BRB No. 13-0378

SANDRA DiCECCA (Widow of GERALD DiCECCA) Claimant-Respondent v. BATTELLE MEMORIAL INSTITUTE and VIGILANT INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: May 9, 2014 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.)

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-LDA-00734) of Administrative Law Judge Daniel F. Sutton rendered 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's husband (decedent) worked for employer in a Department of Defense laboratory in Tbilisi, Georgia, as a Chief Engineer. Decedent worked five days per week from 8 am to 5 pm, although he could be called in at any time outside those hours to respond to emergencies. CX 3 at 36. In addition to wages, a monthly allotment for housing and utilities, and hazard pay, employer provided its employees with vouchers for taxi service for use within a 25 kilometer radius of the city center. Use of the taxis was not restricted by time of day or purpose of travel. On May 26, 2012, decedent was in a taxi going to the grocery store when it was struck head-on by another car;[1] he died due to injuries sustained in this crash.

The administrative law judge found that decedent's accident in an employer-provided taxi on his way to a grocery store was a foreseeable risk, incident to the obligations and conditions of his employment, and therefore is compensable under the "zone of special danger" doctrine. The administrative law judge observed that employer required decedent to work and live in Tbilisi, Georgia, provided him with funds for housing and utilities, gave him 700 Lari per month in taxi service vouchers with essentially no restrictions on travel within 25 kilometers of Tbilisi's city center, and permitted him to utilize the cab service for any reason, including grocery shopping. Thus, the administrative law judge concluded it was foreseeable that decedent could sustain injuries in a taxi accident on his way to a grocery store, as the conditions of his employment made grocery shopping a necessity. Decision and Order at 6. Therefore, the administrative law judge found decedent's death compensable, and he awarded death benefits to claimant. 33 U.S.C. §909(b).

[1] There were two grocery stores near decedent's apartment in Tbilisi. A smaller store was located five-to-ten minutes by foot from his home. However, decedent was on his way to a larger store, located approximately 12-14 kilometers from his apartment. CX 3-39.

Employer appeals the award of death benefits, challenging the administrative law judge's finding that the "zone of special danger" doctrine is applicable in this case. Employer asserts that decedent's activity at the time of his death was personal in nature; therefore, the doctrine does not apply, and decedent's death is not compensable. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, in separate briefs, urging affirmance of the award. Employer filed a reply brief.

Section 9 of the Act provides for death benefits to certain survivors if the death of the employee is work-related. 33 U.S.C. §909. Under the Act, an injury generally occurs in the "course of employment" if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *See, e.g., Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010). In cases arising under the Defense Base Act, the Supreme Court has held that an employee may be within the course of employment, even if the injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" create a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *see also Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *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.), *cert. denied*, 543 U.S. 809 (2004). Thus, an injury is covered by the statute where it results from "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen." *O'Leary*, 340 U.S. at 507. However, the *O'Leary* Court also recognized that in some cases 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.; see, e.g., Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009); *Gillespie v. Gen. Elec. Co.*, 21 BRBS 56 (1988), *aff'd mem.*, 873 F.2d 1433 (1st Cir. 1989).

Employer asserts the "zone of special danger" doctrine does not apply to this case because the types of injuries found to be employment-connected under this doctrine have fallen into only the following two categories: (1) where the injury occurred during/following a reasonable recreational or social activity; and (2) where the injury occurred in a locale that presented living conditions giving rise to an increased risk of the injury sustained by the claimant. Employer argues that because grocery shopping fits into neither category, the facts of this case are analogous to those in *Fear*, 43 BRBS 139, in which the claimant's injury due to the application of a cosmetic chemical peel was not within the "zone of special danger" as the activity was personal in nature.

There is no legal support for employer's premise that only recreational/social activities or local risks can give rise to application of the "zone of special danger"

doctrine. The injuries in the cases cited by employer were found to be employment-related not merely because they were recreational/social or due to local risks.[2] Rather, the activities the employees engaged in were reasonable and foreseeable given the overseas conditions of their employment. Similarly, the Board in *Fear* did not hold that the claimant's use of a chemical peel was not employment-related because the decision was personal, as opposed to recreational, in nature. The injury was not employment-related because it was not foreseeable in light of the conditions and obligations of the claimant's employment in Kuwait. *Fear*, 43 BRBS at 143. Indeed, the Board has explained that the "'zone of special danger' [is] the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant." *N.R. [Rogers] v. Halliburton Serv.*, 42 BRBS 56, 58 (2008) (McGranery, J., dissenting); *see O'Keeffe v. Pan American World Airways, Inc.*, 338 F.2d 319 (5th Cir.), *cert. denied*, 380 U.S. 950 (1965) (death compensable where employee was killed in a traffic accident on Grand Turk Island while riding a motor scooter after his regular duty hours); *Pan American World Airways, Inc. v. O'Hearne*, 335 F.2d 70 (4th Cir. 1964) (death compensable where employee on San Salvador Island was killed in car crash while returning from a pub).

The administrative law judge's finding that decedent's death is compensable in this case is consistent with case precedent. *Self v. Hanson*, 305 F.2d 699 (9th Cir. 1962). The administrative law judge addressed the proper inquiry under *O'Leary*, 340 U.S. at 507, focusing on the foreseeability of the injury given the conditions and obligations of employment in a dangerous locale. *See* Decision and Order at 6. Decedent lived and worked in a dangerous locale as evidenced by employer's payment of a hardship allowance/danger pay. *See* CX 1 at 24; CX 3 at 20, 51. Employer provided its employees taxi vouchers each month for use with a specific cab company that utilized Mercedes Benz automobiles. *See* Emp. Post-hearing Br. at 18. Employer permitted its employees to utilize the cab service for any reason within a certain radius. CX 3 at 27. From this evidence, the administrative law judge rationally concluded that, "[t]he conditions [d]ecedent found himself in as a result of his employment . . . made grocery shopping a necessity" and that "it was foreseeable that employees would use the [employer-paid taxi] service in order to travel to a grocery store." *Id.* Indeed, it is

[2] *See, e.g., O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965) (employee drowned on a Saturday outing while boating on South Korean lake); *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (construction of employer-provided housing prevented employee from receiving timely medical care); *Urso v. MVM, Inc.*, 44 BRBS 53 (2010) (employee's death in Lebanon caused by overdose of painkillers taken for tattooing procedure); *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.), *cert. denied*, 543 U.S. 809 (2004) (employee on Johnston Atoll injured at social club in horseplay).

entirely foreseeable that an employee will need to purchase groceries, and, given the taxi vouchers provided by employer, also entirely foreseeable that decedent would take a taxi to the grocery store. The fatal accident, thus, also was a foreseeable, "if not foreseen," consequence of riding in a taxi in a place where the dangers of automobile travel were anticipated by employer. Although employer attempted to mitigate the danger, employer has not cited any circumstances that could warrant a legal conclusion that decedent's activity was not rooted in the conditions of his employment or was "thoroughly disconnected" from the service of employer.[3] *Truczinskas*, 699 F.3d 672, 46 BRBS 85(CRT); *Fear*, 43 BRBS 139. We, therefore, affirm the administrative law judge's findings that the zone of special danger doctrine applies and that decedent's death is compensable under the Act as they are rational, supported by substantial evidence and in accordance with law. *O'Keeffe*, 380 U.S. 359; *O'Leary*, 340 U.S. 504.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[3] As claimant and the Director assert, employer's argument makes little sense, contending that the law provides coverage for travel to and from certain recreational activities, but not for travel to obtain the necessities of life.