

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 17-0448

LAURENCE E. THIBEDEAU )

Claimant )

v. )

SSA PACIFIC, INCORPORATED )

fka STEVEDORING SERVICES OF )

AMERICA )

Employer-Petitioner )

OREGON INSURANCE GUARANTY )

ASSOCIATION, Putative Successor-in- )

Interest to EAGLE PACIFIC INSURANCE )

COMPANY )

Carrier-Respondent )

ILWU-PMA WELFARE PLAN )

Intervenor )

DIRECTOR, OFFICE OF WORKERS' )

COMPENSATION PROGRAMS, UNITED )

STATES DEPARTMENT OF LABOR )

Respondent )

DATE ISSUED: Aug. 29, 2018

DECISION and ORDER

Appeal of the Order Granting Motion to Dismiss of Richard M. Clark,  
Administrative Law Judge, United States Department of Labor.

John Dudrey, Lake Oswego, Oregon, for employer/carrier.

Robert E. Babcock (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for Oregon Insurance Guaranty Association.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Law Judge:

Employer appeals the Order Granting Motion to Dismiss (2016-LHC-01651) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant retired from longshore employment on June 1, 1991. He filed a hearing loss claim in 1992, which was resolved in an approved settlement with employer and its insurer, Eagle Pacific Insurance Company (Eagle), pursuant to Section 8(i), 33 U.S.C. §908(i).<sup>1</sup> Claimant required new hearing aids in 2013. He purchased them and filed a claim under the Act for reimbursement. The ILWU-PMA Welfare Plan (the Plan), reimbursed claimant for the hearing aids and intervened in the proceeding to recover its payment, pursuant to Section 7(d)(3), 33 U.S.C. §907(d)(3). Eagle was insolvent; therefore, the Office of Workers' Compensation Programs (OWCP) joined the Oregon Insurance Guaranty Association (the OIGA) as a party. Employer contended that the OIGA was the party responsible for reimbursing the Plan for the cost of claimant's hearing aids as this medical expense was a "covered claim" pursuant to the Oregon State Guaranty Act (the Oregon Act). *See* Or. Rev. Stat. Ann. §734.510(4)(a). The OIGA filed a motion to dismiss employer's claim against it on the basis that the administrative law judge lacked jurisdiction to resolve a coverage dispute under the Oregon Act.

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<sup>1</sup> Employer/Eagle paid claimant \$23,004.32 in compensation and agreed to remain liable for medical benefits.

Administrative Law Judge Clark (the administrative law judge) granted OIGA's motion. He found that whether the OIGA is liable under the Oregon Act for reimbursing the Plan was not a question in respect of a claim, pursuant to Section 19(a) of the Act, 33 U.S.C. §919(a). Order Granting Motion to Dismiss (Order) at 5-6. Subsequently, Administrative Law Judge King approved the remaining parties' request for a stipulated compensation order, which provided that employer would reimburse the Plan \$5,000 to settle its claim and pay claimant's counsel's attorney's fee. Employer reserved the right to seek review of the administrative law judge's Order dismissing the OIGA from the case. Order Approving Stipulations and Awarding Benefits and Attorney's Fees at 2. Following the issuance of this final compensation order, employer appealed the administrative law judge's Order Granting Motion to Dismiss the OIGA.

On appeal, employer challenges the administrative law judge's dismissal of the OIGA. The Director, OWCP, and the OIGA respond that the administrative law judge's granting of the OIGA's motion to dismiss was in accordance with law and should therefore be affirmed. Employer filed a reply brief in support of its position. In addition, employer filed a supplemental brief addressing the Board's recent decision in *Walton v. SSA Containers, Inc.*, 52 BRBS 1 (2018) (en banc) (Gilligan, J., dissenting).

Employer contends that, because the Plan intervened for reimbursement of the cost of claimant's hearing aids, pursuant to Section 7(d)(3) of the Act, jurisdiction is conferred on the administrative law judge under Section 19(a). Employer thus contends that the issue of whether Eagle's liability is a "covered claim" such that the OIGA must reimburse employer for its payment to the Plan, pursuant to the Oregon Act, is an issue "in respect of a claim" under Section 19(a).

Citing *Temporary Employment Services v. Trinity Marine Group, Inc.* [Ricks], 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) and *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004), the administrative law judge found that the phrase "in respect of such claim" in Section 19(a)<sup>2</sup> has been construed as limiting an administrative law judge's authority to

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<sup>2</sup> Section 19(a) provides in pertinent part:

the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

33 U.S.C. §919(a); *see* 20 C.F.R. §701.301(a)(7) (changing the title from deputy commissioner to district director). Section 19(d) transferred the adjudicatory duties of the district directors to administrative law judges. This section provides in pertinent part:

adjudicating issues that involve only claimant's entitlement to benefits or who is responsible for paying those benefits under the Act. Order at 4. The administrative law judge found that prior Board cases and, by implication, Section 703.201, 20 C.F.R. §703.201, establish that an administrative law judge may interpret state insurance laws to determine the *extent* of liability of state guaranty associations,<sup>3</sup> but there is no case law directly supporting employer's contention that he has jurisdiction to determine whether the OIGA is liable under the Oregon Act in the first instance. *Id.* at 5. The administrative law judge stated that the liability issue in this case does not involve claimant's entitlement to benefits, or who under the Act is responsible for paying claimant's benefits, because, implicitly, employer is liable. *Id.* Therefore, he found that determining what entity, if any, must pay benefits under the Oregon Act is not a question in respect of claimant's compensation claim. *Id.* Accordingly, the administrative law judge granted the OIGA's motion to dismiss the claim against it in the federal forum. *Id.* at 6.

An administrative law judge has "full power and authority to hear and determine all questions in respect of such claim" arising under the Act. 33 U.S.C. §919(a); *see Crowell v. Benson*, 285 U.S. 22 (1932). Questions "in respect of" a claim have been limited to those that are "essential to resolving the rights and liabilities of the claimant, the employer, and the insurer" under the Act. *Ricks*, 261 F.3d at 463, 35 BRBS at 97(CRT). In the absence of a justiciable claim asserting a right arising out of or under the Act, the administrative law judge does not have jurisdiction to resolve disputes. *Watson v.*

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All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C §919(d).

<sup>3</sup> *See Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009); *Marks v. Trinity Marine Group*, 37 BRBS 117 (2003); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Section 703.201 provides in pertinent part:

[Security deposits] also secure the payment of compensation and medical benefits when a carrier becomes insolvent and such obligations are not otherwise fully secured by a State guaranty fund. Any gap in State guaranty fund coverage will have a direct effect on the amount of security the Office will require a carrier to post.

20 C.F.R. §703.201.

*Huntington Ingalls Industries, Inc.*, 51 BRBS 17 (2017); *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012).

In this case, the rights and liabilities under the Act of employer and claimant were resolved by the approved 1992 Section 8(i) settlement, wherein employer and Eagle agreed to pay claimant compensation for his hearing loss and to provide medical benefits. *Thibedeau v. Stevedoring Services of America, et al.*, 1992-LHC-1290 (Oct. 1, 1992); Application for Approval of Accepted Settlement, §8(i) at 3. Pursuant to Section 4(a) of the Act, 33 U.S.C. §904(a), employer remains liable under the Act for claimant’s medical benefits, which it agreed to pay in the settlement, irrespective of Eagle’s subsequent insolvency.<sup>4</sup> See *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 726, 22 BRBS 24, 34(CRT) (1st Cir. 1989).

We reject employer’s contention that the Plan’s reimbursement claim under Section 7(d)(3) provides the basis for the administrative law judge’s authority to determine liability as between employer and the OIGA. This section states:

The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

33 U.S.C. §907(d)(3). In the 1992 Section 8(i) settlement, employer agreed to provide continuing medical benefits to claimant. The issue in the present proceeding was whether employer was liable to claimant under Section 7(a), 33 U.S.C. §907(a), or to the Plan under Section 7(d) (3) for claimant’s hearing aids. In either instance, employer’s liability under the Act stems from Section 4(a) due to Eagle’s insolvency. *Meagher*, 867 F.2d at 726, 22 BRBS at 34(CRT). Whether the OIGA is liable for Eagle’s obligations under the Oregon Act is not an issue in respect of either claimant’s or the Plan’s claim under the Act.

The administrative law judge properly stated that the issue of whether the medical benefits at issue is a “covered claim” under state law presents a question under the Oregon Act, which may result in the OIGA assuming Eagle’s liabilities under the Act to claimant

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<sup>4</sup> Section 4(a) provides in pertinent part:

Every *employer shall be liable for* and shall secure the payment to his employees of *the compensation payable under sections 907, 908, and 909 of this title.*

33 U.S.C. §904(a) (emphasis added).

and/or to the Plan. Order at 5. However, on the facts of this case,<sup>5</sup> we affirm the administrative law judge's finding that he lacked jurisdiction to determine whether the OIGA is liable under the Oregon Act. Employer is seeking resolution of a collateral dispute that does not involve the claims of claimant and the Plan, or employer's liability therefor, under the Act.<sup>6</sup> See *Walton*, 52 BRBS 1; see also *Ricks*, 261 F.3d at 463, 35 BRBS at

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<sup>5</sup> We note that in cases arising under the Black Lung Act, circuit courts have addressed "covered claim" disputes under state guaranty laws where both the responsible operator and insurer were bankrupt and the issue was whether a prior operator became responsible or the applicable state guaranty association was liable under the Act to assume coverage for the claim. See, e.g., *Island Fork Constr. v. Bowling*, 872 F.3d 754 (6th Cir. 2017); *R&F Coal, Inc. v. Mullins*, 842 F.3d 279 (4th Cir. 2016); *Boyd & Stevenson Coal Co. v. Director, OWCP [Slone]*, 407 F.3d 663 (4th Cir. 2005). Contrary to the administrative law judge's reasoning that his jurisdiction extends to only those cases where the state guaranty association assumed liability and only extent of liability is at issue, pursuant to these cases, an issue of coverage under a state guaranty law is a question in respect of a claim under Section 19(a) in cases where both the employer and insurer are insolvent, as this circumstance requires a determination whether a state guaranty association is liable to the claimant or if the Secretary of Labor authorizes payment by the Special Fund under Section 18(b), 33 U.S.C. §918(b).

<sup>6</sup> We reject employer's contention that the recently-issued *Walton* decision is supportive of its contention that the administrative law judge has the authority in this case to address whether the OIGA is liable to the Plan. In *Walton*, the Board affirmed the administrative law judge's decision that he lacked jurisdiction to resolve a dispute regarding which of two longshore employers is liable to reimburse a third-party insurer for past medical benefits, where no claim under the Act was presented for adjudication. The Board explained that the dispute was not "in respect of" a claim under the Act because the parties' earlier settlement agreement had resolved claimant's interest in her claim and the insurer had not filed a claim for reimbursement of medical expenses under Section 7(d)(3). As no rights arising under or out of the Act were at issue, neither employer faced liability under the Act and the responsible employer dispute therefore was theoretical. *Walton*, 52 BRBS 1.

Employer asserts that, in this case, it remains liable to claimant for medical benefits and the Plan filed a reimbursement claim under Section 7(d)(3) for medical benefits it paid, which renders *Walton* distinguishable. Moreover, unlike *Walton*, employer contends there is no hold harmless agreement among the parties.

We are not persuaded by employer's contention that these factual difference are legally significant. In *Walton*, the lack of a justiciable claim was premised on the absence

97(CRT); *Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

Accordingly, the administrative law judge's Order Granting Motion to Dismiss is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

I concur:

JONATHAN ROLFE  
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the decision of my colleagues to reject employer's contention that the Oregon Insurance Guaranty Association (OIGA) is a proper party to the Plan's reimbursement claim under Section 7(d)(3) of the Act, 33 U.S.C. §907(d)(3), albeit for a different reason. I believe the claim against the OIGA under the Act is now moot given that employer stipulated to its liability to the ILWU-PMA Welfare Plan (the Plan) pursuant to Section 7(d)(3) and has paid the agreed amount of \$5,000 for claimant's hearing aids. Given these circumstances, there is no longer an issue "in respect of a claim" under Section 19(a) of the Act, 33 U.S.C. §919(a), concerning the OIGA's liability. The claim against the OIGA with respect to the matter at issue here now arises solely under state law.<sup>7</sup> *See*

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of an existing controversy under the Act. Our holding herein is similarly premised on the absence of an existing controversy under the Act. Under Section 4(a) of the Act, employer is liable to claimant under Section 7(a) or to the Plan under Section 7(d)(3) when its insurer goes out of business. Employer seeks to hold a state entity liable under state law. On the facts here, this is not an issue in respect of a claim pursuant to Section 19(a).

<sup>7</sup> Had employer not reimbursed the Plan or had claimant remained unpaid, the administrative law judge arguably would have had the authority to resolve the issue of whether OIGA stepped into the shoes of the bankrupt Eagle and was liable to claimant, or to the Plan under Section 7(d)(3) (as responsible carrier-related issues generally are "in

*generally Walton v. SSA Containers, Inc.*, 52 BRBS 1 (2018) (en banc) (Gilligan, J., dissenting). Therefore, I concur in the disposition of this appeal.

JUDITH S. BOGGS  
Administrative Appeals Judge

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respect of a claim” pursuant to Section 19(a)). *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004); *see generally Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998), *aff’d sub nom. Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999). However, those issues are not presented here.