No. 14-1742

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BATTELLE MEMORIAL INSTITUTE
and
VIGILANT INSURANCE COMPANY,

Petitioners

v.

SANDRA DICECCA
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

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

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
MARK REINHALTER
Counsel for Longshore
GARY K. STEARMAN
Counsel for Appellate Litigation
MATTHEW W. BOYLE
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2117, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5660
Attorneys for the Director, Office of Workers' Compensation Programs

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SANDRA DICECCA
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UNITED STATES DEPARTMENT OF LABOR,

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

This appeal arises from a claim for death benefits under the provisions of 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 claim was filed by Sandra DiCecca (Claimant), based on the death of her husband, Gerald DiCecca (DiCecca or

Employee), while he was employed by Battelle Memorial Institute (BMI or Employer) in Tbilisi, Georgia. The Administrative Law Judge (ALJ) had jurisdiction to hear the claim under 33 U.S.C. §§ 919(c), (d). His April 26, 2013 order awarding benefits became effective on April 29, 2013, when it was filed in the office of the district director. Employer's Addendum (Add.) at 7; 33 U.S.C. § 921(a).

BMI filed a notice of appeal with the Benefits Review Board (Board) on May 17, 2013, App. 60-63, 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 May 9, 2014, the Board issued a final Decision and Order, affirming the ALJ's decision.

BMI was aggrieved by the Board's decision, and filed a petition for review with this Court on July 7, 2014, within the sixty days allowed under 33 U.S.C. § 921(c). The DBA provides for judicial review in the circuit court within whose jurisdiction the office of the district director who filed and served the compensation order is located. 42 U.S.C. § 1653(b); *Truczinskas v. Director, OWCP,* 699 F.3d 672, 674-76 (1st Cir. 2012). Here, the district director's office is located in Boston, within this Court's territorial jurisdiction. Consequently, this Court has jurisdiction over this appeal under 33 U.S.C. § 921(c) and 42 U.S.C. § 1653(a).

STATEMENT OF THE ISSUE

To be eligible for benefits under the DBA, a worker injured in overseas employment must establish only that his injury resulted from the obligations and conditions of his employment. Here, DiCecca's employment with BMI required him to live in Tbilisi, Georgia. He was killed in an automobile collision while taking an employer-provided taxi to a grocery store. Is his death covered by the DBA?

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The DBA applies the provisions of the Longshore Act

> to the injury or death of any employee engaged in any employment . . . (4) under a contract entered into with the United States or any executive department . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work . . ..

42 U.S.C. § 1652(a)(4). A "public work" includes "projects or operations under service contracts and projects in connection with the national defense." 42 U.S.C. § 1651(b)(1).

The Longshore Act provides compensation for injuries or deaths that "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-Mason, Inc., 340 U.S. 504, 506-07 (1951). Thus, "foreseeable, if not foreseen," employee activities are "one of the risks of the employment, an incident of the service, . . . and so [injuries arising therefrom] are covered by the statute." *Id*. at 507. By contrast, there is no DBA coverage in those "cases where an employee had 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).

II. STATEMENT OF FACTS

DiCecca worked for BMI as a facility engineer in a United States Department of Defense laboratory 12-15 kilometers from downtown Tbilisi, Republic of Georgia. App. 137, 157, 202. He worked five days per week from 8 a.m. to 5 p.m., but was considered to be "on-call" at all times. App. 188, 95.

BMI did not furnish on-site housing for its employees; instead workers were required to secure their own housing in Tbilisi with a $1,100

monthly housing allowance. App. 93. BMI also paid DiCecca hardship pay amounting to 25% of his salary. App. 138, 188-89. Hardship pay was provided "in those host locations where the living conditions are unusually difficult or dangerous and/or facilities are inadequate." App. 138, 203.

In addition, BMI provided its employees with vouchers for taxi service, amounting to 700 Lari per month,[1] that could be used anywhere within a 25 kilometer radius of the city center of Tbilisi for any personal, recreational, or social purpose, including grocery shopping. App. 178-182, 99. Among other uses, employees typically used the taxi vouchers each workday to get to a local hotel, from which the Employer provided bus service to the lab. App. 93, 186-87. DiCecca's widow testified that driving conditions were not typical of those in the United States, stating that it was not safe to cross the streets, and that cars occupied more lanes than were marked on the street. App. 88-89, 96-98.

The Employer's laboratory had a lunch room with microwaves and refrigerators, but did not have a cafeteria, restaurant, or grocery outlet. App. 17. Employees therefore purchased their own food in Tbilisi. There was a

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[1] The Lari is the Georgian currency. At the time of DiCecca's automobile accident, one Lari was worth about 61 cents, making 700 Lari worth approximately $430. *See* http://www.oanda.com/currency/historical-rates/.

corner market within a ten-minute walk of DiCecca's rented apartment, but it was unsanitary: the meat had flies on it. App. 89-90. To obtain "safe" fresh food, DiCecca would travel by taxi 20-30 minutes to a larger, Walmart-like market that was located within the allowable 25 kilometer radius. DiCecca and one of his BMI colleagues regularly took a taxi together to that grocery store. App. 190.

On May 26, 2012, DiCecca used a voucher to take a taxi to that grocery. App. 100. The taxi was struck head-on by another car, and DiCecca died the next day. App. 100, 221, 225.

III. Decisions Below

The ALJ identified the sole issue before him as whether DiCecca's death arose out of and in the course of his employment under the DBA's zone of special danger doctrine. Add. 8. He concluded that it did.

Quoting *O'Leary*, 340 U.S. at 506-07, the ALJ explained that "all that is necessary [for DBA coverage] is that the 'obligations or conditions of employment create the 'zone of special danger' out of which the injury arose,'" and the accident be one of the foreseeable risks of that employment. Add. 11. He further observed that the courts have consistently found DBA coverage of claims arising from overseas automobile accidents, like DiCecca's, that occur during off-duty hours. Add. 11 (citing *Gondeck v.*

Pan American World Airways, Inc., 382 U.S. 25 (1965); *Takara v. Hanson*, 369 F.2d 392 (9th Cir. 1966); *Pan American World Airways, Inc. v. O'Hearne*, 335 F.2d 70, 71 (4th Cir. 1964); *O'Keefe v. Pan American World Airways, Inc.*, 338 F.2d 319, 322 (5th Cir. 1964); *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962); *Hastorf-Nettles v. Pillsbury*, 203 F.2d 641 (9th Cir. 1955)).

The ALJ thus concluded that Claimant was entitled to death benefits because the activity that led to DiCecca's death arose from the obligations and conditions of employment and was foreseeable. Add. 12. He found that the conditions of DiCecca's employment included residing in Tbilisi, working in a "fairly isolated" lab where food could not be purchased, and using the taxi service that BMI made "available to its employees at all times for any nonwork reason." *Id*. DiCecca's automobile accident while using the taxi service to shop for groceries was therefore a foreseeable risk and compensable according to the ALJ. *Id*.

The ALJ rejected BMI's contention that the zone of special danger doctrine applies only when the employee is injured (1) while engaged in "reasonable and recreational social activities," or (2) due to the "special dangers of the employment locale increasing the risk of injury." Add. 11. He found that restricting DBA coverage to these two categories – and

excluding any injury resulting from an activity that did not neatly fit into either – was "unsupported by the language of the DBA, its underlying policy goals, and precedent." Add. 12. Employer's attempted categorization, the ALJ observed, simply "ignores *O'Leary* and its progeny's emphasis on the foreseeability of the activity resulting in the injury and whether or not it was induced by the conditions and obligations of employment." Add. 12.

The Board affirmed. Add. 1. Like the ALJ, it found no legal support for Employer's attempt to limit the zone of special danger doctrine to two special circumstances. It found that under *O'Leary*, DBA coverage exists when an injury arises from "one of the risks of employment, an incident of the service, foreseeable, if not foreseen." Add. 3 (quoting *O'Leary*, 340 U.S. at 507). It agreed with the ALJ that it was foreseeable that DiCecca would take a taxi to get groceries, and that his fatal automobile accident, even if not foreseen, was also foreseeable. Add. 5. The Board thus agreed that DiCecca's death was covered by the DBA.

SUMMARY OF ARGUMENT

When an employee works outside the continental United States on a public works project, the zone of special danger doctrine applies. The doctrine treats an employee's reasonable and foreseeable activities, including personal activities, as employment-related and provides DBA

coverage for injuries that arise while engaged in such activities. It is entirely unnecessary under the DBA to establish either a direct causal relationship between employment and injury or a benefit to the employer from the activity that occasioned the injury.

The ALJ properly applied the zone of special danger doctrine and awarded benefits here because BMI provided its workers with a taxi service; DiCecca reasonably and foreseeably opted to use the service and was tragically, but foreseeably, involved in a fatal automobile accident.

The Court should affirm the award of benefits.

STANDARD OF REVIEW

This appeal raises a question of law. The Court reviews legal questions *de novo*. *Bath Iron Works Corp. v. U.S. Dept. of Labor*, 336 F.3d 51, 55 (1st Cir. 2003). The Director's interpretation of the DBA expressed in a legal brief is entitled to *Skidmore* deference. *Neely v. Benefits Review Bd.*, 139 F.3d 276, 281 (1st Cir. 1998) (citing *Metro. Stevedore Co. v. Rambo,* 521 U.S. 121, 136 (1997) (Director's reasonable interpretation entitled to weight under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The weight given to an agency's position "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

ARGUMENT

I. DICECCA'S DEATH IS COVERED BY THE DBA BECAUSE THE ACTIVITY THAT LED TO HIS DEATH WAS REASONABLE AND FORESEEABLE, AND AROSE FROM THE CONDITIONS OF HIS EMPLOYMENT.

Generally speaking, the Longshore Act covers injuries (including death) that arise out of and in the course of employment. 33 U.S.C. § 902(2). Under the DBA, however – where injured individuals typically work and reside overseas – the Supreme Court has broadly interpreted this mandate, requiring only 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 506-07 (internal citations omitted); *accord Truczinskas*, 699 F.3d at 677 ("[I]t is enough to connect employment with a suffered harm if the harm arose out of a 'zone of special danger' created by 'the obligations or conditions of employment.'") (quoting *O'Leary*, 340 U.S. at 507). Accordingly, "foreseeable, if not foreseen," activities that result in injury are "one of the risks of the employment, an incident of the service, . . . and so covered by the statute." *O'Leary*, 340 U.S. at 507.[2]

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[2] Professor Larson likens coverage under the zone of special danger doctrine to coverage under state workers' compensation acts for traveling employees:

DiCecca's injury clearly falls within the zone of special danger doctrine and DBA coverage. His use of a taxi to go grocery shopping was both reasonable and foreseeable: workers must eat, the BMI laboratory had no cafeteria, and BMI provided taxi vouchers to its employers for any purpose, including grocery shopping. App. 180-81, 185. Indeed, one of DiCecca's BMI colleagues testified that he and DiCecca regularly used taxis to grocery shop at the very same grocery store.[3] App. 190. In short, it is certainly more reasonable and foreseeable that an employee will take an

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> [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).

[3] This is not to say that Employer's taxi vouchers were a necessary prerequisite to coverage (though they make for an even stronger case here). The connection between DiCecca's employment and his accident is that his employment required him to live in Tbilisi, and living in the city required him to travel in the city to obtain the necessities of daily life. Whether he used transportation made available by Employer or some other means makes no difference in establishing coverage. *See, e.g.*, *O'Keefe v. Pan American*, 338 F.2d 319 (coverage of worker injured while riding friend's motor scooter); *Edmonds v. Al Salam Aircraft Co., Ltd.*, 2002 WL 34708065 (Ben. Rev. Bd. Apr. 5, 2002) (unpub.) (coverage of worker injured while driving own car to grocery store outside of employer's compound).

employer-provided taxi to buy groceries than attempt a rescue by diving into a dangerous channel where swimming is expressly forbidden (*O'Leary*) or overload a boat with sand and attempt to navigate it across a lake on his day off (*O'Keefe v. Smith,* 380 U.S. at 365). Yet the Supreme Court found DBA coverage for both workers.

Finally, motor vehicle accidents are a foreseeable fact of modern life. For this reason, courts have broadly and uniformly applied the zone of special danger doctrine in finding DBA coverage of injuries arising out of motor vehicle accidents. *See* 9 LARSON § 149.04[2], 149-12 – 149-13 ; *Gondeck*, 382 U.S. 25, and *O'Hearne*, 335 F.2d 70 (companion cases in which two workers were killed in the same jeep accident on a small island in the Bahamas); *Self*, 305 F.2d 699 (employee injured on Guam when an army weapons carrier collided with the parked car in which she was a passenger); *Hastorf-Nettles*, 203 F.2d 641 (employee injured in a car accident while returning from an off-site holiday to lodgings on Alaskan military base); *Takara*, 369 F.2d 392 (9th Cir. 1966) (employee hit by a truck after forgoing employer-provided transportation and hitchhiking back to campsite following dinner at local restaurant in Guam); *O'Keefe v. Pan American*, 338 F.2d at 322 (employee killed in traffic accident on Grand Turk Island in

the British West Indies while riding friend's motor scooter after regular duty hours).[4]

BMI tries to distinguish these cases, arguing that the courts were focused on the remoteness of the employees' workplaces, and the resulting lack of recreational activity available.[5] Op. Br. at 14. But the courts' mention of remoteness was not an analytical end in itself. Rather, it was merely a means to determine whether the activities giving rise to the employees' injuries were – in the context of their employment – reasonable and foreseeable. Put simply, the courts found that it was reasonable and foreseeable for the injured employees to seek recreation away from their worksites because there simply was not much to do there. *See O'Hearne*, 335 F.2d at 71; *Self*, 305 F.2d at 702; *Hastorf-Nettles*, 203 F.2d at 643. That

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[4] The employee in *O'Keefe v. Pan American*, like DiCecca here, was on call at all times. The court found that "[a]n employee injured on Grand Turk while off-duty but on call is like a seaman injured ashore on fun of his own. Short of willful misconduct, the seaman is still in the service of his ship." 338 F.2d at 322 (internal quotations omitted).

[5] To the extent that BMI still contends (as it did below) that grocery shopping is not covered because it is neither a social nor recreational activity, *see* Op. Br. at 12, 22, that theory would draw arbitrary and nonsensical lines between covered and noncovered activity. Under it, there would be coverage of a worker while dining/socializing with friends at a restaurant, but not of one buying groceries for his own meal. The bottom line is that, just as recreation and socializing are expected conditions of employment, so, too, is buying groceries.

same reasoning applies with equal force here: DiCecca shopped for groceries in Tbilisi because the BMI laboratory had no outlet for him to buy food. [6]

As noted *supra* at 4, the Supreme Court drew the line against DBA coverage only where the "employee had 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*, 380 U.S. at 362 (*quoting O'Leary*, 340 U.S. at 507). Cases finding no coverage for this reason are inapposite here – they are based on unusual, if not extreme, facts far removed from the necessary and mundane chore – a grocery shopping trip – that led to DiCecca's injury. *See Gillespie v. Gen. Elec. Co.*, 21 BRBS 56

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[6] Contrary to BMI's argument, Op. Br. at 23, it is not necessary to establish proof of a heightened danger in order to establish coverage under the zone of special danger doctrine. *See O'Leary*, 340 U.S. at 506-07. In any event, DiCecca's widow testified that driving conditions in Tbilisi were worse than in the United States, with cars, for example, occupying more lanes than were marked on the street. App. 96-98. And statistically speaking, motor vehicle fatalities occur far more frequently in the Republic of Georgia than in the United States (15.7 deaths per 100,000 population compared to 11.4 deaths per 100,000 population, or at a 37.7% higher rate (15.7 - 11.4 = 4.3; 4.3/11.4 = .37719)). World Health Organization, *Global Status Report on Road Safety 2013*, Table A2, pages 246, 250 (available at http://www.who.int/violence_injury_prevention/road_safety_status/2013/report/en/). To confirm calculation, go to http://www.csgnetwork.com/percentpercapitachangecalc.html.

(1988), *aff'd mem.* 873 F.2d 1433 (Table) (1st Cir. 1989) (no coverage for worker who inadvertently hanged himself during autoerotic activity); *R.F. v. CSA, Ltd*., 43 BRBS 139 (2009) (no coverage for employee claiming psychological harm from cosmetic chemical 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) (no coverage for claimant/widow who participated in employee-husband's murder); *cf. Truczinskas,* 699 F.3d at 679 (no coverage when suicide and "misadventure," *i.e.*, accidental autoerotic strangulation, were only possible causes of death).

In sum, the ALJ correctly found both that DiCecca's accident arose from the conditions and obligations of his employment, and that the activity he was engaged in at the time of his death was reasonable and foreseeable. His death, therefore, is covered by the DBA.

CONCLUSION

The Court should affirm the decisions below.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Matthew W. Boyle
MATTHEW W. BOYLE
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.,
Rm. N-2119
Washington, D.C. 20210
(202) 693-5660
Attorneys for the Director, Office of
Workers' Compensation

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 3,422 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2014, I electronically filed the foregoing Brief for the Federal Respondent through the appellate CM/ECF system, and that all participants listed below are registered users of, and will be served through, the CM/ECF system.

Robert N. Dengler, Esq.
Flicker, Garelick & Assoc., LLP
45 Broadway, 26th Floor
New York, NY 10006

Howard S. Grossman, Esq.
Grossman Attorneys at Law
1098 NW Boca Raton Blvd.
Boca Raton, FL 33432

Thomas A. Tarro, III, Esq.
Kris Mancuso Marottii, Esq.
Tarron & Marotti Law Firm, LLC
Summit East, Suite 330
300 Centerville Rd.
Warwick, RI 02886

/s/ Matthew W. Boyle
MATTHEW W. BOYLE