U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0265

CECILIA R. COON Claimant-Respondent v. OMNI AIR INTERNATIONAL, INCORPORATED and STARR INDEMNITY & LIABILITY COMPANY Employer/Carrier-Petitioners	)	DATE ISSUED: 03/29/2019 DECISION and ORDER

Appeal of the Order Summarily Adjudicating Issue of Defense Base Act Coverage and the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum and Eric R. Gotwalt (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Bradley T. Soshea, Nicholas W. Earles and Dana W. Ladner (Schouest, Bamdas, Soshea & Ben Maier, PLLC), Houston, Texas, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer appeals the Order Summarily Adjudicating Issue of Defense Base Act Coverage and the Decision and Order (2016-LDA-00213) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, 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).

The facts of this case are not in dispute. Employer is a charter airline that contracts with various clients, including the Department of Defense (DOD), to fly charter flights. Claimant started working for employer in 2012 as a flight attendant. CX 1 at 5. Employer assigned claimant to flights for the DOD and four other air carriers from her base at Dallas-Fort Worth International Airport.[1]

Employer contracts with the DOD to transport personnel and equipment outside the continental United States. The contract provides:

> This contract is conditioned upon the Contractor . . . being an air carrier and holding a Certificate of Public Convenience and Necessity issued under Section 401 of the Federal Aviation Act (FAA of 1958, as amended), or otherwise authorized by the Department of Transportation (DOT) to engage in direct air transportation services, holding an Air Carrier's Operating Certificate issued by the FAA under Part 121 of the Federal Aviation Regulations (14 CFR 121) for airlift operated by the offeror, and participating in the [Civil Reserve Air Fleet], if applicable.

JX 9 at 101. It further provides that employer "shall comply with all provisions of applicable statutes, tenders of service, and contract terms as such may affect flight safety, as well as with all applicable Federal Aviation Administration (FAA) Regulations, Airworthiness Directives, Orders, rules and standards promulgated under the Federal Aviation Act of 1958, as amended." *Id.* at 72. Thus, the FAA certification and safety regulations requiring mandatory drug and alcohol testing for flight attendants are expressly incorporated into the contract. *Id.* at 6; 14 C.F.R. §120.105(b).

On February 10, 2014, claimant was assigned to a "reserve day," which meant she was required to be within two hours of her base and available for work if called. Employer's drug-testing agent directed claimant to a facility in Arlington, Texas, for a drug and alcohol test. CX 1 at 13-15. Another flight attendant drove. JX 1; CX 1 at 14. While

[1] The other air carriers were Boliviana, AMC (Egyptian), Scandinavian, and Aer Lingus.

driving back to claimant's residence, their car skidded on an icy road and struck a guard rail. Claimant suffered injuries to her neck, back, ribs, and head.[2] JX 3.

The parties filed opposing motions for summary decision disputing DBA coverage. Employer argued the DBA does not apply because claimant was not injured while working on a DOD flight. The administrative law judge concluded otherwise. He found coverage because the accident occurred while claimant was "in preparation for or in furtherance of her continued covered work as a flight attendant on covered international flights for the Department of Defense." Order at 5 (Nov. 17, 2017). He further found the fact that claimant's employment on non-DBA flights also mandated FAA drug testing does not "sever" the requirement from the performance of the DOD contract. *Id.* The administrative law judge therefore granted claimant's motion for summary decision.[3]

Employer appeals the coverage finding. Claimant filed a response brief, urging affirmance. Employer filed a reply.

In determining whether to grant a motion for summary decision, the fact-finder must review the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact and the moving party is entitled to a decision in its favor as a matter of law. 29 C.F.R. §18.72; *see, e.g., Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). Summary decision is proper here as no party disputes the facts regarding the requirements of claimant's employment and the circumstances of her injury. Employer contends only that the administrative law judge erred as a matter of law in finding DBA coverage.

Coverage is statutorily defined under the DBA. Among other situations, it applies "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States . . . or any agency thereof . . . where such

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[2] Claimant received Texas workers' compensation benefits for her injury.

[3] The administrative law judge noted that there was a dispute over claimant's average weekly wage and so denied summary decision on the other grounds asserted. The parties thereafter submitted stipulations resolving the remaining issues, with employer reserving the issue of DBA coverage for appeal. The administrative law judge affirmed that claimant's injuries are covered under the DBA, accepted the parties' stipulations, and awarded claimant temporary total and partial disability benefits. Decision and Order (Feb. 28, 2018) at 2.

contract is to be performed outside the continental United States . . . for the purpose of engaging in public work[.]" 42 U.S.C. §1651(a)(4).

Employer concedes that work performed in furtherance of its contract with the DOD to transport personnel and equipment outside the United States is a "public work" within the meaning of 42 U.S.C. §1651(a). Nov. 17, 2017 Order at 3 n.4; *see* 42 U.S.C. §1651(b)(1). It further concedes that claimant's injury occurred in the course and scope of her employment.[4] *See* Emp. Br. at 27. Employer contends only that claimant's injury does not fall within DBA coverage because, it alleges, she was not injured while actually "performing the public work contract" while on "a DOD charter." *Id.* at 13.

We disagree and affirm the administrative law judge's decision. The DBA applies "irrespective of the place where the injury or death occurs." 42 U.S.C. §1651(a). That claimant was injured in the United States while not on an international DOD charter therefore does not bar recovery. *Id.* Instead, under the facts of this case – where employer concedes that claimant was within the scope of her employment when she was injured and that its DOD contract is an overseas public work contract – the DBA applies if claimant was acting "under" the DOD contract at the time of injury. 42 U.S.C. §1651(a)(4).

She was. As the DOD contract expressly mandated claimant's drug testing, she fulfilled its straightforward terms by traveling to and from the testing facility. *See, e.g.*, *R & P Enterprises v. La Guarta, Gavrel & Kirk, Inc.*, 596 S.W. 2d 517, 519 (Tex. 1980) ("In the interpretation of contracts the primary concern of courts is to ascertain and to give effect to the intentions of the parties as expressed in the instrument[;]" if a court can give the instrument a "certain or definite legal meaning or interpretation, it is not ambiguous.") (citations omitted); *Phoenix Indem. Co. v. Willard*, 130 F. Supp. 657 (S.D. N.Y. 1957) ("*Willard*") (DBA covered claimant injured in New Jersey returning home from attempting to secure passport clearance, receiving a vaccination, and obtaining a War Department identification card pursuant to overseas public works contract).

The administrative law judge correctly found *Willard* instructive. The *Willard* court reasoned that the DBA covered Mr. Willard's injury because the steps required for processing his departure for overseas employment were "an integral and indispensable part of [that] employment" and the "inoculations and the other steps in preparing him for overseas duties were essential requirements of his job qualification." 130 F. Supp. at 659.

[4] Employer's concession that claimant was injured "within the course and scope of her employment" by "traveling back from an employer-mandated drug test," Emp. Br. at 27, eliminates any question as to whether she was "engaged in employment" at the time she was injured under 42 U.S.C. §1651(a).

The court thus determined that the contractual obligation to obtain a passport and satisfy other security requirements "[was] of course [] essential for the performance of his duties in a foreign area." *Id.* at 658. Indeed, the court concluded the DBA applied even though Mr. Willard "had no specific [DBA] work assignment" at the time of his injury.[5]

So too here. Claimant was injured meeting an "essential requirement" of the DBA contract: traveling home from a drug and alcohol test, a condition of continued employment on DOD flights.[6] Pursuant to any fair interpretation of its language, she thus was injured acting "under" the public works contract. 42 U.S.C. §1651(a)(4); *R & P Enterprises*, 596 S.W. 2d at 519 ("a contract is ambiguous only when the application of the applicable rules of interpretation to the instrument leave it genuinely uncertain which . . . meaning[] is the proper meaning").

The fact that claimant's employment on non-DBA flights also required FAA drug testing does not change this analysis. Relying on *Rosenthal v. Statistica, Inc.*, 31 BRBS 215 (1998), in which the Board denied DBA coverage, employer argues that claimant's work on non-DBA flights means that, like Mr. Rosenthal, she was injured while "not directly in service to a DBA contract," and therefore, "not within jurisdiction of the [DBA]." Emp. Br. at 23. But *Rosenthal* is materially distinguishable on its facts.

Mr. Rosenthal was a project manager who worked on the employer's DBA contract with the State Department[7] and on separate dealings employer had with other clients for its technology services. *Rosenthal*, 31 BRBS at 216-217. He was killed in a car crash returning from Andorra on an assignment unrelated to the DBA contract. *See id.* The Board found he was not acting under the employer's DBA contract because the uncontradicted evidence established his work on it had concluded before he left for Andorra to work on the non-DBA contract. *See id.* at 217-218. *Rosenthal* thus simply reinforces the statutory requirement that an employee must be working under a DBA contract at the time of injury. It does not mean that concurrent, non-covered work severs otherwise valid DBA coverage, as employer and the dissent claim.

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[5] Although Mr. Willard was being paid by the DBA employer, his overseas work had not yet begun. *Willard*, 130 F. Supp. at 659.

[6] As in *Willard*, claimant "was required to keep [herself] available for such purposes" as a condition of her employment under the DBA contract. *Willard*, 130 F. Supp. at 659; *see* JX 9 at 72; JX 8 at 5-7; 14 C.F.R. Part 120.

[7] The employer did not contest that Mr. Rosenthal's work under its contract with the State Department was covered by the DBA. *Rosenthal*, 31 BRBS at 217.

Nothing in the record indicates that claimant's work on DOD flights was at an end, and the undisputed facts plainly belie any contention that claimant would not have been assigned to DOD flights in the future, as the administrative law judge determined as the fact-finder. Order at 5. The parties stipulated that 44 of the 83 flights claimant worked for employer were international DOD flights under the DBA contract, including the three flights immediately preceding her injury. JX 15 at 8. The administrative law judge also accurately found that employer "does not contend that it had decided to relieve [c]laimant of her duties on future DOD international flights, and nothing on the record suggests that it had." Decision and Order at 5. Thus, the administrative law judge rationally rejected employer's argument that *Rosenthal* precludes a finding of coverage under the DBA, and the dissent's unsupported suggestion that claimant's future employment on DOD flights is speculation. Decision and Order at 5.[8]

Under these circumstances, we conclude that claimant was acting in furtherance of employer's DBA contract at the time of her injury. *See generally See Z.S. v. Science*

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[8] The dissent's reliance on *Airey v. Birdair*, 12 BRBS 405 (1980) and *University of Rochester* v. *Hartman*, 618 F.2d 170 (2d Cir.1980) is similarly misplaced. In *Airey*, the Board concluded that a DBA subcontract covering overseas transportation of equipment in November 1974 did not apply to an injury that occurred in January 1975 under a non-DBA contract. *Airey*, 12 BRBS at 409. The Board rejected the argument that a theory of "continuous coverage," which extended coverage under amendments to the Longshore Act to cover maritime employees injured on piers and similar structures who "literally walked in and out of coverage depending on whether [they were] on land or navigable waters," should be incorporated into the DBA. *Id.* Finding no indication that Congress intended the amendments to apply to the DBA, and no equivalent gap in coverage to address, the Board examined whether Mr. Airey was working under a DBA subcontract at the time of his injury. *Id.* Like *Rosenthal*, the Board concluded that the uncontradicted evidence established that the DBA subcontract had ended. *Id.* The concept of "continuous coverage" thus is irrelevant to the outcome here as it is in any DBA case. Similarly, the Second Circuit in *Hartman* considered whether the DBA covered a professor's death occurring while working on a research grant to study soils in Antarctica. It determined that the grant was not a contract, and that such research was not a "public work," within the meaning of the DBA. 618 F.2d at 173-74. Unlike these cases, claimant was actively engaged in employment under a current public works contract; there is no suggestion by any party that the contract had ended or that claimant would not work future DOD flights.

Applications Int'l Corp., 42 BRBS 87, 92 (2008).[9] We therefore affirm the administrative law judge's conclusion that claimant's injury is covered by the DBA.

Accordingly, the administrative law judge's Order Summarily Adjudicating Issue of Defense Base Act Coverage and his Decision and Order are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

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[9] We do not hold, as the dissent suggests, that work having nothing to do with a public works contract is covered by the DBA. Nor do we hold, as employer argues, that all activity in preparation to fulfill an overseas public works contract is per se covered by the DBA. Even if a meaningful distinction can be drawn between fulfilling a DBA contract and work done in preparation to fulfill it, we need not resolve that question here. As always, coverage is a matter of statutory and contractual construction. By traveling to a drug test explicitly mandated by the terms of the overseas public works contract, claimant was neither "preparing" to fulfill a term of the contract nor engaging in work "having virtually nothing to do" with the contract; she was actually engaged in employment under the plain terms of the contract when she was injured. JXs 8, 9. Whether the contractual terms can be accurately characterized as "sweeping" or not, they are abundantly clear. Nothing more is required. 42 U.S.C. §1651(a)(4).

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's conclusion that claimant's injury is covered by the DBA. I would reverse the administrative law judge's decision and hold that claimant's injury does not fall within the coverage of the DBA.

The DBA applies, inter alia, "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States . . . or any agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work[.]" 42 U.S.C. §1651(a)(4). Thus, the circumstances of claimant's activities at the time of injury must be examined to determine if she was "*engaged* in any employment" *under* the public work contract. *Id.* (Emphasis added)*; see Airey v. Birdair*, 12 BRBS 405 (1980); *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008). In my view, claimant was not. Although employer had to meet the FAA drug testing requirement in order to stay in business as well as to continue to qualify under the DOD contract, at the time that claimant took the test she was not engaged in employment under the DOD contract. She was not assigned to any DOD flight, there is no evidence that she would be assigned to a future DOD flight, and she did not perform an activity specifically on behalf of the DOD contract. She was taking the drug test as a condition of her general employment by employer. CX 1 at 13-14. Thus, when the circumstances of claimant's employment are more closely examined, her injury is not covered by the DBA.

<u>Claimant's Employment</u>

Claimant is a flight attendant for employer, a charter airline certified by the FAA to operate commercial flights. JX 7. Employer has contracts with multiple entities, including commercial airlines, under which it supplies airplanes and crew to the chartering entity. JX 8 at 5. Employer has one of its bases in Dallas, the city in which claimant was based at the time of the injury. This base is not exclusive to employer's DOD contract and claimant flew from it, as a flight attendant, for multiple contract customers of employer (including airlines SAS, Boliviana, AMC, and Aer Lingus, as well as the DOD). CX 1 at 8; JX 15.

Flight attendants are employed by employer and supplied as crew members along with the airplane. CX 1 at 9 (p. 33). They bid for available flights, subject to assignment adjustments by employer. *Id.* at 6 (pp. 23-24). They are not assigned to any specific customers. *See id.* However, they are given a schedule a few weeks to a month in advance. *Id.* at 10 (p. 39). When attendants receive a schedule with partial day assignments, they can tell to some extent for which customers they will be flying, but otherwise they cannot. *Id.* at 6. As of the date of her last flight on February 10, 2014, claimant had the schedule

for her on and off days,[10] but did not have any additional flights scheduled. *Id.* at 13 (p. 51).

The Testing Requirement

In order to maintain its FAA certification, employer is required to comply with all FAA regulatory requirements, including the requirement to administer random drug and alcohol tests on employees who perform safety-sensitive functions. 14 C.F.R. Part 120; JX 9 at 5-6. Accordingly, employer requires all its flight attendants, such as claimant, to undergo the FAA-required drug and alcohol testing. JX 9 at 72; JX 8 at 7 (p. 24). In addition, employer's contract with the DOD states in part that the contract "is conditioned upon the Contractor . . . being an air carrier and holding a Certificate of Public Convenience and Necessity issued under Section 401 of the Federal Aviation Act . . . or . . . holding an Air Carrier's Operating Certificate issued by the FAA . . ." JX 9 at 101. The contract further provides that employer "shall comply with all provisions of applicable statutes, tenders of service, and contract terms as such may affect flight safety, as well as with all applicable Federal Aviation Administration (FAA) Regulations, Airworthiness Directives, Orders, rules and standards promulgated under the Federal Aviation Act of 1958, as amended." *Id.* at 72. By requiring compliance with FAA regulatory requirements, the DOD contract incorporates the FAA's regulatory requirement for drug testing.[11]

As employer argues, the circumstances of this case are similar to those in *Rosenthal* in that the claimant was injured in the course of employment but was not covered by the DBA because, at the time of injury, she was not engaged in employment under employer's contract with the government. *Rosenthal v. Statistica, Inc.*, 31 BRBS 215, 217-218 (1998).

At the time she was injured, claimant had completed her last assigned flight but had not been assigned to her next flight, either for one of employer's private clients or for the DOD. She had a schedule of on and off days, but not partial days. Thus, there was no indication from her schedule that she would be assigned to a DOD flight. Further, there was no other evidence that claimant necessarily would be assigned to a future DOD flight. Prior to her injury, claimant worked on flights for Boliviana, Scandinavian Air Services, AMC and Aer Lingus, among employer's private clients, as well as on DOD flights. Claimant's previous engagements as a flight attendant on DOD flights were concluded,

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[10] Her schedule contained on and off day assignments, but not partial day assignments. CX 1 at 13.

[11] Lisa Curtis, the corporate designee of employer, testified at her deposition that employer's contract with the DOD incorporates the FAA requirements, but that the requirements were already in place "just for being an airline." JX 8 at 7 (p. 24).

and there was no evidence as to whose flights claimant necessarily would be assigned in the future. Flight attendants from the Dallas base were not assigned to a particular customer, and assignments from the Dallas base were made to multiple customers. JX 13. As a result, claimant could be assigned to only private flights, only DOD flights, or to both. It is a matter of speculation to assert that claimant would have been assigned to a DOD flight.

Contrary to the majority, assuming continuous DBA coverage because of the contract's sweeping embrace of FAA regulatory requirements is contrary to both DBA law and the facts of this case. The Board has held that, unlike the Longshore Act, employment under the DBA is not continuous. *See Airey,* 12 BRBS 409 (holding that the theory of "continuous coverage" under the Longshore Act does not apply in the DBA context). Moreover, in this case, claimant's engagement in DBA contract employment was sporadic, not continuous. Although claimant was employed continuously by employer, she was not engaged as a flight attendant on DOD flights on either a continuing or regular basis. Her engagements in employment under the contract occurred on separate, discrete occasions; otherwise, she was in reserve status (when she could be called to any charter assignment, DOD or private), on-duty and assigned to a non-DOD customer flight, or off from work. CX 1 at 6-7, 10, 13.

Moreover, the majority's broad interpretation of the scope of DBA coverage would make the DBA applicable to any employee of an airline with a DBA contract who performs an FAA-required function, unless that person was injured while specifically performing work for someone else. This stretches the terms of the DBA beyond the statute's contemplation to cover individuals whose jobs have virtually nothing to do with specific performance of the contract for a public work. That is not in accord with the language of the statute which requires that the injured individual be "engaged in any employment . . . under a contract entered into with the United States or any executive department . . . or agency thereof . . . for the purpose of engaging in public work…." 42 U.S.C. §1651(a)(4). *See generally Ass'n of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 852 (D.C. Cir. 1978) (stating that statutes should be interpreted to give meaning to all the words). The word "engaged" means busy or occupied, *Merriam Webster's Collegiate Dictionary* (10th ed.), thereby requiring active involvement of the claimant, and the requirement that such engagement be in employment under the contract for the public work indicates that the employment is directly tied to the contract for a public work's performance. *See Airey*, 12 BRBS at 406-408 (the DBA limits coverage to claimants who are injured while performing a government contract); *University of Rochester* v. *Hartman*, 618 F.2d 170 (2d Cir.1980) (DBA coverage under §1651(a)(4) not available because claimant's decedent was not engaged in "public work" within meaning of Act). Here, claimant has not established the required nexus between her testing and engagement in employment for a public work under employer's DOD contract. The only connection she has shown is that testing was

incorporated into the DOD contract pursuant to its sweeping incorporation of FAA regulatory requirements as a general contract condition.[12] However, that does not establish her engagement in employment under the contract for a public work at the time of testing. At the time of injury, claimant was not specifically preparing for a DOD flight, assigned to a DOD flight, or necessarily going to be assigned to a DOD flight in future. In short, she has not shown that she was engaged in the requisite contract for a public work employment. Because claimant in this case was not injured while engaged in employment under a DBA contract, I would hold that her injury is not covered by the DBA.

For the foregoing reasons, I would reverse the administrative law judge's conclusion that claimant's injury is covered under the DBA. Therefore, I dissent.

JUDITH S. BOGGS
Administrative Appeals Judge

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[12] This case is distinguishable from *Phoenix Indem. Co. v. Willard*, 130 F. Supp. 657 (S.D. N.Y. 1957), where the claimant was injured while securing a passport in preparation for a DOD assignment overseas. There, the claimant was undergoing preparations for specific DOD work, the passport was required to perform the DBA contract overseas work, and there was no evidence that the claimant contemplated engaging in non-DBA activities for which the passport was requisite.