

LITIGATING DEFENSE  
BASE ACT CASES



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## LITIGATING DEFENSE BASE ACT CASES

The past decade and a half has seen a significant increase in the number of overseas government contractor employees. Civilian contractor employees have been described in Kellogg, Brown and Root literature as 'force multipliers'. Basically, contract employees work and live alongside military service personnel on foreign bases in hostile locations ranging from the mountains of Afghanistan to the deserts of Iraq. But for the absence of a uniform and weaponry, the civilian contractor may be indistinguishable from military personnel. When civilian employees are injured or suffer illness in a foreign location, medical treatment is generally administered initially by an on site contract medic. Based on deposition testimony in a recent DBA case, it is apparent that the medics see many patients and do not always have adequate medical support for what appear to be non-life threatening events. The problem becomes extreme when an 'ordinary disease of life' mushrooms into a more serious event. Then, the military medical system generally takes over and specialized treatment can be obtained, hopefully in time to avert a catastrophic event.

The increase in overseas civilian contractor employees has seen an expected increase in the number of Defense Base Act claims. While run of the mill overseas injury cases are not unique in the manner in which they are litigated, 'exotic' claims should be approached with an appreciation of the special nature of the Defense Base Act. Exotic claims fall into three general categories: (1) reasonable recreation, (2) force of nature, and (3) illness/disease. As will be demonstrated later, proof in these cases must be approached carefully. Because the scope of the Defense Base Act is unlike anything else in the area of personal injury law save for the seaman's right to maintenance and cure, it is helpful to formulate a clear view of compensability. Clearly, the critical Defense Base Act issue today concerns the scope of coverage.

### **1. The Positional-Risk Doctrine as defined by Professor Larsen:**

More than thirty years ago Professor Arthur Larsen wrote an article entitled "*The Positional-Risk Doctrine in Workmen's Compensation.*" It appeared in the Duke Law Journal, Volume 1973, September, Number 4, p. 761-819. The article set forth a critical overview of the phrase 'arising out of' employment. The purpose of the article was to show, by drawing on a wide assortment of apparently unrelated categories, that there can and should be recognized a universal and pervading causal principle – the positional-risk doctrine – and to demonstrate further that, once a jurisdiction has adopted the doctrine in one category, it should logically extrapolate it to every type of neutral-risk case presenting the question of causal relation between injury and employment.

Professor Larson describes the 'positional-risk' doctrine as follows:

*An injury 'arises out of the employment if it would not have occurred but for the fact that the conditions or obligations of the employment placed claimant in the position where he was injured by a neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment. (DLJ, 761).*

The earliest American statement of the positional risk principle as a general doctrine occurred in the Colorado case of *Aetna Life Ins. Co., v. Industrial Comm'n*, 81 Colo. 233, 254 P. 995 (1927). In that case the Supreme Court of Colorado was presented with a classic positional-risk situation: A farm hand was killed by lightning while driving a team of horses without a wagon. The effect of the decision was set forth in a concurring opinion:

*When one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one 'arising out of the employment of the person so injured. Id at 996.*

Justice Denison commented as follows regarding the court's opinion:

*"A majority of the court thinks that, since Oakley's employment required him to be in a position where the lightning struck him, there was a causal relation between employment and accident, so that the latter may be said to arise out of the former and therefore the judgment should be affirmed." Id at 234, 254 P. at 995.*

The 'but for' standard discussed by the Colorado Supreme Court in 1927 eventually worked its way into the Defense Base Act decades later, although the landmark American positional risk lightning strike case from Colorado was never cited as precedent. As we shall see, the U.S. Supreme Court ushered in the era of positional-risk under the Defense Base Act based on English compensation law.

## **2. The Positional-Risk Doctrine under the Defense Base Act: *O'Leary v. Brown-Pacific Maxon* and the 'zone of special danger'.**

In the landmark Defense Base Act 'zone of special danger' case, the Supreme Court of the United States extended the rescue doctrine to its ultimate limit in adopting the positional risk doctrine. The court held that the rescue of complete strangers was covered when the connection with employment was furnished, not by the nature of the employment, but solely by the fact that the

employment brought the employee to the place where he observed the rescue attempt. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 71 S. Ct. 470 (1951).

The *Brown-Pacific Maxon* case combines elements of third party rescue, reasonable recreation and force of nature. The employer maintained a recreation center especially for its employees near shoreline, along which ran a channel so dangerous for swimmers that its use was forbidden. Signs to that effect were erected. An employee drowned while swimming in a forbidden channel in an attempt to rescue an unknown man. The drowning was not necessarily excluded from coverage as the kind of conduct that employees engage in as frolics of their own.

The Supreme Court established the 'zone of special danger' test in Defense Base Act cases in its landmark holding as follows:

*"The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Thom v. Sinclair, (1917) A.C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. Ibid.*

In *Brown-Pacific-Maxon* the Court did not use the same 'but for' language as seen in the Colorado Supreme Court's seminal lightning strike case decided decades earlier. However, the practical impact of the Supreme Court's decision in *Brown-Pacific-Maxon* was to adopt a 'but for' test. The broad causation language used by the Supreme Court in this early rescue of strangers case troubles us today. If there need not be a causal relation between the nature of employment of the injured person and the accident or illness, then what is the minimum threshold that one must cross in order to obtain a finding of compensability? Is mere employment in a 'zone of special danger' enough? Is the test one of manifestation of a condition or illness while overseas in a 'zone of special danger'? Or, does the claimant need to make a showing of some 'increased risk' of occurrence, however slight, of an event, condition or illness in order to make the claim compensable? As will be seen in the following discussion, different fact patterns have produced a variety of approaches by trial judges and appellate bodies. Although several of the cases clearly fit squarely within a "positional risk" analysis, none of the specific decisions mention the doctrine in support of a favorable finding for the employee.

In a subsequent case, the U.S. Supreme Court further defined the broad coverage provided under the Defense Base Act. In *O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359, 85 S.Ct 1012 (1965), the Court affirmed a determination of the Deputy Commissioner that the drowning of decedent employed at a defense base in South Korea while boating on a Saturday outing at a

lake 30 miles from the jobsite arose out of and in the course of his employment. The administrative finding of compensability was not irrational or without substantial evidence on the record as a whole.

In *O'Keefe* the U.S. Supreme Court approved of the causation language set forth in *Brown-Pacific-Maxon*. As in its earlier decision, the Court cited to the English compensation case of *Thom v. Sinclair*, (1917) A.C. 127, 142. However, in its later decision the U.S. Supreme Court discussed where the *Brown-Pacific-Maxon* compensation line was to be drawn.

*The Court in Brown-Pacific-Maxon drew the line only at cases where an employee had become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment.* 340 U.S. at 507, 71 S. Ct. at 472.

The U.S. Supreme Court noted that 'this standard' is in accord with the humanitarian nature of the Act as exemplified by the Section 20(a) presumption. In weighing the importance of the *O'Keefe* decision, it should be noted that the case defines coverage by telling us what is not covered.

In yet another U.S. Supreme Court case we again see how far a claimant can stray and still stay within coverage of the Act. *Gondeck v. Pan American World Airways, Inc.* involved the death of an employee as a result of a jeep accident on San Salvador Island outside a defense base at which the decedent was employed. The accident took place in the evening as *Gondeck* and four others were returning from a nearby town. In *Gondeck*, the Court noted that the decedent and three others had been sitting around the Reef Club drinking champagne from 4 p.m. to 7:30 p.m., when they took off for town in a jeep which they had been forbidden to use for personal missions.

The employee's death in an automobile accident as he was returning to a defense base from a nearby town was noted to be related to 'reasonable recreation.' Therefore, the Court held that the obligations or conditions of employment created the 'zone of special danger' out of which the injury or death arose. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 86 S. Ct. 153 (1965)

While the three U.S. Supreme Court cases under discussion were decided under a 'zone of special danger' standard, the decisions are consistent with Professor Larsen's 'positional risk' analysis. In each case "but for" the employment, the employee would not have been injured by a "neutral" force.

### **3. The outer limits of Defense Base Act coverage: 'Chutzpah claims':**

Decades after the original *O'Keefe* decision, the Benefits Review Board weighed in on the outer limits of DBA coverage. Based on two cases that were handed down within a span of several years, it appears that the Board has decided that cases of unmitigated gall, or 'chutzpah', fall outside coverage. Are we then to conclude based on *O'Keefe v. Smith, Hinchman & Gryllis Associates* that everything that transpires overseas in a 'zone of special danger' other than cases involving 'chutzpah' is covered under the Act? While that is not certain, the argument is compelling based on a reading of the *Gillespie* and *Kirkland* cases.

In *Gillespie v. General Electric Co.*, 1988 WL 232796 (DOL Ben. Rev. Bd), the Benefits Review Board considered a widow's claim for death benefits based on her husband's accidental death while attempting to temporarily asphyxiate himself as part of autoerotic activity. On December 6, 1962, while assigned to Ramstein Air Force Base in West Germany, Mr. Gillespie was found dead in the closet of his room on the base, having hanged himself.

Interestingly, the administrative law judge in the *Gillespie* case found the widow's claim compensable. He concluded that the death arose from the 'zone of special danger' which was created by the conditions of employment. The trier of fact concluded that: "In this case the condition is the separation from his spouse and family with the attendant loneliness." On appeal, the Board decided that onanism taken to the extreme was not compensable. The death was held to be 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.

Several years later, the Board again considered a widow's claim for death benefits, although in a different context. *Kirkland* involved a case of love gone bad. Claimant and decedent met after decedent's arrival in Vietnam. In August 1972, claimant and the decedent married. Decedent was murdered during the burglary of his home in Vietnam on July 22, 1973. The widow/claimant was implicated in the crime by the men who confessed to actually killing her husband. The *Kirkland* case involved clear 'chutzpah'. For the uninitiated, the classic example of 'chutzpah' is as follows: A man, after killing both his parents, throws himself upon the mercy of the Court because he is an orphan. In *Kirkland*, the claimant created her status as a widow. Accordingly, the Board had no trouble in finding that the wrongdoer should not be allowed to benefit from her own foul conduct.

Upon considering the aforementioned cases as a whole, we can identify the outer limits of coverage. Are we then to conclude that everything short of 'chutzpah' is covered under the Defense Base Act? The answer is that the diligent claimant's attorney should argue that

everything under the Defense Base Act sun but 'chutzpah' cases is covered under the 'zone of special danger' doctrine. Otherwise, the U.S. Supreme Court would not have held that the line was drawn 'only' at cases so thoroughly disconnected from employment as to be unreasonable.

Now that we are comfortable with the outer limits of Defense Base Act coverage, how close to the edge can a claimant get and still find coverage? The Federal Appellate Courts have weighed in on the subject on several occasions. While none of the cases have specifically mentioned the positional-risk doctrine, plainly a number of cases have found coverage within the logic of that doctrine. Moreover, as will be seen, at least one federal appellate court favorably compared the scope of Defense Base Act coverage with the remedies afforded seamen.

#### **4. The 'zone of special danger' compared to the seaman's right to maintenance and cure: *O'Keefe v. Pan American World Airways, Inc.***

In *O'Keefe v. Pan American World Airways, Inc.*, 338 F.2 319 (56 Cir. 1964) the Fifth Circuit Court of Appeals addressed a widow's claim concerning the death of her husband. The decedent was a recreation supervisor who died in a motor scooter accident on Frand Turk Island while he was returning home from a social visit after regular working hours. The Court held that the death arose out of and in the course of employment and was compensable.

In light of *Brown-Pacific-Maxon*, which had been decided more than a decade earlier, the Court had little difficulty finding coverage 'irrespective of the place where the injury or death occurs'. The Court noted in holding the recreational activity of the decedent covered that "(e)mmployees working under the Defense Bases Act, far away from their families and friends, in remote places where there are severely limited recreational and social activities, are in different circumstances from employees working at home." *Id* at 321.

The important part of the Pan American World Airways, Inc. case is tucked away in a discussion found in footnote three of the opinion. That footnote contains an analysis of why a Defense Base Act claim is like a seaman's claim for maintenance and cure. The footnote provides strong support for sweeping coverage under the Defense Base Act. In comparing the seaman's right to maintenance and cure to the scope of coverage for contractor employees under the Defense Base Act, the Court noted:

*"(the) employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes. Appropriately it covers all injuries and ailments incurred without misconduct on the seaman's*

*part amounting to ground for forfeiture, at least while he is on the ship, 'subject to the call of duty as a seaman, and earning wages as such.'*

In referring to Defense Base Act cases, the Fifth Circuit noted that:

*"We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage."*

Although the *PanAmerican World Airways, Inc.* decision dealt with a recreational fatality, the careful practitioner would do well to seize upon the broad language in footnote three to argue that all illnesses or injuries that become 'manifest in service to the employer' are covered under the Defense Base Act. If the perils of the sea are like those faced by the overseas defense base employee, then it follows that injuries and illnesses – as well as reasonable recreational activity – ought to be compensable when they become manifest in service to the employer. The scope of coverage should be no less in one context than the other in light of the similar circumstances of employment.

#### **5. Boys (and girls) will be boys (and girls): The Ninth Circuit Court of Appeals considers reasonable recreation.**

Several Ninth Circuit Court of Appeals cases have considered after-work activity and found it within the bounds of reasonableness. *Self vs C.F. Hanson*, 305 F.2d 699 (1962) involved what may well have been an after work romantic liaison between a boss and his stenographer. In view of the employer/contractor's policy of providing vehicles and facilities for recreational purposes on Cabras Island, the after work vehicular accident which occurred while the vehicle in which the employees were 'parking' was struck by another vehicle, was held compensable. The stenographer's injuries, which occurred outside the normal workday, were held compensable whether the 'parking' was due to a professed desire to view a vessel or to mutual attraction. In light of the *Self* case, we can generalize about compensability in cases involving sexual conduct. Heterosexual behavior will be tolerated. *Self Id.* However, sexual activity outside the norm apparently will not pass muster. See: *Gillespie, supra*.

If an injury sustained during a probable romantic liaison is compensable under Ninth Circuit caselaw, then so is an injury occurring during horseplay in a bar. *Kalama Services, Inc. v. Director, OWCP*. 354 F.3d 1085 (9 th Cir. 20003). In *Kalama Services*, claimant Ilaszczat sustained a hip injury at a bar after midnight during the early morning hours. Claimant consumed several drinks at the Tiki Bar. He left the bar after midnight when it closed and proceeded to

another bar. Several more alcoholic drinks were consumed. Then, claimant, apparently on a bet, injured his hip when a soldier, Burum, may have 'swept' claimant's foot out from under him, or kicked him.

The Ninth Circuit Court of Appeals affirmed the Benefits Review Board in holding that injuries suffered by an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a 'zone of special danger' created by the isolation of the island and the limited recreational opportunities available there.

While the Ninth Circuit cases do not plow new ground, they give the practitioner an idea of how far a claimant can go in his after-work activity and still stay within the ambit of coverage.

## **6. Acts of God or Force of Nature**

While there are a significant number of what could be classified as recreational cases, there are few reported Defense Base Act cases involving injury caused by the Force of Nature or an Act of God. Several of the cases in this category are worth noting because they provide insight into the applicability of the 'positional risk' doctrine in Defense Base Act claims. Once coverage is found to exist in one environmentally created injury, it should reasonably apply in other instances as well.

In the early case of *Phoenix Indemnity Company v. Willard*, 130 F. Stipp. 657, we are presented with a Force of Nature/Act of God induced injury which was found compensable. Claimant sustained an injury when he slipped and fell on a piece of ice on the sidewalk. Although the case did not discuss the 'positional risk' doctrine or the 'zone of special danger', the claimant's injury was found compensable. As will be show, the facts presented in Willard fit the classic pattern of a 'neutral' risk as discussed by Professor Larsen.

The facts in *Willard* are instructive in understanding the breadth of Defense Base Act coverage. Willard was hired by a contractor to do construction work for the government in Africa. He was obligated under contract to submit to such processing as necessary. His pay commenced the day he signed the contract. Claimant was processed for employment in New York City. His temporary residence during employment processing was in Hoboken,, New Jersey. On the date of injury, claimant remained in New York City after employment processing and had dinner. He went to the Port Authority Building in New York City and boarded a bus for Hoboken. When claimant arrived in Hoboken, New Jersey where he temporarily resided, he exited the bus. He crossed the street. As he stepped on the sidewalk, due to sleet and rain, he slipped on a piece of ice and fell. He sustained a fracture of the fibula of the left leg.

On this record, the U.S. District Court upheld the Deputy Director's finding of compensability. Claimant's waiting in preparation for his trip overseas was so clearly bound up with it as to be reasonably considered as part of his transportation, just as a stopover en route might be. In any event, it was sufficiently related to his employment and so incidental to the necessary preparation for his overseas assignment as to make the injury sustained one arising out of and in the course of his employment.

The *Willard* case is a classic example of the 'positional risk' doctrine in action. Here, 'but for' his conditions of employment, claimant would not have been in Hoboken, New Jersey to slip and fall on the icy, sleet covered sidewalk. *Willard* is important because it does not find coverage due to an 'increased risk' analysis. Rather, it is merely *Willard's* required presence at the situs of the environmentally caused injury that brings the claim within coverage.

Similarly, the underlying facts in *O'Leary v. Brown-Pacific-Maxon*, supra, show that the claim was also based in part on an environmental condition. Here, Claimant drowned in treacherous currents in a channel so dangerous for swimmers that its use was forbidden and signs to that effect had been erected. Considering the case closely, the treacherous currents in the case are really no different than the icy, sleety sidewalk in *Willard*. A Force of Nature has created a neutral environmental risk that in turn resulted in an injury or fatality.

Lastly, in the recent case of *Wolford vs. SEII*, Case No. 2007LDA00027 (tried January 24, 2007) (ALI- Avery), Administrative Law Judge Richard C. Avery was presented with a lightning strike injury that occurred at Camp Korean, Iraq. Claimant, Jason Wolford, was walking to the DEFAC for a meal. He was on the job and on the employer's payroll. A bolt of lightning struck a nearby wall. Claimant received an electrical injury due to either step-voltage or a sideflash. The employer denied coverage based on the Act of God defense. On the other hand, claimant argued that the Section 20(a) presumption had been triggered and remained unrebutted. Alternatively, claimant argued that the injury was covered under the 'zone of special danger' doctrine.

In presenting the case, Claimant's counsel argued that the claim was covered based on *Brown-Pacific-Maxon* and *Willard*. The employer countered that the 'zone of special danger' only applies to recreational injuries. As will be seen later, the employer's argument is clearly wrong.

The approach in presenting claimant's proof at trial in *Wolford* is instructive. Because the Defense Base Act follows the 'positional risk doctrine', it should have been sufficient to present the facts of the injury and to rely on the original 1927 'positional risk' lightning strike case, *Aetna Life Ins. Co. v. Industrial Com'n.*, supra. However, after reviewing Professor Larsen's discussion about the possibility of a jurisdiction adhering to the 'increased risk' test, claimant's counsel

provided proof by an electrical engineer regarding the increased risk of harm presented by the conditions of claimant's employment. The particular increased risks in Wolford were proximity to a wall, the soil conditions at Camp Korean, and the lack of lightning prevention equipment at the base, which could have deflected the lightning bolt.

At the time of this article no decision and order has been rendered in the Wolford case. Hopefully, a decision and order finding compensability will be issued in accordance with the 'positional risk' doctrine.

While the environmentally induced injuries discussed appear factually different, the general principles underlying the cases are the same. The three examples show compensable injuries that would not have occurred 'but for' the conditions of employment that placed each claimant in a position where his injury was caused by a 'neutral' cause.

**7. "Ordinary diseases of life/illnesses":**

**8.**

Overseas contractor employees face grueling work schedules, stressful environments in hostile regions, little routine medical monitoring of physical condition and exposure to communicable diseases from indigenous workers who only have access to substandard health care. When an illness or disease strikes it may have consequences more serious than would have occurred stateside. Many controverted claims involve what the employer classifies as an 'ordinary disease of life'. Such cases can encompass heart attacks, bacterial meningitis, deep vein thrombosis/pulmonary embolism, hepatitis, tuberculosis, diarrhea, food borne illness, Leishmaniasis, Gulf War syndrome and post-traumatic stress disorder. Reviewing the illness and disease cases, one is struck by the lack of uniformity in approach by the triers of fact. Accordingly, the cautious practitioner will elevate his proof in a given case in this claim category to meet the 'increased risk' standard rather than relying upon the Section 20(a) presumption and the 'zone of special danger' doctrine. The reason for using expert testimony to prove actual causation is due to the lack of uniformity of approach in the decisions in illness and disease cases. Some courts will use an 'increased risk' analysis which requires either medical or epidemiology proof, or both.

The safest course for the practitioner is to review what has succeeded in the past. This requires assembling a series of cases that have found illness or disease compensable under a Section 20(a) analysis with the 'zone of special danger' as an alternate theory. Then, the practitioner should build his or her case after a style case where compensability has been found.

Three particularly well written decisions are worthy of some discussion Although the cases dealt with different illnesses, or 'ordinary diseases of life' as the employer will claim, insight can be gained into this category of claims.

## 1. Heart Attack

In *Jones v. Hawkins*, 1998 WL 327091 (E.D.La.) the District Court affirmed the Benefits Review Board decision upholding an Administrative Law Judge's award of compensation benefits to appellant resulting from the death of her husband. The decedent, Gilbert W. Hawkins, was employed as a pipeline supervisor on a public-works project near Cairo, Egypt. Just before midnight on December 20, 1989, Hawkins returned to the worksite after his normal workday, presumably to check on the dewatering pumps. Between the work site and the site office, decedent's truck collided with a telephone pole. After midnight, coworkers of decedent found him on the floor of his truck. Decedent was taken to a nearby hospital, where he was pronounced dead. No autopsy was performed. However, an Egyptian Health inspection official listed acute failure of the heart and circulatory systems as the cause of death.

The administrative law judge in *Jones* first used a Section 20(a) analysis and found that based on the record as a whole, the facts of the case demonstrated that Hawkins' death arose out of his employment. The Court found that job-related stress must have contributed to some degree to the adverse progress of Hawkins' heart disease.

Alternatively, the ALJ held that recovery under the Act was also proper under the 'zone of special danger' doctrine. The AU found that decedent's employment in Egypt "would itself have been sufficient to have created the zone of special danger within which Hawkins' death occurred."

The District Court decision in *Jones v. Hawkins* is an excellent style case to use in all Defense Base Act heart attack cases. While the case appears to support the notion that mere employment in the zone of special danger might support a favorable ruling in a heart attack case, the careful practitioner should assume that the burden of proof is greater than that. Remember, caution dictates that more proof should be offered into the record at trial than a mere triggering of the Section 20(a) presumption.

## 2. Hepatitis B

In *Davis v. Morganti National Incorporated* the Benefits Review Board affirmed the ALJ's decision supporting the widow's claim based on the decedent's death from Hepatitis-B. As in *Jones v. Hawkins*, supra, the Court used a Section 20 (a) analysis and, as an alternative ground, based compensability on the 'zone of special danger' doctrine.

In *Davis* the decedent worked for employer as a superintendent on a project to construct a radio station for the Voice of America on the island of SaoTome located in the Atlantic Ocean off the coast of Africa. While working for employer decedent complained of vomiting to the company

Doctor. He was diagnosed with Hepatitis B several days later. His condition deteriorated. He was hospitalized overseas. However, he died due to complications before his employer could evacuate him to Switzerland.

The Administrative Law Judge found that the Section 20(a) presumption had been invoked and remained un rebutted by the employer. As an alternative ground for entitlement, the Administrative Law Judge found coverage based on claimant's having been within the 'zone of special danger'.

### 3. Chronic diarrhea and depression

Similarly, in *Wilson vs. Washington Group International, Inc.*, 38 RBS 717 (All), the Administrative Law Judge found the claim based on chronic diarrhea and depression compensable after applying the Section 20(a) presumption and, alternatively, after discussing the 'zone of special danger' doctrine. The Court initially held that the employer had not rebutted the Section 20(a) presumption. Also, the Court discussed the 'zone of special danger' and noted that it was not confined to recreational activities. The Administrative Law Judge in *Wilson* stated that:

*"Indeed, merely employing an individual covered by the Act outside of the borders of the United States, has been held to create a 'zone of special danger' under which injury can be extended to employment as to be covered by the Act." Ford Aerospace & Communications Corp. v. Boling, 684 F.2d 640 (9th Cir. 1982).*

The three cases discussed support the 'zone of special danger' is an alternative theory to a Section 20(a) analysis. At least two of the cases make it appear that mere employment in a 'zone of special danger' is enough to trigger compensability. Earlier in the paper we discussed the similarities between overseas defense contractor claims and claims brought by seamen. In reality, the three cases show illness or disease that became 'manifest in service to the employer'. Ideally, that should be the standard in a Defense Base Act claim just as it is in the case of a maintenance and cure claim brought by a seaman.

While it is axiomatic that we can learn from success, we also know that we can learn from failure. In that regard, *Atkins vs. KBR Government Operations*, 2005-LDA-3 (ALJ Rosenow, 22 Nov. 2005) is worthy of consideration. The *Atkins* case was tried and lost before an Administrative Law Judge. Claimant argued that he was suffering from neurocysticercosis. Neurocysticercosis is an infection stemming from the larval form of a pork tapeworm. When larvae are consumed in infected pork, or food handled by infected food workers, they are activated by gastric acid and can migrate to the Central Nervous System, causing various symptoms. The dispute in *Atkins* was noted as: "Claimant argues that he was infected in Uzbekistan and as such is entitled to medical

care and disability compensation under the Act." On the other hand, the employer argued that claimant was infected prior to coming to Uzbekistan. Also, the employer suggested that the consumption of food would not be activity covered by the Act.

The Court in *Atkins* employed a Section 20(a) analysis. It found that the Section 20(a) presumption had been rebutted. Then, the Court weighed the evidence and found by a preponderance of the evidence that claimant became infected in South America before he ever went to Uzbekistan. The Court addressed the 'zone of special danger' only in passing. After the Court's unfavorable decision and order, the claimant urged reconsideration based on the 'zone of special danger'. Claimant suggested that inadequate consideration was given to claimant's presence in a zone of danger. The Court noted that the argument missed the fundamental determination that the evidence established that it was more likely than not that Claimant was infected in South America. The Court concluded that: "Given that predicate, the onset of symptoms in Uzbekistan was mere happenstance. He would have manifested those symptoms had he been in the United States. There was no nexus whatsoever between his presence in Uzbekistan and his symptoms, rendering any zone of danger status moot."

In hindsight, the better practice in *Atkins* would have been to have downplayed the issue of when claimant contracted the neurocysticercosis as dispositive. Really, when claimant initially contracted the infection is interesting but not controlling. That is because if the conditions of living and working abroad caused physical stress on claimant's system such that the pre-existing infection became manifest while overseas, the entire result would be compensable. In other words, if claimant's job stresses in a 'zone of special danger' contributed to the manifestation of the illness, then the entire claim should have been compensable under the 'aggravation rule'. The lesson learned from *Atkins* is to employ your alternative theories of relief early and to marshal your proof so as to bring your case within the aggravation rule if possible.

## CONCLUSION

The 'positional risk' doctrine as described by Professor Larsen more than thirty years ago has been a work in progress in Defense Base Act cases. Amazingly, caselaw arising under the DBA does not discuss 'positional risk' although it is the majority view of compensability after the U.S. Supreme Court decision in *Brown-Pacific-Maxon*. Counsel handling cases for injured workers under the Defense Base Act will be well served to consider the 'positional risk doctrine', the wide scope of the 'zone of special danger', the outer limits of compensability set forth in the 'chutzpah' cases and the caselaw involving maintenance and cure in the context of seamen in presenting arguments to the trier of fact in a Defense Base Act case. While the bar for compensability is set low in a Defense Base Act case, the careful practitioner will proceed as though he or she must make a showing of 'increased risk' of harm related to employment lest the Court deny the claim due to insufficient proof.

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