BRB No. 07-0135

J.T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN LOGISTICS SERVICES	)	
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
ABDUL RAHMAN AL-GHANIM	)	DATE ISSUED: 04/30/2007
	)	
Principal-Petitioner	)	
	)	
and	)	
	)	
GEORGE H. LEE, JR.	)	
	)	
Principal-Party-in-Interest	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Freidheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Steven L. Roberts (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer and Abdul Rahman Al-Ghanim.

Richard A. Seid (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer, a Kuwaiti corporation, and one of its principals, Abdul Rahman Al-Ghanim, appeal the Decision and Order Awarding Benefits (2006-LDA-00018) of Administrative Law Judge Lee J. Romero, Jr., 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*. (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). 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 was hired by employer to start up a warehouse in Iraq for the Baghdad Police Academy. He alleges he injured his shoulder in a scuffle with a person who was attempting to remove items from the warehouse without permission. Claimant was evacuated to Kuwait for an MRI, where a partial rotator cuff tear was diagnosed. Claimant subsequently had surgery in the United States. The administrative law judge found that claimant established his *prima facie* case, and he thus invoked the Section 20(a) presumption that claimant's shoulder injury is work-related. 33 U.S.C. §920(a). He found that employer did not rebut the Section 20(a) presumption. The administrative law judge found that claimant cannot return to his usual work for employer, and is entitled to temporary total disability benefits from March 31, 2005 to January 23, 2006. 33 U.S.C. §908(b). He found that claimant is entitled to ongoing permanent partial disability benefits thereafter, as claimant obtained a job on his own. 33 U.S.C. §908(c)(21), (h). The administrative law judge also awarded claimant medical benefits, 33 U.S.C. §907, but denied his claim of discrimination pursuant to Section 49, 33 U.S.C. §948a. The administrative law judge, relying on the district director's determination that employer was not insured for DBA coverage, held two principals of the corporation, Abdul Rahman Al-Ghanim and George H. Lee, Jr., together with employer, jointly and severally liable for the benefits awarded claimant, pursuant to Section 38(a) of the Act, 33 U.S.C. §938(a).[1] The administrative law judge noted that neither a representative of

[1] Section 38(a) of the Act states:

employer nor of the principals appeared at the formal hearing or defended the claim, despite the notice of hearing order and two show cause orders he issued prior to the Decision and Order Awarding Benefits.

On appeal, employer and Mr. Al-Ghanim (hereinafter, employer) contend that the administrative law judge did not give them ten days' notice of the formal hearing by certified mail as required by Section 19(c) of the Act, 33 U.S.C. §919(c), and, in fact, allege they never received the administrative law judge's notice of the formal hearing or first show cause order because they were sent to the wrong address. Employer thus alleges a violation of its due process rights. Employer also contends that the administrative law judge erred in failing to analyze the issue of whether the DBA applies in this case. In this regard, employer contends that it does not have a contract with the United States or one of its subdivisions, but with the Coalitional Provisional Authority of Iraq.[2] Claimant has filed a response brief to which employer has replied. In his response

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> Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said chapter in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure to payment of compensation as required by section 932 of this title.

(emphasis added).

[2] Employer also moved for a stay of payments, which the Board denied in an Order dated December 7, 2006, as employer did not demonstrate irreparable economic injury. 33 U.S.C. §921(b)(3). The Board expedited employer's appeal. *See* 20 C.F.R. §802.203(c). Claimant moved for reconsideration of this order. By Order dated January 23, 2007, the Board rejected claimant's contention that the Board erred in expediting the appeal, in view of the due process considerations raised by employer. The Board also rejected claimant's contention that the Board should hold the appeal in abeyance, or should dismiss the appeal without prejudice, while claimant pursues default and enforcement proceedings. The Board stated that such proceedings are distinct from enforcement proceedings and may run concurrently with the enforcement process. Claimant has filed an interlocutory appeal of the Board's December 7, 2006 and January

brief, the Director, Office of Workers' Compensation Programs (the Director), contends that the case should be remanded to the administrative law judge for findings regarding DBA coverage. The Director states that the documents attached to employer's brief were not offered into evidence before the administrative law judge and therefore cannot be relied on by the Board in addressing the issue of DBA coverage. Employer replies in agreement with the Director's contention that the case should be remanded.

The threshold issue is whether employer, as an entity, and Mr. Al-Ghanim, as a potentially liable officer of the corporation, were properly notified of the formal proceeding before the administrative law judge, which was held in Pensacola, Florida, on March 20, 2006. Employer contends that the notice of the hearing was deficient in that it was not addressed properly and was sent by regular mail. Employer also contends that the attempt to notify Mr. Al-Ghanim of a claim against him only six days before the hearing violates Section 19(c) of the Act. Employer avers that the subsequent show cause orders are similarly deficient. Claimant responds that employer did not demonstrate it did not have actual notice of the hearing and that Mr. Al-Ghanim was not entitled to separate notice.[3]

It is clear that employer had notice of claimant's claim for benefits, and that employer, through Mr. Lee, submitted documents to the district director's office after the memorandum of informal conference was issued. The case was referred to the Office of Administrative Law Judges on October 24, 2005. This notice of referral was sent to employer's correct street address, but the city name is incorrect.[4] On December 5, 2005, the administrative law judge issued a notice of hearing, to be held March 20, 2006, in Pensacola. This notice was sent to employer at the incorrect city address previously used

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23, 2007, Orders with the United States Court of Appeals for the Ninth Circuit, alleging error in the Board's advancement of the case on its docket. Claimant's subsequent "Urgent Motion Under Circuit Rule 27-3(b) For Order Staying Proceedings Before Benefits Review Board" was denied by the Ninth Circuit in an Order filed on March 22, 2007.

[3] Mr. Lee did not file an appeal of the administrative law judge's decision holding him liable for benefits. Claimant contends that the award against him is final, and also moves that the Board reform the caption of its two prior orders to reflect Mr. Lee's status as a "party-in-interest" rather than a "petitioner." We grant the motion to reform the caption, but we decline to hold that the administrative law judge's award of benefits is final as to Mr. Lee, for the reasons explained *infra.*

[4] On employer's letterhead, the city name is Salmiya. The district director's office sent the notice to "Salmaiyam APO." APO stands for "Army Post Office."

by the district director. It was not sent to Mr. Lee or Mr. Al-Ghanim as officers of the corporation. It was not sent to anyone by certified or registered mail, or by any method with a tracking system; the service sheet states the notices were sent by "regular mail." The formal hearing was held as scheduled. No representative of employer was in attendance.

On March 23, 2006, the administrative law judge issued an order to employer to show cause why a default order should not be entered against it. This order was sent to employer by regular and certified mail at the wrong city address. It was not sent to any individual corporate officers. On August 7, 2007, the administrative law judge issued another show cause order, noting the lack of response to the prior order. In this order, he ordered Mr. Al-Ghanim and Mr. Lee to show cause why a default order should not be issued, although the administrative law judge did not specifically notify them that they faced personal liability. This order was separately sent, by UPS, to employer as an entity at the correct city address, and in addition, was sent to both individuals at Mr. Lee's new place of employment in Salmiya, Kuwait.

In response, Mr. Lee wrote a letter to the administrative law judge, dated August 13, 2006, in which he stated that his employment had been terminated by Mr. Al-Ghanim. He reiterated information concerning claimant's injury that he had previously recounted to the district director's office, and he stated that he infrequently traveled to the United States. Neither employer nor Mr. Al-Ghanim responded to the administrative law judge's show cause order.

In his decision awarding benefits, the administrative law judge recounted the case's procedural history, and additionally noted that claimant first filed a claim naming Mr. Al-Ghanim and Mr. Lee as parties on March 14, 2006, six days before the formal hearing. CX 21.[5] With regard to the issue of liability, the administrative law judge relied on the district director's determination that employer did not have DBA insurance and that, therefore, pursuant to Section 38(a) of the Act, officers of the corporation could be held jointly and severally liable, with the corporation, for benefits. CX 2. The administrative law judge found that Mr. Al-Ghanim did not respond to the show cause orders and that Mr. Lee's letter was non-responsive to the orders in that he did not address the failure of employer or a representative to appear at the hearing. The administrative law judge then addressed claimant's evidence and found for claimant.[6]

[5] This document was improperly addressed as well.

[6] The administrative law judge did not issue a default order. *See McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002) (default order improper because it relieves claimant of his burden of proof).

The administrative law judge held "Employer, American Logistics Services, Abdul Rahman Al-Ghanim and George H. Lee, Jr." liable for the benefits awarded. Decision and Order at 25.

Section 19(c) of the Act states:

> If a hearing on such claim is ordered the [administrative law judge] shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail . . . .

33 U.S.C. §919(c); *see Sullivan v. St. Johns Shipping Co.*, 36 BRBS 127 (2002) (notice must be sent by certified or registered mail). The regulations require 30 days' notice of the hearing. 20 C.F.R. §702.335;[7] *see Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003). In *Sullivan*, the Board stated, "Failure to give notice of a proceeding to an interested party violates 'the most rudimentary demands of due process of law.' *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). '[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314." *Sullivan*, 36 BRBS at 129.

In this case, claimant's attempt to join Mr. Al-Ghanim and Mr. Lee to the claim occurred only six days prior to the formal hearing; this notice was sent to the wrong city address. The notice of the hearing and the first show cause order were sent only to employer, also at the wrong city address. The notice of hearing was not sent by certified or registered mail, or by a carrier with a tracking system. In the August 7, 2006, show cause order, the two individuals and employer were ordered to show cause why they did not appear at the March 20, 2006, hearing. This was the first communication sent by the administrative law judge to the proper address and by a trackable delivery system.[8]

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[7] Section 702.335 states,

> On a form prescribed for this purpose, the Office of the Chief Administrative Law Judge shall notify the parties (See §702.333) of the place and time of the formal hearing not less than 30 days in advance thereof.

[8] Claimant contends that, according to the United States Post Office website, sending certified and registered mail is possible only in the United States, and that,

We hold that the failure to notify employer and the individuals of the hearing 10 days prior thereto at the correct address violated Section 19(c) of the Act. Therefore, we must vacate the award of benefits. The facts in this case are materially different from those in *Sullivan*, 36 BRBS 127, and thus we reach a different result herein. In *Sullivan*, one of the employers alleged it did not receive actual notice of the hearing and thus was denied the right to be heard. Unlike the present case, the employer in *Sullivan* did not contend that any document, including the notice of hearing, was sent to the wrong address. The Board did not vacate the award of benefits, but remanded only for a hearing on the limited issue of whether the employer was served with the notice of the hearing by certified mail, as required by Section 19(c) of the Act. *Sullivan*, 36 BRBS at 130. If the notice was found to be deficient, then the administrative law judge was to vacate the award of benefits and hold a new hearing. *Id.*

In this case, the lack of proper service is apparent from the evidence and orders in the record and requires that we vacate the award of benefits. The "claim" filed against the two individuals is dated only six days before the hearing, CX 21, and therefore cannot serve as proper notice within the terms of Section 19(c). Moreover, the claim was sent to the wrong city address. The notice of the hearing dated December 20, 2005, was sent only to the corporate entity. We reject claimant's contention that the individuals did not require separate notice of the hearings. They are "interested parties" pursuant to Section 19(c), even if Section 38(a) operates as a matter of law, because they are entitled to the opportunity to argue that Section 38(a) is not applicable. *See infra* at p. 9. The notice of the hearing was mailed to employer at the wrong address by regular mail. Thus, the statute's requirement that "interested parties" be provided 10 days' notice of the hearing by a trackable delivery system was not satisfied. Similarly, the first show cause order did not correct the defect in the address or provide notice of potential liability to the corporate officers. We cannot hold based on the sequence of events established by the record herein that the second show cause order cured the service defects previously created.[9] *See Vinson*, 37 BRBS at 105 (employer not prejudiced by administrative law

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moreover, that part of Section 19(c) requiring certified or registered mail is not mandatory. We reject this contention insofar as claimant contends that a trackable mailing system is not required. The purpose of the certified mail requirement is to ensure that the addressees receive the notice of the hearing. This requirement can be fulfilled by other means. For purposes of this decision, we hold that service by UPS is sufficiently equivalent to certified mail, as there is a tracking system for the items. Contrary to employer's contention, the UPS certificate shows at least one delivery to employer's proper address in Kuwait, though only to the corporate entity and not to Mr. Al-Ghanim. The others were sent to Mr. Al-Ghanim and Mr. Lee at Mr. Lee's new company.

[9] We note that Mr. Lee responded to the show cause order by stating he was no longer employed by employer and that he infrequently traveled to the United States. The

judge's expediting hearing, as it admitted evidence into the record and had opportunity to fully defend claim).

As employer and its principals were not notified of the formal hearing in accordance with the terms of Section 19(c) of the Act, we vacate the award of benefits. The case must be remanded to the administrative law judge for a new evidentiary hearing. The administrative law judge must give notice of the hearing, pursuant to Section 19(c), to all potentially liable entities, both corporate and individual, as well as to claimant and the Director, at their proper addresses by a trackable mailing system. *Sullivan*, 36 BRBS at 130; 20 C.F.R. §702.335. In his decision, the administrative law judge must address any issues properly raised by the parties.

In this regard, employer contends that the DBA does not apply to claimant's claim, as the contract for warehouse services was not between it and the United States or any agency or department thereof. The administrative law judge did not address this issue. The bases for coverage under the DBA are set out at 42 U.S.C. §1651(a)(1)-(6). *See generally University of Rochester v. Hartman*, 618 F.2d 170, 174 (2d Cir. 1980) ("the sine qua non of the Act's applicability has always been a military or a United Stated government construction connection"); *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990); *Casey v. Chapman College, PACE Program*, 23 BRBS 7 (1989); *Fitz Alan-Howard v. Todd Logistics, Inc.*, 21 BRBS 70 (1988).

We decline to address this issue. The Director properly contends that the Board is without authority to review the contract employer attached to its Petition for Review and Brief and to determine its factual and legal significance, as it was not admitted into evidence before the administrative law judge. 20 C.F.R. §802.301. The administrative law judge must address employer's contentions and documents in the first instance and make findings of fact regarding the applicability of the DBA coverage provisions. We note that Section 38(a) applies only if employer fails to secure compensation when required to so. *See* n. 1, *supra.* If the contract into which employer entered is not subject to the provisions of the DBA, then employer was not required to secure compensation, and Section 38(a) is not applicable. If the DBA is not applicable, Mr. Lee cannot be held liable for benefits pursuant to Section 38(a), notwithstanding his failure to appeal the administrative law judge's award of benefits against him.

Accordingly, the administrative law judge's Decision and Order holding employer, Mr. Al-Ghanim, and Mr. Lee liable for benefits is vacated. The case is remanded to the administrative law judge for a new evidentiary hearing. The

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administrative law judge did not address whether this was sufficient reason for his failure to appear at the hearing.

administrative law judge must give notice of the hearing to all interested parties in accordance with Section 19(c) of the Act and address all issues properly raised by the parties.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge