U.S. Department of Labor

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

BRB No. 21-0025

JOHNNY MICHAELPHINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERNIX GROUP COMPANY	)	
	)	
and	)	
	)	
ARCH INSURANCE COMPANY	)	DATE ISSUED: 07/29/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Combined Ruling on the Parties' Cross Motions for Summary Decision of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Scott Thaler and Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Keith L. Flicker and Ian A. Masser (Flicker, Garelick & Associates, L.L.P.), New York, New York, for Employer/Carrier.

Matthew W. Boyle (Elena S. Goldstein, Deputy 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Tracy A. Daly's Combined Ruling on the Parties' Cross Motions for Summary Decision (2020-LDA-00806) (Combined Ruling) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). 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).

The facts of this case are not in dispute. Claimant worked as an electrician for Employer at the United States Embassy in Maputo, Mozambique, Africa, from September 25 to October 15, 2019. He lived in a hotel, paid for by Employer, until Employer selected and paid for his second-floor apartment. Cl. Dep. at 82. On his day off, after having lived in the apartment approximately one week, he started the electric burners on the stove to cook breakfast. While they heated, he stepped onto the balcony for the first time since he moved in to check the weather. Upon stepping outside and seeing mosquitos, Claimant shut the door behind him. Unfortunately, it was a security door with no handle or keyhole on the outside, and it locked automatically, leaving him stranded on the balcony.[1] *Id.* at 27, 36-37, 39, 41, 99.

Claimant was on the balcony for more than an hour.[2] He testified he tried various means to pry open or break the door to gain access to his apartment. He also called for help, despite not speaking the local language. His efforts were to no avail. Claimant was concerned about the burners he had turned on becoming a fire hazard. As a last resort, he

[1] The complex, a gated community with security guards, was in a "high crime" area. Cl. Dep. at 98-99, 102-104.

[2] Claimant estimated between one and three hours. Employer asserts Claimant's deposition testimony puts the time at "just over" an hour. Emp. Br. at 6; Cl. Dep. at 52-53, 63, 70-71, 96, 133.

jumped down from the balcony, a distance of approximately eight or nine feet, and injured his left ankle and foot when he landed on a grassy incline. *Id.* at 25, 40, 42, 45-49, 52-53, 55-59, 61, 66-68, 70-73, 96-98, 131. When he felt able, Claimant crawled to a parking lot where two men finally discovered him. He later was taken to the hospital and underwent surgery. He spent two weeks recovering in his apartment, but thereafter returned to the United States for additional surgery. *Id.* at 73, 136, 143. He did not return to Mozambique or to any work. *Id.* at 139, 147.

Claimant filed a claim for benefits under the DBA, alleging his injury falls within the zone of special danger resulting from his overseas employment. Employer disputed coverage and has not paid any disability or medical benefits. Claimant filed a motion for partial summary decision (M/partial SD), asserting the administrative law judge should find his injury covered under the DBA. Employer filed a combined opposition to Claimant's motion and a cross-motion for summary decision (Cross-M/SD), urging the administrative law judge to summarily decide the injury is not covered. Cl. M/partial SD at 4; Emp. Cross-M/SD at 10.

The administrative law judge stated:

> The crux of this claim rests on determining whether Claimant's action, which directly caused his injuries, was a foreseeable risk associated with his employment or so unreasonable such that the connection between action and employment was severed. The analysis is context-specific; Claimant's motivations and timing, unlike fault, are relevant to determining foreseeability.

Combined Ruling at 7. Although he found Claimant's employment in Mozambique reasonably put Claimant "in the employer-provided apartment and, by extension, on the apartment balcony," and an employer could reasonably foresee an employee "engaging in a myriad of activities on his day off work, including being locked out of an unfamiliar apartment," the administrative law judge nevertheless concluded Employer's position was persuasive and Claimant's jumping off the balcony was unforeseeable.[3] *Id.* He found "Claimant's decision to jump was manifestly unreasonable as reflected by his own

[3] The administrative law judge also found: "it is significant that Claimant stated in his deposition that he had pleaded 'Lord, please, I don't want to jump off the balcony,' but then chose to do so in a relatively short period of time solely because he did not wish to 'waste his day off' waiting for someone to walk under his balcony 'hours later.'" Combined Ruling at 7.

evaluation of the likelihood of injury and the absence of any compelling or exigent concerns or threat to personal safety." *Id.* The administrative law judge concluded:

> [N]o employer would reasonably expect a 64-year old employee to engage in such inherently dangerous conduct solely because of a desire not to lose time off from work. Claimant's voluntary decision to jump from the apartment balcony without a pending threat to his safety was so thoroughly disconnected from service to the employer that it would be unreasonable to say the injury occurred in the course of employment.

Id. Consequently, he denied Claimant's motion and granted Employer's cross-motion as a matter of law. *Id.* at 7-8.

Claimant appeals, contending the administrative law judge erred in granting Employer's cross-motion for summary decision. He asserts the Benefits Review Board should reverse the decision because his injuries are covered under the DBA, and he asks the Board to remand the case for an award of benefits. The Director, Office of Workers' Compensation Programs (Director) responds, asserting the administrative law judge erred in granting Employer's motion because he did not view the facts in the light most favorable to Claimant before granting Employer's cross-motion. He asserts the administrative law judge should find Claimant's injury covered and hold a hearing on the merits of the claim if necessary. Dir. Br. at 9 n.4. Employer responds to each brief separately, urging affirmance. It asserts the administrative law judge applied the correct law to the specific facts of this case, his decision is supported by substantial evidence, and Claimant and the Director improperly ask the Board to conduct a *de novo* review.

Claimant filed a reply brief, asserting *de novo* review is appropriate when reviewing a summary decision, and the administrative law judge (and the Board on review) must construe the facts in the light most favorable to the non-moving party. He states there are many facts the administrative law judge viewed harshly instead of favorably. Claimant also asserts "the zone of special danger covers bad choices[,]" so the administrative law judge committed legal error by equating the logic of his choice with its foreseeability.[4] Cl. Reply Br. at 2-5. He also states the administrative law judge rationally found his presence on the balcony was a result of his job requirements and asserts his later predicament and

[4] Claimant asserts: "[t]he administrative law judge's analysis is essentially that because [Claimant's] decision was illogical, it was unforeseeable. * * * Specifically, the administrative law judge held [Claimant's] decision was not foreseeable because he was not young enough, his reasons for jumping were not compelling enough, and he did not wait long enough." Cl. Reply Br. at 5.

jump should not alter that conclusion. Rather, he argues his jump "*did* 'have its genesis in employment'" and was not a "personal" action. Cl. Reply Br. at 8 (citing *R.F. [Fear] v. CSA, Ltd*., 43 BRBS 139 (2009)).

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. A fact is "material" if it "might affect the outcome of the suit under the governing law." *O'Hara*, 294 F.3d at 61. An issue of fact is "genuine" where "the evidence is such that a reasonable [fact-finder] could return a verdict for the nonmoving party." *Id.*

To defeat a motion for summary decision, the non-moving party must present "specific facts" showing there exists "a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the administrative law judge *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012). Review of an order on summary judgment is *de novo*. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992); *Melton v. Abston*, 841 F.3d 1207, 1219 (11th Cir. 2016).

Under the Act, an injury generally occurs in the "course of employment" if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. 33 U.S.C. §902(2); *see, e.g., Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010). In cases arising under the DBA, the Supreme Court of the United States has held that an employee may be within the course of his employment even if the injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" created a "zone of special danger" out of which the injury arose. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *O'Keeffe*, 380 U.S. 359. Therefore, an injury is covered by the statute if it results

from "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen."[5] *O'Leary*, 340 U.S. at 507; *Battelle Mem'l Inst. v. DiCecca,* 792 F.3d 214, 220, 49 BRBS 57, 60(CRT) (1st Cir. 2015); *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1091-1092, 37 BRBS 122, 125-126(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004); *Ritzheimer v. Triple Canopy, Inc.*, 50 BRBS 1 (2016) (en banc), *aff'd sub nom. Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 2017 WL 176933, 50 BRBS 103(CRT) (M.D. Fla. Jan. 17, 2017) (Magistrate's Report and Recommendation at 2016 WL 7826705, 50 BRBS 97(CRT) (M.D. Fla. Dec. 16, 2016)).[6]

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[5] This logic applies regardless of whether an employee is engaged in an activity actually benefitting his employer. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363-364 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc*., 340 U.S. 504, 507 (1951); *Hastorf-Nettles, Inc. v. Pillsbury*, 203 F.2d 641 (9th Cir. 1953).

[6] 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 while returning from having a beer in town on San Salvador Island); *O'Keeffe*, 380 U.S. 359 (employee drowned on lake in Korea during weekend activities); *O'Leary*, 340 U.S. 504 (employee drowned while attempting rescue at riverside recreational facility on Guam); *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 where employer provided taxi vouchers); *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/horseplay on Johnston Atoll); *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (employee died due to heart attack while off duty in barracks provided by employer 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 Guam); *Hastorf-Nettles*, 203 F.2d 641 (employee injured in a car accident near Anchorage, Alaska, while returning from a sightseeing trip on a scheduled day off) ; *Sabanosh v. Navy Exch. Serv. Command/NEXCOM*, 54 BRBS 5 (2020) (employee drowned in Guantanamo Bay under uncertain circumstances but following a physical altercation on isolated base); *Ritzheimer v. Triple Canopy, Inc.*, 50 BRBS 1 (2016) (en banc), *aff'd sub nom. Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 2017 WL 176933, 50 BRBS 103(CRT) (M.D. Fla. Jan. 17, 2017) (Magistrate's Report and Recommendation at 2016 WL 7826705, 50 BRBS 97(CRT) (M.D. Fla. Dec. 16, 2016)) (employee injured after slipping on wet floor when getting out of shower at employer-provided apartment); *Jetnil v. Chugach Mgmt. Services*, 49 BRBS

Nonetheless, the Supreme Court "drew the line . . . 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); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).[7] The question of whether the obligations or conditions of an individual's employment created a zone of special danger out of which the injury arose involves a factual determination "necessarily specific to context" which "turns on the totality of circumstances." *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT). 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).

Summary Decision

In this case, other than the length of time Claimant was on the balcony, there are no disputed facts; there are only disputes as to the significance of those facts. The administrative law judge stated he considered the "totality of the circumstances," including Claimant's motivation and timing, when addressing the applicability of the zone of special danger doctrine. Combined Ruling at 7. He allowed it was foreseeable for Claimant to be

55 (2015), *aff'd* 863 F.3d 1168 (9th Cir. 2017) (employee injured foot on coral reef while fishing on restricted island in Kwajalein Atoll); *Urso v. MVM, Inc.*, 44 BRBS 53, 55 n.3 (2010) (employee died from overdose of pain medication after getting a tattoo while serving in Lebanon); *N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56 (2008) (employee injured while resisting MPs in Afghanistan); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988) (employee injured at private home in Peru following a business meeting at the home); *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978) (employee died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal).

[7] The zone of special danger doctrine was held to be inapplicable, and the claims non-compensable, in the following DBA cases: *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012) (where 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) (where cosmetic facial chemical peel was not rooted in conditions and obligations of employment in Kuwait); *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990) (where claimant was implicated in her husband's death); *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989) (where cause of accidental death was autoerotic asphyxiation).

on the balcony and locked out of an unfamiliar apartment. However, he stated Claimant's age, then 64, and the absence of a pending safety threat, made unforeseeable Claimant's decision to engage in "inherently dangerous conduct" in his sole "desire not to lose time off from work." *Id.*; Cl. Dep. at 46-47, 54, 60, 65. Because the administrative law judge did not view the undisputed facts in the light most favorable to Claimant, the non-moving party, ignored relevant facts, and improperly considered fault and the logic of Claimant's decision, we cannot affirm his granting of Employer's cross-motion for summary decision. *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012); *Irby v. Blackwater Sec. Consulting*, 44 BRBS 17 (2010).

Although they are ultimately irrelevant under the totality of circumstances of this case, we shall address each of the administrative law judge's reasons and explain why his conclusions are incorrect.

Reason for Jumping

The administrative law judge stated Claimant jumped "solely because of a desire not to lose time off," and he viewed this negatively against Claimant. Combined Ruling at 7. Claimant's deposition testimony reveals the administrative law judge erred in stating Claimant's "sole" reason for jumping off the balcony was to "not waste" his day off. This was neither the first nor the only reason Claimant gave for deciding to jump instead of waiting on the locked balcony. He testified he first tried to get back into the apartment and yelled for help. Cl. Dep. at 42-45, 51-54. In describing his predicament, and when asked why he jumped, Claimant stated he had not seen or heard anyone who could rescue him, and he was concerned about a fire hazard from the burners he had turned on. When asked again why he jumped instead of waiting, he stated it might have taken hours for someone to pass by, the jump was not planned, and "you had to be there." *Id.* at 59-60, 62. Asked again, he reiterated he did not want to wait all day for someone to show up, and he figured he had a 50-50 chance of being injured if he jumped. *Id.* at 63. It was not until he had been asked the same question a few more times did he agree with Employer's counsel that he did not "want to waste that one day I have off sitting around waiting on somebody to come help me." *Id.* at 65. Accepting this final statement as the "sole" reason Claimant decided to jump from the locked balcony misconstrues the record and ignores the other reasons he gave, namely a concern that the burners he had turned on presented a fire hazard, and it could have taken hours for someone to help him.

No Imminent Danger

The administrative law judge also misconstrued the record in concluding Claimant's jump was not logical because it occurred "without a pending threat to his safety." Claimant testified he was concerned about the threat of fire from his stove's electric burners (there

were also two gas burners) that he had turned on before being locked out of his apartment.[8] He also testified Mozambique days get very hot, there were mosquitos, and his community was in a high-crime area.[9] He also testified the balcony was only eight or nine feet above the ground. The administrative law judge ignored or discounted these facts which could have affected Claimant's decision to jump and should have been viewed in the light most favorable to him.[10] Further, by stating Claimant should have jumped only if there was "compelling" danger, the administrative law judge imposed his own arbitrary rule on Claimant's situation, thereby implying Claimant's injury was his fault or was not a smart decision. 33 U.S.C. §904(b) (fault is irrelevant); *Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT) (wisdom of action is irrelevant). Even if "compelling danger" were an appropriate consideration, the administrative law judge did not explain why the threat of a fire inside the apartment and an inability to get anyone to help him off the balcony did not qualify.

Short Duration

The administrative law judge called it "significant" that Claimant considered the risks, acknowledged he did not want to jump, but "chose to do so in a relatively short period of time" anyway. Combined Ruling at 7. That is, the administrative law judge implied the jump may have been foreseeable only if Claimant had stayed on the balcony longer. However, the time between considering an action and taking the action is not necessarily a factor under the zone of special danger test. *See O'Leary*, 340 U.S. 504 (decedent

[8] The administrative law judge found the threat would have been greater if Claimant had turned on the gas burners. Combined Ruling at 7. Regardless, the stove had been on and unattended for more than an hour by the time Claimant jumped.

[9] Both Claimant and the Director add that Claimant had not eaten, there was nothing to eat or drink on the balcony, and the balcony did not have any bathroom facilities. The inferences are reasonable from the facts. In Claimant's reply brief, he states the administrative law judge made negative assumptions to questions no one asked. He asserts no one asked him whether he was comfortable, hot, hungry, thirsty, or needed to go to the bathroom, or whether he was in danger from insects, sun or crime – but all of these factors should have been viewed in his favor. Cl. Reply Br. at 3-4.

[10] Employer asserts the Director assumed facts not in evidence as possible alternate reasons for jumping off the balcony. Dir. Br. at 7; Emp. Resp. to Dir. at 7-8. The Director listed these facts and inferences as potential dangers to Claimant's health and safety – to demonstrate the administrative law judge erred in finding there was no danger forcing Claimant to jump, as the facts viewed favorably to Claimant could weigh otherwise.

"plunged" into the water to attempt a rescue; no discussion of time or alternative methods). If it were, we would be drawn into a debate over how much contemplation is enough. In any event, the administrative law judge should have considered in Claimant's favor that he had spent over an hour trapped on the balcony before he took any potentially-injurious action. In particular, Claimant testified he tried numerous ways to get back into the apartment or yell for help.[11] He also repeatedly testified that he did not want to jump off the balcony, but only did so after his efforts were unsuccessful. At one point he "looked over that balcony again," said, "Lord, I sure don't want to jump . . . [and] started back again trying to get in [the door]. That's how bad I wanted to get in that door." Cl. Dep. at 54.

Risk

The administrative law judge found "Claimant's decision to jump was manifestly unreasonable as reflected by his own evaluation of the likelihood of injury." Combined Ruling at 7. This improperly weighs Claimant's risk-of-injury acknowledgment against him. While the zone of special danger test involves considering whether the risks are foreseeable to an employer, it does not preclude coverage merely because the claimant weighed the risks of action versus inaction and then proceeded accordingly. In *O'Leary*, the seminal case, the employee drowned in a dangerous river channel next to the recreation center when he attempted to rescue two men. His widow's claim was compensable even though he purposefully violated the rule against swimming in the channel because of its known hazards. *O'Leary*, 340 U.S. at 505-507. Similarly, in *Kalama Services*, 354 F.3d 1085, 37 BRBS 122(CRT), the court affirmed the finding that an employee's injury during a bar fight/horseplay on Johnston Atoll was covered. Bodily harm is a well-known and obvious danger of either activity. Both cases involved conscious decisions to act despite knowing the potential dangers. *See also N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56 (2008) (purposefully resisting orders of military police in Afghanistan).[12] An employer

[11] Claimant tried to pull the door off the wall, pry it out of the frame, lift it off the track, and even thought about kicking it, but it was too thick and secure. Cl. Dep. at 42-46. He also tried to yell for help, and he kept searching for anyone to assist, but no one walked by. *Id.* at 50-54, 69.

[12] After taking an unauthorized trip away from his base camp, the claimant was detained by military police (MP) when he returned. He resisted the MP's request to get into a vehicle for transport to another camp. Because of his continued resistance, the MP attempted to put a safety vest on him and put him in the car. He ultimately ended up on the ground and in handcuffs. After they reached their destination, the claimant complained of pain in his shoulder, neck, and wrist. *N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56, 57 (2008). His injuries were covered.

cannot automatically claim it was unforeseeable for a claimant, who was aware of the potential dangers of his action, to take such action – awareness, or acknowledgement of danger, in and of itself, does not disconnect the action from the employment. *O'Leary*, 340 U.S. at 505-507. Again, this improperly implicates fault into the consideration of compensability.

As stated above, the individual nuances of why and when Claimant jumped are not relevant to whether his injuries are covered. What is relevant is this: By ignoring undisputed facts, imposing incorrect standards, drawing inferences against Claimant, and improperly considering fault, the administrative law judge's summary decision analysis is erroneous. *O'Leary*, 340 U.S. at 505-507; *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT); *Ritzheimer*, 50 BRBS at 4; *Rogers*, 42 BRBS at 57. Therefore, the administrative law judge erred in granting Employer's cross-motion for summary decision. *Anderson*, 477 U.S. at 247-248; *Morgan*, 40 BRBS 9.

Zone of Special Danger

Despite the administrative law judge's error, we see no reason to remand this case for further consideration of the coverage issue. Applying the law to the undisputed facts, and in the light most favorable to Employer, we hold Claimant's injury is covered as a matter of law.

As the administrative law judge correctly found, Claimant's employment foreseeably placed him at the apartment and on a locked balcony without any way to get back in. Combined Ruling at 7. Escaping the balcony was not, as the administrative law judge concluded, an act "thoroughly disconnected" from Claimant's employment.[13]

[13] In *Sabanosh v. Navy Exchange Service Command/NEXCOM*, 54 BRBS 5, 10 (2020) (some citations omitted), the Board explained:

> 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. "'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.

Employer selected the apartment and should have known the balcony had a security door with no outside access; an employee unfamiliar with the apartment may be locked on the balcony and need to devise a way to get back inside.

Given the parameters of foreseeability outlined by a mountain of case law under the zone of special danger doctrine, *see* n.6, *supra*, no reasonable person could find it unforeseeable that Claimant, after several unsuccessful attempts to get back inside or yell for help, elected to jump down nine feet, instead of waiting indefinitely on his balcony while the stove's burners were on inside the apartment.[14] *See O'Leary*, 340 U.S. 504. Conversely, this case is easily distinguishable from cases involving personal frolics where coverage was denied. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Fear*, 43 BRBS 139; *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990); *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989); *see* n.7, *supra*. In those cases, the injured parties engaged in unforeseeable and unforeseen acts involving fetishes, crimes, or obsessions, all of which were "so thoroughly disconnected" from their employment that it would be unreasonable to say the injuries occurred during the course of employment. *O'Keeffe*, 380 U.S. at 362. A jump from a nine-foot balcony when locked out of an employer-provided apartment is plainly not in the same category.[15]

A case not addressed by the administrative law judge, *Ritzheimer*, 50 BRBS 1, which was affirmed by the very court to which this case would proceed on appeal,[16] is

[14] The Director also asserts Claimant's age is irrelevant, and the administrative law judge erred in considering it a negative; he asserts a person of any age might have considered jumping from the balcony. Dir. Br. at 8. Additionally, Claimant testified he was "fit" and regularly jogged at the time of this incident. Cl. Dep. at 149.

[15] We need not address Claimant's argument that the administrative law judge's description of his action as "mundane" must mean it is not "astonishing" and, therefore, is necessarily foreseeable. That is not the rule. To be covered, an activity need only be a reasonable and foreseeable risk of employment abroad. *DiCecca*, 792 F.3d at 220, 49 BRBS at 60(CRT).

[16] Because this case was filed by the district director in Jacksonville, Florida, it arises under the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019). Direct appeal of this DBA case would be to the United States District Court for the Middle District

instructive. In *Ritzheimer*, an employee, living in a furnished, employer-provided, apartment, was injured when he slipped on a wet floor while getting out of the shower. The administrative law judge found the obligations and conditions of the claimant's job required him to live in the employer-provided apartment and maintain his personal hygiene. As the claimant was on-call all day every day, the administrative law judge rejected the employer's assertion that the claimant's shower was "entirely personal in nature" and "unconnected to an employment obligation." *Ritzheimer*, 50 BRBS at 4. The Board affirmed the administrative law judge's decision, holding substantial evidence supported his finding that the conditions and obligations of the claimant's job created a zone of special danger and that his conclusion the claimant was covered under the DBA comported with law. *Id.* at 6.[17] Therefore, injuries at employer-selected living quarters may fall within the zone of special danger depending on the factual circumstances.[18] Because review of a decision on a motion for summary decision is *de novo,* we conclude application of the law to the undisputed facts of this case establishes Claimant's injury occurred within a zone of special danger created by the conditions and obligations of his employment with Employer. We therefore hold Claimant's injury is covered by the DBA, and the administrative law judge should have granted his motion for partial summary decision. *O'Leary*, 380 U.S. at 507; *Ritzheimer*, 50 BRBS at 4.

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of Florida. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998).

[17] The district court affirmed the Board in an unpublished decision. *Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 50 BRBS 103(CRT) (M.D. Fla. Jan. 17, 2017).

[18] Contrary to Employer's assertion, the Director is not asking the Board to hold all injuries occurring in employer-chosen apartments are covered. Coverage depends heavily on the facts of each case.

Accordingly, we reverse the administrative law judge's Combined Ruling on the Parties' Cross Motions for Summary Decision, hold Claimant's injury is covered under DBA by the zone of special danger doctrine, and remand the case for proceedings on the remaining issues.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' opinion that the administrative law judge erred in granting Employer's cross-motion for summary decision because, as discussed, he did not view the facts in the light most favorable to Claimant. *See Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012). Therefore, I agree the Board must reverse the grant of Employer's cross-motion for summary decision and vacate the finding that Claimant's injury is not covered by the DBA. *Id.* However, I respectfully dissent from their decision to hold Claimant covered under the DBA. Instead of applying the zone of special danger law and finding facts ourselves, *see, e.g., LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989), I would remand the case for the administrative law judge to fully reconsider Claimant's motion for partial

summary decision and determine whether Claimant's injury is covered under the DBA under applicable law.[19]

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[19] If the parties' pleadings indicate there is a genuine issue of material fact or if it is necessary for the administrative law judge to make credibility determinations, summary decision cannot be granted. *Tisdale v. Am. Logistics Servs.*, 44 BRBS 29 (2010). If necessary, the administrative law judge should hold a formal hearing. *See* 20 C.F.R. §702.331 *et seq.*