U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 21-0423 and 21-0440

KIMBERLY DUVALL (Widow of EDWARD DUVALL) Claimant-Petitioner v. MI-TECH, INCORPORATED Employer-Respondent and THE McHENRY MANAGEMENT GROUP, INCORPORATED and STARR INDEMNITY AND LIABILITY COMPANY/CHUBB INSURANCE COMPANY Employer/Carrier DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 3/15/2022 DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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Benford L. Samuels, Jr. (Boyd & Jenerette, P.A.), Jacksonville, Florida, for Mi-Tech, Incorporated.

Matthew W. Boyle (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant and the Director, Office of Workers' Compensation Programs (Director), separately appeal Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Denying Benefits (2018-LDA-00591) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for Mi-Tech for 28 years, concluding with his job as a Field Service Supervisor. In this position, Decedent's work included "the refurbishment of main propulsion and auxiliary steam system components." Decision and Order at 2 (citing CX 10 at 1). On September 27, 2017, he suffered a heart attack and died while working in a Croatian shipyard on a project overhauling a U.S. Navy ship, the USS *Mt. Whitney*.[1] CX 5. Claimant, Decedent's widow, filed a claim for death benefits on December 15, 2017. CX 1.

The ALJ found Decedent's work in Croatia overhauling the USS *Mt. Whitney* was performed under a U.S. Government contract between the U.S. Navy's Military Sealift

[1] Decedent's job duties included travel to foreign and domestic sites to supervise or instruct Mi-Tech employees. Mi-Tech worked on projects involving the Military Sealift Command (MSC) and the U.S. Navy. Decedent had been to Croatia to work on the USS *Mt. Whitney* several times before September 2017. CX 11; TMMG EX 4 at 12-13.

Command (MSC) and Viktor Lenac Shipyard (Shipyard). Decision and Order at 3; CXs 37-39, 41, 45. The Shipyard then contracted with The McHenry Management Group (TMMG) which agreed to provide a Mi-Tech engineer to supervise the ship's turbine rotor and gear assembly overhaul. Decision and Order at 3; CX 33. Although the ALJ found Decedent performed his work pursuant to a U.S. Government contract, he found none of the DBA coverage provisions apply. He therefore determined the DBA did not cover Decedent's death. Decision and Order at 3-4; *see* 42 U.S.C. §1651(a)(1)-(6).[2]

In rejecting Claimant's assertion that DBA Section 1651(a)(4), 42 U.S.C. §1651(a)(4), provides coverage, the ALJ found, although Decedent was employed under a U.S. Government contract, the USS *Mt. Whitney* overhaul "is not a project for the public use of the United States or its allies and thus said contract was not for the purposes of engaging in public work." Decision and Order at 4. He found there are no cases establishing DBA jurisdiction for similar work, Mi-Tech did not carry DBA insurance, and TMMG carried DBA insurance "for other projects but this project was specially excluded from coverage." *Id.* at 5. Consequently, he determined "the industry did not believe DBA insurance was necessary under these facts." *Id.* He also determined the MSC "did not require DBA coverage for this project" because it was not mandated by any contract or document. *Id.* Accordingly, he denied benefits.

Claimant and the Director appeal the denial.[3] Both argue the overhaul of the USS *Mt. Whitney* is a "public work" within the meaning of Section 1651(a)(4). Citing *Delgado v. Air Serv. Int'l, Inc.*, 47 BRBS 39 (2013), they also argue it is erroneous to exclude from

[2] Subsections (1)-(3) of the DBA provide for coverage at (1) military bases acquired from a foreign government; (2) on any lands used by the military in any Territory or possession outside the continental U.S.; and (3) on any public work in any Territory or possession outside the continental U.S. 42 U.S.C. §1651(a)(1)-(3). Subsection (4) applies to U.S. contracts entered into for the purpose of engaging in a public work in geographic areas not addressed in subsections (1)-(3). Subsection (5) applies to contracts approved and financed by the U.S., performed outside the continental U.S. under the Mutual Security Act, and subsection (6) applies to work outside the continental U.S. by an American employer providing welfare services to the Armed Forces and authorized by the Secretary of Defense. 42 U.S.C. §1651(a)(5), (6).

[3] Claimant's appeal is BRB No. 21-0440; the Director's appeal is BRB No. 21-0423.

statutorily-provided DBA coverage any government contract that does not specifically require the non-governmental parties to obtain DBA insurance.[4]

Before the ALJ, Mi-Tech argued it secured workers' compensation coverage in South Carolina where it is based, but did not secure DBA coverage, and South Carolina is the proper jurisdiction for this claim.[5] It asserted if there is any responsible DBA employer, it is TMMG, because TMMG has DBA coverage. Before the Benefits Review Board, Mi-Tech asserts the ALJ correctly found it has no DBA liability, particularly under its interpretation of Section 1651(a)(4), and the only parties which could be liable are TMMG and/or its carrier, Chubb, who have not responded to the appeal. Therefore, as to Mi-Tech and the denial of DBA coverage, it asserts the ALJ's decision should be affirmed.[6]

We agree with the parties that the primary question we must resolve is whether Decedent was engaged in a "public work" when he died while working on the overhaul of the USS *Mt. Whitney*. We hold he was and reverse the ALJ's determination that his death is not covered by the DBA.

"Public Work"

Section 1651(a) provides:

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[4] Claimant also contends it is erroneous to consider Mi-Tech's failure to secure DBA insurance as evidence of there being no DBA coverage and to interpret TMMG's DBA insurance policy as having specifically excluded this project.

[5] Claimant also filed a claim for benefits under South Carolina workers' compensation law. Mi-Tech stated its South Carolina coverage does not cover accidents or injuries outside the state of South Carolina. Mi-Tech Post-H. Br. at 3.

[6] Mi-Tech also argues the Director has improperly submitted evidence to the Board which was not before the ALJ. Specifically, it asserts all the government websites identifying the USS *Mt. Whitney* as a Naval vessel and MSC as a government entity cannot be considered because he never moved for the ALJ to take judicial notice of them. We reject these arguments. Not only are these facts not in dispute, but the Board may take judicial notice of verifiable government websites and documents. *See generally Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (judicial notice of court documents). The official Navy Regulations, 32 C.F.R. §700.406, authorize the Chief of Naval Operations to maintain the Naval Vessel Registry. *See* https://www.nvr.navy.mil. The Registry verifies the USS *Mt. Whitney* is a Navy Vessel.

> Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—
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> (4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract**, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in public work**, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such public work under such contract the payment of compensation and other benefits under the provisions of this chapter, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract[.]

42 U.S.C. §1651(a)(4) (emphasis added). A "public work" is defined as:

> any fixed improvement or any project, whether or not fixed, involving **construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense** or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project[.]

42 U.S.C. §1651(b)(1) (emphasis added). Therefore, to be compensable under Section (a)(4) of the DBA, a claim must stem from a contract for a "public work" outside the continental United States. "Public work" under this section constitutes government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity. *Univ. of Rochester v. Hartman*, 618 F.2d 170 (2d Cir. 1980) (university professor killed while doing scientific research in Antarctica

pursuant to NASA and National Science Foundation grants not covered; he had no "contract within the purview of the DBA, and [performed] no activity related to a government construction project or the national defense"); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010) (providing security for support services personnel in Iraq and Kuwait is a public work; decedent's death covered); *Casey v. Chapman College, PACE Program*, 23 BRBS 7 (1989) (history instructor aboard Navy ships in Pacific performed public work; covered); *Airey v. Birdair, Div. of Bird & Sons, Inc.*, 12 BRBS 405 (1980) (pilot did not perform work related to employer's contracts with U.S. and was not injured while working pursuant to subcontract with U.S.; not covered).

Both Claimant and the Director contend the ALJ erred in deciding without explanation that Decedent's work on the USS *Mt. Whitney* was not a "public work." They state it is uncontested the USS *Mt. Whitney* is a U.S. Navy vessel, and the MSC is a component of the Department of Defense/Department of the Navy, and these statements are easily verifiable.[7] Further, the ALJ found, and no party disputes, Decedent's contract for work was subordinate to a contract with the U.S. Government. Consequently, Claimant and the Director assert the (b)(1) criteria for a "public work" are met.[8] *See Hartman*, 618 F.2d at 173-174 ("The sine qua non of the [DBA's] applicability has always been a military or a United States government construction connection."); *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46, 49 (9th Cir. 1966) (pilot contracted to transport Air Force personnel performed public work); *Berven v. Fluor Corp.*, 171 F.Supp. 89, 90 (S.D.N.Y. 1959) ("Any military purpose is a public use no matter how accomplished.").

The ALJ found, and Mi-Tech agrees, there are no cases on point which declare work on a Navy ship is a "public work." They are correct insofar as the Board has not explicitly addressed whether the overhaul of a Navy vessel constitutes a "public work" under the DBA, but that does not mean such a holding lacks readily-ascertainable support in the law.

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[7] Although Mi-Tech disputes references to the government websites, n.6, *supra*, it does not dispute these conclusions.

[8] The ALJ made the following statements, Decision and Order at 4: 1) "Section 1651(a)(4) requires the United States or an agency thereof to be a party to the contract." (citing *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990)); 2) "a benefit claim must stem from a contract with the United States to perform public work overseas...." (citing *Hartman*, 618 F.2d at 173-174; *Vance v. CHF Int'l*, 914 F.Supp. 2d 669, 680-681 (D. Md. 2012); *Markis v. Spensieri Painting*, 669 F.Supp. 2d 201, 205-206 (D.P.R. 2009)); and 3) "Duvall was employed pursuant to a contract subordinate to one with the United States" to test and adjust the ship's turbine generator. Nevertheless, he inexplicably and summarily concluded "this is not a project for the public use of the United States or its allies...."

It is clear the USS *Mt. Whitney* is a Navy vessel and is part of our national defense, *see* n.6, *supra*,[9] and federal courts and the Board agree a project with a "military aspect" is by definition a "public work." *Hartman*, 618 F.2d at 170; *Flying Tiger*, 370 F.2d 46; *Berven*, 171 F.Supp. 89; *see also Irby*, 44 BRBS 17; *Casey*, 23 BRBS 7. Consequently, work repairing a Navy vessel satisfies the requirement that a "public work" is "any project, whether or not fixed, involving construction, alteration, removal *or repair* for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense...." 42 U.S.C. §1651(b)(1) (emphasis added). We reverse the ALJ's summary finding to the contrary.

Contract Provisions

Claimant and the Director also contend the ALJ erred in giving heavy weight to the absence of a provision requiring DBA insurance under the MSC's contract with the Shipyard. They argue the statutory requirement for employers to provide DBA benefits for injuries or deaths arising from public works contracts under subsection (a)(4) applies independent of the inclusion of a specific contractual provision requiring the employers to purchase DBA insurance. Conversely, Mi-Tech asserts the ALJ did not err in finding a public work contract's failure to require DBA insurance negates the Act's coverage for employees injured or killed on that project.

We begin our review of this issue by setting forth the ALJ's findings. The ALJ found, and no party disputes, Decedent's work was performed under a series of contracts commencing with the U.S. Government. The MSC contracted with the Shipyard for the overhaul of the USS *Mt. Whitney*. In furtherance of that agreement, the Shipyard contracted with TMMG, which was insured by Chubb. TMMG then agreed with Mi-Tech to provide a Mi-Tech engineer to supervise the contracted work.[10] Mi-Tech sent Decedent to perform that work.

Despite the contractual relationships and purpose, the ALJ concluded the "industry did not believe DBA insurance was necessary" under these facts. He reasoned there was no case law where similar projects had DBA jurisdiction. To further support his conclusion, he found Mi-Tech did not carry DBA coverage, TMMG secured DBA

[9] *See also* https://www.surflant.usff.navy.mil/lcc20/ ("The U.S. Navy's finest warship").

[10] CX 33 is the contract between the Shipyard and TMMG; CX 34 is the TMMG purchase order with Mi-Tech; CXs 35 and 36 are the Mi-Tech quotes; CX 37 is the MSC request for proposal; CX 38 is the solicitation and award package; CX 39 is the specifications for the USS *Mt. Whitney*; and CX 40 is the Chubb insurance policy.

coverage from Chubb, but the policy excluded this project, and the MSC contract with the Shipyard did not specifically address or require the Shipyard to carry DBA insurance. Decision and Order at 5. We disagree with the ALJ's conclusion as well as his reasoning.

Mi-Tech asserts in support of the ALJ's approach that Section 1651(a)(4)'s coverage of injuries or deaths arising under public work contracts cannot be given effect unless the contract itself complies with that section's security clause, which states:

> [E]very such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) ... provide for securing to or on behalf of employees engaged in such public work under such contract the payment of compensation and other benefits under the provisions of this chapter[.]

42 U.S.C. §1651(a)(4). The Board has addressed this issue previously.

In *Delgado*, 47 BRBS 39, which addressed, *inter alia*, identical language in Section 1651(a)(5), the Board rejected the employer's argument and held coverage under that section "cannot be defeated by the omission of a security/insurance provision in the relevant legal agreement." *Delgado*, 47 BRBS at 44; *see* 42 U.S.C. §1651(a)(5). Additionally, the only way to waive DBA coverage is by affirmative action of Secretary of Labor. 42 U.S.C. §1651(e). As the security/insurance language in subsection (a)(5) is the same as that in subsection (a)(4),[11] *Delgado* is controlling. We agree with the Director's position that work "defined as covered by the statute does not become uncovered work simply because a contract fortuitously omits the appropriate insurance provision." Dir. Reply Br. at 4. Indeed, were an employer able to opt out by plan or omission, the Secretary's power to waive coverage would be rendered meaningless. Therefore, we apply *Delgado* to the case before us and hold coverage under Section 1651(a)(4) cannot be defeated by the absence of a security/insurance provision in the relevant legal agreements.[12] Consequently, the fact that the MSC contract did not specifically require the Shipyard,

[11] As the Director notes, the only difference is the internal numbering: numerals in (a)(4) and letters in (a)(5). Dir. Reply Br. at 5 n.4; *compare* 42 U.S.C. §1651(a)(4) *with* 42 U.S.C. §1651(a)(5).

[12] We reject Mi-Tech's attempts to distinguish *Delgado*. The pertinent Board holding addressing the security clause of subsection (a)(5) was not dicta, and there is no legal distinction between the two cases because the language in the two subsections is identical. That *Delgado* addressed other issues, such as whether the claimant worked under a contract within the scope of Section 1651(a)(5) and whether the ALJ properly granted summary decision, is of no moment.

TMMG, or any subcontractors, to carry DBA insurance for this USS *Mt. Whitney* project does not preclude DBA coverage. An employer does not have the authority to waive or avoid DBA coverage.[13] *Delgado*, 47 BRBS at 44.

Accordingly, we reverse the ALJ's Decision and Order Denying Benefits and hold Decedent's work on the USS *Mt. Whitney* is covered by the DBA. We remand the case to

[13] To the extent the ALJ concluded DBA insurance is unnecessary for the project because it was not mentioned in Mi-Tech's contract, he is mistaken. First, we have held an employer does not have the authority to waive DBA coverage by omitting it from the contract. Second, Section 4 of the Act, 33 U.S.C. §904(a), states if the contractor provides compensation insurance, the subcontractor's failure to do so is irrelevant. In this case, although Mi-Tech did not secure DBA insurance, Claimant and Mi-Tech assert TMMG did. Mi-Tech also asserts the only entities which possibly could be liable for DBA compensation are TMMG and Chubb. The determination of which party may ultimately be responsible for any awarded benefits is not relevant to our holding that Decedent worked on a DBA-covered "public work." We therefore take no position on the matter.

the ALJ for further proceedings to address any remaining unresolved issues related to Claimant's claim for death benefits.[14]

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[14] We deny Claimant's Motion for Oral Argument. 20 C.F.R. §802.306.