STATUTORY EXTENSIONS of the LONGSHORE ACT

The Defense Base Act

Coverage

The Longshore Act, as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.,* provides workers' compensation benefits pursuant to the provisions of the Longshore Act for the injury or death of any employee engaged in any employment outside the continental U.S.: (1) at any military base acquired from a foreign government after January 1, 1940; or (2) upon lands used by the U.S. for military purposes in any Territory or possession; or (3) upon any public work in any Territory or possession if such employee is working under the contract of a contractor with the U.S.; (4) under a contract with the United States or an agency thereof, or any subcontract to such a contract, for the purpose of "public work;" (5) under a contract approved and financed by the U.S. or any agency thereof, or any subordinate contract under the Mutual Security Act of 1954; (6) by an American employer providing welfare or similar services for the benefit of the Armed Forces. 42 U.S.C. §1651(a)(1)-(6). The War Hazards Compensation Act (WHCA), 42 U.S.C. §1701 *et seq.,* contains provisions applicable where the injury or death results from a "war-risk hazard" which generally provide employer with reimbursement under the Federal Employees' Compensation Act (FECA).

In *Overseas African Constr. Corp. v. McMullen,* 500 F.2d 1291 (2d Cir. 1974), employer challenged claimant's coverage under the DBA, raising a "highly technical" argument under Section (a)(5) regarding the source of the funding for the contract at issue. The court rejected this argument, holding that employer did not overcome the statutory presumption of jurisdiction contained in Section 20(a) of the Act, 33 U.S.C. §920(a). The court stated that employer obtained DBA insurance for the project in question, which was in accordance with the employment contract between claimant and employer requiring such insurance, and that a *prima facie* showing of federal jurisdiction was made out by the insurance contract. Based on the course of the dispute, the court stated that a strong argument could be made that the insurer should be estopped from challenging federal jurisdiction. While it did not rest its decision on this basis, the court noted that the insurer's actions during the course of the dispute should be weighed in determining whether it rebutted the statutory presumption. The court affirmed the finding of DBA coverage on the basis that the evidence relied upon by the insurer was insufficient to show that the source of the funding placed this contract outside Section (a)(5).

To be compensable under Section (a)(4) of the DBA, a claim must stem from a contract for "public work" overseas. "Public work" under this section constitutes government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity. 42 U.S.C. §1651(b)(1). *See University of Rochester v. Hartman*, 618 F.2d 170 (2d Cir. 1980), *rev'g Vishniac v.*

University of Rochester, 8 BRBS 215 (1978); *Airey v. Birdair, Div. of Bird & Sons, Inc.*, 12 BRBS 405 (1980).

In *University of Rochester*, the Second Circuit held that a university professor who was killed while doing research in Antarctica under grants from NASA and the National Science Foundation was not covered under the Act because he was not engaged in "public work" and his research grant did not constitute a "contract" within the meaning of the Act. Specifically, the court held that to be covered, a service contract must be connected either with a construction project or with a national defense activity. In *Airey*, the Board affirmed the administrative law judge's denial of benefits where substantial evidence demonstrated that claimant had not been performing services related to a service contract with the U. S. government at the time of injury. The Board also found that claimant had not established that any of his work for employer was related to a service contract with the government.

The DBA does not apply to an employee covered under the Federal Employees' Compensation Act, to an employee engaged in agriculture, domestic service, any casual employment not in the usual course of employer's business, or to a "master or member of a crew of any vessel." 42 U.S.C. §1654. In *Sosenik v. Lockheed California Co*., 14 BRBS 191 (1981) (Miller, dissenting), the Board applied the three-part test in use at that time for determining whether a claimant fell within the crew member exception. *See* the section of the desk book on Coverage and the Member of a Crew exclusion. In *Sosenik,* the Board held that substantial evidence supported the administrative law judge's finding that claimant, employer's field service representative aboard a U.S. Navy ship, was a crew member and therefore was not entitled to benefits under the Act.

Claimant's substantive rights must be determined under the provisions of the Longshore Act as incorporated into the DBA. In *Smith v. Director, OWCP*, 17 BRBS 89 (1985), claimant was awarded benefits under the DBA. Employer was reimbursed for these benefits from the FECA Fund pursuant to the WHCA because the injury resulted from a war risk hazard. Claimant later filed a claim for a lump sum payment of his future benefits. The administrative law judge awarded a lump sum commutation of the benefits under the WHCA and FECA. The Board determined that the substantive provisions of the Longshore Act, not FECA, were controlling and that entitlement to commutation should have been considered under pre-1984 Section 14(j) of the Act, 33 U.S.C. §914(j) (1982) (repealed 1984). The WHCA provided only the source of benefits. The DBA was determinative of claimant's rights because his coverage was determined under that statute.

42 U.S.C. §1651(e) provides that, upon the recommendation of the head of any department or other agency of the United States, the Secretary of Labor may waive the application of the DBA with respect to any contract or classification of employees. In *Ann v. Eastern Constr. Co.*, 17 BRBS 163 (1985), the Board affirmed the administrative

law judge's finding that the document waiving DBA coverage limited claimant's recovery to the workers' compensation provided by the law of her own country, rather than affording claimant the option of electing the more favorable benefits of the place of injury.

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The Board vacated the administrative law judge's finding that it is immaterial to DBA coverage whether the decedent was an employee or an independent contractor. The Board held that the DBA applies only to an "employee" as referenced in Section 1(a) of the DBA. The term is not defined, however, and thus it has as its meaning the "conventional master-servant relationship as understood by common-law agency doctrine." The administrative law judge's alternate finding that decedent was an employee also was vacated as it was based on an inference drawn against claimant and was not based on application of law. The administrative law judge did not discuss the evidence offered by claimant in her opposition to employer's motion for summary decision and the administrative law judge did not select and apply an appropriate test for employee status. Thus, the case was remanded for a hearing and findings on the issue of decedent's status as an independent contractor or employee. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

The Board reversed the administrative law judge's determination that claimant's job fell outside DBA jurisdiction. Specifically, the Board held that although the administrative law judge properly viewed claimant's employment contract as one entered into "for the purpose of engaging in public work," a prerequisite to a finding of DBA jurisdiction, he erred in determining that the DBA's exclusion from coverage of employees "engaged exclusively in furnishing materials or supplies" was applicable in this case, since claimant, an administrative assistant hired pursuant to a U.S. Army Corps of Engineers contract with the government of Saudi Arabia, was performing the service of facilitating the use of materials and supplies, rather than engaging "exclusively" in the manufacture or "furnishing" of these goods as of the time of his injury. The case was accordingly remanded for the administrative law judge to address the merits of claimant's claim. *Fitz Alan-Howard v. Todd Logistics Inc.*, 21 BRBS 70 (1988).

The Board reversed the administrative law judge's denial of DBA coverage for a person employed to teach Asian history to Navy personnel aboard Navy ships in the Pacific. A claimant must demonstrate involvement with a "public work," *i.e.*, that a connection existed between his work and national defense, war activity, or construction. In this case, claimant's work furthered the national defense in that he educated Navy personnel in the history and customs of the local population, acted as a translator and lectured on diplomacy. *Casey v. Chapman College, PACE Program*, 23 BRBS 7 (1989).

The Board vacated the administrative law judge's findings that claimant, who was employed under a contract between employer and Saudi Arabia to service Saudi aircraft including C-130's, was not injured while performing services under a subcontract which was subordinate to a contract entered into with the U.S. and that the service contract under which claimant was working was not subordinate to the original sales contract of the C-130's. The case was remanded to allow the administrative law judge to compel production of relevant sales contracts and supporting documents and to reconsider the issue of DBA jurisdiction in light of this evidence. *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990).

The Board affirmed the administrative law judge's finding that the employee was not covered by the DBA at the time of his death as the employee was not performing work related to employer's contract with the State Department at the time of his fatal automobile accident but instead was engaged in private business. Although the DBA includes coverage for an employee's death during transportation to or from his place of employment where the United States or employer pays for the transportation, this provision does not aid claimant here where the evidence established that the employee's travel to and from Andorra was related to non-DBA work. *Rosenthal v. Statistica, Inc.*, 31 BRBS 215 (1998).

The First Circuit affirmed the grant of summary judgment for employer on the ground that employer was immune from a personal injury suit brought by the family of decedent who died in explosion at a naval station in Puerto Rico, holding that Puerto Rico is considered a "territory" for purposes of DBA coverage. The Act is therefore the sole remedy. *Davila-Perez v. Lockheed Martin Corp.,* 202 F.3d 464, 34 BRBS 67(CRT) (1st Cir. 2000).

The district court held that the DBA applied to employees who work on United States military bases in Puerto Rico and that an employer that secures insurance coverage for its employees as required by the DBA is entitled to tort immunity under the Longshore Act. In the instant case, the Act was claimant's exclusive remedy against employer for injuries sustained in a work-related accident on a military base, as the undisputed facts show that employer had a contract with the U.S. Navy at the time of the accident, it had obtained the requisite insurance coverage in accordance with the DBA, and claimant was compensated pursuant to the terms of the insurance policy. The district court therefore granted employer's motion for summary judgment and dismissed claimant's civil suit based on his work-related injuries. *Colon v. U.S. Dept. of Navy*, 223 F.Supp.2d 368 (D.P.R. 2002).

The Board rejected claimant's contention that the oversight by a U.S. District Court of a contract between a state agency and claimant's employer to build a sewage outfall tunnel was sufficient to bring the claim under the jurisdiction of the DBA. The Board affirmed the administrative law judge's finding that there was no evidence that any construction

work on the outfall tunnel was performed pursuant to a contract with the U.S. government. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

The Board declined to address employer's contention that the DBA was not applicable because employer's contract was with the Coalitional Provisional Authority of Iraq, and not the United States or a subdivision, holding that the administrative law judge must address this issue in the first instance. *J.T. [Tisdale] v. American Logistics Services,* 41 BRBS 41 (2007).

After remand, the Board addressed whether the DBA applies where an employer's contract is with the Coalition Provisional Authority for Iraq (CPA). The Board held that, although the CPA is not the "United States," it is an "agency" of the U.S. for purposes of DBA coverage under the applicable tests. This holding also promotes the purpose of providing uniform compensation coverage. Therefore, pursuant to Section 1(a)(4) of the DBA, claimant's injury, which occurred in Iraq while claimant was performing work under the employer-CPA contract, was covered by the DBA. Accordingly, the Board reversed the administrative law judge's finding to the contrary and remanded the case for consideration of the issues on the merits. *Tisdale v. American Logistics Services*, 44 BRBS 29 (2010).

The DBA contains no statutory definition of what constitutes a "military base" for purposes of coverage under Section 1(a)(1). Citing the United States Code under the heading General Military Law, the Board determined that these provisions indicate that a military installation is one governed or controlled by the United States government, and that an area must therefore be under the control of the United States military in order to be considered a base within the meaning of Section 1(a)(1). While the Green Zone of Baghdad had fixed boundaries and was protected by both military forces and private security contractors, individuals within the Zone were not required to follow military rules or standards of procedure. Based on the evidence credited by the administrative law judge, which established that control of the Green Zone did not rest with the United States military, the Board affirmed the administrative law judge's conclusion that the Green Zone was not a military base under Section 1(a)(1). Claimant therefore was not covered under the DBA by virtue of an injury occurring on a military base. In addition, the Board affirmed the administrative law judge's finding that claimant was sent to Iraq to develop new business opportunities, that claimant did not engage in employment under a government contract between employer and the U.S. during the period of her employment in Iraq, and her determination that claimant was consequently not covered under Section 1(a)(4) of the DBA. *Z.S. v. Science Applications Int'l Corp.,* 42 BRBS 87 (2008).

The DBA states it applies to "any employee engaged in any employment at any military. . . base acquired after January 1, 1940" by the United States from a foreign government. This would make the DBA applicable to all NFIA employees on such bases. The court

held that as the NFIA was enacted after the DBA to cover such employees, Congress intended the NFIA to act as exception to the DBA. As the NFIA does not cover foreign citizens working at military bases outside the United States, the Filipino claimant was not entitled to benefits under the NFIA extension of the Longshore Act. *Army & Air Force Exchange Service v. Hanson*, 360 F.Supp. 258 (D. Haw. 1970).

The Board held that claimants, the widows of citizens of the Philippines who were employed by a nonappropriated fund entity at a naval base in the Philippines, are not entitled to benefits under the DBA. The Board held, pursuant to *Hanson*, 360 F.Supp. 258, that as a later-enacted, more specific statute, the NFIA takes precedence over the DBA with respect to employees of nonappropriated fund instrumentalities, and, thus, in view of the exclusive liability provision of the NFIA, the claims are not covered under the DBA. *A.P. [Panaganiban] v. Navy Exchange Service Command*, 43 BRBS 123 (2009).

The Board vacated the administrative law judge's grant of summary decision in employer's favor on the issue of the existence of a service contract with the United States or agency or department thereof, pursuant to Section 1(a)(4) of the DBA. The only contract supplied was between employer and Regency. This contract referenced a contract between Regency and ESS, and stated that ESS provided services to the U.S. armed forces. The administrative law judge inferred that, ultimately, employer's contract with Regency was subordinate to one with the U.S. or an agency of the U.S. The grant of summary decision cannot be based on an inference against claimant where, as here, claimant offered evidence that no such contract with the U.S. existed. As the administrative law judge did not discuss and weigh all the evidence, the case was remanded for him to do so. The Board affirmed the administrative law judge's finding that the service contract for security services between employer and Regency was for a "public work" within the meaning of Sections 1(a)(4) and 1(b)(1),(3). A service contract in connection with war activities is a "public work." *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

The Board vacated the administrative law judge's grant of summary decision in employer's favor and remanded the case for further proceedings on the issue of whether claimant's employment is covered under Section 1(a)(5) of the DBA. Claimant worked for employer under an employment agreement as an airplane mechanic in Chad. Employer's humanitarian air transportation services in Chad are funded through a USAID grant under the Foreign Assistance Act of 1961 (the successor to the Mutual Security Act referenced in Section 1(a)(5) of the DBA) and through a cooperative agreement with the U.S. Department of State (DOS). The administrative law judge found that neither the USAID grant nor the DOS cooperative agreement is a "contract" within the meaning of the DBA and that claimant therefore is not covered under Section 1(a)(5). The Board held that the administrative law judge erred in applying the court's analysis of coverage under Section 1(a)(4) in *University of Rochester v. Hartman,* 618 F.2d 170 (2d

Cir. 1980) to the issue of coverage under Section 1(a)(5) in this case. In contrast to Section 1(a)(4) which requires the employee to have worked under a contract to which the United States is a party, Section 1(a)(5) requires only that the employee's employment be "under a contract approved and financed by the United States," or any agency thereof. The case was remanded for the administrative law judge to consider whether claimant's aircraft maintenance work which was performed under an employment contract with employer constitutes employment under a contract approved and financed by the United States pursuant to Section 1(a)(5). The Board additionally held that, contrary to employer's argument, coverage under Section 1(a)(5) is not precluded by the omission in the contracts of the provision referenced in Section 1(a)(5) regarding the securing of compensation under the DBA. *Delgado v. Air Serv. Int'l, Inc.,* 47 BRBS 39 (2013).

Procedure

The DBA authorizes the Secretary to assign areas of the world to compensation districts, s*ee* 20 C.F.R. §704.101, and, relevant to appeals, states that judicial proceedings shall be instituted in the U.S. District Court where the office of the deputy commissioner (district director) whose compensation order is involved is located. 42 U.S.C. §1653.

Under Section 1653, the court for the area in which the office of the district director which filed and served the administrative law judge's decision is located has jurisdiction over the case. *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998). The Courts of Appeals, however, are split on whether Board decisions are appealable to the circuit court or whether they must first be challenged in district court in the appropriate geographic area.

The First, Second, Seventh and Ninth Circuits have concluded that Congress meant to incorporate the Longshore Act as amended in 1972 into the DBA. Accordingly, appellate review in these circuits lies with the Board and then the United States Court of Appeals for the circuit where the office of the deputy commissioner whose compensation order is involved is located. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019); *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85 (CRT) (1st Cir. 2012); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979); *see also Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980).

The Sixth Circuit, however, concluded that the 1972 Amendment to Section 21, which eliminated review by a district court, was not incorporated into the DBA under 42 U.S.C. §1653(b). It held that review therefore remained in the appropriate district court as it did prior to the Amendments. *Home Indemnity Co. v. Stillwell*, 597 F.2d 87 (6th Cir.), *cert. denied*, 444 U.S. 869 (1979). The Fourth, Fifth and Eleventh Circuits have joined in this view. Thus, in those circuits, a Board decision must first be challenged in the appropriate district court, and then may be appealed to the circuit court. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998); *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991). *See Hice v. Director, OWCP,* 48 F.Supp.2d 501 (D.Md. 1999).

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The Fifth Circuit held that Section 21(b) of the Longshore Act as amended in 1972, which provides for review first by the Board and then by the U.S. Court of Appeals for the circuit in which the injury occurred, is not fully applicable to claims arising under the

DBA, pursuant to 42 U.S.C. §1653(b). Instead, although initial appeal of the compensation order issued on a DBA claim is to the Board, review of a BRB decision is to be undertaken by a district court, rather than a court of appeals. *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991).

The Fourth Circuit, in agreement with the Fifth and Sixth Circuits, and in disagreement with the Ninth Circuit, held that the court of appeals does not have jurisdiction to hear the initial judicial review of Board decisions in DBA cases. Rather, jurisdiction for judicial review of a Board decision in DBA cases lies in the appropriate district court. *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997).

In this case, claimant suffered a heart attack on a military base in Australia, but the claim was transferred to the district director in Baltimore because that office was closest to claimant's residence. The D.C. Circuit ruled that under the DBA, it lacked jurisdiction to hear the case. The court held first that the location of the district director, not the administrative law judge who heard the case, identifies the location of judicial review. Since the district director was in the jurisdiction of the Fourth Circuit, and since the Fourth Circuit has held that the DBA requires appeals from the Board to be heard first by the district courts, not by the courts of appeals, the D.C. Circuit transferred the case to the U.S. District Court for the District of Maryland. *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998).

The Eleventh Circuit held that judicial review of compensation orders under the DBA must be commenced in the district courts pursuant to its unambiguous language, which takes precedence over Section 21 of the Longshore Act. The court stated that were it to dismiss the appeal for lack of jurisdiction, any appeal to the appropriate district court would probably be time barred. Accordingly, citing the "interests of justice," the court, under 28 U.S.C. §1631, transferred the case to the United States District Court for the Middle District of Florida, wherein is located the office of the relevant district director. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998).

The First and Second Circuits, in agreement with the Seventh and Ninth Circuits, and in disagreement with the Fourth, Fifth, Sixth and Eleventh Circuits, held that the court of appeals, rather than the district court, has jurisdiction to hear the initial judicial review of Board decisions in Defense Base Act cases. *Truczinskas v. Director, OWCP,* 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010).

In this case, where claimant was injured in Afghanistan and awarded benefits by an administrative law judge based in Louisiana, the Board affirmed the administrative law judge's determination that counsel's entitlement to a fee under Section 28 of the Act is governed by Ninth Circuit law. The Board discussed the circuit court interpretations of

Section 3(b) of the Defense Base Act, 42 U.S.C. §1653(b), noting that courts differ in concluding to which court an appeal of a Board decision is to be taken, but not to which jurisdiction. Accordingly, the Board held that the applicable law is determined by the location of the office of the district director who filed and served the administrative law judge's decision. Because the district director who filed the administrative law judge's award in this case has his office in San Francisco, despite employer's attempts to have the case transferred to a district office closer to claimant's residence, the applicable law is that of the Ninth Circuit. *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

The Ninth Circuit held that petitions for review of BRB decisions under the DBA are to be filed directly in the Court of Appeals in the circuit where the relevant district director is located, as opposed to where the OALJ office is. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

Zone of Special Danger

Under the DBA, the Supreme Court has allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951), the employee, while spending the afternoon in employer's recreational facility near the shoreline in Guam, drowned when attempting to rescue two men in a dangerous channel. The Court held that his death was compensable under the DBA, stating that "[a]ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." 340 U.S. at 507. However, the Court recognized in *O'Leary* that "an employee might go so far from his employment and 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." *Id.*

In *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (1951), the employee drowned in a lake in South Korea during a weekend outing away from the job; in affirming the award, the Court noted that the employee had to work "under the exacting and dangerous conditions of Korea." 380 U.S. at 364. *See also Gondeck v. Pan-American World Airways, Inc.,* 382 U.S. 25 (1965) (awarding benefits where employee was killed in a car accident while on the way back from having a beer in town on San Salvador Island in the British West Indies); *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (heart attack while off duty in barracks provided by employer in Thule, Greenland held covered under zone of special danger test); *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978) (employee who died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal held within zone of special danger); *Baldwin v. General Dynamics Corp.,* 5 BRBS 579, *aff'd on recon,* 6 BRBS 396 (1977) (heart attack while jogging covered).

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Where the employee died as a result of a self-inflicted activity, no evidence of record supported a determination that the activity which occasioned the employee's death was related to conditions created by his overseas job and the circumstances surrounding the employee's death did not in themselves suggest that the death was work-related, the Board held that, as a matter of law, the "zone of special danger" test was not met. The administrative law judge's award of death benefits was accordingly reversed. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989).

The Board held that claimant's participation in the murder of her husband effectively severed any causal relationship which may have existed between the conditions created by his job and his death. Moreover, the policy that a wrongdoer should not be allowed to benefit from his or her own wrong was applicable in the instant case, which arose under the DBA, where the claimant, whom the administrative law judge rationally found had

willfully participated in the criminal activity leading to her husband's murder, attempted to secure death benefits. *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).

The Board affirmed the administrative law judge's application of the "zone of special danger" doctrine to find that claimant sustained a compensable injury where he was injured while engaged in after-hours recreational activities on the Johnston Atoll. The Board stated that the administrative law judge rationally concluded that the conditions of claimant's employment, *i.e.*, the isolation of the atoll coupled with the limited availability of recreational activities and the accessibility of alcohol, created a special zone of danger out of which claimant's injury arose, and it was within his authority to find that claimant's injury occurred while he was engaged in reasonable recreation. The Board factually distinguished this case from its decisions in *Gillespie*, 21 BRBS 56, and *Kirkland*, 23 BRBS 348. *Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002), *aff'd sub nom. Kalama Services, Inc. v. Director, OWCP,* 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied,* 543 U.S. 809 (2004).

The Ninth Circuit affirmed the Board's decision that the administrative law judge correctly applied the "zone of special danger" doctrine to find that claimant sustained a compensable injury under the Defense Base Act. Where claimant was injured at a social club to which he went after work on Johnston Atoll, a remote island that offered few recreational opportunities, the court held that an injury during horseplay of the type that occurred here was held a foreseeable incident of employment. *Kalama Services, Inc. v. Director, OWCP,* 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied,* 543 U.S. 809 (2004).

In this DBA case, claimant, while working as a contractor in Afghanistan, sustained injuries as a result of passively resisting MPs. The Board held that the administrative law judge's denial of benefits, based on his findings that claimant was at fault, or that the injury-causing incident did not directly involve employer or its personnel, was erroneous. Consideration of fault is directly contrary to the plain language of Section 4(b), as well as its longstanding, underlying principles. Moreover, the Board held that an employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger, since the conditions of claimant's employment placed him in a foreign setting where he was exposed to dangerous conditions. Specifically, the Board observed that 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 that employment. The Board conceded that claimant was at fault in causing the altercation, but concluded that once fault is eliminated, all that remained was an injury on a base in Afghanistan that was rooted in the conditions and obligations of claimant's employment. Consequently, the Board reversed the administrative law judge's conclusion that claimant's behavior removed him from the zone of special danger created by his employment, held that the injury was work-related, and therefore remanded the case for

consideration as to the merits of claimant's claim. *N.R. [Rogers] v. Halliburton Services,* 42 BRBS 56 (2008) (McGranery, J., dissenting).

In this DBA case, claimant alleged a physical harm to his face as the result of his use of a cosmetic chemical peel while in Kuwait. The administrative law judge found that the "zone of special danger" would bring any injury claimant may have suffered into the course of his employment, but found that claimant did not suffer a physical harm, and therefore no psychological harm as a result of the physical harm. The Board reversed the latter findings and held there was uncontradicted evidence of a psychological harm. However, as the psychological harm was the result of the perceived injury claimant believed he suffered related to the chemical peel, and as use of a chemical peel was a personal act, was not rooted in the obligations of his employment, and was not related to the fact that claimant worked in Kuwait, the Board held that any psychological injury related to that use did not have its genesis in claimant's employment. Accordingly, the Board held that the zone of special danger did not apply to bring claimant's actions/injury within the course of his employment. As claimant did not establish the working conditions element of his *prima facie* case, the Board affirmed the administrative law judge's denial of benefits. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009).

Although employer's cross-appeal was not timely filed, the Board nonetheless noted that the administrative law judge had properly applied the "zone of special danger" doctrine in this case. Decedent's decision to get a tattoo while employed overseas was a foreseeable activity for a paramilitary worker and thus was not an activity that was "thoroughly disconnected" from his employment. In addition, the self-administration of legally obtained pain medications is a reasonably foreseeable activity. Thus, the Board affirmed the administrative law judge's finding that the decedent's death was related to the peculiar dangers of overseas employment. *Urso v. MVM, Inc.*, 44 BRBS 53 (2010).

In this DBA case, the First Circuit rejected claimant's reliance on the "zone of special danger" doctrine, holding that claimant failed to establish that the employee's death in Saudi Arabia derived from his presence in a "zone of special danger." In this case where decedent was found dead due to asphyxiation by hanging inside his villa, the court stated that, based on the evidence, there were two plausible explanation for decedent's death: Suicide or accidental strangulation in the course of autoerotic activity. The court held that neither suicide in the ordinary case nor harm resulting from recreational activities that are neither reasonable nor foreseeable fall within the scope of the "zone of special danger." *Truczinskas v. Director, OWCP,* 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012).

In this DBA case, employer provided taxi vouchers to its employees to be used with essentially no restrictions within a certain radius. Decedent was involved in a fatal accident while being transported via taxi to a grocery store in Tbilisi, Georgia. The Board rejected employer's argument that only recreational/social activities or local risks

can give rise to the "zone of special danger." Emphasizing that the proper inquiry under the Supreme Court's decision in *O'Leary,* 340 U.S. 504, focuses on the foreseeability of the injury given the conditions and obligations of employment in a dangerous locale, the Board affirmed the administrative law judge's award of benefits where decedent lived and worked in a dangerous locale, the conditions of decedent's employment made grocery shopping a necessity, and it was foreseeable that employees would use the employer-paid taxi service to travel to a grocery store. The case did not present any circumstances that could warrant the legal conclusion that the decedent's activity was not rooted in the conditions of his employment or was "thoroughly disconnected" from the service of employer. Thus, decedent's death was compensable. *DiCecca v. Battelle Mem'l Inst.*, 48 BRBS 19 (2014), *aff'd,* 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015).

The First Circuit affirmed the Board's holding that the administrative law judge correctly applied the zone of special danger doctrine to find that decedent's death while being transported via taxi to a grocery store in Tbilisi, Georgia was compensable under the DBA because it arose out of foreseeable risks associated with employment abroad. Claimant was an on-call employee and employer provided taxi vouchers for any purposes, limited only by geographical area. The court expressly rejected employer's position that the zone of special danger doctrine applies only: 1) where the injury occurred during a reasonable recreational or social activity; or 2) where the foreign location presented conditions increasing the risk of injury beyond the domestic norm. The court held that the relevant inquiry is whether the injury falls within foreseeable risks occasioned by or associated with the employment abroad, and this factual determination turns on the totality of circumstances. The court stated that the zone of special danger doctrine is not limited to enhanced risks or risks peculiar to the foreign location, but also includes risks that might occur anywhere; however, the doctrine does not encompass "astonishing risks" that are not reasonably associated with the employee's employment. *Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015).

In this case involving an employee who was a citizen and resident of the Republic of the Marshall Islands, the Board affirmed the administrative law judge's application of the "zone of special danger" doctrine to find that claimant sustained a compensable injury. Claimant, who had been sent by employer along with two co-workers to work for a four-day period on an uninhabited, restricted access island, lacerated his foot while engaged in fishing on a coral reef after work hours. The Board rejected employer's primary argument that, as a matter of law, the zone of special danger doctrine may never apply to determine the compensability of an injury sustained by a non-U.S. citizen/resident working in his home country (a local national). Specifically, the Board rejected employer's contentions that application of the doctrine to local nationals contravenes the legislative intent underlying the DBA and is foreclosed by the U.S. Supreme Court's decision in *O'Leary*, 340 U.S. 504, and its progeny. Rather, the Board held that the question of whether the zone of special danger doctrine is applicable to a claim filed by a local national involves a factual determination and is dependent on the specific

circumstances presented by the individual case. In this case, claimant's presence on the isolated island where he was injured was due solely to the obligations and conditions of his employment, and the administrative law judge rationally found that it was foreseeable that he would engage in reef fishing during his four-day stay on the island. That he may have engaged in reef fishing on his home island is not dispositive of the compensability of the claim. *Jetnil v. Chugach Mgmt. Services*, 49 BRBS 55 (2015), *aff'd*, 863 F.3d 1168, 51 BRBS 21(CRT) (9th Cir. 2017).

The Ninth Circuit affirmed the finding that claimant, a citizen of the Marshall Islands, was injured in a "zone of special danger" while employed on a remote island other than the one on which he lived. The court held that local nationals are not precluded by statute or case precedent from receiving benefits under the DBA. The conditions of employment may subject local nationals to "remote, uninhabited, and inconvenient locales, even in their home countries." The factual circumstances implicating the zone of special danger may differ in the case of a local national than in the case of one working "abroad." The court held that substantial evidence supported the administrative law judge's finding that reef fishing on the remote island was foreseeable and reasonable. Claimant was on the remote island for employment reasons, the island was accessible only by employer-provided vessel, employer provided the food and housing, and claimant was injured while reef fishing, which is a traditional activity of the Marshallese. *Chugach Mgmt. Services v. Jetnil*, 863 F.3d 1168, 51 BRBS 21(CRT) (9th Cir. 2017).

The Board affirmed the administrative law judge's application of the zone of special danger doctrine to find that claimant sustained a compensable injury when he slipped on a wet floor after getting out of the bathtub in his employer-assigned apartment in Israel. The Board rejected employer's argument that the showering activity that resulted in claimant's injury was purely personal in nature and was thoroughly disconnected from his employment; in this regard, the Board factually distinguished this case from its decision in *Fear*, 43 BRBS 139. Citing the First Circuit's decision in *DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT), the Board also rejected employer's argument that for the zone of special danger to apply, the bathroom in which claimant was injured must have presented unique risks. The Board held that the administrative law judge rationally found that the conditions and obligations of claimant's employment created a zone of special danger based on substantial evidence, *i.e.*, claimant's 24-7 on-call status; the requirement that he live in the furnished apartment provided by employer; the hot, dirty environment in which he worked; and the employment contract provision requiring him to maintain a professional appearance, including his personal hygiene. The administrative law judge reasonably concluded that, as these employment conditions and obligations made bathing a necessity, slipping while exiting the shower was a foreseeable risk of claimant's employment. *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) (Magistrate's Report and Recommendation at 50 BRBS 97(CRT)).

Miscellaneous

Unique situations present for military contractors in Iraq raised average weekly wage issues addressed in a series of cases under Section 10 in which the Board held that where claimant is employed on a long-term contract in Iraq, it is appropriate to base his average weekly wage solely on Iraq earnings rather than on stateside earnings or a combination of stateside and overseas earnings. *See K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon. en banc,* 43 BRBS 136 (2009), *vacated and remanded sub nom. Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013); *S.K. [Khan] v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007); *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). On appeal, however, the district court vacated the Board's holding in *Simons* that claimant's average weekly wage had to be calculated only with reference to the wages he earned in Kuwait, holding that the Board engaged in a de novo review of the evidence and usurped the administrative law judge's authority. Substantial evidence supported the administrative law judge's finding that a blended approach, using both stateside and overseas earnings, better reflected claimant's true earning capacity pursuant to Section 10(c), taking into account claimant's one-year contract and the conditions of overseas employment. The court held that the Board did not provide any support for the proposition that the decision in *Proffitt* should be applied to all cases with similar facts, as such a conclusion abrogated the wide discretion afforded administrative law judges pursuant to Section 10(c). The court remanded the case, and a companion case, for further proceedings. *Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840, (S.D. Tex. Mar. 11, 2013).

In determining disability, in DBA cases where claimant has extensive overseas experience, the administrative law judge may consider this fact in evaluating suitable alternate employment. *See Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

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The Eleventh Circuit held that the automatic affirmance provision of Public Law 104-134 applied in cases brought under the Defense Base Act, due to the provision in the DBA incorporating the Longshore Act. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998).

The district court held that Section 3(e) of the Act is incorporated into the DBA and that the Saudi Social Insurance Law is a "workers' compensation law" within the meaning of Section 3(e) as it more closely resembles a workers' compensation law than a public social insurance program based on a weighing of the relevant factors. Employer therefore is entitled to a Section 3(e) credit for payments claimant received pursuant to the Saudi Social Insurance Law. *Lee v. Boeing Co., Inc.*, 7 F.Supp.2d 617 (D.Md. 1998).

In a Defense Base Act case, the Board held, based on the unique facts, that the relevant labor market for purposes of establishing the availability of suitable alternate employment included both the Trenton, Missouri, area in which claimant maintained a residence as well as overseas locations where suitable jobs similar to those claimant had performed were available. The facts in this case established that claimant had extensive overseas employment both pre- and post-injury, which supported a conclusion that claimant's job market included overseas locations. Thus, on remand, the administrative law judge must consider whether claimant's actual post-injury overseas employment was sufficient to meet employer's burden of showing the availability of suitable alternate employment and to establish a post-injury wage-earning capacity. The Board affirmed the administrative law judge's rejection of employer's job offers in Indianapolis and Washington, D.C., however, as acceptance of these jobs would require claimant to relocate without the travel and expense money offered by the overseas positions. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

Although Section 10(a) was not applicable, the Board reviewed the comparability of claimant's jobs as it is relevant to Section 10(c). The Board affirmed the administrative law judge's finding that claimant's employment in Iraq was not comparable to his employment in the United States. The administrative law judge rationally inferred, in the absence of contrary evidence, that claimant's job title of labor foreman denoted managerial responsibilities which claimant did not have in his stateside positions as a laborer and maintenance worker. Moreover, the administrative law judge rationally found that claimant's work in a combat zone was inherently different than his work in the Untied States by virtue of the dangerous location and the fact that his job included safety and security requirements that would not have been required of him in his work in the United States. The administrative law judge acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment. Use of only the wages claimant earned from employer appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq, and fully compensates claimant for the earnings he lost due to his injury. The Board therefore affirmed the administrative law judge's average weekly wage calculation under Section 10(c) based solely on claimant's wages in Iraq, as he had "regard to the previous earning of the injured employee in the employment in which he was working at the time of the injury." *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006).

The Board reversed the administrative law judge's use of claimant's combined overseas and stateside earnings during the year preceding his injury to calculate average weekly wage under Section 10(c). The Board held that claimant's average weekly wage must be calculated based solely on his overseas earnings in order to account for the plain language of Section 10(c) that this method shall reflect "the previous earnings of the injured employee in the employment in which he was working at the time of injury." Claimant was enticed to work in a dangerous environment in Iraq and Kuwait in return for higher

wages. Claimant's potential to maintain his higher level of earnings afforded by his one-year contract to perform work overseas was cut short by his injury. Claimant's earnings under this contract provide the best evidence of claimant's capacity to earn absent this injury. *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon. en banc,* 43 BRBS 136 (2009)*, vacated and remanded sub nom. Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

The Board denied employer's motion for reconsideration of the holding that, on the facts of this case, claimant's average weekly wage had to be calculated with use of only his overseas wages. The fact that claimant's injury was not caused by peculiar dangers of overseas work does not negate the conditions which formed the basis for his remuneration, specifically, employer's agreement to pay claimant substantially higher wages to work overseas in dangerous settings. Although the administrative law judge is afforded broad discretion in determining the average weekly wage pursuant to Section 10(c), that discretion is not unfettered as the administrative law judge's finding must be based on applicable law. In this case, the exclusive use of overseas wages provides the legal framework within which the administrative law judge may exercise his discretion in determining the amount of claimant's average weekly wage. *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 136 (2009) (*en banc*), *aff'g on recon.* 43 BRBS 18 (2009)*, vacated and remanded sub nom. Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

The district court vacated the Board's holding that claimant's average weekly wage had to be calculated only with reference to the wages he earned in Kuwait, holding that the Board engaged in a de novo review of the evidence and usurped the administrative law judge's authority. Substantial evidence supported the administrative law judge's finding that a blended approach, using both stateside and overseas earnings, better reflected claimant's true earning capacity pursuant to Section 10(c), taking into account claimant's one-year contract and the conditions of overseas employment. The court held that the Board did not provide any support for the proposition that the decision in *Proffitt*, 40 BRBS 41 (2006) should be applied to all cases with similar facts, as such a conclusion abrogated the wide discretion afforded administrative law judges pursuant to Section 10(c). The court remanded the case, and a companion case, for further proceedings. *Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

In a DBA case arising on the Kwajalein Atoll in the South Pacific, the Board affirmed the administrative law judge's finding that the rate of pay claimant earned in that position realistically reflected his wage-earning potential at the date of injury. The Board rejected claimant's contention that the post-injury job offer he received to return to higher-paying work in the Middle East should be factored into his average weekly wage under Section 10(c). Claimant voluntarily chose to leave higher-paying work in the Middle East and

accept a lower-paying job for employer. The administrative law judge's average weekly wage determination accounts for the extrinsic circumstances of claimant's employment on the Kwajalein Atoll and the language of Section 10(c) that the administrative law judge give "regard to the previous earnings of the injured employee in which he was working at the time of the injury." *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011).

In a claim arising under the DBA, the Board affirmed the administrative law judge's calculation of claimant's average weekly wage at the time of his injury under Section 10(c), based on a blend of his stateside earnings and his contract rate of pay with employer at the time of his injury. Noting that *Simons,* 43 BRBS 18, *aff'd on recon. en banc,* 43 BRBS 136 (2009), does not mandate the use of only overseas to calculate a claimant's average weekly wage in all DBA cases, the administrative law judge rationally found that claimant was working overseas pursuant to a six-month contract, and that claimant's history of non-continuous overseas employment indicated the lack of a long-term commitment to such employment. *Jasmine v. Can-Am Protection Group, Inc.,* 46 BRBS 17 (2012).

The Board rejected claimant's contention that the administrative law judge erred in failing to find that the DBA does not apply because employer intended to harm decedent. Although the Act's exclusive compensation remedy does not apply if employer intended to injure the employee (as the employer is not a third person and the harm was not accidental), this exception is very narrow. Wanton and reckless misconduct is not sufficient to show intent to harm. In this case, the administrative law judge drew all inferences in claimant's favor, and rationally found that claimant's allegations did not give rise to a triable issue of fact as to whether employer intended to injure decedent. The Board thus affirmed the administrative law judge's finding that if DBA coverage otherwise exists, the Act is the claimant's exclusive remedy. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

In a case where insurgents attacked a convoy and decedent, a truck driver, was killed, the Fifth Circuit held that the Defense Base Act precludes the plaintiffs' tort claims, as it is the exclusive remedy for compensation for the employee's death. Specifically, the court held that the death was "caused by the willful act of a third person directed against [decedent] because of his employment" pursuant to Section 2(2). That is, the attacks directly caused the death, and the attacks were not personal, but were "because of" decedent's employment driving in a supply convoy. Because the DBA is the exclusive remedy for an injury or death covered by the DBA, the court rejected the argument that the plaintiffs should, nevertheless, be permitted to proceed with the tort claims under the "substantially certain" theory of intentional tort liability, as the DBA provides no exceptions to the exclusivity rule. The court explicitly declined to address any other scenarios which could potentially permit injured employees to file tort claims, such as where the employer assaulted the employee or the employer conspired with a third party

to do so. Additionally, the Fifth Circuit held that the plaintiffs' fraud claim was barred because they were not seeking to rescind the employment contract but, rather, to obtain damages for a death that is exclusively compensable under the DBA. The court vacated the district court's order and remanded for the district court to dismiss the tort claims. *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir. 2012), *cert. denied*, 568 U.S. 941 (2012).

The claimants' claims of retaliatory discharge, breach of contract, and tortious conduct resulting from injuries allegedly sustained in the course of employment in Iraq were dismissed by the district court. Claimants cannot bring an original cause of action under 33 U.S.C. §948a in federal court; claimants must first proceed under the Act's administrative scheme. Claimants' common law claims are barred by doctrines of preemption. The DBA, through the Longshore Act, provides employers general immunity from tort suits by its employees for injuries covered by the Act. *Sickle v. Torres Advanced Enterprise Solutions, LLC,* 17 F. Supp. 3d 10, 48 BRBS 37(CRT) (D.C.D.C. 2013), *aff'd in pert. part*, 653 F. App'x 763 (D.C. Cir. 2016).

Employee #1 was terminated by employer following a work injury and, with the help of documentation provided by Employee #2, obtained disability benefits under the DBA. Employer subsequently terminated Employee #2 as well. Both employees filed suit against employer raising common law tort and contract claims. The circuit court held that Employee #1's tort claims, including that for retaliatory discharge, are foreclosed by the DBA since they arise directly out of his application for compensation benefits under the DBA. However, the DBA does not preempt Employee #1's contract claim, which involves only the issue of whether employer provided the required notice of termination. Employee #2's tort and contract claims are not preempted by the DBA since each is unrelated to any claim for benefits under the Act. *Sickle v. Torres Advanced Enterprise Solutions, LLC*, 884 F.3d 338, 52 BRBS 7(CRT) (D.C. Cir. 2018).

The D.C. Court of Appeals affirmed the district court's finding that the claimants' common law tort claims arising from benefits owed under the DBA were precluded by the LHWCA and DBA. 33 U.S.C. §905(a) (LHWCA); 42 U.S.C. §1651(c) (DBA). In so finding, the court held that intentional torts fall within the Acts' exclusivity provisions; however, the court noted that the exclusivity provisions do not preclude individuals from pursuing claims, such as an ADA claim, that arise independently of an entitlement to benefits under the Longshore Act. *Brink v. Continental Ins. Co.*, 787 F.3d 1120, 49 BRBS 23(CRT) (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 824 (2016).

After determining that claimant's employer failed to establish that claimant settled his tort claim with a third party, the Board addressed employer's "election of remedies" and "exclusivity" contentions. In rejecting AG Jersey's argument that claimant's decision to pursue a tort claim in the United Kingdom, a right he had as a British citizen, precluded his right to pursue benefits under the Act, the Board explained that "exclusivity" and

"election of remedies" are related but different concepts. That is, "exclusivity" is the pursuit of the same claim in different forums, whereas "election of remedies" is the pursuit of inconsistent claims. This case involves "exclusivity," and specifically, the relationship between foreign law and the Act. The Board held that a foreign court's decision applying that court's own law and resulting in a recovery to the claimant cannot negate a claimant's right under the DBA to receive compensation for his otherwise compensable work injuries. As international law may give rise to concurrent jurisdiction, AG Jersey, in knowing that the DBA was to be claimant's "exclusive" remedy under Section 5(a), should have raised and pleaded that as a defense in the foreign court. Thus, the Board held that claimant's right to benefits under the Act was not barred by the Act's exclusivity provisions. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

The party claiming a credit for the claimant's proceeds from a British tort suit, AG Jersey here, has the burden of proving the allocation of the settlement proceeds to show that it is deserving of a credit for benefits due under the Act. In this case, AG Jersey has not established the applicability of any of the Act's credit doctrines as: it did not show there were payments made under another workers' compensation act or the Jones Act (Section 3(e)); it did not show there was a reduction of benefits due to a modification of a prior award (Section 22); it did not show there was a third-party payment (Section 33(f)); and it did not show there was an injury under the schedule for which prior payments had been made (*Nash*). AG Jersey also did not show that the settlement payment was an advanced payment of compensation (Section 14(j)), as the details of the settlement have not been divulged. The Board also rejected the suggestion that it create another extra-statutory credit provision; double recoveries are not absolutely prohibited under *Yates*, 519 U.S. 248, 31 BRBS 5(CRT). The Board also rejected AG Jersey's argument that allowing double recovery would give non-U.S. citizens greater rights, stating that the rights of U.S. citizens and foreign nationals are not always equal under the Act. Therefore, the Board held that AG Jersey is not entitled to a credit for payments made to claimant pursuant to the tort settlement. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

War Hazards Compensation Act

If a DBA claimant's injury results from a "war risk hazard," employer may be entitled to reimbursement for disability benefits owed, pursuant to the War Hazards Compensation Act (WHCA). Reimbursement is made by the Federal Government under the Federal Employees' Compensation Fund. 5 U.S.C. §8147. The government, alternatively, can decide to pay the claimant directly. The benefits payable to the claimant are determined pursuant to the Longshore Act as extended by the DBA. The minimum provisions of the Longshore Act for computing disability compensation (33 U.S.C. §906(b)) and death benefits (33 U.S.C. §909(e)) do not apply to these claims or to cases paid under the DBA. Medical treatment and care are furnished under the applicable sections of the Federal Employees' Compensation Act (FECA). The applicability of the WHCA is determined by the Office of Workers' Compensation Programs, Division of Federal Employees' Compensation, whose decision is final.

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In this case, which arises under the DBA, and is still before the district director, employer requested a subpoena from the administrative law judge ordering claimant to attend a deposition so that it may investigate its potential claim for reimbursement under the WHCA. Based on OALJ rules and on the Board's decision in *Maine,* 18 BRBS 129 (1986) (en banc), the administrative law judge found that he has the authority to issue the requested subpoena. The Board vacated the order and quashed the subpoena on the ground that the administrative law judge abused his discretion in issuing an unnecessary subpoena, the purpose of which is to obtain information that is irrelevant for resolving the DBA claim. In addressing the relevancy of the information sought by employer, the Board summarized the WHCA process to determine that a reimbursement decision under the WHCA is not reviewable by any court or administrative agency. Therefore, the administrative law judge does not have any authority over the reimbursement claim, and that claim is not related to the undisputed DBA claim before him. Moreover, the Board noted that the WHCA does not require a "statement" to be in deposition form; therefore, claimant's offer to make a statement in an informal conference should suffice. *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012).

The Board affirmed the administrative law judge's order granting employer's motion for summary decision, as he correctly determined there is no genuine issue of material fact in this DBA case, and employer is entitled to summary decision as a matter of law. In this case, the Division of Federal Employees' Compensation (DFEC) had approved employer's application for reimbursement of compensation paid to claimant for his war hazard injuries. Additionally, the DFEC opted to pay claimant directly for his future medical needs. Accordingly, the Federal Government, not employer, is responsible under the WHCA for paying claimant's medical benefits, and it was proper for the administrative law judge to dismiss claimant's claim against employer. The Board

rejected claimant's assertion that he is without recourse to obtain his medical benefits. Rather, claimant is to follow the procedures under the FECA, pursuant to the WHCA, to obtain those benefits, and if a dispute arises in the DBA claim, claimant, who retains his procedural rights under the Longshore Act, could request a hearing before the OALJ to resolve the dispute. As there is no present dispute in the DBA case, and as DFEC has neither authorized nor rejected claimant's treatment, there is no factual dispute on which to hold a hearing, and the administrative law judge properly granted employer's motion for summary decision. *Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.,* 47 BRBS 9 (2013).

The Board held that claimant has no basis under the Act to challenge the transfer of the payment of his DBA benefits from employer to the Federal Government pursuant to the WHCA. Rather, if a claim is accepted under the WHCA, the Director has the authority to administer the claim as a reimbursement or a direct payment. Decisions of the Division of Federal Employees' Compensation are final, and there is no mechanism for review by any other official of the United States or by any court. Therefore, the administrative law judge has no authority to address the propriety of the transfer of claimant's claim under the WHCA. *Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.,* 47 BRBS 9 (2013).

The Board granted the Director's motion for reconsideration and clarified its decision to eliminate any suggestion that an employer is entirely relieved of liability under the DBA upon the federal government's acceptance under the WHCA of the employer's request for reimbursement and/or its decision to pay the claimant directly following an acceptance of a reimbursement request. Employer remains a party to the case and primarily liable under the DBA. The employer is relieved only of its current responsibility to administer and pay the claimant's benefits until such time, and if, the DFEC transfers the case back to the employer. *Cathey v. Service Employees Int'l, Inc.*, 47 BRBS 9 (2013), *clarifying on recon.* 46 BRBS 69 (2012).

The Nonappropriated Fund Instrumentalities Act

The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. §8171 *et seq.,* extends the provisions of the Longshore Act to civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Navy exchanges, Marine Corps exchanges and similar instrumentalities of the U.S. armed forces for the "comfort, pleasure, contentment, and mental and physical improvement" of military personnel.

Cases involving employees covered under NFIA raise the same issues as in any case under the Act and appear throughout the desk book. Of particular interest are cases involving whether employees injured on a military base but outside the building where a nonappropriated fund employer is located are within the course of their employment. These decisions are addressed in the Causation section of the desk book under Course of Employment. In addition, the "zone of special danger" doctrine is not applicable to the NFIA. *See Harris v. England Air Force Base, Nonappropriated Fund Financial Management Branch*, 23 BRBS 175 (1990); *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base,* 22 BRBS 372 (1989).

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The First Circuit held that an uncontested finding of compensability (rendered by way of approval of a settlement) under the Longshore Act, which is incorporated into NFIA, is sufficient to bar a related lawsuit (against a U.S. Navy Hospital, for medical malpractice) brought under the Federal Tort Claims Act, since the Longshore Act provides the employee's exclusive remedy for injury-related recovery in this situation, noting that: (1) because the employee in this case did not appeal the deputy commissioner's approval of his Longshore Act settlement, he was collaterally estopped from later contesting Longshore Act coverage; and (2) because NFIA does not contemplate third-party actions against the U.S., the employee was barred, under NFIA's exclusivity provision, 5 U.S.C. §8173, from bringing his lawsuit against the U.S. Navy hospital. *Vilanova v. United States*, 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989).

The Board rejected employer's argument that the claim of claimant's medical provider, St. Mary's Medical Center, was not covered under the Nonappropriated Fund Instrumentalities Act. The Act provides that compensation under the Longshore Act is the exclusive remedy against both the United States and the nonappropriated fund employer for injuries "arising out of and in the course" of an employee's employment. 5 U.S.C. §8173; 33 U.S.C. §902(2). In the instant case, it was undisputed that employer, Army & Air Force Exchange Service, is a nonappropriated fund employer and that claimant suffered an injury covered by the NFIA. The question of whether the treatment claimant received was related to her injury pursuant to Section 7 was within an

administrative law judge's authority to decide. *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

After consideration of the relevant statutory provisions, particularly 5 U.S.C. §8171(a), military regulations, a DOL program memorandum, and case law pertaining to coverage under the NFIA, *see Amarillo Air Force Base Exchange v. Leavey*, 232 F.Supp. 963 (N.D. Tex. 1964), and *Employers Mutual Liability Ins. Co. of Wisconsin v. Arrien*, 244 F.Supp. 110 (N.D. N.Y. 1965), the Board held that active duty military personnel are excluded from coverage under the NFIA. *Hardgrove v. Coast Guard Exchange System*, 37 BRBS 21 (2003).

The Board vacated an award under the NFIA and remanded for consideration of the status of an employee working at an exchange at Guantanamo Bay Naval Station. The NFIA applies to United States citizens or to permanent residents of a "territory or possession" employed by a nonappropriated fund instrumentality outside the United States, and claimant was a Cuban citizen granted refuge at the base. The Board held that the Guantanamo Bay base was a "possession" of the United States for purposes of the NFIA and remanded the case for a finding as to whether claimant was a "permanent resident" of the base based on his five years there as an exile from the Castro regime. *Utria v. U.S. Marine Exchange*, 7 BRBS 387 (1978).

The Board held that claimants, the widows of citizens of the Philippines who were employed by a nonappropriated fund entity in the Philippines, were not entitled to benefits under the NFIA extension of the Longshore Act, 5 U.S.C. §8171. Rather, compensation for the work-related injuries or deaths of nonappropriated fund employees who are not U.S. citizens or permanent residents and who are employed outside of the continental U.S. is governed by Section 8172 of the NFIA, which states that compensation shall be provided in accordance with regulations provided by the applicable military department or the Secretary of Transportation. Thus, the Board held that claimants in this case were limited to any remedy provided by the Secretary of the Navy over which DOL has no jurisdiction. *A.P. [Panaganiban] v. Navy Exchange Service Command*, 43 BRBS 123 (2009).

The Outer Continental Shelf Lands Act

The Longshore Act, as extended by the Outer Continental Shelf Lands Act (OCSLA, also known as the Lands Act), 43 U.S.C. §1331 *et seq.,* provides workers' compensation coverage for the death or disability of an employee resulting from any injury occurring as the result of operations connected with the exploration, development, removal, and transportation of natural resources from the seabed and subsoil of the Outer Continental Shelf. 43 U.S.C. §1333(c). The Lands Act applies to all submerged lands (and artificial islands and fixed structures located thereon) which lie beneath navigable waters seaward of state jurisdictional boundaries, and which are subject to the jurisdiction and control of the United States. 43 U.S.C. §§1331(a), 1301(a).

The coverage requirements of the Lands Act are separate from and are not related to the coverage provisions of the LHWCA; thus, claimant's coverage under each statute must be evaluated separately. *See Herb's Welding, Inc. v. Gray*, 703 F.2d 176, 15 BRBS 126(CRT) (5th Cir. 1983), *reh'g denied*, 711 F.2d 666, 16 BRBS 70(CRT) (5th Cir. 1983), *rev'd,* 470 U.S. 414, 17 BRBS 78(CRT) (1985), *decision after remand,* 766 F.2d 898, 17 BRBS 127(CRT) (5th Cir. 1985); *Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987). Like the coverage requirements of the Longshore Act, however, the term "employee" under the Lands Act does not include the master or member of a crew of any vessel. 43 U.S.C. 1333(c)(1). *See* the desk book section on Coverage, Member of a Crew.

In *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), the court held that the provisions of the Longshore Act applied to a claim against a helicopter pilot's employer for the death of the pilot while transporting passengers to work on a rig on the Outer Continental Shelf. The court held that the helicopter was not a "vessel," and that the pilot was covered under the Lands Act because his duties transporting workers and equipment to and from the rig played an important role in developing the Shelf. The court further found that the definition of "employer" in 43 U.S.C. §1333(c)(2) included the helicopter pilot's employer because its pilot employee was engaged in operations connected with the development of the Shelf.

The injury resulting in disability or death must have occurred as the result of operations on the Shelf. In *Barger*, the court adopted a "but for" test of causation for determining whether a particular injury was the result of operations on the Shelf. The court held that the helicopter pilot was covered under the Lands Act because his death would not have occurred "but for" the extractive operations on the Shelf.

In *Herb's Welding*, 766 F.2d 898, 17 BRBS 127(CRT), *rev'g* 12 BRBS 752 (1980), the court applied the "but for" test in determining whether a worker injured while bracing a gas line on an oil rig in Louisiana territorial waters was covered under the Lands Act.

The Board had held that, because the worker spent 25 percent of his time working on oil rigs on the Shelf and was injured on a platform that was connected by a gas flow pipeline to another platform located on the Shelf, the worker was covered under the Lands Act because his work was an integral part of operations on the Shelf and his injury occurred as the result of such operations. The Fifth Circuit initially affirmed a finding of coverage under the Longshore Act without addressing OCSLA coverage, *Herb's Welding*, 703 F.2d 176, 15 BRBS 126(CRT), but after this decision was reversed by the Supreme Court, *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), the Fifth Circuit reversed the Board's determination that claimant was covered under OCSLA. The court held that there was no coverage under the Lands Act because the worker's injury would have occurred even if there had been no operations on the Shelf, as the fact that the platform may have been connected to another platform on the Shelf was unrelated to the cause of the accident. The court acknowledged that an employee's coverage could change depending on the rig to which he was assigned on a particular day, but concluded that this element of inconsistency was dictated by the geographic limitations imposed by the Lands Act.

In a subsequent case, the Fifth Circuit held that in addition to the "but for" test, claimant's injury must also occur on the outer continental shelf or the waters above it. *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989) (en banc). The Ninth and Third Circuits had not adopted a "situs" requirement for OCSLA coverage. *Valladolid v. Pacific Operations Offshore, L.L.P.*, 604 F.3d 1126, 44 BRBS 35(CRT) (9th Cir. 2010); *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988). The Supreme Court, in affirming the Ninth Circuit's decision in *Valladolid*, held that the OCSLA covers an injury occurring as a result of operations on the shelf if the employee establishes a substantial nexus between his injury and his employer's extractive operations on the shelf. A situs of injury test is incompatible with Section 1333(b) and the a "but for" test is too broad in that does not emphasize "operations on the shelf." *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 45 BRBS 87(CRT) (2012); *see infra.*

The claim for disability or death must arise from an injury occurring as the result of operations connected with the exploration, development, removal and transportation of natural resources from the seabed and subsoil of the Shelf. 43 U.S.C. §1333(b). In *Robarge*, 17 BRBS 213, the Board held that a pipefitter/welder working on a fixed offshore oil platform under construction on the Shelf was an employee under the Lands Act because he was engaged in "development" of the natural resources of the shelf even though the platform was not operational at the time of injury. The Board examined the legislative history and statutory provisions of the Lands Act and concluded that Congress did not intend to exclude workers engaged in pre-production, exploratory activities when return is uncertain. The Ninth Circuit affirmed this decision. *Kaiser Steel Corp.*, 812 F.2d 518.

The Act provides the exclusive remedy against an employer for disability or death of an employee covered under it. *See Barger*, 692 F.2d 337; 33 U.S.C. §905(b), as incorporated into 43 U.S.C. §1333(c). In *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982), however, the Fifth Circuit held that admiralty jurisdiction over non-employer third parties was not ousted by Lands Act coverage of a helicopter pilot who died while engaged in a maritime function on the shelf. Furthermore, notwithstanding the apparent exclusive applicability of federal law to the shelf, the Lands Act adopts the laws of the adjacent state, to the extent they are not inconsistent with the Act or other federal law, as "surrogate" federal law in cases where federal law is not applicable or there is a gap in federal law. 43 U.S.C. §1333(a)(2); *Rodrigue v. Aetna Casualty and Surety Co*., 395 U.S. 352 (1969); *Smith,* 684 F.2d 1102.

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OCSLA did not create a cause of action in tort for injured offshore platform worker against employer under the Longshore Act. However, the Fifth Circuit did note that the only new private right of action created by Section 1349(a) permits a private citizen to bring suit to enforce OCSLA and to seek civil penalties. This is nevertheless an enforcement action and not a strict-liability tort claim. *Wentz v. Kerr-McGee Corp.*, 784 F.2d 699 (5th Cir. 1986).

Where an employee is injured as a result of operations conducted on the Outer Continental Shelf, the injured worker is covered under the Act. *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987).

The court held that the Lands Act extends Longshore coverage to an employee injured while working as a pipefitter/welder on a stationary offshore oil platform under construction on the outer continental shelf (OCS). The court found that the employee's welding activity contributed directly to the development of natural resources of the OCS, and that the employee did not come within the seaman or government employee exceptions of the Lands Act. *Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987), *aff'g Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985).

The Board deemed *Maher v. Bunge Corp.*, 18 BRBS 203 (1986), which involved a settlement under Section 8(i) of the Act, dispositive despite the fact that, unlike this case, it did not arise under OCSLA. Although OCSLA provides for utilization of state law "where necessary," the Board held that such resort to state law was not "necessary" in this case, since the Longshore Act and its regulations comprehensively address the subject of Section 8(i) settlements. *Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18 (1987), *aff'd*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

The Board affirmed the administrative law judge's finding that claimant, a land-based construction worker engaged in building offshore oil platforms, was not covered under

the Lands Act because his alleged injury on land did not bear a sufficient relationship to operations on the shelf to warrant application of the Lands Act. The Board cited the "but for" test of causation (for determining whether an injury occurred as the result of operations on the shelf) adopted by the Fifth Circuit in *Herb's Welding*, 766 F.2d 897, 17 BRBS 127(CRT). *Mills v. McDermott, Inc.*, 19 BRBS 258 (1987), *aff'd sub nom. Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989) (*en banc*), *rev'g* 846 F.2d 1013, 21 BRBS 83(CRT) (5th Cir. 1988).

On appeal, the court held on reconsideration *en banc* that, in determining whether OCSLA jurisdiction exists, the claimant's injury must occur as a result of operations on the outer continental shelf (OCS) ("but-for" test) and must occur on the OCS (or on the waters above the OCS). Thus, shore-based workers such as claimant who are injured while building component parts headed for the shelf are not entitled to coverage under OCSLA. *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989) (*en banc*), *rev'g* 846 F.2d 1013, 21 BRBS 83(CRT) (5th Cir. 1988).

The Third Circuit reversed the Board's holding of no OCSLA jurisdiction over an offshore drill-rig employee injured on a highway while en route to his work site. In determining that the employee was covered by the OCSLA, the court noted that the OCSLA does not contain a "situs" requirement, that it covers injuries "arising out of or in connection with" any OCSLA operations, and that the employee in this case would not have been injured "but for" his job, which was related to operations on the Outer Continental Shelf. The case was accordingly remanded for consideration of substantive issues. *Curtis v. Schlumberger Offshore Service, Inc.,* 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988).

On remand from the Third Circuit, the Board held that claimant was not a member of a crew excluded from OCSLA coverage because the administrative law judge found that claimant was not aboard the vessel to aid in its navigation. [Note that the test for member of crew status was subsequently altered]. The Board also rejected employer's contention that claimant was excluded from coverage under the pre-1978 version of OCSLA because his work was in connection with a floating offshore drilling rig. Items temporarily attached to the seabed, such as floating oil drilling rigs, are not excluded from coverage. *Curtis v. Schlumberger Offshore Services, Inc.*, 23 BRBS 63 (1989), *aff'd mem.*, 914 F.2d 242 (3d Cir. 1990).

The Board held that claimant, who was injured while building a housing superstructure and who spent, at the most, eight hours during his entire four month tenure with employer offloading such a superstructure, was not covered under Section 2(3) of the Act as his loading activities were clearly incidental to his participation in the construction of such superstructures and not integral to the loading and unloading process. The Board nonetheless held that since claimant was a land-based worker injured while building a housing superstructure destined for an offshore drilling rig, he may be entitled to benefits

under the Longshore Act as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(b). The Board, therefore, remanded this case for the administrative law judge to reopen the record for evidence indicating whether the housing superstructure was destined for the Shelf. The Board followed the first decision in *Mills*, 846 F.2d 1013, 21 BRBS 83(CRT) (as discussed above, this *Mills* decision was subsequently reversed by the Fifth Circuit sitting *en banc*, 877 F.2d 356, 22 BRBS 97(CRT)). *Laviolette v. Reagan Equipment Co.*, 21 BRBS 285 (1988).

A claimant, who injured himself while supervising the maintenance of a production platform which furthered mineral development, was within the jurisdiction of the OCSLA because the injury would not have occurred "but for" the maintenance work he was performing and supervising on the platform. *Recar v. CNG Production Co.*, 853 F.2d 367, 21 BRBS 153(CRT) (5th Cir. 1988).

Where it was uncontradicted that claimant was injured while involved in the construction of an offshore drilling rig located approximately 12 miles off the coast of Long Beach, Calif., the Board modified the administrative law judge's decision to reflect that the claim arose under OCSLA. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990).

The coverage provisions of OCSLA are separate from, and not related to, the coverage provisions of the Longshore Act. Claimant, an employee of an independent contractor who worked aboard lift boats while performing construction and repair work for well platforms was not a member of a crew excluded from coverage under OCSLA, as he did not work aboard an "identifiable fleet of vessels." *Nix v. Hope Contractors, Inc.*, 25 BRBS 180 (1991).

Citing *Mills*, 877 F.2d 356, 22 BRBS 97(CRT), the Fifth Circuit held that a claimant who was injured constructing a parking lot at a heliport used to transport crewmen to oil platforms was not covered under the OCSLA because he was not injured on the Outer Continental Shelf. *Sisson v. Davis & Sons*, *Inc.,* 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998).

The Board held, based on the decision in *Mills*, 877 F.2d 356, 22 BRBS 97(CRT), that as claimant's car accident did not occur on the Outer Continental Shelf, or on waters over the Shelf, but on a highway in Mississippi, claimant did not satisfy the situs requirement of the OCSLA irrespective of whether the accident was due to fatigue caused by claimant's working long hours on the Shelf. *Martin v. Pride Offshore, Inc.,* 34 BRBS 192 (2001).

The Fifth Circuit held that the situs requirement of OCSLA was met as to the offshore jack-up rig in this case, as it was temporarily attached to the seabed and was erected on the OCS for the purpose of drilling oil. It was not excluded from OCSLA coverage as a vessel used to transport resources from the OCS. Moreover, the OCSLA status test

applied as the claimant was injured as a result of operations conducted on the Shelf for the purpose of exploring for, removing, etc., resources from the OCS. As the indemnification contract between the general contractor and the subcontractor was a "maritime contract," Louisiana law was not applicable. Thus, under Section 5(c) of the Longshore Act, the indemnification agreement was valid. *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 35 BRBS 131(CRT) (5th Cir. 2002).

Claimant, who was injured in an office on a fixed platform off the coast of Louisiana, met the status and situs requirements of OCSLA and was entitled to benefits under the Act. The OCSLA covers non-seamen who are injured as the result of operations conducted on the OCS for the purpose of exploring, developing, etc., the natural resources of the subsoil and seabed. The Board held that claimant was covered because his injury occurred on a platform affixed to the OCS, which was erected for the purpose of producing natural resources, and it rejected employer's argument that the Fifth Circuit decision in *Demette*, 280 F.3d 492, 35 BRBS 131(CRT), prohibited coverage on installations under construction. Consequently, the Board affirmed the administrative law judge's determination that claimant was a covered worker, as he was injured on an OCSLA covered situs during the performance of his job procuring supplies to construct the platform complex. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Board rejected INA's argument that *Tarver*, 384 F.3d 180, 38 BRBS 71(CRT), was controlling, intervening law, as *Tarver* addressed coverage under Section 3(a) of the Longshore Act and coverage in this case was based on the OCSLA requirements. Consequently, the Board held that its prior decision affirming the finding that claimant satisfied the OCSLA coverage requirements was the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

The widow of a helicopter pilot killed when the helicopter crashed over land was not entitled to coverage under the OCSLA because her husband's death did not occur over the Outer Continental Shelf and thus did not satisfy the OCSLA's situs requirement. *Pickett v. Petroleum Helicopters, Inc.*, 266 F.3d 366, 35 BRBS 101(CRT) (5th Cir. 2001), *cert. denied*, 535 U.S. 1090 (2002).

As claimant was not engaged in activities within the meaning of the OCSLA, namely explorative and extractive operations involving natural resources on the seabed or subsoil, and thus did not meet a threshold requirement for coverage, the Board affirmed the administrative law judge's finding that the claimant was not covered by the OCSLA. Claimant was engaged in digging a sewage tunnel under the ocean. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

The Board, in this case arising within the jurisdiction of the Ninth Circuit, addressed the issue of whether OCSLA coverage requires both a situs-of-injury and status test. The Board discussed the opposing positions articulated on the situs-of-injury requirement by

the Third Circuit in *Curtis*, 849 F.2d 805, 21 BRBS 61(CRT), and the Fifth Circuit in *Mills*, 877 F.2d 356, 22 BRBS 97(CRT). After noting that the Ninth Circuit had not explicitly addressed the situs requirement, the Board held that the language and legislative history of the OCSLA, in conjunction with the Supreme Court's interpretation thereof, supported the decision of the Fifth Circuit in *Mills*, 877 F.2d at 361, 22 BRBS at 100(CRT), that coverage under the OCSLA involves meeting both a situs-of-injury and status test. The Board added that the Ninth's Circuit's decision in *Phillips*, 179 F.3d 1187, 1189 n. 1, 33 BRBS 59, 61 n. 1(CRT), wherein the court stated, in *dicta*, that "the situs requirement is a predicate for coverage under OCSLA," provided a strong indication that the Ninth Circuit was more closely aligned with the Fifth Circuit on this issue. The Board thus rejected claimant's assertion that a situs-of-mineral extraction operations test rather than a situs-of-injury test is more appropriate to determine coverage under the OCSLA. Consequently, as it was undisputed that decedent's injury did not occur while he was working on the OCS, the administrative law judge's finding that claimant did not establish situs under the OCSLA, and thus, was not covered under that Act, was affirmed. *L.V. [Valladolid] v. Pacific Operations Offshore, LLP*, 42 BRBS 67 (2008), *rev'd*, 604 F.3d 1126, 44 BRBS 35(CRT) (9th Cir. 2010), *aff'd*, 565 U.S. 207, 45 BRBS 87(CRT) (2012).

The Ninth Circuit reversed the Board's decision holding that Section 1333(b) of the OCSLA contains a "situs-of-injury" test. It held that Section 1333(b) may apply to injuries occurring outside the situs of the Outer Continental Shelf. Thus, the court rejected the test espoused by the Fifth Circuit's *en banc* decision in *Mills,* 877 F.2d 356, 22 BRBS 97(CRT). However, the court declined to consider this a simple "but-for" test. Thus, the court also rejected the Third Circuit's interpretation in *Curtis,* 849 F.2d 805, 21 BRBS 61(CRT). Rather, the court stated that injuries with a tenuous connection to operations on the Shelf are not covered. The test adopted by the court is: "the claimant must establish a substantial nexus between the injury and the extractive operations on the Shelf. To meet this standard, the claimant must show that the work performed directly furthers Outer Continental Shelf operations and is in the regular course of such operations." The Ninth Circuit remanded the case for consideration of whether decedent's death at an onshore oil processing facility was covered. *Valladolid v. Pacific Operations Offshore, L.L.P.*, 604 F.3d 1126, 44 BRBS 35(CRT) (9th Cir. 2010), *aff'd*, 565 U.S. 207, 45 BRBS 87(CRT) (2012).

The Supreme Court affirmed the Ninth Circuit's decision holding that claimant must establish a substantial nexus between the employee's injury and extractive operations on the outer continental shelf to be covered under Section 1333(b) of the OCSLA. The Court rejected the Fifth Circuit's "situs of injury" test and the Third Circuit's "but for" test as incompatible with Section 1333(b). The Court also rejected the status-based test urged by the Solicitor General which would apply one test to injuries occurring on the shelf and a different test to injuries occurring off the shelf. The Court held that the substantial nexus test is most faithful to the text of §1333(b) and that this test requires the

employee to establish a significant causal link between his injury and his employer's extractive operations conducted on the shelf. The case was remanded for necessary findings in this regard. *Pacific Operators Offshore, LLP v. Valladolid,* 565 U.S. 207, 45 BRBS 87(CRT) (2012).

Claimant, a marine carpenter hired by employer to fabricate topside living quarters to be incorporated onto the tension leg oil platform *Big Foot*, did not satisfy the coverage requirements of the OCSLA. Pursuant to *Pacific Operators Offshore, LLP v. Valladolid*, 132 S.Ct. 680, 45 BRBS 87(CRT) (2012), claimant's on-shore work at employer's shipyard facility was not the "result of" OCS operations because it did not have a substantial nexus to OCS operations. As the administrative law judge found, there was no completed or operating rig on the OCS, and the living quarters being constructed, while destined for *Big Foot*, were not unique to on-OCS operations. As claimant's activities "were geographically, temporally, and functionally distant from" extracting operations on the OCS, the Board affirmed the denial of benefits under the OCSLA. *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), *aff'd sub nom. Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Fifth Circuit affirmed the Board's holding that claimant did not satisfy the coverage requirements of the OSCLA. The court held that claimant did not meet the substantial nexus test of *Valladolid* as his injury occurred on dry land while building the living and dining quarters for a tension leg oil platform. The court stated that claimant's employment was too attenuated from the platform's purpose of extracting natural resources from the OCS, he was not required to travel to the OCS, and his employer had no role in moving the platform, or installing and operating it on the OCS. *Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Board affirmed the administrative law judge's conclusion that claimant's claim, seeking benefits for an injury sustained in an automobile accident while traveling from his home to a designated pick-up area on a dock for further transport to a rig on the OCS, falls under the coverage of the OCSLA. The Board discussed, at length, the substantial nexus standard adopted by the Supreme Court in *Valladolid*. The Board affirmed the administrative law judge's finding that the evidence establishes a significant causal link between claimant's injuries and employer's on-OCS extractive operations as it is supported by substantial evidence. Specifically, the administrative law judge rationally relied on the following facts: 1) claimant's duties on the OCS examining off-shore facility storage tanks for defects was in the "regular course of" and "directly furthered" operations on the OCS; 2) claimant's injuries occurred while he was in route, along with his work equipment, to the OCS facility to perform his job duties; and 3) claimant was compensated by the mile and for his travel time to the job site on the OCS on the date of his injury. The Board rejected employer's contention that a risk-based analysis should be applied to determine OCSLA coverage. *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (2015).

The Board affirmed the administrative law judge's conclusion that claimant is covered by the OCSLA because he established a substantial nexus between his injury and the extraction of natural resources from the OCS. The Board rejected the contention that claimant did not establish a substantial nexus between his injury and employer's extractive operations on the OCS because claimant performed his duties on land and was not required to travel to the OCS. The Board affirmed the administrative law judge's finding of a substantial nexus because claimant's work was directly related to extractive operations as he supervised the loading and unloading of vessels that transported equipment and personnel to the offshore rigs. *Spain v. Expeditors & Prod. Serv. Co., Inc.*, 52 BRBS 73 (2018), *aff'd sub nom. Expeditors & Prod. Serv. Co., Inc. v. Director, OWCP*, ___ F. App'x ___, 53 BRBS 75(CRT), 2019 WL 5699966 (5th Cir. Nov. 5, 2019).

The 1928 D.C. Act

The District of Columbia Workmen's Compensation Act of 1928, 36 D.C. Code §501 *et seq.* (1973) (the 1928 Act), extends the provisions of the Longshore Act to injuries and deaths arising out of employment in the District of Columbia. In 1979, the District of Columbia government repealed the 1928 Act and enacted its own workers' compensation law, which became effective on July 26, 1982. The District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code §301 *et seq.* (1981) (the 1982 Act).

Injuries to employees in the District of Columbia occurring prior to July 26, 1982, the effective date of the 1982 Act, are covered by the Longshore Act. Due to the repeal of the 1928 Act, the D.C. Circuit held that the 1984 Amendments to the Longshore Act have no effect on and are not to be applied to claims for injuries sustained prior to the effective date of repeal of the 1928 Act. Thus, the provisions of the Longshore Act as they existed in 1982 are preserved for the benefit of employees whose claims are derived from injuries occurring prior to enactment of the 1982 Act. *Keener v. Washington Metro. Area Transit Auth.*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *See Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

With regard to occupational disease claims, the D.C. Circuit held that where the employment events giving rise to the injury occurred prior to the effective date of the new D.C. Act, but the worker did not become aware of the injury and its relation to his employment until after the effective date, the new D.C. Act applies under the "manifestation rule," rejecting the Board's approach applying an "exposure rule." *Railco Multi-Constr. Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990), *vacating* 18 BRBS 264 (1986) and 19 BRBS 238 (1987); *see also Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986), and 27 BRBS 47 (1993); 20 C.F.R. §701.101(b). However, due to coverage requirements in the new Act, the court recognized that a "coverage gap" may exist that would deprive some workers of a remedy. Thus, if there is no jurisdiction under the new Act at the time of manifestation or under any other state law, the court held the 1928 Act would apply. The court also held that 20 C.F.R. §701.101(b), which adopted an "exposure rule" for determining which Act applies, is invalid.

Coverage under the Act applies to employees of employers carrying on any employment in the District of Columbia, irrespective of where the injury occurs. The term "employer" means every person carrying on any employment in the District, and the term "employee" means every employee of any such person. 36 D.C. Code §501. The Board has held that a general partner is not an "employee" within the meaning of the Act. *Duncan v. D & K Foreign Auto Repair*, 17 BRBS 40 (1985).

A two prong test is applicable in determining whether the Act covers specific claimants. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947). First, the fact-finder must

determine whether the employer carries on any employment in the District. If the fact-finder determines that the employer carries on some employment in the District, he must then weigh the contacts between the employee, the employer, and the District and determine whether the contacts are substantial enough to confer jurisdiction. The Section 20(a) presumption applies to the issue of jurisdiction in cases arising under the Act. *Id.*; *see also Dorn v. Safeway Stores, Inc.*, 18 BRBS 178 (1986).

In order to be carrying on employment in the District, employer must have some employment activities in the District. In *Carraway v. LTD Contracting Co., Inc.*, 16 BRBS 210 (1984), employer had completed its single project in the District more than one year prior to the date of injury and neither solicited nor accepted any other work in the District. The fact that employer occasionally published employment opportunities in the Washington Post was insufficient alone to establish that employer carried on employment in the District. In *Gatling v. Colonial Masonry, Inc.*, 11 BRBS 123 (1979), the Board held that employer must be carrying on employment within the same time frame as the employment injury for jurisdiction to exist.

It should be noted that facts which may constitute contacts under the second part of the jurisdiction test, discussed below, do not necessarily indicate that employer is carrying on employment. In *Oliver v. Frank Brisco Co.*, 8 BRBS 684 (1978), employer submitted bids on construction jobs located within the District; hired employees through unions located throughout the metropolitan Washington area, including the District; 40 percent of employer's employees were District residents; and claimant was hired through a message sent to him at his brother's home in the District. The Board observed that "although some of the factors constitute contacts with the District of Columbia, they do not constitute the carrying on of any employment in the District of Columbia." *Id.* at 686. *See also Hill v. Allied Aviation Service Co.*, 8 BRBS 204 (1978).

The second prong of the two-part test requires "substantial contacts" between the employee, the employer and the District. In *Cardillo*, 330 U.S. 469, the Supreme Court listed several factors which it considered relevant in determining whether substantial contacts exist to support jurisdiction under the Act. Those factors are: the employee's place of residence, the employer's place of business, the place of contract of hire, the employee's prior work in the District over a period of years, the place from which the employee received direction while working outside of the District, the place from which the employee was paid, and whether the employee was subject to transfer to the District. Another important factor is whether claimant recently performed services on behalf of the employer within the District. *Pfister v. Director, OWCP*, 675 F.2d 1314, 15 BRBS 139(CRT) (D.C. Cir. 1982), *aff'g* 10 BRBS 679 (1979); *Director, OWCP v. National Van Lines, Inc., [Riley]*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied,* 448 U.S. 907 (1980); *Saunders v. Jumbo Food Stores, Inc.*, 16 BRBS 245 (1984). While these factors are all relevant, not all of them need be met for jurisdiction to be proper. *Cardillo*

did not specify how many of the enumerated contacts were required to exist before contacts were "substantial."

Especially significant are those cases finding jurisdiction where the employee was not a resident of the District and the injury did not occur in the District. In *National Van Lines*, 613 F.2d 972, 11 BRBS 298, claimant was a resident of Virginia who was injured in New York while delivering goods picked up in the District, Maryland, and Virginia. The court noted that the usual indicia of connection, such as the residence of the employee, headquarters of the employer, and place of entering the contract, were absent, but determined that the common indicia of connection were unimportant. The court found that the interstate nature of employer's business and employment-related activities in the Washington, D.C. metropolitan area were sufficient to establish jurisdiction.

The Board expressed its disagreement with the holding in *National Van Lines* but nonetheless applied it in factually similar cases arising in the jurisdiction of the D.C. Circuit. *See Robidoux v. Xerox Corp.*, 18 BRBS 209 (1986); *Walker v. Desks & Furnishings*, 17 BRBS 239 (1985); *Brocklehurst v. Giant Food, Inc.*, 16 BRBS 220 (1984).

In *Phillips v. Craft Master Corp.*, 14 BRBS 330 (1981), claimant was not a District resident at the time of his injury and was working exclusively outside of the District when the injury occurred. The Board held that substantial contacts existed to establish jurisdiction where claimant had contracted for hire in the District, initially worked in the District, and was subject to transfer back to the District by the same employer. In *Cunningham v. Washington Gas Light Co.*, 12 BRBS 177 (1980), the Board held that where claimant had previously worked in the District and was transferred outside of the District, it was to be assumed, in the absence of specific evidence to the contrary, that he was subject to transfer back to the District.

For cases finding no substantial contacts, *see Pfister*, 675 F.2d 1314, 15 BRBS 139(CRT); *Butler v. Continental Western Lines, Div. of Trailways, Inc.*, 668 F.2d 1374 (D.C. Cir. 1981), *aff'g* 13 BRBS 1 (1980); *Dorn*, 18 BRBS 178; *Sanford v. Shenandoah's Pride Dairy*, 16 BRBS 237 (1984). In *Pfister*, neither a showing of one isolated contact by the employee with the District nor employer's operation of ticket offices in the District were sufficient contacts where overwhelming evidence located the employment relationship in Virginia. In *Butler*, the employer's three subsidiaries operating in the District and the District residence of claimants (employee's children) were insufficient to confer jurisdiction where the employee's work for the employer had never brought him within 2000 miles of the District and the employee did not reside in the District.

In *Dorn*, 18 BRBS 178, claimant, who was hired in the District, lived and worked in the District for nine years before requesting a transfer to Maryland where she lived and worked for 13 years prior to filing a claim under the Act. The Board held that claimant

had severed her contacts with the District when she transferred to Maryland. The Board distinguished *National Van Lines* based on the specific location of the employment relationship. In *National Van Lines*, claimant regularly entered the District during the course of his employment. Unlike the situation in *National Van Lines*, once claimant in *Dorn* transferred to Maryland, she lived and worked exclusively in Maryland, thereby severing all employment ties with the District. *See also Basinger v. Kaufmann Graphics, Inc.*, 19 BRBS 165 (1986).

In *Sanford*, 16 BRBS 237, the Board held that past contact with the District, standing alone, did not support a finding of substantial contacts. Claimant's travel through the District did not constitute a contact because he did not perform any services there for employer and was not required to travel through the District by the employer.

The "zone of special danger" doctrine in cases arising in the District of Columbia, following holdings of the Court of Appeals for that Circuit applying it to cases arising under the 1928 D.C. Workmen's Compensation Act. *Durrah v. Washington Metropolitan Area Transit Authority,* 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *see Delinski v. Brandt Airflex Corp*., 645 F.2d 1053, 13 BRBS 133 (D.C. Cir. 1981) (employee injured while walking up 9 flights of stairs to work; general coming and going rule not applicable because the stairway constitutes a zone of special danger).

Digests

As the 1984 Amendments do not apply to the D.C. Act, reconsideration *en banc* pursuant to Section 21(b)(5) is not available in D.C. Act cases. *Higgins v. Hampshire Gardens Apartments*, 19 BRBS 192 (1987), *on recon. of* 19 BRBS 77 (1987).

The Board affirmed *Gardner*, 18 BRBS 264, on remand from D.C. Circuit for reconsideration without application of the 1984 Amendments to the extent that it held that injurious exposure prior to July 26, 1982 gave DOL jurisdiction under the 1928 D.C. Act. The Board vacated *Gardner* insofar as it held that 1984 Amendments applied to the 1928 D.C. Act and held that under pre-1982 Section 12, the disability claim was time-barred. The Board held that the Section 20(b) presumption applies to Section 12(d) in accordance with D.C. precedent, but found employer submitted evidence sufficient to rebut it. *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990).

The D.C. Circuit held that in a case where the employment events giving rise to the injury occurred prior to the effective date of the new D.C. Act, but the worker did not become aware of the injury and its relation to his employment until after the effective date, the new D.C. Act applies under the manifestation rule. However, due to coverage requirements in the new Act, a "coverage gap" may exist that would deprive some workers of a remedy. Thus, if there is no jurisdiction under the new Act at the time of

manifestation or under any other state law, the 1928 Act will apply. The court held that 20 C.F.R. §701.101(b), which adopted an "exposure rule" for determining which Act applies is invalid. The court remanded the case for a determination of whether claimant was covered under the 1979 D.C. Act or any other state law. *Railco Multi-Constr. Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990).

On remand, the Board held that where claimant first discovered the work-relatedness of his hearing loss on Sept. 16, 1982, subsequent to the effective date of the 1979 D.C. Act, the 1979 Act could apply based on the holding that jurisdiction is determined by the date an injury becomes manifest. Since it was not clear from the existing record whether claimant met the jurisdictional requirements of the 1979 Act, or would be covered under any other state workers' compensation scheme (in which case DOL would not have jurisdiction), the case was remanded to the administrative law judge to make this determination. If claimant was not covered under the 1979 Act or any state law, the 1928 Act would apply under the "coverage gap" holding of the D.C. Circuit. Under *Edgerton v. Washington Metro. Area Transit Auth.*, 925 F.2d 422, 24 BRBS 88(CRT) (D.C. Cir. 1991), the burden of disproving jurisdiction rests on the party opposing the claim. *Gardner v. Railco Multi-Constr. Co.*, 27 BRBS 266 (1993) (decision on remand).

In a case initially decided at the same time as *Gardner I, Pryor,* 18 BRBS 273, which was remanded for further consideration, the Board held that the case must be remanded under the D.C. Circuit's decision in *Gardner* for consideration of whether claimant was covered under the 1979 Act or another state law so as to divest DOL of jurisdiction over the claim under the 1928 D.C. Act, as this issue had not been addressed previously. The Board initially held that employer bore the burden of proving that claimant would not be covered by the 1928 Act, as claimant presented evidence of coverage during the relevant time period. The Board also rejected employer's reliance on a case decided under the new D.C. law because claimant's last employment in the District was before July 1982. The Board noted that the 1979 Act generally will apply where the claimant continued to work, and that despite rejecting the Board's time of exposure approach, the *Gardner* court did not disturb the Board's reliance on the law identifying the last covered employer as responsible for benefits. *Pryor v. James McHugh Constr. Co.*, 27 BRBS 47 (1993).

The Board affirmed an award of death benefits under the 1928 D.C. Act to a widow whose husband died from causes unrelated to the work injury which caused his permanent total disability. 20 C.F.R. §701.101(b) provides that claims for injuries or deaths based on employment events occurring prior to the effective date of the new D.C. Act are covered under the 1928 Act. Thus, although decedent's death occurred after the effective date of the 1982 Act, employer incurred liability for death benefits under the 1928 Act when decedent became permanently totally disabled by the work injury, as it was this disability that formed the basis of the death benefits claim under the 1972 Act, which applies since the 1984 Amendment to Section 9 does not apply in D.C. Act cases. *Lynch v. Washington Metro. Area Transit Auth.*, 22 BRBS 351 (1989).

The Board held that the 1928 D.C. Act applied to this case, given that claimant had no other remedy available, citing *Gardner*, 902 F.2d 71, 23 BRBS 69(CRT). In light of *Gardner*, the Board stated that its reasoning in *Lynch*, 22 BRBS 351, a case with similar facts, could not be the basis for its decision. Nonetheless, the Board reached the same result, since the claimant-widow had no remedy under the new D.C. Act. At the time of decedent's non work-related death he was permanently totally disabled due to a work injury covered under the 1928 Act, and he had no employment contacts with D.C. after 1982; thus, there was no subject matter jurisdiction under the new Act. Since the injury that caused decedent's disability occurred in D.C. and his death was unrelated to a work injury, the death would not be covered under any other state law. In light of the above factors, and because claimant had a remedy under Section 9 of the 1972 Longshore Act, the Board affirmed the award under the 1928 D.C. Act. The Board noted that this remedy was available to claimant only because the 1984 Amendments, which eliminated recovery for unrelated deaths, do not apply in D.C. cases. *Holden v. Shea, S&M Ball Co.*, 23 BRBS 416 (1990), *aff'd sub nom. Shea, S&M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991).

The D.C. Circuit affirmed the Board's decision that claimant was entitled to death benefits under the 1928 D.C. Act. The 1928 Act covers claims arising from injuries that occurred before July 26, 1982. The "injury" in this case did not occur when the decedent died in 1986, but when the injury giving rise to the cause of action occurred. In this case, the award of death benefits arose because decedent was permanently totally disabled at the time of the unrelated death, and thus it was derivative of the employment injury that occurred in 1974. Therefore, the 1928 Act, and not the new Act, applied. *Shea, S&M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170(CRT) (D.C. Cir. 1991).

The D.C. Circuit held that the 1928 D.C. Workmen's Compensation Act is a matter of local law, and therefore it would defer to the D.C. Court of Appeals' construction of the D.C. Act, as it applies the terms of the Longshore Act. The Circuit Court therefore affirmed the D.C. Court's holding that an employee's tort claim was barred by the exclusivity provisions of the Longshore Act, as incorporated by the 1928 D.C. Act. *Hall v. C&P Telephone Co.*, 793 F.2d 1345 (D.C. Cir. 1986), *reh'g denied*, 809 F.2d 924, 19 BRBS 67(CRT) (D.C. Cir. 1987).

In an interlocutory appeal involving discovery orders, the Board held that the peer-review privilege contained in the regulations at 7 D.C. Code Ann. §§32-504 - 32-505 applies in claims under the D.C. Act. The administrative law judge therefore erred in ordering information protected under these provisions to be produced, since no extraordinary circumstances existed to warrant the production of this information. *Niazy v. The Capitol Hilton Hotel*, 19 BRBS 266 (1987).

The Board affirmed the administrative law judge's finding that while decedent's connections with the Washington office of a Saudi Arabian construction business prior to

departure for Saudi Arabia were sufficient to establish jurisdiction under the D.C. Act had he been injured in that period, those connections were severed or became extremely tenuous after he traveled to Saudi Arabia to work. Therefore, there was no jurisdiction under the D.C. Act for his death in Saudi Arabia. *Gustafson v. Int'l Progress Enterprises*, 18 BRBS 191 (1986), *rev'd*, 832 F.2d 637, 20 BRBS 31(CRT) (D.C. Cir. 1987).

Reversing this decision, the D.C. Circuit held that where a foreign enterprise recruited D.C. area individuals, in D.C., to work overseas, it was viewed as a D.C. employer, and a claim filed by the widow of one of its overseas employees recruited in this manner fell within the jurisdiction of the D.C. Act. The Board's determinations to the contrary were accordingly reversed. *Gustafson v. Int'l Progress Enterprises*, 832 F.2d 637, 20 BRBS 31(CRT) (D.C. Cir. 1987).

The Board affirmed the administrative law judge's determination that employer carried on employment in the District at the time of claimant's injury. Employer's agents were engaged in bidding procedures at the time of claimant's injury for a prospective construction project in D.C. The Board held that these bidding procedures were simply one stage of an ongoing project that began with the initial interviews prior to the invitation to bid and culminated in the actual completion of the project. *Williams v. Whiting Turner Contracting Co.*, 19 BRBS 33 (1986).

The Board held that an employer with employees who made deliveries in D.C. carried on employment in D.C. Infrequent employment-related trips into D.C., D.C. residence and additional factors, *e.g.*, District union local membership, were sufficient contacts to render claimant covered under the D.C. Act, even though claimant was injured in Maryland. *Norfleet v. Holladay-Tyler Printing Corp.*, 20 BRBS 87 (1988).

The Fourth Circuit held that the Board erred in reversing the administrative law judge's finding of no D.C. Act jurisdiction. Applying the "substantial connection" test set forth in *Cardillo*, 330 U.S. 469, the court reasoned that since the claimant in this case had not resided, been hired, or suffered his work injury in D.C. and was not subject to transfer to D.C., and since the employer had no place of business in D.C., the administrative law judge properly found no D.C. Act jurisdiction. *Exhibit Aids, Inc. v. Kline*, 820 F.2d 650, 20 BRBS 1(CRT) (4th Cir. 1987).

The Board affirmed the administrative law judge's finding of no jurisdiction under the D.C. Act, holding that the administrative law judge adequately weighed the relevant jurisdictional factors and rationally distinguished *National Van Lines*. The Board noted that the Fourth Circuit, in *Exhibit Aids*, 820 F.2d 650, 20 BRBS 1(CRT), rejected the proposition that the Act applies to every employer in the Washington metropolitan area. *Greenfield v. Volpe Constr. Co., Inc.*, 20 BRBS 46 (1987), *rev'd*, 849 F.2d 635, 21 BRBS 118(CRT) (D.C. Cir. 1988).

Reversing this decision, the D.C. Circuit stated that its jurisdictional inquiry "is whether there is a 'substantial connection' between the District and the employment relationship, not whether the District's interests are in some way superior to those of other jurisdictions [cite omitted]," and indicated that the extraterritorial aspects of a claimant's employment relationship are irrelevant to the "substantial connection" injury. The court accordingly reversed Board's affirmance of the administrative law judge's finding of no D.C. Act jurisdiction. In addition, court noted that it possessed jurisdiction to decide the case despite the fact that the claimant's injury did not occur in D.C. *Greenfield v. Volpe Constr. Co., Inc.*, 849 F.2d 635, 21 BRBS 118(CRT) (D.C. Cir. 1988).

The Board held that the administrative law judge erred in addressing, *sua sponte*, the issue of D.C. Act jurisdiction, given that the parties previously reached a Section 8(i) settlement which had been approved by a deputy commissioner. Because the deputy commissioner's approval of the settlement had become final, the administrative law judge was bound by it and thus was empowered only to decide, pursuant to Section 18 of the Act and Section 702.372(a) of the regulations, a factual issue pertaining to employer's liability for paying certain medical expenses. The Board accordingly reversed the administrative law judge's finding of no D.C. Act jurisdiction. *Kelly v. Bureau of National Affairs*, 20 BRBS 169 (1988).

The Board reversed the administrative law judge's finding that contacts between employer, claimant and the District were sufficient to confer jurisdiction under the Act. Although claimant was hired in the District in 1957, he had not worked for employer in D.C. since 1969-1970, when he was transferred to a Rockville, MD, sales route. The Board distinguished this case from *National Van Lines*, wherein the D.C. Circuit found jurisdiction despite the absence of many of the common indicia of substantial connection, because this claimant never traveled into the District for business purposes after 1969-1970. *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987).

Claimant, a Virginia resident, averaged one business trip into the District per month prior to her injury while working for employer, a Maryland-based company. The Board reluctantly reversed the administrative law judge's finding of no D.C. Act jurisdiction and applied the precedent set forth by the D.C. Circuit in *National Van Lines* to the instant case. *Horton v. A.B. Dick Co.*, 21 BRBS 101 (1988).

The Board affirmed the administrative law judge's denial of D.C. Act jurisdiction where: 1) claimant was not located in the District; 2) claimant was hired at the Maryland job site; 3) all incidents of his employment occurred at Maryland job site; 4) paychecks were issued from Nebraska and delivered to him in Maryland; 5) he was not subject to transfer to the District. The Board rejected claimant's contention that his prior work in D.C. for employers other than Kiewit-Shea brought him within the jurisdiction of the D.C. Act. The Board affirmed the administrative law judge's conclusion that the District's interest in Metro construction and the fact that Metro was the general contractor on the project were

not sufficient to confer D.C. Act jurisdiction. The Board distinguished the case from *National Van Lines* because claimant never traveled into D.C. for a work-related purpose, and from *Greenfield* because that claimant was hired in D.C., worked there for a period of time, and physically returned to the District on work-related tasks after his transfer to Virginia. *Dupree v. Kiewit-Shea Constr. Co.*, 21 BRBS 229 (1988).

In a case involving a claimant who lived, worked, and was injured approximately 60 miles from D.C., the Board upheld the administrative law judge's finding of no D.C. Act jurisdiction. In so doing, the Board reasoned that the administrative law judge rationally viewed the number of work-related trips made into D.C. as not establishing "substantial contacts" with the District, and that claimant's town was not within the D.C. "metropolitan area," thus rendering the case outside the scope of *National Van Lines*. *MacRae v. MacMyer Investments, Ltd., Inc.*, 21 BRBS 332 (1988).

The Board reversed the administrative law judge's finding of no jurisdiction under the D.C. Act, reluctantly following *National Van Lines*. Claimant was a resident of Maryland, who worked and was injured in Maryland. Claimant, however, visited employer's home office in the District on several occasions for business purposes, often traveled into the District to solicit customers, and had frequent personal contact with the home office. Also, claimant's paychecks were drawn on a D.C. Bank. Such contact with the District is sufficient to confer jurisdiction under the D.C. Act. *Shorb v. Peoples Life Ins. Co.*, 22 BRBS 67 (1989).

The Board affirmed the administrative law judge's finding of D.C. Act jurisdiction for a Maryland resident who was injured in Maryland while working for a Maryland-based company. Claimant received his paycheck and his supervision in Maryland. About 6 percent of employer's business was performed in D.C., and claimant worked for employer in D.C. for two months in 1977 and 1978. Under *National Van Lines*, the Board reluctantly found this contact sufficient to confer jurisdiction. *Bennett v. Rockville Glass Co.*, 22 BRBS 394 (1989) (Neusner, J., concurring).

The Board affirmed the administrative law judge's finding that claimant was not covered under the D.C. Act. Claimant did not reside in D.C., his job site was not in D.C., he never traveled into D.C. in the course of employment, and he was not hired in D.C. nor was he subject to transfer to the District. The case thus was distinguishable from *National Van Lines* as claimant had no employment contacts with the District. *Butts v. Fischbach & Moore and Comstock*, 22 BRBS 424 (1989).

The Board affirmed the administrative law judge's finding that claimant, a tow truck driver who made 170 work-related trips into D.C. from March 1978 until August 5, 1979, and served as a designated back-up tow truck driver to employer's towing business, which was headquartered in Maryland, but was manifestly interstate in nature, was

covered under the D.C. Act. *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991).

The court reversed the Board's affirmance of an administrative law judge's decision that claimant lacked substantial contacts with D.C. sufficient to warrant coverage under the D.C. Act. Claimant, a Metro bus driver, could not remember whether he drove into the District on the day he suffered his injury, or whether he entered D.C. on his regular route. The court stated that because claimant testified he may have frequently driven into the District as part of his employment, it was employer's burden under Section 20(a) to disprove claimant's assertions that he worked in D.C., particularly since such evidence presumably was in employer's control. The court reasoned that employer must present persuasive evidence to demonstrate the absence of substantial contacts to rebut the presumption, at least where sufficient evidence to justify the coverage of the Act has been presented. In this circumstance, where there was no evidence to prove or disprove the assertion, employer failed to rebut the presumption. *Edgerton v. Washington Metro. Area Transit Auth.*, 925 F.2d 422, 24 BRBS 88(CRT) (D.C. Cir. 1991).

Relying on D.C. Circuit statements regarding the "zone of special danger" doctrine in D.C. Act cases, the Board held that the doctrine would apply in this case. Thus, it is not necessary that the employee be engaged at the time of injury in activities that benefit his employer if the obligations or conditions of employment create the zone of special danger out of which the injury arose. On the facts here, however, the Board affirmed the administrative law judge's finding that claimant, an off-duty bartender, was thoroughly disconnected from his employment when he was injured in a fight outside the bar. *McNamara v. Mac's Pipe & Drum, Inc.*, 21 BRBS 111 (1988).

The Board noted that the zone of special danger rationale of Defense Base Act cases is applicable in D.C. Act cases, and affirmed the administrative law judge's use of that doctrine in this case. Coverage under this doctrine extends to injuries resulting from foreseeable risks attendant to the employee's work duties. Thus, 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. *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

The D.C. Circuit held that the Omnibus Consolidated Rescissions and Appropriations Act, P.L. 104-134, which enacted a one-year deadline for deciding Longshore cases, was without effect on the District of Columbia Workmen's Compensation Act of 1928 because, since 1982, the D.C. Act may no longer be amended by cross-reference to the Longshore Act. *Washington Metro. Area Transit Auth. v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998).

In this D.C. Act case where the 1984 Amendments to Sections 22 and 8(f)(2)(B) were not applicable, the administrative law judge dismissed employer from the modification proceeding in which claimant requested additional compensation from the Special Fund. Contrary to the administrative law judge's finding, the Board held that employer's financial interest in the modification proceeding was not too remote in order to establish standing under Section 702 of the APA. With respect to carriers and employers covered under the D.C. Act, any increase in payments to claimant from the Special Fund will result in an increase in employer's assessment to the Special Fund, pursuant to Section 44(c) of the Act. As employer had a cognizable interest in the modification proceeding, the Board vacated administrative law judge's decisions, and remanded the case for a new hearing. *Terrell v. Washington Metro. Area Transit Auth.*, 34 BRBS 1 (2000).