

BRB No. 97-805

GILKA ROSENTHAL)
(Widow of JULES ROSENTHAL))

Claimant-Petitioner)

v.)

STATISTICA, INCORPORATED)

Employer-Respondent)

) DATE ISSUED:

) DECISION and ORDER

Appeal of the Decision and Order - - Denying Benefits of Mollie W. Neal,
Administrative Law Judge, United States Department of Labor.

Gilka Rosenthal, La Paz, Bolivia, *pro se*.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - - Denying Benefits (95-LHC-1539) of Administrative Law Judge Mollie W. Neal rendered on a death benefits claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act), as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* In an appeal by a claimant without representation, we will review the administrative law judge's decision to determine whether the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law; if so, they must be affirmed. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, the widow of the deceased employee, filed a claim for death benefits under the DBA on May 20, 1993, as a result of fatal injuries the employee suffered in an automobile accident in Spain while he was returning from a business trip to the nation of Andorra on March 4, 1992. Cl. Ex. 32; Emp. Ex. I. Claimant asserted coverage under the DBA because her husband's fatal accident occurred on his way home from a business trip involving in part employer's contract with the State Department. Employer asserted that the employee was not engaged in the performance of his duties related to the State Department contract at the time of the accident but in pursuit of employer's independent commercial venture with the Andorran government.¹

The administrative law judge concluded that the deceased employee was not covered under the DBA as he was not involved in the performance of a government contract at the time of his death. The administrative law judge disagreed with claimant's assertion that the employee was covered under the DBA when he began his return trip from Andorra to the United States. Consequently, the administrative law judge denied claimant death benefits.

Appealing without the assistance of counsel, claimant challenges the denial of death benefits. Employer responds in support of the administrative law judge's denial of benefits.²

The employee was employed by Statistica, a corporation engaged in the business of providing computer-based information technology for the development of machine readable

¹The United States does not have an embassy or consular office in Andorra.

²Employer filed its response brief accompanied by a Motion to Accept Brief Filed Out of Time. The Board accepts employer's response brief as part of the record. 20 C.F.R. §802.217(e).

visa and passports systems (MRVP) as well as computer identification and security cards. Tr. at 31. In September 1988, Statistica entered into a contract with the State Department to provide hardware and computer technology services to assist the U.S. government in developing secure passports and visas for use in American embassies and consulates worldwide. Emp. Ex. K. During the implementation and installation of its MRVP project in American embassies, Statistica also engaged in negotiations with other nations, states, universities, and private corporations for the sale and installation of its MRVP technology and hardware. Tr. at 68.

As program manager for Statistica's MRVP project starting in December 1991, the employee was responsible for both the State Department contract and unrelated dealings with foreign governments and corporations also interested in acquiring the MRVP system. Cl. Exs. 8-9. When the employee was working for the American embassies pursuant to the State Department contract, he was paid by the State Department. Emp. Exs. D, E. Similarly, when the employee was involved in marketing the visa and passport system to other nations independent of the State Department contract, he was paid by Statistica. Emp. Exs. D, E. The determination as to who paid the employee was dependent on the time sheets completed by the employee, which specified whether time was spent on the State Department MRVP project or on private marketing. Emp. Exs. D, E.

On February 24, 1992, the employee arrived in Dublin to perform work for both the State Department's contract and Statistica's private enterprise. From February 24 through February 26, 1992, the employee performed MRVP work in Dublin and Brussels under the State Department contract. Emp. Exs. D, E. On February 27 and 28, 1992, the employee performed work for Statistica unrelated to the State Department contract. From February 29 through March 2, 1992, the employee visited with his relatives in Antwerp. Cl. Ex. 11. From March 2 forward, all of the employee's salary and travel expenses were paid by Statistica. Emp. Exs. D, E.

On March 3, 1992, the employee arrived in Barcelona and drove to Andorra in a rented car to conduct business with the Andorran government unrelated to the State Department contract. Emp. Ex. E. The next day, March 4, 1992, the employee attempted to drive from Andorra to Barcelona to begin his trip back to the United States.³ During this trip, the employee suffered his fatal injuries in the automobile accident. Cl. Exs. 23-31. If he had arrived in Barcelona safely, the employee was scheduled to fly to Madrid and then back home to Washington. Claimant contended that because the employee had begun his trip home, he was covered by the DBA.

The DBA provides workers' compensation coverage for workers engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside of the continental United States. 42 U.S.C. §1651. To be

³There are no airports in Andorra. Emp. Ex. L at 48. Hence, the employee had to drive from Andorra to Barcelona, where he was to catch a flight to Madrid. Cl. Ex. 11.

compensable under the DBA, a claim must stem from a “contract” for “public work” overseas, public work constituting government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity. *University of Rochester v. Hartman*, 618 F.2d 170 (2d Cir. 1980); *Airey v. Birdair, Division of Bird and Sons, Inc.*, 12 BRBS 405 (1980). Under the DBA, compensation is authorized under a public service contract entered into with the United States but performed outside of the United States irrespective of the place where the injury or death occurs, and includes any injury or death occurring to any employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost. 42 U.S.C. §1651.

After consideration of the administrative law judge’s decision in light of the record evidence, we affirm the administrative law judge’s finding that the employee was not covered by the DBA at the time of his death. In determining that the employee was not covered by the DBA, the administrative law judge initially noted that employer did not contest that the employee’s work for the State Department relating to the installation of the MRVP system at the American embassies in Europe constituted activities covered by the DBA. Decision and Order at 8-9; Tr. at 12-13. Assuming that the employee’s work for the State Department relating to the installation of the MRVP system at the American embassies in Europe constituted activities covered by the DBA, the administrative law judge nonetheless found that the employee was not performing work related to Statistica’s contract with the State Department at the time of the fatal accident, and he therefore was not covered by the DBA. The finding that the employee was engaged in private business of employer’s at the time of death is supported by substantial evidence. Decision and Order at 9-11. The employee’s time sheets establish that after he completed his work in Dublin and Brussels on the State Department contract on February 26, 1992, the time from February 27, 1992, onward plus travel expenses was billed to Statistica.⁴ Emp. Exs. D, E. Moreover, the administrative law judge credited the uncontradicted testimony of Mr. Ashworth, the president of Statistica, that the employee’s work under the State Department contract concluded on February 27, 1992, when the employee left Brussels. Tr. at 52, 60. Consequently, we affirm the administrative law judge’s finding that the employee was not acting in furtherance of Statistica’s contract with the State Department at the time of the fatal accident. See *Hartman*, 618 F.2d at 170; *Airey*, 12 BRBS at 405.

The DBA, however, provides coverage not only for deaths occurring during work on a covered contract, but also for any death occurring to an employee during transportation

⁴Specifically, the time sheets from February 18 through 26 indicate that the employee’s time was charged to the State Department contract or MRVP contract. Emp. Ex. D. The time on February 27 and 28 was charged to marketing. Emp. Ex. D. As for the employee’s final time sheet from March 1 through 15, 1992, it charged 32 hours to marketing and 18.3 hours to vacation. Emp. Ex. D. Statistica’s accounting records show that it paid \$780.04 from the employee’s Andorra trip which included hotel and car rental expenses incurred by the employee in Andorra and Spain. Emp. Ex. E.

to or from his place of employment, where, as here, the United States or employer pays for the transportation. Thus, claimant asserted in this case that since the employee had begun his trip back to the United States from Europe, he was covered by the DBA at the time of his death. The administrative law judge found that the employee was not within the coverage of the DBA merely because he had begun his trip back to the United States. Decision and Order at 11-12. She relied upon Mr. Ashworth's testimony that the airfare from Brussels to the United States was probably paid by the State Department, but that any excess airfare in addition to all the travel associated with the trip to Andorra was paid for by Statistica, corroborated by the employee's time sheets billing time and travel expenses in Andorra and Spain to Statistica. This evidence supports the conclusion that the employee's travel to and from Andorra was related to work performed by Statistica and thus not covered by the DBA. As the employee died in an automobile accident in Barcelona returning from Andorra and was in this region only because of the non-DBA

work, we affirm the administrative law judge's finding that at the time of the accident, the employee was not within the coverage of the DBA.⁵

Accordingly, the administrative law judge's Decision and Order - - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁵The administrative law judge suggests that her holding may have been different had the employee been injured on his return trip from Brussels, rather than Andorra. See *Casey v. Chapman College, PACE Program*, 23 BRBS 7 (1989); *Alan-Howard v. Todd Logistics, Inc.*, 21 BRBS 70 (1988); Decision and Order at 10-11. These facts, however, are not before us in view of the finding that the employee was on the return leg of a trip related to a private contract.

We also note that it is not contested that the employee was within the course and scope of his employment when the accident occurred. The "zone of special danger" test thus does not aid the employee here. See *O'Keefe*, 380 U.S. at 359; *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951).