

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.**

**IN THE MATTER OF R.M., S.W., S.Y., A.K.Y.,)
R.H., A.B.A., A.A., M.A., M.S.)**

Claimants,)

v.)

SALLYPORT GLOBAL SERVICES,)

Employer,)

CONTINENTAL CASUALTY COMPANY)

Carrier)

**Case Nos. 2010-LDA-00538, 2010-
LDA-00539, 2010-LDA-00540, 2010-
LDA-00541, 2010-LDA-00542, 2011-
LDA-00001, 2011-LDA-00002, 2011-
LDA-00003, 2011-LDA-00004**

**CLAIMANTS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
DECISION AND CLAIMANTS' CROSS-MOTION FOR SUMMARY DECISION**

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Claimants' Beneficiaries¹ respectfully submit this: 1) Opposition to Defendants' Motion for Summary Decision and 2) Claimants' Cross-Motion for Summary Decision.

I. PRELIMINARY STATEMENT

Claimants' Beneficiaries are the dependant parents of nine Iraqi translators who were kidnapped and brutally murdered while working for Sallyport Global Services ("Sallyport"), a defense contractor providing translation support for Coalition Police Training operations in and around Basra, Iraq. Following the deaths of the Claimants, Sallyport's Defense Base Act (DBA) insurer, Continental Casualty Insurer (CNA), conducted an "investigation" into Claimants' eligible beneficiaries. That investigator, Z.M., met with the families, collected evidence of dependency and assured the survivors that compensation would be forthcoming. Nonetheless, CNA presented false reports to the Department of Labor's Office of Worker's Compensation Programs (OWCP) contending that Claimants' Beneficiaries were ineligible for DBA benefits. Indeed, in most cases CNA intentionally omitted the pages of its own investigation reports that recorded the information compiled by its investigator from its filings with OWCP. As a result of the false reports, OWCP issued orders that failed to recognize that Claimants' Beneficiaries were eligible and should receive compensation. However, these orders were never served on the Claimants' Beneficiaries, who did not have actual notice of the orders until November 15, 2010.

¹ Claimants' Beneficiaries are R.M.'s (2010-LDA-00538) mother, B.K.; S.W.'s (2010-LDA-00539) mother and father: B.H. and H.A.; S.Y.'s (2010-LDA-00540) mother and father: S.M. and A.Y.; A.K.Y.'s (2010-LDA-00541) mother and father: S.K.; R.H.'s (2010-LDA-00542) mother and father: S.H. and A.A.; A.B.A.'s (2011-LDA-00001) father, J.B.A.; A.A.'s (2011-LDA-00002) mother, S.M.; M.A.'s (2011-LDA-00003) mother and father: Y.N. and A.Y.; and M.S.'s (2011-LDA-00004) mother, F.S.

As described herein:

1. **All of Claimants' Beneficiaries are "surviving" fathers or mothers of the deceased and were supported "wholly or in part" for one year prior to Claimants' death.**
2. **All of Claimants' Beneficiaries cooperated with CNA's investigation of Claimants' eligible beneficiaries, and all of Claimants' Beneficiaries provided undisputed evidence of their dependency on the Claimants.**
3. **CNA's investigator led Claimants' Beneficiaries to reasonably believe that they would be receiving compensation.**
4. **The investigation reports CNA has produced confirm that CNA knew of the dependency of Claimants' Beneficiaries on the Claimants, yet withheld these portions of the investigation reports from the Department of Labor.**

Yet, Defendants have moved for summary decision, arguing that Claimants' claims are untimely.

As described below, the statute of limitations has not run on these claims. Moreover all of the claims are timely under the applicable statutes, regulations and case law. In addition, Defendants' misrepresentations to both the Claimants' Beneficiaries and the Department of Labor estop Defendants from asserting an untimeliness defense. Moreover, even if such defense were available, the extraordinary circumstances in Iraq, including a bloody civil war and the particular vulnerability of Iraqi translators and their families, tolls the statute of limitations.

Finally, there is no evidence in the record disputing that the Claimants' Beneficiaries are entitled to benefits under the DBA. As such, Claimants cross-move for summary decision.

II. BACKGROUND AND PROCEDURAL HISTORY

On October 29, 2006, a bus transporting the Claimants to work was hijacked by militia. Claimants were forced from the bus provided by Sallyport, split into groups of four, and taken to

different areas around Basra where they were shot dead execution style, with their bodies being dumped in and around Basra.²

A. Violence in Iraq Was Unrelenting and Iraqi Translators Were Extremely Vulnerable

Meanwhile, the civil war which ravaged the country raged on, and the families of the Claimants lived in both fear of further retribution from insurgents for the assistance their children had provided to the Coalition Forces as translators and in increasingly desperate poverty due to the loss of income and assistance that their deceased sons had provided.

At the time of the Claimants' death, Iraq was "marked by unrelenting, spiralling and increasingly sectarian violence."³ See Declaration of Joost Hilterman ("Hilterman Decl.") ¶¶ 6-9, attached as Ex. 1. The security and human rights situation in Iraq worsened significantly as the conflict escalated into a sectarian civil war and civilians became the primary target of insurgent attacks.⁴

As Kirk Johnson, the Executive Director of the List Project, a non-profit assisting Iraqis who have worked for Coalition forces has described:

When the war in Iraq began in 2003, Coalition forces had virtually no capacity to interpret the Arabic language, Iraq customs and social mores. Our men and women, serving as soldiers, Marines, diplomats, and aid workers were consequently hobbled in their ability to carry out the most basic of functions. As Coalition forces entered villages, this linguistic and cultural gap between

² See, e.g., Aug. 19, 2009 Letter from Marcy Singer Ruiz to Robert Manak, Employment Standards Administration, U.S. Dep't of Labor/Office of Worker's Compensation Programs (OWCP), attached as Ex. 12.

³ Amnesty Int'l, *Iraq - Amnesty Int'l Report 2007*, May 23, 2007, available at <http://www.amnesty.org/en/region/iraq/report-2007>.

⁴ Human Rights Watch, *Human Rights Watch World Report, 2007 – Iraq*, Jan. 11, 2007, available at <http://www.hrw.org/legacy/englishwr2k7/docs/2007/01/11/iraq14705.htm>.

occupier and occupied was only able to be bridged by a unique group of Iraqis who stepped forward to help as interpreters. These interpreters became, in effect, the eyes, ears, and voice of the Coalition as it tried to make the best of an increasingly harrowing situation.

See Declaration of Kirk Johnson (“Johnson Decl.”) at ¶ 5, attached as Exhibit 2.

Among the principal victims of the conflict were these Iraqi interpreters who worked for the United States and its Allies.⁵ Calculating that it is “more destabilizing to kill Iraqi civilians working with the U.S.-led occupation than it is to target U.S. forces,”⁶ insurgents waged a brutal “campaign of intimidation and assassination”⁷ against Iraqis thought to be cooperating with the United States. See Johnson Decl., Ex. 2 ¶ 6. Their assaults succeeded in “making life very dangerous for Iraqis who are trying to help rebuild their country.”⁸ See Johnson Decl., Ex. 2 ¶ 6-7. Graffiti and chilling letters warned Iraqis not to work with the United States, as insurgents launched a “systematic and bloody campaign designed to scare, injure or kill anyone seen as working with the American-led coalition.”⁹ See Johnson Decl., Ex. 2 ¶ 6.

Among the many groups insurgents have targeted, from high-ranking government officials to lower-level police officers and security guards,¹⁰ **no group of employees in Iraq**

⁵ Ed Timms, Riskiest business in Iraq Working for Americans – even in low-level jobs – can lead to death, *The Dallas Morning News*, 2nd ed., July 17, 2004.

⁶ Terry Moran, *World News Tonight: Iraq Update* (ABC television broadcast Mar. 29, 2004) (transcript available from Fed. News Service).

⁷ See Ed Timms, *supra* note 5.

⁸ See Moran, *supra* note 6.

⁹ Neal Karlinsky, *World News Tonight: Iraq Update*, *supra* note 6.

¹⁰ See Timms, *supra* note 5; see also Patrick Kerkstra, *Many Iraqis Quit Jobs After Getting Threats*, *The Miami Herald*, Oct. 8, 2004.

has been targeted more viciously and faced greater danger than Iraqi interpreters.¹¹ See Johnson Decl., Ex. 2 ¶ 6. The U.S. Department of Labor released figures in 2006 that showed that approximately 40% of death claims filed by private contractors were on behalf of interpreters.¹² See also Johnson Decl., Ex. 2 ¶ 7-8 (observing that of the 100 Iraqis with whom he had served at USAID, 98 have since fled or gone into hiding). Translating Arabic for the U.S. military in Iraq has been called “one of the most dangerous civilian jobs in one of the world’s most dangerous nations.”¹³

With bounties on their heads, Iraqi interpreters have often been forced to conceal their identities—for instance, by wearing helmets, black masks, sunglasses, and balaclavas¹⁴—and to hide their jobs from anyone but their closest relatives and friends.¹⁵ Some relocate their families to escape suspicion, and many cannot marry because families of potential brides refuse

¹¹ See Kerkstra, *supra* note 10; see also Sharon Cohen, *Soldier fights to secure future for Iraqi translator in U.S.*, Associated Press, Oct. 11, 2009, available at http://www.usatoday.com/news/washington/2009-10-11-translator-to-us_N.htm.

¹² Nick Wadhams, *Iraqi interpreters face death threats from countrymen, alienation from U.S. troops*, Associated Press, Jan. 23, 2006.

¹³ Reginald T. Dogan, *Translators play a vital role for troops serving in Middle East*, Pensacola News Journal, July 28, 2007; see also Omar Sinan, *Iraqi translators who work for Americans face dilemma: risk assassination by insurgents or give up livelihood*, Associated Press, Jan. 17, 2005; Richard Colebourn, *Interpreting danger in Iraq*, BBC News, July 25, 2007, available at <http://news.bbc.co.uk/2/hi/programmes/newsnight/6915433.stm> (interpreters are “often at the top of the militia hit lists”).

¹⁴ See, e.g., Declaration of S.M. Regarding Defendants’ Investigations (“A. Decl., Ex. 7A”) ¶ 4 (son A. wore black sunglasses and a veil to work); W. Decl., Ex. 9A ¶ 5; see also Wadhams, *supra* note 12.

¹⁵ See, e.g., Y. Decl., Ex. 3A ¶ 4 (son hid employer’s identity); A. Decl., Ex. 8A ¶ 4; see also Wadhams, *supra* note 12.

to accept the danger of affiliation.¹⁶ *See* Johnson Decl., Ex. 2 ¶ 9. Indeed, recognizing the severe danger and high sacrifices of the job, Congress and the Bush administration worked to enable Iraqi translators to resettle in the United States.¹⁷

Despite extraordinary risks, Claimants offered their services to the U.S. military and its Allies, providing critical assistance to the United States' mission until the day they were killed. *See* Johnson Decl., Ex. 2 ¶ 5.

B. Defendants' Investigation Into Claimants' Dependents

Discovery has demonstrated that after the incident, CNA's representatives conducted investigations with the Claimants' families. The Claimants' Beneficiaries' dependence on the Claimants was described in detail to Defendants' investigator. *See, e.g.*, Declaration of A.Y. Regarding Defendants' Investigations ("Y. Decl., Ex. 3A") ¶ 13 ("Z. asked if our family was dependent on the deceased, and I said yes. I told him that my son was financially responsible for the family"); M. Decl., Ex. 11A ¶ 12 ("Z. asked me if I was dependent on R. I told him that my son was the main breadwinner of the family after my husband's death and that he used to give me most of his salary each month to pay for household expenses."); Y. Decl. Ex. 5A ¶ 10 ("Z. asked if our family was dependent on the deceased, and we both said yes. We told him that our son used to pay for the family's expenses, which includes my wife and I, as well as his younger brother and two sisters, who are too young to work.").

During these investigations, Defendants' agent informed Claimants' Beneficiaries that they would receive periodic compensation based on the wages of the Claimants. *See, e.g.*, A. Decl., Ex.

¹⁶ *See* Wadhams, *supra* note 12.

¹⁷ *See* Robert Siegel and Michele Norris, *All Things Considered: Iraqis Who Translated for U.S. Seek Visas* (Nat'l Pub. Radio broadcast, Apr. 17, 2007).

10A ¶ 13 (“Z. said that we would initially get reimbursed for burial expenses and that after some time we would get the rest of the compensation in the form of monthly income”); A. Decl., Ex. 8A ¶ 13 (“Z. told us that we would receive compensation for our son’s death. He said we would receive a monthly income.”); *see also* Y. Decl., Ex. 5A ¶ 8 (Sallyport representative “told me that Sallyport insured its employees and that we would get monthly income and wages as compensation”).

Furthermore, that the Claimants’ Beneficiaries were dependant on the Claimants was then reported back to Defendants, as confirmed in Defendants’ own Investigation Reports. For example:

- **Investigation Report for S.Y., attached as Ex. 3D:**

- Page 6 of the report details two discussions Defendants’ investigators had with Claimants’ parents, the first being on January 2, 2007 in which the Claimant’s father explained his son, the Claimant, “was their sole provider and that his death had caused financial and psychological tragedy to his family.” The next day, the investigator met with the Claimant’s family again and the Claimant’s father again explained that the Claimant was the “eldest son and was the sole provider for the family.”
- Page 4 of the report describes that the investigator “located the beneficiaries, the parents of the Claimant, and obtained the required documents”

- **Investigation Report for H.A., attached as Ex. 9D:**

- Page 7 of the report describes the discussions that investigator had with the Claimant’s father on December 24, 2006, where the father explained to the investigator that the Claimant was a provider to both Claimant’s mother and father.

- **Investigation Report for R.H., attached as Ex. 4D:**

- Page 7 of the report describes the investigator learning from Claimant’s father that: i) the Claimant was his eldest son and was a provider to both of his parents; and ii) Claimant used to pay the rent of the house.

See also Y. CMF, Ex. 5 ¶ 40; M. CMF, Ex. 11 ¶ 38; A. CMF, Ex. 7 ¶ 37; S. CMF, Ex. 6 ¶ 38.

Moreover, each of these investigation reports describes on page 2 the investigator's "Client Objectives," one of which is to determine if the Claimant had dependants. *See* Exs. 3D, 4C, 5D, 6D, 7D, 9D, and 11C. This page goes on to describe that if it is determined that the Claimant does have dependants, then the investigator should obtain Copies of Birth Certificates and ID cards for each dependant and a copy of the deceased's birth certificate and death certificate. *See* Exs. 3D, 4C, 5D, 6D, 7D, 9D, and 11C. Next to these instructions, the report notes that these tasks have been "DONE." *See* Exs. 3D, 4C, 5D, 6D, 7D, 9D, and 11C.

Yet *CNA never provided this information to the Department of Labor*. *See* April 8, 2011 Letter from Matthew Handley to District Director Richard Robilotti, attached as Ex. 14. Instead, CNA intentionally excluded these pages of the investigation reports from its submissions to the DOL seeking Compensation Orders and falsely claimed that the Claimants had no dependants. For example, Attachment 15 (page 24) of the Investigation Report of A.A. ("A. Invest. Rep., Ex. 7C"), which is a Confirmation from the Town Council in K. that the Claimant was "the sole provider to his mother S.M." was carefully omitted from the copy of the investigation report submitted to the DOL. A. CMF, Ex. 7 ¶ 37. Meanwhile, CNA's agent never challenged this dependency in his discussions with the Claimants' Beneficiaries, and, indeed, requested that the Claimants' Beneficiaries open bank accounts because they would be receiving compensation in the form of periodic payments. The sworn statements of the Claimed Beneficiaries confirms that they all explained to CNA's agent their dependency on the Claimants, and that CNA's agent never challenged this dependency, instead describing to the Claimed Beneficiaries that death benefit compensation for Claimant's loss of wages would be forthcoming. *See* Exs. 3A, 4A, 5A, 6A, 7A, 8A, 9A, 10A, and 11A. Relying on CNA's representative, the Claimed Beneficiaries trusted CNA

and did as instructed, but the promised compensation never came. *See* Exs. 3A, 4A, 5A, 6A, 7A, 8A, 9A, 10A, and 11A.

Claimants' Beneficiaries waited for the promised compensation which never came, even following up with Defendants' investigator who reassured them that the money was coming. *See supra* pp. 15 – 20. Then in 2009, a U.K. law firm that had begun to operate in the area was able to refer the families to the undersigned counsel. Counsel filed claims for compensation with the OWCP between November 19, 2009 and January 4, 2010.

Based on CNA's misrepresentations, the DOL's Compensation Orders found that the Claimants died with no or only one eligible beneficiary. The truth, however, as known by Defendants at the time these claims were administered, was that the Claimants did have eligible dependants.

Additionally, because of the stark discrepancy between the findings and descriptions regarding dependency contained within the withheld investigation reports on the one hand and the assertions made by Defendants to the OWCP regarding lack of dependants on the other hand, we respectfully request that the Court refer this matter to the OWCP for an investigation of Defendants for fraud or abuse pursuant to Section 31(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA) and its extensions, which provides that:

an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents . . . shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both.

See also April 8, 2011 Letter from Matthew Handley to District Director Richard Robilotti, attached as Ex. 14, explaining our intention to request such referral.

III. STANDARD OF REVIEW

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds “the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d).

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. *Lincoln v. Reksten Mgmt.*, 354 F.3d 262 (4th Cir. 2003); *Green v. Ingalls Shipbuilding, Inc.*, 29 Ben. Rev. Bd. Servs. 81, 3 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact).

As described herein, the evidence in the record demonstrates that Claimants are entitled to prevail as a matter of law.

IV. ARGUMENT

A. The Claims Are Timely

1. All of the Claims Are Timely Under the Applicable Statutes, Regulations and Caselaw

As described in more detail below, because the compensation orders were never served on the claimants or their counsel pursuant to 33 U.S.C. §§ 919(e) and 921(a), the statute of

limitations has not begun to run on these claims. Indeed, the Claimants here not only were never served, but they also did not have actual notice of the order until November 15, 2010, when Defendants' counsel e-mailed Claimants' counsel with Compensation Orders for eight of the nine Claimants.¹⁸ *See* November 15, 2010 Letter from Marcy Singer-Ruiz, attached as Ex. 13. Moreover, even if the statute of limitations has been triggered, seven of the nine claims are timely without the need for tolling because they were filed within one year of the date the compensation order became final. In addition, one claim was filed four months after the date of the last payment, well within the statutory period. Defendants' motion must be denied.

a. All of the Claims Are Timely Because the Statute of Limitations Has Not Run

Section 21 of the Act provides that a compensation order becomes effective when “filed” and becomes “final” thirty days thereafter. 33 U.S.C. § 921(a). “Every circuit that has decided the issue of whether ‘filing’ under § 921(a) required service on the parties has held that it does.” *Stevedoring Servs. of Am. v. Director, Office of Workers’ Comp. Programs*, 29 F.3d 513, 516 (9th Cir. 1994) (citing cases); *Nealon v. Ca. Stevedore & Ballast Co.*, 996 F.2d 966, 971 (9th Cir. 1993) (“there is no case that even suggests that the Longshore Act does not require service on the claimant and the employer as part of ‘filing’”); *see also Big Horn Coal Co. v. Director, Office of Workers’ Comp. Programs*, 55 F.3d 545, 549 (10th Cir. 1995); *Patton v. Director, Office of Workers’ Comp. Programs*, 763 F.2d 553, 556-558 (3d Cir. 1985); *Youghioghenny and Ohio Coal Co. v. Benefits Review Board*, 745 F.2d 380, 382 (6th Cir. 1984); *Ferro v. Holt Cargo*

¹⁸ Defendants have not produced a Compensation Order in this litigation that relates to Claimant R.H.. *See* Ex. 13, Letter from Marcy Singer-Ruiz to Matthew Handley, Nov. 15, 2010 (attaching compensation orders for each Claimant except Mr. H.).

Systems, BRB Nos. 04-0226, 0226A (May 28, 2004); *cf. Urso v. MVM*, BRB No. 09-0831, *et al.*, 2010 WL 3019967, at *3 (Ben. Rev. Bd., July 29, 2010) (service on party, not counsel, is required).

The compensation orders were never served on the claimants. *See* A. CMF, Ex. 7 ¶ 39; Y. CMF, Ex. 5 ¶ 42; A. CMF, Ex. 10 ¶ 42; M. CMF, Ex. 11 ¶ 42; S. CMF, Ex. 6 ¶ 40; A. CMF, Ex. 8 ¶ 37; W. CMF, Ex. 9 ¶ 43; Y. CMF, Ex. 3 ¶ 43.¹⁹

Because the compensation orders were not served on the claimants, the requirements for “filing” were never satisfied, the orders never became effective or final, and therefore the statute of limitations did not begin to run. *Nealon*, 996 F.2d 966; *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 369 (4th Cir.1989); *Patton*, 763 F.2d at 556-558; *Youghioghenny*, 745 F.2d at 382.²⁰

This rule is appropriate both as a matter of statutory construction and as a requirement of due process. “It is well established that procedural due process requirements are applicable to administrative proceedings.” *Sullivan v. St. Johns Shipping Co.*, BRB. No. 02-0159, 2002 WL 32069330, at *2 (Ben. Rev. Bd., Oct. 31, 2002) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)); *cf. Jeffboat v. Mann*, 875 F.2d 660, 664 n.6 (1989) (observing that had commissioner failed to notify both Jeffboat and its counsel, a question of due process deprivation would be

¹⁹ *Id.*

²⁰ The Fourth Circuit has observed that courts should hold that actual notice satisfies the statute, so that the failure to serve a compensation order does not create an indefinite time period in which to appeal. *Dominion Coal Corp. v. Honaker*, 33 F.3d 401, 404 (4th Cir. 1994); *but see Big Horn Coal*, 55 F.3d at 549. Here, actual notice was not had until November 15, 2010. *See* Y. CMF, Ex. 5 ¶ 41; A. CMF, Ex. 10 ¶ 41; S. CMF, Ex. 6 ¶ 39; M. CMF, Ex. 11 ¶ 39; A. CMF, Ex. 7 ¶ 38; H. CMF, Ex. 4 ¶ 38; W. CMF, Ex. 9 ¶ 42; Y. CMF, Ex. 3 ¶ 42.

raised); *In re Hillsborough Holdings Corp.*, 172 B.R. 108, 111 (Bankr. M.D. Fla. 1994) (holding in an analogous bankruptcy action that “failure to serve the Motion and Order setting the claims bar date violates the Claimant’s right to due process.”). Because the Claimants were not served with the compensation orders and did not have actual notice of the orders until November 15, 2010, the statute of limitations has not run.

b. Seven of the Nine Claims Are Timely Pursuant to 33 U.S.C. § 922

Even if the statute of limitations had begun to run despite the failure to serve and lack of actual notice, Claimants’ claims are timely. Section 22 of the Act permits modification of a compensation award within one year of the date the rejection becomes final. 33 U.S.C. § 922; 20 C.F.R. § 702.373; *e.g.*, *M.*, No. 2010-LDA-00538, Defs.’ Mot. For Summary decision ¶ 13 (“a final order is subject to modification if a party of grief by that order seeks modification within one (1) year”); *see also* 33 U.S.C. § 919(e) (“The order rejecting the claim or making the award” is “referred to in this chapter as a compensation order”). Under section 21(a), a compensation order becomes final 30 days after it is filed in the office of the deputy commissioner. 33 U.S.C. § 921(a); 20 C.F.R. § 702.350; *see also, e.g.*, *In The Matter Of: William L. Woodmansee v. Newport News Shipbuilding And Dry Dock Co.*, No. 2003-LHC-1285, 2003 WL 21371523, at *3 (Ben. Rev. Bd. June 4, 2003) (“Director’s compensation order was issued on December 13, 2001, and became final thirty days later by operation of § 21(a) of the Act”). Accordingly, a claim for modification made within one year and thirty days of the date the compensation order was filed is timely under the statute. *E.g.*, *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 09-0729 BLA, 10-0149 BLA, 2010 WL 3514135, at *6 (Ben. Rev. Bd. Aug. 31, 2010) (claim is rejected when the denial becomes “final” and a request for modification may be filed “at any

time prior to one year after the rejection of a claim.”); *Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 952 (6th Cir. 1999), *cert. denied*, 531 U.S. 818 (2000) Dep’t of Labor: Offices of Administrative Law Judges BenchBook §22.3.2 (“The one-year time period within which modification of a denial of a claim must be sought by any party begins to run on the date the decision denying the claim becomes final, not on the date of the decision.”).

Thus, the claims of Y. (OWCP No. 02-152202, Case No.: 2010-LDA-00541); A.A. (OWCP No. 02-152211, Case No.: 2011-LDA-00002); A. (OWCP No. 02-152210; Case No.: 2011-LDA-00001); M. (OWCP No. 02-152207; Case No.: 2010-LDA-00538); W. (OWCP No. 02-152204; Case No.: 2010-LDA-00539); Y. (OWCP No. 02-152206; Case No.: 2010-LDA-00540); A. (OWCP No. 02-152212; Case No.: 2011-LDA-00003) are all timely because they were all filed within a year of the final rejection of the compensation claim, as detailed in the chart attached as Ex. 16.²¹

In addition, 33 U.S.C. § 922 also provides that an application for the modification of an award is timely if made “at any time prior to one year after the date of the last payment of compensation.” *See also, e.g., Banks v. Chi. Grain Trimmers Ass’n*, 390 U.S. 459 (1968); *Blackwell Const. Co. v. Garrell*, 352 F. Supp. 192, 196 (D.D.C. 1972). In the case of A., No. 2011-LDA-00001, Defendants’ Exhibit 2 states that the last payment of compensation made was

²¹ Defendants own argument concedes that five of the Claimants’ actions are timely. Defendants assert that the one year clock starts running on date the compensation orders were issued (rather than the date the rejection became final as specified in the implementing regulations, 20 C.F.R. § 702.350)). *See, e.g., M. Mot.* ¶ 13. But even under Defendants’ timeline, five of the Claimants’ actions would still be timely. *See* Timeliness Chart, Ex. 16 (Y., filed 108 days after Compensation Order; A., filed 123 days after Compensation Order). The other claims, which have slightly earlier Compensation Orders, would require only modest tolling—twenty days for Claimant A., thirty days for Claimant A., and less than a year for Claimant S..

on September 10, 2009. Because this application for modification was filed on January 4, 2010, four months later and plainly within one year of the last payment, it is timely under this prong of § 922 as well.

Defendants do not contest the relevant dates, which are found on Defendants' own documents. Thus, the claims filed on behalf of Mr. Y., Mr. A., Mr. A., Mr. M., Mr. W., Mr. Y., and Mr. A. are all timely on their face even if the statute of limitations had begun to run prior to service of the Compensation Orders. In addition, because even under Defendants' view, the claims of Mr. Y., Mr. A., Mr. M., Mr. W., and Mr. Y. are timely, there can be no dispute that Defendants' motion for summary decision on these claims must be denied.

2. Defendants' Misrepresentations to Both Claimants and the Department of Labor Prevent them from Asserting a Timeliness Defense to All Claims

a. Claimants' Beneficiaries Were Misled by Defendants into Justifiably Believing that they Had Taken the Proper Steps to Obtain Compensation

Defendants are estopped by their conduct from asserting a timeliness defense. *Blackwell Constr. Co.*, 352 F. Supp. at 195-96; *see also Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-235 (1959); *Grage v. J.M. Martinac Shipbuilding*, 21 Ben. Rev. Bd. Servs. 66 (1988), *aff'd on other grounds sub nom., J.M. Martinac Shipbuilding v. Director, Office of Workers' Comp. Programs*, 900 F.2d 180 (9th Cir. 1990). Under the estoppel doctrine, a defendant cannot rely on the statute of limitations if his conduct has tended to lull the plaintiff into inaction, permitting the statute to run. *Wymer v. Lessin*, 625 F. Supp. 1286 (D.D.C. 1985); *Dikeman v. Georgia-Pacific Corp.*, 2004-LHC-02243, 2005-LHC-00718 (Mar. 27, 2006).

Courts have applied estoppel where, as here, a defendant has led the plaintiff to believe that a resolution is forthcoming. *See, e.g., Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d

1518 (11th Cir. 1992) (plaintiff led to believe that pay disparity would be corrected); *Kleckley v. Northwestern Nat'l Cas. Co.*, 526 S.E.2d 218, 220 (S.C. 2000); *see also Holland v. Nelson*, 5 Cal. App. 3d 308 (Cal. Ct. App. 1970) (partial payments support determination that plaintiff reasonably expected further payments to be made, supporting estoppel).

In particular, courts have found that claims are not time-barred where an insurance company, directly or through an agent, initially admitted liability, but never bothered to communicate an ultimate denial to the plaintiff. *E.g.*, *Bowler v. Fidelity & Cas. Co.*, 250 A.2d 580 (Sup. Ct. N.J. 1969); *Agric. Ins. Co. v. Iglehart*, 386 P.2d 145 (Sup. Ct. Okla. 1963); *see also Price v. State Farm Mut. Auto. Ins. Co.*, 486 S.W.2d 721 (Sup. Ct. Tenn. 1972). Indeed, *Bowler* held

The slightest evidence of deception or overreaching will bar reliance upon time limitations ...[The insurer] must notify the insured of its decision not to pay his claim. But mere naked rejection would not be sufficient. The giving of such notice should be accompanied by a full and fair statement of the reasons for its decision not to pay benefits, and by a clear statement that if the insured wishes to enforce his claim it will be necessary for him to obtain the services of an attorney and institute a court action with the appropriate time.

250 A.2d at 588. A failure to inform a plaintiff about the correct claims procedure also results in estoppel. *Kleckly*, 526 S.E.2d at 221 (estoppel where insurer did not inform plaintiff of the appropriate procedure); *see also Dikeman*, 2004-LHC-02243, 2005-LHC-00718 at 7 (estoppel based on erroneous representation by agent).

Courts take a plaintiff's education, experience, and sophistication into account in determining whether reliance on a defendant's representations was reasonable. *See William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1192 (D.C. Ct. of App. 1980) (defendant lulled "an unsophisticated employee"); *Lovell v. C.A. Timbes, Inc.*, 210 S.E.2d 610, 612 (Sup. Ct. S.C. 1974) (plaintiff had limited education and limited experience); *see also infra* p. 26 (language

barriers justify tolling). Where the defendant holds himself out as a fiduciary, courts provide greater protection to the plaintiff. *Ray v. Queen*, 747 A.2d 1137, 1142 (D.C. Ct. of App. 2000).

Here, Defendants' agents, Mr. M. and Mr. A. repeatedly informed the Claimants' Beneficiaries that there was no doubt that they would receive compensation in the form of monthly income from Defendant's insurance. *See, e.g.*, Y. Decl., Ex. 3A ¶¶ 10, 17 (parents told they would receive monthly income and that "there was no doubt about our receiving this compensation and that our rights were assured."); H. Decl., Ex. 4A ¶¶ 11, 13 (Mr. M. explained that "since my son was single when he died, the compensation would go to us, his parents" and that "we would initially receive insurance money for funeral expenses, and after a period of time we would receive additional insurance money for wages"); Y. Decl., Ex. 5A ¶¶ 8, 12 (parents told Sallyport insured its employees and they would get monthly income as compensation); A. Decl., Ex. 7A ¶ 10; A. Decl., Ex. 8A ¶ 13; M. Decl., Ex. 11A ¶ 10.

Claimants' Beneficiaries were specifically told they were eligible for insurance compensation. *Id.*, H. Decl., Ex. 4A ¶ 11; S. Decl., Ex. 6A ¶ 11; W. Decl., Ex. 9A ¶ 12; A. Decl., Ex. 10A ¶¶ 10, 12, 13 (Mr. M. stated "the company was ready to pay our compensation"). Indeed, Claimants' Beneficiaries were told to expect roughly \$30,000 to \$40,000, S. Decl., Ex. 6A ¶ 11, in periodic payments and to open bank accounts. Y. CMF, Ex. 5, ¶ 25; S. Decl., Ex. 6A ¶ 11; W. CMF, Ex. 9 ¶ 27 (Mr. M. assisted the family in setting up a bank account); A. Decl., Ex. 10A, ¶¶ 12, 16; *see also* H. CMF, Ex. 4 ¶¶ 20, 22 (Mr. M. obtained information about "the parents' bank account as they are the beneficiaries"); A. CMF, Ex. 8 ¶ 23, 25 (Mr. M. collected evidence of dependency and told beneficiaries they were eligible to receive compensation); A. CMF, Ex. 7 ¶¶ 23-24 (same).

Mr. M. collected documentation and photographs from each claimant and reassured them that “he was there to help” and that he would work on their behalf to get their compensation. *E.g.*, S. Decl., Ex. 6A ¶ 11 (“He told us I would receive compensation as a result of giving him the required information.”); Y. CMF, Ex. 3 ¶ 26; W. CMF, Ex. 9 ¶¶ 26, 28; M. CMF, Ex. 11 ¶ 26. Indeed, Defendants paid the burial expense portion of the compensation award, which made the Claimants’ Beneficiaries trust and rely upon the representations all the more. *E.g.*, H. Decl., Ex. 4A ¶ 16; S. Decl., Ex. 6A ¶ 17; W. Decl., Ex. 9A ¶¶ 14-17.

At no time did Defendants communicate to Claimants’ Beneficiaries that they were not eligible for benefits and would not be receiving compensation. *See, e.g.*, Y. Decl., Ex. 5A ¶ 18, 19; M. Decl., Ex. 11A ¶ 15; A. Decl., Ex. 10A ¶ 19. To the contrary, when Claimants’ Beneficiaries called Mr. M. to inquire about the delay, he responded that he had submitted their information to Sallyport, that the company would determine when they got payment, that everything was going well, that he would follow-up on their case, and that no further steps were necessary to obtain compensation. *E.g.*, Y. Decl., Ex. 3A ¶ 19; H. CMF, Ex. 4 ¶ 24; A. Decl., Ex. 10A ¶ 15 (Mr. M. said if he needed further, he could contact us); A. CMF, Ex. 10 ¶ 27; Y. CMF, Ex. 5 ¶ 27; S. CMF, Ex. 6 ¶ 25.

Claimants’ Beneficiaries relied on CNA’s representations to their detriment. This reliance was reasonable. The Claimants’ Beneficiaries trusted the information provided by Mr. M., who had reassured them that he would work on their behalf. Claimants’ Beneficiaries did not have independent information about the DBA as they had never heard of, or from, the Department of Labor. *See, e.g.*, Y. Decl., Ex. 3A ¶ 16; S. Decl., Ex. 6A ¶ 16; W. CMF, Ex. 9 ¶¶

35, 39, 42-43. District Director Richard Robilotti, who oversees many of the claims, confirmed recently that:

The department does not even attempt to communicate with injured Iraqis or Afghans for fear that a letter from the U.S. might imperil their lives. Instead, the department asks employers to forward Labor Department mail informing workers of their rights.²²

But Sallyport did not inform Claimants' Beneficiaries of their rights. *See, e.g., Y. Decl., Ex. 5A ¶ 14; S. Decl., Ex. 6A ¶ 16; see also H. CMF, Ex. 4 ¶¶ 30-31, 33.*

Additionally, Claimants' Beneficiaries were limited by language barriers, lack of education (many by illiteracy) and unfamiliarity with American procedures. *See, e.g., H. Decl., Ex. 4A ¶¶ 1-2; S. Decl., Ex. 6A ¶ 2; A. Decl., Ex. 7A ¶¶ 2, 12; A. Decl., Ex. 10A ¶¶ 1-2, 17.* The Department of Labor has no employees posted in Iraq and no speakers of any Arabic dialect. *See Miller supra.* Claimants' Beneficiaries also live without access to computers or the internet and some live in remote locations. *E.g., Y. Decl., Ex. 3A ¶¶ 1, 26; A. Decl., Ex. 10A ¶ 21.* This isolation and lack of sophistication made their reliance on Mr. M. all the more reasonable. Finally, as described in detail below, after the murders of their sons, Claimants' Beneficiaries feared that they, too, would be targeted if they revealed an affiliation with the United States. *Infra pp. 23-26.* Nonetheless, Claimants' Beneficiaries attempted to follow up on their anticipated compensation diligently, by contacting Mr. M. and by attempting to travel to Sallyport's offices in Baghdad in order to resolve the perceived delay in payment. *E.g., Y. CMF, Ex. 3 ¶¶ 28-29; H. CMF, Ex. 4 ¶¶ 24-25; Y. CMF, Ex. 5 ¶¶ 27-28; S. CMF, Ex. 6 ¶¶ 25-26; A. CMF, Ex. 7 ¶¶ 25; W. CMF, Ex. 9 ¶¶ 28-29; A. CMF, Ex. 10 ¶¶ 27-28.*

²² *See T. Christian Miller, Foreign Workers for U.S. Are Casualties Twice Over, ProPublica, June 19, 2009, attached as Ex. 18.*

Because of their conduct, Defendants are not entitled to raise the statute of limitations under sections 13 and 22 of the Act as a defense.

b. Defendants' Falsely Represented the Findings of Their Investigation to the DOL

The Defendants' conclusion that the Claimants left no eligible beneficiaries is false and (based on the actions taken by the investigator and the statements made to the Claimants' families), likely fraudulent. As noted above, in filing Defendants' request for compensation orders, Defendants withheld from the OWCP those portions of the investigation reports confirming or discussing the existence of Claimants' dependants. For example, pages 4, 6 and 7 of the Investigation Report for S.Y., attached as Ex. 3D, were intentionally omitted from the copy provided to the DOL. Those pages unequivocally state that the investigator "located the beneficiaries, the parents of the Claimant, and obtained the required documents," that the investigator learned from Claimant's father, that his son, the Claimant, "was their sole provider and that his death had caused financial and psychological tragedy to his family" and that Claimant's mother was a housewife. *Id.* at 4, 6. In addition, page 7 of the Investigation Report for R.H., attached as Ex. 4D, was purposefully withheld from the copy provided to the DOL. Those pages clearly detail that the Claimant's father informed the investigator that: i) the Claimant was his eldest son and was a provider to both of his parents; and ii) Claimant used to pay the rent of the house. Exhibit 17 is a chart summarizing the omissions from the investigation reports evidencing dependency in each and every case.

These omissions led to compensation orders being issued "with a mistake in a determination of fact," under Section 22 of the LHWCA for all of the Claimants' Beneficiaries as the Department of Labor relied on the incomplete and factually erroneous submissions to find

that the Claimants died with no or only one eligible beneficiary. Under Section 22, modification is appropriate and desirable here “in order to render justice under the act.” *See, e.g., Bath Iron Works Corp. v. Director, Office of Workers’ Comp. Programs*, 244 F.3d 222, 227 (1st Cir. 2001). For the reasons discussed above, Defendants misrepresentations to the Department of Labor provide a second independent basis to find that Defendants are estopped from raising the statute of limitations as a defense. As the Supreme Court has held, the maxim that “no man may take advantage of his own wrong” is a principle “[d]eeply rooted in our jurisprudence” and has been applied “in many diverse classes of cases.” *Glus*, 359 U.S. at 232; *see also, e.g., Bowler*, 250 A.2d at 587-93 (insurer’s unconscionable, deceptive and inequitable behavior barred reliance on statute of limitations).

Moreover, because of the stark discrepancy between the intentionally withheld investigation reports on the one hand and the erroneous factual assertions made by Defendants to the OWCP regarding lack of dependants on the other hand, Claimants’ Beneficiaries respectfully request this court to refer the matter to the OWCP for an investigation of Defendants for fraud or abuse pursuant to Section 31(c) of the LHWCA and its extensions. It is precisely to deal with these matters that this provision in the Act was created.

3. The War and the Beneficiaries’ Legitimate Fear of Reprisal Constitute Extraordinary Circumstances that Prevented Claimants from Pursuing These Claims

a. Extraordinary Circumstances Are a Recognized Basis for Tolling the Statutory Limitations Period

Under the doctrine of equitable tolling that has been “read into every federal statute of limitation,” *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946), the DBA’s statutory deadlines may be delayed where “extraordinary” or “special circumstances” have intervened, causing delay

despite the party's diligent efforts. *E.g.*, *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 227 (5th Cir. 2001); *McKinney v. O'Leary*, 460 F.2d 371, 373 (9th Cir. 1972); *Cabral v. E. Assoc. Coal Corp.*, BRB No. 90-1353 BLA, 1993 WL 545241, at *2 (Ben. Rev. Bd. Dec. 16, 1993) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)); *In the matter of Arthur Nides v. 1979, Inc.*, No. 2002DC-W00006 (Nov. 18, 2002) (Solomon, J.). Tolling in light of extraordinary circumstances is consistent with the Supreme Court's statement that the LHWCA compensation scheme "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953) (citation omitted).

Pervasive violence and a legitimate fear of reprisal is the paradigmatic case in which such tolling is appropriate. Indeed every court that has considered whether wartime constitutes "extraordinary circumstances" has "answered in the affirmative." *Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005). Tolling is particularly warranted when, in the midst of such a conflict, a person reasonably believes that taking steps to preserve or exercise his legal rights will expose him to an acute risk of reprisal. *E.g.*, *Chavez v. Carranza*, 559 F.3d 486, 493-94 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 110 (2009); *Arce v. Garcia*, 434 F.3d 1254, 1262-63 (11th Cir. 2006); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1146-48 (E.D. Cal. 2004). In such circumstances, it makes no difference that the statute sought to be tolled is a United States statute, while the violent and threatening circumstances are abroad. *E.g.*, *Carranza*, 559 F.3d at 493. Moreover, tolling may be warranted for a number of years after the worst of the conflict has ended. *Id.* at 494 (crediting plaintiffs' belief that it was not safe for their families to bring suit until many years after the end of the war).

b. Pervasive Violence, Civil Disruption, and a Legitimate Fear of Reprisal Prevented the Claimants' Beneficiaries from Bringing these Claims

The violent conflict in Iraq during the relevant period, compounded by the elevated dangers to the families of Iraqi interpreters and the intense fear the Claimants' Beneficiaries experienced after their sons were murdered, constitute extraordinary circumstances that justify equitable tolling in this case.

If there is any group in Iraq more vulnerable than Iraqi translators assisting U.S. military operations, it is the relatives of those translators. *See* Johnson Decl., Ex. 2 ¶ 11. Without the safety and assistance that the military provides to the translators themselves, their family members are often driven into hiding, taking measures to avoid raising suspicion of any link to the employment of their family members who serve (or in the instant case, who were assassinated for serving) as a translator. *See* Johnson Decl., Ex. 2 ¶¶ 6-14. The Claimants' Beneficiaries were not only overwhelmed by the turmoil of military occupation and war; they were also terrified by the brutal murder of their sons and legitimately afraid that they would become targets of further violence if they let their connection to the United States and Coalition forces be known. These circumstances, which were entirely beyond their control, prevented the Beneficiaries from filing claims earlier. *See also supra* pp. 3-6.

After the translators' death, Iraq continued to be wracked by violence.²³ *See* Hiltermann Decl., Ex. 1 ¶¶ 6-11. Throughout 2006, "criminality, political assassinations, and sectarian killings" had become "rampant" in Iraq, and by 2007 the security situation was unprecedentedly bad. In 2007, "[m]any basic aspects of Basra's society and governance ceased to function." *See*

²³ *See, e.g.,* Steven Lee Myers, *Car Bombings Kill 33 In and Near Baghdad*, N.Y. Times, Apr. 6, 2009 (2006 and 2007 were "the peak of ethnic and sectarian bloodshed" with spikes in attacks continuing through 2009); Patrick Cockburn, *Suicide Bomber Kills 33 At Iraqi Conference*, Independent UK, Mar. 11, 2009 (Iraq remained "one of the most dangerous places in the world" in mid 2009).

Hiltermann Decl., Ex. 1 ¶¶ 6-9. In mid 2008, a major military offensive was launched in Basra by the Iraqi army and Coalition forces against local militia.²⁴ *See* Hiltermann Decl., Ex. 1 ¶ 10. Hundreds were killed and wounded, including many civilians, in what is now known as the “Battle of Basra.” Throughout this period essential services were unreliable and frequently interrupted. Indeed, the New York Times reported that members of Basra’s police force were “believed to be under the influence of militia groups.”²⁵ The intense degree of danger and civil society disruption during this period effectively prevented the Beneficiaries from learning that they were being misled by Sallyport’s representatives and from pursuing death benefit claims through the DBA claims process. *See* Hiltermann Decl., Ex. 1 ¶ 11; Johnson Decl., Ex. 2 ¶¶ 9-13.

The Claimants’ Beneficiaries were not only affected by the general violence pervading Iraq, they were directly impacted by the murder of their loved ones, who had been targeted and killed because of their affiliation with the United States and Coalition forces. *E.g.*, S. Decl., Ex. 6A ¶ 6 (“Following my son’s death, I was afraid about our safety and afraid of us being killed.”); H. Decl., Ex. 4A ¶ 6 (“I was terrified of the militia because they considered our family to be traitors due to my son’s work for the British and Americans.”). They were terrified by their sons’ deaths and they feared retaliation against themselves and their other family members. *E.g.*, A. Decl., Ex. 7A ¶ 6 (“After my son’s death, I was fearful that I would be killed as the family of an Iraqi translator.”); S. Decl., Ex. 6A ¶ 6 (“I also worried about us being watched and followed.

²⁴ Michael R. Gordon, et al., U.S. Cites Planning Gaps in Iraqi Assault on Basra, N.Y. Times, Apr. 3, 2008.

²⁵ Gordon, *et al.*, *supra* note 24.

I did not want anyone to think that my family was affiliated with the U.S., so I never spoke about my son's death.”). Their profound fear of revealing their association with the United States—such as by openly pursuing compensation from their sons' American employer—was justified and reasonable in the violent and polarized conflict surrounding them.

Nonetheless, the Claimants' Beneficiaries pursued their rights with remarkable diligence under the circumstances. The Beneficiaries made every effort to contact Sallyport to inquire about what they believed to be a delay—not a rejection—of their compensation payments. *E.g.*, *H. Decl.*, Ex. 5A ¶ 17 (“I contacted Z. many times Multiple times he told me that everything was going well and that we would receive the compensation.”); *S. Decl.*, Ex. 6A ¶ 18 (“We contacted Z. many times. He informed us that the case was ongoing”); *W. Decl.*, Ex. 9A ¶ 18 (“our son A. called Z. to ask about the payments, and Z. answered that he had sent all the documents and information to Sallyport”); *see also A. Decl.*, Ex. 10A ¶ 15 (“Z. said that if he needed anything further he would contact us.”). They repeatedly telephoned the company and its agents and even sent representatives to Bagdad to try to make contact with the company despite their intense fear of being targeted because of their sons' affiliation with the Coalition forces. *E.g.*, *H. Decl.*, Ex. 5A ¶¶ 19-22. Frustrated by Sallyport's unresponsiveness, Claimants' Beneficiaries attempted to contact the U.S. government, as well. *Id.* ¶ 25. They were turned away without being given any information about the DBA claims process and without being told to contact the Department of Labor, let alone how to do so. *Id.* Among the Beneficiaries, the mothers faced an especially difficult situation, as cultural norms caused some men to refuse to speak to them directly about these matters. *E.g.*, *M. Decl.*, Ex. 11A ¶ 7.

Indeed, the fact that the claims had to be filed in the United States, 6500 miles from Claimants' home, in a language Claimants' Beneficiaries neither speak nor read, without access to counsel familiar with the DBA compensation scheme and without the benefit of a single communication to them from the Department of Labor,²⁶ made the obstacles even more insurmountable. *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006) (foreign language barrier and lack of access to translator or translated legal materials could justify equitable tolling); *cf. Voris*, 346 U.S. at 333 (claimant's illiteracy weighed against strict construction of LHWCA notice provision). That the Claimants' Beneficiaries managed to retain British and American attorneys familiar with the DBA and filed these claims between November 2009 and January 2010 is a mark of their diligence and resourcefulness in the face of extraordinarily obstacles.

4. Tolling Will Not Prejudice the Defendants

Tolling is particularly appropriate here because Defendants will suffer no undue prejudice. *Baldwin Cnty. Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). Statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944). None of those concerns are present here. As discussed above, Defendants knew of Claimants' deaths immediately. *E.g.*, *Y. CMF*, Ex. 3 ¶ 11. In one case Defendants were the ones who informed Claimants' Beneficiaries that their sons had been killed on the job. *H. Decl.*,

²⁶ See section IV.A, above, discussing the DOL's failure to send a copy of the Compensation Orders to Claimants' Beneficiaries, though 33 U.S.C. § 919(e) requires such notice.

Ex. 4A ¶ 5. Defendants were, moreover, informed by their own investigator shortly after the deaths that the Beneficiaries were Claimants' dependent parents. *E.g.*, *S. Invest. Rep.*, Ex. 6C at 2 (“Principal Beneficiary: F.S.. Relationship to Insured: Mother.”); *A. Invest. Rep.*, Ex. 7C at 2 (“Principal Beneficiary: Mrs. S.M.. Relationship to Insured: Mother.”); *Y. Invest. Rep.*, Ex. 5D at 2 (“Principal Beneficiary: Y.K., S.K.. Relationship to Insured: Claimant’s father, Claimant’s mother.”). They cannot now claim surprise that the decedents’ dependent parents have a claim for death benefits. Indeed, Defendants’ own misrepresentations to the Beneficiaries and the Department of Labor contributed substantially to delaying this process. *Supra* pp. 15-22. The evidence required to prove these claims is not complicated and has not been lost or diminished. *See, e.g.*, *H. CMF*, Ex. 4. Thus, even if the Court finds that Defendants’ own actions did not estop them from raising a statute of limitations defense, the Court should exercise its discretion to toll the statute in light of the extraordinary circumstances that prevented Claimants’ Beneficiaries from bringing these actions any earlier.

B. Claimants Are Entitled to Summary Decision in Their Favor

The record demonstrates that there is no genuine issue as to any material fact and that Claimants are entitled to prevail as a matter of law. The LHWCA and DBA provide that eligible beneficiaries include the widow, children, and parents of the deceased if dependent upon him at the time of the injury and supported by the employee, either wholly or in part, for the period of one year immediately prior to the date of the injury. *See* 33 U.S.C. § 909; 42 U.S.C. § 1652. Because the nine Iraqi translators had no widows or children, and because each of them supported their parents financially before their deaths, their parents are entitled to death benefits.

Pursuant to 29 C.F.R. § 18.40, summary decision in the Claimants’ favor is appropriate where the pleadings, declarations, and discovery materials show that there is no genuine issue as

to any material fact and that they are entitled to summary decision as a matter of law. Claimants have met their affirmative burden by providing detailed affidavits and Defendants' own documents in support of each element of their claims. Y. CMF, Ex. 3; H. CMF, Ex. 4; Y. CMF, Ex. 5; S. CMF, Ex. 6; A. CMF, Ex. 7; A. CMF, Ex. 8; W. CMF, Ex. 9; A. CMF, Ex. 10; M. CMF, Ex. 11. In response to this affirmative evidence, Defendants' opposition "may not rest upon the mere allegations or denials of such pleading," but "must set forth specific facts showing that there is a genuine issue of fact for the hearing." *Id.*; see also *In the Matter of C.C. v. Serv. Emps. Int'l, Inc.*, 2007-LDA-00008, OWCP No. 02-147984 (July 26, 2007) (granting claimant's motion for summary decision and awarding benefits where defendants did not "come forth with specific facts to show the existence of a genuine issue of material fact"); *St. Amant v. Electric Boat Corp.*, 2003-LHC-2102, OWCP No. 01-154326 (July 27, 2005) (same). Here, Defendants concede eligibility in each case. Y. Mot. ¶ 4; H. Mot. ¶ 4; Y. Mot. ¶ 4; S. Mot. ¶ 4; A. Mot. ¶ 4; A. Mot. ¶ 4; W. Mot. ¶ 4; A. Mot. ¶ 4; M. Mot. ¶ 4.

To establish dependency under the DBA, a surviving mother or father must show that the covered employee supported him or her "either wholly or in part, for the period of one year prior to the date of the injury." 33 U.S.C. § 909(g); 42 U.S.C. § 1652(b). The "test for dependency turns upon whether the claimants were dependent on the decedent at least in part at the time of the injury for maintenance of their accustomed standard of living." *Urso*, 2010 WL 3019967, at *4-6. Contributions to household expenses including food, maintenance, house repairs, medical supplies, and appliances satisfy this standard. *Id.*; see also *Indus. Indem. Exch. v. Pillsbury*, 175 F.2d 911, 912 (9th Cir. 1949).

Claimants' Beneficiaries provide ample evidence of each element of their compensation claims, including dependency. Defendants either do not contest or do not supply any contradictory evidence whatsoever for any of these elements:

- **The Claimants were employed by Sallyport Global Services** at the time of their death. Y. CMF, Ex. 3 ¶ 2; H. CMF, Ex. 4 ¶ 2; Y. CMF, Ex. 5 ¶ 2; S. CMF, Ex. 6 ¶ 2; A. CMF, Ex. 7 ¶ 2; A. CMF, Ex. 8 ¶ 2; W. CMF, Ex. 9 ¶ 2; A. CMF, Ex. 10 ¶

2; M. CMF, Ex. 11 ¶ 2. Defendants concede this fact. *Y. Mot.* ¶ 2; *H. Mot.* ¶ 2; *Y. Mot.* ¶ 2; *S. Mot.* ¶ 2; *A. Mot.* ¶ 2; *A. Mot.* ¶ 2; *W. Mot.* ¶ 2; *A. Mot.* ¶ 2; *M. Mot.* ¶ 2. There is no dispute of material fact regarding this element and Claimants are entitled to summary decision on this issue as a matter of law.

- **The Claimants were killed in the course of employment**—indeed, they were targeted because of their work in support of the Coalition forces. Defendants concede this fact, as well. *Y. CMF*, Ex. 3 ¶¶ 2-4; *H. CMF*, Ex. 4 ¶¶ 2-4; *Y. CMF*, Ex. 5 ¶¶ 2-4; *S. CMF*, Ex. 6 ¶¶ 2-4; *A. CMF*, Ex. 7 ¶¶ 2-4; *A. CMF*, Ex. 8 ¶¶ 2-4; *W. CMF*, Ex. 9 ¶¶ 2-4; *A. CMF*, Ex. 10 ¶¶ 2-4; *M. CMF*, Ex. 11 ¶¶ 2-4. There is no dispute of material fact regarding this element and Claimants are entitled to summary decision on this issue as a matter of law.
- **The Beneficiaries before the Court are the Claimants’ Parents.** *See* footnote 1, above. Defendants do not dispute the familial relationship between the Claimants and the Beneficiaries and their own investigation reports unequivocally establish that the Beneficiaries are in fact the parents of the deceased Iraqi translators. *Y. CMF*, Ex. 3 ¶¶ 18-19; *H. CMF*, Ex. 4 ¶¶ 16-17; *Y. CMF*, Ex. 5 ¶ 18; *S. CMF*, Ex. 6 ¶ 18; *A. CMF*, Ex. 7 ¶ 18; *A. CMF*, Ex. 8 ¶¶ 17-18; *W. CMF*, Ex. 9 ¶¶ 18-19; *A. CMF*, Ex. 10 ¶ 18; *M. CMF*, Ex. 11 ¶ 18. There is no dispute of material fact regarding this element and Claimants are entitled to summary decision on this issue as a matter of law.
- **The Beneficiaries were financially dependent on the Claimants** at the time of their death. *Y. CMF*, Ex. 3 ¶ 21; *H. CMF*, Ex. 4 ¶ 19; *Y. CMF*, Ex. 5 ¶ 20; *S. CMF*, Ex. 6 ¶ 20; *A. CMF*, Ex. 7 ¶ 20; *A. CMF*, Ex. 8 ¶ 20; *W. CMF*, Ex. 9 ¶ 21; *A. CMF*, Ex. 10 ¶ 20; *M. CMF*, Ex. 11 ¶ 20. Defendants offer no evidence to dispute this fact. Rather, Defendants’ own investigation reports refer to Claimants’ mothers and fathers as “beneficiaries” who were “entitled to DBA benefits.” *E.g.*, *Y. Invest. Rep.*, Ex. 3D at 5 (decedent’s father stated that his son “was their sole provider and that his death had caused financial and psychological tragedy to his family”); *H. Invest. Rep.*, Ex. 4D at 1 (father told investigator that his son “used to pay the rent of the house”); *A. Invest. Rep.*, Ex. 7C at Attachment 15 (page 24) (certificate from town council confirming that decedent was the “sole provider to his mother S.M.”). Again, there is no dispute of material fact regarding this element and Claimants are entitled to summary decision on this issue as a matter of law.

Indeed, Defendants have expressly conceded that each of the nine “case[s] raise[] a viable claim for relief under the Defense Base Act Extension” of the LHWCA. *Y. Mot.* ¶ 4; *H. Mot.* ¶ 4; *Y. Mot.* ¶ 4; *S. Mot.* ¶ 4; *A. Mot.* ¶ 4; *A. Mot.* ¶ 4; *W. Mot.* ¶ 4; *A. Mot.* ¶ 4; *M. Mot.* ¶ 4.

As Claimants have satisfied each of the elements of their compensation claims and Defendants have not only offered no evidence to the contrary, but actually conceded that the cases “raise[] a viable claim for relief,” it is unnecessary to hold an evidentiary hearing to resolve these matters. Claimants’ Beneficiaries respectfully assert that summary decision in their favor is appropriate here.

V. CONCLUSION

For the reasons described above, Defendants’ Motions for Summary Decision should be denied and Claimants’ Cross-Motion for Summary Decision should be granted. Additionally, Claimants request that this matter be referred to the OWCP for an investigation of Defendants for fraud or abuse pursuant to Section 31(c) of the LHWCA and its extensions.

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