U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0361

EDWIN JETNIL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: July 21, 2015
CHUGACH MANAGEMENT SERVICES	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Patrick B. Streb (Weltin, Streb & Weltin, LLP), Oakland, California, for claimant.

Keith Flicker and Timothy Pedergnana (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-LDA-00466) of Administrative Law Judge William Dorsey 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the DBA).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, rational, and 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, a citizen of the Republic of the Marshall Islands (RMI), resides on Third Island, located within the Kwajalein Atoll, a remote Pacific coral atoll in the RMI. *See* Decision and Order at 4-5; CX 7 at 1-Paragraphs 1, 2. Kwajalein Atoll is home to the U.S. Army Space and Missile Defense Command's Ronald Reagan Ballistic Missile Defense Test Site. *See* Decision and Order at 4; EX Z at 10, 14-15, 18-20, 64-66. Since 1980, claimant has worked for the companies that have successively held the contracts to provide logistical support for the Missile Defense Test Site; employer has been the contractor since 2003. *See* Decision and Order at 4; CX 7 at 2-Paragraph 4; EX Y at 9; EX Z at 9-15. Claimant worked for employer as a painter five eight-hour days per week, Tuesdays through Saturdays, from 7 a.m. to 4 p.m. *See* Decision and Order at 5; EX X at 8-9; EX Z at 16, 23-24. Claimant usually was assigned to work on the island of Roi-Namur, and he traveled to Roi-Namur from Third Island and back at the end of each day on a boat provided by employer. *See* Decision and Order at 5; CX 7 at 2-Paragraphs 5, 6; CX 8 at 20-21, 37; EX Y at 11-12; EX Z at 22. Claimant also was assigned some work each year on Gagan Island, a small, uninhabited, defense support island with an optic sensor and some communications buildings. *See* Decision and Order at 5; CX 7 at 2-Paragraph 7; EX Z at 18-19, 26-28, 64-66. Gagan Island is located approximately nine miles from Roi-Namur. *See* EX Z at 24. Gagan Island is restricted to persons assigned to work there and the only access to the island is by employer-provided boat or helicopter. *See id*. at 24-26, 65-66. Work assignments on Gagan Island for employer's workers required that they remain on the island during off-duty hours. Typically, employer's workers were transported to Gagan Island on a Tuesday by a charter boat rented by employer. They remained on the island until Saturday, when the charter boat returned to take them back to Roi-Namur. *See* EX X at 16-17; EX Y at 22-23; EX Z at 24-26, 29. The employees stayed in the only living quarters on Gagan Island, a three-bedroom trailer with a kitchen, living room, and bathroom. *See* Decision and Order at 5; CX 7 at 2-Paragraph 7; EX X at 7; EX Y at 19; EX Z at 28-29, 65.

[1] In its Brief in Support of Employer/Carrier's Petition for Review, employer requests that the Board hold oral argument on the issues presented in this appeal. We deny employer's request, as it was not filed in a separate document in accordance with 20 C.F.R. §§802.219(b), 802.305, and as we have determined that oral argument is not necessary for the disposition of this appeal.

Claimant was assigned to work on the Gagan Island pier refurbishment project from Wednesday, January 7, through Saturday, January 10, 2009. *See* Decision and Order at 6; CX 7 at 2-Paragraph 7; EXs K, M, N; EX Y at 10; EX Z at 26-29. Claimant and two co-workers were transported via a boat provided by employer from Roi-Namur to Gagan Island on January 7. *See* Decision and Order at 6; CX 7 at 2-Paragraph 7. Employer provided food and ice, which was brought with the employees on the boat that transported them to Gagan Island; the food furnished by employer consisted of bread, rice, chicken, hot dogs, and bacon. *See* Decision and Order at 5, 9; CX 7 at 2-Paragraph 7. Claimant and his two co-workers stayed in the trailer provided by employer. *Id*. While working on Gagan Island, claimant and his co-workers worked their regular 7 a.m. to 4 p.m. work schedule. *See* EX X at 9; EX Y at 12, 23.

Claimant, who has diabetes, had been advised by his doctor to eat fish whenever possible. *See* Decision and Order at 4, 9; CX 7 at 2-Paragraph 8; *see also* CX 8 at 205-207; EXs D, I. After work hours on Friday, January 9, claimant, while wearing flip-flop style sandals, went fishing on the reef on Gagan Island for his dinner. *See* Decision and Order at 6; CX 7 at 2-Paragraph 8; EX N. Claimant slipped and cut his right foot on the coral. *Id*. Claimant remained on the island, and after finishing work the next day he and his two co-workers went back to Roi-Namur. *Id*. After the weekend, claimant worked for employer on Roi-Namur for two more days, January 13 and 14; he then sought medical attention for his right foot laceration at an RMI government-operated one-room clinic on Third Island, the island on which he resides. *See* Decision and Order at 5-6; EX N; EX Z at 37-39, 53-54, 56-57. On January 26, claimant was transported via E.M.S. to the Roi-Namur Dispensary; after examination of his foot, claimant was flown by helicopter to Kwajalein Hospital, where he was diagnosed with a severe infection of the right foot with necrosis and gas gangrene.[2] *See* Decision and Order at 5-6; CX 7 at 3-Paragraph 9; EXs A-D, N; EX Z at 37, 39-46. On January 27, claimant's right leg was amputated below the knee. *See* Decision and Order at 7; CX 7 at 3-Paragraph 3; EX E. Claimant filed a claim under the DBA. Employer controverted the claim on the basis that claimant's injury did not arise within the scope and course of his employment and that consequently the claim is not compensable under the DBA; therefore, employer has paid no disability or medical benefits to claimant. *See* CX 3; Cl. Resp. Br. at 3-4.

In his Decision and Order, the administrative law judge found that the obligations and conditions of claimant's employment created a zone of special danger out of which his injury arose, and thus the injury is compensable under the DBA. The administrative law judge further found that claimant has not yet reached maximum medical

[2] Claimant's Kwajalein Hospital records document his history of diabetes and hypertension and the administration of insulin to claimant during his hospitalization. EX D at EC00014, EC00016; EX I.

improvement,[3] that he is unable to perform his usual work as a painter, and that employer did not identify any suitable alternate employment. The administrative law judge therefore awarded claimant continuing temporary total disability benefits commencing January 15, 2009, and medical benefits.

On appeal, employer contends the administrative law judge committed legal error in applying the "zone of special danger" doctrine to this case in which a DBA employee was injured while working in his home country.[4] Employer alternatively contends that, assuming, *arguendo*, that the zone of special danger does apply to a local national working in his homeland, the administrative law judge's finding that claimant's off-duty reef fishing injury occurred within the zone of special danger is not supported by substantial evidence. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, in separate briefs, that the administrative law judge properly determined that the fact that claimant is a resident of the Marshall Islands where his injury occurred does not make the zone of special danger doctrine inapplicable. In response to employer's alternative argument, claimant and the Director contend that the administrative law judge properly found that claimant's injury on Gagan Island arose from the obligations and conditions of his employment consistent with the zone of special danger doctrine. Employer filed a reply brief.[5]

Under the Act, an injury generally occurs in the "course of employment" if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *See, e.g., Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010). In cases arising under the DBA, the Supreme Court of the United States has held that an employee may be within the course of employment,

[3] The administrative law judge found that as claimant has not yet gained access to a prosthetic limb, he has not reached maximum medical improvement. *See* Decision and Order at 4, 10-11.

[4] The term "local nationals" is used by employer and the Director, Office of Workers' Compensation Programs, when referring to individuals who are neither citizens nor residents of the United States and who are engaged in DBA-covered employment in their home countries. For the sake of convenience, this decision will also use the term "local nationals" when referring to this class of employees. Employer does not contend that the DBA does not provide coverage to local nationals working in their homelands; rather, employer argues only that the zone of special danger doctrine may not be utilized in determining the compensability of an injury sustained by a local national.

[5] We accept the Director's filing on July 8, 2015, of the recent decision of the United States Court of Appeals for the First Circuit in *Battelle Mem'l Inst. v. DiCecca*, ___ F.3d ___, No. 14-1742, 2015 WL 4072072 (1st Cir. July 6, 2015), as supplemental authority.

even if the injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" create a "zone of special danger" out of which the injury arose. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *see also O'Keeffe,* 380 U.S. 359; *Gondeck v. Pan American World Airways, Inc*., 382 U.S. 25 (1965); *Battelle Mem'l Inst. v. DiCecca*, ___ F.3d ___, No. 14-1742, 2015 WL 4072072 (1st Cir. July 6, 2015), *aff'g* 48 BRBS 19 (2014); *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004), *aff'g Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002). Thus, an injury is covered by the statute where it results from "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen." *O'Leary*, 340 U.S. at 507; *see also DiCecca*, 2015 WL 4072072, at *4; *Kalama Services*, 354 F.3d at 1091-1092, 37 BRBS at 125-126(CRT). However, the *O'Leary* Court also recognized that in some cases an employee "might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *O'Leary*, 340 U.S. at 507; *see, e.g., Truczinskas v. Director, OWCP,* 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009); *Gillespie v. Gen. Elec. Co*., 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989). In its recent decision in *DiCecca*, the United States Court of Appeals for the First Circuit stated that "the determination of foreseeable risk is necessarily specific to context and thus turns on the totality of circumstances." 2015 WL 4072072, at *5.

For the reasons that follow, we reject employer's primary contention that, as a matter of law, the zone of special danger doctrine is inapplicable to local nationals who are injured during off-duty hours. As acknowledged by the parties, *see supra* at 4 n.4, Section 1(a) of the DBA, 42 U.S.C. §1651(a), extends the provisions of the Longshore Act to "the injury or death of any employee engaged in any employment" described in Section 1(a)(1)-(6), and, thus, the DBA provides coverage to those individuals who are neither citizens nor residents of the United Stated States and who are employed in their homelands by DBA employers. By way of background, we note that the DBA, as originally enacted in 1941, covered all employees of DBA employers. In 1953, the DBA was amended to exclude non-U.S. citizen employees from DBA coverage. Pub. L. 100, 83d Cong. (June 30, 1953); *see* S. Rep. No. 1886, 85th Cong. (2d Sess.), July 23, 1958 (discussing amendments to the DBA enacted in Pub. L. No. 83-100 (1953)). Subsequent amendments to the DBA in 1958 eliminated the exclusion of noncitizen employees from DBA coverage, *id*., and local nationals have been continuously covered by the DBA since that time.[6] We do not find merit in employer's contention that application of the zone of

[6] Section 1(e) of the DBA, 42 U.S.C. §1651(e), grants the Secretary of Labor the discretion to waive the application of the DBA in certain circumstances, including, *inter alia*, to a class of employees. Section 2(b), 42 U.S.C. §1652(b), provides that, with two exceptions involving survivor eligibility and commutation of compensation, the terms of recovery under the DBA for local nationals are the same as they are for U.S. residents

special danger doctrine to local nationals contravenes the legislative intent underlying the DBA. As pointed out by the Director, the doctrine has been applied in DBA cases since the Supreme Court decided *O'Leary*, 340 U.S. 504, in 1951, at a time when local nationals were covered under the DBA. Notably, when Congress reinstated coverage of foreign nationals in its 1958 re-enactment of the DBA, it did not include statutory language restricting the applicability of the zone of special danger in cases involving foreign nationals. The Director correctly contends, in this regard, that Congress knows how to limit coverage for injured local national workers under a federal compensation program when it wishes to do so. *See, e.g.*, 42 U.S.C. §1701(d) (coverage limitations applicable to local nationals under the War Hazards Compensation Act, 42 U.S.C. §1701 *et seq.*).[7] *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [*Harcum*], 514 U.S. 122, 135, 29 BRBS 87, 92-93(CRT) (1995) (when a particular provision is included in only one of two related statutes, Congress did not intend for the provision to apply to the second statute).

Employer further argues that application of the zone of special danger doctrine to local nationals injured during off-duty hours in their own homelands is foreclosed, as a matter of law, by the Court's decision in *O'Leary* and its progeny. We disagree. While employer seeks to frame this case as primarily presenting a question of law, the *O'Leary* Court clearly viewed the issue of whether the zone of special danger doctrine is applicable as involving a factual determination. *O'Leary*, 340 U.S. at 507-08; *see DiCecca*, 2015 WL 4072072, at *2. We therefore decline employer's invitation to hold as a matter of law that the zone of special danger doctrine may never be applied in cases involving local nationals who are injured while working in their home countries. As the Supreme Court reiterated in *Gondeck*, "[n]o more is required than that the obligations or

---

and citizens. Neither the Section 1(e) waiver provision nor the exceptions contained in Section 2(b) are at issue in this appeal.

[7] The War Hazards Compensation Act, 42 U.S.C. §1701 *et seq*. (the WHCA), a companion statute to the DBA, is inapplicable to claimant's injury, which did not arise out of a war-risk hazard. While the WHCA generally covers injuries caused by war-risk hazards "whether or not such person was actually engaged in the course of his employment" when the injury occurred, 42 U.S.C. §1701(a), the statute specifically excludes from coverage "any person (1) whose residence is at or in the vicinity of the place of his employment, and (2) who is not living there solely by virtue of the exigencies of his employment, unless his injury or death resulting from injury occurs…in the course of his employment,…" 42 U.S.C. §1701(d). We agree with the Director that the exclusion provision included in the WHCA is evidence that Congress knows how to limit coverage for injured local national workers under a federal compensation program, and that the absence of any similar exclusionary language in the DBA weighs against employer's position that the zone of special danger doctrine, as a matter of law, is inapplicable to local nationals.

conditions of employment create the 'zone of special danger' out of which the injury or death arose." *Gondeck*, 382 U.S. at 27. The question of whether the obligations or conditions of an individual's employment created a zone of special danger out of which his injury occurred involves a factual determination that turns on the particular circumstances of his DBA employment. *See O'Leary*, 340 U.S. at 507-08; *DiCecca*, 2015 WL 4072072, at *5. The zone of special danger doctrine may or may not be applicable to a local national working for a DBA employer in his home country, depending on the specific circumstances presented by the individual case. As is generally true for DBA cases involving the application of the zone of special danger doctrine, the question of whether the doctrine is applicable to a claim filed by a local national is a factual determination, and the administrative law judge's findings regarding the doctrine are subject to review based on the substantial evidence standard. *See O'Leary*, 340 U.S. at 507-08; *DiCecca*, 2015 WL 4072072, at *2; *see also Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT).

As we have rejected employer's position that, as matter of law, the zone of special danger doctrine cannot be used in determining the compensability of an injury sustained by a local national, we turn to employer's alternative contention that the administrative law judge's finding in this case, that claimant's off-duty reef fishing injury occurred within the zone of special danger, is not supported by substantial evidence. We reject employer's contention that the administrative law judge erred in finding the doctrine applicable based on the circumstances presented by this case. Of particular note is the fact that claimant's injury occurred on Gagan Island, a small, uninhabited, restricted access island, to which claimant was sent by employer. Claimant and his co-workers were sent to Gagan Island for a four-day period, and they were required to remain on the island during their off-duty hours for the duration of this period. *See* Decision and Order at 3-6, 9-10; CX 7 at 2- Paragraph 7; EX Z at 18-19, 24, 26-29, 64-66. As correctly asserted by the Director, claimant's presence on Gagan Island for four days was due solely to the fact that the obligations and conditions of his employment required it; he could not have been there otherwise, as access to the island was restricted and claimant could leave the island only by utilizing the transportation provided by employer. Thus, contrary to employer's argument, the fact that claimant was working in his home country is not dispositive of the zone of special danger inquiry in this case as claimant's presence at the particular place of his injury, Gagan Island, was due solely to the obligations and conditions of his employment. *See generally O'Leary*, 340 U.S. at 507. Where employer created employment obligations and conditions for claimant and his co-workers, requiring their restriction to an isolated location for the duration of a four-day period, the administrative law judge rationally found that those conditions gave rise to a zone of special danger notwithstanding claimant's status as a citizen and resident of the RMI.

Of further significance in this case is the fact that the limited food selections provided by employer for claimant and his co-workers were not suitable for claimant's diabetic condition. *See* Decision and Order at 4, 9; CX 7 at 2-Paragraph 8. Employer's

assignment of error to the administrative law judge's consideration of the evidence regarding claimant's diabetic condition and associated dietary recommendations is wholly without merit. Contrary to employer's contention that these factors are irrelevant to the zone of special danger inquiry, it is axiomatic that an employer takes its employees as it finds them. *See e.g., Urso v. MVM, Inc.*, 44 BRBS 53, 55 n.3 (2010). Thus, the administrative law judge rationally found that claimant's pre-existing diabetes and the dietary recommendations made because of that condition, coupled with the limited food selections provided by employer on Gagan Island, were factors that made reef fishing a foreseeable activity during claimant's off-duty hours on Gagan Island. *See* Decision and Order at 3-4, 9.

Employer further asserts that reef fishing is a customary practice in the RMI and that employer cannot be considered to have increased the risk of injury to claimant associated with the practice of reef fishing as that same risk was present throughout the Kwajalein Atoll. We do not agree with employer that the zone of special danger doctrine does not encompass risks, including the risk here of injury while reef fishing, that might also be present in locations other than the particular site of the employee's injury. We note in this regard that similar arguments were made by the employer, and were rejected by the First Circuit, in the *DiCecca* case.[8] As we find the First Circuit's reasoning to be persuasive, we reject the related arguments made by employer in this case. Of particular relevance to the case before us is the following statement made by the *DiCecca* court:

> Although the requisite "special danger" covers risks peculiar to the foreign location or risks of greater magnitude than those encountered domestically, the zone also includes risks that might occur anywhere but in fact occur where the employee is injured. "Special" is best understood as "particular" but not necessarily "enhanced."

2015 WL4072072, at *4. Whether or not claimant might also have faced a risk of sustaining a reef fishing injury on his home island, or elsewhere in the Kwajalein Atoll, is

[8] In *DiCecca*, the employer argued that for a DBA claim to be compensable pursuant to the zone of special danger doctrine, there must be a nexus between the employment and the activity giving rise to the injury. 2015 WL 4072072, at *6. The employer maintained that the requisite nexus could be satisfied in only two alternative ways: "(1) when the injury occurred during a reasonable recreational activity in an isolated place with limited social opportunities, or (2) where the site of work presented conditions enhancing the risk of injury to some appreciable degree beyond the domestic norm." *Id*. The First Circuit rejected the employer's argument that the requisite nexus could be satisfied in only these two alternative ways. *Id*. With respect to the second alternative, the *DiCecca* court specifically rejected the employer's position that the zone of special danger doctrine extends to only "risks of greater magnitude than encountered domestically[.]" *Id*. at *4.

immaterial. The fact remains that claimant's injury occurred on Gagan Island, an isolated location with restricted ingress and egress, and claimant was there s*olely* due to the obligations and conditions of his employment. In view of claimant's pre-existing diabetes and his doctor's recommendation to eat fish, coupled with the limited food provisions on Gagan Island, the administrative law judge rationally determined that it was foreseeable that claimant would engage in reef fishing, and, further, suffer a foot laceration, during his four-day stay on Gagan Island. *See* Decision and Order at 3-4, 9; *Kalama Services*, 354 F.3d at 1092, 37 BRBS at 126(CRT).

We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the obligations and conditions of claimant's employment, specifically, his four-day assignment to Gagan Island, created a zone of special danger out of which his injury arose. *See O'Leary*, 340 U.S. at 507; *DiCecca*, 2015 WL 4072072, at *6; *Kalama Services*, 354 F.3d at 1092, 37 BRBS at 126(CRT). As the administrative law judge's conclusion that claimant's injury is compensable under the DBA pursuant to the zone of special danger doctrine is rational, supported by substantial evidence and in accordance with law, it is affirmed. *O'Keeffe*, 380 U.S. 359; *O'Leary,* 340 U.S. 504.

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

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge