

MICHAEL ILASZCZAT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
KALAMA SERVICES)	DATE ISSUED: <u>June 19, 2002</u>
)	
and)	
)	
CIGNA PROPERTY AND CASUALTY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2000-LHC-1877) of Administrative Law Judge Robert D. Kaplan 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 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).

Claimant began working for employer in August 1996 as the manager of the “Self-Help Store” on the Johnston Atoll.¹ The “Self Help Store” served local residents, military and civilians with materials and tools for individualized projects on the island. Claimant initially sustained a work-related injury to his left leg in December 1996, which ultimately resulted in a total left knee replacement in December 1998. Claimant alleges that he also sustained an injury to his left hip on July 25, 1999, while engaging in a post-work recreational activity. At about 9:30 p.m., after completing his work on July 24, 1999, claimant went for drinks first at the Tiki Bar, where he remained until closing at about 12:30 a.m. on July 25, 1999, and then to the AMVETS. According to claimant, while at the AMVETS, he approached a group of soldiers, bought them drinks, and later allegedly entered into a wager with one of them, Military Police Officer Private First Class (PFC) Clyde Burum, wherein claimant bet PFC Burum \$100 that he could not, in a karate demonstration, “put [his] leg over [claimant’s] head without touching [claimant].” Hearing Transcript [HT] at 88-89, 103-104. Claimant stated that he set down his drink, that PFC Burum went to kick him, and that once he saw that there was no way that PFC Burum’s foot was going over his head, he raised his left arm and blocked the kick. HT at 91. Claimant stated that he then picked up his drink to walk away and “the next thing I know I was on the ground and my hip was broken.” HT at 86. In describing how he had fallen, claimant testified that PFC Burum may have “swept” his foot out from under him, or kicked him.² Claimant was immediately taken to the Kalama Services Clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. While recovering from surgery, claimant received notice from the base military commander, Colonel Jeffrey A. Thomas, that he was expelled

¹The Johnston Atoll is a two mile long by one-half mile wide island located in the South Pacific about 800 miles southwest of Hawaii. It served as a United States nuclear and chemical warfare waste storage facility until late 2000. Employer was a contractor of the United States military responsible for providing operating and maintenance services on Johnston Atoll.

²Claimant’s version of the altercation which resulted in his injury significantly varies from those of PFC Burum and another soldier, PFC Sanchez. These soldiers described an altercation in which claimant wagered that even with his total left knee replacement, he was too fast for anyone to knock him to the ground or kick him in the knee and that claimant was injured when he charged at PFC Burum and fell to the ground. *See, e.g.*, Claimant’s Exhibit 20, p. 18-19, 21-24; Claimant’s Exhibit 18, p. 93-96, 99, 39-40.

from the atoll and was precluded from ever returning.³ HT at 107. Employer thereafter discharged claimant by notice dated August 5, 1999, based on the fact that the debarment order prohibited his return to the Johnston Atoll.

Claimant subsequently filed the instant claim. At the hearing, the parties entered into stipulations, and the administrative law judge thereafter issued a Decision and Order on February 9, 2001, based on those stipulations awarding claimant a 70 percent permanent partial disability scheduled award under Section 8(c)(2), 33 U.S.C. §908(c)(2), for the work-related left knee injury which occurred in December 1996. However, with regard to the left hip injury sustained on July 25, 1999, employer asserted that claimant did not sustain a compensable injury, specifically arguing that this injury does not fall within the “zone of special danger” doctrine. Alternatively, employer averred that claimant is not entitled to permanent partial disability benefits as his alleged loss of wage-earning capacity was caused solely by his own misfeasance in violating the standards of conduct for employees on the Johnston Atoll which resulted in his inability to work for employer.

In his Decision dated June 13, 2001, the administrative law judge determined that claimant’s injury is compensable under the Act, despite the fact that it did not occur while claimant was performing the duties of his employment, as a “zone of special danger” was created by the conditions of claimant’s overseas job. In addition, the administrative law judge determined that claimant’s conduct, although perhaps unauthorized and/or prohibited, was not so egregious as to sever the relationship between his employment and the injury under the “zone of special danger” doctrine. He therefore awarded, based on the parties’ stipulations, temporary total disability benefits from July 25, 1999, until January 1, 2000, permanent partial disability benefits continuing from January 1, 2000, based on a loss of wage-earning capacity of \$335.60 a week, and medical benefits. Lastly, the administrative law judge found that employer is entitled to Section 8(f) relief, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge’s finding that claimant sustained a compensable injury under the Act, and that he is entitled to permanent partial disability benefits. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in finding that claimant’s conduct fell within the “zone of special danger” doctrine since the record clearly establishes that his actions at the time of injury were grossly unreasonable, in clear violation of the

³In particular, the order prohibits claimant from returning because of the events of July 25, 1999, and characterizes those events as an “altercation.” Claimant’s Exhibit 10, p.2.

standards of conduct applicable to employees on the Johnston Atoll, and resulted in his debarment from the island. Employer further argues that the administrative law judge has completely ignored the legal “reasonable recreation” standard, wherein only those incidents in which the claimant’s conduct was reasonable are accepted as falling within the “zone of special danger” doctrine.

Under the Defense Base Act, the United States Supreme Court has allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a “zone of special danger.” In *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the employee, while spending the afternoon in the employer’s recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The Court stated that “[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 unconventional conditions of Korea.” *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 followed the Supreme Court’s holdings in deciding *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978), when the employee died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal. The deceased had been employed as an educational advisor by Southern Illinois University, which in turn had a contract with the United States Government to provide educational assistance to the Nepalese government. The round of golf was shown not to have been employment-related, but the Board held that this fact was insufficient to deny the claim based on precedent extending coverage under the Defense Base Act to all employees subjected to the “zone of special danger,”⁴ which it defined as the special set of circumstances, varying

⁴In 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); *Pan-American World Airways, Inc. v. O’Hearne (Smith)*, 335 F.2d 70 (4th Cir. 1964) (awarding benefits where employee was killed in the same car crash as in *Gondeck*, 382 U.S. 25); *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*,

from case to case, which increase the risk of physical injury or disability to a 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),⁵ 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.* The Board, however, has also held in a Defense Base Act case that where no evidence of record supported a determination that the activity which occasioned the employee’s death was related to conditions created by his overseas job, and where the circumstances surrounding the employee’s death did not in themselves suggest that the death was work-related, the “zone of special danger” test was, as a matter of law, not met. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff’d mem.*, 873 F.2d 1433 (1st Cir. 1989)(employee who asphyxiated himself while engaged in a personal activity at an Air Force base in Germany did not fall within the zone of special danger).

In the instant case, the administrative law judge found that claimant and the other employees on the Johnston Atoll had limited choices and opportunities for recreation, and

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).

⁵In *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.

that this is, presumably, the reason why the military authorized the operation of “social clubs” on the atoll. The administrative law judge further found that with the existence of clubs serving alcohol to employees, in combination with the employees’ lengthy periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and employer that “risky horseplay” or scuffles such as that which occurred on July 25, 1999, would occur from time to time. As such, he determined that claimant’s conduct herein was not “so far from his employment” and was not “so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment.” Decision and Order at 8, citing *O’Leary*, 340 U.S. at 507. The administrative law judge also found no evidence that claimant initiated the scuffle with PFC Burum, and held that it is apparent that he was a “somewhat reluctant” participant in the incident. Decision and Order at 8. Moreover, the administrative law judge observed, based on the evidence, that claimant participated in the “demonstration” thinking that he would not get hurt because PFC Burum would either accomplish what he had promised or because claimant would be able to block the kick.

It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge’s decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff’d*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge observed in his decision, the record contains conflicting evidence regarding the events which culminated in claimant’s injury on July 25, 1999. Nevertheless, the administrative law judge, after consideration of the entirety of this evidence, found claimant’s version of the events to be more credible.⁶ Thus, based on claimant’s credible testimony, the administrative law judge concluded that the conditions of claimant’s employment, *i.e.*, the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol, created a special zone of danger out of which claimant’s injury arose. In particular, the

⁶In this regard, the administrative law judge acknowledged that claimant lied to the police officer at the scene about the events resulting in his injury, and that there was conflicting testimony from eyewitnesses regarding the exact terms of the wager, *i.e.*, whether claimant challenged PFC Burum to try to knock claimant to his knees. The administrative law judge, however, determined that claimant’s motivation for lying to the police officer, *i.e.*, he did not want to be accused of having engaged in an altercation, was apparently somewhat understandable, and that the variation in terms of the wager made no difference in his analysis of this issue.

administrative law judge found that claimant's injury occurred while he was engaged in reasonable recreation. As these findings of fact are rational and within the administrative law judge's authority to make, they are affirmed.

In contrast to employer's contentions, the cases wherein the zone of special danger doctrine were deemed inapplicable are factually distinguishable from the case at hand. First, in *McNamara v. Mac's Pipe & Drum, Inc.*, 21 BRBS 111 (1988), a D.C. Act case, the claimant, an off-duty bartender was injured during a fight which began on employer's premises. Although claimant may have initially responded to employer's request to protect patrons and property in the event of an altercation, so that he was theoretically on duty, the Board affirmed the administrative law judge's finding that claimant acted voluntarily and beyond the scope of that request by going across the street to assist a patron who had run out of the bar with a two-by-four. The Board also affirmed the administrative law judge's finding that claimant was thoroughly disconnected from employer's service when he was injured, and that therefore the obligations or conditions of employment did not create any zone of special danger out of which the injury arose. Unlike *McNamara*, the administrative law judge here found claimant was not an aggressor. Moreover, it is also distinguishable from the instant case on the basis that it arose in a bar in D.C. and thus the scope of the zone of special danger was much narrower than here, where the administrative law judge rationally found it encompassed the entirety of the Johnston Atoll, a remote and isolated location. In *McNamara*, by his own actions, the employee left the zone created by the obligations of his employment.

Similarly, in *Gillespie*, 21 BRBS 56, the Board reversed the administrative law judge's finding that claimant's death arose from the zone of special danger created by the conditions of his employment and thus his award of death benefits. In resolving this case, the Board distinguished *O'Leary* and *O'Keefe*, on that ground that the record lacked any evidence which could be construed as supporting the administrative law judge's assumption that a relationship existed between the conditions created by the employee's job and the activity which occasioned his death.⁷ Specifically, the Board, citing *O'Leary*, held that this was a case wherein the employee went "so far from his employment and [became] so thoroughly disconnected from the service of his employer" that it was unreasonable to say that his injury arose out of and in the course of his employment. *Gillespie*, 21 BRBS at 58, citing *O'Leary*, 340 U.S. at 507. In contrast, as discussed above, the administrative law

⁷In particular, the Board observed that the record lacks any evidence bearing on the claimant's motivation for engaging in the autoerotic activity which led to his death, as well as the fact that the circumstances surrounding his death do not in themselves suggest that the death was work-related. *Gillespie*, 21 BRBS 56.

judge in the instant case specifically considered the connection between claimant's injury and his work for employer and concluded, based on the evidence, that there was the requisite connection for the application of the zone of special danger doctrine, *i.e.*, that events resulting in claimant's injury were reasonably foreseeable and related to his employment given the conditions associated with his job for employer on the Johnston Atoll.

Finally, the denial of benefits in *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), *aff'd mem. sub. nom. Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991), rested on the policy that a wrongdoer should not be allowed to benefit from his or her own wrongdoing, and thus, contrary to employer's suggestion, did not turn on the inapplicability of the zone of special danger doctrine. In *Kirkland*, the administrative law judge determined that claimant's participation in the criminal activity leading to her husband's murder precluded her attempt to secure death benefits arising from his death. As such, the Board noted in a footnote that it need not address claimant's argument that the administrative law judge erred in finding that decedent was not killed in a "zone of special danger."⁸ *Kirkland*, 23 BRBS at 353, n. 6. Consequently, *Kirkland* is likewise inapplicable to the case at hand.

As the administrative law judge properly applied the "zone of special danger" doctrine in this case,⁹ *see O'Keefe*, 380 U.S. 359; *O'Leary*, 304 U.S. 504, and as his findings of fact

⁸In its decision, the Board held "that the policy prohibiting a spouse from recovering his or her ill-gotten gains, is equally applicable to this case arising under a Federal Act where a claimant, who has willfully participated in a felony leading to her husband's murder occurring in an alleged 'zone of special danger,' attempts to secure compensation benefits arising from the murder." *Kirkland*, 23 BRBS at 350.

⁹Moreover, we hold that while the administrative law judge, at one point in his decision, incorrectly referred to *Hanson*, 305 F.2d 699, as *O'Keefe*, 380 U.S. 359, Decision and Order at 8, he nevertheless set out and applied the appropriate standard, *i.e.*, whether

and conclusions of law are rational, supported by substantial evidence and in accordance with the appropriate standards, his conclusion that claimant sustained a compensable injury under the Act, based on the specific facts of this case, is affirmed.

Employer also argues that the administrative law judge erred in awarding benefits to claimant since claimant's conduct resulted in his debarment from the Johnston Atoll by the base commander and justifiable discharge by employer. In support of its contention, employer cites *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), for the proposition that where, as in the instant case, a claimant is justifiably discharged for violating company rules or performing unauthorized activities, he is not entitled to disability compensation benefits. Employer also argues that the administrative law judge's finding that claimant's expulsion from the island for participating in prohibited activity would not bar his claim for benefits is erroneous as it is based upon a misapplication of *O'Leary* and *O'Keefe*, since in those cases employer did not seek to have the claimant terminated for violation of company standards.

In his decision, the administrative law judge found, assuming *arguendo*, that while claimant was engaged in "unauthorized" or prohibited behavior (*i.e.*, assuming that employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that claimant's behavior was unforeseeable. Specifically, in addressing this issue, the administrative law judge found that as in *O'Leary*, the incident of July 25, 1999, was certainly "foreseeable, if not foreseen" by employer, and thus the mere fact that fighting was prohibited does not necessarily preclude claimant's recovery under the Defense Base Act, even if fighting constituted grounds for expulsion from the atoll. Additionally, the administrative law judge concluded that claimant's conduct was not so egregious that it severed the relationship between his employment and the injury under the "zone of special danger" doctrine.

Employer's reliance on *Brooks* is misplaced. In that case, claimant was, as a result of an injury to his lower back sustained on May 19, 1986, intermittently off work through August 15, 1986, after which he was assigned light duty work in employer's tool room issuing tools. Claimant was subsequently discharged by employer on October 14, 1986, on

claimant's behavior was foreseeable and reasonable given the context within which they occurred, in determining that although claimant may have violated some rules it did not preclude his recovery under the Act.

the basis that he falsified company records. In its decision, the Board held that employer established suitable alternate employment as it was undisputed that claimant's post-injury job in its tool room was suitable for claimant. *Brooks*, 26 BRBS 1. Additionally, the Board held that because claimant's inability to perform the post-injury work at employer's facility on or after October 14, 1986 was due to his own misfeasance in violating a company rule, any *total* disability thereafter was not compensable under the Act inasmuch as it was not due to claimant's disability resulting from the work-related incident. *Id.* Thus, *Brooks* applies to the situation wherein an employer has provided claimant with suitable alternate employment, *e.g.*, a light duty job in its facility with no loss in wage-earning capacity, and at some point thereafter claimant is discharged as a result of his own misfeasance. The holding in *Brooks* therefore does not, as suggested by employer, establish a rule barring all benefits in cases where claimant cannot return to post-injury work due to his own misfeasance. *See also Managaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Rather, *Brooks* addresses whether employer has a renewed burden to establish suitable alternate employment in cases where claimant is fired from a suitable post-injury job for cause.

In the instant case, claimant was never offered any position by employer post-injury, nor did employer establish that suitable alternate employment would have been available to claimant at pre-injury wages but for his discharge. Thus, the instant case does not present facts analagous to *Brooks*. In fact, at the time when claimant was permanently expelled from the atoll, August 5, 1999, claimant was totally disabled as a result of the injury sustained on July 25, 1999. In contrast to *Brooks*, claimant was not able to work when he lost his job with employer. Indeed, the parties stipulated that claimant was temporarily totally disabled from July 25, 1999, to January 1, 2000, and permanently partially disabled thereafter due to his July 25, 1999, left hip injury. Employer's burden to establish the availability of suitable alternate employment was not altered by claimant's dismissal from the atoll, as it is undisputed that claimant cannot perform his usual employment. Employer did not attempt to show the availability of suitable alternate employment until well after the date of claimant's dismissal when it completed its labor market survey, December 15, 2000. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999). Consequently, we hold that *Brooks* is inapplicable to the present case, and employer is liable for total disability benefits, based upon its stipulation, until January 1, 2000, and for partial disability benefits thereafter.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge