**No. 15-72873**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**CHUGACH MANAGEMENT SERVICES and**
**ZURICH AMERICAN INSURANCE COMPANY,**

**Petitioners,**

**v.**

**EDWIN JETNIL and**
**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,**

**Respondents.**

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**On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor**

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# BRIEF FOR THE FEDERAL RESPONDENT

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EDWIN JETNIL
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Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

# STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION AND SUGGESTION OF MOOTNESS

## I. STATUTORY REQUIREMENTS

This appeal arises from a claim filed by Edwin Jetnil (Jetnil or Claimant), against his former employer, Chugach Management Services (Employer or Chugach), for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or Act),

as extended by the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq*. The Administrative Law Judge (ALJ) had jurisdiction to hear the claim under 33 U.S.C. §§ 919(c), (d). His Decision and Order, dated July 1, 2014, ER 15,[1] became effective on July 2, 2014, when it was filed in the office of the district director.[2] 33 U.S.C. §§ 919(e); 921(a).

Chugach filed a notice of appeal with the Benefits Review Board (Board) on July 17, 2014, within the thirty-day period provided by 33 U.S.C. § 921(a), thereby invoking the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On July 21, 2015, the Board issued a final Decision and Order, affirming the ALJ's decision. ER 1.

Chugach was aggrieved by the Board's decision, and filed a petition for review with this Court on September 16, 2015, within the sixty days allowed under 33 U.S.C. § 921(c). The Board's DBA decisions are reviewed by the United States Court of Appeals for the circuit in which the office of the district director who filed and served the compensation order is located. 42 U.S.C. § 1653(b); *Pearce v. Director, OWCP*, 603 F.2d 763, 770 (9th Cir. 1979). Here, the district director's office is located in San

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[1] References to the Employer's Excerpts of Record are cited as "ER."

[2] The official identified in the statutes as the "deputy commissioner" is now called the "district director." 20 C.F.R. § 701.301(a)(7).

Francisco, within this Court's territorial jurisdiction. Consequently, under 33 U.S.C. § 921(c) and 42 U.S.C. § 1653(b), the statutory jurisdictional prerequisites for this appeal have been satisfied.

## II. MOOTNESS CONCERNS REGARDING THE COURT'S JURISDICTION

It is well-established that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1528 (2012) (internal quotation marks and citations omitted). This is so because "a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. U.S.*, 506 U.S. 9, 11 (1992) (internal quotation marks and citations omitted). Thus, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." *Id*.

The Director believes it may be impossible for the Court to grant any effective relief in this case. On October 30, 2015, Employer informed the district director of Jetnil's death, and of its final payment of compensation.[3]

[3] The Director has attempted to investigate and ascertain the underlying facts with greater certainty, but definitive information, including the date Jetnil

(Notice of Final Payment attached.) Jetnil's intervening death has two major impacts on this appeal. First, to the Director's knowledge, Jetnil has been paid the compensation due under the ALJ's order, and he has no additional disputes or claims pending.[4] Second, assuming no further compensation is due, the Employer does not have a right to repayment of overpaid compensation. *Stevedoring Serv. of Am., Inc. v. Eggert*, 953 F.2d 552 (9th Cir. 1992). The only permissible method of recouping prior payments, even if wrongly made, is as an offset or credit against disability compensation payments due prospectively to the injured employee, *Id*. at 555-57, and Jetnil's death means there is no further compensation payable to him. In

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died, has been hard to come by. The relevant facts are primarily in the hands of the private parties and communicating with the Marshall Islands, Jetnil's residence, is difficult.

[4] Claimant's response brief asserts that Jetnil was prescribed a prosthesis and that Employer refused to provide it. Jetnil Response Brf. at 9. It is not clear whether Jetnil obtained a prosthetic leg before his death; in any event, neither the district director nor the district court has been informed of a problem regarding Jetnil's medical benefits. 33 U.S.C. §§ 918(a) and 921(d). Moreover, any claim for death benefits that might be filed by Jetnil's survivors would not affect the mootness of this claim, because the claim for death benefits is a separate claim that would be payable to individuals other than Jetnil. *See* 33 U.S.C. § 909; *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 519 U.S. 248, 257-58 (1997).

short, Jetnil has been fully compensated, and Employer cannot recoup its money if wrongly paid. Thus, it appears this appeal is moot.[5]

## STATEMENT OF THE ISSUES

I. The zone of special danger doctrine under the DBA expands traditional employer liability to include coverage for injuries that have no direct causal connection to an employee's job, or are sustained while the employee was not in the immediate service of his employer. The only requirement is that the employee's activity at the time of the injury arose from the conditions or obligations of his employment and was foreseeable. The first question presented is whether the doctrine categorically excludes, as a matter of law and under all circumstances, local nationals injured while working in their home country.[6]

II. Jetnil was injured while stationed on an uninhabited island for a four-day work assignment. The ALJ found that, at the time of his injury, Jetnil

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[5] The Director believes that Employer has not yet paid Jetnil's attorney's fees. 33 U.S.C. § 928. Even if it intends to dispute them at some later date, "an interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

[6] "Local national" is the term used by the Employer, and adopted by the Board. For simplicity, we will use this term when referring to non-citizens and non-residents of the United States who are working on a DBA-covered contract in their home country.

was engaged in an activity that arose from the conditions of his employment and was foreseeable. Is Jetnil entitled to compensation under the DBA's zone of special danger doctrine?

## STATEMENT OF THE CASE

### I. STATUTORY BACKGROUND

#### A. The Defense Base Act

With the exception of three groups of workers, the Defense Base Act (DBA) establishes a federal workers' compensation system for all civilian employees working outside the continental United States on U.S. military bases or under a contract with, or approved by, the U.S. government for public works or for national defense.[7] 42 U.S.C. § 1651 *et seq*. The DBA provides that, unless otherwise modified, "the provisions of the [Longshore Act] shall apply in respect to the injury or death of *any employee* engaged in any [covered] employment." 42 U.S.C. § 1651(a) (emphasis added). The Longshore Act, in turn, provides compensation for injuries or deaths that

[7] The three excluded classes, none of which are applicable here, are (1) employees subject to the Federal Employees' Compensation Act; (2) employees engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) masters or members of a crew of any vessel. 42 U.S.C. § 1654.

"aris[e] out of and in the course of employment." 33 U.S.C. § 902(2). In the context of the DBA, however,

> the test of recovery is not a causal relationship between the nature of employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to the employer. No more is required than that the obligations or conditions of employment create the 'zone of special danger' out of which the injury or death arose.

*O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-07 (1951).

Under the zone of special danger doctrine, employee activities that are foreseeable are considered risks of the employment, and injuries arising from those activities come within the doctrine and thus are covered by the statute. *Id*. at 507; *Battelle Mem. Inst. v. DiCecca*, 792 F.3d 214, 221 (1st Cir. 2014) (to be compensable, injuries must simply fall within the foreseeable risks occasioned by the employment); *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1090-91 (9th Cir. 2004) (permitting recovery for injuries from "reasonable and foreseeable recreational activities" arising out of the obligations or conditions of employment).[8]

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[8] Examples of foreseeable activities covered by the zone of special danger doctrine include the following: *O'Keefe v. Pan American World Airways, Inc.*, 338 F.2d 319, 325 (5th Cir. 1964) (driving motor scooter when returning from social visit); *Pan American World Airways, Inc. v. O'Hearne*, 335 F.2d 70, 71 (4th Cir. 1964) (driving jeep when returning from bar); *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (being a

By contrast, there is no recovery under the zone of special danger doctrine in those "cases where an employee ha[s] become 'so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say the injuries suffered by him arose out of and in the course of employment.'" *O'Keefe v. Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359, 362 (1965) (quoting *O'Leary*, 340 U.S. at 507).[9]

When compensation is payable, the DBA affords local nationals the same amount of compensation as U.S. citizens. 42 U.S.C. § 1651(a) (provisions of the Longshore Act apply unless otherwise modified). Compensation to aliens or non-nationals for certain permanent disabilities or death, however, may be commuted at the employer/carrier's insistence and

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passenger in same jeep returning from bar); *Self v. Hanson*, 305 F.2d 699, 702 (9th Cir. 1962) (parking at scenic overlook); *DiCecca*, 729 F.3d at 221-22 (taking taxi to buy groceries); *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1091-92 (engaging in horseplay at bar), *O'Keefe v. Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359, 360 (1965) (boating accident)

[9] Examples of activities not considered within the zone of special danger doctrine include the following: *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988), *aff'd mem.* 873 F.2d 1433 (Table) (1st Cir. 1989) (inadvertent hanging during autoerotic activity); *R.F. v. CSA, Ltd.*, 43 BRBS 139 (2009) (undergoing cosmetic chemical facial peel that allegedly damaged skin); *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990) (1990 WL 284045), *aff'd mem. sub. nom. Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991) (participating in employee/husband's murder); *cf. Truczinskas v. Director, OWCP*, 699 F.3d 672, 679 (1st Cir. 2012) (possible suicide or "misadventure," *i.e.*, autoerotic activity).

paid in a lump sum. 42 U.S.C. § 1652(b). In addition, dependents of local nationals eligible for death benefits are limited to wife, children, and dependent parents, 42 U.S.C. § 1652(b), whereas there are additional possible dependents for U.S. workers. *See* 33 U.S.C. § 909(d).

### B. The War Hazards Compensation Act and the Federal Employee Compensation Act.

Although the Director believes that the War Hazards Compensation Act (WHCA), 42 U.S.C. § 1701 *et seq*., and Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101 *et seq*., do not affect the outcome of this case, we discuss these statutes because Employer has relied on them.

The WHCA generally establishes two types of compensation claims for injury or death arising from "war-risk hazards." 42 U.S.C. § 1701 *et seq.* The first is a direct action by the worker against the United States for injury or death arising "from a war-risk hazard, whether or not such person then actually was engaged in the course of his employment." 42 U.S.C. § 1701(a); 20 C.F.R. Part 61 Subpart C. Where, however, the injured employee resides "at or in the vicinity of his place of employment" and lives there for reasons other than "the exigencies of his employment," direct action coverage is limited to injuries that occur "in the course of

employment." 42 U.S.C. § 1701(d); 20 C.F.R. § 61.200(c)(1). (The DBA contains no similar statutory restriction on recovery by local workers.).

The second type of WHCA claim is one seeking reimbursement from the United States for compensation paid (or payable) by a DBA employer who has been found liable under the DBA, but where the employee's injury resulted from a war-risk hazard. 42 U.S.C. § 1704; 20 C.F.R. Part 61 Subpart B. Unlike a direct action claim, a reimbursement claim contains no limitation on or exclusion of the coverage of local nationals.[10] 42 U.S.C. § 1704 (containing no such exclusion); 20 C.F.R. Part 61 Subpart B (same). Thus, the scope of local national coverage under the DBA and WHCA reimbursement claims is coextensive. In fact, a final DBA award is considered "as establishing prima facie, the right of the beneficiary to the payment awarded or provided for." 20 C.F.R. § 61.102(c).

FECA, as the name suggests, is a workers' compensation program for federal employees. Its only relevance here is that WHCA claims are paid from the compensation fund established under FECA. 42 U.S.C. § 1701(a) (referencing fund established by 5 U.S.C. § 8147).

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[10] By its terms, the exclusion contained in § 1701(d) applies only to "this section," *i.e.*, § 1701, which, in turn, establishes direct claims against the United States. 42 U.S.C. § 1701(d); *see also* 20 C.F.R. Part 61 Subpart C (exclusion found only in subpart pertaining to direct claims).

## II. STATEMENT OF FACTS

The facts of this case are not in dispute. Jetnil is a citizen and resident of the Republic of the Marshall Islands (Marshall Islands). ER 18. He lives on Third Island, which is one of 97 islands comprising Kwajalein Atoll, a remote Pacific coral atoll in the Marshall Islands, approximately 2,400 miles southwest of Honolulu, Hawaii. *Id*. at 18, 19; *see* ER 290 (map of the Atoll with Third Island alternatively labeled as Ennubirr). Kwajalein Atoll is also home to the U.S. Space and Missile Defense Command's Ronald Reagan Ballistic Missile Defense Test Site. ER 18. Since 1980, Jetnil has worked for the prime contractor that administers the work of the U.S. Army on Kwajalein Atoll. *Id*. Petitioner Chugach has been the prime contractor since 2003. *Id*.

Jetnil worked for Employer as a painter Tuesdays through Saturdays from 7 a.m. to 4 p.m. ER 19. He usually worked on Roi Namur, a larger island at the northern tip of the Atoll, but was also assigned work each year on Gagan Island, located nine miles away (over water) from Roi Namur. *See* ER 2, 19. Gagan Island is an uninhabited island with an optic sensor, some communications buildings, and no medical facilities. ER 2, 19-20; ER 290 (map with Gagan alternatively labeled at Bikejlan); ER 344 (aerial photograph of Gagan Island). It can be reached only by boat or helicopter

and can be accessed only with the Employer's permission. ER 2,19. When the Employer transports workers there, they remain at the island until the assignment is complete, ER 7, staying in an Employer-provided trailer (the only living quarters on the island), which is stocked with food provided by the Employer – in this case, bread, hot dogs, bacon, chicken, and rice. ER 19.

The Employer stationed Jetnil on Gagan Island for four days, from January 7-10, 2009, to paint and perform routine maintenance on the island's pier. ER 19. Jetnil and his coworkers were transported from Roi Namur to Gagan Island on January 7 by boat provided and operated by the Employer. *Id*. at 20; *see* ER 359 (picture of the catamaran used for transport to Gagan Island). On January 9, after work hours, Jetnil went fishing on the reef. Reef fishing is common throughout the Marshall Islands, including the Kwajalein Atoll, and Jetnil had been advised by his doctor to eat fish whenever possible because he was diabetic. ER 23, 268. He was wearing flip-flop style sandals while fishing, and slipped and cut his right foot on the coral, between the fourth and fifth toes. He remained on the island, working there as scheduled through January 10. *Id*.

Jetnil returned to work on Roi Namur on January 13 and 14. On January 15, while on paid leave, he went for treatment to the Third Island

Clinic, a one-room clinic run by the Marshall Islands government, and staffed by a person with "nurse-type" training. ER 19, 20. On January 26, he went to the Roi Namur Dispensary, which is staffed by a nurse and physician's assistant, and provides basic care such as EKGs, bandages, and sutures. *Id*. When Jetnil arrived at the Roi Namur Dispensary, his right foot was wrapped, soiled, and foul-smelling. Staff took a blood sample, elevated his foot, and called for a helicopter. *Id*. at 6.

Jetnil was then flown to Kwajalein Hospital on Kwajalein Island. He was given Vicodin to relieve his pain, which he rated at 9 on a scale of 1 to 10. His fourth and fifth toes were black, there was a large open wound on the top of his foot, and the examining physician found maggots between his toes. ER 21. Jetnil was admitted for IV antibiotics and evaluation for surgery. Examinations revealed severe infection and possible gas gangrene. The examining physician recommended amputation of the right leg below the knee. The amputation was performed on January 27, 2009. *Id*. Jetnil was discharged from the hospital on February 28, 2009. *Id*.

## III. DECISIONS BELOW

### A. The ALJ's Decision

The ALJ awarded Jetnil medical benefits and compensation for total disability under the DBA from January 15, 2009 and continuing. ER 26. He found that the obligations and conditions of Jetnil's employment created a zone of special danger out of which his injury arose. ER 22 (citing *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965)).

The ALJ recognized that, under Supreme Court and other court decisions interpreting the DBA, "[i]njuries suffered away from work or after work hours are compensable, not because they are causally related to work, but because 'the entire work environment may be located in some remote situs.'" ER 22 (quoting 9 Lex. K. Larson, Larson's Workers' Compensation Law § 149.02 (2010)). The ALJ further recognized that the Board, in addressing the zone of the special danger, focused on whether the activity that resulted in the injury was "reasonable and foreseeable" in light of the conditions of employment. *Id*. at 23-24 (citing *DiCecca v. Battelle Memorial Institute*, 48 BRBS 19 (2014)).

The ALJ found the conditions on Kwajalein Atoll, and on Gagan Island in particular, presented unique risks, and created a zone of special

danger that ultimately led to the amputation of Jetnil's lower right leg. ER 23-24. Specifically, he observed that Gagan Island was uninhabited and that access to Gagan was restricted – it was accessible only by boat and with the Employer's "express permission." In addition, the ALJ noted that reef fishing was a popular Marshallese activity, that Jetnil had been advised to add fish to his diet whenever possible because he was diabetic, and that fish was not among the foods stocked in the Employer's trailer. According to the ALJ, these facts, combined, made reef fishing "appropriate" and foreseeable.

Furthermore, the ALJ determined that Jetnil's amputation was foreseeable. He stated that a foot laceration from coral while fishing on a coral reef was plainly foreseeable. In addition, he observed that the laceration could worsen into a serious infection due both to the humidity of the Marshallese tropical climate and the limited availability of medical care. He thus concluded that both Jetnil's activity at the time of the injury – reef fishing – and the ultimate injury itself were foreseeable. *Id*. at 23. Accordingly, he determined that Jetnil had established the elements of the zone of special danger doctrine.

Last, the ALJ rejected Employer's argument that the zone of special danger doctrine was inapplicable because Jetnil was a local national of the Marshall Islands. He stated that "[t]he zone of special danger is not negated

because the place of employment is not an overseas locale [for the injured worker]," and reasoned that the risks Jetnil faced on Gagan Island were unrelated to his citizenship and did not dissipate because he was born in the Marshall Islands. *Id*. at 24.

### B. The Board's Decision

The Board affirmed the ALJ's decision on appeal. It rejected Employer's contention that the zone of special danger doctrine does not apply, as a matter of law, to local nationals injured during off-duty hours. The Board concluded that there was no basis in the DBA to categorically exclude local nationals from the doctrine, and further, that the doctrine's application is not a legal question, but rather, a factual one that is resolved by the ALJ and then reviewed on appeal for substantial evidence.

Examining the plain text of the DBA and the Longshore Act, the Board explained that the DBA extends, without qualification or limitation, to "the injury or death of *any employee* engaged in any employment" covered by the DBA. ER 5 (emphasis added). Therefore, it held that the DBA "provides coverage to those individuals who are neither citizens nor residents of the United States and who are employed in their homelands by DBA employers." *Id*. In addition, the Board noted that the Supreme Court had not limited the zone of special danger doctrine to U.S. citizens or

residents when it first applied the doctrine, ER 6; nor had Congress done so when it reinstated DBA coverage for non-U.S. citizens (after previously excluding them). ER 5-6; *see supra* n. 7. And last, the Board observed that if Congress had wanted to exclude non-U.S. citizens, it knew how to restrict coverage of local nationals under a federal compensation statute, because it had done just that under the War Hazards Compensation Act.[11] ER 6. Thus, the Board found nothing in the statutory text justifying the exclusion of local nationals from the doctrine.

Moreover, the Board disagreed with Employer's attempt to frame the issue of non-citizen coverage under the doctrine as a legal question. It emphasized that the case law had uniformly treated the doctrine's application as requiring a "factual determination [by an administrative law judge] that turns on the particular circumstances of [the worker's] DBA employment," which accordingly is reviewed "based on the substantial evidence standard." ER7 (citing *O'Leary*, 340 U.S. at 507-08; *DiCecca*, 792 F.3d at 221; *Kalama Services*, 354 F.3d 1085 (9th Cir. 2004)).

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[11] *See supra* at 6-10, *infra* at 26-27 (discussing the differences in DBA and WHCA coverage).

Turning to the facts of the instant case, the Board found that substantial evidence supported the ALJ's finding that Jetnil's injury occurred within the zone of special danger. ER 7. It explained:

> Where employer created the obligations and conditions for claimant and his co-workers, requiring their restriction to an isolated location for the duration of a four-day period, the administrative law judge rationally found that those conditions gave rise to a zone of special danger notwithstanding claimant's status as a citizen and resident of the [Marshall Islands].

ER 7.

The Board also found it significant that the limited foods provided by the Employer for Jetnil and his coworkers – bread, chicken, hot dogs, bacon and rice, *see* ER 23 – were not suitable for Jetnil's diabetes. ER 7. It rejected the Employer's argument that the ALJ erred by considering Jetnil's diabetes, noting that an employer takes its employees as it finds them. ER 8 (citing *Urso v. MVM, Inc*., 44 BRBS 53, 55 n.3 (2010). The Board found rational the ALJ's finding that Jetnil's recommended diet, coupled with the limited food selections provided by the Employer, were factors that made reef fishing foreseeable during Jetnil's off-duty hours on Gagan Island. ER 8, 9.

The Board also rejected the Employer's argument that the zone of special danger doctrine does not cover risks that an employee would encounter regardless of his employment. Specifically, the Employer argued

that reef fishing is a customary practice throughout the Kwajalein Atoll and that the Employer did not increase Jetnil's risk of a reef-fishing injury by sending him to Gagan Island. In rejecting this argument, the Board quoted from the First Circuit's decision in *DiCecca*:

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

ER 8 (quoting *DiCecca*, 792 F.3d at 220). The Board thus found that Jetnil's risk of sustaining the same injury on his home island, or anywhere else on the Atoll, was immaterial. "The fact remains that claimant's injury occurred on Gagan Island, an isolated location with restricted ingress and egress, and claimant was there solely due to the obligations and conditions of his employment." ER 9.

The Board affirmed the ALJ's decision.

## SUMMARY OF ARGUMENT

The DBA's zone of special danger doctrine covers, without qualification, injured workers whose injury arises from the obligations or conditions of employment, so long as the employee's activity at the time of the injury was reasonable and foreseeable. The Court should therefore reject Employer's argument that the zone of special danger doctrine cannot apply as a matter of

law to local nationals under any circumstances. That said, the doctrine will likely have a more limited application in cases involving injured local nationals. But that determination must be made on a case-by-case basis depending on the particular facts and circumstances presented.

The ALJ's award of compensation here, and his reliance on the zone of special danger doctrine, is correct and supported by substantial evidence. Jetnil's injury arose from the obligations and conditions of his employment. He was stationed on an uninhabited island for a period of four days during which he was injured. And the recreational reef fishing in which he was engaged when injured was foreseeable. The ALJ therefore properly utilized the zone of special danger doctrine and awarded compensation.

## STANDARD OF REVIEW

With regard to questions of fact, the Court must accept the ALJ's findings if they are supported by substantial evidence and may not substitute its views for those of the ALJ. *General Construction Co. v. Castro*, 401 F.3d 963, 965 (9th Cir. 2005). The ALJ's application of the zone-of-special-danger doctrine to the facts of a particular case is subject to the same standard of review. *O'Leary*, 340 U.S. at 507; *Hastorff-Nettles v. Pillsbury*, 203 F.2d 641, 643 (9th Cir. 1953). Thus, the ALJ's rational determination that the doctrine applies in a given case "is treated as far as possible as a

finding of fact, for which a reviewing court considers only whether the agency had a substantial basis in the record." *DiCecca*, 792 F.3d at 221 (citing *O'Leary,* 340 U.S. at 507–09; *O'Keefe v. Smith*, 380 U.S. at 361–65; *Gondeck*, 382 U.S. at 27).

The Court reviews legal questions *de novo*, but affords respect to the Director's position under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944) and *U.S. v. Mead Corp*., 533 U.S. 218 (2001). *Price v. Stevedoring Serv. of Am*., 697 F.3d 820, 824-33 (9th Cir. 2012) (en banc). Because the Board is not a policymaking entity, its interpretations are not entitled to any special deference. *Id*.

## ARGUMENT

The DBA's zone of special danger doctrine may apply to local nationals, and the ALJ properly concluded that Jetnil's injury was compensable under that doctrine. The injury occurred while Jetnil was engaged in a reasonable and foreseeable activity during a four-day painting assignment on an isolated island. The ALJ's award of compensation is reasonable, in accordance with law, and supported by substantial evidence. This Court should therefore affirm the award of benefits.

## I. THE DBA'S ZONE OF SPECIAL DANGER DOCTRINE APPLIES TO LOCAL NATIONALS.

The DBA's zone of special danger doctrine expands traditional employer liability to cover injuries "without a direct causal connection to an employee's particular job or to any immediate service for the employer." *DiCecca*, 792 F.3d at 220. The doctrine requires only that the obligations or conditions of employment give rise to an injury, and that the employee's activity at the time of the injury was foreseeable in light of those obligations and conditions. *See O'Leary*, 340 U.S. at 506-07; *DiCecca*, 792 F.3d at 220; *Kalama Services*, 354 F.3d 1090-91.

Despite its broad and unqualified terms, Employer contends that the zone of special danger cannot apply to local nationals as a matter of law. There is nothing in the DBA, however, or in the doctrine itself, that precludes its application to local nationals, or that categorically excludes local nationals from its operation. Rather, the doctrine's application to a local national, as with a U.S. worker, must be determined on a case-by-case basis depending on the particular facts and circumstances presented. *See DiCecca*, 792 F.3d at 221. And while virtually all of a U.S. worker's activities will be covered – because that worker is outside the continental United States solely because of his job – a local national's activities may also be covered if the injury arises from the conditions and obligations of

employment, and the activity causing the injury is foreseeable. That is the case here.

### A. The DBA does not exclude local nationals from coverage.

In most major respects, the DBA treats local nationals no differently than U.S. citizens. It broadly extends coverage to "the injury or death of *any employee* engaged in any employment" described in sections 1651(a)(1)-(6). 42 U.S.C. § 1651(a) (emphasis added). In fact, with two minor exceptions not relevant here, *supra* at 8-9, the Act explicitly affords local nationals the same amount of compensation as U.S. citizens. 42 U.S.C. 1651(a) (provisions of the Longshore Act apply unless otherwise modified). Moreover, the Act does not require an employee to be working in a foreign country for coverage; it requires only that the employment be "outside the continental United States." 42 U.S.C. § 1651(a)(1)-(6). Indeed, many injuries covered by the zone of special danger have occurred in U.S. territories. *Kalama Services*, 354 F.3d at 1088 (Johnston Atoll); *Self*, 305 F.2d at 699 (Guam); *Hastorff-Nettles*, 203 F.2d at 641 (Alaska, then a U.S. territory). Thus, being a "local national," – a citizen of the country where the injury occurred – is immaterial.

After excluding local nationals from the DBA in 1953, Pub. L. 83-100, 67 Stat. 135 (June 30, 1953), Congress reversed course five years later

and struck the exclusion, which it characterized as "discriminatory."[12] Pub. L. 85-608 § 201(c), 72 Stat. 538 (August 8, 1958); Sen. Rep. No. 1886, 85th Cong. (2d Sess., July 23, 1958) at 11, 19; H. Rep. No 2045, 85th Cong. (2d Sess. June 27, 1958) at 25. Significantly, in reinstating DBA coverage for local nationals, Congress did not restrict application of the zone of special danger doctrine in their claims, even though the doctrine had been established seven years earlier, in 1951. *Lorillard v. Pons*, 434 U.S. 575, 581 (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."); *see also Porter v. Board of Trustees of Manhattan Beach Unified School District*, 307 F.3d 1064, 1072 (9th Cir. 2002) ("We presume that when Congress amends a statute it is knowledgeable about judicial decisions interpreting the prior legislation.").[13]

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[12] In its place, Congress authorized the Secretary of Labor to waive coverage for any class of employees at the recommendation of another department or agency head. Pub. L. 85-608 § 201(c), 72 Stat. 538 (August 8, 1958) codified at 42 U.S.C. § 1651(e).

[13] Employer contends that Congress could not have intended to have the zone of special danger doctrine apply to local nationals because no prior judicial decision had done so. Emper's Brf. at 21. But clearly, if Congress had wanted to categorically exclude local nationals from the zone of special danger, their reintroduction into the DBA would have been the time to do so. That Congress did not enact Employer's proposed rule of law strongly suggests that the doctrine would continue to apply to DBA workers, as

### B. <u>The zone of special danger doctrine does not exclude local nationals from its operation</u>.

As Employer emphasizes, Emper's Brf. at16-18, the zone of special danger doctrine originated, and has been utilized, in the context of U.S. citizens abroad, when the "obligations or conditions" of employment have dislocated them and stationed them away from their home. But employment conditions and obligations may also take local nationals away from home, to remote or, as here, uninhabited places. Indeed, Professor Larson likens coverage under the doctrine to coverage under state workers' compensation acts for traveling employees:

> [W]hen an employee's work entails travel away from the employer's premises, the course of employment concept is generally expanded to include most reasonable activities, whether directly related to employment or not. In the case of employees covered by the Defense Base Act, however, it isn't so much that the employee's work entails travel *away from the employer's premises* as it is the fact that the entire work environment may be located in some remote situs.

9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 149.04[2], 149-10 (2013) (emphasis in original). Because local nationals

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appropriate, on a case by case basis. In any event, the courts "will not ignore the plain, unambiguous language of a statute where it achieves its intended purpose without any absurd result but simply has additional unintended consequences." *Olden v. LaFarge Corp.*, 383 F.3d 495, 506 (6th Cir. 2004) (citing, *inter alia*, *Brogan v. United States*, 522 U.S. 398, 403 (1998)).

may be just as affected by the "obligations or conditions" of their employment, there is no basis for categorically excluding them from the doctrine. ER 7.

Employer holds up the War Hazards Compensation Act as a model of coverage restrictions on local nationals. Emper's Brf. at 23-24. But Employer's reliance on these WHCA restrictions is misplaced. As an initial matter, the restrictions apply only to direct action claims against the United States, and not to claims for reimbursement of DBA compensation. *Supra* at 9-10. Thus the scope of coverage for local nationals for WHCA reimbursement claims is the same as under the DBA, which makes sense since the reimbursement is for DBA compensation in the first place. *See* 20 C.F.R. § 61.102(c) (accepting final DBA award as prima facie evidence of entitlement). Even if this coverage was not coextensive, the absence of any similar exclusionary language in the DBA regarding the zone of special danger doctrine suggests that Congress wanted local nationals to receive the full benefit of the doctrine. *See Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122 (1995) (that a provision is included in only one of two related statutes suggests Congress did not intend provision to apply to second statute).

In any event, even the WHCA's coverage restrictions for direct claims by local nationals are much less draconian than Employer's proposed categorical exclusion under the DBA. When applicable, the WHCA compensates any injury that "results from a war-risk hazard, whether or not such person then actually was engaged in the course of his employment." 42 U.S.C. § 1701(a). This broad coverage applies to local nationals, except when it is established that the injured local national resides at or near the place of employment *and* resides there for reasons other than "the exigencies of his employment." 42 U.S.C. § 1701(d).[14] By comparison then, these WHCA restrictions are, by their terms, more narrow than the Employer's proposed categorical DBA exclusion and apply only when justified by the particular facts of the case, not as an overarching rule of law that excludes an entire class of workers. Thus, Employer's reliance on the WHCA restrictions is overstated.

Employer's parade of horribles, Emper's Brf. at 24 (coverage for local national watching television or attending religious functions), also reflects a fundamental misunderstanding of the zone of special danger doctrine. The application of the doctrine's requirement that the injury arise from the

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[14] When both factors are present, the WHCA limits coverage to injuries occurring in the course of employment. *Supra* at 9-10.

"obligations or conditions of employment" will necessarily differ for a U.S. worker who must travel overseas for employment and a local national who may be living and working at home. *Cf.* 42 U.S.C. § 1701(d).

For example, if Jetnil had been hurt fishing on a day off on his home island, rather than between shifts during a four-day overnight work assignment on an uninhabited island with restricted access, the Employer would have a strong argument against application of the zone of special danger doctrine. In that hypothetical case, Jetnil's activities would not have arisen from the conditions or obligations of his employment. And they would have been "so thoroughly disconnected from the service to the employer that it would be unreasonable to say that the injury occurred in the course of employment." *O'Leary*, 340 U.S. at 507. Likewise, if instead of fishing on his day off, Jetnil had been injured while watching television in his living room or walking to his church, Emper's Brf. at 24, his activities would, in all likelihood, not be found covered because they did not arise from the obligations and conditions of his employment. By contrast, those same activities by a U.S. resident likely would be found covered, because the U.S. worker's sole reason for being in the Marshall Islands would be his DBA employment, *i.e.*, any injury would therefore arise from the obligations or conditions of his employment.

Thus, it is obvious that the zone of special danger doctrine will apply under more limited circumstances to local nationals than to U.S. workers. But to acknowledge this possibility is to refute Employer's contention that the doctrine cannot, as a matter of law, apply under any circumstances to local nationals. Rather, for local nationals, as with U.S. citizens, the application of, and compensation under, the zone of special danger doctrine will depend on the totality of particular facts and circumstances in each case. *See DiCecca*, 792 F.3d at 221; ER 7. And the determination of the doctrine's application is particularly reserved to the ALJ as factfinder. *Id*.; *O'Keefe v. Smith*, 380 U.S. at 364; *Hastorff-Nettles*, 203 F.2d at 643; ER 7.

In this case, as we discuss below, the ALJ properly applied the doctrine and found Jetnil entitled to compensation.

## II. JETNIL'S INJURY IS COMPENSABLE BECAUSE IT AROSE OUT OF THE CONDITIONS OF HIS EMPLOYMENT, AND OCCURRED WHILE HE WAS ENGAGED IN A REASONABLE, FORESEEABLE ACTIVITY.

The Employer argues that the zone of special danger doctrine should not apply to Jetnil because he was injured while engaged in an activity – reef fishing – which he typically does, regardless of work. This argument is without merit.

As explained above, *supra* at 6-9, 21, and as the ALJ correctly found, the zone of special danger doctrine requires only that the obligations and

conditions of Jetnil's employment gave rise to his injury, and that his activity at the time of the injury was foreseeable in light of those obligations and conditions. *See O'Leary*, 340 U.S. at 506-07; *Kalama Services*, 354 F.3d 1085; *DiCecca*, 729 F.3d at 220. Both requirements are met here. First, it is clear that Jetnil's 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 permitted there – had it not been a requirement of his job. And the activity he was engaged in when injured – reef fishing – was foreseeable. The Employer concedes as much, noting repeatedly that reef fishing was "a traditional Marshallese activity" that Jetnil engaged in regularly, Emper's Brf. at 2, 15, 18,19, 29-30, and that Jetnil was known to store his catch in the Employer's refrigerator on Gagan Island. *Id*. at 30 (citing ER 561, 576); *see* ER 23 (ALJ finding that reef fishing was popular in the Marshall Islands, and thus foreseeable).[15]

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[15] Adding to that foreseeability is the fact that Jetnil was diabetic, and had been instructed by his doctor to eat fish whenever possible. While the Employer argues that there was insufficient evidence that the foods provided by the Employer – bread, hot dogs, bacon, chicken, and rice – were not suitable for a diabetic, Emper's Brf. at 35-36, the suitability of those foods is not at issue. The only issue – and it is a minor one – is whether Jetnil's reef fishing was made even more foreseeable because his doctor instructed him to eat fish. The Employer does not argue that Jetnil's doctor never gave him such an instruction, that such an instruction did not contribute to the foreseeability of Jetnil reef fishing, or that his reef fishing was unforeseeable

The Employer attempts to turn that foreseeability to its favor, arguing that the DBA cannot possibly cover activities that a worker would normally engage in during his off-duty hours. But that is exactly what the zone of special danger does. Indeed, the courts and Board have found compensable injuries that occurred while a worker was riding a motor scooter after work hours, *O'Keefe v. Pan American*, 338 F.2d at 322; driving to a nearby town for a drink, *O'Hearne*, 335 F.2d at 71 (driver) and *Gondeck*, 382 U.S. 25 (1965) (passenger); hitchhiking, *Takara v. Hanson*, 369 F.2d 392 (9th Cir. 1966); sitting in a parked car, *Self*, 305 F.2d 699; being driven to on-site housing after a vacation day, *Hastorff-Nettles*, 203 F.2d 641; taking a taxi to get groceries, *DiCecca*, 729 F.3d 214; going boating on a weekend, *O'Keefe v. Smith*, 380 U.S. 359; and even engaging in horseplay in a bar, *Kalama Services*, 354 F.3d 1085.

These are all activities that the workers could just as easily have engaged in while off-duty at home. But that fact had no bearing on their compensability because the zone of special danger doctrine covers "risks that might occur anywhere but in fact occur where the employee is injured." *DiCecca*, 792 F.3d at 220. Thus, the fact that Jetnil could have been injured

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with or without that instruction. Whether the Employer-provided foods were suitable for a diabetic, therefore, simply does not matter.

while reef fishing on his home island is simply irrelevant. He was, in fact, injured on the uninhabited Gagan Island, which had *no* medical facilities and where he was sent by his Employer to fulfill the obligations and conditions of his employment. And because he was also engaged in a reasonable, foreseeable activity at the time of his injury, that injury and the resulting disability fall within the zone of special danger doctrine and are compensable under the DBA.

## CONCLUSION

For the foregoing reasons, the Court should affirm the agency determination that Jetnil is entitled to benefits under the DBA.

Respectfully submitted,

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## STATEMENT OF RELATED CASES
Pursuant to Ninth Circuit Rule 28-2.6

The Director is aware of no related cases.

/s/ Matthew W. Boyle
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## CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Ninth Circuit Rule 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 7,134 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

## CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2016, I electronically filed the foregoing Brief for the Federal Respondent through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
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