BRB No. 01-0602

CLAYTON O. EDMONDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AL SALAM AIRCRAFT COMPANY, LIMITED	)	DATED ISSUED: April 5, 2002
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIU NORTH AMERICA, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United Sates Department of Labor.

E. Paul Gibson (Riesen Law Offices), Charleston, South Carolina, for claimant.

Roger A. Levy and Mia C. Perachiotti-Germack (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-0950) of Administrative Law Judge Jeffrey Tureck awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began working in 1992 as an aircraft maintenance specialist for employer at

the King Khalid military base in Saudi Arabia. In this employment, obtained through the Peace Sun Program,[1] claimant serviced F-15 aircraft purchased by the Saudi Arabian government from the United States government. While in Saudi Arabia, claimant lived with his family on an employer-run American compound which was occupied solely by McDonnell-Douglas and Al Salam employees and associates and was located about ten to twenty miles away from the King Khalid base. The compound had numerous amenities including a commissary, but because the commissary was small and oftentimes contained food that was stale, claimant stated that he would regularly shop for food at the Al-Ghoneim supermarket located between the compound and the base.

The commute between the compound and the base took approximately 40 minutes, and employer provided bus transportation. The buses stopped running at 9 pm, and because claimant worked rotating shifts and was on-call 24 hours a day, he would often not be able to use this service. On those occasions, employer would sometimes send a vehicle to take claimant and others to work, but oftentimes claimant would ride to work or home in other employees' vehicles.

Claimant bought a car after he had lived in Saudi Arabia for two or three years, and from that point forward he would usually drive himself to work. He stated that driving in Saudi Arabia was different and more dangerous than driving in the United States. Claimant testified that his employer orally warned him that driving in Saudi Arabia was dangerous, and that at the inception of his employment, McDonnell-Douglas gave him a brochure that advised workers, "[s]ome families may decide to purchase their own cars, though driving is hazardous in Saudi Arabia." Claimant's Exhibit (CX) 17.

On March 7, 1998, claimant decided to stop at the Al-Ghoniem supermarket on his return drive home from work. Rather than attempt a "dangerous" left-hand turn, claimant parked his car in a parking lot on the right side of the highway, as he usually did, and in proceeding to cross the highway on foot, he was hit by a vehicle. The impact of the collision

[1]Claimant's service in the United States military as an aircraft armament systems specialist, from 1979 until his honorable discharge in 1988, qualified him for the Peace Sun Program. Initially, this program was operated through a contract with McDonnell-Douglas. The instant employer, Al Salam Aircraft Company, Limited, subsequently took over the contract and claimant was, at the time of his accident, working on this project.

shattered claimant's right shoulder. After initial treatments in Saudi Arabia proved unsuccessful, claimant returned home to the United States, where Dr. Friedman performed surgery, inserting a titanium ball and socket in claimant's right shoulder. Dr. Friedman opined that claimant reached maximum medical improvement on June 10, 1999, with a 61 percent permanent impairment of his right upper extremity. He additionally stated that claimant could no longer elevate his right arm, but would be able to perform any task where his arm was held at his side.

Claimant has not been employed since the accident, although he has enrolled in a job training program called Technet to become a Microsoft-certified systems engineer. At the time of the hearing, claimant was in the process of completing this training. Employer declined to pay any temporary total disability benefits, prompting claimant to file the instant claim. Employer asserted that claimant did not sustain a compensable injury, specifically arguing that this case does not fall within the "zone of special danger" doctrine.

In his decision, the administrative law judge initially determined that claimant's injury is compensable under the Act, despite the fact that it did not occur while claimant was performing the duties of his employment, as a "zone of special danger" was created by the conditions of claimant's overseas job. He then concluded that claimant is entitled to total disability benefits from March 7, 1998, through May 31, 2000,[2] the date on which he became eligible for employment as a Microsoft-certified systems engineer, as well as permanent partial disability benefits from June 1, 2000, based on a loss of wage-earning capacity of $509.29 a week, and medical benefits.

On appeal, employer challenges the administrative law judge's finding that claimant sustained a compensable injury under the Act. Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in finding that claimant's employment put him in a "zone of special danger" and thus that claimant sustained a

[2]The administrative law judge awarded temporary total disability benefits from March 7, 1998, through June 10, 1999, and permanent total disability benefits from June 11, 1999, through May 31, 2000. Upon reconsideration, the administrative law judge modified his decision to reflect that claimant's entitlement to total disability benefits commenced on March 8, 1998.

compensable injury. Employer first avers that the administrative law judge erred in finding that driving in Saudi Arabia is more dangerous than driving in the United States, and in finding that employer did not provide convenient transportation to and from the base. In addition, employer argues that at the time of his injury, claimant was not under its supervision or control and, therefore, it should not be held responsible for the poor choices made by claimant which resulted in his injury. Along this line, employer urges the Board to reconsider the "zone of special danger" doctrine in light of the 21st Century, since the applicability of this doctrine, as exemplified by past case precedent, is premised on an antiquated view of the world outside of the United States. Specifically, employer argues that the vast majority of cases invoking the doctrine rely on an ill-conceived perception of 24-hour coverage for all employees working under the Defense Base Act, solely by virtue of the requirement that these employees work on foreign soil. Employer avers that factors such as lack of recreational facilities, remoteness of the exotic locale, or harshness of the living conditions, which existed in the 1940s, 1950s, and 1960s when the injuries which gave rise to this precedent occurred, no longer exist or apply to today's Defense Base Act employment. As such, employer requests the Board to re-examine the "zone of special danger" doctrine in light of present-day society.

Under the Defense Base Act, the United States 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, Inc.*, 340 U.S. 504 (1951), the employee, while spending the afternoon in the employer's recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The Court stated that "[a]ll that is required [for compensability] is that the 'obligations or conditions' of employment create the 'zone of special danger out' of which the injury arose." *O'Leary*, 340 U.S. at 505. In *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965), the employee drowned in a lake in South Korea during a weekend outing away from the job. In awarding benefits, the Court noted that the employee had to work under "the exacting and unconventional conditions of Korea." *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).

The Board followed the Supreme Court's holdings in deciding *Smith v. Board of Trustees, Southern Illinois University*, 8 BRBS 197 (1978), when the employee died from a ruptured abdominal aortic aneurysm after playing a round of golf in Katmandu, Nepal. The deceased had been employed as an educational advisor by Southern Illinois University, which in turn had a contract with the United States Government to provide educational assistance to the Nepalese government. The round of golf was shown not to have been employment-related, but the Board held that this mattered little because, at least for purposes of Defense Base Act cases, it perceived a tendency on the part of Federal courts to broadly

interpret the Act and to extend coverage to all employees subjected to the "zone of special danger,"[3] which it defined as the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant. The Board added that it believed this view of the Defense Base Act was necessary because those employees who come within its ambit are subjected to unusual risks, working as they often do in the farthest reaches of the globe. In *Harris v. England Air Force Base*, 23 BRBS 175

[3]In addition to the Supreme Court decisions in *O'Leary, O'Keeffe*, and *Gondeck*, several circuits have applied the "zone of special danger" doctrine to award benefits in cases arising under the Defense Base Act. *See e.g., O'Keeffe v. Pan-American World Airways, Inc.*, 338 F.2d 319 (5th Cir.), *cert. denied*, 380 U.S. 950 (1965)(awarding benefits where employee was killed in a motorcycle accident on Grand Turk Island in the British West Indies while driving on the wrong side of the road); *Pan-American World Airways, Inc. v. O'Hearne (Smith)*, 335 F.2d 70 (4th Cir. 1964) (awarding benefits where employee was killed in the same car crash as in *Gondeck*, 382 U.S. 25; *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962)(awarding benefits where employee was injured during a midnight rendezvous in a turn-around area at the seaward end of a breakwater on the island of Guam); *Hastorf-Nettles, Inc. v. Pillsbury*, 203 F.2d 641 (9th Cir. 1953)(awarding benefits where employee was injured in car accident near Anchorage, Alaska, while on the way back to camp from a sightseeing trip on a scheduled day off).

(1990),[4] the Board further explained that "this [zone of special danger] test was formulated in cases arising under the Defense Base Act and is well-suited to those cases since the conditions of employment place the employee in a foreign setting where he is exposed to dangerous conditions." *Harris*, 23 BRBS at 179. The Board also stated that in "these cases [arising under the Defense Base Act] employer can be said to create a zone of special danger by employing the employee in a foreign country." *Id.* The Board, however, has also held in a Defense Base Act case that where 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 where the circumstances surrounding the employee's death did not in themselves suggest that the death was work-related, the "zone of special danger" test was, as a matter of law, not met. *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989).

Initially, we decline to address employer's invitation to reconsider the "zone of special danger" doctrine in light of the 21st Century, since the Board's use and application of the "zone of special danger" doctrine stems directly from the binding precedent of the Supreme Court's decisions in *O'Leary*, 304 U.S. 504, and *O'Keeffe*, 380 U.S. 359. *See, e.g., Smith*, 8 BRBS 197. Additionally, we reject employer's assertion that this case precedent provides coverage for workers employed under the Defense Base Act 24 hours a day solely by virtue of the requirement that these employees work on foreign soil. As evidenced by the Board's decision in *Gillespie*, a claimant's injury is not brought within the Defense Base Act merely because his job is located on foreign soil. Rather, the activity which occasioned the employee's death must be related to conditions created by his overseas employment. As the Court recognized in *O'Leary*, 340 U.S. at 507, there are cases where an employee may "go so far from his employment and become so thoroughly disconnected from the service of his employer that he cannot be said to be in the course of his employment." *See Gillespie*, 21 BRBS at 58; *see generally 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)(claimant's participation in the murder of her husband effectively severs any causal relationship which

[4]In *Harris*, a case arising under the Nonappropriated Fund Instrumentalities Act, the Board held that the administrative law judge erred by relying on the "zone of special danger" doctrine, since application of that test is limited to claims arising under the Defense Base Act and cases arising under the District of Columbia Workmen's Compensation Act. *Harris*, 23 BRBS at 178-179.

may have existed between the conditions created by his job and his death).

This case, however, is not a case where claimant was "so thoroughly disconnected" from work for employer that it is unreasonable for his injuries to be covered, as the administrative law judge's findings of fact establish that claimant's injuries were related to his living and working conditions in Saudi Arabia. The administrative law judge determined that employer did not provide claimant with on-base housing, convenient transportation to and from the base, or fresh food at the commissary on the housing compound, and it was reasonable for him to buy food off-base. Additionally, he found that claimant was always on call and his hours of work were not consistent; thus, it was reasonable for him to drive his own car. He also determined, based in part on claimant's credible testimony and a pamphlet distributed by employer's predecessor on the Peace Sun Program, McDonnell-Douglas, to workers residing in Saudi Arabia, that driving in Saudi Arabia presented hazards not found in the United States. Based on these findings, the administrative law judge rationally concluded that the obligations and conditions of claimant's employment created the situation which led to his injury and it thus fell within the "zone of special danger." As the administrative law judge properly applied the "zone of special danger" doctrine in this case, *see O'Keeffe*, 380 U.S. 359; *O'Leary*, 340 U.S. 504, and as his findings of fact are rational and supported by substantial evidence, his conclusion that claimant sustained a compensable injury under the Act is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge