U.S. Department of Labor

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

BRB No. 20-0019

LARA M. SABANOSH (Widow of CHRISTOPHER M. TUR) Claimant-Respondent	)	DATE ISSUED: 06/25/2020
v.	)	
NAVY EXCHANGE SERVICE COMMAND/NEXCOM Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order on Motion for Reconsideration and Erratum of J. Alick Henderson, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and David C. Barnett (Barnett, Lerner, Karsen & Frankel, PA), Fort Lauderdale, Florida, for claimant.

R. John Barrett and Megan B. Caramore (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order on Motion for Reconsideration and Erratum (2018-LHC-00874) of Administrative Law Judge J. Alick Henderson rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., (the Act), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq*. (the NFIA). We must affirm the administrative law judge'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 sought benefits under the Act alleging the death of her husband, Christopher M. Tur (decedent), was causally related to his work as the Loss Prevention and Safety Manager for the employer's Base Exchange, a NFIA entity, at Naval Station Guantanamo Bay, Cuba. At the time of his death, decedent was engaged in a 24 month "tour of duty." Decedent's job required him and his family to live on base. Decedent and his family were encouraged but not required to participate in numerous on-base community events the Morale, Welfare, and Recreation (MWR) division of the base organized.

On the evening of January 9, 2015, decedent and claimant attended a "Hail and Farewell" party at the base's Officer's Club to honor both the outgoing and incoming executive officers. At the party, a verbal altercation arose between decedent, his wife, and Captain John R. Nettleton, the base commander, when decedent accused his wife and Captain Nettleton of having an extramarital affair. The two men subsequently left the gathering and did not return. Later that night, decedent appeared at Captain Nettleton's residence and a physical altercation between them ensued. Decedent never returned home.

A search commenced the next day and decedent's body was recovered from the Atlantic Ocean on January 11, 2015. Two autopsies were performed: Dr. Christopher Gordon listed decedent's cause of death as "probable drowning in the setting of ethanol and fluoxetine [an ingredient in Prozac] toxicity," EX 2; Dr. Zhongxue Hua listed it as "drowning with recent blunt injuries (circumstances unknown)," with "recent alcohol and Prozac intoxication" as contributing causes, EX 3.

Claimant filed a Claim for Compensation by Widow under the Federal Employees' Compensation Act, 5 U.S.C. §8101, on December 26, 2017, EX 8, which was denied on February 22, 2018, due to lack of jurisdiction. EX 8. Employer responded to claimant's December 26, 2017 claim by filing a First Report of Injury and Notice of Controversion

under the Act on January 31 and February 1, 2018, respectively. EX 9. On February 12, 2018, claimant and her two children with decedent, both full-time students under the age of 23, filed a claim for death benefits under the Act. 33 U.S.C. §909; EXs 10, 12, 14.

The administrative law judge found claimant's claim for death benefits timely filed and covered under the NFIA. He found the circumstances of decedent's employment placed him within a "zone of special danger" out of which his death arose, and claimant's claim compensable under the Act. The administrative law judge therefore awarded death benefits to claimant and her daughters in accordance with Sections 9(b) and (c) of the Act, 33 U.S.C. §909(b), (c). Order on Recon and Erratum at 1.

On appeal, employer challenges the administrative law judge's conclusion the claim is timely filed and his application of the "zone of special danger" doctrine to find decedent's death arose out of his employment.[1] Claimant and the Director, Office of Workers' Compensation Programs (the Director), both respond, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

Section 13(a)

Employer argues the administrative law judge erred in finding claimant's claim timely under Section 13(a), 33 U.S.C. §913(a), because it was filed on December 26, 2017, more than one year after decedent's January 11, 2015 death. Notwithstanding its failure to file a Section 30(a) report, 33 U.S.C. §930(a), employer contends it rebutted the Section 20(b) presumption, 33 U.S.C. §920(b), that claimant's claim was timely filed by presenting substantial evidence it had no knowledge of the work-relatedness of decedent's death until after claimant filed her claim. Employer further contends the administrative law judge's finding that its knowledge of the employee's death at Guantanamo, alone, triggered the Section 30(a) reporting requirement is not in accordance with established precedent providing an employer is not required to file a Section 30(a) report until it is aware of the work-relatedness of an employee's injury or death.

Section 13(a) applies in traumatic death cases and provides the right to compensation is barred unless a claim is filed within one year of the date the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the

[1]We affirm the administrative law judge's finding that Section 3(c), 33 U.S.C. §903(c), does not bar claimant's claim, as that finding is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

relationship between the death and the employment. 33 U.S.C. §913(a);[2] *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). In the absence of contrary substantial evidence it is presumed, pursuant to Section 20(b) of the Act,[3] the claim was timely filed. *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). In order to rebut the Section 20(b) presumption, an employer must establish either the claimant gained "awareness" of the work-relatedness of the death before employer did and that the proscriptive period has expired, or the employer complied with the requirements of Section 30(a) by filing a first report of injury or death.[4] *See*

---

[2]Section 13(a) provides:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

[3]Section 20(b) provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary--
>
> ***
>
> (b) That sufficient notice of such claim has been given.

33 U.S.C. §920(b).

[4]Based on the effect of the Section 20(b) presumption, employer has the initial burden to produce substantial evidence of its lack of knowledge, then claimant has to show she had awareness within the meaning of Section 13(a). *Blanding v. Director, OWCP*, 186 F.3d 232, 237, 33 BRBS 114, 117(CRT) (2d Cir. 1999). Employer's contention that the administrative law judge applied "unequal reasonableness standards" to claimant and employer is thus without merit.

Bustillo v. Southwest Marine, Inc., 33 BRBS 15 (1999); 20 C.F.R. §§702.201-702.205. Section 30(f), 33 U.S.C. §930(f),[5] provides that where an employer has been given notice or has knowledge of the death and fails to file the Section 30(a) report, the statute of limitations does not begin to run until the report is filed. *Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); 20 C.F.R. §§702.201-702.202; *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd*, 924 F.2d 105 (5th Cir. 1991) (table). Thus, for Section 30(a) to apply, the employer or its agent must have notice of the injury or death, or knowledge of the injury or death and its work-relatedness; the employer may overcome the Section 20(b) presumption by providing substantial evidence that it never gained knowledge or received notice of the injury or death for Section 30 purposes. *See Blanding*, 186 F.3d 232, 33 BRBS 114(CRT); *Bustillo*, 33 BRBS 15. Knowledge of the work-relatedness of an injury or death may be imputed where the employer knows of the injury or death and has facts that would lead a reasonable person to conclude compensation liability is possible and further investigation is warranted. *Stark v. Washington Star Co*., 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

The administrative law judge found employer had knowledge of decedent's death as early as January 12, 2015, but did not file a First Report of Injury until January 31, 2018. He then addressed whether and when employer had sufficient knowledge of the possible work-relatedness of decedent's death. The administrative law judge determined the "ambiguous circumstances" surrounding decedent's death "on a restricted, isolated island base" should have "led a reasonable man to conclude that compensation liability is at least possible." Decision and Order at 6.

This finding is within the administrative law judge's discretion. *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge is entitled to draw "the inferences he deems most reasonable in light of the evidence as a whole and the common sense of the situation"). Decedent had arguments and a physical altercation with the base commander, commencing at a base social event, on the night he disappeared. Additionally, at least part of decedent's alcohol consumption occurred at the Hail and Farewell party – a social event

---

[5]Section 30(f) provides in pertinent part that:

> the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, *until* such report shall have been furnished as required by the provisions of subsection (a) of this section.

33 U.S.C. §930(f) (emphasis added).

with a connection to decedent's job. Moreover, decedent's death prompted a contemporaneous investigation by the United States Navy. *See* EX 5. Thus, the administrative law judge reasonably found employer had adequate knowledge of the possible work-relatedness of decedent's death to warrant further investigation and to require the filing of a Section 30(a) report.[6] *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

Because employer did not file a Section 30(a) report until January 31, 2018, Section 30(f) tolled the time for claimant to file her claim until that date. We therefore affirm the administrative law judge's finding that claimant's claim, filed on February 12, 2018, was timely as rational, supported by substantial evidence, and in accordance with law. *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980).

Zone of Special Danger Doctrine

Employer contends the administrative law judge erroneously applied the "zone of special danger doctrine" in this NFIA case. Employer maintains "clear Board precedent" establishes this doctrine applies to claims arising under the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.*, but not those arising under the NFIA. Employer alternatively contends that if the zone of special danger doctrine applies, the specific facts of this case -- including decedent's intoxication, personal altercation concerning an alleged extramarital affair, and subsequent death under questionable circumstances -- qualify as "astonishing risks" thoroughly disconnected from decedent's employment.

In response, the Director asserts the circumstances of decedent's employment, as well as the relationship between the Longshore Act, the DBA and the NFIA, support application of the zone of special danger doctrine. She contends the "obligations or conditions" of decedent's job created the zone of special danger from which his death arose. As the administrative law judge found, decedent's job required him to live and work on base, confined him to the base even during non-duty hours and weekends, and limited all social and recreational activities to the base, thereby establishing his death fell "within

[6]An investigation regarding the circumstances of decedent's death began almost immediately following the recovery of his body. Employer argues that both it and claimant simultaneously had the requisite knowledge for purposes of the Act, either around the time of decedent's death in 2015, or not until 2017. Under the former scenario, employer's failure to file the Section 30(a) Report of Injury would have tolled the Section 13(a) statute of limitations, while under the latter scenario the Section 13(a) statute of limitations would not have commenced until 2017. Thus, under either scenario, claimant's claim for benefits is timely.

the foreseeable risks occasioned by or associated with the employment abroad." *See Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 220, 49 BRBS 57, 60(CRT) (1st Cir. 2015). Regardless of whether decedent's death by drowning resulted from his physical fight with Captain Nettleton or was simply an accident which occurred on his way home from the social event, the Director asserts it was a foreseeable risk of working at an isolated coastal location such as the Guantanamo Bay Naval Station. She maintains that because the doctrine is not tied to a particular statute, but to the circumstances of the employment, employer's contention that the doctrine can apply only under the DBA fails.

Under the Longshore 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); *see* 33 U.S.C. §902(2). The Supreme Court of the United States has held, in cases arising under the DBA, an employee may be within the course of employment even if the employee's injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" overseas create a "zone of special danger" out of which the injury arose. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *see also Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *O'Keeffe*, 380 U.S. 359. The zone of special danger doctrine extends coverage in overseas employment cases such that time and space limits or whether the activity is related to the actual job requirements may not remove an injury from the Act's coverage. *O'Leary*, 340 U.S. at 506; *see also N.R.* [*Rogers*] *v. Halliburton Services*, 42 BRBS 56 (2008) (McGranery, J., dissenting). The parties raise two issues relating to the zone of special danger doctrine in this case: 1) Is the doctrine applicable to the NFIA? and 2) If it is applicable, did the "obligations or conditions of decedent's employment" create a "zone of special danger" out of which his death arose? We hold it applies under the facts of this case.

Zone of Special Danger Doctrine and Overseas NFIA Cases

The Longshore Act, as extended by the DBA, covers "any employee engaged in any employment . . . upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone)." 42 U.S.C. §1651(a)(2). The NFIA extends Longshore Act benefits for injuries occurring to employees of nonappropriated fund instrumentalities who are "a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States." 5 U.S.C. §8171(a)(1).[7] Prior to the

[7]Section 8171(a) of the NFIA provides in pertinent part:

NFIA's enactment in 1952, overseas employees of nonappropriated fund instrumentalities working on military bases were covered by the DBA. The later-enacted NFIA pre-empts the DBA for overseas citizen employees of a nonappropriated fund instrumentality and applies as their exclusive remedy. 5 U.S.C. §8173; *see generally Army & Air Force Exch. Serv. v. Hanson*, 360 F. Supp. 258 (D. Haw. 1970); *A.P.* [*Panaganiban*] *v. Navy Exch. Serv. Command*, 43 BRBS 123 (2009). Given the shared purposes and history of the two Acts, however, we agree with the Director and claimant that the zone of special danger doctrine can apply to overseas employment under the NFIA.

The zone of special danger doctrine includes coverage for injuries, without any direct causal connection to an employee's particular job duties, so long as those injuries fall within the foreseeable risks occasioned by or associated with the claimant's employment abroad. *See DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT). "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." *Gondeck*, 382 U.S. at 27; *see also O'Keeffe*, 380 U.S. at 362; *O'Leary*, 340 U.S. at 507. As the Supreme Court has articulated, a key element regarding the applicability of the zone of special danger doctrine is "the exacting and unconventional conditions" of the overseas employment, *O'Keeffe*, 380 U.S. at 363; conditions which, in certain instances, may be as equally "exacting and unconventional" for employees working for nonappropriated fund instrumentalities outside the United States as they are to employees covered by the DBA.

The Board's decisions involving the zone of special danger doctrine in NFIA cases do not preclude such an application. *See Harris v. England Air Force Base*, 23 BRBS 175 (1990); *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989). In those cases, the Board limited application of the zone of special danger doctrine to DBA cases.[8] *Id.* Citing *O'Keeffe*, the Board stated the zone of special danger test is

---

> (a) The Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 *et seq.*) applies with respect to disability or death resulting from injury, as defined by section 2(2) of such Act (33 U.S.C. §902(2)), occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title…. who is –
>
> (1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States;

5 U.S.C. §8171(a)(1).

[8]In *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988), the Board affirmed the administrative law judge's application of the zone of special danger doctrine

well-suited to DBA cases because the conditions of the employment place the claimant in a foreign setting exposed to dangerous conditions. *Harris*, 23 BRBS at 178-179; *Cantrell*, 22 BRBS at 374 n.3.[9]

Neither *Harris* nor *Cantrell* involved overseas employment; both claimants were injured on domestic air force bases. While a distinction in employment circumstances may foreclose application of the zone of special danger doctrine to domestic claimants, it disappears for overseas claimants the doctrine would have covered under the DBA prior to enactment of the NFIA. The Board's logic in *Harris*, 23 BRBS at 178-179, and *Cantrell*, 22 BRBS at 374 n.3, as to the suitability of the zone of special danger doctrine in DBA cases applies equally to such similarly-situated employees under the NFIA.

We therefore hold the zone of special danger doctrine applies to NFIA cases involving overseas employment occurring under "exacting and unconventional" conditions. *O'Keeffe*, 380 U.S. at 363. Nothing in the NFIA precludes such an application, no legal precedent prohibits the application to overseas employment, and no reason exists to treat individuals the doctrine previously covered differently after enactment of the NFIA.[10] Application of the zone of special danger doctrine turns on the totality of

---

in a case under the District of Columbia Workmen's Compensation Act of 1928, 36 D.C. Code §501 *et seq*. (1973), involving an injury sustained in overseas employment. The claimant was injured in a private residence after hosting a work-oriented cocktail party during a business trip to Lima, Peru. *Id.* at 161 In affirming the administrative law judge's finding that the claimant's injury was covered, the Board stated "where entertainment in private homes is part of the employee's duties, it is reasonably foreseeable that an employee could suffer an injury in a private home after his employment duties in a foreign country were completed." *Id.*

[9]Claimant Harris worked as a payroll clerk for her employer, whose operation was located on the grounds of England Air Force Base, Louisiana. Upon departing from work, she sustained her injuries as a result of a fall in the parking lot adjacent to her employer's building. Claimant Cantrell worked as a restaurant cashier for her employer, Base Restaurant, located on the grounds of Wright-Patterson Air Force Base, Ohio. She sustained her injuries as a result of a trip and fall while walking from a parking lot to her place of employment, both located within the confines of the gated base. The Board stated that nothing in those cases suggested the claimants' work created a zone of special danger. Moreover, neither job was located "in a foreign setting."

[10]Indeed, the legislative history to the NFIA's 1958 amendment made clear it was "not intended to disturb any employees in their rights under the Defense Bases Act with respect to workmen's compensation laws." *Placing Nonappropriated-Fund Employees*

circumstances in each case. Thus, merely working overseas for a nonappropriated fund instrumentality will not, as employer appears to suggest, result in automatic entitlement to benefits under the Act.

The "Obligations and Conditions of Decedent's Employment"

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."[11]

Under the Longshoremen's and Harbor Workers' Compensation Act: Hearing on H.R 10504 Before the H. Comm. on Post Office and Civil Service, 85th Cong. 6 (March 24, 1958) (statement of William H. Baier, Acting Director, Professional Assistants Div., Bureau of Supplies and Accounts, Dept. of the Navy). Because Congress enacted the NFIA, in part, to separately cover some overseas employees of nonappropriated funds instrumentalities the DBA previously covered, and because both the DBA and the NFIA incorporate the Longshore Act's causation provision that spawned the zone of special danger doctrine, it is presumed Congress logically also intended to maintain the applicability of the doctrine to those overseas employees in appropriate circumstances. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (Where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

[11]The zone of special danger doctrine has been applied to award benefits in the following cases arising under the DBA: *Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965) (employee killed in a car accident on the way back from having a beer in town on San Salvador Island); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965) (employee drowned on lake in Korea during weekend activities); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951) (employee drowned while attempting a rescue at a riverside recreational facility in Guam); *Chugach Mgmt. Services v. Jetnil*, 863 F.3d 1168, 51 BRBS 21(CRT) (9th Cir. 2017), *aff'g* 49 BRBS 55 (2015) (employee injured foot on coral reef while fishing on restricted island in Kwajalein Atoll); *Ritzheimer v. Triple Canopy, Inc.*, 50 BRBS 1 (2016), *aff'd sub nom. Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 2017 WL 176933, 50 BRBS 103(CRT) (M.D. Fla. Jan. 17, 2017) (employee slipped on a wet floor after getting out of the bathtub in his apartment in Israel); *Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015), *aff'g* 48 BRBS 19 (2014) (employee killed in taxi in Tbilisi on the way to the grocery store; employer provided taxi vouchers and hazard pay); *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) (employee injured in bar fight on Johnston Atoll); *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d

O'Leary, 340 U.S. at 507; *see also DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT). The Board has defined the "zone of special danger" as the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant. *Rogers*, 42 BRBS 56. "'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. Inquiries into the employee's 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 the scope of the zone of special danger. *See, e.g.*, *O'Keeffe*, 380 U.S. at 363; *O'Leary*, 340 U.S. at 507; *see also Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004).

With respect to the doctrine's scope, 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 cognizability, however, which stops short of astonishing risks 'unreasonably' removed from employment.").[12]

---

640 (9th Cir. 1982) (employee had heart attack while off duty in barracks in Greenland); *O'Keeffe v. Pan-American World Airways, Inc.*, 338 F.2d 319 (5th Cir.), *cert. denied*, 380 U.S. 950 (1965) (employee killed in a motorcycle accident on Grand Turk Island in the British West Indies while driving on the wrong side of the road); *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962) (employee injured during a midnight rendezvous in a turn-around area at the seaward end of a breakwater on the island of Guam); *Hastorf-Nettles, Inc. v. Pillsbury*, 203 F.2d 641 (9th Cir. 1953) (employee injured in a car accident near Anchorage, Alaska, while on the way back to camp from sightseeing trip on a scheduled day off); *Urso v. MVM, Inc.*, 44 BRBS 53 (2010) (employee's death in Lebanon caused by overdose of painkillers taken for tattooing procedure); *N.R.* [*Rogers*] *v. Halliburton Services*, 42 BRBS 56 (2008) (employee injured while passively resisting military police in Afghanistan); *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978) (employee died from a ruptured abdominal aortic aneurysm after playing golf in Katmandu, Nepal).

[12]The zone of special danger doctrine was held to be inapplicable in the following DBA cases: *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012) (suicide and "misadventure," i.e., accidental autoerotic asphyxiation, were the only possible causes of death); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009) (claim for

Whether the obligations or conditions of an individual's employment created a zone of special danger out of which the injury arose involves factual determinations that turn on the particular circumstances of the employment, and the administrative law judge'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). In this regard, the United States Court of Appeals for the First Circuit has held the determination of whether an injury falls within foreseeable risks associated with the employment abroad "is necessarily specific to context and thus turns on the totality of circumstances." *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT). With these factors in mind, we address the administrative law judge's consideration of the "totality of circumstances" and application of the zone of special danger doctrine.

Decedent was engaged in a 24 month tour of duty that required him to live and work exclusively at Naval Station Guantanamo Bay. EX 4. The administrative law judge found the nature of his overseas employment isolated decedent and limited his movement. For example, had he terminated his employment prior to the expiration of his tour of duty, he would have been personally responsible for the cost of leaving the island, presumably via military aircraft. *Id.*

Decedent's job duties further required him to develop "strong relationships with command, base" and other law enforcement officials. EX 13. Employees, military service members, and their dependents were restricted to base and not allowed to go into Cuba. *Id.* On weekends, residents of the base were encouraged to participate in various on-base community events the MWR organized, all of which were held on base. Decedent's supervisor, Nancy Devore, stated Guantanamo is a "pretty active base for being so isolated," "everybody joins in on MWR" because of the isolation, and participation in MWR-sponsored events was encouraged as a means to de-stress. EX 4. The isolated and insular nature of the Naval Station supports the administrative law judge's finding that the zone of special danger could apply to an off-duty injury. *O'Keeffe*, 380 U.S. 359; *O'Leary*,

---

psychological harm associated with perceived skin injury resulting from cosmetic chemical peel where use of chemical peel was not rooted in conditions and obligations of employment or related to the fact that claimant was employed in Kuwait); *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), *aff'd mem. sub nom. Kirkland v. Director, OWCP*, 925 F.2d 489 (D.C. Cir. 1991) (widow's participation in plan to murder her husband effectively severed any causal relationship which may have existed between the conditions created by his job and his death); *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989) (accidental death due to autoerotic asphyxiation where record lacked evidence of relationship between conditions of employment and activity which occasioned death).

340 U.S. 504; *Chugach Mgmt. Services v. Jetnil*, 863 F.3d 1168, 51 BRBS 21(CRT) (9th Cir. 2017); *Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT).

The issue turns on whether the specific events resulting in decedent's death were reasonably foreseeable and related to his employment or were "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable" to say his death arose out of and in the course of his employment. *O'Leary*, 340 U.S. at 507. Recognizing "[f]orseeability is viewed expansively where the zone of danger applies," Decision and Order at 9, and that decedent probably drowned in the waters of Guantanamo Bay, the administrative law judge found it "reasonably foreseeable that an employee restricted to a remote island base that boasts swimming and scuba diving as a means to de-stress could enter the water and drown." *Id.* (citing EX 4.13).

In reaching this conclusion, he found that the Hail and Farewell party was an "unofficial" social event had no bearing in this case. The administrative law judge also found employer's supposition that Captain Nettleton killed decedent due to a dispute over an extramarital affair entirely unrelated to his employment, flawed because it is speculative, and "is not evidence." *Id* at 10. He found decedent disappeared at some point after having left the Hail and Farewell party and was found two days later in the Atlantic Ocean. *Id.* He found it undisputed decedent was involved in a physical altercation with Captain Nettleton outside the captain's residence, and the autopsies showed physical injuries to decedent consistent with that encounter, but those reports state decedent's death probably resulted or did result from drowning. EXs 2, 3. The administrative law judge concluded decedent's death "fell within the foreseeable risks occasioned by or associated" with his work for employer. Decision and Order at 9.

Contrary to employer's contentions, the events leading to decedent's death were not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that [his death] 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). Decedent's presence at Naval Station Guantanamo Bay, including his proximity to the Atlantic Ocean, and his attendance a base social event were due solely to the obligations and conditions of his overseas employment. *See generally O'Leary*, 340 U.S. at 507; *Jetnil*, 863 F.3d 1168, 51 BRBS 21(CRT). 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 decedent's job requirement to develop "strong relationships with command," made decedent's attendance at the Hail and Farewell party and his alcohol consumption at the event foreseeable consequences of his work for employer at the base. *See Kalama Services*, 354 F.3d at 1092, 37 BRBS at 126(CRT) (foreseeable that injury from horseplay could result from alcohol being served in authorized social clubs on Johnston Atoll).

Finally, the administrative law judge 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, as here, the employee is restricted to a remote geographic area for the benefit of his employer.[13] Decision and Order at 9 (citing *O'Keeffe*, 380 U.S. 359, and *O'Leary*, 340 U.S. 504). Consequently, we affirm the administrative law judge's conclusion that decedent's death occurred within the zone of special danger created by the obligations and conditions of his employment as rational, supported by substantial evidence, and in accordance with law.

Accordingly, we affirm the administrative law judge's Decision and Order and the Order on Motion for Reconsideration and Erratum.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[13]Notably, had the administrative law judge determined decedent died because of his physical altercation with Captain Nettleton rather than drowning, the outcome would likely be the same: injuries resulting from physical altercations have been found covered under the zone of special danger doctrine. *Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT) (claimant covered when injured during a physical altercation in a bar); *Rogers*, 42 BRBS 56 (finding coverage even when the physical altercation was the claimant's fault).