

***STATEMENT  
OF  
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U.S. DEPARTMENT OF LABOR***

***DOMESTIC POLICY SUBCOMMITTEE  
OVERSIGHT AND GOVERNMENT REFORM COMMITTEE***

***Thursday, June 18, 2009  
2154 Rayburn HOB  
10:00 a.m.***

Thank you, Mr. Chairman. My name is Seth Harris. I am the Deputy Secretary of the Department of Labor. The Department's Office of Workers' Compensation Programs (OWCP) is responsible for overseeing, among other workers' compensation activities, the provisions of the Defense Base Act (DBA) and the War Hazards Compensation Act (WHCA).

I appreciate this opportunity to appear before you today to discuss the Department's roles, responsibilities, and values as applied to these statutes. The OWCP shares the Committee's concern that civilian contractors who work overseas in support of our military and civilian agencies are not in all cases receiving prompt and appropriate benefits to remedy the physical, psychological and financial effects of injuries that happen in the course of their employment. Employees should know what benefits they may be entitled to and how to access them. Employers and their insurance carriers should have systems in place to respond to injuries and should voluntarily provide necessary medical benefits and monetary compensation for disability or death as quickly as possible. Reducing the consequences of work related injuries is OWCP's primary goal. I look forward to working with Congress and our stakeholders to ensure that injured workers and their families receive the benefits to which they are entitled, and to address the obstacles employers and their insurers encounter in delivering benefits to injured workers.

The 1941 Defense Base Act (42 U.S.C. § 1651 et seq.) is an extension of the Longshore and Harbor Workers' Compensation Act (Longshore Act) (33 U.S.C. § 901 et seq.). The DBA covers all workers, regardless of nationality, who are injured or die while working overseas under contract to federal agencies. Since 1950, the DBA has been administered by the Department of Labor (DOL). Like state workers' compensation systems, benefits under the DBA are paid by private insurance companies. The cost of the premiums for the DBA insurance policies is included in the contracts let by the federal agencies. The costs of benefits paid by

the insurer for DBA claims arising from a war-risk are eligible for reimbursement by the federal government under the War Hazards Compensation Act.

From an obscure program with no more than a few hundred claims a year, the Defense Base Act has undergone a significant expansion in recent years, as contractors have taken on an ever-increasing role in supporting our war and reconstruction efforts in Iraq and Afghanistan. In 2007, OWCP received over 10,000 new reports of injury and death under the DBA. Originally established to protect a much smaller and more homogenous group composed primarily of engineers and construction workers, the DBA program has been hard-pressed to successfully support the efforts of two hundred thousand workers, many on the front lines in combat zones, engaged in nearly every type of work. Although the Department of Labor has worked hard to see that prompt and appropriate benefits are delivered under this statute, and we believe that the majority of participants in the DBA program have as their goal effectively addressing the needs of our civilian contractors working in war zones, we acknowledge that significant problems have been identified in several important aspects of the program.

Congress has clearly communicated its concern about the cost of DBA insurance and has directed the Department of Defense (DOD), the largest DBA contracting agency, to study alternative approaches to procuring such insurance. DOD will be submitting a report to Congress on cost issues in July 2009. DOL has provided technical assistance to DOD and other contracting agencies in their evaluation of various procurement options and insurance acquisition strategies. DOL will continue to do all we can to assist in this effort. There are a variety of alternative approaches, each with its own sets of strengths and weaknesses, and I will address some of them later in my statement.

Other critical administrative issues must be addressed. These include making sure that insurance coverage is obtained for all contractors and subcontractors; helping workers understand their rights under the DBA; and reducing the delays and disputes that occur in the claims process.

When reconstruction efforts began in Iraq in mid-2003 and increasing numbers of civilian contractors were deployed overseas, DOL recognized the need to educate contractors, subcontractors, contracting agencies, and insurance brokers to ensure that all had appropriate DBA insurance coverage. There are a number of unique obstacles and challenges that make this effort especially difficult. One is the involvement of overseas contractors with no presence in the United States, making effective communication extremely difficult. Distance, language differences, time differences, and lack of local infrastructure magnify these communication difficulties. Prolific and layered subcontracting, down to the smallest local 'Mom & Pop' business that actually provides, for example, janitorial services on a military base in rural Iraq, makes ensuring universal coverage nearly impossible. DOL has made efforts through the contracting agencies and the prime contractors to communicate the DBA's insurance

requirements to all subcontractors, but DOL is limited in its ability to guarantee that all employers have the necessary insurance, as there is no comprehensive system for tracking overseas contracts, contractors and subcontractors, and workers under each contract. While the prime contractor may ultimately bear the risk for any losses when a worker for a small local subcontractor suffers injury, it is sometimes difficult for DOL staff to identify the employer, the prime contractor, and the responsible insurance carrier. This can make claims investigation time consuming because establishing the employment relationship is a prerequisite to benefit eligibility. A related problem arises when, in the competition for subcontracts, some companies decide to go without insurance in order to lower their costs. Identifying uninsured employers is difficult in the best of circumstances – adding small foreign subcontractors to the equation magnifies the challenge. The Department of Defense, the State Department, and USAID have recently implemented a data system to track contractors and contractor personnel operating in Iraq and Afghanistan. DOL plans to work with these agencies to leverage this data and improve compliance with DBA insurance requirements among contractors and subcontractors.

Ensuring that all covered workers understand their rights under the DBA is similarly problematic. While communicating with American employees of major contractors is relatively straightforward, reaching foreign workers from countries around the globe, employed many subcontracting levels below the prime contractor, is especially complicated. In one instance, the United States prime contractor subcontracted with a company in Nation A to transport supplies. The subcontractor then hired employees from Nation B to transport supplies from Nation C, across Nation D, and into Nation E. These circumstances are not unique. DOL has addressed this challenge by educating agency contracting officials and prime contractors of the need for DBA insurance through each level of subcontracting; by making it clear to the prime contractors and their insurance carriers that it is their responsibility to provide DBA information to covered workers; and by posting on the DOL website information about the DBA and the claims process, both in English and in Arabic.

One of the Department of Labor's strategic goals is to "Reduce the Consequences of Work Related Injuries," and we have been directing our efforts toward improving the delivery of benefits. The Department oversees benefit delivery by receiving and monitoring reports of injury and of benefit payments, and providing informal but critical dispute resolution services. We educate the various participants about their rights and responsibilities under the DBA, and provide technical and compliance assistance whenever necessary. Our district directors and national office managers regularly speak at industry conferences and seminars to highlight current trends and recommend improvements in claims handling practices. We maintain a robust website to provide claim and insurance information to program participants, including Arabic translations of key DBA information and claim forms.

We also monitor the claims decisions of the insurance industry through our review of individual claims records, and provide corrective guidance and compliance assistance when we discover errors and omissions. For example, if an insurance company reports that benefits are being paid at an incorrect rate, our district office claims examiners notify the parties of the error and request an immediate adjustment. If benefits are suspended based on erroneous or missing medical documentation, we recommend that benefits be continued pending submission of the requisite reports. Reminders are issued to insurance companies if required claims actions are not performed when due. If any dispute arises or if either party to a claim fails to respond appropriately, we convene an informal conference to discuss and resolve issues.

The issue of Post-traumatic Stress Disorder (PTSD) claims provides a good example of DOL efforts to improve outcomes under the Defense Base Act. In early 2006, when the inventory of PTSD claims began to rise, we convened a meeting with insurance industry leaders to heighten their awareness of the issue, address common problems encountered by the claims handling community, and share resources and best practices in resolving these complex claims. We continue to monitor the industry's progress with this type of claim to see that they are handled in accordance with law, but also in a sensitive fashion given the war-zone source of many such claims.

To strengthen our claim monitoring efforts, we redistributed DBA claims from the initial intake in the New York district office to district offices around the country. Injured U.S. workers now have access to our district office personnel located closer to their residence. All district office staff also receive training in the best DBA claim practices based on the work done in our New York office, which has the most experienced DBA staff.

Issues have been raised with respect to the execution of the claims process. We have worked hard to improve our internal processes to meet the needs of claimants and to assist the insurance industry in meeting its obligations. Despite the age-old tradeoff between labor and industry at the heart of workers' compensation -- predictable benefits in exchange for foregoing tort lawsuits -- most workers' compensation systems remain inherently contentious. Insurance companies are required to pay only the claims that meet certain legal criteria, that is, the medical condition must be related to employment and the disability must be supported by medical evidence; thus, insurance carriers investigate claims thoroughly before authorizing benefit payments. Under normal conditions, this can result in delay; given the nature of claims under the DBA, the delay can be extensive. The nature of some injuries, especially those of a psychological nature such as Post-traumatic Stress Disorder, can make investigation time-consuming and dependent on difficult-to-obtain supporting medical reports, at times resulting in frustration for all involved. That the traumatic incident occurred in a foreign country, thousands of miles from the United States, sometimes in the fog of war,

with little local infrastructure for investigation and reporting, makes the claims adjustment process even more challenging.

As in any workers' compensation system, the DBA insurer relies on factual and medical evidence to establish claim eligibility, both initially to satisfy threshold requirements and subsequently to establish continuing eligibility for benefits. Some of the delays in carrier claim decisions are due to the complexity of the underlying entitlement issues that often depend on expert medical opinion for resolution. The medical sector does not always work with the speed that our stakeholders expect or want. Evaluation and testing, treatment, discovery, and reporting all take time; securing competent medical opinions from overseas is frequently difficult. While the DOL has found no deliberate intent to delay claims handling, we have discussed and will continue to discuss with insurers the amount of time required by some claims adjusting behavior.

The recent media coverage of several injured contractor employees highlighted some of the systemic problems with the DBA claims process. In the majority of these cases, the insurer voluntarily paid compensation and medical expenses without a formal award once the employer reported the injury, and those outcomes reflect how the system should work. In one case, the injured worker received vocational rehabilitation services from DOL and returned to work with another stateside employer. However, disputes subsequently arose regarding various aspects of these claims. OWCP claims examiners promptly conducted informal conferences and in most cases issued recommendations favorable to the claimants. If the parties still were unable to resolve the issue in dispute, the case was promptly referred to the Office of Administrative Law Judges (OALJ) for formal hearing. In two cases, disputes arose after the ALJ had entered an award of benefits; one was resolved after an informal conference; the other required a second referral to the OALJ.

We continue to work on our ability to monitor, measure, and improve the claims processes in the DBA program. We are establishing new performance measures for the program, with plans to produce and publicize an 'Industry Report Card,' which will measure how quickly insurers and self-insured employers report injuries and initiate payments. We have just added a large number of "Frequently Asked Questions" to our website to educate and assist all program participants in the claims process. Information available on the website includes a basic discussion about DBA coverage and a reference for contractor employees on how and where to report an injury and file a claim. Quarterly statistics on injuries and deaths as captured in DBA case reports will also be available.

DOL is committed to improving the DBA program to meet participants' needs while working to reduce claim delays, and meet other challenges. In light of increasing claims volume, claim complexity, and escalating demands for detailed reporting, DOL is reviewing the adequacy of its existing data system used to monitor DBA activity. We will look for opportunities to upgrade and strengthen

that data system. DOL will also emphasize its educational and technical assistance role by continued improvements to its website. In addition, DOL will study the feasibility of educating and certifying claims adjusters who work for private DBA insurers, setting benchmarks to monitor their claim-handling proficiency and providing for decertification of those claims adjusters with substandard performance.

Despite our efforts to improve various administrative aspects of the DBA program, some problems persist both with insurance and claims administration. Some of the insurance problems may be addressed when the DOD presents its proposals to Congress later this summer. Other problems are inherent to DBA claims and are not easily susceptible to administrative remedy.

On the insurance side, DOL's viable options for encouraging carriers to timely process claims or keep premium costs down are limited. DOL can only authorize insurers to write DBA insurance if they are authorized by at least one State, a United States territory, or the District of Columbia to write workers' compensation insurance. Foreign insurance companies cannot, therefore, cover DBA. Many of the authorized companies will only accept U.S. risks because they are not equipped to cover overseas employers, limiting the market for foreign employers. DOL has no authority to set or oversee premiums; although DOL may refuse reimbursement of a war hazards claim if OWCP were able to determine that the DBA premium included an additional charge or loading for such hazard. While DOL may suspend or revoke an insurance carrier's authorization to write DBA insurance for good cause, this remedy leads to a reduction in the available market (only three companies currently write the vast majority of DBA policies) and may lead to corresponding upward pressure on prices.

Further, local companies in Afghanistan and Iraq may be declined by U.S. insurers because their underwriting profile is unsuitable or, given the increase in DBA claims generally, U.S. insurance companies may not have the capacity to accept these additional risks. Since there is no market of last resort—similar to state-assigned risk pools—that would allow an employer to buy insurance from a designated DBA insurer if no other coverage is available, foreign companies may be excluded from the contracting process altogether.

One common complaint among smaller contractors is that most insurers require a minimum premium to cover their administrative costs. This means that absent a single source contract obliging the insurer to accept all risks at the same rates, small contractors with a limited scope of work are charged disproportionately high rates, even assuming they would otherwise have access to DBA insurance.

As local subcontracting proliferates, we encounter more instances of uninsured employers who either are not aware of the DBA insurance requirement or who believe that DBA insurance is not required. By law, an uninsured employer is responsible for payment of DBA benefits. When payment of benefits cannot be

enforced against any employer, claims are paid as a last resort from a Special Fund, which receives assessments levied on all carriers and self-insurers under the Longshore Act and its extensions. The increasing financial burden resulting from uninsured employers would thus fall on private-industry members, many of whom have no connection with work performed overseas but rather are stevedoring, ship building and ship repair companies.

Another potential problem confronting the current system is the financial security of the insurance carriers themselves. State guaranty funds, which protect employers under their local workers' compensation statutes, do not cover DBA risks. DOL requires insurers, as a condition of their continuing authorization, to post security based on their outstanding DBA-benefit obligations. If a carrier becomes insolvent, the employer is bankrupt, and the security is exhausted, the Special Fund would once again become the payor of last resort. Thus, under the current scheme, the cost of civilian contracting would be passed on to private industry in the U.S. that has no connection to the work performed overseas.

The claims administration side of the DBA system has its problems too. The lack of a comprehensive system of tracking overseas contracts, contractors and multiple layers of subcontractors, and workers under each contract limits DOL's ability to ascertain contractor compliance with the DBA insurance requirement. It also impedes the prompt and accurate identification of the insurer responsible for each covered injury. This problem may be alleviated if there were a central system for securing insurance and reporting and tracking injuries that may be utilized across contracting agencies and DOL. DOD, DOS, and USAID have established a joint tracking system for their contractors and contractor personnel in Iraq and Afghanistan, and this will go a long way to facilitate matching injured workers with their responsible employers in case of injury.

Without an efficient system for reporting injuries and deaths, delays in claim investigation and early claim resolution arise. This problem is particularly acute among small local subcontractors who do not understand the concept or the requirements of workers' compensation coverage. Further complications include the difficulty of providing foreign workers with clear information about the DBA, the lack of local resources to assist in filing claims, and language barriers.

Finding a comprehensive solution to these insurance and claims processing problems has proved challenging. Using a single-source-insurance provider such as the State Department and the Army Corps of Engineers currently have in place overcomes the problems associated with access to insurance and minimum premiums; the insurer must accept all risks at the same rates set by the contract. But the single carrier needs to demonstrate that it has both the financial capacity and claims handling ability to service the contract. Currently, only one company (CNA) is bidding on these contracts. If that company does not wish to renew, the single-source option may no longer be viable or not as attractive. Also, since single-source contracts are agency specific, employers who contract with more

than one agency may be covered for DBA liabilities by two different insurers, creating another problem when injuries occur. For example, an employer providing personnel to two agencies with different insurers might assign the same worker on a rotating basis between the two agencies. If the worker was killed in the line of duty, it may not be immediately apparent which insurer should respond, although the right to benefits is beyond doubt. Also, a single-source insurance program does not cure the problem of a contractor's failure to secure DBA insurance, and does not guarantee the long term financial soundness of the single source provider.

Another insurance strategy that has been under consideration is a government-wide self-insurance plan. This option would create an entity similar to a state insurance fund or a private captive insurance company which would automatically extend DBA insurance protection to all eligible contracts, subcontracts, and locations overseas and cover all employees working under those contracts and in those locations. There would be no individual insurance policies. Instead, there would be blanket insurance coverage for all DBA risks. This plan would alleviate most of the problems discussed above, and would also minimize the disparity in claims handling by different insurance carriers and reduce the incentive for litigating disputes. The cost of workers' compensation benefits would flow directly back to the contracting agencies, without the added layers of profit markup by the contractors, insurance brokers, and insurance carriers. It would also eliminate the need for a separate war risk hazard determination (currently the costs under the War Hazards Compensation Act are paid out of the Federal Employees' Compensation Fund and not charged back to the agencies).

Additional options being considered would require devoting more resources to delivering benefits to injured overseas workers and their families. While insurance companies have been hiring overseas adjusters to assist in the claim-filing and investigation processes, more could be done, such as providing contracting agency staff at local embassies to provide additional support. DOL will also explore ways to improve the dissemination of DBA insurance information to the smaller local subcontractors through the contracting agencies and the insurers.

Among the challenges participants experience in the DBA system are delays and the length of time required to navigate the dispute resolution mechanism. Although DOL provides an effective and efficient informal dispute resolution service that resolves disputes in an average of about eight months, cases that require formal litigation may take much longer. Further, for claims arising from a multi-national workforce deployed around the globe, support systems to assist in perfecting a claim, presenting necessary documentation, and engaging in appeals - - e.g., union representation and access to an effective plaintiff bar -- may not be available. Consideration could be given to decoupling the DBA adjudicatory process from the standard Longshore Act requirements to offset these deficiencies. Revisions might be made to the DBA that would streamline the

adjudication processes, enhance the ability of overseas claimants to participate in the informal resolution system, enhance some of the benefit payment requirements, provide incentives to insurers for prompt decision making, and reduce the need for litigation. DOL will be pleased to work collaboratively with the contracting agencies, insurance companies, claimant attorneys, and Congress to draft proposals to achieve these improvement goals.

Mr. Chairman, the Department of Labor has initiated conversations about alternatives that might improve the functioning of the Defense Base Act with the primary contracting agencies, including Defense, State, and USAID. We look forward to the DOD report on its analysis of insurance options to be submitted to Congress in July 2009. We will continue to work to improve our oversight of the current system, but we would welcome the opportunity to participate in additional dialogue about enhancing that system.