BRB No. 12-0196

FARIBA ARMANI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL LINGUIST SOLUTIONS	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: 12/19/2012
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Denying Claimant's Objections to Employer/Carrier's Request for Subpoena of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, P.L.C.), Coronado, California, for claimant.

Alan G. Brackett, Jon B. Robinson, and Robert N. Popich (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Claimant's Objections to Employer/Carrier's Request for Subpoena (OWCP No. 02-192501) of Administrative Law Judge Paul C. Johnson, Jr., 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA). The administrative law judge's discovery determinations will be upheld unless the challenging party establishes they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

This case arises under the DBA, and claimant's claim is pending before the district director. According to the parties, there is no dispute in the DBA claim at this time. However, employer believes the circumstances of claimant's injury may trigger application of the War Hazards Compensation Act (WHCA), 42 U.S.C. §1701 *et seq.*, and it wishes to depose claimant to determine "which act applies." Order at 2. Because claimant was unwilling to be deposed voluntarily at the informal level, employer filed a motion with the Office of Administrative Law Judges (OALJ) for a subpoena to compel claimant's deposition, asserting its right to inquire about the circumstances of claimant's injury, as those facts are pertinent to its WHCA case. Order at 2.

Specifically, on October 3, 2011, employer submitted to the OALJ a request for a subpoena to take claimant's deposition. Claimant objected, contending that the administrative law judge does not have jurisdiction to issue a subpoena while the case is pending before the district director, as the case has not been referred to the OALJ, and that employer did not exhaust informal procedures. In response, employer asserted that an administrative law judge may issue subpoenas at any stage of the proceedings, citing 29 C.F.R. §§18.22(a), 18.24(a).[1] In support of its request, employer stated:

> In the instant matter, the issuance of a subpoena is necessary because Claimant will not voluntarily submit to a deposition. Employer and Carrier

[1]Section 18.22(a) states in part: "The deposition of any witness may be taken at any stage of the proceeding at reasonable times." Section 18.24(a) states in part: "the Chief Administrative Law Judge or the presiding administrative law judge, as appropriate, may issue subpoenas. . . ."

> believe that in this claim arising under the Defense Base Act, the circumstances of Claimant's injury may trigger application of the War Hazards Compensation Act. In order to determine which Act applies to this claim, Employer and Carrier must be given the opportunity to question Claimant as to the circumstances of her alleged injury.
>
> . . . The law allows an Employer and Carrier to investigate applicability of the law and the proper method to accomplish this is through a deposition of the Claimant. . . .

Emp. Resp. to Cl. Opposition at 3-4. In reply, claimant argued that the deposition is unnecessary and costly and that *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986) (en banc), on which employer relied, was incorrectly decided. Claimant also volunteered to attend an informal conference on the matter, and on November 18, 2011, she requested that the district director schedule an informal conference.

The administrative law judge relied on the OALJ's subpoena authority at 29 C.F.R. §18.24 and the Board's decision in *Maine* to reject the argument that he is not authorized to issue a subpoena while the claim is pending before the district director. Additionally, the administrative law judge rejected claimant's arguments that: the parties must first exhaust informal procedures before turning to adversarial ones; the subpoena was unnecessary to obtain the requested information; and, the cost to claimant justifies denying the subpoena request. Order at 3-5. Therefore, the administrative law judge granted employer's motion for a subpoena compelling claimant's deposition. Claimant appeals the administrative law judge's Order, reiterating her contentions. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's Order and quash the subpoena on grounds similar to those argued by claimant. Employer responds, urging affirmance of the administrative law judge's Order.[2]

[2]The Board initially dismissed claimant's appeal as interlocutory; however, on motions from claimant and the Director, the Board reconsidered its decision and reinstated the appeal. *Armani v. Global Linguist Solutions*, BRB No. 12-0196 (May 24, 2012, *vacating* Order dated Feb. 13, 2012).

Claimant contends the administrative law judge exceeded his authority in issuing a subpoena in a claim that has not been referred to the OALJ and is still in its informal phase.[3] Alternatively, if the administrative law judge is authorized to issue a pre-referral subpoena, claimant asserts that the administrative law judge erred in issuing the subpoena in this case for the purpose of aiding employer's request for reimbursement under the WHCA. She also asserts that the informal procedures should be used first and that, even under the procedure in *Maine*, this deposition is not "necessary." The Director agrees the administrative law judge should not have issued this subpoena, as its purpose is solely to obtain information relevant to a potential WHCA case, over which the administrative law judge has no authority. 29 C.F.R. §18.14. However, the Director avers that the Board need not reach the issue of whether the administrative law judge has the general authority to issue a pre-referral subpoena, as the case may be decided on the narrower question of whether the administrative law judge lacked the authority to issue this subpoena in particular. Employer responds, contending that the administrative law judge has the authority to issue pre-referral subpoenas in general, as well as this one in particular, because the subject matter is related to the DBA case, as a case has only one set of facts, it is attempting to learn those facts, and it matters not that the facts may also be used for WHCA purposes. In reply, claimant reasserts her position that the Board's decision in *Maine* is incorrect and does not support the administrative law judge's action. We agree with the Director that this appeal may be resolved on the narrow issue of whether the administrative law judge should have issued the subpoena in this case.[4] For the reasons that follow, we hold that, on the facts of this case, the administrative law judge was without authority to issue the subpoena to compel claimant's attendance at a deposition.

As stated above, the administrative law judge rejected each of claimant's arguments for denying the request for a subpoena. The administrative law judge found claimant's assertion that the subpoena is unnecessary "unavailing." Order at 4. He stated that her willingness to provide information at an informal conference does not deprive him of his "authority to issue the requested subpoena and does not justify denying Employer access to proper means of discovery." *Id.* Further, the administrative law judge noted that claimant did not challenge the subpoena specifically on grounds of relevance, but to the extent she did, he rejected the argument. He found that employer may seek information that is not privileged but is relevant "to the subject matter involved in this proceeding, such as Employer's potential entitlement to relief under the War

[3]Claimant argues that there is no authority for this power in the Act or regulations and that the Board's decision in *Maine* should be either overruled or limited to its facts.

[4]Thus, we decline to address claimant's challenge to the Board's en banc decision in *Maine*. *See generally Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

Hazards Compensation Act." *Id.* In a footnote, the administrative law judge analogized this situation to that of a claimant who withholds information necessary for an employer to apply for Section 8(f), 33 U.S.C. §908(f), relief. *Id* at 4 n.7. With regard to the potential expense, the administrative law judge found that claimant had not proven an "undue burden" so as to justify denying employer's access to "relevant and properly discoverable" information. *Id.* at 5.

Initially, we agree with claimant that the subpoena for a deposition is unnecessary in this case. In *Maine*, the Board stated: "[i]f a party refuses to produce requested evidence," the other party may apply for a subpoena with the OALJ. *Maine*, 18 BRBS at 132. That is, "should an opponent attempt to frustrate pre-hearing discovery[,]" and "the issuance of a subpoena becomes necessary," the parties may apply to the OALJ for said subpoena. *Id.* at 133. It is clear from *Maine* that an administrative law judge may issue a subpoena upon application from a party, whose case is still at the informal level before the OWCP and has not been referred to the OALJ, only when it is "necessary" to do so. In order to be "necessary," there must be a refusal to produce the evidence requested by the opposing party. The *Maine* criteria have not been met in this case. Claimant has not "frustrated" the processing of her DBA claim or refused to produce any "evidence." Indeed, she has offered to give her statement, including any information employer may seek regarding the underlying facts of the case which could affect a WHCA reimbursement claim, at an informal conference. While employer may be correct in stating that it need not exhaust all informal methods, it appears employer did not attempt to obtain the information by any informal methods. Rather, it proceeded with the subpoena request when claimant refused to participate in a deposition voluntarily, despite claimant's willingness to participate in an informal conference on the matter. As claimant has offered to provide the requested information without resorting to a formal deposition, she has not made "the issuance of a subpoena . . . *necessary*." *Maine*, 18 BRBS at 133 (emphasis added). This case is not one of "the few cases where the informal nature of the pre-hearing investigatory process [has broken] down," *id.*, as contemplated by *Maine*. Accordingly, it was unnecessary for the administrative law judge to issue a subpoena for a deposition in this case.

Moreover, we agree with claimant and the Director that the information sought by employer relates solely to ascertaining its eligibility for reimbursement of compensation under the WHCA, and this information is irrelevant to resolving the DBA claim. The WHCA, 42 U.S.C. §1701 *et seq.*, provides for the payment of benefits from the Division of Federal Employees' Compensation (DFEC) in the event a DBA claimant suffers injury

or death as the result of a "war-risk hazard."[5] 42 U.S.C. §§1704, 1711; 20 C.F.R. §61.1, 61.100. DFEC may either reimburse the DBA employer/carrier or pay the claimant directly. OWCP Bulletin No. 12-01 (Oct. 6, 2011); OWCP Bulletin No. 05-01 (Oct. 18, 2004). In order for an employer to be reimbursed under the WHCA, it must file with DFEC a request which includes documents itemizing the disability and medical payments it has made, as well as documents related to the underlying worker's compensation claim such as notice and claim forms, statements of the employee or employer, compensation orders under the Longshore Act such that the rate of compensation and the period of payment are "relatively fixed and known," and proof of liability. 20 C.F.R. §61.101; Bulletin No. 12-01; *see, e.g., Irby v. Blackwater Security, L.L.C.*, 41 BRBS 21, 22 n.1 (2007). DFEC decides the amount to approve for reimbursement. Review of a DFEC decision consists only of objections filed in a motion for reconsideration with the Associate Director for Federal Employees' Compensation, and his determination is final. 20 C.F.R. §16.102(d); Procedure Manual at Part 4-0300 para. 9(c). There is no review by any other official of the United States or by any court. 42 U.S.C. §1715. Thus, the

[5]The DFEC Procedure Manual for Special Case Procedures explains that the WHCA

> supplements the Defense Base Act (42 U.S.C. 1651), which is an extension of the [Longshore Act]. The WHCA completes the protection provided to Federal contractors' employees and certain other selected employees performing work outside the United States. All liability for injury, death and detention benefits under the WHCA is assumed by the Federal Government, and is paid from the Employees' Compensation Fund established by 5 U.S.C. 8147.

Procedure Manual at Part 4-0300 para. 6(a). Further, the Procedure Manual explains:

> The administrative procedures of the Federal Employees' Compensation Act (FECA) are generally applicable to claims filed under Section 101 of the WHCA, with the exception that computation of disability and death benefits, and determination of pay rate and beneficiaries, are made in accordance with the provisions of the [Longshore Act]. The minimum provisions of the [Longshore Act] for computing disability compensation (Section 6b) and death benefits (Section 9e) do not apply to these claims or to cases paid under the Defense Base Act. Medical treatment and care are furnished under the applicable sections of the FECA.

Id. at Part 4-0300 para. 6(c); http://www.dol.gov/owcp/dfec/procedure-manual.htm.

administrative law judge in a DBA claim does not have any authority over the WHCA decision.

Nonetheless, an administrative law judge is charged with finding the facts in the DBA claim and rendering a decision on those facts. That decision may be used by an employer to support its claim for either direct pay or reimbursement under the WHCA. *See* 20 C.F.R. §§61.101, 61.105. As the underlying facts in the two claims are identical, we cannot state definitively that the administrative law judge has no authority to issue a discovery subpoena in a case involving the WHCA.

However, the question before the Board is more specific: does the administrative law judge have the authority to issue a subpoena in this case where employer has stated that the deposition is needed solely to determine its entitlement to reimbursement under the WHCA, when there is no dispute in the underlying DBA claim? We hold he does not. Although the administrative law judge has subpoena power, a party's right to discovery is not unlimited. The scope of permissible discovery extends only to that information which is not privileged and "which is relevant to the subject matter involved in the proceeding. . . ." 29 C.F.R. §18.14. That is, longshore district directors and administrative law judges have authority over Longshore and, therefore, DBA, claims, and matters which are "in respect of" those compensation claims; they do not have authority to address matters that are not "in respect of" the compensation claims.[6] 33 U.S.C. §919(a), *see, e.g., Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (no jurisdiction over contractual indemnity dispute between an employer, its carrier, and a borrowing employer); *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 F. App'x 415 (5th Cir. 2004) (no jurisdiction over issue of intervenors' tort immunity); *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) (no jurisdiction over contract dispute between an employer and its carrier over an employer's attorney's fee). Employer has not shown that the information sought via deposition is "in respect of" the DBA claim at this juncture.[7] As the information sought is irrelevant to the

[6]Thus, the administrative law judge's analogy to a case in which a claimant withholds information relevant to an employer's Section 8(f) claim is imperfect. Issues concerning Section 8(f) are "in respect of" a claim under the Act.

[7]We note that, in one sentence in its brief before the administrative law judge, employer asserted that the deposition also may be necessary to explore its settlement options. Emp. Resp. to Cl. Opposition at 4; *see* 33 U.S.C. §908(i). However, that "argument" appears to have been abandoned, as employer has not identified in any of its briefs the information that would be relevant to settlement negotiations, and its briefs are devoted entirely to discussing the administrative law judge's powers and the WHCA's

resolution of the undisputed DBA claim, a subpoena for its discovery is not permitted in this case.[8] *See generally Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Sprague v. Bath Iron Works Corp.*, 11 BRBS 134 (1979), *decision following remand*, 13 BRBS 1083 (1981)**,** *aff'd*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); 29 C.F.R. §18.14.

For the above reasons, we agree with claimant and the Director that the administrative law judge erred in issuing a subpoena for claimant's deposition in this DBA case. The subpoena is unnecessary, as claimant has offered to give her statement using informal measures, and the information employer seeks to obtain via the deposition is not "in respect of," and therefore not relevant to, the resolution of the DBA claim. Although an administrative law judge has the authority to issue discovery subpoenas in certain situations, 29 C.F.R. §18.24, his authority is limited to that information which, *inter alia*, is "relevant to the subject matter involved in the proceeding." 29 C.F.R. §18.14. In this case, therefore, it was an abuse of discretion to reject claimant's offer for an informal solution in an undisputed DBA claim where the purpose of the requested deposition is to develop information for an application of reimbursement under the WHCA.

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relationship to the DBA facts. Although the facts that would be learned from the deposition would apply to both the DBA and the WHCA cases, there was no dispute in the DBA case, and employer was quite specific that the deposition was for the purpose of determining whether it is entitled to reimbursement under the WHCA. Its argument that it needed to determine "which act applies" is inapposite, as both must apply for an employer to obtain reimbursement.

[8]Moreover, a review of the WHCA requirements for an application for reimbursement reveals no mandate that a "statement" in support of the application be in deposition form. 20 C.F.R. §61.101(c). Section 61.101(c) provides:

> When filing an initial request for reimbursement under the [WHCA], the carrier shall submit copies of all available documents related to the workers' compensation case, including –
> (1) Notice and claim forms;
> (2) Statements of the employee or employer;
> (3) Medical reports;
> (4) Compensation orders; and
> (5) Proof of liability (e.g., insurance policy or other documentation).

see also Bulletin No. 05-01. Claimant's offer to make a statement at an informal conference should suffice.

Accordingly, the administrative law judge's Order is vacated, and the subpoena quashed.

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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REGINA C. McGRANERY
Administrative Appeals Judge