BRB No. 99-1081

STEVEN IRWIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HONOLULU MARINE, INCORPORATED, dba KEWALO SHIPYARD	)	DATE ISSUED: 7/18/2000
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Robert C. Kessner and Muriel M. Taira (Kessner, Duca, Umebayashi, Bain & Matsunaga), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (1998-LHC-1622) of Administrative Law Judge Michael P. Lesniak 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).

Claimant was employed as a welder for employer and normally worked between the hours of 7:30 a.m. and 4:00 p.m. On the date of the injury, March 28, 1997, claimant clocked out just after 4:30 p.m. He looked for a ride home, but did not find one, so he stayed at employer's facility to socialize with his friends. Soon thereafter, Charlie Pires, owner of both the shipyard and the tugboat claimant had been working on, the *J.D. Pringle*, asked claimant to help put a bumper on the tug. Emp. Ex. 16 at 30; Tr. at 73-74. Claimant did so and hand-marked an additional two hours of work on his time card for which he was paid. Cl. Ex. 12; Emp. Ex. 17 at 32; Tr. at 74. Afterwards, claimant and some of the other workers, including George Leitner, captain of the *Pringle*, gathered to socialize, drink beer and eat in the Hawaiian shipyards' Friday "tradition" of pau hana.[1] Cl. Ex. 11 at 9, 15; Emp. Exs. 16 at 37, 17 at 74, 18 at 53, 22 at 108; Tr. at 72-73. At approximately 9:00 p.m., Mr. Leitner decided to close up the tugboat for the night. Emp. Ex. 22 at 24; Tr. at 75-76, 122, 170. According to claimant's testimony, he followed Mr. Leitner up the ladder to the tugboat, intending to do a final fire watch, as he stated the cabin had been too smoky from welding at 4:30 p.m. when he previously tried to check for fire. Emp. Ex. 16 at 42, 47; Tr. at 70, 76-77. Although Mr. Leitner safely climbed up the ladder, claimant hit his head on a beam that extended off a building adjacent to the tug's dry-dock position. Upon hitting his head, claimant fell to the ground ten to twelve feet below. Claimant was rendered unconscious. By the time the ambulance arrived, claimant regained consciousness but refused treatment, believing it unnecessary. Because he did not look well, Mr. Leitner helped claimant board the *Pringle*, laid him down in one of the bunks and stayed with him for several hours. Cl. Ex. 10; Emp. Ex. 22 at 24-31; Tr. at 78-81, 174-177. The next morning, claimant's friend, Rusty Kuesinberry, came to the shipyard in search of claimant, was told of the incident, and boarded the tug to talk to him. Mr. Kuesinberry convinced claimant to go to the hospital. Claimant was later diagnosed with a left temporal lobe contusion with an intercerebral hematoma and a significant midline shift, necessitating brain

[1]Claimant testified he had two hamburgers and two or three beers. Tr. at 92. Mr. Leitner testified that claimant had five or six beers, the same as he, but that neither was intoxicated. Tr. at 171.

surgery which rendered claimant unconscious for nearly one month.[2] Cl. Ex. 1; Emp. Ex. 19 at 15, 18-23; Tr. at 145-149.

[2]As a result of this injury, claimant testified that he remains on anti-seizure medicine, and that he cannot smell or taste, he has blurred vision, his equilibrium is poor, fumes make him ill, and he is often anxious. Tr. at 84.

Claimant filed a claim for benefits under the Act.[3] The administrative law judge found that claimant's injury was caused by his hitting his head and falling from the ladder. He also found that this incident occurred "within the boundaries of [claimant's] employment" despite its having occurred so long after he completed his welding duties, as the administrative law judge found it was reasonable for claimant to believe it was his duty to ensure the safety of the area in which he had worked. Decision and Order at 14. Additionally, the administrative law judge determined that claimant had been attempting to conduct a final fire watch when he was injured, and, as that task was not prohibited, and as it benefitted the shipyard by potentially preventing damage, claimant's injury occurred within the course of his employment. *Id.* The administrative law judge further concluded that claimant's injury was not caused solely by intoxication, and he awarded claimant temporary total disability benefits under the Act. Decision and Order at 13, 15-16. Employer appeals, and claimant responds, urging affirmance.

Under the Act, an injury occurs within 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 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 or 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, his employer is not liable for any resulting injuries. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *Bobier v. The Macke Co.*, 18 BRBS 135 (1986), *aff'd mem.*, 808 F.2d 834, 19 BRBS 58(CRT) (4th Cir. 1986).

Employer first contends the administrative law judge erred in finding it failed to rebut the Section 20(a) presumption. 33 U.S.C. §920(a). It appears the administrative law judge did not apply the Section 20(a) presumption to this issue. Nevertheless, this error in not applying the presumption is harmless, as he found claimant's evidence persuasive on the record as a whole. The result is thus the same as if he had invoked the presumption, found that employer presented

[3]Employer voluntarily paid temporary disability insurance benefits for a limited period of time, classifying this injury as non-industrial. Emp. Ex. 18 at 70, 75-76; Tr. at 85.

substantial evidence to rebut it, and then based his decision on the record as a whole. Consequently, it would serve no purpose to remand this case for application of the Section 20(a) presumption. Therefore, we reject employer's initial argument. *See Merrill v. Todd Shipyards Corp.*, 25 BRBS 140 (1991); *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983).

Employer next contends that the administrative law judge erred in concluding that claimant's injury occurred within the course of his employment because the injury did not occur while claimant was performing or attempting to perform a work-related duty, as it was neither required nor expected of him to conduct fire watches on this particular job. While there is evidence supporting employer's assertion that claimant was not required to perform fire watches,[4] the administrative law judge clearly credited testimony that it is part of claimant's overall job as a welder to be sure his work area was left in a safe condition. Decision and Order at 14. Specifically, claimant testified that it was his job "not to burn the boat up[,]" and no one prohibited him from performing a fire watch. Emp. Ex. 16 at 43. He stated that he was not looking to be paid for performing the final check because it was not extra work, as checking for fires goes with the job. *Id.* at 66-67, 143; Tr. at 97-98. Mr. Pires stated that the crew of the *Pringle* was assigned the fire watch but that he expected his shipyard employees to be safety conscious and take care of potential fire hazards even if they have already punched out. Emp. Ex. 17 at 42, 89. Mr. Leitner stated that, although the responsibility was with him and his crew for performing fire watches on the *Pringle*, it was conscientious of a shipyard worker to also personally check for fires. Tr. at 196-197. Moreover, although there is no testimony to corroborate claimant's assertion that he was climbing the ladder to board the *Pringle* to perform a final fire watch, the administrative law judge credited claimant's testimony on the matter of his motive for being on the ladder, as is within his discretion. In light of the testimony of record, and given that the administrative law judge has the authority to evaluate conflicting evidence and to assign dispositive

[4]The determination of who was to perform fire watches was on a case-by-case basis depending on the agreement between the owner of the vessel being repaired and the shipyard. Emp. Ex. 18 at 88; Emp. Ex. 25 at 10. Mr. Pires and Mr. Leitner both testified that fire watches on the *Pringle* were conducted by the crew of the *Pringle* pursuant to the work agreement. Emp. Ex. 22 at 10, 14, 32-33; Emp. Ex. 25 at 20, 72. Additionally, Mr. Leitner testified that, contrary to claimant's assertion, Tr. at 76, 93-94, claimant did not discuss performing a final fire watch with him. He also testified that he was going to perform the final fire watch when he closed up the vessel for the night, and that he was unaware claimant was going to follow him up the ladder. Emp. Ex. 22 at 24-27; Tr. at 172-174.

weight to it as he deems fit, *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and as the administrative law judge's credibility determination is neither inherently incredible nor 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), we affirm the administrative law judge's determination that claimant's purpose in climbing the ladder was to board the *Pringle* to perform a final fire watch, as such finding is supported by substantial evidence. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

Employer also argues that claimant's attempted fire watch was not in the course of his employment because it was of no benefit to employer. It so avers because Mr. Leitner's purpose in boarding the vessel was to perform a final fire watch and to close up the boat. Claimant's efforts, employer asserts, were duplicative and therefore not beneficial to it. Although there is testimony that performing a fire watch at so long an interval after the welding is complete is unnecessary,[5] the administrative law judge found that it served a work-related purpose for employer's benefit, and he noted that even Mr. Leitner was going to check for fire when he locked up for the night, despite the fact that welding had been completed four or five hours previously. The administrative law judge did not discuss the redundancy of claimant's efforts but he did conclude they were for employer's benefit. As Mr. Pires testified that he required his employees to be aware of and prevent any hazards, it was reasonable for the administrative law judge to conclude that claimant's attempted off-hours final fire watch was for the benefit of employer in that it may have prevented damage to the shipyard or to property therein. *See Boyd*, 30 BRBS at 218. As the administrative law judge's findings are supported by substantial evidence and within his authority as fact-finding, we affirm the conclusion that claimant's efforts were for the benefit of employer.

[5]The testimony regarding the length of time a fire hazard continues after welding has been completed varied from as little as 20 minutes to several hours. Emp. Ex. 18 at 87-90; Emp. Ex. 22 at 135; Emp. Ex. 25 at 11.

Employer lastly contends that claimant's injury did not occur within the time boundaries of his employment. Specifically, it argues that claimant had ceased work for the day, consumed beer and food, and was not an employee but was merely a guest looking for a place to sleep when he attempted to board the tugboat. As a general rule, to be covered an injury "must occur within the period of employment, at a place or area where the employee may reasonably be expected to be, and while the employee is performing his work duties or engaged in an activity at least incidental to his employment." 82 Am. Jur. 2d Workers' Compensation §272 (1992) (footnotes omitted) (Am. Jur.). It is not required that the injury occur within the "regular working hours or during hours of active labor." *Id.* Injuries which occur outside the normal working hours have been held compensable if they occur within a "reasonable interval" of the employee's working hours, and whether they are within this period depends on the length of time involved as well as the circumstances and the nature of the activity.[6] 2 Larson's Workers' Compensation Law §21.06[1][a] (2000) (Larson's). Courts have also awarded compensation if there are special reasons for the claimant's presence on the premises, before or after work, for a period which is "longer-than-usual." *Id.*, §21.06[1][b].

For example, in *Wilson*, 16 BRBS at 73, the claimant arrived at work five hours early to obtain supervisory authorization to purchase a uniform shirt. After obtaining the approval, the claimant fell down the stairs and injured his back. The Board held that it was unnecessary to look, as the administrative law judge did, at whether five hours was within a "reasonable interval" of his official work hours. *Wilson*, 16 BRBS at 76. Rather, because the claimant was on the employer's premises for a work-related errand and because the employer did not set a specific time for seeking authorization, the time factor was irrelevant. *Id.* at 76. Thus, the claimant's injury was held to be compensable. *Id.* In *Ex parte Strickland*, 553 So.2d 593 (Ala. 1989), *reh'g denied* (Sept. 8, 1989), benefits were awarded to an employee who was injured after hours when he sought to retrieve tools he had left on the employer's lot but might need because of his "on-call" status. Another employee was awarded

[6] *See Osbun v. Workers' Compensation Appeals Board*, 93 Cal. App. 3d 163 (1979) (sheet rock installer injured on his employer's premises on a Sunday was not covered because stocking sheet rock was not part of his duties as an installer, stocking sheet rock did not benefit the employer because it was the general contractor's job, and the premises were closed and locked on Sundays).

compensation when he was injured one hour after his work-shift ended while waiting for a co-worker, with whom he usually got a ride home, to finish his shift. *Blattner v. Loyal Order of Moose*, 264 Minn.79, 117 N.W.2d 570 (1962).

Generally, however, loitering on the premises before or after work severs the employment relationship. For example, where an employee of a supermarket completed work but remained in the store to shop for her mother, her slip-and-fall injuries were not covered, as she had been on a personal mission at the time of her accident. *Zahner v. Pathmark Stores, Inc.*, 321 N.J. Super. 471, 729 A.2d 478 (1999); *but see Briley v. Farm Fresh, Inc.*, 240 Va. 194, 396 S.E.2d 835 (1990) (slip-and-fall injury while shopping for self in supermarket within 15 minutes of clocking out was not enough of a deviation to sever the link). Similarly, where an employee who tended bar on the evening of his death stayed nearly three hours after his shift ended talking and drinking at the bar with the manager, and was shot as a result of an argument with the manager, the injury was not in the course of his employment. The court held that he was a customer at the time of his demise. *Lona v. Sosa*, 420 N.E.2d 890 (Ind. Ct. App. 1981). In a case under the Act, where a claimant socialized on the premises with co-workers immediately after work and was injured when exiting a vehicle, the Board held that the administrative law judge erred in failing to address whether the claimant's participation in the social gathering severed the link between her employment and her injury. *Alston v. Safeway Stores, Inc.*, 19 BRBS 86 (1986). The case was remanded for further consideration.

In this case, there is no question that claimant's injury occurred after his normal hours of work. Undisputed also is the fact that claimant remained on the premises after work hours to partake in the pau hana socializing. While it is established that an injury during the socializing would not have occurred within the course of employment, *see Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992) (injury in after-hours softball game not in course of employment as relevant factors were not present); *Alston*, 19 BRBS at 88, it was not unreasonable for the administrative law judge to find that claimant re-entered the course of his employment after the socializing ended. Indeed, that very same evening, claimant had begun to socialize after his regular work day when he was recalled to work for an additional two hours; those hours were noted informally by hand on claimant's time card, and claimant was paid for this time. Thus, employer did not enforce a rule that once an employee clocked out for the day he became a "guest" until he arrived for work the next day. By crediting claimant's testimony that he was boarding the ship in order to perform a fire watch, the administrative law judge essentially found that claimant re-entered the scope of his employment following his deviation for a social activity.

Although claimant's injury did not occur within the strict time frame of his regular work hours, we reject employer's assertion that this alone is sufficient to hold that the injury did not occur within the course of employment. It is clear from the evidence credited by the administrative law judge that it was not unusual for a worker to perform work-related duties after normal working hours. Moreover, the precedent is well-established: injuries can be covered even if they do not occur within the employee's regular working hours if they occur during the course of a work-related activity.[7] *Wilson*, 16 BRBS at 73; Larson's, §21.06[1][a]; Am. Jur. §272. Consequently, the administrative law judge correctly found that the time of the occurrence of claimant's injury, alone, is an insufficient reason to deny benefits. Thus, as we have affirmed the administrative law judge's finding that claimant's purpose for climbing the ladder to board the tugboat was to conduct a fire watch, and that such activity is beneficial to employer, we affirm the administrative law judge's conclusion that claimant's injury occurred within the course of his employment, and the consequent award of benefits. *Wilson*, 16 BRBS at 73; Larson's §21.06[1][a]-[b]; Am. Jur. §272.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[7]Contrary to claimant's assertion, however, the "bunkhouse rule" is inapplicable to this situation. Although claimant testified that he intended to sleep on employer's premises the evening of the injury, such intention does not invoke the bunkhouse rule. Rather that rule is an extension of the "reasonable interval" rule and pertains to those employees who, by virtue of their work contract, live on the employer's premises because of the nature of their job or because of its remote location. Those employees injured after hours are generally acting within the scope of their employment, even if they are engaged in leisure activities, if they are making a reasonable use of the premises, *Randolph v. Budget Rent-a-Car*, 97 F.3d 319 (9th Cir. 1996), or if the injury is "reasonably attributable or incidental to the nature of the employment." Am. Jur. §274; *see Deffenbaugh Industries v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992); *United States Fidelity & Guaranty Co. v. Slaughter*, 836 S.W.2d 745 (Tex. App. 1992).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge