

FACTUAL HISTORY

The record reflects that on May 11, 2006 the employee, a Department of Defense contractor in Iraq, was kidnapped, tortured and on May 15, 2006 killed. The District Director of the Division of Longshore and Harbor Workers' Compensation issued an award of compensation on March 3, 2008. The Longshore District Director found that the employee's death came within the purview of the Defense Base Act (DBA)⁴ and that appellant and her son were entitled to death benefits:

“The uninsured employer, Al-Tijan General Contracting Co., Ltd., shall pay to [appellant] compensation for death benefits for herself and her son, ..., as described above subject to the limitations of [DBA].

“Upon receipt of documentation of payment of funeral expenses, the employer will reimburse the family up to the statutory maximum of \$3,000.00.”⁵

Appellant, through her representative, filed a direct claim for benefits under section 101(a) of WHCA. She explained that no death benefits were paid by the uninsured employer because the employer no longer existed: “there is thus no entity that can provide DBA death benefits to Claimants.” Appellant asked the Department of Labor to assume responsibility for the direct payment of death benefits.

In a decision dated March 12, 2013, OWCP denied appellant's claim on the grounds that she had failed to show that no compensation was payable under DBA. Appellant submitted no determination by a Longshore District Director to that effect. To the contrary, OWCP noted the Longshore District Director's award of compensation found that compensation was payable under DBA. It further noted that appellant was erroneously conflating “not payable” with “unpaid” and that DBA had established procedures for a claimant in the event an award of benefits went unpaid.

On appeal, appellant's representative argues that the employee's death arose from a war-risk hazard and that the United States Government must directly assume future benefit payments if there is no employer or carrier who pays or is required to pay benefits. He cites section 101 of WHCA, together with OWCP Bulletin No. 12-01. Appellant's representative asserts three reasons the claim under WHCA should be granted: the claimants have never recovered or received workers' compensation benefits from any source on account of the death for which benefits are being sought under WHCA; the claimants will never be able to recover such benefits, as Al-Tijan no longer exists; and OWCP went against the clear intent of Congress in passing WHCA.

⁴ 42 U.S.C. § 1651 *et seq.*

⁵ DLHWC Case No. 2-151607 (issued March 3, 2008).

LEGAL PRECEDENT

WHCA supplements DBA, which extends the Longshore and Harbor Workers' Compensation Act (LHWCA).⁶ WHCA completes the protection provided to federal contractors' employees and certain other selected employees performing work outside the United States. All liability for injury, death and detention benefits under the WHCA is assumed by the Federal Government, and is paid from the Employees' Compensation Fund established by 5 U.S.C. § 8147.⁷

Section 101(a) of WHCA⁸ provides that, in case of injury or death resulting from injury to any person employed by a contractor with the United States, if such person is an employee specified in DBA, and no compensation is payable with respect to such injury or death under DBA, and such injury proximately results from a war-risk hazard, whether or not such person then actually was engaged in the course of his employment, the provisions of FECA, as amended, and as modified by WHCA, shall apply with respected thereto in the same manner and to the same extent if the person so employed were a civil employee of the United States and were injured while in the performance of his duty.

Thus, a condition precedent to coverage under section 101(a) of WHCA is that no compensation is payable under DBA with respect to such injury or death. To this end, regulations implementing WHCA provide: "An employee or his or her survivors may file a claim under section 101(a) of the WHCA only after a determination has been made that no benefits are payable under the DBA administered by the Office's Division of Longshore and Harbor Workers' Compensation."⁹

The condition precedent is also found in OWCP's procedures: "An employee or survivor should file a claim directly with the Division of Federal Employees' Compensation under section 101 of the WHCA only after a Longshore District Director has determined that no compensation is payable under the DBA."¹⁰

Further, an OWCP bulletin issued in 2004 states that claimants under section 101(a) of WHCA should be aware of the condition precedent:

"Direct Claims -- Section 101(a) of the WHCA provides for a direct claim for compensation for disability or death. In view of the infrequency of these claims, they will not be addressed in this bulletin. Claimants should look to relevant sections of the regulations and Federal (FECA) Procedure Manual for guidance in

⁶ 33 U.S.C. § 901 *et seq.*

⁷ Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *War Hazards*, Chapter 4.300.6.a (September 1994).

⁸ 42 U.S.C. § 1701(a)(1).

⁹ 20 C.F.R. § 61.201.

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 4.300.10.a (September 1994).

filing direct claims and should be aware that the regulations require a determination by DLHWC that DBA benefits are not available before a direct claim may be filed. *See* 20 C.F.R. § 61.201.”¹¹

ANALYSIS

The law is clear: Before appellant may make a direct claim for compensation under section 101(a) of WHCA, a Longshore District Director must determine that no compensation is payable under DBA with respect to the employee’s death. Appellant has not produced such a determination. Indeed, a Longshore District Director determined just the opposite on March 3, 2008, finding that the employee’s death came within the purview of DBA and that appellant and her son were entitled to death benefits under LHWCA, as extended by DBA.

Accordingly, the Board finds that appellant has not met the conditions for coverage under section 101(a) of WHCA. The Board will therefore affirm OWCP’s March 12, 2013 decision denying her direct claim for benefits.

Appellant’s representative acknowledges the condition precedent but argues that appellant is nonetheless entitled to coverage under section 101(a) of WHCA. That the employee’s death resulted from a war-risk hazard does not, by itself, establish coverage, nor does it establish coverage when combined with the fact that the employee was employed by a contractor with the United States and was an employee specified in DBA. Without a determination by a Longshore District Director that no compensation is payable under DBA with respect to the employee’s death, appellant has failed to establish that she and her son fall within the class of claimants protected by section 101(a).

CONCLUSION

The Board finds that appellant is not entitled to benefits under section 101(a) of WHCA.

¹¹ OWCP Bulletin No. 05-01 (issued October 18, 2004).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board