

BRB No. 97-1581

JOSEPH STEVENS )  
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 Claimant-Petitioner ) DATE ISSUED: \_\_\_\_\_  
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 v. )  
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 MATSON TERMINALS, )  
 INCORPORATED )  
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 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Order Denying Withdrawal of Claim and Order Re: Filing of Additional Claim of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Gretchen Guzman (Cantrell, Green, Pekich, Cruz, McCort & Baker), Long Beach, California, for claimant.

James P. Aleccia, Long Beach, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Withdrawal of Claim and Order Re: Filing of Additional Claim (96-LHC-51) of Administrative Law Judge Daniel L. Stewart 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).<sup>1</sup> 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup>By Order dated November 17, 1997, the Board denied employer's motion to dismiss claimant's appeal as interlocutory and stated that claimant's appeal is properly before the Board.

A formal hearing for claimant's claim under the Act was scheduled for May 7, 1996. Prior thereto, in March 1996, the administrative law judge granted the parties a continuance. On March 19, 1997, the administrative law judge received a letter from claimant indicating he wished to withdraw his claim under the Act. On March 24, 1997, employer filed its objections and requested a hearing or a conference call. Claimant opposed both, asserting that he had withdrawn his claim for benefits. The administrative law judge granted employer's request and held a conference call on June 17, 1997. Order at 2. Thereafter, he issued an order which addressed the conference call agenda.

Initially, in his order, the administrative law judge denied claimant's motion to withdraw. He found that claimant's desire to file a workers' compensation claim under California law is not a proper purpose for withdrawal of the claim under the Act and that employer is entitled to a determination of liability in the forum originally chosen by claimant. Order at 3. In the order, the administrative law judge also noted that claimant indicated the intent to file an additional claim under the Act. In response, employer stated it did not object to a continuance provided the administrative law judge retained jurisdiction. The administrative law judge granted both requests by holding the scheduling of a hearing in abeyance until claimant filed his second claim. The administrative law judge instructed claimant to file the new claim within 15 days of the date of the order and to include a cover letter to the district director requesting consolidation with the pending claim as well as a new LS-18 Pre-Hearing Statement. *Id.* Claimant appeals the order, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in denying his request to withdraw his claim. He argues that it is proper for him to proceed in state court, and he asks that the Board hold, as a matter of law, that seeking a state workers' compensation remedy is a proper purpose for withdrawing a claim under the Act. Claimant also contends the administrative law judge exceeded his authority by instructing claimant as to how and when he must file a second longshore claim.

Although there is no specific provision for withdrawing a claim in the language of the Act itself, withdrawal is addressed in the implementing regulations. Section 702.225(a) provides:

*Before adjudication of claim.* A claimant (or an individual who is authorized to execute a claim on his behalf) may withdraw his previously filed claim: *Provided, That:*

(1) He files with the district director with whom the claim was filed a

written request stating the reasons for withdrawal;

(2) The claimant is alive at the time his request for withdrawal is filed;

(3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and

(4) The request for withdrawal is filed, on or before the date OWCP makes a determination on the claim.

20 C.F.R. §702.225(a). If withdrawal is granted, it is without prejudice to the filing of another claim under the Act, subject to the time limitations of Section 13 of the Act, 33 U.S.C. §913. 20 C.F.R. §702.225(c); *see Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). The Board has held that administrative law judges have the authority to consider motions for withdrawal, provided they adhere to the requirements in the regulations. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993)(Brown, J., dissenting on other grounds); *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978).

In this case, the administrative law judge stated that the only reason claimant gave for seeking withdrawal was his desire to file a claim under the California workers' compensation law. The administrative law judge summarily found that this was not a proper purpose for withdrawal and denied the motion. Therefore, the only issue before the Board is whether claimant's request satisfied the requirement at Section 702.225(a)(3). Claimant argues that it does, as he is entitled to file his claim in the forum of his choice. Employer argues that claimant is not allowed to forum-shop and that whether filing a state claim is a proper purpose must be decided on a case-by-case basis.

It is well-established that a claimant can pursue his claim for his work-related injury in either the federal or state forum, or both. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980); *Langley*, 27 BRBS at 140. Contrary to the administrative law judge's conclusion, it is proper for claimant to determine the forum in which he will seek benefits. If, prior to adjudication, claimant determines he would rather file a claim under the state law rather than under the Act, he is within his rights to do so, and the administrative law judge erred in concluding that a determination on the merits also must be made in the federal forum. Therefore, we hold that claimant's decision to withdraw his longshore claim because he chooses to pursue a claim under state law is, as a matter of law, a proper purpose for withdrawing a longshore claim. Accordingly, we vacate the denial of the motion to withdraw, we reverse the administrative law judge's determination that claimant's

request for withdrawal was not made for a proper purpose, and we remand the case for the administrative law judge to determine whether withdrawal of the claim under the Act is in claimant's best interest. See *Jennings v. Lockheed Shipbuilding & Construction Co.*, 9 BRBS 212 (1978) (both "best interest" and "proper purpose" must be addressed in considering a withdrawal request).

Claimant also challenges the administrative law judge's instructions regarding the filing of a second longshore claim for a cardiovascular injury.<sup>2</sup> We agree with claimant. The administrative law judge exceeded his authority in requiring claimant to file his claim within 15 days of the date of his order. Even if, as employer asserts, the administrative law judge did not require claimant to file a second claim but merely created a mechanism for such a filing, he erred in limiting claimant's filing time to 15 days. Under the Act, a claimant has one year from the date he becomes aware or should have been aware of the relationship between his injury and his employment or, in the case of an occupational disease which does not immediately result in death or disability, two years from the date he becomes aware or should have been aware of the relationship between his disease, his employment and his disability within which he may file his claim. 33 U.S.C. §913(a), (b)(2); 20 C.F.R. §§702.221, 702.222. As the decision to file a claim, as well as when to file a claim, provided he abides by the time limitations of the statute, lies with claimant, it was erroneous for the administrative law judge to mandate how and when claimant should file his claim. Consequently, we vacate the administrative law judge's instructions to claimant for filing a second longshore claim.

Accordingly, the administrative law judge's order is vacated, and the case is remanded to him for consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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<sup>2</sup>The file before us does not contain information regarding the nature of the injury for which claimant filed his first claim.

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REGINA C. McGRANERY  
Administrative Appeals Judge