BRB No. 09-0614

MICHAEL PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PMB SAFETY & REGULATORY, INCORPORATED	)	DATE ISSUED: 02/26/2010
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Christopher A. Edwards (Edwards Law Firm), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-LHC-01922) of Administrative Law Judge Clement J. Kennington 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 worked as a galley hand in the kitchen and as a "B.R." assigned to clean the living quarters of an oil rig. On June 21, 2007, claimant testified that he was lying in a bunk taking a break after making the beds when Chase Fruge, a co-worker, came into the room and pulled him off of the bunk by his ankles onto the concrete floor. Mr. Fruge then twisted claimant's arm behind his back. Mr. Fruge mistakenly believed that claimant had previously thrown water on him. Claimant reported the incident and was asked to leave the platform.

Claimant initially sought treatment with employer's physician at Gulf Regional Occupational Medicine Center, complaining of right ankle and right shoulder pain. Dr. Laborde diagnosed claimant with right ankle and right shoulder pain, prescribed over-the-counter medication and returned claimant to regular duty. Claimant returned to Gulf Regional the next day, and Dr. Hutchinson diagnosed right ankle and right shoulder pain, prescribed over-the-counter medication and returned claimant to work. Subsequently, claimant sought treatment at the emergency room on June 24 and with Dr. Alleman, his family practitioner, on June 25, 2007. Dr. Alleman recommended physical therapy, and claimant attended two sessions before stopping. On July 15, 2007, claimant was involved in a non-work-related car accident, injuring his neck and back. In November 2008, claimant underwent a procedure to repair a superior labral anterior/posterior tear in his right shoulder and a scope of scar tissue in his right shoulder at University Hospital in New Orleans, Louisiana. Claimant has not returned to work since the incident in July 2007 and sought benefits under the Act.

In his decision, the administrative law judge found that claimant was not a credible witness and that claimant was not in the course of his employment at the time of the incident. He found that claimant was injured during the course of non-work-related conduct and that a third-party's intentional or negligent conduct was an intervening cause of claimant's injury. Therefore, the administrative law judge denied benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that claimant was not in the course of his employment at the time of the incident. Claimant contends he was attacked by Mr. Fruge, and that there was no horseplay involved. Claimant also contends that the administrative law judge erred in finding Mr. Fruge's intentional and negligent conduct relieved employer of liability, and that claimant

was not in a "zone of special danger."[1] Thus, claimant contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

The presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), that the claim comes within the provisions of the Act, applies to the issue of whether an injury arises in the course of employment. Employer, therefore, has the burden to produce substantial evidence to the contrary. *See, e.g., Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73 (1984). An injury occurs in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Boyd v. Ceres Terminal*, 30 BRBS 218 (1997).

In this case, the administrative law judge found that claimant was on an unauthorized break at the time of the injury and thus had "severed the employment nexus." Decision and Order at 16. Claimant testified that his work hours on the rig were from 6:00 a.m. until 3:00 p.m., and that he was allowed to take smoke breaks and rest breaks. H. Tr. at 22. Although the administrative law judge found that claimant was not a credible witness, the parties do not dispute that claimant was on a break at the time of the incident,[2] and this assertion is supported by the other witnesses. Emp. Ex. 4.

The administrative law judge erred in placing the burden on claimant to establish that the break was authorized, as, pursuant to Section 20(a), employer bears the burden of producing substantial evidence that the rest break was unauthorized and subjected claimant to risks unrelated to his employment. *Durrah*, 760 F.2d at 325, 17 BRBS at 100-101(CRT). Assuming, *arguendo*, that claimant's break was unauthorized, this fact alone does not rebut the Section 20(a) presumption. Generally, employees who, within the time and space limits of their employment, act to accommodate personal comforts do

[1] We reject claimant's contention that the "zone of special danger" doctrine is applicable in this OCSLA case. The "zone of special danger" doctrine has limited application to cases arising under the Defense Base Act and the District of Columbia Workmen's Compensation Act. *See generally Cantrell v. Base Restaurant, Wright–Patterson Air Force Base*, 22 BRBS 372 (1989); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

[2] Specifically, claimant testified that he was waiting for the room to clear before he made the beds, and that he was lying on the lower bunk in order to make the bed above it. H. Tr. at 21.

not leave the course of employment. *Id.*, 760 F.2d at 326, 17 BRBS at 101(CRT). In *Durrah,* the United States Court of Appeals for the District of Columbia Circuit held that the claimant, who had left his guard booth unattended contrary to an employment rule to get a soda and who fell on the stairs, was injured in the course of his employment. *See also G.S. [Schwirse] v. Marine Terminals, Inc.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 198 (2009) (drinking on the job does not take claimant out of the course of his employment); *Willis v. Titan Contractors, Inc.*, 20 BRBS 11 (1987) (unauthorized use of crew boat not outside the course of employment); *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981) (unauthorized use of planing equipment not outside course of employment). Claimant's taking a rest break did not remove him from the course of his employment, as the incident occurred in a place where he would reasonably expect to be in the course of his work and not in an "unanticipated path of new risks not inherent in his employment situation." *Durrah*, 760 F.2d at 326, 17 BRBS at 99(CRT). Therefore, regardless of whether claimant's break was authorized, he was in the course of his employment at the time the incident with Mr. Fruge occurred.

The administrative law judge also found that claimant's prior history of unsanctioned "horseplay" severed the employment nexus. Initially, the administrative law judge erred in relying on evidence that claimant and Mr. Fruge were asked to leave the platform after the incident at issue. The administrative law judge concluded from this evidence that claimant acted against employer's express prohibition of horseplay. This conclusion cannot support a finding that claimant was outside the scope of employment given the evidence that Mr. Fruge's attack on claimant was unprovoked and employer's disapproval was expressed only after the incident. Injuries caused by fights between co-workers, moreover, are compensable where employer presents no evidence that the injured employee had any personal or social contacts with the assailant outside of work.[3] *Williams v. Healy-Ball-Greenfield*, 15 BRBS 489, 492 n.2 (1983); *Twyman v. Colorado Security*, 14 BRBS 829 (1982), *on remand from* 670 F.2d 1235 (D.C. Cir. 1981), *vacating and remanding* 12 BRBS 863 (1980) (Miller, dissenting). Such injuries, however, do not arise out of employment if the dispute giving rise to the physical altercation has its origins in the employee's domestic or personal life. *Figuero v. National Steel & Shipbuilding Co.*, 8 BRBS 852 (1978), *aff'd mem.*, No. 78-3345 (9th Cir. 1980). Both claimant and Mr. Fruge testified that the incident was based solely on Mr. Fruge's misconception that claimant had previously thrown water on him at work. H. Tr.

[3] Injuries are not compensable if occasioned solely by the willful intent of an employee to injure himself or another. 33 U.S.C. §903(c). This section is not applicable under the facts of this case as claimant was not the aggressor in the incident on June 21, 2007. *See generally Green v. Atlantic & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986).

at 22-23; Emp. Ex. 4; Cl. Ex. 20 at 14. Thus, the evidence indicates that the only contact between claimant and Mr. Fruge occurred at work on the oil rig. Therefore, as this incident occurred at work between co-workers, it occurred in the course of claimant's employment. Any past history of horseplay between claimant and Mr. Fruge does not take this incident out of the course of claimant's employment.

The administrative law judge also found that employer was relieved of liability as claimant's injury occurred as a result of a third party's intentional or negligent conduct. The inquiry into "intentional or negligent" conduct arises only when employer alleges that a *subsequent* event constitutes an intervening cause of claimant's injury. It does not apply to whether the original injury is compensable, as the Act provides that benefits are payable "irrespective of fault as cause for the injury."[4] 33 U.S.C. §904(b). *See Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring & dissenting). Moreover, the assailant in this case was not a "third party" but was instead a co-worker on the oil rig.[5] Although Mr. Fruge and claimant were "employed" by separate subcontractors, they worked in the confined environment of the oil rig for the same company, Chevron. Chevron retained the right to fire employees on the rig, and did fire claimant and Mr. Fruge following the altercation on June 21, 2007. An employer is liable under the Act for injuries caused by co-workers. *See Perron v. Bell Maintenance & Fabricators*, 970 F.2d 1409, *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993) (although nominally employed by different companies, because claimant and his co-worker were borrowed servants of the same employer, when claimant was injured by his co-worker, Section 33(i) barred claimant's tort suit against the nominal employer of the co-worker; claimant's sole remedy is under the Act).

As claimant was injured by a fellow employee while on a break during his employment on the oil rig, the administrative law judge's conclusion that claimant was so thoroughly disconnected from the service of his employer that he was no longer in the course of employment has no support in law or in fact. Consequently, the administrative law judge's finding that claimant was not in the course of his employment at the time of the incident is reversed. Employer has offered no evidence legally sufficient to rebut the Section 20(a) presumption, *see Durrah*, 760 F.2d 322, 17 BRBS 95(CRT), and therefore the incident occurred in the course of claimant's employment as a matter of law. Thus,

[4] The sole exception is contained in Section 3(c) which, as explained in n.3, *supra*, does not apply here.

[5] Injuries are not removed from the course of employment by the mere fact of third party involvement. *See* 33 U.S.C. §933. In addition, under Section 2(2), a compensable injury includes one "caused by the willful act of a third person directed against an employee because of his employment." 33 U.S.C. §902(2).

we vacate the denial of benefits and remand the case for consideration of any remaining issues.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for consideration of any remaining issues.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge