BRB No. 09-0548

PATRICIA IRBY (on behalf of the minor children of STEPHEN S. HELVENSTON, deceased) Claimant-Petitioner v. BLACKWATER SECURITY CONSULTING and FIDELITY AND CASUALTY COMPANY OF NEW YORK/CNA INTERNATIONAL Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 04/14/2010 DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision and the Order on Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Marc P. Miles and Kristy A. Schlesinger (Callahan & Blaine, APLC), Santa Ana, California, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates, LLP), New York, New York, and Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Matthew W. Boyle, (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision and the Order on Reconsideration (2006-LDA-00015) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is on appeal for the second time. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007). The claim for death benefits under the Defense Base Act arises out of the death of Stephen Helvenston, as well as three other men, in an ambush in Fallujah, Iraq, on March 31, 2004. The decedent worked for Blackwater Security Consulting (employer), which apparently assigned him to its contract with Regency Hotel and Hospital Company. Regency had a contract with ESS Support Services Worldwide to provide security services for ESS in Iraq and Kuwait. Claimant, on behalf of decedent's minor children, filed a claim for death benefits under the Act, 33 U.S.C. §909, but also filed suit against employer in state court in North Carolina, alleging causes of action for wrongful death and fraud under North Carolina law.[1] *See Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C. 2005), *appeal dismissed sub nom. In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006), *cert. denied*, 549 U.S. 1260 (2007). This case was subsequently submitted to arbitration. *See Blackwater Security Consulting, LLC v. Nordan*, No. 2:06-CV-49-F (E.D. N.C. Apr. 20, 2007), *appeal dismissed*, No. 07-1508 (4th Cir. Oct. 17, 2008).

With regard to the death benefits claim filed under the Act, employer accepted liability for the claim and began paying appropriate death benefits. Claimant, however, would not agree to the district director's entry of a compensation order. Employer therefore sought referral of the claim to the Office of Administrative Law Judges (OALJ) for a formal hearing. Employer filed with the administrative law judge a "Confession to Entry of Order Awarding Benefits," and sought remand of the case to the district director

[1] Claimant was divorced from decedent.

for the entry of a compensation order pursuant to the withdrawal of controversion regulation, 20 C.F.R. §702.351. Claimant resisted the entry of a compensation order, and the district director therefore declined to issue a compensation order due to the lack of agreement between the parties. *See* 20 C.F.R. §702.316. The administrative law judge subsequently ordered employer to file a motion for summary decision, which it did. Claimant did not respond to the motion, but instead filed a motion for withdrawal of the claim pursuant to 20 C.F.R. §702.225. The administrative law judge denied the motion to withdraw, finding it was not for a proper purpose or in claimant's best interests.

Employer appealed the refusal to enter a compensation order pursuant to the withdrawal of its controversion. Claimant appealed the denial of her motion to withdraw the claim. The Board first addressed employer's contention that the administrative law judge lacked jurisdiction to rule on claimant's motion to withdraw because employer withdrew its controversion of the claim before claimant moved to withdraw. The Board held that Section 702.351 of the regulations presupposes that the parties are in agreement as to the disposition of the case. As the parties were not in agreement here, with employer seeking a compensation order and claimant resisting one, the Board stated that the administrative law judge properly declined to remand the case to the district director and retained authority over the case at the time claimant filed her motion to withdraw the claim. *Irby*, 41 BRBS at 24.

The Board next addressed whether the administrative law judge properly denied claimant's motion to withdraw her claim pursuant to 20 C.F.R. §702.225. The Board held that the administrative law judge erred in finding that claimant's motion to withdraw was not for a proper purpose, as a claimant has the right to choose in which forum she will first litigate her claim. However, the Board affirmed the finding that withdrawal was not in claimant's best interest as claimant's recovery in the state forum was uncertain, both on the claims asserted and on a monetary basis. *Irby*, 41 BRBS at 26-28. The Board thus remanded the case to the administrative law judge to address employer's motion for summary decision.[2]

[2] Employer appealed the Board's decision to both the United States Court of Appeals for the Second Circuit and the District Court for the Southern District of New York. Claimant appealed to the district court. The Second Circuit dismissed employer's appeal and its motion for reconsideration. *Blackwater Security Consulting, LLC v. Irby*, No. 07-1993 (2d Cir. Aug. 10, 2007). Employer's action in district court was dismissed on its motion, and the district court subsequently dismissed claimant's appeal as well. *Irby v. Blackwater Security Consulting, LLC*, 07 Civ. 5939 (S.D.N.Y. March 31, 2008).

On remand, the administrative law judge granted employer's motion for summary decision. Relevant to this appeal, employer's motion asserted that: (1) decedent was subject to the DBA as he was employed on a "public work" project pursuant to a contract subordinate to one with the United States, 42 U.S.C. §1651(a)(4); and (2) the DBA covers all those who work under a contract covered by Section 1651(a), 42 U.S.C. §1651(a), regardless of one's status as an employee or an independent contractor. Claimant responded that decedent's work was not within the coverage of the DBA such that summary decision is not appropriate as a matter of law. Specifically, she contended that employer did not establish that decedent worked pursuant to a contract with the United States, that only employees are covered under the DBA and that she raised an issue of material fact as to whether decedent was an "employee" of employer's or an independent contractor, and that employer had a willful intent to injure decedent such that employer is not entitled to tort immunity pursuant to Section 1651(c), 42 U.S.C. §1651(c).[3]

The administrative law judge found that decedent was working under the "public work" provision of the DBA, as this section covers "operations under service contracts and projects in connection with . . . war activities." 42 U.S.C. §1651(a)(4), (b)(1), (3). The administrative law judge found that no issues of fact were raised with regard to this issue and that DBA coverage exists as a matter of law. The administrative law judge also found that decedent was covered under the DBA regardless of whether he was an "employee" or an "independent contractor." Lastly, the administrative law judge found that claimant did not put forth sufficient evidence to establish that employer intended to injure the decedent. Thus, the administrative law judge found that the Act is claimant's exclusive remedy. Accordingly, the administrative law judge granted employer's motion for summary decision and entered an award of death benefits to decedent's minor children.

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[3] This section states:

> The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

42 U.S.C. §1651(c).

The Director, Office of Workers' Compensation Programs (the Director), moved for reconsideration. He contended that the administrative law judge failed to make a finding that decedent's work for employer was pursuant to a contract with the United States. The Director also contended that the DBA applies only to "employees" and not to independent contractors; in this regard, the Director maintained that if there was a genuine issue of fact on this issue, employer's motion for summary decision must be denied and a hearing held.

In his decision on reconsideration, the administrative law judge found that decedent was working pursuant to a string of contracts ultimately tied to a contract with the Department of Defense. The administrative law judge also stated that the Director's opinion that one must be an "employee" would create a class of DBA workers without a remedy short of a tort action. The administrative law judge concluded that if an "employee" requirement exists, then decedent was an "employee" of employer.[4]

Claimant appeals the administrative law judge's grant of employer's motion for summary decision. Claimant contends the administrative law judge erred in failing to allow claimant to withdraw her claim. Claimant also contends the administrative law judge erred in failing to allow sufficient discovery. Claimant contends the grant of summary decision was improper because she raised genuine issues of material fact and that the DBA does not apply as a matter of law because: none of the DBA's coverage elements was met; the DBA does not apply to independent contractors; and the exclusive DBA compensation remedy does not apply when the injury is caused by the intentional misconduct of employer.

The Director has filed a response brief, agreeing with claimant that the grant of summary decision was improper because employer did not establish that there is an unbroken string of contracts commencing with one between a contractor and the United States and as the administrative law judge erred in finding that the DBA applies to independent contractors. The Director contends the case must be remanded for a hearing as claimant raised genuine issues of material fact with regard to these matters.

Employer has filed a response brief, urging affirmance of the grant of summary decision and the award of benefits under the DBA. Employer contends there is sufficient evidence of an unbroken string of contracts commencing with one let by the United States such that decedent was covered under Section 1651(a)(4). Employer also contends that the administrative law judge properly found coverage irrespective of decedent's

[4] Pursuant to the Director's motion for reconsideration, the administrative law judge corrected the applicable average weekly wage.

status as an "employee" or an "independent contractor." Employer further avers that the administrative law judge properly found that the Act is claimant's exclusive remedy as there is no evidence of employer's intent to injure decedent. In addition, employer contends that claimant has improperly raised the issue of whether the administrative law judge erred in failing to grant her motion to withdraw her claim, as the Board already ruled on this issue.

Claimant has filed a reply brief, reiterating the issues raised in her petition for review and brief. Claimant also contends that the Board should revisit the issue concerning her motion to withdraw the claim. Employer has filed a reply to the Director's brief asserting that no deference is due his position on the issue of employee/independent contractor and that the Director is incorrect in his interpretation of the "contract" provision of the public work subsection of the DBA.[5]

For the reasons that follow, we agree with claimant and the Director that the grant of summary decision was improper on the issues of the existence of a contract with the United States and decedent's status as an employee. Thus, the case is remanded for a hearing on these issues. If the DBA is otherwise applicable, we affirm the administrative law judge's findings that decedent was engaged in a "public work" and that claimant did not establish the existence of a genuine issue of material fact with regard to whether employer intended to injure decedent.

WITHDRAWAL OF CLAIMANT'S CLAIM

Claimant raises several contentions as to why the administrative law judge erred in denying her motion to withdraw her claim pursuant to 20 C.F.R. §702.225. The Board fully addressed these contentions in its first decision, and claimant has not cited any intervening case law suggesting that the Board's decision was in error, nor has claimant established that the Board's decision was "clearly erroneous." *Irby*, 41 BRBS at 27-28. Thus, the Board's decision on this issue constitutes the law of the case, and we decline to address claimant's contentions in this regard. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Claimant's allegations of error

[5] Employer has filed a motion to strike the appendix to claimant's reply brief to the extent it contains documents not submitted to the administrative law judge. Claimant has filed a response to this motion, which employer contends was filed out of time. We accept claimant's response to the motion to strike, and we deny employer's motion to strike. 20 C.F.R. §802.219(f). However, any documents that were not submitted to the administrative law judge will not be considered on their merits but only in terms of claimant's allegation that the administrative law judge erred in limiting the scope of discovery.

regarding the discovery process do not bear on the propriety of the Board's affirmance of the administrative law judge's finding that withdrawal of the claim is not in claimant's best interest.

DISCOVERY

Claimant contends the administrative law judge erred in limiting the scope of her discovery requests. Discovery rulings are reviewed under an abuse of discretion standard, *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993), and the administrative law judge's interlocutory orders are reviewable now that an award of benefits has been entered. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

In 2005 and 2006, claimant sought to depose a number of employer's officers and other personnel, as well as to obtain documents. Employer resisted these discovery requests. *See* Orders dated December 28, 2005, March 3, 2006, March 23, 2006. Ultimately, the administrative law judge ordered employer to produce several witnesses for deposition, with the caveat that their testimony was to be limited to:

- whether the decedent executed the independent contractor services agreement attached to the Employer/Carrier's motion for summary decision as EX C, and

- whether the decedent's duties in Iraq related to "public work" as the term is used in the Defense Base Act, 42 U.S.C. § 1561 et seq. ...

Order dated March 3, 2006.[6] In part, the administrative law judge's limiting of claimant's discovery to these issues was based on claimant's request for admissions. In response to claimant's requests for admissions, employer admitted, *inter alia*: (1) that decedent's death is covered by the DBA; (2) that decedent died while working in the course and scope of his employment with employer; (3) that the scope of work in which decedent was engaged in at the time of death was covered by the DBA; and (4) that decedent was employer's employee at the time of death. *See* Order dated March 23, 2006.

[6] The depositions of Messrs. Rush, Jackson and Berman subsequently took place.

In his decisions granting employer's motion for summary decision and denying reconsideration, the administrative law judge did not discuss the deposition testimony and drew inferences concerning the existence of a contract with the United States and the employee status of decedent. *See* discussion, *infra.* The administrative law judge relied, in part, on claimant's failure to establish the existence of material issues of fact with regard to these matters. On appeal, claimant contends she was precluded from fully engaging in discovery on these issues. *See* Reply Brief at 13-17.

We reject claimant's contention that the administrative law judge erred in 2006 in limiting the scope of discovery, as she has failed to establish an abuse of discretion. *See Martiniano v. Golten Marine Co*., 23 BRBS 363 (1990). The administrative law judge rationally relied on claimant's request for admissions and employer's responses thereto to limit the deposition testimony to issues not covered by the admissions.[7] Moreover, claimant's claim of error in the discovery process is largely based on information that has come to light, based on other events involving employer, in the years after her discovery was limited. *See* Reply Brief at 13. Nonetheless, as the administrative law judge erred in granting employer's motion for summary decision on two issues, *see* discussion, *infra,* claimant may renew her request for discovery relevant to the issues remaining, *see* 29 C.F.R. §18.14, and may introduce testimonial and documentary evidence concerning these issues at the hearing. 20 C.F.R. §§702.338-339. The administrative law judge has the discretion to limit the scope of discovery and to set reasonable time frames for its completion. *Olsen*, 25 BRBS 40.

DBA COVERAGE

The DBA contains six bases for coverage. 42 U.S.C. §1651(a)(1)-(6). Only subsection (a)(4) is at issue in this appeal.[8] The DBA provides: "(a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment—"

> (4) *Under a contract entered into with the United States or any executive department,* independent establishment, *or agency thereof* (including

[7] Apparently, however, the admissions were not offered into evidence by either party, *see* 29 C.F.R. §18.20(g), and thus the matters admitted were not "conclusively established." 29 C.F.R. §18.20(e).

[8] In its motion for summary decision, employer asserted coverage under subsections (a)(1), (a)(2), and (a)(6), as well as (a)(4).

> 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), (2), and (3) of this subdivision, *for the purpose of engaging in public work, . . .*

42 U.S.C. §1651(a)(4) (emphasis added). The administrative law judge found that decedent was engaged in a "public work" pursuant to a contract subordinate to one with the United States as required by subsection (a)(4).

On appeal, claimant makes a two-part argument concerning subsection (a)(4) coverage. First, claimant contends that employer did not establish that decedent worked in Iraq pursuant to a contract ultimately subordinate to a contract with the United States or an executive department or agency thereof. Second, claimant contends that employer's contract was not for the purpose of engaging in "public work." The Director addresses only the former argument and contends that summary decision should have been denied on this issue because there is a genuine issue of material fact regarding the existence of a contract with the United States. Employer seeks affirmance of the administrative law judge's findings on both issues.

Contract with the United States

Pursuant to Section 1651(a)(4), a contract with the United States, or an agency thereof, is a necessary element of DBA coverage and decedent's work for employer must have been pursuant to that contract. *Z.S. v. Science Applications Int'l Corp*., 42 BRBS 87 (2008); *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990). With its motion for summary decision, employer attached a portion of the contract dated March 12, 2004, between employer and Regency Hotel & Hospital Company. This contract states that Regency signed an agreement with ESS Support Services of Cyprus, "a contractor providing catering support services and design and build services to the US Armed Forces and other US contracting agencies in Iraq and Kuwait." Emp. S/D at Ex. B. The contract does not state the nature of the agreement between Regency and ESS. It does state that Regency is contracting with employer for security services for its ESS contract, as Regency is "desirous to obtain security services to support Regency's contract with ESS in Iraq, Kuwait, Jordan and Turkey." *Id.*

The administrative law judge discussed this contract, noting the absence of actual copies of any other contracts, including one with the United States. Decision and Order at 7-9. Nonetheless, he found that this absence was not an obstacle to his finding that, ultimately, employer's contract is tied to one with the United States, because it is the

government's "job" to feed the troops, which is what ESS was doing, according to the employer/Regency contract. *Id.* at 9. The administrative law judge found that the only rational inference to be drawn was that employer's contract with Regency was ultimately tied to a contract with the United States. On the Director's motion for reconsideration, the administrative law judge found that claimant failed to refute employer's allegation that a string of contracts existed starting with one let by the United States, notwithstanding the lack of physical evidence of such contracts. The administrative law judge again determined that the only rational inference to be drawn was that a contract with the United States existed despite that one had not been produced. Order on Recon. at 3-4.

The administrative law judge found support for a contractual relationship in the state lawsuit complaint filed by claimant. Therein, claimant alleged that the Cypriot entity, ESS, provided catering services for the Armed Forces in Iraq and Kuwait. Claimant averred that ESS contracted with employer and Regency for security forces to protect food convoys. Cl. Opp. S/D at Ex. 1 p. 7. The administrative law judge also found that in opposing employer's motion for summary decision, claimant contended that there was an intervening contract between ESS and Kellogg, Brown and Root (KBR) that completed the link to the United States.

The administrative law judge erred in this regard. Claimant's allegation in the tort suit does nothing more than recite the contract between Regency and Blackwater as to ESS's status. *Id.* Moreover, in her opposition to employer's motion for summary decision, claimant contended that if indeed there was a contract between ESS and KBR, no such contract has been produced. Claimant also relied on the absence of any affidavits supplied by employer to support its contention of a string of contracts leading to one with the United States. Cl. Opp. S/D at 13-15.

The administrative law judge also found support for a contract with the United States in a staff report of the House of Representatives Committee on Oversight which investigated the Fallujah killings. This report is dated September 2007, and is entitled: "PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH."[9] This report states, at p.6-7, the following:

> The Blackwater personnel who were killed in Fallujah were operating under a complex series of contracts. Between the Blackwater personnel,

[9] http://oversight.house.gov/images/stories/documents/20070927104643.pdf, cited in Employer's Reply to Claimant's Opposition to Motion for Summary Decision.

> who were themselves independent contractors with Blackwater, and the federal government, which was ultimately paying for their services, there were four distinct contracting companies. Blackwater was providing security services to ESS Support Services Worldwide (ESS) as a subcontractor to a Kuwaiti company, Regency Hotel & Hospital Company. ESS itself was acting as a subcontractor to two government prime contractors. ESS was a subcontractor under Kellogg, Brown & Root (KBR), then a subsidiary of Halliburton, which held the LOGCAP contract with the U.S. Army to provide logistical support such as meals, laundry, and living containers for soldiers in Iraq. ESS was also a subcontractor under the Fluor Corporation, which held a similar prime contract to provide logistical services to the U.S. Air Force.

In addition, the administrative law judge found that the Secretary of Defense posthumously awarded decedent the "Secretary of Defense Medal for the Defense of Freedom." Decedent is identified in the memo as an "Army contractor" supporting Operation Iraqi Freedom. The medal is awardable to "non-defense personnel" based on their involvement in Department of Defense activities. Emp. S/D at Ex. O. The administrative law judge concluded that there were several possible prime contractors – KBR, Fluor Corporation or ESS itself – to which the Regency/Blackwater contract could have been subordinate, and that this evidence demonstrates the existence of a contract with the United States. Decision and Order at 8.

Claimant and the Director contend that the administrative law judge erred in drawing an inference in favor of employer regarding the existence of a contract with the United States and in granting employer's motion for summary decision based on that inference. They contend that claimant put forth sufficient evidence in opposition to the motion for summary decision such that a reasonable fact-finder could find that such a contract does not exist.

We agree that the administrative law judge erred in granting employer's motion for summary decision on this issue. Claimant and the Director correctly assert that the administrative law judge erroneously drew an inference regarding the existence of a contract and the fact of decedent's work under such a contract in employer's favor, contrary to the rules of summary decision which require that all inferences be drawn in favor of the non-moving party. *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). Furthermore, in opposing employer's motion for summary decision, claimant put forth sufficient evidence to establish the existence of an issue of fact which is both material and genuine, material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *See Brockington v.*

Certified Electric, Inc., 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Morgan*, 40 BRBS 9; *Buck v. General Dynamics Corp*., 37 BRBS 53 (2003).

In opposition to employer's motion, claimant offered evidence that refutes the existence of the contract inferred by the administrative law judge. The Secretary of the Army, Francis J. Harvey, on behalf of Secretary of Defense Rumsfeld, responded by letter dated July 14, 2006,[10] to a letter from Representative Shays (on the Oversight Committee), that (a) KBR has never "directly hired" private security contractors, (b) KBR states ESS is unaware of any services under LOGCAP III provided by Blackwater, (c) KBR has no knowledge of any subcontractors under LOGCAP III using private armed security.[11] Cl. Opp. S/D at Ex. 7. Claimant provided a "statement" from Melissa Norcross, Public Relations for Halliburton, dated December 7, 2006, that "Blackwater provided services for the Middle East Regional Office of KBR. This office is not associated with any government contract and not associated with LOGCAP III . . . and were not billed directly to any government contract." Cl. Opp. S/D at Ex. 8. Employer's personnel also surmised on deposition that additional contracts might or might not exist. This evidence is sufficient to raise a genuine issue of material fact concerning whether the Blackwater/Regency contract was subordinate to a contract with the United States. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on reconsideration en banc*, 30 BRBS 5 (1996) (Brown and McGranery, concurring and dissenting).

Therefore, we vacate the administrative law judge's grant of summary decision and we remand the case for the administrative law judge to hold an evidentiary hearing on this issue. *Morgan*, 40 BRBS at 13; 20 C.F.R. §702.331 *et seq.*; 29 C.F.R. §18.41(b). The administrative law judge must discuss and weigh all relevant evidence offered by the parties on the issue of the existence of a contract with the United States or agency thereof and whether decedent was assigned to work pursuant to such a contract, such that the requirement of Section 1651(a)(4) is satisfied. *Z.S.*, 42 BRBS 87; *Cornell*, 23 BRBS 253. Although the grant of summary decision on this issue cannot be based on inferences drawn against claimant, the administrative law judge's ultimate decision after a full evidentiary hearing may be based on reasonable inferences that are consistent with law, contrary to the Director's suggestion that employer may prevail only if it produces actual contracts. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

[10] This letter predates the Committee on Oversight report, *supra.*

[11] LOGCAP stands for the Army's Logistics Civil Augmentation Program.

Public work

Section 1651(a)(4) requires that the contract with the United States be for the purposes of engaging in a "public work," which is defined by Section 1651(b)(1), (3) 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;
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> ***
>
> The term "war activities" includes activities directly relating to military operations;

42 U.S.C. §1651(b)(1), (3). The administrative law judge found that decedent was providing security to convoys under a service contract in connection with war activities, such that the "public work" provision is satisfied. He stated that claimant did not raise a genuine issue of material fact with regard to this provision. Decision and Order at 9. On appeal, claimant contends that only construction projects are covered as public works and that decedent did not work on such a project. We reject this contention.

In *University of Rochester v. Hartman*, 618 F.2d 170 (2^{d} Cir. 1980), the Second Circuit held,

> As we read the DBA, § 1651(a)(4) applies only when a benefit claim stems from a contract with the United States to perform "public work" overseas, "public work" constituting a construction project, work connected with national defense, or employment under a service contract supporting either activity. Therefore, to be covered, a service contract must be connected either with a construction project or with a national defense activity. Service contracts lacking a construction or national defense nexus simply fall beyond the boundaries of the DBA.

Id. at 173.[12] The DBA plainly states that "service contracts in connection with war activities" are considered to be a "public work." 42 U.S.C. §1651(b)(1); *see Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46 (9th Cir. 1966) (death of pilot covered - contract between Flying Tiger and the United States Air Force to transport military personnel from Travis Air Force Base in California to Viet Nam);[13] *see also Republic Aviation Corp. v. Lowe*, 69 F.Supp. 472 (D.C. N.Y. 1946), *aff'd*, 164 F.2d 18 (2d Cir. 1947), *cert. denied*, 333 U.S. 845 (1948) (test pilot killed engaged in "public work" because he was engaged in "project in connection with the war effort" – prior version of (b)(1)). Assuming, *arguendo*, that decedent was employed pursuant to a contract subordinate to one with the United States, the administrative law judge properly found that employer is entitled to summary decision on the "public work" issue as claimant did not raise a genuine issue of material fact as to whether decedent was engaged in a service contract supporting war activities. Thus, the finding that decedent was engaged "public work" is affirmed as it is in accordance with law.

INDEPENDENT CONTRACTOR/EMPLOYEE

Claimant next contends that the administrative law judge erred in finding that the DBA applies whether decedent was an employee of Blackwater or an independent contractor. Claimant additionally asserts that decedent was an independent contractor such that the DBA, or any workers' compensation scheme, is inapplicable. The Director agrees that the Act applies only to "employees," and that as the issue of decedent's status is an issue of fact, the case must proceed to a hearing.

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[12] Thus, in *Hartman*, the court held that a university professor who was killed while doing research in Antarctica under grants from NASA and the National Science Foundation was not covered under the DBA because he was not engaged in "public work" and his research grant did not constitute a "contract" within the meaning of the DBA.

[13] In *Flying Tiger Lines,* the 9th Circuit stated:

> In 1958 . . . Congress enacted the definition of 'public work' in its present form . . . The Senate Report on the amendatory bill reveals that the purpose for the redefinition was "* * * to clarify its meaning and make it construe consistently with Federal court decisions. * * * By redefining the term 'public work' to include the words 'whether or not fixed,' the original intention to have it apply to projects of all kinds otherwise within the definition, including service contract projects, is reaffirmed." 1958 U.S. Code Cong. & Ad. News 3321, 3324.

Flying Tiger Lines, Inc. v. Landy, 370 F.2d 46, 49 (9th Cir. 1966).

As noted above, the DBA applies to "the injury or death of *any employee engaged in any employment*" if one of the coverage provisions is applicable. 42 U.S.C. §1651(a). The administrative law judge gave thoughtful consideration to this phrase and stated that a mechanistic interpretation of the word "employee" would frustrate the purposes of the statute should an employer try to cast the injured worker as an "independent contractor" rather than an employee. The administrative law judge found that the general workers' compensation tradeoff – the certainty of benefits in exchange for tort immunity – should be paramount even though, in this case, it is claimant who is seeking to have decedent classified as an independent contractor. The administrative law judge stated that the DBA should be read expansively under the "engaged in any employment" language as it is designed to protect workers overseas who might not otherwise have a remedy under foreign laws or the laws of states without extraterritorial jurisdiction. Decision and Order at 9-12.

The administrative law judge went on to discuss the decedent's status. He accepted, "for the sake of argument," that in the "narrowest" sense of the word, decedent was not employer's employee because of the "individual security consultant" agreement he signed. *See* Emp. S/D at Ex. C. Nonetheless, he noted, employer had obtained DBA insurance. *See* Emp. S/D at Exs. D, J. Moreover, the administrative law judge found that the decedent did not enjoy the independence of an independent contractor. The administrative law judge noted the inconsistencies in claimant's assertions – that employer exercised such control over decedent so as to intentionally harm him in an unarmored convey, yet claimed he was an "independent contractor." The administrative law judge found it "preposterous" to think that the decedent would have supplied his own tools (*i.e.,* armored security vehicles, maps of Iraqi land, etc.), and that proceeding to trial on the issue of whether the title of the employment agreement overcomes the "pervasive control" exercised by employer would "exalt form over substance." Decision and Order at 10-12. On reconsideration, the administrative law judge stated that if he must decide the employee/independent contractor issue, then he was finding that decedent was an employee notwithstanding the employment agreement, for the reasons stated in his Decision and Order. Order on Recon. at 5.

The term "employee" is not defined in the DBA and cannot be defined with reference to the term "employee" in Section 2(3) of the Longshore Act, 33 U.S.C. §902(3).[14] The Supreme Court has held that when a "statute containing the term does not

[14] As Section 2(3) defines "employee" as "any person engaged in maritime employment . . .," the administrative law judge properly noted that this definition does not aid in defining "employee" under the DBA. *See generally Pearce v. Director, OWCP*, 603 F.2d 763, 765, 10 BRBS 867, 868 (9th Cir. 1979) ("Congress passed the

helpfully define it," the term "employee" has as its meaning the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). In *Crowell v. Benson*, 285 U.S. 22, 54-55 (1932), the Supreme Court stated that the Longshore Act "applies only when the relation of master and servant exists." The Longshore Act does not apply to an independent contractor. *Cardillo v. Mockabee,* 102 F.2d 620 (D.C. Cir. 1939). In view of this precedent, the DBA's incorporation of the Longshore Act, and the DBA's explicit use of the word "employee," we agree that the administrative law judge erred in finding that DBA applies to independent contractors.[15] Pursuant to the Supreme Court's guidance, we hold that one must be an "employee" under a common law "master-servant" test in order to be covered under the DBA as "an employee engaged in any employment."

The administrative law judge also stated that if one must be an "employee" to obtain coverage under the DBA, employer would be entitled to summary decision on this issue. Order on Recon. at 5. The administrative law judge noted that decedent signed an "individual security consultant" contract with employer that, on its face, indicates independent contractor status. He continued, however, that employer's control over the circumstances of decedent's work made decedent an employee "under any recognized test for genuine independent contractor status." Decision and Order at 11 n.41; Order on Recon. at 5. The administrative law judge relied only on claimant's pleadings with

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Defense Base Act in order to provide workers' compensation coverage for specified classes of employees working 'outside the continental United States.'").

[15] The case cited by the administrative law judge as support for his finding, *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998), while instructive, contains a caveat that undermines his conclusion. In that case, the Ninth Circuit held that a state law claim for wrongful death was pre-empted by Section 5(b) of the Longshore Act, 33 U.S.C. §905(b), notwithstanding that the decedent was an independent contractor rather than an employee. The Ninth Circuit stated:

> The Ghotras rely upon *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932) to require a "master-servant" relationship for coverage under the LHWCA. However, *Crowell* and the other cases cited by the Ghotras address recovery against an employer pursuant to the LHWCA's remedial scheme. We do not disagree that the requirement of a "master-servant" relationship may be necessary to justify liability without fault against a putative employer.

113 F.3d at 1059-1060. This is exactly the situation presented in this case, as it is the application of the no-fault workers' compensation scheme that is at issue.

regard to the alleged intentional misconduct of employer to find its control "pervasive." *See* Cl. Opp. S/D at Ex. 1.

We agree that the administrative law judge erred in granting summary decision as decedent's employment status raises a genuine issue of material fact. The administrative law judge correctly stated that the title of the contract decedent signed with employer is not dispositive of his status. *Burbank v. K.G.S., Inc*, 12 BRBS 776 (1980). However, there is evidence in the parties' summary decision pleadings that the administrative law judge did not discuss.[16] In addition, although the administrative law judge mentioned "recognized tests" for employee status, he did not discuss any of them.[17] The administrative law judge may use whichever test is best suited to the facts of a particular case. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997); *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986). Therefore, as the administrative law judge did not select an appropriate legal test for employee status, did not fully address the evidence submitted with the motion for summary decision and responses thereto, and as a genuine issue of material fact exists on the issue of employee status, the grant of summary decision on this issue is vacated. The case is remanded for the administrative law judge for an evidentiary hearing on this issue. *Morgan*, 40 BRBS at 13; 20 C.F.R. §702.331 *et seq.*; 29 C.F.R. §18.41(b).

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[16] As the administrative law judge did not discuss the evidence pursuant to law, we reject claimant's contention that the Board should hold decedent was, in fact, an independent contractor. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982) (administrative law judge must address evidence in the first instance). The administrative law judge should discuss the contents of the contract decedent signed with employer, the relevant deposition testimony of employer's employees, and other relevant evidence offered by the parties.

[17] These tests include: (1) the nine-factor test enunciated in the Restatement (Second) of Agency, Section 220. This test focuses on the extent of control, kind of occupation and method of payment. *Eckhoff v. Dog River Marina & Boat Works, Inc*., 28 BRBS 51 (1994); (2) the "right to control the details of work" test. This test requires application of four factors: (a) the right to control the details of the job; (b) the method of payment; (c) the furnishing of equipment; and (d) the right to fire. *Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997); and (3) the "relative nature of the work" test. This test requires a two part analysis, examining: (a) the nature of the claimant's work; and (b) the relation of that work to the regular business of the employee. *Haynie v. Tideland Welding Service*, 18 BRBS 17 (1985), *aff'd mem. sub nom. Haynie v. U.S. Dept. of Labor*, 797 F.2d 975 (5th Cir. 1986); *see also Carle v. Georgetown Builders, Inc*., 19 BRBS 158 (1986).

EMPLOYER'S INTENT TO HARM DECEDENT

Claimant contends the Act does not apply if employer intended to injure the decedent. Claimant contends that the administrative law judge erred in granting employer's motion for summary decision on this point on the ground that claimant failed to prove such intent. Rather, claimant contends, she put forth sufficient evidence to raise a triable issue of fact such that summary decision should have been denied.[18] The Director did not address this issue. Employer responds that the administrative law judge properly granted summary decision on this issue.

The administrative law judge found that employer's mere intent to act in a certain way, or its negligence in acting, is not sufficient to remove decedent's death from the Act's coverage. He stated that claimant would have to establish that employer intended to injure decedent through deliberate and specific acts. The administrative law judge found that claimant's assertions did not raise a triable issue of fact in this regard.[19] The administrative law judge stated that even if he accepted all these assertions as true they would not be "minimally adequate" to support a conclusion that employer schemed to injure decedent.

[18] As claimant raised this defense in response to employer's assertion that claimant is entitled to a workers' compensation remedy under the DBA, this issue was properly before the administrative law judge in this case. Normally, this issue would be raised in a court proceeding, as opposed to an administrative forum, in which claimant was trying to obtain a tort remedy. In an Order dated March 9, 2006, the administrative law judge stated that claimant waived this issue by failing to comply with the administrative law judge's December 28, 2005, Order that claimant file a brief on this issue. Nonetheless, the administrative law judge addressed the issue in his decision granting employer's motion for summary decision.

[19] Claimant alleged: (1) employer sent only two men, not three, in convoys, as the contract had specified; (2) employer used unarmored vehicles instead of the armored vehicles the men had been told would be used; (3) employer did not give maps to the men; and (4) employer prevented the men from learning their route before they left the compound. Claimant also alleged that the manager of the project, Justin McQuown, "greatly disliked" the decedent and required him to participate in the fatal mission even though decedent felt unprepared. *See, e.g.*, Cl. Opp. S/D at Ex. 1; Berman dep. at 49, 52, 64-67, 87, 90.

The Longshore Act applies to:

> 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.

33 U.S.C. §902(2). Moreover, pursuant to Section 1651(c), 42, U.S.C. §1651(c), the remedy provided by the DBA/Longshore Act is claimant's exclusive remedy against an employer. *See also* 33 U.S.C. §905(a); *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 21 BRBS 1(CRT) (5th Cir. 1988). Case precedent holds, however, that the Act is not the employee's exclusive remedy if the injury or death was due to the intent of the employer to injure the employee, because employer is not a "third person" and the injury was not "accidental." *See Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860 (La. Ct. App. 2001), *cert. denied*, 534 U.S. 1020 (2001). In *Fisher v. Halliburton* 390 F.Supp.2d 610, 613 (S.D. Tex. 2005), the court stated that, "A very narrow exception to the DBA's exclusive liability provision applies where the employer acted with the specific intent to injure the employee." In *Fisher*, the plaintiffs alleged that Halliburton "knew and intended that [plaintiff truck drivers' convoy] would be attacked by anti-American enemy insurgents." The court stated that on a Rule 12(b)(6) Motion to Dismiss, the court must accept plaintiffs' allegations as true and that they thus alleged facts that fall within the exception to the exclusivity provision of the DBA. Thus, Halliburton's motion to dismiss the tort suit based on the exclusivity provision of the DBA was denied. On the merits, however, the court stated that the plaintiffs would have to prove that Halliburton specifically intended for "Plaintiff truck drivers to be attacked by the anti-American insurgents." *Id.* at 614 n.2.[20]

In this regard, it is well settled that wanton and reckless misconduct of an employer is not the equivalent of an intentional tort. *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *see also Johnson v. Odeco Oil & Gas Co., Inc.*, 679 F.Supp. 604 (E.D. La. 1987), *aff'd*, 864 F.2d 40 (5th Cir. 1989) (no deliberate intent to injury in not evacuating oil platform before hurricane); *Houston v. Bechtel Assoc. Professional Corp.*, 522 F.Supp. 1094 (D.C. D.C. 1981) (no intent to

[20] This case remains pending and has a lengthy procedural history. *See Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008), *rev'g* 454 F.Supp.2d 637 (S.D. Tex. 2006); *Fisher v. Halliburton*, ___ F.Supp.2d ___, 2010 WL 1268097 (S.D. Tex. March 25, 2010); *Fisher v. Halliburton*, ___ F.Supp.2d ___, 2010 WL 519690 (S.D. Tex. Feb. 8, 2010).

injure by exposing employee to silica); *Austin v. Johns-Manville Sales Corp.,* 508 F.Supp. 313 (D. Me. 1981) (no deliberate intent to injure by using asbestos products). While this case law permits a claimant to seek a tort remedy against his employer for alleged intentional misconduct, there are no reported cases under the Longshore Act or DBA where such a suit successfully established that the employer committed such a tort such that the exclusivity provision of the Act was nullified.[21] *Id.; see Fisher v. Halliburton,* ___ F.Supp.2d ___, 2010 WL 1268097 (S.D. Tex. March 25, 2010) (finding genuine issue of material fact for trial on issue of employer's knowledge of likely attack on convoy); *Bowen v. Aetna Life & Casualty Co.,* 512 So.2d 248 (1987) (permitting suit to go forward on allegation of intentional emotional distress due to insurer's refusal to pay benefits); *Rustin v. District of Columbia*, 491 A.2d 496 (D.C. 1985), *cert. denied*, 474 U.S. 946 (1985) (D.C. Workmen's Compensation Act case – no intent to injure in improperly hiring co-worker with criminal record who shot employee to death). In this case, the administrative law judge drew all inferences in favor of claimant and considered all the evidence she cited to establish that employer intended to injure decedent. The administrative law judge found that claimant's allegations did not give rise to a triable issue of fact and that employer is entitled to a finding as a matter of law that a compensation remedy is mandated by the Act's exclusivity provision. We affirm this finding as it is rational, consistent with the law concerning a grant of summary decision, *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, (1986), and in accordance with case precedent concerning intentional torts allegedly committed by an employer. *Sample,* 771 F.2d 1335.

SUMMARY

We vacate the administrative law judge's grant of employer's motion for summary decision on the issues of the existence of a contract with the United States and decedent's status as an "employee" of employer. The case is remanded for an evidentiary hearing on these issues. Assuming that decedent was an employee of employer working on a contract subordinate to one with the United States, we affirm the administrative law judge's finding that decedent was engaged in "public work" pursuant to Section 1651(a)(4). We also affirm the administrative law judge's rejection of claimant's contention that a compensation remedy is precluded due to employer's intent to injure decedent, as claimant failed to establish the existence of a material issue of fact in this regard.

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[21] There is no intentional tort exception under the Federal Employees' Compensation Act. *McEntee v. Henderson*, 154 F.Supp.2d 1286 (S.D. Ohio 2001). Some state workers' compensation statutes have specific provisions waiving the employer's right to tort immunity in the case of an intentional tort. 6 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, ch. 103 (2009).

Accordingly, employer's motion to strike the appendix to claimant's reply brief is denied. The administrative law judge's Decision and Order Granting Summary Decision and the Order on Reconsideration are vacated, and the case is remanded for proceedings consistent with this decision.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge