U.S. Department of Labor

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

BRB No. 21-0075

ARCHIE BUTCHER Claimant-Petitioner v. SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/29/2022 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

William G. Pulkingham (Rendon & Associates Attorneys), Houston, Texas, for Claimant.

Billy J. Frey and Gabriella V. McBee (Thomas Quinn, LLP), Houston, Texas, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s, Decision and Order Denying Benefits (2018-LDA-00378) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer in Iraq recovering damaged military equipment from the field. Tragically, he sustained a traumatic brain injury, possibly from riding a moped, on September 23, 2008, while on leave in Phuket, Thailand. Tr. at 49-50, 56-58, 81-84; CXs 8 at 1-4, 9 at 1; EX 5 at 4-5. Claimant has no recollection of how the injury occurred. Tr. at 85-86. Claimant filed a claim for benefits under the DBA, asserting he can no longer perform his usual work and his injuries are covered by the zone of special danger doctrine as he was engaged in reasonable recreational activity in a foreign country while on leave from his employment in a war zone. Employer controverted the claim, contending recreational activity while on personal leave outside the vicinity of Claimant's duty station is not within DBA coverage.

The ALJ agreed with Employer's position that the zone of special danger doctrine does not extend to include coverage for Claimant's injury and, therefore, the injury is not compensable. Much like traditional annual leave, the ALJ determined that after 120 days of service Claimant's employment contract permitted interim leave called Rest and Recreation (R&R); the ALJ also determined that its use was voluntary even though it was forfeited if not used.[2] Decision and Order at 7; *see* EX 2 at 1; CX 45. Claimant had no

[1] The Benefits Review Board's processing of this case was substantially delayed due to the COVID-19 pandemic which impacted the Board's ability to obtain records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs.

[2] Claimant's job in Iraq required he work 12 hours a day, 7 days a week, for 120 days; then he became entitled to 80 hours of leave at a location of his choosing. Tr. at 67, 110; CX 45.

work duties or responsibilities while on leave, and Employer placed no limitations on his recreational activities, the costs for which he was solely responsible. *Id*. The ALJ found Claimant was not required to stay in contact with his supervisor while on R&R, and although he did check in at times, he was not subject to recall. *Id*.; Tr. at 118-120; EXs 2 at 2, 4 at 11. The ALJ summarized Claimant's travel itinerary as a flight on an Employer-owned aircraft to Dubai, United Arab Emirates, and then self-paid commercial flights to Bangkok and Phuket, Thailand. *Id*.; *see* Tr. at 122-123. The ALJ also found the $860 airfare reimbursement Employer paid Claimant was taxable income, Claimant paid for the remaining costs of airfare and for all his personal needs and activities while on R&R, and Employer placed no limitations on his activities.[3] EX 2 at 10. The ALJ determined Claimant voluntarily chose to take interim leave in Phuket, Thailand, where he had gone for R&R on two prior occasions.[4] Decision and Order at 8. The ALJ's fact findings are all accurate and supported by substantial evidence. The question is whether he correctly applied the law to those facts. We conclude he did.

The ALJ considered zone of special danger case precedent involving recreational activities that resulted in compensable injuries. In this case, he found Claimant was injured "at a location a two-day trip and many thousands of miles away from the duty station while [Claimant] was not connected to his employment…." Decision and Order at 8-9. The ALJ concluded that finding Claimant's injury arose within a zone of special danger "would be to expand [that doctrine] beyond recognition" as Claimant was "so thoroughly disconnected from the service of his employer." *Id.* at 9 (quoting *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965)). Accordingly, he found Claimant's injuries "did not arise out of or in the course of his employment with Employer and are not subject to the DBA."[5] Decision and Order at 9.

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[3] Claimant's Employment Agreement entitled him to "pay uplifts," which included a foreign-service bonus, area differential, and danger pay. CX 46 at 2-3. Employer's interim leave policy, however, prohibited Claimant from vacationing in any area where he would be eligible for hazard pay if he worked there; he was not entitled to receive any "pay uplifts" while on vacation. CX 45 at 1. Except for the prohibition on vacationing in a hazardous duty pay area, Claimant was free to go anywhere in the world.

[4] The ALJ found Claimant had "engaged in recreational activities including scuba diving, deep-sea fishing, and moped rental" on his two prior trips to Phuket. Decision and Order at 8.

[5] Because of the outcome on the merits, the ALJ declined to address Employer's untimeliness contention. Decision and Order at 2 n.2.

Claimant contends he is covered by the DBA at his duty station in Iraq, so he was also covered while on his overseas vacation in Thailand. He asserts his vacation complied with Employer's interim leave policy, was for their mutual benefit, and furthered Employer's interests. He also asserts he would not have been in Thailand on R&R, "but for" his job with Employer. Claimant argues his accident occurred during "recreational activities," and "was a reasonably foreseeable risk arising out of the obligations and conditions of his employment overseas[;]" therefore, his injury while on leave occurred within the zone of special danger created by his employment. Cl. Br. at 2,10. Employer asserts Claimant was not injured while performing any activity related to his work, and Claimant's conclusion would amount to his having DBA coverage 365 days per year regardless of where he is or what he is doing. Emp. Br. at 28-30.

In a DBA case, an injury is covered by the zone of special danger doctrine if it results from "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen."[6] *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *see also Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015), *aff'g* 48 BRBS 19 (2014). The "zone of special danger" is 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 (2008) (McGranery, J., dissenting). "'Special' is best understood as 'particular' but not necessarily 'enhanced.'" *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT). Thus, the limits of the zone of special danger are defined by whether the injury occurred within the zone created by the obligations and conditions of employment; it does not impose specific time and space boundaries, but it also does not void the requirement that an injury be connected to a claimant's job.

[6] 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 an employee may be within the course of employment, 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*, 340 U.S. at 507; *see also Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *O'Keeffe,* 380 U.S. 359; *DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT); *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).

Inquiries into the employee's activities at the time of injury, work location, transportation arrangements, housing conditions, availability of recreational activities, as well as the control the employer exerts over the employee's living conditions, help define the "obligations or conditions" of employment and whether they create the zone of special danger. *See, e.g., O'Keeffe*, 380 U.S. at 363 (1965); *O'Leary*, 340 U.S. at 507; *see also Kalama Services, Inc.*, 354 F.3d 1085, 37 BRBS 122(CRT). While the zone of special danger may be created even when an activity is not directly related to work, with respect to the doctrine's coverage the Supreme Court "drew the line only at cases where an employee had 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'Keeffe*, 380 U.S. at 362 (quoting *O'Leary*, 340 U.S. at 507); *see also DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT) ("there is a pale of cognoscibility, however, which stops short of astonishing risks 'unreasonably' removed from employment."); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009). In those cases where the employees' injurious activities are so far removed from the obligations of employment, the zone of special danger does not apply to bring them into the course of employment. The question of whether the obligations or conditions of an individual's employment created a zone of special danger out of which the injury arose involves a factual determination "necessarily specific to context" which "turns on the totality of circumstances." *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT). Thus, an ALJ'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*, 792 F.3d at 218, 221-222, 49 BRBS at 58-60(CRT); *see also Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT).

Supreme Court cases addressing recreational activity, as here, include the seminal decision in *O'Leary*. In that case, the employee, while spending the afternoon in the employer's recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The Court stated "[a]ll that is required [for compensability] is that the 'obligations or conditions' of employment create the 'zone of special danger out' of which the injury arose." *O'Leary*, 340 U.S. at 505. In *O'Keeffe*, 380 U.S. 359, the employee drowned in a lake in South Korea during a weekend outing away from his job on a base in South Korea. In awarding benefits, the Court noted the employee had to work under "the exacting and unconventional conditions of Korea."[7] *See also*

[7] The Court stated O'Keeffe's contract required him to:

> remain [in South Korea] for two years, and then, at his employer's expense, be transported back to the United States. The employer paid his rent and provided him with a per diem expense allowance for each day of the year, including weekends and holidays, to cover 'the necessary living expenditures in the Korean economy.' He worked on a '365 day per year basis * * * subject

Gondeck v. Pan-American World Airways, Inc., 382 U.S. 25 (1965) (awarding benefits where employee was killed in a car accident outside the base at which he worked while returning from having a beer in town on San Salvador Island in the British West Indies).

More recently, in *Sabanosh v. Navy Service Command/Nexcom*, 54 BRBS 5 (2020), the doctrine was applied when the decedent drowned after attending a "Hale and Farewell" party at the Guantanamo Bay Naval Station. The Board determined the decedent's presence at Guantanamo Bay, including his proximity to the Atlantic Ocean, and his attendance at a base social event was due solely to the obligations and conditions of his overseas employment. The Board reasoned the decedent would not have been there otherwise, as access to the Naval Station is restricted. Furthermore, the limited recreation and socialization opportunities at the Naval Station and the decedent's job requirement to develop "strong relationships with command" made his attendance at the Hail and Farewell party and his alcohol consumption at the event foreseeable consequences of his work for employer at the base. Finally, the Board determined the ALJ rationally relied, in part, on established case law holding that drowning, even during off-duty hours, is within the zone of special danger, especially where the employee is restricted to a remote geographic area for the benefit of his employer. Consequently, the Board affirmed the ALJ's conclusion that the decedent's death occurred within the zone of special danger created by the obligations and conditions of his employment.

Contrary to Claimant's contentions, he has not shown that his injury on vacation in Thailand was related to the location and hazards of his overseas employment, that it falls within the zone of special danger created by his employment in Iraq, or that case precedent supports his request for benefits. *Fear*, 43 BRBS 139. Unlike the claimants in *O'Leary*, *O'Keefe*, *Gondeck*, and *Sabanosh* who remained near to their areas of employment, Claimant's accident in another country while on vacation is so disconnected from the service of his employer that it is unreasonable to link his injuries to his employment.

As with any DBA claim, whether the obligations or conditions of an individual's employment created a zone of special danger out of which the injury arose involves a

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> to call to the job site at any time.' He 'quite often' worked on Saturdays and Sundays and at other times outside the normal work day. The employer considered all its employees to be 'in the course of regular occupation from the time they leave the United States until their return.' The employer expected the decedent and its other employees to seek recreation away from the job site on weekends and holidays.

O'Keeffe, 380 U.S. at 360.

factual determination that turns on the particular circumstances of the DBA employment. *See O'Leary*, 340 U.S. at 507-08; *DiCecca*, 792 F.3d at 218, 221-222, 49 BRBS at 58-60(CRT); *see also Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT). The United States Court of Appeals for the First Circuit stated in *DiCecca* that the determination of whether an injury falls within foreseeable risks associated with the employment abroad "is necessarily specific to context …." *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT). The United States Court of Appeals for the Ninth Circuit has explained:

> The zone of special danger doctrine is justified in part because the employment takes the employees to remote, uninhabited, or generally inconvenient places. *See, e.g.*, *Kalama*, 354 F.3d at 1092 (describing Johnston Atoll as a "small, remote island ... which offers residents few recreational opportunities"); *Ford*, 684 F.2d at 642 (describing the need to live in barracks because of the remote location of Thule, Greenland); *O'Keeffe*, 338 F.2d at 322 (explaining that "[e]mployees working under the Defense Bases Act, far away from their families and friends, in remote places where there are severely limited recreational and social activities, are in different circumstances from employees working at home"); *Self*, 305 F.2d at 703 (noting "Guam's remoteness from other civilization—particularly Sausalito (or Palo Alto)").

Jetnil, 863 F.3d at 1175, 51 BRBS at 25(CRT).

In each of those previous cases, the recreational activities resulting in injury or death occurred within the vicinity of the employment and its associated zone of special danger. *See O'Leary*, 340 U.S. 504; *DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT); *Kalama*, 354 F.3d at 1092, 37 BRBS 122(CRT). That is, they occurred in or near the remote or confined area of the employment such that participation in them was not so removed from the obligations or conditions of employment as to make them not foreseeable. The term "zone" conveys an "area" of "inclusion" with some sort of physical or purposeful limitation. Though we do not propose setting a physical distance from the employment past which the zone cannot extend, we do acknowledge there still must be a connection to the employment in order to satisfy the necessary requirement of causation as the 'obligations or conditions' of employment must create the 'zone of special danger out' of which the injury arose." *O'Leary*, 340 U.S. at 505.

But for the obligations of Claimant's employment, he would not have been in Iraq; however, it is undisputed Claimant was not working or in the vicinity of his duty station in Iraq at the time of his injury. He elected to take leave, which, while advisable given his

work stressors, was, nevertheless, optional.[8] Claimant was on vacation and had unlimited choices for his destination and recreation; he chose to spend that time in Phuket, Thailand, more than 5,000 miles from his duty station and place of hazardous employment in Iraq. Employer placed no restrictions on vacation activities, even potentially dangerous ones, and Claimant had to pay for those chosen activities himself. Although Employer may "foresee" any of its employees being injured at any time, to hold it liable for every injury sustained on a frolic like a vacation would be to expand DBA coverage beyond its intended limits. Like most employees who become tourists on vacation, Claimant cannot assert his employment creates a nexus between his vacation and his employment; his argument that he would not have been in Thailand "but for" his employment in Iraq is inaccurate – "but for" his employment, he would not have been in Iraq. Going to Thailand was not a condition of his employment or even connected to it. Claimant was not sent to Thailand by Employer, did not have any job duties while in Phuket, and was not subject to Employer's control or recall during his leave period. Tr. at 118-120; EXs 2 at 2, 4 at 11. Although Employer paid $860 towards Claimant's airfare, such payment was taxable income and was not offered in exchange for limiting Claimant's vacation destinations or personal activities.[9] Consequently, to impose coverage under such circumstances would make Employer an insurer of Claimant's health and well-being twenty-four hours a day, seven days a week regardless of his whereabouts.

While it may be beneficial to Employer for its employee to take advantage of his earned R&R, Claimant was under no obligation to do so in Thailand or in any other location abroad. Indeed, Claimant could have returned to the United States for his vacation.[10]

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[8] That Employer encouraged its employees to take advantage of leave opportunities or provided assistance when making travel arrangements does not render the leave, the destination, or the activity any less optional or any more connected to the employment or the duty station.

[9] As stated above, n.3, *supra*, Claimant's only limitation was to avoid other hazardous areas. The fact that Employer paid Claimant while he was on leave is a result of Claimant's having a contractual salary. The need for Employer's approval of the timing of leave is mission-dependent, as with any employer paying a salaried employee. The suggestion to use Employer's resources to arrange travel plans and the requirements to obey rules while being transported in and out of a warzone are to the employee's benefit and safety; in no way do they limit or control where an employee ultimately decides to vacation or what personal activities he chooses to engage in.

[10] Claimant in fact planned to return to the United States for a previous period of leave. The first time he went to Thailand he originally planned to vacation in the United States but changed his plans unexpectedly for personal reasons. Tr. at 101-104. Claimant

Upon electing to take advantage of R&R, Claimant's only restriction on travel was the specific prohibition from taking R&R in locations where he would be eligible for hazardous duty pay uplifts. *DiCecca*, 792 F.3d at 221-222, 49 BRBS at 61(CRT) (hazardous duty pay when injured supports the conclusion that injury arose within the zone of special danger); *see* n.3, *supra*; *see also* Tr. at 67, 110; CX 45 at 1. While we acknowledge Claimant had a dangerous job in a dangerous location and his injury was a tragedy of debilitating proportions, the two were not connected. Claimant's employment did not increase the risk or even create a particular risk of his sustaining this injury.

Claimant's injuries while on R&R in Thailand are far removed from his duty station and do not fall within a foreseeable risk associated with his combat theater employment in Iraq. His decision to undertake any particular personal frolic while on vacation in Thailand, including a potentially dangerous one, was his own choice and cannot be considered an "obligation" or "condition" of employment. It is too far removed from his employment to be included in a zone of special danger surrounding his employment in Iraq. *See DiCecca*, 792 F.3d at 220, 223, 49 BRBS at 60, 62(CRT); *see also Fear*, 43 BRBS 139. Claimant cannot expect injuries sustained on vacation away from the hazards of his employment and duty station to be covered by workers' compensation insurance.[11] *See Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012) (DBA is not the equivalent of health or life insurance).

Consequently, because Claimant's activities on vacation were thoroughly disconnected from his service to employer, and his employment did not create any special or unique danger that contributed to his injury, we affirm the ALJ's determination that the zone of special danger doctrine does not apply to Claimant's September 2008 injury sustained while on R&R in Thailand. The ALJ engaged in the proper inquiry under

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concedes any injuries incurred while he was in the United States would not be covered by the DBA. Cl. Br. at 11. We need not address that issue at this time.

[11] The dissent appears to assume the claimant sustained his injuries as a result of a moped accident; however, the circumstances under which Claimant's injuries were incurred are unclear. Nonetheless, we reject Claimant's contention that it is necessary to remand the case for the ALJ to determine the exact circumstances of his injury. The ALJ resolved the case based upon a determination that the injury did not arise within a zone of special danger and was not employment-connected. Because we, too, resolve the case based upon an application of the zone of special danger doctrine, conclude the injury did not arise within a zone of special danger and was not employment-connected, we take no position on the cause of Claimant's injuries, and need not address Claimant's remaining contentions.

O'Leary by considering whether "the obligations or conditions of [Claimant's] employment create[d] the zone of special danger out of which the injury arose." Decision and Order at 8. He provided a comprehensive summary of all the evidence relevant to the zone of special danger analysis and a cogent explanation of his evaluation of that evidence. *DiCecca*, 792 F.3d at 218-222, 49 BRBS at 59-61(CRT); *see generally Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 1219-1220, 43 BRBS 21, 23(CRT) (11th Cir. 2009). The ALJ rationally determined from the evidence he relied upon that Claimant was "so far from his employment and [was] 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." Decision and Order at 9 (quoting *O'Keeffe*, 380 U.S. at 362).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's affirmance of the ALJ's denial of Defense Base Act benefits on the basis that Claimant's injury did not arise within a "zone of special danger."

Claimant, Archie Butcher, worked as a recovery mechanic for Employer, first in Mosul, then at Camp Taji, Iraq. Tr. at 65-66. His job involved driving or riding in a heavy equipment transport vehicle to recover U.S. military equipment that had been damaged on the battlefield, thus preventing enemy fighters from retrieving it. *Id*. at 68, 72. Once on the scene, he personally exited the vehicle to help load the damaged equipment, including M1 tanks and large trucks. *Id*. at 68.

Needless to say, Mr. Butcher's job was extremely dangerous. When in the field, he traveled only with a heavily-armed military escort; he had to wear an 80-pound vest

designed to protect him from explosive devices; he has been shot at several times; and an improvised explosive device once detonated next to his truck, blowing shrapnel into the vehicle and breaking the windshield.[12] *Id*. at 68-73. His life was also at-risk when on the base. For example, one night, while lying in bed in his trailer, a 50-caliber bullet came through the ceiling and landed at the foot of his bed but fortunately did not hit him. *Id*. at 68.

The job was also grueling, with little to no opportunity for social or recreational activities, in terms of time or facilities. He worked 120 days at a time, 7 days per week, at least 12 hours per day (from 4 a.m. to 4 p.m.) "if [he was] lucky to get off" – but often up to 16 hours per day depending on the U.S. military's equipment recovery needs. *Id*. at 67, 80. When asked whether Camp Taji offered recreational opportunities, Mr. Butcher responded that he found a bicycle, bought new tires for it, and could get some exercise on it but primarily used it to ride to his duty station at the beginning of his shift. *Id*. at 78. Upon further questioning, he confirmed that he was not aware of the base having *any* recreational facilities:[13] no gymnasium, no fishing, no hunting, and no sports.[14] *Id*. at 78-80. The bicycle he rode to and from work was "about it." *Id*. at 79.

The one true recreational opportunity for Mr. Butcher and his coworkers was Employer's "Interim Leave" policy set forth in his employment contract and in a policy document titled, "Policy for Interim Leave for In-Theater Personnel." CX 45, CX 46. Together, these documents comprise what Employer refers to as its "Rest and Relaxation" policy, or "R&R." CX 45, CX 46. Under the terms of the contract, upon completion of 120 days, 240 days, and 365 days of assignment in-theater, Mr. Butcher was entitled to 10 days of consecutive rest and relaxation outside of Iraq, in a non-hazardous location. CX 46 at 4. The stated purpose of R&R is for employees to spend "time away from the project during the assignment period due to [the] hardships, lack of amenities and cultural

[12] When not in the field on recovery missions, he performed maintenance on the military equipment. Tr. at 80-81.

[13] Mr. Butcher testified that his lack of awareness of recreational facilities at Camp Taji stems in part from the fact that he had only been there for a couple of days prior to his career-ending injury. Tr. at 79. Employer does not, however, dispute his account of the lack of social or recreational opportunities at the base.

[14] His earlier duty station in Mosul at least had a gymnasium "close by." Tr. at 79.

disorientation in the Assignment Location," CX 46 at 4, which Employer "reaffirmed" in its policy document. CX 45.

But Employer's motivation was not simply altruistic, as both the employment contract and policy document acknowledge the specific benefit Employer derives: "provid[ing] rest and relaxation (R&R) from the work environment; thus, maintaining operational effectiveness and optimum performance." CX 45 at 1; CX 46 at 5. While an employee could "voluntarily decline" to take R&R, the benefit to Employer was so important it not only "expected" employees to take it, Employer "expected [them] to adhere" to the schedule of taking it every 120 days. CX 45 at 1; CX 46 at 4.

Moreover, Employer took several steps to facilitate and encourage employees to take R&R. In Mr. Butcher's case, this meant transporting him on Employer-owned aircraft from his "remote work location" in Iraq to the designated "international departure location" of Dubai;[15] designating such transport "business travel," entitling him to an additional 8 hours of pay per day until arriving in Dubai; paying for his overnight lodging in Dubai; reimbursing him up to $860 for airfare from Dubai to Thailand; and paying his salary for each of the ten days he was on R&R. CX 45 at 2-8; CX 46 at 4-5. It also offered him and other employees the services of its Human Resources department to purchase tickets from Dubai to another location, resolve problems with the flight and other transport arrangements, assist with itinerary changes and, in certain circumstances, reimburse employees for flight change fees. CX 45 at 3.

Employer also maintained sufficient control over when an employee could take and return from R&R to ensure it continued to derive the benefit of the employee's time away from the warzone. First, all R&R was subject to "project schedules" and required approval by the employee's supervisor; any proposed R&R that deviated from Employer's policies, including the expectation that employees take it every 120 days, required approval by the In-Country Project Manager and could only be granted if warranted by "mission requirements;" and Employer would not approve any R&R unless the employee's assignment lasted at least 30 days beyond the date the employee qualified for it. CX 45 at 1. Second, employees who failed to take any period of R&R forfeited those 10 days and could not combine them with future earned days of R&R. CX 45 at 1; CX 46 at 5. Third, an employee approved to take R&R early (before reaching the requisite 120 days of work) forfeited any right to payment for the R&R until he returned to the warzone and worked the necessary days to complete the eligibility period; all other employees were not paid

[15] Employer's leave policy document identifies Kuwait City as the international departure location for employees in Iraq; however, Employer does not dispute Mr. Butcher's testimony that Dubai was his proper international departure location.

until they completed their R&R and were paid only for the actual number of days taken. CX 45 at 2. Fourth, while being transported from their remote work locations to their international departure locations (Iraq to Dubai in Mr. Butcher's case), employees "at all times . . . [were] not free to wander off and [were] subject to convoy commander, site manager, and safety and security direction." CX 45 at 5.

After departing Dubai and landing in Thailand for R&R, Mr. Butcher suffered a serious, career-ending injury on September 23, 2008. Tr. at 49-50, 56-58, 81-84; CXs 8 at 1-4, 9 at 1; EX 5 at 4-5 pp 13-17. Although he has no recollection of the accident, the parties agree the medical records reflect he was involved in a motorcycle crash and suffered a traumatic brain injury. Tr. at 12. The injury was so severe that he arrived at the hospital with part of his skull missing, underwent several surgeries, and had part of his brain removed. *Id*. at 25, 44. He returned to the United States in a vegetable-like state. *Id*. at 28. Although Mr. Butcher has recovered such that he no longer requires a legal guardian and is somewhat self-sufficient, he still needs help performing basic daily tasks, such as traveling to medical appointments and putting on clothes. *Id*. at 36. His ability to "walk, talk, think, [and] logic" has also suffered. *Id*. at 51.

As Mr. Butcher is now disabled from performing his previous work as warzone recovery mechanic, the question becomes: Is Mr. Butcher's injury while on Employer-approved, Employer-paid R&R covered by the Defense Base Act (DBA) and, in particular, the zone of special danger doctrine? For the following reasons, I answer that question in the affirmative.

The DBA is an extension of and largely built upon the Longshore and Harbor Workers' Compensation Act. Generally speaking, the former covers military contractors injured overseas supporting the mission of the United States Armed Forces,[16] while the latter applies to employees injured at ports and shipyards in the United States for private sector employers. *See* 33 U.S.C. §901 *et seq.*; 42 U.S.C. §1651 *et seq.*

In one significant respect relevant to this case, the law of the two Acts deviates. Under the Longshore Act, an injury is covered if it occurs in the "course of employment," meaning that 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. 33 U.S.C. §902(2); *see, e.g., Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010). In cases arising under

[16] More specifically, the DBA applies to injuries sustained on military bases acquired from foreign governments after January 1, 1940, as well as injuries while employed on various military and public works projects outside the continental United States, including those in foreign countries. 42 U.S.C. §1651(a)(1)-(6).

the DBA, however, the Supreme Court of the United States has held that an employee may be within the course of his employment even if the injury did not occur within the time and space boundaries of work, so long as the "obligations or conditions of employment" created a "zone of special danger" out of which the injury arose. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Importantly, a "special danger" is not an "enhanced" risk faced by the employee in his military-related employment; rather, it is understood as a "particular" risk created by the obligations and conditions of the employment. *Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 220 (1st Cir. 2015). Thus, the zone of special danger applies DBA coverage to non-work injuries, i.e., injuries while engaged in personal, social, or recreational activities, if warranted by factors such as the circumstances of the employee's work location, transportation arrangements, housing conditions, availability of recreational activities, and control the employer exerts. *Sabanosh v. Navy Exchange Service Command/NEXCOM*, 54 BRBS 5, 10 (2020).

Although each case necessarily requires an inquiry into the circumstances of the injured worker's employment, the bottom line is this: a DBA injury is covered by the zone of special danger doctrine if 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; *DiCecca*, 792 F.3d at 220; *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1091-1092 (9th Cir.), *cert. denied*, 543 U.S. 809 (2004); *Ritzheimer v. Triple Canopy, Inc.*, 50 BRBS 1 (2016) (en banc), *aff'd sub nom. Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 2017 WL 176933 (M.D. Fla. Jan. 17, 2017) (Magistrate's Report and Recommendation at 2016 WL 7826705 (M.D. Fla. Dec. 16, 2016)).

As for whether an injury is foreseeable, the Supreme Court "drew the line only at cases where an employee had 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'Keeffe*, 380 U.S. at 362 (quoting *O'Leary*, 340 U.S. at 507). The United States Court of Appeals for the First Circuit similarly described this category of non-compensable injuries as encompassing only "astonishing risks 'unreasonably' removed from employment."). *DiCecca*, 792 F.3d at 220 (citing O'Leary, 340 U.S. at 506-507); *R.F.* [*Fear*] v. *CSA, Ltd.*, 43 BRBS 139 (2009).

Applying these principles, federal Courts and the Board have held the following broad array of injuries foreseeable by DBA employers, and thus covered under the zone of

special danger doctrine, despite their alleged disconnection from actual employment-related duties:

Employee killed in car accident while returning from having a beer in town on San Salvador Island. *Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965). Employee drowned in lake in Korea during weekend recreation. *O'Keeffe*, 380 U.S. 359. Employee drowned while attempting rescue at riverside recreational facility on Guam. *O'Leary*, 340 U.S. 504. Employee killed in taxi in Tbilisi on the way to the grocery store. *DiCecca*, 792 F.3d 214, *aff'g* 48 BRBS 19. Employee injured in bar fight on Johnston Atoll. *Kalama Services*, 354 F.3d 1085, *cert. denied*, 543 U.S. 809, *aff'g* 36 BRBS 78. Employee died from heart attack while off duty in barracks in Greenland. *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982). Employee killed driving motorcycle on wrong side of the road while off-duty on Grand Turk Island in the British West Indies. *O'Keeffe v. Pan-American World Airways, Inc.*, 338 F.2d 319 (5th Cir. 1964), *cert. denied*, 380 U.S. 950 (1965). Employee injured during a romantic midnight rendezvous in a turn-around area at the seaward end of a breakwater on Guam. *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962).

The list goes on:

Employee injured in car accident while returning from a recreational trip to another city. *Hastorf-Nettles v. Pillsbury* [*Vogel*], 203 F.2d 641 (9th Cir. 1954). Employee drowned in Guantanamo Bay under questionable circumstances following a physical altercation. *Sabanosh*, 54 BRBS 5. Employee injured slipping on wet floor when getting out of the shower after work at an employer-provided apartment. *Ritzheimer*, 50 BRBS 1, *aff'd sub nom.* 2017 WL 176933. Employee injured while fishing recreationally on restricted island in Kwajalein Atoll. *Jetnil v. Chugach Mgmt. Services*, 49 BRBS 55 (2015), *aff'd* 863 F.3d 1168 (9th Cir. 2017). Employee died from overdose of pain medication after getting infection from new tattoo while serving in Lebanon. *Urso v. MVM, Inc.*, 44 BRBS 53 (2010). Employee injured while resisting arrest from military police in Afghanistan. *N.R.* [*Rogers*] *v. Halliburton Services*, 42 BRBS 56 (2008). Employee injured at private home in Peru after his employment duties had ended. *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). Employee died from a ruptured

abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal. *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978).

Conversely, relatively few injuries, arising from only the most unique circumstances, have been held so thoroughly disconnected from DBA service that it would be entirely unreasonable to hold the injury foreseeable by the employer:

Employee's death not covered where suicide and autoerotic asphyxiation were the only possible causes. *Truczinskas v. Director*, OWCP, 699 F.3d 672 (1st Cir. 2012). Employee's physical and psychological injuries from cosmetic procedure not covered where employee had history of undergoing such procedures and was diagnosed as obsessed with his skin. *Fear*, 43 BRBS 139 (2009). Employee's death not covered for purposes of survivor's benefits where the widow/beneficiary was implicated in the employee's murder. *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990). Employee's accidental death due to autoerotic asphyxiation not covered. *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989).

In likening Mr. Butcher's injury to the latter category of unforeseeable, non-covered injuries, the majority characterizes his trip to Thailand as merely a "frolic" and "vacation" completely disconnected from his employment. But, as explained above, Mr. Butcher was not simply on vacation when he was injured; he was on Employer-provided R&R that was governed by the parties' employment contract and, as outlined in the contract, was specifically necessitated by "hard ships, lack of amenities, and cultural disorientation" in his "remote work location" of Iraq. CX 45 at 1. His R&R was subject to specific approval by Employer and such approval depended on the R&R not interfering with Employer's "project schedules" and "mission requirements," thus ensuring Employer benefitted from the R&R by "maintaining operational effectiveness and optimum performance." CX 45 at 1; CX46 at 5. While an employee could "voluntarily decline" to take R&R, the benefit to Employer was so important that it not only "expected" employees to take it, Employer "expected [them] to adhere" to the schedule of taking it every 120 days. CX 45 at 1; CX 46 at 4. Employer also created a strong incentive for employees to take R&R by requiring them to forfeit any unused days and paying them for only the days they used. CX 45 at 1-2; CX 46 at 5.

Further, Mr. Butcher's ability to take R&R was dependent on Employer providing him transportation out of the remote Iraq warzone on Employer-owned aircraft, providing him lodging in Dubai, and reimbursing him for additional flights overseas. CX 45 at 2-8; CX 46 at 4-5. While in transport out of the warzone, he was paid for business travel, could not "wander off" freely, and was subject to the direction of the convoy commander, site manager, and safety and security personnel. CX 45 at 5. And, to ensure his and other employees' return to the warzone to carry out Employer's mission, Employer required

some employees to return to the warzone before being paid, and refused to make R&R payments to any employee until they completed their R&R. CX 45 at 2.

Thus, unlike the denied DBA claims relied upon by the majority, where suicide, murder, autoerotic asphyxiation, and a pre-existing obsession with cosmetic procedures were denied as "so thoroughly disconnected" from the claimants' employment, Mr. Butcher's case is markedly different. Far from engaging in activity disconnected from his employment, Mr. Butcher's trip to Thailand was *governed by* his employment contract and *necessitated by* the lack of recreational opportunities and grueling 12- to 16-hour-per-day, 7-day-per-week work schedule in a dangerous warzone. It bears repeating: Employer "expected" Mr. Butcher to take R&R; its very purpose was to ensure Employer's operational effectiveness; its approval was subject to Employer's mission needs and project schedules; Employer facilitated the R&R by transporting Mr. Butcher on Employer-owned aircraft, paying him for "business travel" while in transport, and providing lodging in the international departure location of Dubai; and Employer was contractually obligated to reimburse him at least partially for flights on commercial aircraft to the R&R location of Thailand and to pay his daily wages for the duration of the R&R.[17]

In setting forth a new physical proximity test, wherein an injury must occur within an undefined "vicinity" of the employee's duty station, the majority holds that the term "zone" in "zone of special danger" implies a geographic limit to coverage. This assessment, however, is unsupported by the case law and counter to the very purpose of the doctrine. "Zone of special danger" does not refer to some undefined, and perhaps undefinable, area of land around an employee's remote duty station.[18] Nor is it confined

[17] Mr. Butcher does not remember being paid for this period of R&R. *See* Tr. at 127-128. Even if Employer refused to pay, that fact cannot defeat coverage as Mr. Butcher's inability to complete R&R was occasioned by his covered work injury, not a decision to abandon his work duties in Iraq. Regardless, the employment contract identifies days spent on R&R as payable. And while the majority suggests that the taxable nature of Employer's airfare reimbursement somehow severs its connection to Mr. Butcher's employment, the majority's conclusion is wholly unexplained. Whether subject to income tax or not, Employer agreed to pay for at least part of Mr. Butcher's and other employees' travel to facilitate their participation in R&R and thus recoup the benefit of enhanced mission readiness.

[18] The majority purports to derive its proximity test from its own assessment that the employees in *O'Leary*, *DiCecca*, and *Kalama* were injured "in or near" their duty stations. However, none of those cases discussed the physical proximity of the injury to the duty station as a factor necessary for coverage. The courts' analyses suggest otherwise. *See, e.g.*, *O'Leary*, 340 U.S. at 472 ("*All that is required* is that the 'obligations or

by traditional scope of employment requirements that injuries must occur within the time and space boundaries of the employment. *O'Leary*, 340 U.S. at 507 (rejecting "common law conceptions of scope of employment"). Instead, as the Supreme Court instructed, the "obligations or conditions of employment" create the "zone of special danger." *Id.* Mr. Butcher's isolation in a remote, dangerous Iraqi warzone, with near round-the-clock employment and no opportunities for recreation, explains why the zone of special danger applies DBA coverage to his injury. It does not, as the majority contends, act as a geographic limitation on coverage. *DiCecca*, 792 F.3d at 222-223 ("isolation in a foreign country . . . explains why an otherwise personal activity, like recreation, should be deemed a necessity and thus incident to overseas employment"); *Jetnil*, 863. F.3d at 1175 ("The zone of special danger doctrine is justified in part because the employment takes the employees to remote, uninhabited, or generally inconvenient places."); *Kalama*, 354 F.3d at 1092 (employee worked on "small, remote island ... which offers residents few recreational opportunities"); *Ford*, 684 F.2d at 642 (employee needed to live in barracks because of the remote location of Thule, Greenland); *O'Keeffe*, 338 F.2d at 322 ("[e]mployees working under the [DBA], far away from their families and friends, in remote places where there are severely limited recreational and social activities, are in different circumstances from employees working at home"); *Self*, 305 F.2d at 703 (noting "Guam's remoteness from other civilization").

Relatedly, in emphasizing the distance between Iraq and Thailand as a factor defeating coverage, the majority fails to explain why an identical R&R injury in a country near Iraq might be covered, while Mr. Butcher's injury is not. It remains that Mr. Butcher's 12- to 16-hour-per-day, 7-day-per week employment in warzone conditions, with no recreational opportunities, necessitated that he leave Iraq and travel a minimum of hundreds of miles to Dubai before beginning his R&R. Employer itself approved of and facilitated his trip to Thailand and, as set forth in the contract, benefitted from it. That Mr. Butcher might be injured while on R&R using a common form of transportation, like a motorcycle, is eminently foreseeable.[19]

The ALJ and the majority also completely miss the mark in suggesting DBA coverage is precluded because Mr. Butcher was not performing work duties for Employer

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conditions' of employment create the 'zone of special danger' out of which the injury arose.") (emphasis added); *DiCecca*, 792 F.3d at 220 ("[T]he zone also includes risks that *might occur anywhere* but in fact occur *where the employee is injured*.") (emphasis added).

[19] The majority disputes that Mr. Butcher was injured on a motorcycle. Although Mr. Butcher has no memory of the accident, the parties agreed at the hearing that the

or under Employer's direct control at the time of his injury. The zone of special danger doctrine, by definition, applies to non-work activity. *O'Leary*, 450 U.S. at 506-507 ("The test of recovery is not a causal relation between the nature of employment of the injured person and the accident."). If that were the standard, hardly any of the claims covered up to this point would qualify for DBA coverage. *See, e.g.*, *Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965) (car wreck off base after drinking at a bar in town); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965) (recreational boating at a lake not controlled by the employer); *DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT) (traveling to grocery store by taxi); *O'Keeffe v. Pan Am. World Airways, Inc.*, 338 F.2d 319 (5th Cir. 1964) (off-base scooter wreck while driving on wrong side of the road after visiting a friend's home); *Vogel*, 203 F.2d 641 (returning from recreational trip on day off); *Urso MVM, Inc.*, 44 BRBS 53 (2010) (pain medication overdose after getting infection from tattoo).

In *DiCecca*, 792 F.3d 214, for example, the First Circuit held an injury while riding in a taxi to buy groceries for personal consumption was covered under the zone of special danger doctrine. The court stated that although a benefit to the employer is not a requirement for coverage, the employer in that case *did* benefit because an employee's act of buying groceries promotes a healthy workforce. That rationale applies with greater force to Mr. Butcher's claim: Employer specifically encouraged, facilitated, and benefitted from his and other employees' R&R through enhanced mission readiness, as recognized in the employment contract itself. The majority's attempt to liken the mission-readiness Employer derives from warzone R&R to the mission readiness "any employer" might gain from its employees' vacations trivializes the uniquely isolating, dangerous nature of Mr. Butcher's work that necessitated Employer's inclusion of R&R in his contract. Regardless, as noted, *DiCecca* confirms that a requirement for an employer benefit as a prerequisite to coverage was "flatly rejected" by the Supreme Court. *DiCecca*, 792 F.3d at 222; *see O'Leary*, 340 U.S. at 507 ("[T]he employee [need not] be engaged at the time of the injury in activity of benefit to his employer."). The explicit benefit to Employer in this case only strengthens Mr. Butcher's claim.

Finally, the majority's assertion that a finding of coverage would extend the zone of special danger doctrine "beyond its intended limits" is unfounded. *First,* application of the zone of special danger doctrine is "necessarily unique to the factual circumstances" of each case. *Jetnil*, 863 F.3d at 1176.[20] My decision is appropriately based on those facts, not

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evidence of record points to a motorcycle wreck as the cause of his traumatic brain injury. Tr. at 12.

[20] Like the employer in *Jetnil*, Employer in this case raises concerns about the possibility of 24-hour-per-day, 365-day-per-year DBA coverage. *Jetnil*, 863 F.3d at 1176

(rejecting the employer's concerns that zone of special danger application to foreign nationals injured in their home countries would absurdly result in "twenty-four hour-a-day, seven-day-a-week coverage" including injuries sustained while sitting at home watching television). However, it fails to provide any explanation or identify any legal authority as to why an employee, like Mr. Butcher, who works in a warzone 12 to 16 hours per day, seven days per week, for 120 days at a time, and whose only recreational opportunity is a 10-day trip outside the warzone, could not qualify as a covered employee for the duration of his contract.

some hypothetical injury that might occur in the future. *Second*, decades-old Supreme Court precedent already defines the outer limits of zone of special danger coverage. The test for coverage is one of foreseeability; the line is drawn "only at cases where an employee had 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'Keeffe*, 380 U.S. at 362 (quoting *O'Leary*, 340 U.S. at 507). I see no reason to deviate from that standard in favor of one that emphasizes physical proximity to an employee's duty station above all else, especially where, as here, that duty station is a dangerous warzone far from any safe recreational locations.

As the ALJ misapplied the law, I would reverse his finding that Mr. Butcher's injury, while on R&R from his dangerous, near round-the-clock employment in a warzone, did not arise within a zone of special danger and remand the claim for him to address any remaining issues.

GREG J. BUZZARD
Administrative Appeals Judge