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United States District Court For The Southern District Of Texas Deprives Battlefield Contractors Of The Protections Of The Defense Base Act

By Alexander W. Major

A recent decision by the United States District Court for the Southern District of Texas may have caused grave damage to protections long available to overseas government contractors and their employees under the Defense Base Act ("DBA"), 42 U.S.C. § 1651 *et seq*.

In *Fisher v. Halliburton*, 2010 WL 1268097 (S.D. Tex., Mar. 25, 2010), the court ruled the deaths and injuries sustained by a group of civilian convoy drivers in Iraq during insurgent attacks were not "accidents" and, therefore, that they were outside the scope of the protections afforded by the DBA. Absent the DBA's protections, the Defendant employers are now in the legal "line of fire" – for the hefty compensable tort and negligence damages being alleged. The court, through its own motion, submitted its decision for immediate interlocutory appeal to the U.S. Court of Appeals for the Fifth Circuit. If upheld, the decision could mean an end to the substantial protection from tort liability that the seventy-year old act has afforded contractors deploying personnel to support combat operations.

Established in 1941 at the request of the Secretary of War, the DBA extends and incorporates the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and requires employers to provide disability compensation, medical treatment, and vocational rehabilitation to workers injured at work and death benefits to survivors when the worker is killed abroad under six categories of Federal public work or national defense contracts. Subject to exceptions for failures of an employer to secure the payment of such compensation, the DBA is the exclusive worker's compensation remedy to employees of covered employers and applies to an "accidental injury or death arising out of the and in the course of employment … and includes an injury caused by the willful act of a third person directed against an employee because of his employment." 33 U.S.C. §902(2). As applied in war zones and remote locations over the years, the DBA has been interpreted broadly to allow benefits even where the injury did not occur within the space and time boundaries of the employee's scope of work. Rather, "(a)ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951); *see also O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359, 364 (1965) (finding DBA benefits existed for man who drowned during a weekend outing since, when

working, he was "under the exacting and dangerous conditions of Korea"); *Kalama Servs. Inc et al., v. Director, Office of Worker's Compensation Programs*, 354 F.3d 1085, 1092 (9th Cir. 2004) (holding DBA applied to injuries sustained by employee in bar fight on Johnston Atoll since "horseplay of the type that occurred here is a foreseeable incident of one's employment on the atoll"); *but see Gillespie v. General Electric Co*., 21 B.R.B.S. 56, 58 (1988) (denying DBA benefits to the widow of a man who died due to autoerotic asphyxiation since no "relationship existed between the conditions created by the employer's job and the activity which occasioned his death.").

The Plaintiffs in *Fisher*, understandably wishing to remove themselves from the DBA umbrella to seek damages directly from the Defendants, argued that the Defendants intentionally misled the convoy drivers into employment in Iraq and that once in-country, exposed the employees to injury or death when assigning them to convoys because the employers were substantially certain that those convoys would be attacked. The Defendants moved for summary judgment premised on the exclusivity provision of the DBA and argued that, as the sole avenue for relief, the DBA bars all of the Plaintiffs' claims – intentional or otherwise. The Plaintiffs urged the court to find either that the DBA does not apply to intentional torts or find that the events complained of do not fall within the meaning of the term "accident" as used in the DBA. Ruling against Defendants, the court agreed with the Plaintiff's latter argument.

The crux of the court's decision in *Fisher* was that an injury must be a true "accident" if it is to be covered under the DBA. The term "accident" is not defined by the DBA or the LHWCA, but the court concluded – after engaging in an extensive etymological and statutory analysis – that an accident is an event that is "*both* undesired *and* unexpected." (Emphasis added). As such, if an injury is either desired or expected, the DBA would not apply. Accordingly, the court reasoned, there is no intentional tort exception in the DBA since an injury sustained from an intentional tort – as either desired or expected – would not trigger the protections of the DBA.

Armed with this definition, the court looked to the events of April 8 and April 9, 2004, the dates on which the Plaintiffs were either injured or killed when a series of convoys came under heavy insurgent attack. Taking at face value that the injuries sustained were "undesired," the court focused on whether the injuries were "unexpected." As to the events of April 8th, the court noted that insurgent attacks began to escalate in the area and that the Plaintiff's convoy was attacked well after leaving its operating base. The court noted that the Defendants were scrambling to respond to these assaults despite being advised earlier in the month to expect increasing attacks during the period leading up to April 9th—which was both the Shi'a Muslim holiday of Arabeen and the one-year anniversary of US presence in Iraq. Despite these warnings, the court found that the Defendants' resultant fear and "heightened apprehension" were insufficient to characterize the events leading to the Plaintiff's injuries as "expected." Accordingly, the court found that the injuries sustained by the Plaintiff on April 8th were indeed the result of an accident, thereby invalidating his claims for fraudulent inducement and limiting his relief to that available under the DBA.

The court came to a far different conclusion as to the events that occurred on April 9th – and side-stepped the DBA in the process. Relying on a combination of intelligence reports, the events of April 8th and emails between the Defendants' managers related to force protection efforts, the

court held that "defendants knew" that convoy drivers would be attacked and killed on April 9th. Citing to a timeline from April 9th identifying heavy insurgent strikes through the day, the court held that the "[D]efendants had grounds or reasons to believe that the [attacks were] likely to occur" when they sent out convoys at the same time other, previously deployed convoys were mired in insurgent attacks. The court concluded that the Defendants were therefore unable to demonstrate that the injuries sustained by the Plaintiffs on April 9th were *both* undesired *and* unexpected and, therefore, that they were not an accident as contemplated by the DBA. As a result, the court held the DBA did not apply to the deaths and injuries sustained by the Plaintiffs on April 9th and the Plaintiffs were able to pursue available tort actions against the Defendants.

The court's final blow to the DBA came when it also concluded that the injuries sustained by the Plaintiffs on April 9th were not "caused by the willful act of a third person directed against an employee because of his employment" so as to bring the injuries under the exclusivity provision of the DBA. Although recognizably deep behind the lines of the U.S. Supreme Court's "zone of special danger," the court found that an act applicable to bar brawls and recreational accidents was not applicable to the Plaintiffs because the injuries they sustained were not the direct result of an attack against them for being truck drivers. Rather, the court held that the Plaintiffs were targeted because "they were Americans on the first day of Arabeen" at a time when insurgents appeared to be "targeting primarily coalition forces." Again, as a result of the court's finding, the Plaintiffs who sustained injuries on April 9th would be eligible to seek tort damages against the Defendants and were not constrained by the liability limitations of the DBA.

If upheld by the Fifth Circuit, the *Fisher* decision could transform the DBA into a paper shield that, while still required by contractors pursuant to FAR 28.309, would offer overseas government contract employers little to none of the protections it once promised. For battlefield contractors, it also appears to place a greater responsibility on managers to read and heed intelligence reports before acting. Furthermore, the court's conclusion that an employee's nationality may trump application of the DBA in a war zone is cause for additional concern. During combat, individuals are generally always targeted due to their nationality, most commonly reflected in the uniforms worn or the flags flown. By placing an emphasis on the nationality of an employee, or perhaps the particular "target *du jour*" (since the DBA is not nationality dependent), the court is inviting an uncertainty into the DBA's exclusivity provision that was not intended.

For seventy years, the DBA has provided employees and employers with fairly predictable assurances relating to their respective risks when injuries occur while working in service of their country overseas. But now the DBA itself appears to be the victim of Iraqi insurgents. Let us hope that, in light of the countervailing appellate and Supreme Court precedents, the shots taken at the DBA in Texas do not prove to be fatal.

Authored By:

Alexander Major
(202) 469-4936
amajor@sheppardmullin.com