D.C. ACT

The 1984 Amendments do not apply to cases arising under the 1928 D.C. Act. Keener v. Washington Metropolitan Area Transit Authority, 800 F.2d 1173 (D.C. Cir. 1986), cert. denied, 480 U.S. 918 (1987); Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

1984 Amendments do not apply to D.C. Act, and therefore 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 affirms Gardner, 18 BRBS 264, on remand from D.C. Circuit to the extent that injurious exposure pre-July 26, 1982 gives DOL jurisdiction under 1928 D.C. Act. The Board vacates Gardner insofar as it held that 1984 Amendments applied to 1928 D.C. Act. Section 20(b) presumption applies to Section 12(d) sufficient notice in D.C. Gardner v. Railco Multi Construction Co., 19 BRBS 235 (1987), vacated, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990).

The court of appeals holds 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 holds that 20 C.F.R. §701.101(b), which adopted an "exposure rule" for determining which Act applies is invalid. The court remands the case for a determination of whether claimant is covered under the 1979 D.C. Act or any other state law. Railco Multi-Construction 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).

The Board remands for consideration of the issue of whether claimant is covered under the 1979 Act or another state law so as to divest DOL of jurisdiction of the claim under the 1928 D.C. Act, pursuant to Gardner, as this issue has not been addressed previously. (See 18 BRBS 273 (1986) for underlying case). The Board initially holds that employer bears the burden of proving non-coverage pursuant to Edgerton, 925 F.2d 422, 24 BRBS 88 (CRT) (D.C. Cir. 1991), as claimant presented evidence of coverage during the relevant time period. The Board also rejects employer's reliance on a DOES case, because claimant's last employment in the District was before July 1982. Lastly, the Board notes that the 1979 Act generally will apply where the claimant continues 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, see, e.g., Black, 717 F.2d 1289, 16 BRBS 13 (CRT) (9th Cir. 1983). Pryor v. James McHugh Construction Co., 27 BRBS 47 (1993).

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 applies as jurisdiction is determined by the date an injury becomes manifest. Since it is not clear, however, from the existing record whether claimant meets the jurisdictional requirements of the 1979 Act, or is covered under any other state workers' compensation scheme (in which case DOL would not have jurisdiction), the case is remanded to the administrative law judge to make this determination. If claimant is not covered under the 1979 Act or any state law, the 1928 Act applies under the "coverage gap" provisions. Under *Edgerton*, 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-Construction Co.*, 27 BRBS 266 (1993) (decision on remand).

The Board affirms 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 Longshore Act when decedent became permanently totally disabled by the work injury, as it is this disability that forms the basis of the death benefits claim, as the 1984 Amendments do not apply in D.C. Act cases. Lynch v. Washington Metropolitan Area Transit Authority, 22 BRBS 351 (1989).

The Board holds that the 1928 D.C. Act applies 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 decision in Lynch, 22 BRBS 351, a case with similar facts, could not be the basis for its decision. Since decedent's death was unrelated to the work injury, there is no remedy for claimant under the new D.C. Act. At the time of decedent's death he was permanently totally disabled and had no employment contacts with D.C. after 1982; thus, there is no subject matter jurisdiction under the new Act. Since the injury that caused decedent's disability occurred in D.C. and his death is unrelated to the injury, the death would not be covered under any other state law. In light of the above factors, and because claimant has a remedy under Section 9 of the 1972 Longshore Act, the Board affirmed the award under the 1928 D.C. Act. Finally, the Board noted that this remedy is available to claimant only because the 1984 Amendments, which eliminated recovery for unrelated deaths, do not apply in D.C. 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 court of appeals affirmed the Board's decision that claimant is 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 is derivative of the employment injury that occurred in 1974. Thus, the 1928 Act, and not the new Act applies. Shea, S&M Ball Co. v. Director, OWCP, 929 F.2d 736, 24 BRBS 170 (CRT) (D.C. Cir. 1991), aff'g Holden v. Shea, S&M Ball Co., 23 BRBS 416 (1990).

The U.S. Court of Appeals for the D.C. Circuit held that the 1928 D.C. Workmen's Compensation Act is a matter of local law, and therefore it will 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 applied 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).

The peer-review privilege contained in the regulations found at 7 D.C. Code Ann. §§32-504 - 32-505 applies to claims under the 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 affirms the administrative law judge's finding that while decedent's connections with 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 is no jurisdiction under the D.C. Act. Gustafson v. International Progress Enterprises, 18 BRBS 191 (1986), rev'd, 832 F.2d 637, 20 BRBS 31 (CRT)(D.C. Cir. 1987).

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 was thus viewed as falling within the jurisdiction of the D.C. Act. The Board's determinations to the contrary were accordingly reversed. Gustafson v. International Progress Enterprises, 832 F.2d 637, 20 BRBS 31 (CRT)(D.C. Cir. 1987), rev'g 18 BRBS 191 (1986).

The Board affirms 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).

Employer with employees who make deliveries in D.C. carries on employment in D.C. Infrequent employment-related trips into D.C., D.C. residence and additional factors (e.g., District union local membership) are sufficient contacts to render claimant covered under the D.C. Act, even though claimant was injured in Maryland, see Cardillo, 330 U.S. 469 (1947). Norfleet v. Holladay-Tyler Printing Corp., 20 BRBS 87 (1988).

The U.S. Court of Appeals for 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 (1947), 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 fond 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)(4th Cir. 1987), rejected the proposition that the Act applies to every employer in the Washington metropolitan area. Greenfield v. Volpe Construction Co., Inc., 20 BRBS 46 (1987), rev'd, 849 F.2d 635, 21 BRBS 118 (CRT)(D.C. Cir. 1988).

The court states 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 indicates that the extraterritorial aspects of a claimant's employment relationship are irrelevant to the "substantial connection" injury. Court accordingly reverses Board's affirmance of administrative law judge's finding of no D.C. Act jurisdiction. In addition, court notes that it possesses jurisdiction to decide the case, despite the fact that the claimant's injury did not occur in D.C. Greenfield v. Volpe Construction Co., Inc., 849 F.2d 635, 21 BRBS 118 (CRT)(D.C. Cir. 1988), rev'g 20 BRBS 46 (1987).

The Board holds that administrative law judge erred in addressing, sua sponte, the issue of D.C. Act jurisdiction, given that the parties previously achieved a Section 8(i) settlement and that the settlement was approved by a deputy commissioner. Because the deputy commissioner's approval of the settlement had become final, the administrative law judge was empowered to decide, pursuant to Section 18 of the Act and Section 702.372(a) of the regulations, only a factual issue pertaining to employer's liability for paying certain medical expenses. The Board accordingly reverses 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 rejects claimant's contention that his prior work in D.C. for employers other than Kiewit-Shea brings him within the jurisdiction of the D.C. Act. The Board affirms administrative law judge's conclusion that the District's interest in the Metro construction and the fact that Metro is the general contractor on the project are not sufficient to confer D.C. Act jurisdiction. The Board distinguishes case from National Van Lines because claimant never traveled into D.C. for 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 Construction 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 reverses 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 Insurance Co., 22 BRBS 67 (1989).

The Board affirms 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 is 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 finds this contact is sufficient to confer jurisdiction. Bennett v. Rockville Glass Co., 22 BRBS 394 (1989)(Neusner, J., concurring).

The Board affirms the administrative law judge's finding that claimant is 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 is distinguishable from National Van Lines as claimant has no employment contacts with the District. Butts v. Fischbach & Moore and Comstock, 22 BRBS 424 (1989).

The Board affirms 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 is headquartered in Maryland, but is manifestly interstate in nature, is 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 holding affirming the administrative law judge's decision that claimant lacked substantial contacts with D.C. sufficient to warrant coverage under 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 is no evidence to prove or disprove the assertion, employer has failed to rebut the presumption. Edgerton v. Washington Metropolitan Area Transit Authority, 925 F.2d 422, 24 BRBS 88 (CRT) (D.C. Cir. 1991).

The Board notes that zone of special danger rationale of Defense Base Act cases may apply to D.C. Act cases, and affirms the administrative law judge's use of doctrine in this case. Coverage under this doctrine is extended 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 the private home after employment duties were completed. Forlong v. American Security & Trust Co., 21 BRBS 155 (1988).

The zone of special danger doctrine applies to D.C. Act cases. 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. In this case, the Board affirms the administrative law judge's finding that claimant was thoroughly disconnected from his employment when he was injured where claimant, an off-duty bartender, was injured in a fight outside the bar. McNamara v. Mac's Pipe & Drum, Inc., 21 BRBS 111 (1988).

The D.C. Circuit held that the Omnibus Consolidated Rescissions and Appropriations Act, P.L. 104-134, is without effect on the District of Columbia Workmen’s Compensation Act of 1928 inasmuch as since 1982 the D.C. Act may no longer be amended by cross-reference to the Longshore Act. *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998).

In this D.C. Act case (and thus amended Section 22 and Section 8(f)(2)(B) are 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 Metropolitan Area Transit Authority*, 34 BRBS 1 (2000).

DEFENSE BASE ACT

The Board reversed 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 of "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).

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 Board held that, as a matter of law, the "zone of special danger" tests 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 reverses 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 furthers the national defense in that he educated 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).

Claimant's participation in the murder of her husband effectively severs 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 is applicable in the instant case which arises under the DBA where the a 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 affirms the administrative law judge's application of the "zone of special danger" doctrine to find that claimant sustained a compensable injury in this case arising under Defense Base Act. *See also* Section 2(2). The Board factually distinguishes 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 offers few recreational opportunities, an injury during horseplay of the type that occurred here is a foreseeable incident of employment. *Kalama Services, Inc. v. Director, OWCP,* 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *aff'g Ilaszczat v. Kalama Services,* 36 BRBS 78 (2002), *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 remains is an injury on a base in Afghanistan that is 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. v. Halliburton Services,* BRBS (2008) (McGranery, J., dissenting).

The Board vacates 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 is 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).

Ext-6b

The Fifth Circuit holds 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 taken 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, holds that the court of appeals does not have jurisdiction to hear the initial judicial review of Board decisions in Defense Base Act cases. Rather, after jurisdiction for judicial review of a Board decision in Defense Base Act cases lies in the appropriate district court. *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997).

In the instant 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 United States Court of Appeals for the District of Columbia ruled that under the Defense Base Act (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 is 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 holds that judicial review of compensation orders under the Defense Base Act must be commenced in the district courts pursuant to the unambiguous language of the DBA, 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 automatic affirmance provision of Public Law 104-134 applies in cases brought under the Defense Base Act, due to provision of that Act incorporating the Longshore Act. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT)(11th Cir. 1998).

The Board affirmed the administrative law judge's finding that the employee was not covered by the Defense Base Act 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 Defense Base Act 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-Defense Base Act work. *Rosenthal v. Statistica, Inc.*, 31 BRBS 215 (1998).

The district court holds that Section 3(e) of the Act is incorporated into the Defense Base Act, 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 worker's 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).

The First Circuit affirmed the grant of summary judgment for employer on the ground that employer was immune from personal injury suit brought by 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 Defense Base Act coverage. The Longshore 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 applies 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 is 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 United States 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 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 United States District Court of contract between a state agency and claimant's employer to build a sewage outfall tunnel is 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 Federal government. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

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

OCSLA

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 §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 Longshore 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, 18 BRBS 203, dispositive despite the fact that, unlike this case, it had not arisen 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's 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 affirms administrative law judge's finding that claimant, a land-based construction worker engaged in building offshore oil platforms, is not covered under the Lands Act because his alleged injury on land does not bear a sufficient relationship to operations on the shelf to warrant application of the Lands Act. Board cites 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)(5th Cir. 1985). 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).

The court holds that, in determining whether OCSLA jurisdiction exists, the claimant's injury must occur as a result of operations on the 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), aff'g Mills v. McDermott, Inc., 19 BRBS 258 (1987), rev'g 846 F.2d 1013, 21 BRBS 83 (CRT) (5th Cir. 1988).

The court reverses 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 is 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. Case is accordingly remanded for consideration of substantive issues. *Curtis v. Schlumberger Offshore Service, Inc.,* 849 F.2d 805, 21 BRBS 61(CRT) (1988).

The Board holds 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 holds 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 follows *Mills*, 846 F.2d 1013, 21 BRBS 83(CRT) (5th Cir. 1988). [Note: *Mills* was subsequently rev'd b the Fifth Circuit sitting *en banc*. *See* 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989)(*en banc*); *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).

On remand from the Third Circuit, the Board holds that claimant is 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. The Board also rejects employer's contention that claimant is 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).

Where it is 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 arises 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 is 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, the Fifth Circuit holds that a claimant who is injured constructing a parking lot at a heliport used to transport crewmen to oil platforms is 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 that based on the decision in *Mills*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989)(*en banc*), 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 holds that the situs requirement of OCSLA is met as to the offshore jack-up rig in this case, as it was device temporarily attached to the seabed, which was erected on the OCS for the purpose of drilling oil. It is not excluded from OCSLA coverage as a vessel used to transport resources from the OCS. Moreover, the OCSLA status test applies 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 is a "maritime contract," Louisiana law is not applicable. Thus, under Section 5(c) of the Longshore Act, the indemnification agreement is valid. *Demette v. Falcon Drilling Co., Inc.,* 280 F.3d 492, 35 BRBS 131(CRT) (5th Cir. 2002).

Claimant, who was injured in office on a fixed platform off the coast of Louisiana, met the status and situs requirements of OCSLA and is 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 is 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 is 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) (5th Cir. 2004), is controlling, intervening law, as *Tarver* addressed Section 3(a) under the Longshore Act and coverage in this case must be ascertained under the OCSLA. Consequently, the Board held that its prior decision affirming the finding that claimant satisfies the OCSLA coverage requirements is the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

Widow of helicopter pilot killed when helicopter crashed over land is 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).

Nonappropriated Fund Instrumentalities Act

The court holds that an uncontested finding of compensability (rendered by way of approval of a settlement) under the Longshore Act, which is incorporated into the 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 the NFIA does not contemplate third-party actions against the U.S., the employee was barred, under the 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 Longshore Act, as extended by the NFIA. The question of whether the treatment claimant received is related to her injury pursuant to Section 7 is within an administrative law judge's authority. *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 holds that active duty military personnel are excluded from coverage under the NFIA. *Hardgrove v. Coast Guard Exchange System*, 37 BRBS 21 (2003).