BRB No. 04-0731

SHERRY HALLMAN (Widow of BRIAN C. HALLMAN) Claimant-Respondent v. CSX TRANSPORTATION, INCORPORATED Self-Insured Employer-Petitioner	)	DATE ISSUED: 11/23/2004 ORDER

Employer appeals the administrative law judge's Decision and Order granting employer's motion for summary decision, the Order Granting Reconsideration granting claimant's motion for summary decision, and the Order Denying Employer's Motion for Reconsideration. Claimant has filed a motion to dismiss employer's appeal as interlocutory, to which employer responds, urging the Board to decide its appeal. Each party additionally has filed affidavits in support of its position, in response to which the other party has filed a motion to strike.

Claimant filed a claim under the Act for the death of her husband resulting from injuries he sustained in a car accident. It is undisputed that decedent was in the course and scope of his employment at the time of the accident. Decedent was employed as a carman, a job which involves the inspection, maintenance, and repair of railroad freight cars, at Port Manatee, a deepwater port adjacent to Tampa Bay. While in the course of his employment, decedent was required to deliver a piece of equipment to employer's Tampa facility. The accident occurred just outside the port, on the route to Tampa, at the intersection of Piney Point Road and U.S. 41 in Palmetto, Florida. Both parties filed motions for summary decision with the administrative law judge on the issues of coverage under the Act, *i.e.*, 33 U.S.C. §§902(3), 903(a).

The administrative law judge found that decedent was a maritime employee pursuant to Section 2(3), but that the site of the accident was outside the port area, on public roads, and that the situs test of Section 3(a) was not satisfied. Therefore, he granted employer's motion for summary decision and denied claimant's motion.

Claimant filed a motion for reconsideration, which the administrative law judge granted. He found that the intersection where the accident occurred is essentially part of

the port facility and thus is in an "adjoining area" pursuant to Section 3(a). Therefore, he found both of the Act's coverage provisions satisfied, he granted claimant's motion for summary decision, and he denied employer's motion for summary decision, on the coverage issues. The administrative law judge stated, "A hearing in this matter will be rescheduled in the near future," presumably to address any remaining issues.

Employer filed a motion for reconsideration. One of the contentions raised by employer was that it did not have the opportunity to cross-examine three individuals whose affidavits formed the basis for the administrative law judge's grant of claimant's motion for reconsideration on the situs issue. The administrative law judge denied this contention on the ground that the affidavits were submitted with claimant's original motion for summary decision and employer did not initially raise the contention that it needed to cross-examine the affiants. The administrative law judge also denied employer's motion to strike two of the affidavits on a procedural ground. Employer appeals all of the administrative law judge's decisions.

The administrative law judge's decision finding the Act's coverage provisions satisfied is an interlocutory order as it neither grants nor denies benefits. 33 U.S.C. §919(e); 20 C.F.R. §702.348. The Board ordinarily does not undertake review of non-final orders. *See, e.g., Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. First, the order must conclusively determine the disputed question. Secondly, the order must resolve an important issue that is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271 (1988) ("collateral order doctrine"). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id*. at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on federal court procedures for guidance where the Act and regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16, 15 BRBS 11, 21 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed from does not satisfy this three-pronged test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process. *See Butler v. Ingalls Shipbuilding, Inc*., 28 BRBS 114 (1994); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

We grant claimant's motion to dismiss employer's appeal, as the issues of status and situs are not collateral to the merits of the action and as they may be addressed once a

final decision and order granting or denying benefits is issued.[1] We reject employer's contention that the administrative law judge's denial of its motion to depose claimant's affiants denied it due process of law. A claim of denial of due process may be sufficient for the Board to entertain an interlocutory appeal. *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987); *see also Newton v. P&O Ports*, 38 BRBS 23 (2004). Claimant attached to her motion for summary decision the affidavits of some of the decedent's co-workers. Both parties filed pleadings offering their respective interpretations of the affidavits. Only after the administrative law judge issued his second decision finding the situs element satisfied did employer first raise an objection based on its lack of cross-examination of the affiants. The administrative law judge stated that this objection was raised too late. This finding is rational and is grounded in the regulations regarding summary decision, which anticipate the filing of affidavits as support for a motion for summary decision, and which provide the opportunity for a party to oppose such a motion. *See* 29 C.F.R. §§18.40, 18.41. A denial of due process occurs when there is an absence of an *opportunity* to respond to an order or a pleading. *See Niazy*, 19 BRBS at 269. In this case, employer had the opportunity to challenge the affidavits and assert the matter was not appropriate for summary decision, but it did not do so until after an adverse decision was issued. Thus, there was no denial of due process.

Employer also contends that the issues presented by its appeal are important and should be decided now, because the administrative law judge's decisions have created uncertainty for its risk management procedures, *i.e.* liability under the Longshore Act versus under the Federal Employers' Liability Act. We are not persuaded that this alleged uncertainty requires us to decide employer's appeal at this time, as railroad workers previously have been held covered under the Longshore Act if their work is integral to the loading and unloading of vessels. *See, e.g., Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989).

Finally, we reject employer's contention that we should decide this appeal because the Board has previously decided interlocutory appeals of coverage issues. *See, e.g., Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179 (1999); *Caldwell v. Universal Maritime Serv. Corp..*, 22 BRBS 398 (1989) (deciding interlocutory appeal because case had been pending for a long time). The fact that the Board has the authority

[1] Similarly, employer's contention that the administrative law judge erred in not holding a hearing, although collateral to the merits, may be addressed once a final decision is issued. *See, e.g., Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003). Employer's contention, however, is disingenuous, in that both parties moved for summary decision.

to decide interlocutory appeals does not require that we do so as it is desireable to avoid piecemeal review.[2] *See Arjona*, 24 BRBS 222.

Accordingly, claimant's motion to dismiss employer's appeal is granted. The parties' motions to strike are moot.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[2] Claimant avers that the parties have not reached an agreement as to the remaining issues in this case. Claimant's Motion to Dismiss at 3. In *Jackson v. Straus Systems, Inc.*, 21 BRBS 266 (1988), the Board decided an interlocutory appeal addressing the Act's coverage provisions because the parties represented that they could reach an agreement on the issues remaining in that case.