

OWCP BULLETINS (OB)--TEXT

OWCP BULLETIN NO. 05-01

Issue Date: October 18, 2004

Expiration Date: October 18, 2005

Subject: War Hazard Compensation Act-Claims for Reimbursement and Detention Benefit Procedures

Background: The War Hazards Compensation Act (WHCA) 42 U.S.C. § 1701 et seq. establishes a compensation system that provides reimbursement to contractors covered by the Defense Base Act (DBA) 42 U.S.C. § 1651, et seq. for both benefit and administrative costs resulting from an injury or death caused by a “war risk hazard.” It also provides direct payments to DBA and certain employees as a result of their detention by a "hostile force or person" and payments to certain employees (and their dependents) when injury or death occurs due to a “war risk hazard.”

Reimbursement--Section 104(a) of the WHCA provides for reimbursement to an employer or carrier by the United States, from the Employees' Compensation Fund, for compensation and medical benefits paid pursuant to a valid compensation claim under the DBA where the injury for which such compensation is payable "arose from a war risk hazard" as defined in section 201(b) of the WHCA. 42 U.S.C. § 1711(b). Reimbursement is available for both the amount of benefits paid and reasonable and necessary claims expenses. Section 104(a)(3) also provides the Secretary with the authority once the reimbursement claim is accepted to pay the benefits directly to the employee 42 U.S.C. § 1704(a)(3) See also 20 C.F.R. § 61.105.

Detention--Section 101(b) of the WHCA, 42 U.S.C. § 1701(b) provides benefits for “detention.” It applies to:

- employees identified in section 101(a) of the WHCA;
- employees covered by the DBA;
- employees covered by the Non-Appropriated Funds Instrumentalities Act (NFIA) (civilian employees working outside the continental U.S. for non-appropriated funds

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- instrumentalities such as military PX's); and
- employees under contract by the United States for personal services outside of the U.S.

Detention benefits, payable from the Employees' Compensation Fund, are provided for a covered employee missing because of a belligerent action of a "hostile force or person" or when the employee has been taken by a "hostile force or person" as a prisoner, hostage, or otherwise. While being detained the employee is entitled to be credited with compensation benefits, as for total disability, at a rate of 100 percent of his or her average weekly wage at the time detention begins; seventy percent of such benefits can be disbursed to his or her U.S. resident dependents.

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 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.

Issues--Because of the large number of contractor employees serving the military in Afghanistan and Iraq and their exposure to "war-risk hazards" and detention by a "hostile force," employers and insurance carriers for these employees are anticipating an increase in claims under the DBA for injuries and deaths caused by military or terrorist actions.

DBA claims are administered by OWCP's Division of Longshore and Harbor Workers Compensation (DLHWC); DBA claims arising in Iraq and Afghanistan are initially reported to its New York District Office (201 Varick Street, Room 750 Post Office Box 249 New York, NY 10014-0249). Employers and insurers anticipate seeking reimbursement under the WHCA in cases meeting WHCA criteria as well as assisting employees and their dependents in seeking detention benefits. Consequently, it is anticipated that there will also be a corresponding increase in reimbursement and detention benefits claims filed with the Division of Federal Employees' Compensation (DFEC), which is responsible for administering WHCA claims and does so through its Cleveland District Office, U.S. Department of Labor, OWCP, 1240 East Ninth Street, Room 851, Cleveland, OH 44199, under the direction of the DFEC National Office. Initial claims for reimbursement should be submitted directly to the Cleveland office; follow-up correspondence should contain the claim number and be submitted to the U.S. Department of Labor, DFEC Central Mailroom, PO Box 8300, London, KY 40742-8300.

In recognition of the anticipated increase in WHCA claims and the relationship between the DBA and the WHCA, it is necessary to address certain aspects of the claims process to ensure prompt and orderly adjudication of the WHCA claims. One of the critical issues that need to be addressed is whether an insurer or employer must first obtain a compensation order under the DBA from DLHWC finding that its employee is entitled to DBA benefits, before filing a claim for reimbursement under the WHCA. Similarly, guidance is needed concerning whether a claimant must obtain a compensation order issued by DLHWC finding that an employee is not entitled to benefits under the DBA before submitting a claim for detention benefits on behalf of the employee. A question has also been raised regarding the extent that DFEC will rely on the findings in a compensation order including the findings made in a section 8(i) settlement.

Reference: Statutes; WHCA 42 U.S. C § 1701 et seq., DBA 42 U.S.C. § 1651 et seq., Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 et seq., Regulations; WHCA 20 C.F.R. Part 61, Longshore 20 C.F.R. Part 702, Procedure Manuals; Federal (FECA) Procedure Manual Chapter 4-300; Longshore PM Chapter 0-200, Forms; CA-278.

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Purpose: To establish clear guidance on the procedures for processing reimbursement claims and detention benefit claims under the WHCA.

Applicability: Regional Directors, District Directors, Assistant District Directors, and National Office Staff.

Action:

The following policies are hereby put into effect--

1. Compensation Orders Under the DBA are Strongly Encouraged but Not Required for Reimbursement and Detention Benefit Claims.

The WHCA or its regulations do not require that a compensation order under the DBA be issued before either a DBA-benefits reimbursement claim or a detention-benefits claim can be filed and adjudicated. However, to ensure efficient adjudication of reimbursement claims and detention benefit claims under the WHCA, OWCP suggests that employees, employers and insurers obtain a compensation order under the DBA from the appropriate DLHWC district office since that will expedite payment of claims.

2. Reimbursement Claims Should Not Be Filed Until Benefits Have Been Paid, Should Contain Appropriate Documentation and It is Strongly Encouraged that a Compensation Order under the DBA be Obtained.

The fundamental requirement for filing a reimbursement claim is that the employer or insurer has actually paid benefits to the employee or the employee's dependents. Notice of an intention to pay or report of injury such as a LS-202 is not sufficient grounds to justify filing a claim under the WHCA. A claim requesting reimbursement should not be filed until an employer or insurer has made payments for which it is seeking reimbursement. Such a request should be made by means of a Form CA-278 with supporting documentation. The WHCA regulations require the following documents if available; statements of the employee or employer, medical reports, proof of liability (e.g. insurance policy) and compensation orders. *See* 20 C.F.R. § 61.101(c). It is recommended that the employer or insurer also provide a statement concerning why its claim should be reimbursed as a war hazard.

In addition, the regulations and procedures contemplate that entitlement to benefits should be established, and the rate of compensation and period of payment should be relatively fixed and known before a claim for reimbursement is submitted. *See* 29 C.F.R. § 61.105; Federal (FECA) Procedure Manual Chapter 4-300.12. Thus, it is recommended that the employer or insurer first seek to obtain a compensation order from the appropriate DLHWC district office.

If a compensation order has been issued on the DBA claim, the employer or insurer must submit BCT-FY05.nfo

this order with its claim for reimbursement under the WHCA when filing the claim with the Defect's special claims unit in the Cleveland District Office. *See* 20 C.F.R. § 61.101(c). Absent extraordinary circumstances, the DFEC will generally accept the findings regarding DBA compensability including DBA coverage, injury, causal relationship, dependents and benefit rates made in the compensation order without further independent review. In addition, a compensation order can be the basis for DFEC to assume direct payments of DBA benefits.

If a compensation order has not been issued on the DBA claim, either because the claimant declines to participate in the proceeding or because one or more parties do not agree to the issuance of such an order, the insurer or employer may obtain an OWCP recommendation on the compensability of the DBA claim by requesting an informal conference at the office of the DLHWC District Director.¹⁽¹⁾ 20 CFR § 702.311 et seq. Such a request should only be made after the employer or insurer has engaged in documented good faith efforts to contact the employee or the eligible survivors, to reach agreement on all issues in the claim, and to obtain a signed stipulation for issuance of a compensation order. The informal conference may be held in person or by telephone, and the District Director or the Claims Examiner must make every effort to ensure the participation of the claimants and/or their legal representatives and will document their efforts. Following the informal conference, if the parties still cannot agree to submit stipulations for entry of a compensation order, the District Director or the Claims Examiner will prepare a Memorandum of Informal Conference, setting forth all pertinent issues in the DBA claim, a summary of all relevant facts and evidence, and his or her recommendations and rationale for resolution of such issues. In the case of a permanent (or potential permanent) disability claim, such recommendations should not be made until the employee has reached maximum medical improvement. The Memorandum of Informal Conference will address all issues of DBA compensability and will contain the same elements of a compensation order; however it will not have the binding effect of a compensation order.

If a Memorandum of Informal Conference as described above has been issued by the DLHWC, the Memorandum should be filed with the claim for WHCA reimbursement. Absent extraordinary circumstances, the DFEC will accept the recommendations made by the DLHWC District Director or Claims Examiner with regard to DBA compensability, including DBA coverage, injury, causal relationship, dependents and benefit rates without further independent review.

Note: Development of Reimbursement Claims filed without either a compensation order or an informal conference memorandum is likely to result in greater processing time than those reimbursement claims that were filed with compensation orders or informal conference memorandums, as the DFEC will be required to develop all aspects of the claim including DBA compensability. This includes DBA coverage, injury, causal relationship, dependents and benefit rates. DFEC may consult DLHWC on this additional development.

3. DFEC Will Not Accept a WHCA case for Direct Payment without a Formal
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Compensation Order, Absent Extraordinary Circumstances.

While the acceptance of a reimbursement claim can be based on an informal conference memorandum issued by a DLHWC District Director or Claims Examiner, DFEC will not utilize the informal conference memorandum as the basis to assume direct payment of DBA benefits. It has determined that, absent extraordinary circumstances, only a compensation order will meet the requirement of the regulations that “the rate of compensation or benefit and the period of payment have become relatively fixed and known.” *See* 20 C.F.R. § 61.105(c). Thus an employer or insurer seeking to have DFEC assume direct payment of a claim should obtain a compensation order fixing liability for the claim.**1(2)**

4. Settlements Pursuant to section 8(i) of the LHWCA Should Be Carefully Reviewed by Insurers Who Believe They May Seek Reimbursement from OWCP under the WHCA To Assure the Settlement is Not Excessive.

DBA claims with potential for WHCA reimbursement may be settled pursuant to § 8(i) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 908(i). Settlement applications are reviewed and approved by the District Director within thirty days of receipt unless the settlement sum is inadequate or procured by duress. The settlement application must comply with the regulatory criteria in 20 CFR § 702.241 – 243, and the order approving settlement must include an explanation of why the proposed settlement is adequate.

If the DBA claim has been settled under § 8(i) of the LHWCA, a copy of the settlement application and the compensation order approving settlement must be submitted to the DFEC when the employer or insurer is seeking reimbursement under the WHCA. The reimbursement claim should also include an explanation from the employer or insurer as to why the settlement was not excessive. Absent extraordinary circumstances, the DFEC will generally accept without further independent review the findings with regard to DBA compensability, including DBA coverage, injury, causal relationship, dependents and benefit rates, made in the compensation order approving the § 8(i) settlement by the District Director. Settlement amounts that appear to be excessive will constitute extraordinary circumstances and DFEC will conduct its own independent review of the settlement, engage in any development it deems appropriate and if necessary determine the appropriate amount of benefits that should be reimbursed.

5. Claims for Detention Benefits Should Contain Appropriate Documentation; It is Recommended that a Compensation Order under the DBA be Obtained.

A claim for detention benefits should contain the information identified in the regulations at 20 C.F.R. § 61.301, which includes the name, address, and occupation of the missing employee; name, address and relation to the employee of any dependent making the claim; name and address of the employer; contract number under which employed; and date, place and circumstances of capture and detention. The employer must provide information about the BCT-FY05.nfo

circumstances of the detention, which should include available evidence on whether the employee is being detained by a hostile force or individual within the meaning of the WHCA, and the employee's pay rate at the time of capture. Dependents making claims for detention benefits may be required to submit all evidence available to them concerning the employment status of the missing person and the circumstances surrounding his or her absence.

In addition to filing the above information, it is highly recommended that the person filing the claim for detention benefits (such as an employer, insurer, employee or the employee's dependents) should first obtain a compensation order from the appropriate DLHWC district office. Upon receipt of the DBA claim and after conducting the necessary investigation, the DLHWC will immediately issue a compensation order which will include a finding on whether the employee is covered under the DBA and whether DBA benefits are payable. If there is no evidence that the employee is either injured or has died, the compensation order will be in the form of a denial of DBA benefits. If the DLHWC is unable to issue a compensation order, the DLHWC will issue an informal conference memorandum in accordance with the procedures described in Section 2 of this Bulletin. At the same time that the compensation order or informal conference memorandum is issued, the District Director will advise the claimants of the opportunity to file for detention benefits under the WHCA with DFEC.

Either the compensation order or the informal conference memorandum can be a basis for the acceptance of the detention benefit claim. The DFEC, absent extraordinary circumstances, will accept the findings of either the compensation order or the informal conference memorandum as they pertain to the DBA claim such as whether the employee is injured or has died and whether the employee would be entitled to DBA benefits. The DFEC will engage in development as to whether the employee has been detained and the appropriate amount of compensation benefits.

Note: Development of detention benefit claims filed without either a compensation order or an informal conference memorandum may result in greater processing time than those detention benefit claims filed with compensation orders or informal conference memorandums as the DFEC may be required to develop all aspects of the claim, including DBA compensability. The DFEC may consult DLHWC on this additional development.

6. WHCA Reimbursement Claims May Be Denied Due to "Premium Loading."

A claim for reimbursement filed by an insurance carrier or self-insured employer will be denied if it is found that the benefits paid or payable were on account of injury, detention or death which arose from a war-risk hazard for which a premium (which included an additional charge or loading for such hazard) was charged. By submission of a Form CA 278, the party seeking reimbursement is certifying that that premium loading has not occurred. If deemed necessary in a particular case, the DFEC will scrutinize DBA insurance policies and any other relevant information to ensure that such premium loading has not occurred and insurers may be required to certify that such loading has not occurred beyond the statement on the Form CA-278 that the BCT-FY05.nfo

claim does not contain, nor will the insurance carrier or self-insured demand, an additional charge or loading for war-risk hazard, as defined in 42 USC 1711(b).

Disposition: Retain until the indicated expiration date.

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Distribution: Regional Directors, District Directors, FECA Director, and Longshore Director

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Endnotes

1 (Popup - Popup)

1 Nothing in this Bulletin changes the existing informal conference procedures for the purpose of resolution of one or more claim disputes at any stage of a DBA claim while it is pending before the District Director.

2 (Popup - Popup)

¹ Nothing in this Bulletin changes the existing informal conference procedures for the purpose of resolution of one or more claim disputes at any stage of a DBA claim while it is pending before the District Director.