Recent Developments Regarding the Scope and Application of the Zone of Special Danger Doctrine

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More than ten years of engagement in Iraq and Afghanistan have produced considerable litigation under the Defense Base Act, 42 U.S.C.S. §§ 1651-1654 (DBA), an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. §§ 901-950 (LHWCA). The DBA provides workers' compensation benefits to overseas employees of federal contractors. *Director, OWCP v. Rasmussen*, 440 U.S. 29, 59 L. Ed. 2d 122, 99 S. Ct. 903, 9 BRBS 954 (1979). The United States Supreme Court held shortly after the DBA's enactment that the LHWCA's required showing of a causal connection between the injured worker's employment and his injury is broadened in DBA cases. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 95 L. Ed. 483, 71 S. Ct. 470, 16 Cal. Comp. Cases 89 (1951). The Court created a "zone of special danger" doctrine to address causation issues arising under the DBA. Recently, however, employers have challenged the scope of this doctrine and its proper application.

Like virtually all workers' compensation statutes, the LHWCA specifies that an injury is compensable only if it arises out of and in the course of employment. 33 U.S.C.S. § 902(2). In the context of the DBA, however, *O'Leary* held that this standard is not limited by common law concepts governing the scope of employment. Rather, the connection between employment and injury is loosened such that recovery under the DBA is available so long as the injury arises out of a "zone of special danger." *O'Leary*, 340 U.S. at 506-507. In the words of Justice Frankfurter, "[t]he test of recovery is not a causal relation between the nature of employment of the injured person and the accident….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.* Applying this standard, the Court found compensable a death that occurred while an employee was trying to rescue a drowning swimmer in a dangerous channel near a recreation facility in Guam. The Court reaffirmed the "zone of special danger" doctrine in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 13 L. Ed. 2d 895, 85 S. Ct. 1012 (1965). In that case the employee drowned in a weekend boating accident 30 miles from his job site at a defense base in South Korea. Similarly, the Court affirmed a compensation award in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 15 L. Ed. 2d 21, 86 S. Ct. 153 (1965), in which the employee was killed in an after-hours jeep accident in the Bahamas. The claim was found compensable even though the jeep was speeding and the employer may not have authorized its use. The Court deemed both cases compensable under the zone of special danger doctrine. Applying these principles, the Benefits Review Board has defined the "zone of special danger" as "the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant." *N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56, 58 (2008),.

The doctrine is based on two principal grounds. First, DBA projects are frequently located in dangerous places, enhancing the risk of injury to workers sent there through factors such as harsh environments (the jungle or involving extreme heat or cold), unusual exposures (toxic substances, desert diseases, or unsanitary conditions), lack of access to medical facilities

(resulting in delayed or deficient treatment), and highly risky or hazardous surroundings (war settings or terrorist havens). Second, DBA workers are typically sent from one country to the DBA work location in another country, for example, on remote islands or military bases. There, limited opportunities for social and recreational activities exist because the workers are far away from home, family, friends, and everyday non-work life. Thus, Judge Wisdom, in authoring the Fifth Circuit's decision in *O'Keeffe v. Pan American World Airways, Inc.*, 338 F.2d 319, 322 (5th Cir. 1964), stated: "Personal activities of a social or recreational nature must be considered as incident to the overseas employment relationship." The Board has indicated that it understands *O'Keeffe* to extend the boundaries of the employment relationship to recreational activities, at least so long as those activities bear some semblance of employer sanction and benefit. *See Trans-Asia Eng'g Assocs., Inc. v. Reichart*, BRB No. 101-73 (Ben. Rev. Bd., June 25, 1973).

There are outer limits to the doctrine's expanded boundaries of compensability, however. The Supreme Court itself noted that the doctrine does not make compensable an injury where the employee has "go[ne] 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. Subsequent decisions have held that injuries resulting from employee misconduct that is disconnected from the employer's service are not compensable. Thus, injuries resulting from recreational activities that are neither reasonable nor foreseeable are not compensable. *Kalama Servs., Inc. v. Director, OWCP (Ilaszczat)*, 354 F.3d 1085, 1091-1093, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 543 U.S. 809, 160 L. Ed. 2d 12, 125 S. Ct. 36 (2004).[1] Thus, a "misadventure" in which the employee died while attempting to temporarily asphyxiate himself as part of autoerotic activity fell outside the zone of special danger doctrine. *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56, *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989).

Certain injuries and deaths resulting from suicide or the intervening acts of third persons have also been deemed non-compensable despite the zone of special danger doctrine.[2] In a case involving a DBA worker murdered by his jealous mistress in Vietnam, *Trans-Asia Eng'g Assocs., Inc. v. Reichart, supra,* the Board emphasized Section 2(2)'s language that death by the willful act of a third person must be "because of his employment" and held that the death there was not attributable to the hostilities in Vietnam or to some greater hazard in the area. "The risk of violent retaliation by a rejected mistress is no greater in Saigon than anywhere else. The caveat 'Hell hath no fury like a woman scorned' was not first written in Vietnamese. The 'zone of danger' for such risks is the planet." *Id*. slip op. at 10. Another murder also resulted in a

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1 The claim of the employee in *Kalama* was found compensable although he was injured in a late-night bar fight. The court relied on the limited opportunities for recreation on the Pacific Ocean's Johnson Atoll and the isolated conditions of employment that existed in that remote outpost and the foreseeability of the type of horseplay that occurred. *Id.*

2 Those cases implicate additional statutory provisions that may impact the outcome. LHWCA Section 2(2) defines injury to include those "caused by the willful act of a third person directed against an employee because of his employment." LHWCA Section 3(c) bars compensation "if the injury was occasioned solely by … the willful intention of the employee to injure or kill himself" and these provisions apply under the DBA. 42 U.S.C.S. § 1651(a).

refusal to apply the zone of special danger doctrine. In this case, an administrative assistant for a company affiliated with the CIA was slain during a home burglary in Laos. His spouse participated in the burglary and aided the murderer. *Kirkland v. Director, OWCP*, No. 90-1267, 1991 U.S. App. LEXIS 2066 (unpublished court opinion) (D.C. Cir. 1991). More recently, the First Circuit affirmed the Board's decision declining to apply the doctrine to a death that resulted from either suicide or "misadventure." *Truczinskas v. Director, OWCP*, 699 F.3d 672, 674, 46 BRBS 85(CRT) (1st Cir. 2012). And, a district court concluded that the zone of special danger doctrine did not apply after considering whether a government contractor's rape by a co-worker while stationed in Iraq's Green Zone was an injury arising out of and in the course of employment. *Jones v. Halliburton Co.*, 791 F. Supp. 2d 567, 583-588 (S.D. Tex. 2011).

Currently, two appellate cases raise challenges to the application and scope of the zone of special danger doctrine: (1) *DiCecca v. Batelle Memorial Institute*, BRB No. 13-0378, 48 BRBS 19 (May 9, 2014), appeal pending, First Circuit No. 14-1742; and (2) *Jetnil v. Chugach Management Servs.*, http://www.oalj.dol.gov/Decisions/ALJ/LDA/2012/JETNIL_EDWIN_v_CHUGACH_MANAGEMENT_S_2012LDA00466_(JUL_01_2014)_130318_CADEC_SD.PDF, appeal pending, BRB No. 14-0631, 48 BRBS 631(ALJ).

In *DiCecca*, the employer contends that the "zone of special danger" doctrine does not apply because the doctrine reaches only cases that fall into the following two categories: (1) injuries occurring during reasonable recreational or social activities; and (2) injuries occurring in locations that present living conditions giving rise to an increased risk of the injury sustained by the claimant. In *Jetnil*, the employer argues that the doctrine applies only to an employee sent to work at a location outside his or her own country.

The deceased worker in *DiCecca v. Batelle Memorial Institute* was a facility engineer in a United States Department of Defense laboratory 12-15 kilometers from downtown Tbilisi, Republic of Georgia. He worked five days per week from 8 a.m. to 5 p.m., but was considered to be "on-call" at all times. The employer did not furnish on-site housing. Thus, its employees were required to secure their own housing with a monthly housing allowance. The employer provided hardship pay and monthly vouchers for taxi service and vouchers could be used anywhere within a 25 kilometer radius of the Tbilisi city center for any personal, recreational, or social purpose. Evidence was offered that driving conditions were not typical of those in the United States, with cars occupying more lanes than marked on the street. The employer's laboratory had a lunch room with microwaves and refrigerators, but did not have a cafeteria, restaurant, or grocery outlet. Employees therefore purchased their own food in Tbilisi. To obtain sanitary fresh food, the worker (and his co-workers) regularly traveled by taxi 20-30 minutes to a large market located within the allowable 25 kilometer radius. The worker was killed when a taxi driving him to that grocery store was struck head-on by another car.

The sole issue before the ALJ was whether the death arose out of and in the course of employment under the DBA's zone of special danger doctrine. Concluding that it did, the ALJ reasoned that the claim was compensable because the activity that led to the death arose from the obligations and conditions of employment and was therefore foreseeable. He found that the conditions of employment included residing in Tbilisi, working in a "fairly isolated" lab where

food could not be purchased, and using the taxi service that the Employer made "available to its employees at all times for any non-work reason." Thus, the automobile accident while using the taxi service to shop for groceries was foreseeable. On review, the Board, like the ALJ, found no legal support for the employer's attempt to limit the zone of special danger doctrine. It found that under *O'Leary*, DBA claims are compensable when an injury arises from "one of the risks of employment, an incident of the service, foreseeable, if not foreseen." It agreed with the ALJ that it was foreseeable that the worker would take a taxi to get groceries, and that his fatal automobile accident, even if not foreseen, was foreseeable.

On appeal to the First Circuit, the Director OWCP, has opposed the employer's contention that the zone of special danger doctrine applies only when the employee is either injured (1) while engaged in reasonable recreational or social activities, or (2) due to the "special dangers of the employment locale increasing the risk of injury." Restricting DBA coverage to these two categories and excluding any injury resulting from an activity that did not neatly fit into either is, in the Director's view, unsupported by the DBA's language, its underlying policy goals, and precedent. In particular, such a position ignores *O'Leary* and its progeny's emphasis on the foreseeability of the activity that resulted in the injury and whether or not it was induced by the conditions and obligations of employment. Proof of a specific heightened danger is not necessary to invoke the zone of special danger doctrine so long as the activities giving rise to the employee's injuries were reasonably and foreseeably part of the conditions or obligations of the employment. Traveling to purchase groceries easily meets that standard.

The employer attacks the application of the zone of special danger doctrine on a different basis in *Jetnil v. Chugach Management Servs.* (appeal pending, BRB No. 14-0631). There, the employer contends that the doctrine can never apply to a "local national" working in his home country. It asserts that the doctrine is intended to apply solely to United States workers, or at the very least, employees sent to work on DBA projects outside their native countries because it is a "*sine qua non*" of the doctrine that the worker be injured in an overseas locale far away from his home, family, friends, and everyday non-work life. The injured worker in *Jetnil* is a citizen of the Marshall Islands who lives on one of the 97 islands comprising Kwajalein Atoll, a remote Pacific coral atoll that is part of the Marshall Islands. Kwajalein Atoll is also home to the U.S. Space and Missile Defense Command's Ronald Reagan Ballistic Missile Defense Test Site. The employee worked twenty-nine years as a painter for the prime contractor that performs work for the U.S. Army on the Atoll. His work schedule was five eight-hour days per week, Tuesdays through Saturdays, from 7 a.m. to 4 p.m. He usually worked on Roi Namur, a larger island at the northern tip of the Atoll, but was also assigned some work each year on Gagan Island. Gagan Island is uninhabited, reachable only by boat, and access is limited to those having the employer's permission. Workers sent there stay in the only living quarters on the island, a three-bedroom trailer with a bathroom, kitchen, and living room. The employee was assigned to Gagan Island for four days and brought there by an employer-provided boat. On the third night of his stay, after work hours, he went fishing on the reef wearing flip-flop style sandals. He slipped and cut his foot on the coral. He remained on the island, finished work the next day and, after an intervening weekend, resumed work on Roi Namur for two more days. Five days after cutting his foot, he took paid leave and sought treatment on another island, at a one-room clinic run by the Marshall Islands government, staffed by a person with "nurse-type" training. Ten days later he went to the Roi Namur Dispensary, which is staffed by a nurse and physician's

assistant. After consultation, they flew him by helicopter to Kwajalein Hospital's Emergency Room. His foot was found to be severely infected and gangrenous. He required a below-the-knee amputation.

The employer argued that the zone of special danger doctrine was never intended to provide "24 hour coverage, seven days a week," or to make the employer a guarantor for injury or death as a matter of absolute liability. The ALJ found, however, that the zone of special danger doctrine applied, and the injury was compensable. Focusing on the facts at hand, the ALJ found that the remote Kwajalein Atoll, and Gagan Island in particular, placed the employee in an environment with unique risks, and created a zone of special danger that led to his amputation. In addition, the food the employer provided for the employee was not ideal for his diabetic diet. Those conditions made reef fishing appropriate. Whether for sustenance or recreation, reef fishing was popular in the Marshall Islands, and foreseeable. Further, a foot laceration from the coral was foreseeable as were infection due to the humid climate and limited medical care. As a result, the resulting infection and amputation were foreseeable, if not foreseen. Rejecting the employer's argument that because the employee was a citizen of the Marshall Islands, he could not be considered as within the zone of special danger, the ALJ found that the doctrine is not negated because the place of employment is not an overseas locale. "Life on Gagan Island in particular, and on the Kwajalein Atoll generally, poses dangers unrelated to the citizenship of the injured worker. The risks to human health and safety incident to life on Kwajalein Atoll do not dissipate simply because one was born there." http://www.oalj.dol.gov/Decisions/ALJ/LDA/2012/JETNIL_EDWIN_v_CHUGACH_MANAGEMENT_S_2012LDA00466_(JUL_01_2014)_130318_CADEC_SD.PDF at 10.

The employer sought further support for its theory that local nationals are not entitled to the protection of the zone of special danger doctrine from the War Hazards Compensation Act, 42 U.S.C.S. § 1701 et seq. (WHCA). That Act 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.S. § 1701(a). Congress specifically excluded from recovery, however, "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.S. § 1701(d). The employer argued that the same result should occur in the application of the DBA, making injuries suffered by local nationals non-compensable unless the injury occurred while the worker was actually engaged in the course of employment. The DBA contains no language similar to WHCA section 1701(d), however, and in the Director's view, the absence of comparable language is dispositive.

The DBA's legislative history also buttresses the Director's position that local nationals are not precluded from application of the zone of special danger doctrine. Since its enactment on August 16, 1941, 55 Stat. 622, Pub. L. 208, aside from a limited period between 1953 and 1958, the DBA has explicitly covered injuries suffered by local nationals. While it is true that the zone of special danger doctrine was established by the Supreme Court in its 1951 *O'Leary* decision, the DBA's history strongly suggests that Congress meant for the doctrine to apply to local nationals such as Jetnil. When originally enacted, the DBA covered local nationals. In 1953, Congress excluded local nationals from DBA coverage. Pub. L. 100, 83d Cong. (June 30,

1953). It reversed course in 1958 to again cover local nationals, amending the DBA "[t]o eliminate the discriminatory exclusion of noncitizen employees […] from Defense Base act coverage imposed" in 1953. Sen Rep. No. 1886 (July 23, 1958) 1958 U.S.C.C.A.N. 3321, 3325. The zone of special danger doctrine has applied to DBA cases since the Supreme Court decided *O'Leary v. Brown-Pacific-Maxon* in 1951, a period when local nationals were covered under the DBA. Given that the zone of special danger doctrine was applicable to DBA claims when Congress excluded local nationals from coverage in 1953, and that Congress made no attempt to restrict the doctrine's application when it repealed that exclusion in 1958, it may be presumed that Congress intended the doctrine to apply to local nationals. *Lorillard v. Pons*, 434 U.S. 575, 581, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") Congress' awareness of how to limit coverage of injured local national workers under a federal compensation program is evidenced by the WHCA, 42 U.S.C.S. § 1701(d). The WHCA and the DBA are companion statutes in that the WHCA is also a workers' compensation scheme that covers the same employees as the DBA, if their injuries occur as the result of a war-risk hazard. Under its plain language, however, the WHCA covers only employees injured while actually engaged in the course of employment. See S. Rep. No. 1448, at 5 (1942). The absence of any similar exclusionary language in the DBA regarding the zone of special danger doctrine demonstrates that Congress intended the doctrine to apply to local nationals. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 129-330, 135, 131 L. Ed. 2d 160, 115 S. Ct. 1278, 29 BRBS 87(CRT) (1995) (that a provision is included in only one of two related statutes suggests Congress did not intend for provision to apply to second statute).

Assuming the Board does not hold the zone of special danger doctrine inapplicable to local nationals, the ALJ's award of compensation in *Jetnil* should be affirmed. At bottom, the doctrine requires only that the activity resulting in the injury arise from the obligations and conditions of employment and be reasonable and foreseeable. *See O'Leary*, 340 U.S. at 506-507; *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d at 1091; *DiCecca*, BRB No. 13-0378 (2014). Both of those requirements are met on the facts in *Jetnil*. There is no dispute that his injury arose from the obligations and conditions of his employment. He would not have been on Gagan Island at all – and indeed would not have been allowed on the island at all – had it not been a requirement of his job. There is also no dispute that the activity he was engaged in when injured – reef fishing – was foreseeable. Thus, the doctrine can be applied to his injury because the employer relocated him for work within the Marshall Islands away from his residence and usual place of employment and directed him to a more remote location. That location's limited access to nutritional food made his reef fishing and foot infection reasonable and foreseeable.

The *DiCecca* and *Jetnil* cases pose interesting questions about the circumstances in which the zone of special danger doctrine applies. It is the Director's position that Supreme Court precedent, however, more than adequately defines the doctrine's scope.