck surgery. Around March 1, 2006, he began taking additional jobs but indicated that he is limited from doing any heavy lifting and from using his hands above his head, as well as having significant pain and trouble in driving and sitting in a vehicle for any prolonged period of time. Claimant thereafter filed this claim under the Act.[2]

The administrative law judge found that claimant established that he suffered harm on November 20, 2005, and that the events resulting in his injuries are not disputed. Decision and Order at 22, 26. Nonetheless, he concluded that claimant did not establish a *prima facie* case for an injury under the Act, as he failed to establish that his injury occurred in the course of his employment. Specifically, the administrative law judge found that claimant's injury did not occur at the hands of co-workers, but were incurred due to his resistance to the "force designed and empowered to protect him." *Id.* at 26. The administrative law judge concluded that claimant's conduct at the time of his injury placed him beyond the scope of the "zone of special danger," since claimant willfully refused to comply with the lawful instructions of the MPs, obstructed their efforts to equip him for travel and defied their requests. The administrative law judge concluded that through his actions, claimant became "so thoroughly disconnected from the service of his employer that it would be unreasonable" to conclude that his injuries arose out of, or in the course of, his employment. *Id.* at 26. The administrative law judge further stated that, even if claimant had established a *prima facie* case for application of Section 20(a), 33 U.S.C. §920(a), upon weighing the evidence as a whole, claimant's obstructive conduct led to his injuries "at the hands of the force protector, not the employer" such that employer is not liable for claimant's injuries incurred while he "resisted the lawful

[2] Claimant also filed a lawsuit in U.S. District Court against employer and the U.S. Army.

mandates of the U.S. Army on a military base in a foreign hostile land." *Id.* at 27. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that his injuries are not work-related and the consequent denial of benefits. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that the injuries he sustained as a result of the November 20, 2005, incident are not compensable. Claimant maintains that the undisputed facts establish that the incident causing his disability occurred at Camp Eggers and was directly linked to his employment with employer. In this regard, claimant maintains that, in contrast to the administrative law judge's finding, a "zone of special danger" was created by the conditions of his overseas job with employer and that claimant's injury occurred within this zone.[3]

Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). However, in cases arising under the Defense Base Act, the United States Supreme Court has held the employees may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment

[3] Claimant also argues that the administrative law judge erred in finding that claimant did not establish a *prima facie* case for invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer's evidence was sufficient to rebut the presumption. Section 20(a) applies to both the "arising out of" and "in the course of employment" elements of a claim, as it provides that, in the absence of substantial evidence to the contrary, the "claim comes within the provisions of the Act." *See Durrah v. Washington Metro. Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985). In this case, the administrative law judge found that claimant suffered a harm which arose from the undisputed incident with MPs on November 20, 2005. Claimant thus established the "harm" and "accident" elements of a *prima facie* case. Nonetheless, any error with regard to Section 20(a) is harmless. The burden on employer under Section 20(a) is one of production, and employer produced evidence in support of its argument that claimant's injury is not within the course of his employment. Moreover, Section 20(a) does not apply to questions of legal interpretation. *See generally Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002). Section 20(a) is thus not dispositive as the issue concerns the scope of the zone of special danger on the facts presented.

creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). In *O'Leary,* the employee, after spending the afternoon at the employer's recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel.[4] The Court held that an employee need not establish a causal relationship between the nature of his employment and the accident that occasioned his injury. *Id.* at 506-07. "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." *Id.* at 507. Rather, "[a]ll that is required [for compensability] is that the "obligations or conditions of employment create the 'zone of special danger' out of which the injury arose." *O'Leary*, 340 U.S. at 505. In *O'Keeffe*, 380 U.S. 359, the employee drowned in a lake in South Korea during a weekend outing away from the job. In awarding benefits, the Court noted that the employee had to work under "the exacting and dangerous conditions of Korea." 380 U.S. at 364. *See also Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965)(awarding benefits where employee was killed in a car accident while on the way back from having a beer in town on San Salvador Island in the British West Indies).

The Board has followed the Supreme Court's holdings in a series of cases. In *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978), the employee, an educational advisor employed by Southern Illinois University who, through a United States Government contract, was providing assistance to the Nepalese government, died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal. The Board held that the claimant's death was covered under the Act through application of the "zone of special danger."[5] In reaching this conclusion, the Board defined the "zone of special danger" as the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a

[4] Swimming was forbidden in the channel and signs were posted to that effect. Nonetheless, claimant and others plunged in to effect the rescue.

[5] In addition to the Supreme Court decisions in *O'Leary*, *O'Keeffe*, and *Gondeck*, several circuits have applied the "zone of special danger" doctrine to award benefits in cases arising under the Defense Base Act. *See, e.g., O'Keeffe v. Pan-American World Airways, Inc.*, 338 F.2d 319 (5th Cir.), *cert. denied*, 380 U.S. 950 (1965)(awarding benefits where employee was killed in a motorcycle accident on Grand Turk Island in the British West Indies while driving on the wrong side of the road); *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962)(awarding benefits where employee was injured during a midnight rendezvous in a turn-around area at the seaward end of a breakwater on the island of Guam); *Hastorf-Nettles, Inc. v. Pillsbury*, 203 F.2d 641 (9th Cir. 1953)(awarding benefits where employee was injured in a car accident near Anchorage, Alaska, while on the way back to camp from a sightseeing trip on a scheduled day off).

putative claimant. The Board stated that this view of the Defense Base Act was necessary because those employees who come within its ambit are subjected to unusual risks, working as they often do in the farthest reaches of the globe. In *Harris v. England Air Force Base*, 23 BRBS 175 (1990),[6] the Board further explained that "this [zone of special danger] test was formulated in cases arising under the Defense Base Act and is well-suited to those cases since the conditions of employment place the employee in a foreign setting where he is exposed to dangerous conditions." *Harris*, 23 BRBS at 179. The Board also stated that in "these cases [arising under the Defense Base Act] employer can be said to create a zone of special danger by employing the employee in a foreign country." *Id.*

Most recently, in *Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub nom. Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004), a Defense Base Act case, the Board affirmed the administrative law judge's application of the "zone of special danger" doctrine to find that claimant's injury sustained during a "scuffle" in a bar with a soldier in the U.S. Army was compensable. The administrative law judge found that the events resulting in Ilaszczat's injury were reasonably foreseeable and related to his employment given the conditions associated with his job for employer on the Johnston Atoll. In affirming the Board's decision, the United States Court of Appeals for the Ninth Circuit held that where claimant was injured at a social club to which he went after work on Johnston Atoll, a remote island that offers few recreational opportunities, an injury during horseplay of the type that occurred here is a foreseeable incident of employment. *Kalama*, 354 F.3d 1085, 37 BRBS 122(CRT).

In this case, the administrative law judge found that claimant willfully and deliberately refused to comply with the lawful instructions of the MPs on November 20, 2005, and improperly hindered their efforts to safely equip him for off-base travel. In particular, the administrative law judge observed that claimant admitted he would not have been injured if he had complied with military orders. He stated that claimant "engaged in recalcitrant and obdurate behavior when others present sought his acquiescence in the process." Decision and Order at 26. The administrative law judge concluded that "it is not reasonable or foreseeable that a U.S. contractor employee stationed for work on a military base in a hostile foreign country would engage in the conduct exhibited by claimant on November 20, 2005," in which he repeatedly resisted

[6] In *Harris*, a case arising under the Nonappropriated Fund Instrumentalities Act, the Board held that the administrative law judge erred by relying on the "zone of special danger" doctrine since application of that test is limited to claims arising under the Defense Base Act and cases arising under the District of Columbia Workmen's Compensation Act. *Harris*, 23 BRBS at 178-179.

the efforts and authority of the U.S. military police. *Id.* In light of these facts, the administrative law judge concluded that claimant's behavior so thoroughly disconnected him from the service of his employer that claimant's actions culminating in his injuries on November 20, 2005, exceeded the "zone of special danger" created by his employment in Afghanistan. Accordingly, he concluded that claimant's injuries did not arise out of, or in the course of, his employment.

The administrative law judge's analysis regarding the zone of special danger is flawed in several aspects. First, the administrative law judge's repeated references to claimant's willful and deliberate refusals to follow orders and/or rules indicates that his denial of benefits is premised, at least in part, on a finding that claimant is "at fault." His reliance on claimant's "fault" is illustrated by the administrative law judge's statements that claimant would not have been injured had he obeyed the MPs, that he "willfully refused to comply" with lawful instructions, that he "deliberately opposed" the orders of the MPs, and that he "engaged in recalcitrant and obdurate behavior." Decision and Order at 26. Based on these findings the administrative law judge concluded that claimant's own "actions and obstructive conduct" served as the proximate cause of his injury, for it sufficiently disconnected him from the service of his employer to remove him from the zone of special danger, such that his injuries could not be considered compensable under the Act.[7] *Id.* at 26-27.

The conclusion that claimant's behavior places him at fault, and thus outside the scope of the Act, is directly contrary to the specific language of the Act, as well as its longstanding, underlying principles. Section 4(b) of the Act, 33 U.S.C. §904(b), explicitly states that "compensation shall be payable irrespective of fault as a cause for the injury."[8] This point has been reiterated by the courts. *See, e.g.*, *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281, 14 BRBS 363, 368 (1980) (the Act

[7] Moreover, the administrative law judge's rationale for distinguishing *Kalama*, 354 F.3d 1085, 37 BRBS 122(CRT), *i.e.*, because claimant "was not involved in 'horseplay,'" Decision and Order at 26, is also indicative of a conclusion that claimant is at fault for his injuries.

[8] Section 3(c), 33 U.S.C. §903(c), contains the only provision under the Act for barring benefits due to an employee's misconduct. It specifically states: "[n]o 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." 33 U.S.C. §903(c). In the instant case, employer did not raise the applicability of Section 3(c). Instead, it argued "claimant's deliberate actions removed him from the course and scope of his employment," and "outside the 'zone of special danger' exception." Decision and Order at 21.

"imposes liability without fault and precludes the assertion of various common-law defenses"); *Howlett v. Birkdale Shipping Co., S.A.,* 512 U.S. 92 (1994) (under the Act, injured longshoreman's employer must pay statutory benefits regardless of fault); *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000) (recovery under the Act rests on the theory of liability without fault); *see also O'Leary*, 340 U.S. 504; *Cyr v. Crescent Wharf & Warehouse Co.* 211 F.2d 454 (9th Cir. 1954); *Voris v. Texas Emp. Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952); *Smoot Sand & Gravel Corp. v. Britton*, 152 F.2d 17 (D.C. Cir. 1945); *Hartford Accident & Indem. Co v. Cardillo,* 112 F.2d 11 (D.C. Cir.) *cert. denied*, 310 U.S. 649 (1940);[9] *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring & dissenting). Therefore, to the extent the denial of benefits rests on claimant's "fault," it cannot be affirmed.

Secondly, the administrative law judge's decision reflects that the denial of benefits is also based on his apparent belief that claimant's injuries required a direct connection to his employment, as the administrative law judge emphasized that claimant was not injured by employer's personnel, but "at the hands of the force protector, not the employer." Decision and Order at 26. This conclusion also is in conflict with the underlying rationale for the zone of special danger doctrine. The specific purpose of the zone of special danger doctrine is to extend coverage in overseas employment such that considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment. *O'Leary*, 340 U.S. at 506; *see Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 481 (1947). Moreover, the cases do not distinguish between whether the injury occurred at the hands of another employee of employer or someone else. *See Kalama*, 354 F.3d 1085, 37 BRBS 122(CRT)(injury at a bar during an altercation with military personnel); *Self v. Hanson,* 305 F.2d 699 (9th Cir. 1962) (employee of Morrison-Knudsen and Peter Kiewit Sons injured while parked in a truck on a breakwater, when a runaway weapons carrier driven by a corporal from the nearby base crashed into the truck).

[9] In *Hartford*, the court observed that the Act "is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, [or] illegality." *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11, 17 (D.C. Cir.), *cert. denied,* 310 U.S. 649 (1940) (quoted in *Durrah v. Washington Metro. Area Transit Auth.*, 760 F.2d 322, 326 n. 8, 17 BRBS 95, 101 n.8(CRT) (D.C. Cir. 1985), which reversed the Board's holding that claimant left his course of employment when he violated his employer's rule against leaving his duty station).

Under the Defense Base Act, an employee need not establish a causal relationship between his actual employment duties and the event that occasioned his injury. *O'Leary* at 506-07. "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." *Id.* In particular, the zone of special danger doctrine is well-suited to cases, like this one, arising under the Defense Base Act, since the conditions of the employment place the employee in a foreign setting where he is exposed to dangerous conditions. *See O'Keeffe* 380 U.S. at 364. Thus, an employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger.

As the administrative law judge's denial of benefits relied on his findings that claimant was at fault, or that the injury-causing incident did not directly involve employer or its personnel, it is in error. Given the totality of the administrative law judge's discussion, it is apparent that his conclusion that claimant's injuries are not within the scope of employment was inappropriately influenced by those determinations. The administrative law judge's conclusion that "it is not reasonable or foreseeable that a U.S. contractor employee stationed for work on a military base in a hostile foreign country would engage in the conduct exhibited by claimant on November 20, 2005, and repulse the efforts and authority of the U.S. military police," Decision and Order at 26, also rests on claimant's fault and further supports a conclusion that the administrative law judge applied an inappropriate test to this issue.[10] In this regard, the limits of the zone of special danger are defined by whether the injury occurred within the zone created by the obligations and conditions of employment. In *O'Leary*, the Court recognized that in some cases an employee "might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *O'Leary*, 340 U.S. at 507.

In *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989), the Board applied the *O'Leary* test and held that there was no nexus between the conditions of an employee's overseas job and his death by autoerotic asphyxiation. In reaching this conclusion, the Board relied on the fact that the record contained no evidence that the activity leading to the claimant's death was related to the

[10] We note that whether risks are "reasonable or foreseeable" is not a separate test but is part of the *O'Leary* formulation. In *O'Leary*, 340 U.S. at 507, after stating that all that is required is that the conditions of employment create the "zone" from which the injury arose, the court noted that a rescue attempt may be one of the "risks of the employment" covered by the Act. Thus, under *O'Leary*, whether an activity is within the risks "foreseeable, if not foreseen" turns on whether it is encompassed in the zone created by employment conditions. *Id.*

conditions of his overseas employment, and the circumstances pertaining to that death did not suggest that it was work-related. Thus, the Board held that the activity was not connected to the conditions of claimant's employment and the zone of special danger did not apply. The *O'Leary* test must be applied in determining whether an employee under the Defense Base Act is outside the zone of special danger.[11]

Thus, the question in this case concerns whether claimant became so "thoroughly disconnected" from the service of his employer that it would be "entirely" unreasonable to say his injuries arose in the course of his employment. In his conclusion in this case, the administrative law judge stated that claimant's actions did result in such a thorough disconnection; however, this statement is supported only by his findings regarding claimant's fault in causing the events leading to the injury, and the fact that he was injured by the force protector rather than an employee of employer. Thus, the administrative law judge did not properly apply the *O'Leary* test, and his conclusion that claimant was outside the scope of his employment cannot be affirmed. As the administrative law judge's findings establish that claimant's injury occurred within the zone of special danger, there is no need for us to remand the case for further consideration of this issue.

As established by the administrative law judge's findings, this case involves an employee who took an unauthorized trip from Camp Eggers where he was employed. Upon his return, employer, along with the military commander, decided to remove him from Camp Eggers and return him to the United States. Claimant disagreed with the rules imposed by employer and the military for transport out of the country, which required that he go via military convoy to BAB and board a flight from that base.[12] He

[11] There are few cases which actually hold that overseas employees' injuries occurred outside the zone of special danger created by the specific conditions of employment in that locale. The decision in *Gillespie* relied on the personal nature of the activity and the lack of evidence of a connection to claimant's employment in Germany in reversing an award of benefits. In *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), a widow implicated in her husband's murder in Laos was denied benefits on the basis that a spouse committing murder cannot benefit from the deed. Although the Board stated that claimant's actions severed any causal connection between his death and his job, 23 BRBS at 349-350, it also specifically declined to address the zone of special danger argument. *Id.* at 353 n.6. As the cases cited previously demonstrate, far more decisions held the claimant to be within the scope of his employment in a wide range of factual situations.

[12] The administrative law judge found that claimant's employment agreement stated requirements for his travel, refuting his argument he was entitled to depart from Kabul, and that he was required to comply with the convoy and other procedures in

sustained injuries at Camp Eggers when he resisted the MPs efforts to ensure his compliance with the requirements for transport. It cannot be disputed that employer, by hiring claimant to work in Afghanistan, placed him in an environment with unique risks, thus creating a zone of special danger. Moreover, it is clear that the disagreement which resulted in claimant's injuries arose out of the obligations and conditions of his employment in that environment. On the facts found by the administrative law judge, the only basis for finding that claimant was "thoroughly disconnected" from his employment is that his behavior caused the altercation.[13] Claimant was clearly at fault in causing the altercation, but once fault is eliminated, we are left with an injury on a base in Afganistan which is rooted in the conditions and obligations of his employment. We thus reverse the administrative law judge's conclusion that claimant's behavior removed him from the zone of special danger created by his employment in Afghanistan. As the dispute leading to claimant's injuries had its genesis in his employment, we hold, as a matter of law, that claimant's injuries fall within the zone of special danger. We therefore remand this case for consideration of the merits of claimant's claim.

Accordingly, the administrative law judge's finding that claimant's injuries fall outside the scope of the zone of special danger created by his employment is reversed. The case is remanded for consideration of any remaining issues.

SO ORDERED

_____
ROY P. SMITH
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

General Order 1. Decision and Order at 25-26. These findings are supported by the evidence.

[13] Employer's evidence in this case goes to claimant's misconduct, and the administrative law judge's findings of fact that claimant was indeed at fault, while the MPs were not, are supported by substantial evidence. However, those considerations are not relevant under the Act.

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent. I agree with my colleagues insofar as they hold that the administrative law judge's decision is premised, in part, on inappropriate considerations, and therefore, cannot be affirmed. I, however, disagree with the majority's holding that, as a matter of law, claimant's injuries arose out of the zone of special danger created by the conditions of his employment. I believe the majority fails to recognize that in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951), the Supreme Court "drew the line…," between those injuries suffered by employees within a zone of special danger which are compensable, and those injuries suffered by employees within a zone of special danger which are not compensable. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965). Instead of reversing the administrative law judge's finding that claimant is not within the Act's coverage, I would remand this case for the administrative law judge to apply the correct standard, as enunciated by the United States Supreme Court in *O'Leary*.

In *O'Leary*, the Supreme Court declared that not all injuries sustained by employees within a zone of special danger are compensable under the Act. The Court stated that injuries would not be covered where they result from a claimant's conduct which has become "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." 340 U.S. at 507. Moreover, relevant to this case, the United States Court of Appeals for the Ninth Circuit recognized, in *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *aff'g Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *cert. denied*, 543 U.S. 809 (2004), that injuries resulting from employee misconduct disconnected from employer's service are not compensable under the Act. The court observed: "employee misconduct is, in general, not material in compensation law, unless it 'takes the form of deviation from the course of employment.' 2 ARTHUR LARSON." 354 F.3d at 1093, 37 BRBS at 126(CRT). Review of the record reveals that claimant's actions in this case have taken "the form of deviation" from the course of his work for employer. In this regard, evidence exists which, if credited, would support a finding that claimant's actions so "thoroughly disconnected" him from the service of his employer that the administrative law judge could find, on remand, "it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *O'Leary*, 340 U.S at 507.

Claimant was injured in a confrontation with the military police which was precipitated by his determination to terminate his contract early and to leave Afghanistan from Kabul International Airport. Claimant persisted in his efforts to leave from Kabul even though employer's Human Resources personnel advised him the day before the incident that he must return through Bagram Airfield. Nevertheless, to arrange for a

flight from Kabul, claimant went to a travel agency in Kabul, leaving the compound of Camp Eggers, unaccompanied by a military person. This was a violation of employer's rules. When claimant's absence from the compound was discovered, employer realized that claimant's continued safety could not be guaranteed and, together with the garrison commander, decided to remove claimant from Camp Eggers. Claimant immediately became resistant and the garrison commander instructed the military police to escort claimant from Camp Eggers. Claimant acknowledged that he had agreed to comply with military orders as a civilian working in connection with the Armed Forces and that if he had obeyed the orders of the military police, he probably would not have sustained his injuries. The transcript of claimant's confrontation with the military police reveals that over a three to four hour period, efforts by the police to obtain claimant's cooperation were rejected with defiance.

In sum, I believe that there is abundant evidence in the record to support a determination that claimant's injuries resulted from his conduct which was "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *O'Leary*, 340 U.S. at 507. Because the record could support a finding that claimant's injuries are not covered under the Act, I dissent from the majority's determination to hold as a matter of law that claimant's injuries arose out of the zone of special danger created by the conditions of his employment. I would therefore remand this case to the administrative law judge to apply the teaching of the Supreme Court in *O'Leary* to the evidence in the record.

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REGINA C. McGRANERY
Administrative Appeals Judge