BRB Nos. 09-0582
and 09-0582A

JOHN TISDALE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
AMERICAN LOGISTICS SERVICES	)	DATE ISSUED: 04/29/2010
	)	
and	)	
	)	
ABDUL RAHMAN AL-GHANIM (Individually and as Principal)	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
GEORGE H. LEE (Individually and as Principal)	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Administrator-Respondent	)	DECISION and ORDER

Appeals of the Order Denying Motion for Partial Summary Decision and Cross-Motion for Summary Decision, the Decision and Order on Remand, and the Order Denying Motion for Reconsideration, Leave to Introduce Newly Discovered Evidence and In the Alternative for Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Jennifer O'Sullivan and Edward J. Patterson III (Fulbright & Jaworski, L.L.P.), Austin, Texas, for employer and Abdul Rahman Al-Ghanim.

Edward D. Sieger (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Motion for Partial Summary Decision and Cross-Motion for Summary Decision, the Decision and Order on Remand, and the Order Denying Motion for Reconsideration, Leave to Introduce Newly Discovered Evidence and In the Alternative for Modification, and American Logistic Services and Abdul Rahman Al-Ghanim (employer or ALS) cross-appeal the Order Denying Motion for Partial Summary Decision and Cross-Motion for Summary Decision (2006-LDA-18) of Administrative Law Judge Lee J. Romero, Jr., 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). 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). The Board held oral argument in this case in Washington, D.C., on March 11, 2010.

This is the second time this case has come before the Board. Employer, a Kuwaiti company, hired claimant to work as a warehouse specialist in Iraq. Claimant filed a claim asserting that he injured his shoulder at work in December 2004. Following a hearing at which employer was not represented, the administrative law judge found that claimant sustained a work-related injury, cannot return to his usual work, and is entitled to medical and disability benefits. Relying on the district director's determination that employer was not insured for coverage under the Defense Base Act (DBA), the administrative law judge held two principals, Al-Ghanim, then-Chairman, and George Lee, then-President and Chief Executive Officer, together with employer, jointly and severally liable for the benefits awarded pursuant to Section 38(a) of the Act, 33 U.S.C.

§938(a).[1] Decision and Order at 4, 25. Employer and Al-Ghanim appealed, arguing that they did not receive the required ten days notice of hearing and, in fact, that they never received the notice of hearing. *See* 33 U.S.C. §919(c). The Board vacated the award of benefits and remanded the case for a new evidentiary hearing with proper notice to employer and the potentially-liable individuals and instructions to address all issues properly raised by the parties.[2] *J.T. [Tisdale] v. American Logistics Services*, 41 BRBS 41 (2007).

On remand, claimant filed a motion for partial summary decision, asserting that the contract under which he worked was either "with the United States" or an agency thereof or was "approved and financed by" the United States, bringing it within DBA coverage, 42 U.S.C. §1651(a)(4), (5), and that the Section 20(a), 33 U.S.C. §920(a), presumption applies to this issue. Claimant also moved for summary decision on the issues of average weekly wage and residual wage-earning capacity. Employer and Al-

[1]Section 38(a) states:

> Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said chapter in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure to payment of compensation as required by section 932 of this title.

[2]Mr. Lee did not appeal the award against him. Nonetheless, the Board vacated the award as to Mr. Lee because the applicability of the DBA had yet to be determined. While the appeal was pending, claimant obtained a default order from the district director and the Board denied employer's request for a stay of payments. Employer and the principals did not pay benefits, and claimant moved for enforcement of the award in federal district court. Despite the Board's vacating the award in 2007, the district court subsequently granted claimant's request. *Tisdale v. American Logistics*, No. C07-80051 MJJ, 2008 WL 928567 (N.D. Cal. April 4, 2008). Employer filed a motion for a new trial on May 28, 2008. There is no indication that the district court has ruled on employer's motion.

Ghanim, as an individual and principal, responded and asserted in a cross-motion that the DBA is not applicable.[3] The administrative law judge found that genuine issues of material fact remained regarding the identities of the parties to, and the source of financing for, the contract under which claimant worked, as those could not be "ascertained within the four corners" of the contract, and that genuine issues remain as to claimant's average weekly wage and wage-earning capacity. Therefore, he denied both claimant's motion for partial summary decision and employer's motion for summary decision.

On July 22, 2008, the administrative law judge conducted a formal hearing in this case. All parties, except Mr. Lee, appeared. The issue before the administrative law judge involved claimant's coverage under the DBA. Specifically, the administrative law judge addressed whether the contract under which claimant was employed was between ALS and the United States or an agency thereof since the contract was issued by the Coalition Provisional Authority (CPA). The administrative law judge found that, assuming Section 20(a), 33 U.S.C. §920(a), applies to the coverage issue, employer rebutted it by showing that, on its face, the U.S. was not a party to the contract. Decision and Order on Remand at 14. Further, the administrative law judge found that, even though U.S. forms were used and the Inspector General for the CPA (CPA-IG) was required to audit the contract, claimant did not establish that employer's contract was with the United States. As he found the evidence was, at best, evenly balanced, he concluded that claimant did not satisfy his burden of showing that the contracting entity, the CPA, was an agency or an instrumentality of the U.S. Government. Thus, the administrative law judge found no coverage under Section 1(a)(4) of the DBA. Decision and Order on Remand at 17; *see* 42 U.S.C. §1651(a)(4). Finally, the administrative law judge concluded that claimant failed to meet his burden of showing that the contract was approved and financed by the U.S. or agency thereof. He found that the contract itself is insufficient to so show, as it designated that payment was to be made by the Iraqi "Ministry of Interior" at the Republican Presidential Compound in Baghdad, Iraq, via "DFI Transfer." The administrative law judge noted that the CPA-IG's Quarterly Report stated that DFI funds are Iraqi funds but did not discuss the specific funding for this particular contract. Decision and Order on Remand at 18; Cl. Ex. 45 at 53. Accordingly, he found that claimant failed to establish that the U.S. "approved and financed" the contract at issue, and that, as a result, there is no coverage under Section 1(a)(5) because, at best, the evidence is in equipoise. Decision and Order on Remand at 18-19; *see* 42 U.S.C. §1651(a)(5). Accordingly, the administrative law judge denied claimant's claim for benefits. *Id.* at 19.

[3]Mr. Lee also responded, asking that he be removed from the claim and the service list because he no longer worked for ALS. Mr. Lee remains a proper party to this case, as he was the President of ALS at the time of claimant's injury and, thus, is potentially liable pursuant to Section 38(a) of the Act.

On February 23, 2009, claimant filed a "Motion for Reconsideration, Leave to Introduce Newly Discovered Evidence and in the Alternative for Modification." Claimant asserted that the administrative law judge failed to consider relevant evidence from an Army investigation and that claimant had newly discovered evidence to present in the form of his Department of Defense Contractor identification badge. Claimant contended this evidence altered the balance of the evidence in his favor. The administrative law judge rejected claimant's arguments, stating that the investigative reports were considered in the denial of the motions for summary decision, wherein claimant conceded they did not contain any final determinations as a matter of law, and the reports were not submitted into evidence at the hearing, despite claimant's having been told that only evidence admitted at the hearing would be considered. Order on M/SD at 3; Order on M/Recon. at 3. With regard to the identification badge, the administrative law judge stated that it was not newly discovered evidence, that claimant did not request the record be held open until he could retrieve his badge, and that the badge is unauthenticated hearsay which does not address the contractual issue at hand. Order on M/Recon. at 3-4. Thus, the administrative law judge denied claimant's motions and affirmed his decision on remand. Order at 1-5.

Claimant appeals the administrative law judge's denial of his motion for summary decision, the finding that his injury is not covered under Section 1(a)(4) or (5) of the DBA, and the denial of his motions for reconsideration and modification. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing that claimant is covered under Section 1(a)(4) of the DBA. BRB No. 09-0582. Employer cross-appeals the administrative law judge's denial of its cross-motion for summary decision. BRB No. 09-0582A.

Initially, we affirm the administrative law judge's denial of both parties' motions for summary decision. In determining whether to grant a party's motion for summary decision, the administrative law judge must decide, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). In this case, the administrative law judge found that genuine issues of material fact remained as to the identity of the parties to the contract and the source of financing.[4] Thus, without further evidence, the administrative

[4] The administrative law judge also found that genuine issues of material fact existed regarding claimant's average weekly wage and wage-earning capacity.

law judge concluded he could not resolve the dispute on the motions. Based on these findings, he properly denied the motions for summary decision and held a hearing. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

The issue presented on appeal involves claimant's coverage under the DBA.[5] The DBA applies, *inter alia*, to employees injured while employed under contracts with the U.S. Government relating to overseas public works, including construction projects, national defense, or war activities. *University of Rochester v. Director, OWCP*, 618 F.2d 170 (2d Cir. 1980); *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008); *Rosenthal v. Statistica, Inc.*, 31 BRBS 215 (1998); *Casey v. Chapman College, PACE Program*, 23 BRBS 7 (1989). Section 1(a) of the DBA sets forth the employment covered by the DBA. 42 U.S.C. §1651(a). Section 1(a)(4) provides that an employee is covered if he is engaged in employment "under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work. . . ." 42 U.S.C. §1651(a)(4). Section 1(a)(4) requires the United States or an agency thereof to be a party to the contract. *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990). Section 1(a)(5) provides that the DBA applies to employment "under a contract approved and financed by the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954. . . ." 42 U.S.C. §1651(a)(5).

[5]We reject claimant's assertions regarding the application of Section 20(a) to this issue. While the administrative law judge properly found that additional facts beyond those introduced in the motions for summary decision were needed to resolve the coverage issue, thus preventing the granting of summary decision to either party, the ultimate question as to whether the CPA is an agency of the U.S. is one of legal interpretation. Evidence regarding the CPA and the contract was introduced at the hearing, and the relevant facts have been found by the administrative law judge. The issues now in dispute concern the application of these facts involving the CPA and the contract to an appropriate legal test in determining whether the contract was with the U.S. or an agency thereof. As the Section 20(a) presumption does not apply to the legal interpretation of coverage issues, *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Alaska Airlines, Inc. v. O'Leary*, 216 F.Supp. 540 (W.D. Wash. 1963); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table), it does not apply in this case.

The contract at issue is titled "Solicitation/Contract/Order for Commercial Items," and the contract number is DABV01-04-C-0082. Emp. Ex. 33 at 43. It is set forth on U.S. Government GSA Standard Form 1149, and it states that the party to call for solicitation information is USAF Major Ronald W. Hirtle. In the "Issued By" box, the contract states "CPA - Contracting Activity." The "Accounting and Appropriation Data" box indicates funds would be from "DFI Transfer," and the payment was to be made by the "Ministry of Interior . . . Republican Presidential Compound, Baghdad, Iraq." The signatories were George H. Lee for ALS and Major Ronald W. Hirtle, who signed as the "contracting officer" in the block entitled "United States of America" on May 12, 2004. Emp. Ex. 33 at 43-44.

Although claimant invites attention to the reference to the United States in the box in which Major Hirtle signed, the contract, on its face, is between ALS and the CPA, and we agree with employer and the Director that the U.S. was not a party to this contract. Despite signing in a box identifying him as a representative of the U.S., another box identified Major Hirtle as the contracting agent, and there is no evidence that he was acting on behalf of, or had the authority to bind, the United States. *Laudes Corp. v. United States*, 86 Fed. Cl. 152 (2009) (*Laudes II*) (extensive involvement by U.S. personnel does not establish, without further proof, that those persons had the authority to bind the U.S. in contract). Mr. Al-Ghanim, on behalf of employer, testified that the contract was with the CPA, Emp. Ex. 33 at 41-42, and as the contract stated that Major Hirtle was the contracting officer and contact for the CPA, we affirm the finding that the contract was between ALS and the CPA, rather than with the U.S. *Laudes II*, 86 Fed. Cl. 152.[6] Therefore, Section 1(a)(4) does not confer coverage on the basis that the contract

[6]In *Laudes*, a contractor brought suit against the United States for breach of two contracts ("Phase I" and "Phase II") with the CPA to provide life support services at the Baghdad Public Safety Officer's Academy. The defendant U.S. filed a motion for summary judgment, and, for the purposes of the motion only, conceded that "the CPA operated as a 'United States entity' over which [the Federal Claims] court has jurisdiction under the Tucker Act." 28 U.S.C. §1491(a)(1); *Laudes Corp. v. United States*, 84 Fed. Cl. 298, 312 (2008) (*Laudes I*). The court concluded it did not have jurisdiction to address issues involving the contractor's inability to collect on Phase I because those services were to be paid from the DFI which were not U.S. funds. *Laudes I*, 84 Fed. Cl. at 312-318. As Phase II was funded exclusively with appropriated funds, the court had jurisdiction. *Laudes I*, 84 Fed. Cl. at 311. With regard to Phase II, Laudes claimed the U.S. breached express and implied contracts to facilitate payments from the Interim Iraqi Government. The U.S. moved for summary judgment. The court granted the Government's motion for summary judgment with regard to the express contract, as the U.S. was not a party to the written contract, despite having controlled all other aspects of the contract, such as drafting, performance, and administration, as the Iraqi Ministry of Defense signed the contract. Further proceedings were necessary, however, as the court

was with the U.S. and we must determine whether Section 1(a)(4) confers coverage because the CPA is an agency of the U.S. or whether the contract was approved and financed by the U.S. Government or an agency thereof pursuant to Section 1(a)(5). Before we address those issues, a brief history of the CPA is warranted.

The CPA was established approximately one month after the coalition forces took control of Baghdad, Iraq, in April 2003. The mission of the CPA, among other things, was to restore stability and security in Iraq, institute representative government, and facilitate economic recovery. *United States ex rel. DRC, Inc. v. Custer Battles, L.L.C.*, 376 F.Supp. 2d 617 (E.D.Va. 2005) (*Custer Battles I*), *rev'd in part*, 562 F.3d 295 (4th Cir. 2009); UNSCR 1493 (2003); Congressional Research Service, Library of Congress, "The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities," by L. Elaine Halchin (Apr. 29, 2004) (hereinafter "CPA Report") at 1.[7] In May 2003, the U.S. and the United Kingdom presented a joint letter to the United Nations confirming that coalition partners created the CPA to exercise temporary governmental powers in post-conflict Iraq. *Id.*; *Laudes Corp. v. United States*, 84 Fed. Cl. 298, 301 (2008) (*Laudes I*). President Bush appointed L. Paul Bremer to serve as the Presidential Envoy to Iraq, and Secretary of Defense Rumsfeld granted him the title of Administrator of the CPA. Mr. Bremer reported to the Secretary of Defense but had final approval of all efforts regarding the reconstruction efforts in Iraq. *Id.* A large majority of the CPA's personnel were U.S. military or U.S. civilian contractors and their employees. The rest were from other coalition countries. *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 298 (4th Cir. 2009) (*Custer Battles*), *rev'g in part* 444 F.Supp. 2d 678 (E.D.Va. 2006) (*Custer Battles II*); *Custer Battles I*, 376 F.Supp. 2d at 649-650.

The CPA had four sources of revenue: U.S. Congressionally-appropriated funds (appropriated funds); Iraqi funds confiscated by the U.S. and vested in the U.S. Treasury (vested funds); Iraqi assets seized by coalition forces (seized funds); and the

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found that the contractor presented evidence establishing it had dealings with U.S. contracting officers and that a genuine issue of material fact existed as to whether those personnel had the authority to enter into implied contracts on behalf of the U.S. *Laudes II*, 86 Fed. Cl. at 154, 164-165.

[7]This research appears to have been undertaken in conjunction with a bill that was pending before Congress at the time of the report, the Stabilization and Reconstruction Civilian Management Act of 2004, S.2127. The report can be found at http://fpc.state.gov/documents/organization/32338/pdf, and we hereby take judicial notice of it.

Development Fund for Iraq (DFI).[8] *Custer Battles*, 562 F.2d at 302; *Custer Battles I*, 376 F.Supp. 2d at 623-629; *Laudes I*, 84 Fed. Cl. at 301-303. The appropriated funds were the only fully non-Iraqi funds. The DFI was a bank account held by the Central Bank of Iraq at the Federal Reserve Bank in New York for the purpose of funding relief and reconstruction efforts in Iraq. *Custer Battles I*, 376 F.Supp. 2d at 623-627; *Laudes I*, 84 Fed. Cl. at 302; UNSCR 1493. DFI funds were to be disbursed at the discretion of the CPA in consultation with the interim Iraqi administration and were to be used for the benefit of the Iraqi people. Mr. Bremer, as administrator, had the authority to name contracting officers who had the authority to enter into contracts on behalf of the CPA to further its mission. *Custer Battles I*, 376 F.Supp. 2d at 626-627; *Laudes I*, 84 Fed. Cl. at 302-303. On June 28 2004, the CPA was dissolved by its own announcement and its authority was transferred to the Interim Iraqi Government (IIG). *Laudes I*, 84 Fed. Cl. at 303; CPA Report at 1.

With this background information, we now address whether the CPA was an agency of the United States for purposes of Section 1(a)(4) of the DBA.[9] The DBA does not define the term "agency;" however, the general definition of "agency" "includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. §451.[10] The United States Court of Appeals for the

[8]Vested funds were at one time Iraqi state funds invested in U.S. banks; they became the property of the U.S. following the executive order to confiscate those funds. Seized funds were Iraqi-regime assets which were confiscated by the occupying forces in Iraq and never left Iraq; they became the property of the U.S./coalition forces as the spoils of war. *Custer Battles I*, 376 F.Supp. 2d at 624, 626, 6641-644.

[9]It is not disputed that claimant was engaged in a "public work" under the ALS contract.

[10]Using this general definition, for example, courts have found that the Red Cross and the Government of the District of Columbia are not agencies of the Federal Government, but the Federal Savings and Loan Insurance Corporation is an agency of the U.S. *Federal Deposit Ins. Corp. v. State of New York*, 732 F.Supp. 26 (S.D.N.Y. 1990); *Walton v. Howard University*, 683 F.Supp. 826 (D.D.C. 1987); *District of Columbia v. Owens-Corning Fiberglas Corp.*, 604 F.Supp. 1459 (D.D.C. 1985).

Ninth Circuit, within whose jurisdiction this case arises,[11] has stated:

> The authority to act with the sanction of government behind it determines whether or not a governmental agency exists. The form the agency takes, or the function it performs are (sic) not determinative of the question of whether it is an agency, although it may be significant with respect to other questions, such as 'good faith', or whether there is an 'administrative regulation, order, ruling, approval or interpretation.'

Lassiter v. Guy F. Atkinson Co., 176 F.2d 984, 991 (9th Cir. 1949) (War Department was an agency of the U.S. under the Portal-to-Portal Act and contractors, in good faith, abided by the agency's command to pay no overtime wages).[12]

Precisely defining the status of the CPA is not an easy task, and few entities have addressed it.[13] As the CPA Report indicates, the creation of the CPA is somewhat obscure, as little documentation remains and none of it was entered into the record. The facts regarding CPA creation and operations are gleaned from such sources as the CPA Report and the few cases to address it, but no party has presented definitive evidence that the CPA either was or was not an agency of the U.S. In *Custer Battles I*, 376 F.Supp. 2d 617, and *Custer Battles II*, 444 F.Supp. 2d 678, the U.S. District Court for the Eastern District of Virginia discussed the status of the CPA in addressing whether fraudulent statements made to CPA officials constituted actionable claims under the False Claims

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[11]Pursuant to 20 C.F.R. §704.101, this claim was filed in OWCP District 2 in New York. The case was then transferred to District 13 in San Francisco. As the San Francisco district director filed and served the administrative law judge's decision, Ninth Circuit law applies. 42 U.S.C. §1651(b); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979).

[12]The Ninth Circuit noted that the Administrative Procedure Act defined "agency" as including "each authority of the Government of the United States whether or not it is within or subject to review by another agency" but excluding, *inter alia*, Congress, the courts, the governments of the possessions, Territories, or the District of Columbia, and military authority exercised in the field in the time of war or in occupied territory. 5 U.S.C. §551(1) (A)-(H) (formerly 5 U.S.C.A. §1001(a)); *Lassiter*, 176 F.2d at 991.

[13]The Board recently rendered a decision wherein it declined to address whether the CPA was an agency of the U.S. as it resolved the case on another basis. *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008).

Act.[14] In deciding this issue, the district court discussed whether the CPA was an agency of the U.S. The district court specifically acknowledged that the U.S. had substantial influence and control over the CPA and supplied a substantial part of its operating budget. Nevertheless, because the CPA was not established by Congress and did not have its funds coming from and returning to the U.S. Treasury, and because the CPA was created by coalition forces and recognized by the United Nations as "an entity through which the Coalition nations acted 'as occupying powers under unified command,'" *Custer Battles I*, 376 F.Supp. 2d at 650 (quoting UNSCR 1483, *infra*), the district court concluded that the CPA was not an instrumentality of its member states, but, rather, was its own entity.[15] *Custer Battles I*, 376 F.Supp. 2d at 650. The district court ultimately

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[14]In *Custer Battles*, relators, or informants, brought action under the False Claims Act (FCA) on behalf of themselves and the U.S. Government, alleging that the contractor, Custer Battles, submitted tens of millions of dollars of false claims to the CPA in connection with two contracts for services during the reconstruction of Iraq – a currency exchange contract and an airport security contract. 31 U.S.C. §3729(a); *Custer Battles I*, 376 F.Supp. 2d at 634. The district court granted in part the contractor's motion for summary judgment, limiting the relators' cause of action to that which would affect the U.S. Treasury coffers. *Custer Battles I*, 376 F.Supp. 2d at 646. The court found it unnecessary to resolve whether the CPA was an instrumentality of the U.S. for the purpose of assessing whether the contractor was liable under the FCA because the contracts were paid with U.S. funds, both vested and seized. However, the court acknowledged that CPA status might be material at some point during the course of the case and addressed the issue. Following a jury trial where the jury returned a verdict in favor of the relators, the defendants moved for a judgment as a matter of law. On the motion, the district court determined that the status of the CPA must be addressed, and it concluded that, as the CPA was not an agency of the U.S., fraudulent claims made to U.S. personnel acting on behalf of the CPA did not constitute violations of the FCA. *Custer Battles II*, 444 F.Supp. 2d at 678-679, 686-689.

[15]The court stated, 376 F.Supp. 2d at 650:

> [W]hile the substantial majority of the CPA staff was comprised of United States employees, a significant portion-13%-hailed from other Coalition partners. Thus, the CPA may also be described as an international body formed by the implicit, multilateral consent of its Coalition partners, which would not be subject to the specific laws of its member states, including the FCA. Given the fluid nature of the conflict in Iraq and the challenges of establishing a new government in a war zone, it is not surprising that the organization of the CPA appears at times to have been ad hoc and to have relied heavily on the resources of its largest contributing member. Thus, it would seem that, like NATO or any other international organization created

concluded that an allegedly fraudulent invoice presented to a U.S. official detailed to the CPA was not actionable under the False Claim Act. This conclusion, however, was reversed by the United States Court of Appeals for the Fourth Circuit, which held that U.S. officers continued to act in their official capacities as U.S. government employees despite their details to the CPA, and thus the claims were actionable under the False Claims Act. The court did not reach the question of whether the CPA was an entity of the U.S. *See Custer Battles*, 562 F.3d at 303-308. There is thus no appellate precedent on the status of the CPA, and the district court's discussion is *dicta* in a decision which was reversed.[16]

The United Nations Security Council adopted Resolution 1483 in 2003 addressing the situation in Iraq, and this resolution indicates that the CPA was a multi-national entity created for the purpose of restoring order and political structure to Iraq. UNSCR 1483. Specifically, the Council:

> Not[ed] the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recogniz[ed] the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority").

The Security Council also welcomed "the willingness of the Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority," and it requested that the Secretary-General appoint a representative for Iraq who would report on the post-conflict situation, coordinate among the international agencies and the United Nations, and, in coordination with the Authority, assist the people of Iraq in various humanitarian and reconstructive needs, including the

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> by the multilateral consent of multiple member nations, whether by treaty or otherwise, the CPA is not an instrumentality of each of its member states, distinctly subject to the laws of all of its members, but a wholly distinct entity that exercises power through a structure agreed to by its member states and that is subject to the laws of war and to its own laws and regulations.

[16]As *Custer Battles* does not control a conclusion as to whether the CPA should be considered an agency of the U.S. for purposes of DBA coverage, we need not specifically discuss the Director's arguments that the district court erred in its legal analysis of the issue and in applying an "exclusive control" test. *But see* discussion, *infra.*

development of an interim transitional administration until an internationally-recognized representative government was formed and assumed the Authority's responsibilities.[17] UNSCR 1483.

In a case involving a breach of contract claim against the United States, the defendant U.S. conceded, solely for purposes of its motion for summary decision, that the CPA "operated as a United States entity" thereby conceding jurisdiction in the Federal Claims Court. *Laudes I*, 84 Fed. Cl. at 312. Additionally, Congress twice identified the CPA as an entity of the United States in appropriations laws. In the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. 108-106, 117 Stat. 1209 (Nov. 6, 2003), Congress specifically appropriated money to "the Coalition Provisional Authority in Iraq (*in its capacity as an entity of the United States Government*)." 117 Stat. at 1225 (emphasis added). In the National Defense Authorization Act for FY2004, Pub. L. 108-136, §1203(b)(1), (3), 117 Stat. 1392 (2004), Congress stated that the CPA is a "civilian group" which reported to the Secretary of Defense and is a "Department of Defense entit[y.]" 117 Stat. at 1648. We also note that the USA.gov website, wherein there is an A-Z Index of Government Departments, includes the CPA as a government agency. *See* www.usa.gov/agencies/federal/all_agencies/c.shtml.

Given the varying statements regarding the CPA, it is understandable that the Congressional Research Service found the CPA's agency status unclear. CPA Report at 5-6. The report states that, while the CPA's mission was "fairly clear, other aspects of the authority [were] more obscure," and the available information produced by the Administration alternately denied that it was a federal agency, stated that it was a governmental entity, suggested it was created by the United Nations, suggested it was created by the United States, and suggested it was created by the United States and the United Kingdom. Thus, after exhaustive research of the CPA's establishment, personnel, reporting requirements, policy issues, and characteristics, undertaken while the CPA was still in existence, the Congressional Research Service was unable to reach a decision and concluded "[i]t is unclear whether CPA is a federal agency." CPA Report at summary.

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[17]Under its Charter, the United Nations called upon

> the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future[.]

In this context, and in the absence of a definition of "agency" in the Longshore Act or the DBA, we must determine whether the CPA is an agency of the U.S. for purposes of the DBA. Initially, the general standard set forth by the Ninth Circuit in *Lassiter*, 176 F.2d at 991, directs that the "authority to act with the sanction of government behind it" determines whether an agency exists. The Director asserts that the "degree of control" test espoused by the United States Court of Appeals for the Second Circuit in *Payne v. United States*, 980 F.2d 148 (2d Cir. 1992), is useful in this regard. *See also Kalinski v. Commissioner*, 528 F.2d 969 (1st Cir. 1976); *Morse v. United States*, 443 F.2d 1185 (Ct. Cl. 1971). The Director argues that, to be an agency, the U.S. must have a degree of effective control over the entity, although such control need not be exclusive, and he argues that under the factors set forth in *Payne*, and consistent with the purposes of the Act, the CPA is an agency of the U.S. as that term is utilized in the DBA. We agree with the Director.[18]

In *Payne*, the Second Circuit held that the Panama Canal Commission (PCC) was an agency of the U.S. within the meaning of the Internal Revenue Code, 26 U.S.C. §911.[19] The court affirmed the district court's grant of summary judgment, holding that the wages paid to an American employee of the PCC constituted taxable income and was not "foreign-earned income" that is exempt from taxes. In assessing whether the PCC was an agency of the U.S., the court utilized a test which "measures the degree of control the government exercises over the entity involved" as agreed upon by both parties to the case. *Payne*, 980 F.2d at 150. The court stated that the following factors are to be considered in determining whether an entity is an agency of the U.S.: "(1) power of the United States to initiate and terminate; (2) effectuation of government purposes by the entity; (3) exclusion of private profit; and (4) limitation of employment to government-connected persons." *Payne*, 980 F.2d at 150; *see also Kalinski*, 528 F.2d 969 (USAF Child Guidance Center was an "agency"); *Morse*, 443 F.2d 1185 (U.S. Employees Association of Tehran, Iran, is U.S. agency); *In re Nadybol*, 254 B.R. 352 (D.Md. 2000) (non-profit entity created to place gaming machines on military bases was an agency of U.S.); *In re Donaldson*, 51 T.C. 830 (1969) (commissary in Pakistan is U.S. agency).

[18]We note that the Ninth Circuit has stated that the Director's interpretation of the statute is due considerable deferences, as he is charged with administering the Act. *See, e.g., Hurston v. Director, OWCP*, 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993).

[19]The PCC was created by the Panama Canal Treaty and by Congress. The correlating legislation stated that it was an agency of the U.S. Additionally, the President of the United States appointed nationals to be members of the PCC Board, the PCC was established to effectuate the U.S. responsibilities under the Treaty, all revenue generated was to go into the Canal fund which was in the U.S. Treasury. Many of the employees were American, but citizens of Panama also worked at the PCC.

The Second Circuit determined that the PCC satisfied all factors and, consequently, was under the control of the U.S., making it an "agency" under Section 911 of the Internal Revenue Code. *Payne*, 980 F.2d at 152; *compare with McComish v. Commissioner*, 580 F.2d 1323 (9th Cir. 1978) (Trust Territory of the Pacific Islands is not an agency of the U.S. under the Internal Revenue Code).[20] We agree with the Director that the "degree of control" test is an appropriate method for determining whether the CPA was a U.S. agency and that it supports a conclusion that the CPA was an "agency of the U.S." under Section 1(a)(4) of the DBA.

The "degree of control" test first requires examination of the power of the United States to initiate and terminate the entity in question. Employer is correct that Congress did not create the CPA. However, direct creation by Congress is not necessary for an entity to be considered an instrumentality or agency of the U.S. *See Kalinski*, 528 F.2d 969 (child guidance center, created by the U.S. Air Force, to treat handicapped children of U.S.A.F. personnel, was an agency of the U.S.); *Morse*, 443 F.2d 1185 (employee association, which was created by the American Embassy employees in Iran to provide recreational activities, was an agency of the U.S.); *Nadybol*, 254 B.R. 352 (recreation machine fund, created by the U.S. Army to install slot and gaming machines on military bases, was an agency of the U.S.).

The CPA was created after the coalition forces secured control over Baghdad. Although there is some confusion over the identity of the person within the U.S. government who actually created the CPA, the Commander of the Coalition Forces, General Tommy R. Franks, first announced the creation of the CPA. The actions of President Bush and Secretary Rumsfeld gave Mr. Bremer control over the CPA. Though other countries participated in the coalition, the U.S., and in particular the Department of Defense, had significant control over the coalition forces, the leadership and the day-to-day functioning of the CPA. Moreover, it was that same leadership which declared the termination of the CPA when it was time to transfer power to the IIG. *See Laudes I*, 84

[20]The United States Court of Appeals for the Ninth Circuit concluded that, although the Trust Territory government had significant ties to its Administrator, the United States, U.S. control was limited by the international agreement under which the Trust Territory was created, and the U.S. did not have the authority to terminate this quasi-sovereign government. *McComish*, 580 F.2d at 1329-1331. Moreover, the Ninth Circuit disagreed with the United States Court of Appeals for the Fifth Circuit's decision in *Groves v. United States*, 533 F.2d 1376 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1977) (Trust Territory is U.S. agency under Internal Revenue Code), which weighed heavily the significant amount of funding provided by the U.S. and the control over the administration of the Trust Territory granted to the President and the Department of the Interior. *McComish*, 580 F.2d at 1328; *Groves*, 533 F.2d at 1383-1386.

Fed. Cl. at 300-301, 308; CPA Report at 2, 4. Although the U.S. may not have exercised exclusive power in creating and terminating the CPA, it certainly wielded significant authority.

The next factor is whether the entity serves a government purpose. The mission of the CPA was to serve the Iraqi people by providing a temporary government, security, humanitarian relief, and reconstruction in a war-torn society. UNSCR 1483. As the Director points out, Article 43 of the Hague Convention – War on Land, 36 Stat. 2277, 2306 (1907), makes the occupying forces responsible for the reformation of the occupied state:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

As the occupying forces had the responsibility to guide the reformation of Iraq, and as the U.S. was the leader of those forces, the CPA served not only Iraqi interests, but also U.S. interests. In this regard, as discussed above, Congress referred to the CPA as an agency of the United States.

The next element addresses whether there is an exclusion of private profit. Employer incorrectly presumes that an entity is an agency of the U.S. only if all of its funds flow to and from the U.S. Treasury. While the *Payne* court found that the PCC obtained its funds from, and deposited its revenue in, the Treasury coffers, such facts are not the only way by which to demonstrate a lack of private profit. In *Kalinski*, the United States Court of Appeals for the First Circuit held that the Child Guidance Center, a non-profit entity developed by the U.S. Air Force, was an agency of the U.S. Its funding came from appropriated funds, grants, and fees charged for services, all subject to military control, and the money was used to pay for overhead, supplies, and staff wages. Its operations were audited by the Air Force Comptroller. *Kalinski*, 528 F.2d at 972-974; *see also Morse*, 443 F.2d at 1189 (operating funds for employee association came from appropriated funds and membership fees; all profits were to be kept to a minimum and used for welfare and recreational activities); *compare with Mendrala v. Crown Mortgage Co.*, 955 F.2d 1132 (7th Cir. 1992) (Federal Home Loan Mortgage Corporation privately owned and controlled by shareholders and receives no appropriations from Congress; it was not an agency of the U.S. for purposes of the Federal Tort Claims Act).[21] In this

[21]The court held that the corporation was also structured to function independently of the government, and the fact that it served a federal purpose was insufficient to outweigh the other factors. *Mendrala*, 955 F.2d at 1139.

case, the CPA was not a private profit enterprise but one which expended funds for the governmental purposes of providing a temporary government, security and reconstruction in Iraq. The CPA's funds came from four governmental sources, three of which constituted U.S. assets. *Custer Battles*, 562 F.2d at 302; *Custer Battles I*, 376 F.Supp. 2d at 623-629; *Laudes I*, 84 Fed. Cl. at 301-303. Its financial activities were audited by the CPA-IG pursuant to U.S. Public Law 108-106 to ensure there were no improprieties or private profits. *See* Cl. Ex. 45. Although the contract under which claimant worked, on its face, did not involve appropriated or other U.S. funds, the issue under Section 1(a)(4) is the status of the contracting entity, not the financing of one particular contract. As the CPA used government funds in pursuit of government purposes, it was not a private profit-making enterprise.

Finally, the degree of control test addresses whether employment in the entity is restricted to government-connected persons. In this case, the leadership of the CPA was composed mainly of U.S. government-selected civilians and military personnel. Overall, U.S. citizens constituted 87 percent of the employees of the CPA while the remaining 13 percent came from other coalition countries. *See Custer Battles I*, 376 F.Supp. 2d at 650. As the "degree of control" test does not require exclusive control, it is necessary only to demonstrate that the government has some degree of control over the entity. *See Payne*, 980 F.2d 148 (participation by Panamanians on Board of PCC did not preclude finding PCC an agency).

Our analysis leads us to accept the Director's position that the CPA is an agency of the U.S. for the purposes of conferring coverage under Section 1(a)(4) of the DBA. The CPA clearly possessed the "authority to act with the sanction of [the U.S.] government behind it." *Lassiter*, 176 F.2d at 991. Thus, the ALS contract under which claimant worked was entered into with an agency of the U.S. Not only does this conclusion coincide with Congress's statements in the appropriations laws but also with the evidence of record demonstrating that the U.S. considered itself to be the injured party when there were fraudulent actions committed during the renewal process involving this contract.[22] Cl. Ex. 46 at 3, 9-12;[23] M/Summary Decision exhs. 2-4 (investigative reports charging Mr. Lee with committing fraud against the U.S. during the renewal of

[22]The renewal process occurred after claimant's injury.

[23]Claimant submitted the "Information" and "Plea Agreement" in *United States v. Selph*, Case No. 1:07-cr-00295-RBW (D.C. Cir. 2007), wherein defendant Selph, who served as a member of the selection team for "the DoD warehousing contract DABV01-04-C-0082," pleaded guilty to bribery and conspiracy related to the solicitation of warehousing construction bids. The counts were brought as violations of 18 U.S.C. §201.

the contract at issue). Further, contrary to employer's arguments, we agree with the Director that treating the CPA as an agency of the U.S. in this case serves the purposes of the DBA.

The purpose of the DBA is to provide uniform workers' compensation coverage for injuries or deaths of employees at military bases outside the United States and certain other employees engaged in public works projects outside the continental limits. *See Kalama Services, Inc. v. Director, OWCP [Ilaszczat]*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004); *O'Keeffe v. Pan Am World Airways, Inc.*, 338 F.2d 319 (5th Cir. 1964); 32B Am. Jur. 2d Federal Employers' Liability, Etc. §133; *see also* 86 U. Det. Mercy L. Rev. 407, 416-417 (2009) discussing workers' compensation law for employees who work abroad; (author noted that DBA employees are often unable to use foreign courts to collect against contractors because the courts do not have jurisdiction over military contractors, or if a third party is responsible, the lack of familiarity with the court system and the law may discourage an employee's claims). As the Director argues, Congress provided for broad coverage under the DBA for the purpose of providing uniform workers' compensation coverage to employees working on overseas defense- and public works-related contracts. Such coverage ensures that these employees are properly compensated for work-related injuries without relying on the uncertainties of foreign laws, and it ensures that employers are not exposed to tort liability. Holding that employees working under a contract with the CPA are not entitled to coverage would create a gap in this scheme of coverage for the 13 months of the CPA's existence.[24] The claimant in this case is an American citizen employed under a public works contract involved in the rebuilding of Iraq after occupation by the American-led coalition forces. Further, the coalition forces created a temporary government of Iraq, the CPA, and the U.S. maintained a significant degree of control over the CPA, which was the contracting agency in this case. Based on the totality of the circumstances here, we hold that claimant was employed under a contract with an agency of the U.S. and is covered under Section 1(a)(4).

[24]As the Director stated at oral argument, employees working under CPA contracts could be covered under other provisions of Section 1 of the DBA, thus resulting in disparate treatment.

Accordingly, we hold that the CPA is an agency of the U.S. within the meaning of Section 1(a)(4) of the DBA. As a result, the administrative law judge's denial of benefits is reversed, and the case is remanded to the administrative law judge for consideration of the issues on the merits.[25]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[25]We reject claimant's arguments concerning the administrative law judge's denial of his motions for reconsideration, *see United States v. Ortiz*, 136 F.3d 161 (D.C. Cir. 1998); *Bell v. Herbert*, 476 F.Supp. 2d 235 (W.D.N.Y. 2007), as claimant has not shown there was any abuse of discretion in denying the motions. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); 29 C.F.R. §18.54(c). Additionally, in light of our decision herein holding claimant's injury covered by Section 1(a)(4) of the DBA, claimant's arguments concerning the denial of his motion for modification are moot, and we need not address coverage under Section 1(a)(5).