Professional appearance and employment contracts may result in 'zones of special danger' for purposes of longshore benefits

By Michael H. Weier ■ April 26, 2016

In *Steven Ritzheimer v. Triple Canopy, Inc.*,[1] the five-member U.S. Department of Labor Benefits Review Board (BRB) recently issued a unanimous decision affirming an administrative law judge's (ALJ) award of benefits for injuries sustained in a slip-and-fall upon exiting a bathtub shower after work.

Among daily life activities, bathroom injuries are a common occurrence. Approximately a quarter million U.S. adults are injured while performing bathroom hygiene activities.[2] Excepting Alfred Hitchcock's *Psycho* antagonist Norman Bates, the shower has not been considered a "zone of special danger" – until now.

Mr. Ritzheimer (Claimant), a force protection officer for a private company under contract with the U.S. Department of Defense, filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act[3] (LHWCA) as amended by the Defense Bases Act[4] (DBA). Due to national security and a Department of Defense non-disclosure agreement, Claimant could provide only limited testimony regarding his specific job duties and work locations. The admissible evidence, however, revealed Claimant wore a uniform, helmet and Kevlar protective vest; he carried weapons, ammunition, a gas mask and a medical kit. Claimant testified he worked in an environment described as extremely windy and hot, infested with flies and subject to sandstorms.

Claimant considered personal hygiene to be a requirement of his job because his employer expected professionalism, including good grooming. He testified he became sweaty and dirty from work and showered in his apartment after his shift. He also acknowledged he showered on his days off.

Claimant alleged four broken ribs and punctured lung for which he was hospitalized due to a slip-and-fall injury upon exiting the shower after work. In addition to the physical injuries, he claimed consequential depression and anxiety due to pain and physical limitations resulting from the slip-and-fall injury.

Longshore ALJs award benefits for injuries sustained in a slip-and-fall upon exiting a bathtub shower after work.

The ALJ declared Claimant's physical and subsequent mental health disabilities were compensable under the LHWCA and DBA. The employer appealed to the BRB and argued the shower injury did not occur in the course of employment and, accordingly, the claim should be denied.

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Longshore 'zones of special danger' (continued)

In an administrative proceeding under the Oregon or Washington state workers' compensation system, the ALJ's[5] decision is only recommended or proposed. Under state laws, the administrative Board may perform a de novo review of the evidence and renders the final decision.[6] Conversely, in an appeal under the LHWCA, the BRB must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence and in accordance with law.[7] Clearly, federal ALJs in Longshore matters have much greater power than their reciprocal state colleagues under the state workers' compensation systems.

Under the LHWCA, an injury is in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an employment-related activity.[8] In cases arising under the DBA, an employee is deemed within the course of employment, though the injury did not occur within the time and space boundaries of work, if the "obligations or conditions of employment" create a "zone of special danger" out of which the injury arose.[9]

The federal ALJ and BRB considered the terms of the employment contract when assessing whether Claimant's after-work shower was within the "zone of special danger." The contract, in relevant part, stated,

> The U.S. Government requires a favorable image and considers it to be a major asset of a protective force. The Company requires its employees to maintain a neat and professional appearance, paying particular attention to their grooming, personal hygiene, bearing, clothing, and equipment while conducting business on behalf of the Company and the U.S. Government.

Upon review, the BRB affirmed the ALJ's findings of fact and conclusions of law. Moreover, the BRB agreed the obligations and conditions of Claimant's employment created a "zone of special danger" out of which the physical injuries resulting from the shower slip-and-fall incident and the subsequent mental health conditions arose. Accordingly, the BRB affirmed the ALJ's determination that Claimant's physical and mental health disabilities are compensable under the LHWCA and DBA amendments.

Employers and insurers of LHWCA and DBA benefits should pay special attention to the language of employment contracts and employee handbooks. As the decision in Ritzheimer indicates, employment policies and employer expectations of professionalism may create "zones of special danger" from which compensable injuries may arise.

Employers and claims professionals with Longshore benefits questions may contact Matt Fisher at matthewf@rwwcomplaw.com or 503.245.1846. ■

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Longshore 'zones of special danger' (continued)

[1] *Steven Ritzheimer v. Triple Canopy, Inc. and Allied World National Assurance Co.*, BRB No. 15-0233, (En Banc), February 23, 2016.

[2] In 2008, U.S. hospital emergency rooms treated an estimated 234,000 non-fatal bathroom injuries among persons aged fifteen years or older. The highest injury rates occurred due to slips and falls while exiting a bathtub or shower. Centers for Disease Control and Prevention, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6022a1.htm, June 10, 2011.

[3] 33 U.S.C. §901 *et seq.*

[4] 42 U.S.C. §1651 *et seq.*

[5] In Washington, the administrative law judge who presides at a workers' compensation hearing is referred to as an industrial appeals judge. RCW 51.52.104

[6] ORS 656.712, et seq.; OAR 438-011-0015; RCW 51.52.100, et seq.; WAC 263-12-140, *et seq.*

[7] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[8] S*ee, e.g., Phillips v. PMB Safety & Regulatory, Inc.,* 44 BRBS 1 (2010).

[9] *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); s*ee also Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *O'Keeffe*, 380 U.S. 359; B*attelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 49 BRBS 57(CRT) (1st Cir. 2015), aff'g 48 BRBS 19 (2014); *Kalama Services, Inc. v. Director, OWCP,* 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004), *aff'g Ilaszczat v. Kalama Services,* 36 BRBS 78 (2002).

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