

# The Journal of Workers Compensation

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THE PAST, PRESENT, AND FUTURE OF THE DEFENSE BASE ACT



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# DBA INSURANCE MARKET WILL GROW AS CONTRACTORS MEET EXPANDING NEEDS FOR U.S. MILITARY SUPPORT AND RECONSTRUCTION ABROAD

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**W**hen workers compensation insurance became a reality for the United States in 1911, the nation had only recently become a player on the world stage in the wake of the 1898 Spanish-American War. Few Americans would have imagined a turbulent 20th century that would result in a U.S. economic, diplomatic, and military presence that would encircle the globe.

With the expansion of that presence came the need for increasing numbers of civilian employees to work abroad in support of a wide range of U.S. government-funded activities — from providing support on military bases to working on a vast array of reconstruction and development projects in foreign lands.

While conventional workers compensation remains a permanent feature of employer-employee relationships at home, U.S. contractors' overseas

employees working under federally funded contracts are protected by an important variation on the workers compensation theme: Defense Base Act (DBA) insurance. As an increasing number of services required by U.S. government facilities abroad are outsourced to private corporations (including in Iraq, Afghanistan, and other locations representing vital U.S. interests), the importance of DBA insurance is certain to grow. This article will briefly review some of the history, underlying principles, and claims issues associated with DBA insurance as well as take a look ahead to the future of this important line of business.

### **BORN IN CONFLICT**

In 1941, the Second World War was already well underway, with Great Britain standing alone against the Axis powers for almost two years. With war clouds on the horizon, President Franklin Roosevelt and a majority of U.S. Congressional members recognized that it was just a matter of time before the United States would become engaged in the conflict. With this in mind, Congress passed the Defense Base Act (DBA) in August 1941, at the request of then Secretary of War Henry L. Stimson. The Act recognized that civilian employees working on U.S. military bases and other installations overseas — some of which were likely to be situated in war zones in the not-too-distant future — needed workers compensation beyond the scope of typical coverages provided at home. The DBA required U.S. companies to secure *without exception* workers compensation coverage for their civilian employees performing services on U.S. military bases and other overseas projects, no matter where those bases or projects might be located.

The DBA effectively extended the provisions of the United States Longshore and Harbor Workers (USL&H) Act passed by Congress in 1927. Private firms with employees abroad who were either U.S. citizens or foreign nationals working on U.S. government contracts would be required by those contracts to provide DBA insurance coverage. The U.S. Department of Labor was empowered to: 1) authorize private insurers to underwrite DBA insurance; and 2) maintain oversight of the administration of DBA's provisions on an ongoing basis.

Like traditional workers compensation insurance, DBA coverage provides benefits for deaths or injuries arising from or out of the course of employment. Benefit levels under DBA are typically higher than those provided by traditional workers compensation insurance. Eligibility criteria for DBA coverage include:

- work for private employers on U.S. military bases or on any lands

used by the United States for military purposes outside of the United States, including those in U.S. Territories and possessions;

- work on any public work contracts with any U.S. government agency, including construction and service contracts, in connection with national defense or with war activities outside the United States;
- work on any contracts approved and funded by the United States under the Foreign Assistance Act, which among other things provides for cash sale of military equipment, materials, and services to its allies if the contract is performed outside of the United States; and
- work for any American employers providing welfare or similar services outside the United States for the benefit of the Armed Services, e.g., the United Services Organization (USO).

When any one of the above criteria is met, all employees engaged in such employment — regardless of nationality — are subject to the provisions of the DBA. Once again, this includes U.S. citizens and residents, host-country nationals (local hires), and even third-country nationals (individuals who may be hired from another country to work in the host country). An example of the latter would be a Kuwaiti national hired to perform engineering or other support duties within the Green Zone in Baghdad, Iraq.

Insurance requirements under the DBA are the same as those found within the USL&H Act. Specifically, every employer (including contractors and their subcontractors) must either secure insurance for the payment of DBA workers compensation benefits or certify that they are permissibly self-insured to a level sufficient to cover any claims that might occur. Further, if a subcontractor fails to secure adequate insurance for its employees or otherwise ensure the payment of compensation, the contractor will be liable and will ultimately be required to secure payment of adequate benefits.

Under DBA, if an employer fails to secure payment of compensation to workers who die, their survivors may sue the employer for damages. In such cases, the employer will not be allowed to use as a defense any argument that the injury or death was due to someone else's negligence or that the injured or deceased employee was guilty of any contributory negligence. Furthermore, the failure to secure coverage can result in a misdemeanor charge against the employer, with the potential of fines and even jail sentences for corporate officers.

One important expansion of the DBA legislation was the War Hazards Compensation Act (WHCA), enacted in 1942 and rolled onto the previous DBA legislation. As written, the WHCA enables the U.S. government to reimburse insurers for medical and compensation benefits paid under DBA insurance when an employee's injury arises from "war risk hazard," which was an obvious concern in the opening days of America's involvement in World War II.

Today, war risk hazard carries a very broad definition that extends to war, terrorist attacks, armed conflict against the United States or its allies, and war or armed conflict between the military forces of any origin or in any country in which a person covered by the WHCA may be serving. In situations considered a war risk hazard, any benefits for injuries caused by bullets, bombs, missiles, and any other weapons of war will be reimbursed to the insurer by the government in addition to a nominal service charge for handling the claims.

### **DBA AT WAR AND AT PEACE**

Following World War II, a tremendous amount of postwar reconstruction was funded by the U.S. government — the most obvious example being the Marshall Plan, which generated a spike in DBA insurance activity as U.S. contractors took on large-scale projects around the globe. Following the reconstruction boom, the DBA insurance marketplace settled into a relatively routine level of activity. With a military draft still in place concurrent with ongoing and robust recruiting efforts, the U.S. military generally had the human resources necessary for most support roles from within its own ranks. Even after the suspension of the military draft in 1973 and the institution of an all-volunteer military in the closing days of the Vietnam War, the military continued to staff most routine support roles from within. This practice remained the status quo throughout the remainder of the Cold War period.

After Iraqi troops marched into Kuwait in 1990, the first Gulf War represented the largest military deployment since the transition to an all-volunteer force. The need to free up enlisted personnel for frontline jobs for which they were trained meant that an increasing number of support roles would need to be performed by civilians under contract to the U.S. government. These roles ran the gamut from operating base commissaries and maintaining vehicles to providing routine security.

These "force multipliers" lived and worked next to soldiers throughout the deployments of the first Gulf War. Today, with the actions in Afghanistan following the September 11 terrorist attacks, and since the Iraq invasion

in 2003, the use of civilian contractors and their employees has grown exponentially. As a result, activity in DBA workers compensation insurance has spiked anew to now cover many thousands of U.S. civilian workers abroad and a significant number of foreign nationals employed locally on U.S. installations and other federally funded projects.

Historically, DBA coverage was needed primarily by large U.S. contractors with close connections to the military that were engaged in performing specific services on behalf of the U.S. military and base maintenance operations. However, with the advent of the Afghan and Iraqi military operations, the U.S. government has changed a long-standing policy of not extensively involving private companies in other activities (including reconstruction) to a new policy of engaging contractors in a variety of “on the ground” frontline support services. Many smaller contractors are now being employed to provide services to U.S. and allied troops in everything from services in base maintenance, food, and laundry to vehicle maintenance and repair, base construction, and many other needs. As a result, the need and market for DBA insurance has grown dramatically.

### **DBA CLAIMS DIFFER FROM STANDARD WORKERS COMPENSATION**

DBA claims handling is complex and specialized, requiring a degree of expertise and finesse beyond the typical demands of standard workers compensation business. For example, the U.S. Department of Labor requires the filing of claim notices within specific timeframes. If deadlines are not met it can result in fines against the offending organization. WHCA claims associated with injuries due to active hostilities require a higher degree of specialized knowledge. Even the process of gathering information about the claimant may be a challenge in cases where the covered person is a local foreign national or a third-country national. Having the capability and resources to investigate claims in different parts of the world is a necessity for effective DBA insurance claims handling.

One key difference in DBA claims handling versus traditional workers compensation is the scope of coverage afforded by DBA insurance. Under the standard workers compensation system, benefits are clearly afforded only where the injury or death “arose out of and in the course of employment.” However, this precisely defined set of conditions gets a bit fuzzier under DBA. Depending on the location where a civilian employee is posted, the test of recovery does not necessarily need to rest with a causal relationship between the nature of employment and the accident. There are no hard-and-fast rules regarding compensability similar to those that govern typical workers compensation. Generally, the more remote and harsher

the environment where an employee is posted, the more lenient the rules on compensability.

DBA case precedents have determined that, in some circumstances, an employee does not even need to be engaged in activities of benefit to the employer at the time of an accident to recover under DBA. All that is required is an obligation or condition of employment, such as a posting overseas, that represents a positional risk and thus a “zone of special danger” for the employee. The basis for this is: *But for the fact* the worker was deployed on foreign soil under contract to the U.S. government at the time of the event, the injury or death would not have occurred.

Consider a civilian truck driver (whether American, Iraqi, Kuwaiti, British, etc.) working for the U.S. military out of Baghdad’s Green Zone. The employee would certainly be covered under DBA insurance for injury or death due to an event occurring during the performance of his or her duties. That person is also covered when off-duty and relaxing with friends at a base commissary if a rocket attack occurs and causes injury. Likewise, the injury would be compensable if it occurred when a vehicle accidentally crashed into the commissary and struck the employee who was off-duty while sitting at a table.

However, what if the employee leans back too far in his chair, falls over, and hits his head on the patio? Would DBA insurance respond to such an injury? The hard-and-fast answer is: It depends. If an employee is stationed in what today is considered a stable venue such as Germany or Okinawa, it is unlikely that such a mishap would be compensable under DBA insurance. In Iraq, where opportunities for “reasonable recreation” outside the Green Zone are necessarily limited, such an occurrence *might* be compensable depending upon a judge’s interpretation of the “zone of special danger” principle. However, on a remote island where the employee is provided all housing, recreation, medical care, and transportation by the employer (thus essentially “living the job” 24/7), it is very possible that positional risk and the zone of special danger would be interpreted in such a way that the injury might be deemed compensable. Compensability under DBA travels a continuum of shades of gray — not the relatively black-and-white guidelines of traditional workers compensation.

### **CAUSAL RELATIONSHIPS NEED NOT EXIST**

In a key 1951 U.S. Supreme Court decision, the court found that the test of recovery under DBA insurance does not necessarily demand a direct causal relationship between the nature of the claimant’s employment and the accident that causes an injury or death. In this case, a civilian

employee stationed on the island of Guam was spending the afternoon at an employer-owned recreational facility when he attempted to rescue two swimmers in a dangerous channel where swimming was forbidden.<sup>1</sup> The employee's death was found to be compensable under DBA through his "connection to employment," i.e., the positional risk involved in deploying the worker to a country where circumstances resulted in his being present to undertake an ultimately tragic rescue attempt.

In a 1965 case, the U.S. Supreme Court affirmed a decision that the drowning of a South Korean-based civilian employee who was boating on his day off 30 miles from his workplace was still compensable due to the positional risk inherent in his overseas posting.<sup>2</sup> Had the employee not been stationed in South Korea as a prerequisite of employment, the circumstances leading up to his drowning would not have existed.

In another case that same year, an employee was killed in a vehicular accident outside a military base on San Salvador Island (a British possession).<sup>3</sup> The accident occurred as the employee and several others were returning from an evening out in a nearby town when their vehicle was driven on the wrong side of the road. The court held that the evening out represented "reasonable recreation" and that the driver's error in remembering what side of the road on which to drive in British territory constituted a zone of special danger.

Under traditional workers compensation, it is unlikely that a heart attack would be compensable. However, in a 1982 case, a claim involving an employee who suffered a heart attack while off-duty in a living facility provided by his employer in Greenland was found to be compensable.<sup>4</sup> The occurrence of such a grave medical condition at such a remote location constituted the employee's presence in a zone of special danger.

In one precedent, positional risk came into play in an unexpected way. A U.S. government contractor's DBA-covered employee was being processed in New York City in preparation for assignment to a federally funded project in Africa. While commuting to temporary housing provided by his employer in New Jersey, the man slipped on a patch of ice, fell, and broke his leg. Admittedly, the incident occurred a long way from Africa (where slips and falls due to ice are usually rare). However, the court found for the claimant by virtue of the fact that the act of his commuting to his temporary, employer-provided housing was a consequence of his status as a DBA-covered employee.

Clearly, successfully underwriting, pricing, and servicing DBA business requires an insurer with a clear understanding of the claims dimensions for this highly specialized product. In reality, while the U.S. Department

of Labor has authorized many insurers to market DBA insurance, only a handful are actively doing so today. Such companies are generally quite large and possess the international scope and knowledge and the specialized expertise to underwrite this coverage profitably while managing claims handling effectively and efficiently.

### **GROWTH CERTAIN, CONTROVERSY LIKELY**

What does the future hold for DBA insurance business? All indications point toward the likelihood of major growth, given today's world conflicts.

In Iraq, an estimated \$100 billion will have been committed to reconstruction efforts by the end of 2008; that money that will be used in a multitude of projects — most of a nonmilitary nature, such as infrastructure work on schools, roads, water projects, airports, refineries, and governmental and medical facilities. Because a large number (some estimate a majority) of these projects will be undertaken through U.S. government contracts, the people working these projects will require DBA insurance provided by their employers.

Although the major, future reconstruction focus will be on the Iraqi theater of operations, additional opportunities will probably continue to expand in other parts of the world, creating many solid opportunities for DBA insurers to meet the needs of contractors, subcontractors, and their employees. During the next three years, it is estimated that the total DBA market could increase by as much as 40 percent or even more as directives from the U.S. military and other agencies result in the outsourcing of a broad range of support services to outside companies.

At the same time, the DBA insurance market has not been without recent controversy. Some members of Congress have questioned whether insurers underwriting DBA coverage are using appropriate pricing regimens and potentially earning returns higher than would be warranted by the degree of risks they are accepting.

Congressional critics have also suggested that a single pool insurer be assigned to provide DBA coverage for all contracts let by the Department of Defense, which remains the largest source of federally funded contracts requiring DBA insurance. This would mirror the pool arrangements already used by U.S. Agency for International Development, the U.S. Army Corps of Engineers, and the U.S. Department of State. The Department of Defense has thus far resisted pressure to adopt this approach, preferring its current method of working with a number of private insurers individually.

Those interested in learning more about DBA and the rights and respon-

sibilities of U.S. government contractors and their employees will find a wealth of detailed information at the Web site of the U.S. Department of Labor ([www.dol.gov](http://www.dol.gov)). Specifically, information about the USL&H Act and DBA may be viewed at the DOL pages devoted to the Office of Workers Compensation Programs (OWCP) at <http://www.dol.gov/esa/owcp/dlhwc/lbdba.htm>.

## ENDNOTES

1. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951) 71 S.Ct. 470.
2. *O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965) 85 S.Ct. 1012.
3. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) 86 S.Ct. 153.
4. *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9<sup>th</sup> Cir. 1982).

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