U.S. Department of Labor

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

BRB No. 19-0559

HANNAH COVARRUBIAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL LINGUIST SOLUTIONS, LLC	)	
	)	DATE ISSUED: 05/29/2020
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Brian E. Wiklendt (Garfinkel Schwartz, PA), Maitland, Florida, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Decision (2017-LDA-00655) of Administrative Law Judge Evan H. Nordby rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must

affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer in Iraq as a linguist from April 8, 2008, through February 10, 2011. She filed a claim under the Act in February 2009 for post-traumatic stress disorder (PTSD), which she related to an incident on June 18, 2008, involving her roommate and another co-worker. Emp. Mot. For Summary Decision (MSD) Exs. B, C. On February 15, 2011, after employer terminated her due to the withdrawal of American forces from Iraq, claimant filed a second claim under the Act with a date of injury of April 20, 2009. She alleged she suffers depression and PTSD due to sexual harassment and discrimination. *Id*. Ex. E. An informal conference was conducted on October 11, 2011, which claimant attended with her attorney. *Id*. Ex. F. The conference memorandum notes claimant's attorney withdrew the claim for the alleged June 2008 injury and requested that the claim for the alleged April 2009 injury be referred to the Office of Administrative Law Judges (OALJ).[1] *Id*. In August 2013, claimant, employer and the insurer on the risk for the April 2009 claim, Ace American Insurance Company (Ace American), submitted a settlement agreement under Section 8(i), 33 U.S.C. §908(i), to the OALJ which Administrative Law Judge Clark approved in a decision issued in September 2013.[2] *Id*. Ex. H.

In April 2017, claimant filed an LS-18 Pre-Hearing Statement for her June 2008 claim; she alleged a psychiatric injury which she attributed to sexual harassment and hostility by her site manager.[3] MSD Ex. I at 4. Employer filed for summary decision on the basis that the June 2008 claim was either withdrawn or settled pursuant to the terms of the 2013 settlement agreement. Claimant responded that summary decision was inappropriate as the claims involved different supervisory personnel, a different insurance

[1] The Office of Workers' Compensation Programs subsequently notified the parties that it administratively closed the claim for the alleged June 2008 injury because claimant was not pursuing it. MSD Ex. G.

[2] Employer agreed to pay claimant $228,000 in return for a complete discharge of its liability for compensation and medical care. MSD Ex. H at 7.

[3] Claimant testified at her deposition that the harassment in 2008 consisted of inappropriate touching by her site manager and that the June 2008 incident with her roommate and other co-worker was prompted by her complaints about the site manager. MSD Ex. J at 4 (p. 12), 9-10 (pp. 30-35).

carrier, and a separate injury which she was not aware was related to her 2008 claim until after she settled her 2009 claim.

In his Order Granting Motion for Summary Decision (Order), Administrative Law Judge Nordby (the administrative law judge) found it "clear and undisputed" that claimant also settled any June 2008 PTSD claim when she settled her April 2009 PTSD and depression claim. Order at 4. The administrative law judge relied on the plain language of the settlement agreement that it "satisfies and eliminates all her claims . . . for the incidents described herein" for "the cumulative injury sustained between Claimant's date of hire and termination." *Id.*; *see* MSD Ex. H at 8. The administrative law judge stated the settlement explicitly discussed the opinion of claimant's treating psychologist, Dr. Debra Johnson, that claimant's psychological condition is attributable to sexual harassment she experienced in 2008. Order at 4. He found "claimant cannot now create disputed issues of fact as [to] the scope of the settlement . . . by testifying at a deposition contrary to the settlement application" and determined she is judicially estopped from asserting a position inconsistent with the settlement terms to which she agreed.[4] *Id.* at 4-5; *see* MSD Ex J. Accordingly, the administrative law judge granted employer's motion for summary decision and dismissed claimant's claim.

On appeal, claimant avers the administrative law judge erred by finding the settlement agreement included her 2008 PTSD claim based on sexual harassment. Claimant also contends the settlement agreement is inapplicable to her 2008 claim because employer was insured at that time by Zurich American Insurance Company (Zurich), which was not a party to the settlement. Employer responds that Zurich's liability is derivative of employer's pursuant to Section 35 of the Act.[5] Employer asserts its liability for all claims was discharged because the settlement covered all injuries from the date of claimant's hire.

In determining whether to grant a motion for summary decision, the fact-finder must determine, after reviewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Wilson v. Boeing Co.*, 52 BRBS 7

[4] He also rejected claimant's assertion that she was unaware her June 2008 claim was withdrawn, as the informal conference memorandum reflects she was present at the conference when her attorney withdrew the claim. Order at 5; *see* MSD Ex F.

[5] Section 32 of the Act, 33 U.S.C. §932, requires an employer to self-insure or obtain insurance coverage. Section 35 of the Act, 33 U.S.C. §935, states in pertinent part that "any . . . decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer." *See also* 20 C.F.R. §703.115.

(2018); *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); 29 C.F.R. §18.72. To defeat a motion for summary decision, the non-moving party must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the administrative law judge could find for the non-moving party, or if it is necessary to weigh conflicting evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (emphasis in original)); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon*., 46 BRBS 57 (2012).

In this case, the "form" of the settlement agreement indicates the parties were settling claimant's April 2009 claim; the claim number references that claim and the approval order also references the 2009 claim. MSD Ex. H. Nevertheless, the administrative law judge quoted language in the settlement application he found makes clear the parties also settled all claims from the date of claimant's hire, including the claim based on sexual harassment in 2008, as Dr. Johnson described in the settlement documents. Order at 4. The settlement application specifically states the parties were settling all claims for the incidents described in the document and Dr. Johnson described claimant's condition as being due to her supervisor's harassment in 2008, which formed the basis for claimant's allegation in her April 2017 pre-hearing statement. MSD Ex. H. Moreover, the settlement discharged employer of any liability "for cumulative injury sustained between the date of hire and termination." *Id*. at pp 9-10.[6]

Section 8(i) of the Act, 33 U.S.C. 908(i), provides for the discharge of employer's liability for benefits where the district director or administrative law judge approves an application for settlement. Once approved, the effect of a settlement is to completely

[6] The agreement states:

> Based on the disputed issues discussed above, the parties agree that the proposed settlement is adequate to compensate the Claimant for the effects of the industrial injury of April 20, 2009 and the cumulative injury sustained between Claimant's date of hire and termination.

MSD Ex. H at 9-10.

discharge the employer's liability for the claimant's injuries that are the subject of the settlement. 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b); *see, e.g., Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998). "An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence." 20 C.F.R. §702.241(g). A Section 8(i) settlement is a final adjudication of the issues resolved therein, and may not be collaterally attacked by the parties in a subsequent proceeding. *Vilanova v. United States*, 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989).

In this case, the 2008 claim was "in existence" at the time of the settlement, notwithstanding that the file had been administratively closed. *See generally Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring). The administrative law judge properly determined from the plain language of the settlement agreement that the parties settled the 2008 claim because the basis for the claim, sexual harassment, was described in the agreement and the parties settled all claims from the date of claimant's hire. Moreover, he properly determined claimant was precluded from relitigating her 2008 sexual harassment claim based on the doctrine of judicial estoppel, as she took inconsistent positions to employer's detriment in signing the settlement agreement and subsequently making a claim for an injury encompassed in that agreement. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996). Thus, there was no genuine issue of material fact for hearing as to the viability of the claim based on harassment in 2008. *Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.*, 47 BRBS 9 (2013); *Smith v. Labor Finders*, 46 BRBS 35 (2012). Accordingly, we reject claimant's assertion that the terms of the settlement agreement did not include her 2008 claim.

Moreover, claimant's contention regarding the non-participation of Zurich in the settlement proceedings is a red herring. Section 8(i)(3) of the Act states: "A settlement approved under this section shall discharge the liability of the employer or carrier, or both." 33 U.S.C. §908(i)(3). Under Section 35 of the Act, an insurer's liability is derivative of employer's, as it provides that "any . . . decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer."[7] 33 U.S.C. §935. *See generally Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd mem.*, 640 F.2d 383 (5th Cir. 1981) (table). Claimant is without standing to assert any rights Zurich may have against employer; the source of the settlement funds does not concern her. *See generally Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988); *Dove*

[7] Also, as the settlement refers to a "cumulative injury," the last carrier, Ace American, is fully liable under the aggravation rule and it settled with claimant. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

v. Southwest Marine of San Francisco, 18 BRBS 139 (1986). As the settlement extinguished employer's liability, the liability of Zurich for her 2008 claim is also extinguished. Thus, we reject claimant's contention and affirm the administrative law judge's dismissal of the claim.

Accordingly, we affirm the administrative law judge's Order Granting Motion for Summary Decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge