BRB No. 99-118

MICHAEL COMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Martin Regan, Jr. (Regan & Boshea, P.L.C.), New Orleans, Louisiana, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-LHC-776) 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.* (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).

The pivotal facts of this case are highly disputed. It is undisputed, however, that claimant worked as a sandblaster/painter for employer. On May 22, 1997, the date of injury, claimant and his fellow crew mates were assigned to remove sand from the bow of the ship in preparation for launch the next day. Claimant was later found two levels below deck,

approximately 300 feet from his work area, with a broken hip and a broken ankle. Employer voluntarily initiated disability and medical benefits. A dispute arose over the reason for claimant's departure from his assigned work area and, thus, whether his injury occurred in the course and scope of his employment.

Claimant alleged he left his assigned work area in search of a broom.[1] Specifically, claimant testified that he first searched the deck and then he went below deck and began searching room by room for a broom. He testified that while he was searching, he stepped into and fell through a hole leading into ballast tank #5. Tr. at 70-72. Claimant sustained a compound fracture to his right ankle and a broken hip. Tr. at 255, 276. Employer initially paid medical expenses and disability compensation but later terminated benefits and controverted the claim.

[1]Much of the testimony differs with regard to whether claimant's crew had any tools or sufficient tools with which to accomplish the assigned task. At one point, claimant testified that they had no tools and had to search on the vessel, while he later contradicted himself and stated that he found two shovels and a broom on the ground after receiving his assignment. Neither of the other crewmen verify this aspect of the case and, in fact, their recollections differ. Mr. Troulliet testified that he got his own broom and then found another and gave one to Mr. Campbell. Mr. Campbell stated that he found a broom in the boatswain's stores (one level below the bow) and told claimant such. Emp. Ex. 25 at 8-9, 25-26; Tr. at 67-70, 84-86, 159-160, 175. Their supervisor, Mr. Cantrell, testified that the tool room issued the three-man crew two shovels and one broom. Tr. at 201-202.

Employer contended the accident did not happen the way claimant alleges and that claimant's injuries did not occur in the course of his employment. Specifically, employer asserted that claimant was on a personal frolic to smoke marijuana and fell when he attempted to climb out of the ballast tank and lost his footing. Employer relied on the testimony of several witnesses for this defense. First, Mr. Cantrell, claimant's foreman, and Mr. Tabony, manager of medical services, stated that claimant's assigned workspace was 300 feet from where he was found, and Mr. Cantrell stated that the path between claimant's work area and where he was found was obstructed by pipes and other permanent structures. Tr. at 217, 266. Next, Mr. Cantrell and Mr. Caillouet, the shipfitter foreman who found claimant, stated that the area in which claimant was found was powerless and dark, as preparations were being made to seal the area off in readiness for launch the next day. Tr. at 122-123, 215. Thus, employer argued that it made no sense to look for brooms in the tank areas. Moreover, Mr. Tabony, during his rescue of claimant, discovered a half-smoked marijuana cigarette in the compartment where claimant was found,[2] and Mr. Troulliet, a co-worker, discovered rolling papers and marijuana in claimant's lunch box.[3] Emp. Exs. 15, 25 at 13-14; Tr. at 263, 271. Finally, based on the testimony of Mr. Tabony, employer asserted that it would be extremely difficult for the injury to have occurred the way claimant alleged because the hole he allegedly fell through is only 18 inches wide. Mr. Tabony testified that, had claimant, who is six feet nine inches tall and weighs 250 pounds, stepped through the hole while walking, he would have expected to see more abrasions and lacerations of the soft tissue (external injuries) from contact with the edge of the hole. However, claimant's injuries were limited to the ankle fracture, the hip fracture and an internally-caused bruise by the hip, which Mr. Tabony believed were more likely caused by a fall while climbing the ladder. Tr. at 256, 276, 278-279.

[2]There is no information as to whether the cigarette had been smoked recently. There was, however, testimony that neither claimant nor the area in which he was found (an unventilated area) smelled of marijuana smoke. Tr. at 272.

[3]Everyone agreed that claimant displayed great concern for the whereabouts of his lunch box, which was on the deck, and the need for his co-worker to bring it to him. Emp. Ex. 25 at 39; Tr. at 220, 278-279.

The administrative law judge discredited claimant's testimony. He found that Mr. Tabony's theory was more plausible than claimant's account of the accident. The administrative law judge also credited Mr. Cantrell's testimony and found that even if claimant's goal was to find another broom, he chose an unreasonable area in which to search: two levels below deck in an unlit, unpowered, confined area. In conjunction with other evidence such as claimant's over-concern with his lunch box, his admitted past marijuana use, a marijuana cigarette being found in his proximity, the results of his urinalysis which indicated recent and/or chronic use of marijuana,[4] and his unrealistic explanation, the administrative law judge found that claimant was involved in an unauthorized/unsanctioned personal mission which did not benefit his employer. Therefore, he denied benefits, as he found that claimant's injury did not occur within the course of his employment. Decision and Order at 14-16. Claimant appeals this decision, and employer responds, urging affirmance.

Under the Act, an injury occurs within the scope 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 Terminals*, 30 BRBS 218 (1997). The Section 20(a), 33 U.S.C. §920(a), presumption applies to this question. *Id.; Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73 (1984). If an employee deviates from his work for personal reasons, the activity may not have occurred in the course of employment and his employer is not liable for any resulting injuries. *Bobier v. The Macke Co.*, 18 BRBS 135 (1986), *aff'd mem.*, 808 F.2d 834, 19 BRBS 58(CRT) (4th Cir. 1986).

It is undisputed that claimant's injuries occurred within the time and space boundaries of his employment, as this accident occurred on a vessel on employer's premises during the work day. *See Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). The issue herein involves whether claimant was injured while engaged in an activity that had a purpose related

[4]Dr. George, an expert in pharmacology and toxicology, performed a drug screening on claimant the day following his injury. The test results screened positive at over 500 ng/ml and confirmed positive at 768 ng/ml. The screen test is presumptively positive at greater than 50 ng/ml and the confirmation test is presumptively positive at greater than 15 ng/ml. Dr. George stated that claimant's results are indicative of either his acute use within hours of the test or of his chronic use of marijuana or both. Additionally, Dr. George explained that marijuana is not eliminated from the body quickly, so a 24-hour difference between the injury and the test is not significant. Moreover, he stated that claimant would still be affected, although not "high," if he had smoked marijuana at 9:00 p.m. the night before the accident as he testified. Emp. Ex. 17; Tr. at 15-17, 23, 25-26.

to his employment. *Willis v. Titan Contractors, Inc.*, 20 BRBS (1987). In this regard, claimant challenges the administrative law judge's determination that he was not engaged in such an activity, contending that the administrative law judge erred in finding the Section 20(a) presumption rebutted by circumstantial evidence. Employer argues that the administrative law judge's decision is supported by substantial evidence, is rational, and should be affirmed.

The administrative law judge is responsible for resolving conflicts in the evidence. He is to admit relevant evidence and exclude irrelevant evidence. "Relevant evidence" is defined as:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. §18.401. Inasmuch as hearings before the administrative law judge follow relaxed standards of admissibility, the admissibility of evidence depends only on whether it is such evidence as a reasonable mind might accept as probative.[5] *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968). In instances where there are no witnesses to an accident and the claimant's credibility is called into question, such as in the case presently before the Board, the administrative law judge may have to resolve issues using the evidence available, which may well involve circumstantial evidence. "Circumstantial evidence" is defined as "indirect evidence; secondary facts by which a principal fact may be rationally inferred." *Barron's Law Dictionary* (1984). Further, circumstantial evidence may be "substantial evidence" if it meets the definition thereof. "Substantial evidence" has been defined as that quantum of evidence which a "reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Abosso v. D. C. Transit System, Inc.*, 7 BRBS 47 (1977). As the evidence herein was admitted for its relevancy, there is no reason that this "circumstantial" evidence may not be relied upon by an administrative law judge. *See Mulvaney*, 14 BRBS at 597; *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 820 (1976). Consequently, we reject claimant's assertion to the contrary. Thus, we must determine whether the evidence credited constitutes substantial evidence which supports the administrative law judge's findings.

Questions of witness credibility are for the administrative law judge as the trier-of-

[5]Section 702.339 of the regulations states that an administrative law judge is not bound by common law or statutory or formal rules of evidence or procedure and that he must make his inquiry so as to best ascertain the rights of the parties. 20 C.F.R. §702.339.

fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and determinations in this regard must be affirmed unless they are "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). Based on the evidence herein, the administrative law judge rationally discredited claimant. *See U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Cordero*, 580 F.2d 1331, 8 BRBS at 744. He noted that claimant's testimony contained conflicts regarding obtaining brooms and shovels, that claimant admitted to using marijuana the night before the accident, but his wife testified that he did not use it then, Tr. at 195-196, that claimant's reason for being in a dark, unpowered area of the ship was unbelievable, and that claimant downplayed the concern his co-workers testified he expressed for his lunch box (which was found to have marijuana and rolling papers in it). Further, a half-smoked marijuana cigarette was found in claimant's proximity, although he testified he did not know how it got there.

Next, the administrative law judge rationally credited claimant's foreman and the manager of medical services. Their testimony supports the inference that claimant was not looking for a broom in the area he was found because the area was dark, unpowered and supposed to have been closed off in preparation for a launch the next day. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994) (the administrative law judge may draw inferences from the evidence credited). Additionally, the administrative law judge found that Mr. Tabony's testimony casts doubt on claimant's version of how the accident physically occurred: given claimant's size and the fact that he was walking forward, how did he fall straight through an 18-inch hole without striking the edges and causing external injuries to some part of his body?

Claimant's disagreement with the administrative law judge's conclusion is not sufficient reason to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). In this case, the administrative law judge's findings are supported by substantial evidence of record and will not be disturbed. As the evidence credited rebuts the Section 20(a) presumption, the presumption falls out and the case must be decided on the record as a whole, and claimant bears the burden of persuading the administrative law judge that his injury occurred during the course of his employment under the preponderance of the evidence standard. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996). The administrative law judge credited employer's evidence over claimant's, and he found, on the record as a whole, that claimant's version of the incident was not persuasive and that claimant did not fulfill his burden of proof. The administrative law judge thus found

that claimant's purpose in leaving his work area was not to find a broom, but rather was to smoke a marijuana cigarette in private, and this determination is supported by substantial evidence. As we affirm this finding of fact, the legal question we must now address is whether the administrative law judge correctly determined that claimant deviated sufficiently from the course of his employment so as to release employer from all liability.

The general rule is that an injury occurs during 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. If the employee goes so far from his employment and becomes so thoroughly disconnected from the service to the employer that it would be unreasonable to say that the injury occurred in the course of employment, then the activity is no longer in the course of employment. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); 99 C.J.S. Workers' Compensation §222 (1958). Insignificant deviations during the time and space limits of employment to attend to personal comforts are not sufficient to take the employee out of the course of his employment. *Durrah*, 760 F.2d at 322, 17 BRBS at 95(CRT); 2 A. Larson and L. Larson, *Larson's Workers' Compensation Law*, §21.01 *et seq.* (1999); 82 Am. Jur. 2d Workers' Compensation §281 (1992); 99 C.J.S. Workers' Compensation §222 (1958). However, if the employee violates an express prohibition, acts without authorization, acts for purely personal reasons or has abandoned his employment duties and embarked on a personal mission, then the employment nexus may be severed. *Willis*, 20 BRBS at 11; *Mulvaney*, 14 BRBS at 595.

In this case, claimant did not leave employer's premises; however, he did venture 300 feet, and two levels, away from his assigned work area to an area of the ship which was not being used and in which there was no work being performed. Moreover, the administrative law judge found, and we have affirmed, that claimant's reason for being below deck was to find a secluded spot to smoke marijuana. Thus, there can be no question but that claimant was acting for personal reasons, in violation of employer's express prohibition against the use of drugs and alcohol, Emp. Ex. 12, and not for any purpose which promoted employer's interests. *See Boyd*, 30 BRBS at 220-221. Additionally, the activity in which the administrative law judge found claimant sought to partake is an illegal activity.[6] Decision

[6]An employer's interest can be advanced directly or indirectly, such as where an employee helps a known hostile employee start his car so as to keep the peace in the work place. *Boyd*, 30 BRBS at 218. Although there are personal activities which may not directly advance an employer's interest, they promote the employee's comfort and, consequently, are types of activities the employer should expect to have occur: posting mail, making personal phone calls, getting food or drink, or smoking a cigarette. *Durrah*, 760 F.2d at 322, 17 BRBS at 95 (CRT); 2 A. Larson and L. Larson, *Larson's Workers' Compensation Law*, §21.01 *et seq.* (1999); 82 Am. Jur. 2d Workers' Compensation §281 (1992); 99 C.J.S. Workers' Compensation §222 (1958). We cannot, however, equate claimant's actions here

and Order at 14-15. We hold that claimant's detour from his job to a remote area of the ship to smoke marijuana was a personal frolic which served no purpose related to his employment and was sufficient to sever the employment nexus. *Oliver v. Murry's Steaks*, 21 BRBS 248 (1988) (detour to a bar without returning to work took the claimant out of the "course of employment"); *Bobier*, 18 BRBS at 135 (5-hour detour to a restaurant took the claimant out of the "course of employment"); *Oliver v. Murry's Steaks*, 17 BRBS 105 (1985). Therefore, we affirm the administrative law judge's determination that claimant's injury did not occur within the "course of his employment," and we affirm the denial of benefits.[7] *Id.*

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with general personal comfort departures from work, as employer cannot have expected its employee to venture into a closed area of the ship to commit a crime.

[7]We reject claimant's assertion that the administrative law judge failed to consider the "zone of special danger" doctrine. Contrary to claimant's contention, this doctrine applies only in cases arising under the Defense Base Act or the D.C. Workmen's Compensation Act. *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989). Further, in light of our decision, we need not address employer's alternate argument that claimant was intoxicated when he was injured. 33 U.S.C. §903.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge