No. 03-1440

In the Supreme Court of the United States

KALAMA SERVICES, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

Under *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951), an employee's injury is covered by the Defense Base Act, 42 U.S.C. 1651 *et seq.*, if "the 'obligations or conditions' of employment create [a] 'zone of special danger' out of which the injury arose." The questions presented are:

1. Whether injuries to an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a zone of special danger created by the isolation of the island and the limited recreational opportunities available there.

2. Whether any misconduct by the employee during the horseplay was sufficiently egregious to sever the relationship between his employment and the injury under the zone of special danger doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 354 F.3d 1085. The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 15a-30a) is reported at 36 Ben. Rev. Bd. Serv. (MB) 78. The decision and order of the administrative law judge (ALJ) (Pet. App. 31a-53a) is reported at 35 Ben. Rev. Bd. Serv. (MB) 627.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2004. The petition for a writ of certiorari was filed on April 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Base Act, 42 U.S.C. 1651 *et seq.*, subjects covered employments to provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, which provide compensation and medical benefits to employees and their survivors for disability or death resulting from a covered injury. 33 U.S.C. 903(a), 907, 908, 909. Under the LHWCA, the definition of "injury" includes "accidental injury or death arising out of and in the course of employment." 33 U.S.C. 902(2).

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), this Court held that the "arising out of and in the course of employment" standard

> is not confined by common-law conceptions of scope of employment. * * * The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. * * * Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. 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. at 506-507 (citations omitted); see *Gondeck* v. *Pan Am. World Airways, Inc.*, 382 U.S. 25, 27 (1965) (applying the *O'Leary* standard); *O'Keeffe* v. *Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359, 362-364 (1965) (same).

2. Petitioner Kalama Services, Inc., is a Defense Base Act contractor providing operational services on Johnston Atoll, an island in the Pacific Ocean that is two miles long, one-half mile wide, and 700 miles from Hawaii. Pet. App. 2a, 16a n.1, 34a, 41a. Petitioner Ace U.S.A. insures Kalama. Pet. 3. In August 1996,

Kalama hired respondent Michael Ilaszczat to manage a store on the island. Pet. App. 2a, 34a.

On July 24, 1999, Ilaszczat finished work and went to an authorized social club on the island, where he had two drinks and played pool. Pet. App. 3a, 16a-17a, 36a-37a. When the club closed at about 12:30 a.m., Ilaszczat went to another social club on the island, where he had two more drinks and then approached a group of soldiers and bought them drinks. *Id.* at 3a, 17a, 37a. Later, he entered into a $100 wager with one of the soldiers to see if the soldier, in a karate demonstration, could put his leg over Ilaszczat's head without touching him. *Id.* at 3a-4a, 17a, 38a. When the soldier tried to do so, Ilaszczat saw that the soldier's leg would not clear his head, blocked the kick, and said, "No, that's it. Bull****." *Id.* at 4a, 17a, 38a. Ilaszczat picked up his drink to walk away, then found himself on the ground with his left hip broken. *Ibid.*[1]

Several days later, while recovering from hip surgery, Ilaszczat received a notice from the military commander of Johnston Atoll that he was expelled from the island and prohibited from returning because of the July 25, 1999 "physical altercation." Pet. App. 5a, 17a-18a, 39a. On August 5, 1999, petitioner Kalama Services terminated Ilaszczat's employment based on this debarment order. *Id.* at 5a, 18a. Ilaszczat subsequently filed a claim for compensation under the Defense Base Act. *Ibid.*

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[1] The ALJ heard conflicting accounts of the incident, and found Ilaszczat's version of the events—that he was injured when one of the soldiers swept his legs out from under him, causing him to fall to the ground—to be more credible. Two of the soldiers claimed that Ilaszczat charged at them, lost his balance, and fell. Pet. App. 39a. The ALJ found that this version of events was not supported by the evidence. *Ibid.*

3. An administrative law judge (ALJ) awarded compensation to Ilaszczat under the Act. Pet. App. 31a-53a. The ALJ reasoned that, under the zone of special danger doctrine, Ilaszczat could establish that his injury arose out of and in the course of his employment if "the 'obligations or conditions' of [that] employment create[d] the 'zone of special danger' out of which the injury arose." *Id.* at 42a (quoting *O'Leary*, 340 U.S. at 507). Ilaszczat established an employment-related zone of special danger, the ALJ reasoned, because it was clearly foreseeable that the existence of social clubs serving alcohol to employees isolated for lengthy periods on an island in the middle of the Pacific Ocean, with limited choices and opportunities for recreation, would result in risky horseplay or scuffles from time to time. *Id.* at 44a-45a. Accordingly, an injury resulting from horseplay in such a setting was compensable.

The ALJ recognized that an employee's conduct might be "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." Pet. App. 45a (quoting *O'Leary*, 340 U.S. at 507). However, the ALJ found that Ilaszczat's conduct was not so egregious that it severed the relationship between his employment and his injury. *Id.* at 46a. Ilaszczat participated in the "demonstration" thinking he would not get hurt. *Id.* at 45a. And, the ALJ reasoned that even if Ilaszczat's injury involved unauthorized conduct, such conduct would still give rise to a compensable injury if, as here, it was foreseeable. *Id.* at 45a-46a.[2]

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[2] The ALJ also found that Ilaszczat's injury was not caused solely by his own intoxication so as to disqualify him from benefits

4. The Benefits Review Board affirmed. Pet. App. 15a-30a. The Board noted that under the zone of special danger doctrine, there must exist a special set of circumstances that increases the risk of physical injury or disability to a putative claimant. *Id.* at 20a-21a. The Board found substantial evidence to support the ALJ's findings of such special circumstances here based on "the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol." *Id.* at 24a.

The Board rejected petitioners' reliance on Board cases where no zone of special danger existed. Pet. App. 24a-26a. The Board also rejected petitioners' argument that benefits should be denied on the ground that the claimant engaged in misconduct that resulted in his debarment from the island and loss of his job. *Id.* at 27a-30a.

5. The court of appeals affirmed. Pet. App. 1a-14a. The court held that under the zone of special danger doctrine, injuries resulting from reasonable and foreseeable recreational activities in isolated or dangerous locales are compensable under the Defense Base Act, while injuries resulting from recreational activities that are neither reasonable nor foreseeable are generally not compensable. *Id.* at 9a. The court concluded that the Board properly affirmed the ALJ's decision because "horseplay of the type that occurred here" is a foreseeable incident of employment on a "small, remote island—only two miles long and one-half mile wide—which offers residents few recreational opportunities." *Id.* at 11a.

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under 33 U.S.C. 903(c). Pet. App. 43a-44a. Petitioners do not challenge that finding. *Id.* at 11a n.3, 44a n.6.

The court rejected petitioners' argument that Ilaszczat's claim should be barred because he engaged in misconduct. Pet. App. 12a-14a. Misconduct is generally not material unless it "takes the form of deviation from the course of employment." *Id.* at 12a (quoting 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 32.00 (2000)). The court concluded that petitioners had not established such a deviation in this case. *Id.* at 12a-14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue that the court of appeals has circumvented the zone of special danger doctrine and imposed absolute liability on Defense Base Act employers for injuries that occur at distant, isolated locations. Pet. 2, 6. That assertion is incorrect. The court of appeals specifically recognized that injuries resulting from recreational activities in isolated or dangerous locales would not be compensable when the activities are unreasonable and unforeseeable. Pet. App. 9a. That interpretation of the zone of special danger doctrine is consistent with decisions of this Court, which have allowed compensation for recreational activities that are reasonable and foreseeable. For example in *Gondeck* v. *Pan America World Airways, Inc.*, 382 U.S. 25, 26 (1965), this Court held that a death that occurred in a jeep accident when an employee was returning from "reasonable recreation" after work on San Salvador Island was compensable. Similarly, in *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359, 359-360, 364 (1965), the Court held that a drowning

death that occurred during a Saturday recreational outing at a lake 30 miles from the employee's job site in South Korea was compensable. And in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 505-507 (1951), the Court found compensable a death that occurred while an employee was trying to rescue a swimmer in a dangerous channel near a recreation facility in Guam. In each of these cases, as here, the injury occurred while an employee, stationed in a remote location, was engaging in foreseeable recreational activity after normal working hours.

There is also no merit to petitioners' argument that no court of appeals has recognized limits on the zone of special danger doctrine. Pet. 9. Two courts of appeals, by affirming Board decisions denying compensation, have recognized limits in cases where the injury was neither reasonable nor foreseeable. See *Kirkland* v. *Air Am., Inc.*, 23 Ben. Rev. Bd. Serv. (MB) 348 (1990) (no compensation to widow of employee who was murdered during a home burglary in Laos where the wife participated in the burglary), aff'd *sub nom. Kirkland* v. *Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991) (Table); *Gillespie* v. *General Elec. Co.*, 21 Ben. Rev. Bd. Serv. (MB) 56 (1988) (no compensation to widow of employee who died in Germany while engaged in autoerotic activity), aff'd, 873 F.2d 1433 (1st Cir. 1989) (Table)).

2. Petitioners further argue that review is warranted so that the Court can set forth the parameters of the zone of special danger doctrine as applied to Defense Base Act contractors and employees who are subject to rules of conduct set by a military commander. Pet. 10. Petitioners assert that the court below failed to consider the role of such rules in this case. Pet. 10-11.

The court of appeals correctly considered the relevance of these rules, however, in holding that employee misconduct is generally not material unless it "takes the form of deviation from the course of employment." Pet. App. 12a (quoting 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 32.00 (2000)). Whether misconduct amounts to such a deviation is generally a question of fact for the ALJ, which must be upheld if supported by substantial evidence. See, *e.g.*, *O'Leary*, 340 U.S. at 508 (a finding that death was fairly attributable to the risk of employment was supported by substantial evidence and therefore would not be disturbed). Petitioners simply disagree with the ALJ's finding that Ilaszczat's conduct was not so egregious that it severed the relationship between his employment and his injury. See Pet. App. 44a. Review of that factbound issue is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor

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