BRB No. 09-0500

JOYCE TOURO (Widow of JESSE TOURO) Claimant-Petitioner v. BROWN & ROOT MARINE OPERATORS and BROWN & ROOT, INCORPORATED Employer-Respondents HUGH O'CONNER, INCORPORATED (defunct) ACE INSURANCE COMPANY Carrier	)	DATE ISSUED: 11/18/2009 DECISION and ORDER

Appeal of the Amended Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John F. Dillon, Folsom, Louisiana, for claimant.

Douglass M. Moragas, River Ridge, Louisiana, for Brown & Root Marine Operators and Brown & Root, Incorporated.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Amended Decision and Order (2008-LHC-00715) of Administrative Law Judge Clement J. Kennington rendered on claims 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The employee, Jesse Touro, now deceased, filed a claim on July 16, 2007, seeking benefits for a lung injury he sustained as a result of his inhalation of asbestos during his work for Hugh O'Conner, Incorporated (HOC). He stated that he was hired by HOC in 1968 to work as a supervisor and carpenter, and that he was exposed to asbestos while on navigable waters during a one-week assignment with HOC in 1970 to do carpentry work on the living quarters of a pipe-laying barge owned by Brown & Root, Incorporated (B&R) and moored at its facility in Belle Chasse on the Intracoastal Canal.[1] Decedent continued to work with HOC until 1972, and in general, until his retirement in 2000 due to health problems. On May 30, 2005, Dr. Gomes first diagnosed decedent with severe pulmonary impairment due to asbestosis and asthma, and subsequently opined, on March 21, 2007, that he was totally disabled as a result of a combination of fibrosis from asbestosis and asthma, although Dr. Gomes added that decedent's asbestosis was the major component of his respiratory impairment.

Decedent died on August 28, 2008, due to severe restrictive lung disease and asbestosis, leading his surviving spouse (claimant) to pursue the *inter vivos* claim and to file a separate claim seeking survivor's benefits. As HOC was dissolved in 1980, claimant pursued these claims against B&R and Brown Root Marine Operators, Incorporated (BRMO) arguing that they are liable for benefits under Section 4(a) of the Act, 33 U.S.C. §904(a), because a general contractor/subcontractor relationship existed among the three entities at the time of claimant's injury. B&R controverted the claims, arguing that it is not liable for benefits under the Act.

In his Amended Decision,[2] the administrative law judge initially found that decedent was an employee of HOC at the time of his asbestos exposure, that HOC was not a subcontractor of B&R, and thus, that HOC and not B&R, is the employer liable for benefits in this case. In addition, the administrative law judge found that claimant did not show that HOC failed to secure insurance coverage pursuant to Section 4(a) at the time of

[1] Decedent stated that his one-week assignment with HOC at the B&R facility represented his only exposure to asbestos while on the water.

[2] The administrative law judge issued an initial Decision and Order Denying Benefits in this case on February 19, 2009. Claimant sought reconsideration, requesting that the administrative law judge further expound on certain issues, including a resolution as to HOC's liability for the work injury, as well as identification of the relief available to claimant due to the insolvency of HOC.

decedent's injury, that ACE Insurance Company (ACE) is not the responsible carrier in this case,[3] and that claimant did not otherwise present any evidence to identify the responsible carrier for the now-defunct HOC at the time of injury. Moreover, the administrative law judge concluded that a general contractor/subcontractor relationship did not exist between B&R and HOC and thus, that B&R cannot be liable for benefits pursuant to Section 4(a). As a result of the insolvency of HOC and the inability to identify and/or locate its responsible carrier, the administrative law judge consequently urged claimant to seek benefits from the Special Fund pursuant to Section 18(b) of the Act, 33 U.S.C. §918(b).

On appeal, claimant challenges the administrative law judge's finding that B&R is not liable for benefits. B&R responds, urging affirmance of the administrative law judge's decision.

Claimant first argues that the administrative law judge erred in denying her motion to continue the formal hearing, asserting that B&R's failure to comply with claimant's pre-trial discovery requests resulted in a highly prejudicial trial "with surprise witnesses and exhibits." Claimant specifically asserts that the administrative law judge erred because he had the hearing proceed without having B&R respond to claimant's pre-trial discovery request, which was in the form of a Rule 30(b)(6) deposition, Fed. R. Civ. P. 30(b)(6).[4] Claimant maintains that B&R's nonfeasance precluded her from receiving

[3] The administrative law judge found that ACE, which formerly was Insurance Company of North America (INA), was not the insurer of HOC in 1970, since no insurance "policy was found for HOC in the state of Louisiana for the years 1968-1971," and because claimant acknowledged in his post-hearing brief that INA "negated the existence of Longshore coverage in 1970 for HOC." Amended Decision at 18.

[4] Rule 30(b)(6) of the Federal Rules of Civil Procedure states:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

timely pre-hearing notice of B&R's witnesses and/or the substance of its defense and thus, prevented claimant from effectively presenting her claims at the formal hearing.

Claimant, prior to the formal hearing in this case, was unsuccessful in obtaining information from B&R and ACE regarding decedent's work history at the Belle Chasse site via the discovery process.[5] In light of this, claimant's counsel stated at the formal hearing on December 2, 2008, hearing, that he was "opposing" B&R's decision to call Charles Miller as a witness "to testify regarding a number of matters related to [Section] 904(a)," arguing that Mr. Miller's testimony would be "highly prejudicial" since claimant's pre-hearing discovery requests sought information on issues to be discussed by Mr. Miller that had "never been properly answered." HT at 16. Alternatively, claimant's counsel requested that the hearing be "continued briefly" for B&R to produce the sought after records so that claimant could "prepare for any defense [B&R] may wish to raise using this particular aspect of the law." *Id.* at 16-17, 33.

After considerable discussion both on and off the record, HT 18-40, the parties agreed, and the administrative law judge ordered, that the record be held "open for completion of discovery [for a] 45-day period" following the hearing. *Id.* at 40. Claimant's counsel thereafter agreed to allow B&R to call its witness. *Id.* at 42. On January 29, 2009, claimant filed a Motion to Supplement and Amend the Record Post-Hearing, in which she sought to submit the report of claimant's expert, Frank Parker, Industrial Hygienist, as well as the January 19, 2009, deposition of B&R witness, Jeff Smith, which "was designated as the 30(b)(6) Notice and Response." The administrative law judge acknowledged in his decision that "[p]ost-trial, claimant introduced the Deposition of Frank Parker, which was admitted." Amended Decision and Order at 2. Moreover, the administrative law judge admitted into evidence, and thoroughly considered, the deposition testimony of Mr. Smith.[6] Amended Decision and Order at 6-7.

Fed. R. Civ. P. 30(b)(6).

[5] Specifically, at claimant's behest, the administrative law judge issued subpoenas to both B&R and ACE on July 7, 2008, to compel their production of the information requested by claimant. Claimant followed this up, on September 10, 2008, by filing a notice of a Rule 30(b)(6) deposition against B&R.

[6] The administrative law judge also acknowledged that Mr. Smith was "designated [the] 30(b)(6) witness for B&R." Amended Decision and Order at 6.

Claimant's contentions lack merit. First, the administrative law judge did not abuse his discretion by declining to continue the formal hearing in this case, since claimant's counsel, in essence, withdrew his request for a continuance once the parties agreed to leave the record open post-hearing for the submission of any additional evidence.[7] Second, claimant's post-hearing submission of the deposition of Mr. Smith reflects that B&R ultimately complied with claimant's discovery requests. Thus, it cannot be said that claimant sustained any prejudice in the prosecution of her claims as a result of the administrative law judge's refusal to continue the hearing in this case.[8] Furthermore, there was no violation of claimant's due process rights, as claimant was provided notice and an opportunity to be heard prior to the administrative law judge's issuance of his decision. *Goldberg v. Kelly*, 397 U.S. 254 (1970). We, therefore, reject claimant's assertion that the administrative law judge violated claimant's due process rights by conducting a "highly prejudicial" formal hearing.

Claimant next argues that the administrative law judge erred in his narrow and mechanical application of Section 4(a), 33 U.S.C. §904(a), in this case. Specifically, claimant argues that since the vessel operator BRMO contracted with B&R to perform general vessel repair work and that B&R, in turn, subcontracted HOC to perform interior carpentry work as part of the larger barge refurbishment project, case law supports a finding that B&R is liable for claimant's benefits pursuant to Section 4(a) of the Act.[9]

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[7] Additionally, as noted above, claimant's counsel specifically withdrew his objection to the testimony of Mr. Miller. HT at 42.

[8] Moreover, there is no basis for claimant to argue that the hearing resulted in the submission of "surprise exhibits" since the record reflects that B&R did not introduce any exhibits in this case. In addition, claimant's counsel was aware on November 18, 2008, of B&R's intent to call Mr. Miller to testify at the December 2, 2008, hearing and the witness was listed on the witness list submitted by B&R on November 25, 2008, thereby providing claimant with advance notice of this witness's appearance. Despite claimant's counsel's inability to talk with Mr. Miller pre-hearing, claimant's counsel ultimately agreed to allow Mr. Miller to testify at the hearing. HT at 42.

[9] As B&R notes in its response brief, claimant's arguments that the administrative law judge too narrowly interpreted the standard espoused for application of Section 4(a) in this case are based on her position that BRMO was a corporate entity in 1970, that it existed separate and apart from B&R, that BRMO owned and operated the B&R barges, and that B&R maintained and repaired those barges for BRMO. Referencing the decision of the United States Court of Appeals for the Fifth Circuit in *Brown & Root Marine Operators, Inc. v. Zapata Offshore Co.*, 377 F.2d 724 (5th Cir. 1967), as well as a document entitled *Louisiana Secretary of State Detailed Record*, CX 8, the administrative

Section 4(a) of the Act states:

> 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. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. §904(a).[10] The United States Court of Appeals for the Fifth Circuit has stated that Section 4(a) "premises liability on a finding that the principal is subject to some contractual obligation, which it, in turn, passed in whole or in part to the subcontractor." *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). The Fifth Circuit referred to this as a "two contract" requirement. *Id.* The Fifth Circuit also noted that the Act readily distinguishes between employers who are owners and those who are general contractors working under contractual obligations to others, and recognized that this is the differentiating feature between the dispositions in *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Dailey v. Edwin H. Troth, t/a EHT Constr. Co.*, 20 BRBS 75 (1986).

In *National Van Lines*, 613 F.2d 972, 11 BRBS 298, National Van Lines contracted with various shippers to carry cargo interstate; it then delegated a portion of its contracts to Eureka. The D.C. Circuit held that Eureka employees performed work that would normally be performed by National Van Lines's own employees, and therefore

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law judge found that BRMO had been dissolved and replaced by B&R prior to 1970. Thus, the underlying premise of claimant's arguments, *i.e.*, that BRMO owned the barge upon which decedent, as an employee of alleged subcontractor HOC to general contractor B&R, did the carpentry work in 1970, is flawed. Nevertheless, we will address the administrative law judge's findings in terms of the Section 4(a) standard.

[10] Claimant does not challenge the administrative law judge's finding that ACE/INA is not liable for benefits as the responsible carrier to HOC. Claimant's pursuit of liability against B&R pursuant to Section 4(a) stems from her inability to positively identify any carrier for HOC, which has been dissolved since 1980. Liability under Section 4(a) is premised, *inter alia*, on the subcontractor's failure to secure the payment of compensation.

National Van Lines was liable for workers' compensation benefits due to Eureka's failure to carry insurance. *National Van Lines*, 613 F.2d at 987, 11 BRBS at 317. The court rejected National Van Lines's assertion that it was an "owner." The court stated that, "[t]he 'owner' cases are exemplified by the situation in which a property owner contracts with a contractor for services to the property." *Id.* at n. 58.

In *Dailey*, 20 BRBS 75, Starlit Partnership, which purchased, renovated, and resold property for investment purchases, contracted with EHT to perform carpentry work on homes. Claimant Dailey worked for EHT, which did not have insurance. The Board held that Starlit could not be held liable under Section 4(a) because Starlit was not contractually obligated to perform the duties claimant was doing at the time of his injury. *Id.* at 77. Moreover, as Starlit's partners were engaged in investment activity and therefore did not retain any regular workers, the duties performed by claimant were not of the type normally performed by the general employer's own employees. *Id.* at 77-78. Thus, the Board held that neither of the *National Van Lines* tests for general contractor liability was satisfied, that Starlit could not be held liable for benefits, and that EHT is solely liable for the benefits awarded.[11]

The Board has more recently addressed this issue in *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005). In *Boyd*, the decedent, who worked for Hodges & Bryant (H&B), from 1960 to 1997, alleged that he was exposed to asbestos while on an H&B job installing steel pipe in Ship Shed #4 at Newport News Shipbuilding (NNS) in the late 1960s. Decedent stated that the building was undergoing renovation and that his work for H&B there, which lasted four months, was a small part of the overall renovation process. A claim was filed under the Act against H&B, and NNS was joined as a potentially liable general contractor pursuant to Section 4(a). NNS defended the claim, in part, on the ground that H&B was an independent contractor and not an uninsured subcontractor of NNS. On this issue, the administrative law judge found that while H&B did not have longshore coverage, NNS is not liable under Section 4(a), because H&B was not a "subcontractor." On appeal, the Board affirmed the administrative law judge's finding that there is no evidence of a contract requiring NNS, the owner of Ship Shed #4 to renovate its building, part of which NNS then contracted to H&B. Consequently, the Board affirmed the administrative law judge's finding that this case did not involve the "two-contract" situation presented in *National Van Lines.* Moreover, the Board held that the administrative law judge rationally found that there is no evidence that NNS is in the

[11] Similarly, in *Roach v. M/V Aqua Grace*, 857 F.2d 1575 (11th Cir. 1988), the United States Court of Appeals for the Eleventh Circuit applied Florida law to define the term "contractor," and held that the owner of the barge was under no contractual obligation to repair its barge. Rather, the barge owner acted only as any responsible owner would to preserve his property. *Id.* at 1581.

business of renovating buildings or that NNS's own employees usually perform this type of work. Consequently, the Board affirmed the administrative law judge's finding that NNS cannot be held liable for any benefits due claimant as a result of H&B's failure to secure longshore coverage.

In this case, the administrative law judge's application of the "two contract" rule is in accordance with the standard espoused by the Fifth Circuit. *Sketoe*, 188 F.3d 596, 33 BRBS 151(CRT). His finding that B&R was the owner of the barge upon which decedent was working at the time of his injury, and the consequent conclusion that there was no general contractor/subcontractor relationship between B&R and HOC at the time of the injury, are supported by the testimony of Jeff Smith and Charles Miller. Mr. Smith, an employee of B&R since September 1968, repeatedly stated that to the best of his knowledge all of the pipe laying vessels that would be repaired at the Belle Chasse facility were owned and operated by B&R or one of its other subdivisions. CX 8, Dep. at 34-36, 38, 50, 51, 59, 61, 64, 65. Mr. Miller, who is a director for B&R's carrier, Highlands Insurance Company, likewise stated that B&R owned the barges at the Belle Chasse facility,[12] that B&R would refurbish these barges, and that B&R would, at times, hire independent outside contractors to perform some of the refurbishment work. HT at 49-51.

The administrative law judge therefore properly found that B&R was the owner of the barge upon which decedent worked, and as such, was not under a contractual obligation to refurbish the barge. In this regard, there is no evidence of a contract requiring B&R to refurbish the barge in question, part of which B&R then contracted to HOC. Thus, as the administrative law judge found, this is not a "two-contract" situation, as that presented in *National Van Lines,* 613 F.2d at 987, 11 BRBS at 317, but rather more akin to the ownership situations delineated in both *Boyd*, 39 BRBS 17, and *Dailey*, 20 BRBS 75. Moreover, the administrative law judge rationally found that there is no evidence that B&R was in the business of refurbishing barges or that B&R's own employees usually performed this type of work. CX 8, Dep. at 51; *see also* Dep. at 53; HT at 49-51. Rather, the administrative law judge found that, as in *Dailey*, B&R was the owner of the barge who contracted a job to an independent contractor. *See also Roach v. M/V Aqua Grace*, 857 F.2d 1575 (11th Cir. 1988). As the administrative law judge's finding that HOC was not a "subcontractor" of B&R is rational, supported by substantial evidence, and in accordance of law, we affirm the administrative law judge's finding that B&R cannot be held liable for any benefits due claimant due to HOC's insolvency. *See Boyd*, 39 BRBS 17; *Dailey,* 20 BRBS 75.

[12] Mr. Miller identified BRMO as a division of B&R. HT at 53-54. *See* n. 9, *supra*.

Furthermore, as the administrative law judge found, claimant may seek benefits from the Special Fund pursuant to Section 18(b) of the Act, 33 U.S.C. §918(b), which provides that "[i]n cases where *judgment* cannot be satisfied by reason of the employer's insolvency. . ." [emphasis added] the Secretary of Labor may, in her discretion and to the extent she deems advisable, make payments from the Special Fund. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on reconsideration* 35 BRBS 75 (2001). However, while the administrative law judge found that HOC, as responsible employer, "should be fully liable for claimant's disability and death benefits," Amended Decision at 13, he did not issue a judgment against HOC to that effect. As the specific language of Section 18(a) requires that a "judgment" be entered against an insolvent employer in order for that provision to apply, we must remand this case for adjudication of any remaining issues relative to the disability and survivor's claims, and for entry of an order explicitly finding HOC liable for those benefits. Thereafter, claimant may proceed pursuant to Section 18(b).

Accordingly, the administrative law judge's finding that B&R cannot be held liable for any benefits due claimant as a result of HOC's insolvency is affirmed. The case is remanded for findings necessary to determine claimant's entitlement to benefits from HOC consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge