BRB No. 99-0280

JANE DAVIS (widow of HANK DAVIS)	)	
Claimant-Respondent	)	
v.	)	
MORGANTI NATIONAL, INCORPORATED	)	DATE ISSUED:_____
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

James C. Thompson, Jr. (Wickwire Gavin, P.C.), Vienna, Virginia, for claimant.

William W. Pollock (Cranfill, Sumner & Hartzog, L.L.P.), Raleigh, North Carolina, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-1091) of Administrative Law Judge John C. Holmes 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 Longshore 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 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).

Decedent worked for employer as superintendent on a project to construct a radio broadcasting station for the Voice of America on the island of Sao Tome, located in the Atlantic Ocean, off the west coast of Africa. Decedent had previously

worked on Sao Tome for another American contractor from June 1992 until August 1993, and had remained on the island until he began working for employer in October 1993. On January 24, 1994, decedent complained of vomiting to the company doctor. He was diagnosed with Hepatitis B several days later and flown to Libreville, Gabon, on February 3. His condition deteriorated, and he was hospitalized on February 9. Employer made arrangements to evacuate decedent to Switzerland, but decedent died on February 10, 1994, due to complications from Hepatitis B.

In December 1995 claimant, decedent's widow, filed a wrongful death action against employer in the United States District Court for the Western District of North Carolina.[1] Employer moved to dismiss on the ground that her exclusive remedy was under the Longshore Act, because the overseas construction project was covered under the DBA. The district court granted employer's motion and dismissed the lawsuit, holding that it lacked jurisdiction to consider claimant's cause of action and that her sole remedy was under the the DBA and Longshore Act. *Davis v. Morganti Nat'l, Inc.*, Civ. No. 2:95CV256 (W.D.N.C. Jan. 27, 1997) (Memorandum and Order); Cl. Ex. B-5. Thereafter, claimant filed a claim for death benefits under the DBA.

The administrative law judge found that employer is subject to the jurisdiction of the DBA. He then determined that claimant was entitled to invocation of the Section 20(a) presumption of the Longshore Act, 33 U.S.C. §920(a), which applies to relate decedent's death from Hepatitis B to his employment on the construction site. The administrative law judge next determined that employer failed to present any credible evidence to rebut the Section 20(a) presumption. The administrative law judge also found that decedent's death occurred within the "zone of special danger" which was created by the place where claimant worked and the lack of perfect conditions in the hospital where he was treated. Consequently, the administrative law judge awarded claimant death benefits and allowable funeral expenses and interest. 33 U.S.C. §909.

On appeal, employer contends that there is no jurisdiction under the DBA. Employer argues that in order to be subject to the DBA, employer must maintain Longshore Act coverage, and that the contract in this case only requires the contractor to maintain workers' compensation insurance, rather than coverage under the DBA or Longshore Act. Employer also challenges the administrative law judge's

[1]Claimant brought the action in district court rather than state court based on diversity jurisdiction, which the district court found was not present.

finding that decedent's death was causally related to his employment. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

First, we address employer's challenge to the administrative law judge's jurisdictional finding. Congress enacted the DBA to extend the workers' compensation coverage of the Longshore Act to employees working on air, military, and naval bases outside the United States, or on contracts entered into with the United States or an agency thereof for the purpose of engaging in public work outside the United States. *See* 42 U.S.C. §1651(a). The coverage provisions of the DBA clearly provide that the Act is the sole remedy for injury or death arising out of and in the course of employment which falls within its scope. *Flying Tiger Lines, Inc. v. Landy,* 370 F.2d 46, 52 (9th Cir. 1966). Employer argues that decedent's employment herein is not covered under the DBA, because its contract did not require Longshore Act insurance, citing 42 U.S.C. §1651(a)(4) in support of this proposition.[2] Under that section, the provisions of the Longshore Act apply to the

[2]We note that employer did not raise this issue below. At the hearing, the administrative law judge stated that, based on the district court decision, "there is a strong presumption that that there was jurisdiction in this case...and unless [I] hear differently... with strong arguments, [I] would consider that to be a correct statement." Tr. at 46. Later he stated that he thought employer stipulated to jurisdiction, but if there was some problem, employer was advised to make arguments "fairly strenuously," because it would appear that jurisdiction would lie. Tr. at 73. Employer agreed that if it determined that jurisdiction was at issue, it would address it in its post-hearing brief. *Id.* Employer did not even mention, much less brief, the jurisdictional issue in its post-hearing brief. In his decision, the administrative law judge stated: "While Employer conceded jurisdiction under the Defense Base Act, I, also specifically find such jurisdiction lies and is directly made applicable by the terms of the contract entered into between the [USIA] and

injury or death of any employee engaged in any employment–

> (4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof...where such contract is to be performed outside the continental United States...for the purpose of engaging in public work, and every such contract shall contain provisions requiring that the contractor...(1) shall, before commencing the performance of such contract, provide for securing to or on behalf of employees engaged in such public work under such contract the payment of compensation and other benefits under the provisions of this Act....

42 U.S.C. §1651(a)(4). The courts have described this coverage provision as extending the provisions of the Longshore Act to employees engaged in employment under certain contracts entered into with any agency of the United States for the purpose of performing "public work" as defined in 42 U.S.C. §1651(b)(1). *See University of Rochester v. Hartman,* 618 F.2d 170 (2d Cir. 1980); *Flying Tiger Lines*, 370 F.2d at 48.

Employer, however, would add another requirement to this test; in order for it to be subject to the DBA, it argues, the contract also must contain a requirement that employer obtain Longshore insurance. This argument lacks support in the plain language of the statute and in the case law. The cited subsection states that the Act covers employment under a contract with the government which is to be performed outside the United States for the purpose of engaging in public work, and these three requirements are necessary for jurisdiction. *See University of Rochester,* 618 F.2d at 172. The subsection then states that the contract *shall* contain provisions requiring that the contractor secure the workers' compensation benefits due to those covered therein. This language creates a mandatory legal obligation for those entering into covered contracts, not an additional jurisdictional requirement. Employer's argument would allow it to avoid jurisdiction simply by omitting provisions required by the Act from its own contracts, a result plainly inconsistent with the statute.

Moreover, in this case, employer admits that the contract required that employer obtain workers' compensation insurance, but argues that "[n]othing in the contract requires the contractor to maintain coverage under either the Defense Base

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Employer (E-1)." Decision and Order at 4.

Act or the Longshore and Harbor Workers' Compensation Act." Employer does not further explain its argument, but it also lacks merit. The Longshore Act is, of course, a workers' compensation statute. Moreover, the DBA is the exclusive compensation remedy for covered contracts, as it provides:

> The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate subcontractor to his employees (and their dependents) coming within purview of this chapter, under the workmen's compensation of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

42 U.S.C. §1651(c). *See also* 20 C.F.R. Part 703. As the contract required employer in this case to provide workers' compensation insurance, and there is no argument that the contract was otherwise outside the scope of subsection (a)(4), the appropriate insurance on the facts of this case is for benefits under the Longshore Act. Thus, employer's contract does provide for payment of workers' compensation benefits under the DBA.

Employer next contends that the administrative law judge erred in finding that decedent's death arose out of his employment. Employer argues that the evidence is insufficient to invoke the Section 20(a) presumption to establish a causal connection between decedent's death due to Hepatitis B and his employment. Employer alleges that there was no injury in this case, as defined under the Act, and that working conditions described by the administrative law judge are irrelevant to contraction of Hepatitis B, as it is a blood-borne pathogen. Employer argues that the record lacks substantial evidence to support the award, as there is no evidence as to how decedent contracted Hepatitis B and, in any event, Dr. Rutala's testimony is sufficient to rebut Section 20(a).

We reject employer's argument and affirm the administrative law judge's finding that decedent's death was related to his employment. In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984), *aff'g Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98 (1984); *see generally Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). To establish a *prima facie* case, a claimant must show that decedent suffered a harm and that working conditions existed or an accident occurred at the employer's facility which could have caused that harm. *Id.* Once the presumption is invoked, an employer

may rebut it by producing substantial evidence that the employment did not cause or contribute to the death. *See generally Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990).

Initially, we conclude that the administrative law judge properly invoked the Section 20(a) presumption, as claimant established a *prima facie* case.[3] It is not disputed that decedent became ill with Hepatitis B while employed on Sao Tome and that he died from complications related to the disease. Therefore, claimant established the first prong of her *prima facie* case. Additionally, in determining that working conditions existed which could have caused decedent's harm, it was within the administrative law judge's authority to rely on the testimony of Dr. Rutala and claimant, decedent's widow. According to Dr. Rutala, a PhD expert in epidemiology, or infectious diseases, Sao Tome is hyperendemic for Hepatitis B conditions, making it a high risk area for contraction of the disease. Deposition of Dr. Rutala at 25. The administrative law judge rationally determined that the high risk profile of sexual, prenatal, or needle transmission, the other means of infection, did not likely fit decedent, while exposure through wounds or treating others might. According to claimant, decedent's duties included administering first-aid to workers on the construction site he supervised, where he sustained nicks, cuts, and scratches; she observed him on several occasions lancing boils. Tr. at 33-34. Claimant and employer's witness, Mr. Barnes, testified without contradiction that primitive sanitary conditions existed on the island. The administrative law judge also observed that as claimant started working for employer in October 1993 and began exhibiting symptoms at the end of January 1994, he fell squarely within the mean of 11 weeks for the incubation period of the disease described by Dr. Rutala. The administrative law judge thus did not err in finding Section 20(a) invoked, as the conclusion that working conditions existed could have caused claimant's disease is supported by the record.

In addition, with regard to claimant's working conditions, the administrative law judge found that claimant established an alternate ground for entitlement, based on being within the "zone of special danger." This doctrine applies in Defense Base Act cases, expanding the reach of the Act so that it is not necessary that the employee

[3]Contrary to employer's contention, claimant's initial burden does not include establishing an "injury" as defined in Section 2(2) of the Act, 33 U.S.C. §902(2) . *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981); *see also American Grain Trimmers, Inc. v. OWCP,* 181 F.3d 810 (7th Cir. 1999).

be engaged at the time of injury in an activity that benefits employer. All that is required is that 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 O'Keeffe,* 380 U.S. at 364. Employer argues that the "zone of special danger" test does not apply, but points to no evidence that decedent's activities were "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. Accordingly, the administrative law judge here did not err in finding Section 20(a) applies to link decedent's Hepatitis B and his employment.

Employer thus bore the burden of rebutting Section 20(a) by introducing substantial evidence that decedent's disease was not related to his employment. Employer has not demonstrated error in the administrative law judge's finding that it introduced no credible evidence to rebut the presumption. Employer's reliance on Dr. Rutala is misplaced, as his testimony discussed risk factors and hypothetical probabilities in contracting the disease. Dr. Rutala gave no opinion based on a reasonable medical certainty with regard to decedent; in fact, he acknowledged that he lacked sufficient information to say how decedent contracted the disease. Employer's assertion that this opinion, along with the lack of medical records establishing causation, is sufficient to establish rebuttal is rejected, as it does not meet employer's burden of producing evidence that claimant's condition was not work-related. *See American Grain Trimmers v. OWCP,* 181 F.3d 810 (7th Cir. 1999). Therefore, as Section 20(a) was not rebutted, the administrative law judge properly found that decedent's disease was work-related, and the award of death benefits must be affirmed.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge