Government Contractors -- Fifth Circuit Upholds Exclusivity of Defense Base Act Compensation Scheme for Injuries to Federal Contractors Overseas

On January 12, 2012, a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit issued an opinion ending six years of litigation against KBR and Halliburton over injuries and fatalities to contractor drivers in an insurgent attack on a U.S. military supply-truck convoy in Iraq. This long-awaited opinion is a solid defense of the Defense Base Act (DBA) [1] as the exclusive remedy provided by Congress for compensating workers who are injured or killed overseas while performing federal contracts. Over the past decade, the size of the DBA program has grown dramatically as the U.S. military relied heavily on contractor-provided support services to conduct operations in Iraq and Afghanistan. This opinion represents a good result for employers and employees alike, furthering the dual purposes of the Defense Base Act: prompt relief for employees, with limited and predictable liability for employers.

Background on the Defense Base Act

The DBA extends workers' compensation coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA) to "employees of American contractors engaged in construction related to military bases in foreign countries, and to foreign projects related to the national defense whether or not the project is located on a military base."[2] The DBA establishes a uniform, federal compensation scheme for civilian contractor employees for injuries sustained while providing functions under contracts with the U.S. outside its borders.[3] The DBA provides compensation for "the injury or death of any employee engaged in any employment … under a contract entered into with the [U.S.] … where such contract is to be performed outside the continental United States."[4]

The DBA "was adopted at the request of the Secretary of War in order to save the precious heavy expense of providing its contractors with insurance of such employees on the basis of tort liability and full accident insurance."[5] Like the LHWCA and other workers' compensation statutes, the DBA represents a compromise between employees and their employers. "Employers relinquish[] their defenses to tort actions in exchange for limited and predictable liability," and "[e]mployees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail."[6] Thus, the DBA, like the LHWCA, includes a provision making an employer's liability under the workers' compensation scheme

[1] 42 U.S.C. §§ 1651-54.
[2] *Fisher et al. v. Halliburton et al.*, No. 10-20202 c/w 10-20371, slip op. at 10 (5th Cir. Jan. 12, 2012).
[3] *Id*.
[4] *Id*. (*quoting* 42 U.S.C. § 1651(a)(4)).
[5] *Id*. at 10-11.
[6] *Id*.

exclusive.[7] If an employee's injury is covered under the DBA, he is generally precluded from pursuing a tort claim against his employer to recover for the same injury.

Basis for claims

The Plaintiffs in these cases were KBR employees injured in insurgent attacks, as well as spouses and family members of employees killed in the attacks. The Plaintiffs filed negligence claims based primarily on the allegation that KBR, in its zeal to provide logistical support services to the U.S. military in Iraq, allowed convoys to proceed on missions despite knowing that insurgent attacks on the convoys were likely to occur. The fateful missions coincided with the first anniversary of the United States' presence in Baghdad, as well as the first day of Arabeen (a Shia commemorative event). Other convoys had already come under attack that day.

The Plaintiffs also brought fraud claims alleging that KBR, during its recruiting and orientation activities, intentionally misled the drivers into believing they would only be engaging in rebuilding activities, not combat. KBR moved to dismiss all of the Plaintiffs' claims arguing that the court lacked subject-matter jurisdiction over the claims because the DBA provided Plaintiffs' exclusive remedy for their injuries.

Key Holdings

The 5th Circuit's opinion contains several important holdings:

1. **Injuries resulting from insurgent attacks were "caused by the willful act of a third person directed against an employee because of his employment"**

The DBA's definition of an "injury" capable of triggering DBA coverage and exclusivity is borrowed from the LHWCA:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an *injury caused by the willful act of a third person directed against an employee because of his employment*.[8]

The Plaintiffs in this case failed to acknowledge the connection between their employment and the attacks – asserting that the attacks might have been directed against them simply because they were Americans – not because of their employment as KBR truck drivers. The Court rejected this "overly narrow conception of the nature of their employment. Plaintiffs were not

[7] *See* 42 U.S.C. § 1651(c).
[8] 33 U.S.C. § 902(2) (emphasis added).

simply employed as truck drivers; rather, Plaintiffs were driving trucks in support of the American coalition's rebuilding and security efforts in Iraq."[9]

The Court considered this "the quintessential case of a compensable injury arising from a third party's assault"[10] and reasoned that the statutory requirement that an injury be directed against an employee "because of his employment" is meant only to exclude injuries willfully caused by third parties that obviously have *nothing* to do with their employment – that is, where it is clear that a tort was motivated by personal animosity rather than any nexus to employment.[11]

The Court recognized that construing the DBA as urged by the Plaintiffs would leave "many of those injured by insurgent attacks in Iraq or other battle zones … without a remedy. If the DBA did not apply because the worker was killed or injured by intentional acts of third parties because he was an American, and there was no negligence or other fault on the part of the employer, there would be no meaningful remedy. This, patently, is not what Congress intended."[12]

2. A concurring cause to an injury otherwise covered by the DBA does not remove the injury from coverage.

Plaintiffs argued that their injuries were not caused by the insurgent attacks, but rather by KBR's failure to halt convoy operations once it was aware that attacks on other convoys were occurring. The Court held that "the DBA does not carve out from its coverage employees' injuries that would otherwise be covered by the Act as injuries resulting from a third party's intentional tort when there may be a concurring cause."[13] In a case like this, in which a third party's assault is a direct cause of the employee's injuries, the Court considered it "clear that the third party's act has 'caused' the injury for purposes of coverage under the DBA."[14]

3. No intentional tort liability based on employer's alleged failure to protect employee from "substantially certain" injury

The Plaintiffs argued that KBR committed an *intentional* tort by failing to act to protect Plaintiffs from "substantially certain" injury.[15] The Fifth Circuit rejected this attempt to circumvent the DBA. The court reasoned that allowing an injured employee to recover from his employer under this theory of intentional-tort liability would inject into the DBA compensation scheme an element of uncertainty at odds with the statute's basic purpose: providing prompt relief for employees, and limited and predictable liability for employers.[16]

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[9] *Fisher* at 20.
[10] *Id*. at 18.
[11] *Id.* at 19.
[12] *Id*. at 23.
[13] *Id*. at 22.
[14] *Id*.
[15] In the context of the LHWCA, some courts have determined that injuries resulting from intentional torts perpetrated by the employer were neither "accidental" nor the acts of a "third party", and are therefore outside the coverage scheme.
[16] *Fisher* at 26.

4. Any employer deceit that precedes and helps produce an otherwise compensable injury merges into that injury for purposes of compensation coverage.

The Court likewise dismissed Plaintiffs' fraud in the inducement count. Plaintiffs were not seeking to rescind their employment agreements, but rather seeking damages for injuries that were compensable under the DBA. The Court relied upon a general proposition of worker's compensation laws that an employer's deceit preceding and helping produce an otherwise compensable injury merges into that injury for purposes of compensation coverage.[17]

This opinion represents a good result for employers and employees alike, furthering the dual purposes of the Defense Base Act: prompt relief for employees, with limited and predictable liability for employers. Importantly for government contractors supporting contingency operations, this thorough opinion may discourage future employee lawsuits arising out of injuries sustained in high-risk environments.

If you have any questions concerning the issues raised in this alert, please contact Ryan Berry, the author of this alert, or any of Womble Carlyle's Government Contracts or Government Business Team attorneys.

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[17] *Id*. at 29.