BRB No. 97-1634

EVA JOURDAN (Widow of E. ELLIOTT JOURDAN)	)	
Claimant	)	DATE ISSUED:
v.	)	
EQUITABLE EQUIPMENT COMPANY	)	
Employer-Petitioner	)	
and	)	
FIDELITY & CASUALTY COMPANY OF NEW YORK	)	
Carrier-Respondent	)	
and	)	
AETNA CASUALTY & SURETY COMPANY	)	
Carrier	)	
and	)	
WAUSAU INSURANCE COMPANIES	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Attorney Fees of James Guill, Administrative Law Judge, United States Department of Labor.

Peter L. Hilbert, Jr. and Darnell Bludworth (McGlinchey Stafford, P.L.L.C.), New Orleans, Louisiana, for employer.

Dean A. Sutherland, New Orleans, Louisiana, for Wausau Insurance

Companies.

John M. Sartin, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Fidelity & Casualty Insurance Company of New York.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order- Denying Attorney Fees (87-LHC-588) of Administrative Law Judge James Guill 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case has been before the Board several times previously, and the full procedural history need not be repeated here. *See Jourdan v. Equitable Equipment Co*., 889 F.2d 637, 23 BRBS 9 (CRT) (5th Cir. 1989); *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992)(Dolder, J., dissenting). Decedent was employed by Equitable Equipment Company (employer) at its Madisonville Shipyard from December 17, 1940, until July 1, 1973. On June 6, 1985, decedent died from mesothelioma, asbestosis, pulmonary emphysema and acute congestive heart failure. Decedent's widow (claimant) filed a claim for death benefits on February 24, 1986, alleging that decedent's death was caused, in part, by exposure to asbestos while in employer's employ. During the course of the ensuing litigation, employer was required to obtain its own counsel due to difficulty in establishing insurance coverage, as Wausau Insurance Companies (Wausau), Fidelity & Casualty Insurance Company of New York (Fidelity), and Aetna Casualty & Surety Company (Aetna) each disputed whether it was the carrier on the risk at the time of the decedent's last injurious exposure.[1]

[1]Aetna provided coverage prior to 1970, Fidelity provided coverage from January 1, 1970 to December 29, 1972, and Wausau provided coverage from January 1, 1973 to January 1, 1974.

Relevant to the current case, in its 1992 decision the Board vacated the administrative law judge's denial of modification and remanded the case for the administrative law judge to conduct a new hearing with all potentially liable carriers present. Thereafter, Administrative Law Judge G. Marvin Bober determined that Aetna, who was on the risk between 1957 and 1970, was the responsible carrier as decedent's last injurious exposure occurred during the 1960s. Accordingly, Aetna was ordered to reimburse employer for all past benefits paid and to commence payment of any current and future benefits due claimant. In his Decision and Order, Judge Bober further stated that employer could file a fee petition with citations to statutes, regulations, and case authority in support of its position that an employer may obtain payment of its attorney's fees from its insurers. *Jourdan v. Equitable Equipment Co.*, 89-LHC- 588 (August 16, 1994).[2]

On September 16, 1994, employer filed a fee petition in which it asserted that it was entitled to attorney's fees from Aetna pursuant to Section 28 of the Act, 33 U.S.C. §928, and that Aetna, Wausau, and/or Fidelity was responsible for any remaining fees and costs not covered under the Act pursuant to insurance law regarding the duty to defend in the state of Louisiana. The potentially liable carriers filed objections. The Decision and Order currently on appeal followed, wherein Associate Chief Administrative Law Judge James Guill denied employer's fee petition, finding that he did not have jurisdiction to determine whether the parties had entered into an enforceable contract providing for the payment of attorney's fees. Judge Guill reasoned that the issues before Judge Bober on remand were limited to the determination of the carrier responsible for the payment of claimant's compensation and that his jurisdictional authority to interpret insurance contracts was limited to those circumstances where it is necessary to adjudicate compensation

[2]On September 14, 1994, Aetna filed a Notice of Appeal of this Decision and Order. In *Aetna Casualty & Surety Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996), *aff'g Jourdan v. Equitable Equipment Co.*, 29 BRBS 49 (1995) (order) (Brown, J., dissenting), the court affirmed the Board's Order which dismissed this appeal and the cross-appeal filed by employer pursuant to 20 C.F.R. §802.206(f). This decision ended the litigation on the merits of this case.

liability.

On appeal, employer argues that the administrative law judge's determination that he lacks jurisdiction to decide whether the parties entered into an enforceable contract providing for the payment of attorney's fees does not comport with applicable law, in that the Board previously held to the contrary in *Gray & Co., Inc. v. Highland Ins. Co.*, 9 BRBS 424 (1978)(Miller, J., concurring; Kalaris, J., dissenting). Employer further asserts the administrative law judge also erred in finding the present case distinguishable from *Gray* on the basis that it "relied on *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978), in which the Third Circuit found that there was a close factual relationship between reimbursement and compensation claims," which he followed with the conclusion that *Harris* was distinguishable. Decision and Order at 3. Employer avers that in determining that his authority to resolve an insurance contract dispute is limited to those circumstances where adjudication of compensation liability turns on an interpretation of an insurance contract, the administrative law judge applied a more burdensome standard than that mandated by *Gray* and *Harris,* which required only a close factual relationship. Employer argues that while its claim for a fee may not turn on the resolution of the compensation issue, it does arise from the same nucleus of operative fact. Accordingly, employer contends that allowing the administrative law judge to resolve this issue would prevent duplicative litigation and reduce the expenditure of time and money by the parties and other courts, the same policy concerns identified as supporting a finding of jurisdiction in *Gray* and *Harris*. Finally, citing *Dugas Pest Control of Baton Rouge, Inc. v. Mutual Fire, Marine & Inland Insurance Co.*, 504 So.2d 1051, 1054 (La. App. 1 Cir. 1987), and *Storm Drilling Co. v. Atlantic Richfield Corp.*, 386 F. Supp. 830 (E.D.La. 1974), employer avers that the administrative law judge erred in determining that there was no authority to allow him to award attorney's fees to employer because under Louisiana law it is clear that where an insurer fails to adequately defend its insured, including failing to appoint separate counsel where it is denying coverage but providing a defense, that insurer is liable for the attorney's fees and costs incurred by the insured with respect to the suit. Accordingly, employer urges the Board to reverse the administrative law judge's decision and remand for him to determine whether it is entitled to attorney's fees.

Wausau responds that the administrative law judge's decision should be affirmed without the necessity of addressing the procedural and jurisdictional issues employer raises, inasmuch as there is no basis for awarding employer a fee under Section 28 of the Act, 33 U.S.C. §928, and employer has misrepresented the applicable Louisiana law regarding attorney's fees based on the duty to defend. Wausau further argues that while the determination of which of the potentially responsible carriers provided coverage for the benefits awarded to claimant falls

within the administrative law judge's jurisdiction, the determination of whether a non-responsible carrier may be liable under Louisiana law for a portion of the attorney's fees and costs which employer claims it incurred to establish that Aetna was the responsible carrier is not necessary for the determination of employer's and Aetna's compensation liability to claimant, and thus is beyond the constitutionally-permissible limits of a tribunal operating under Article I of the United States Constitution.

Citing *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123, 126 (1984), Fidelity also responds, urging affirmance and asserting that the Board's decisions subsequent to *Gray* have limited the administrative law judge's adjudicative authority only to those limited insurance contract disputes which arise out of, or under, the Act, the resolution of which are necessary in order to determine compensation liability in claims under the Act. Alternatively, Fidelity maintains that inasmuch as it was unaware of the pending claim against employer until after the initial hearing, it did not breach its duty to defend and that, in any event, its liability would be limited to those costs incurred by employer in its defense of claimant's claim for benefits, and not those associated with employer's demand for coverage, which are non-recoverable under Louisiana state law.[3] Aetna has not responded to employer's appeal.

Initially, we must decline Wausau's invitation to affirm the administrative law judge's decision based on Louisiana law, which it asserts would eliminate the need to address the procedural and jurisdictional issues raised. Wausau and Fidelity correctly assert that Louisiana law draws a distinction between allowable attorney's fees and costs under the duty to defend which an insured incurs to defend itself from the underlying claim and those fees incurred where the insured hires an attorney to represent him in coverage disputes; the latter are generally the responsibility of the insured, absent a provision in the applicable insurance contract indicating otherwise. *See Steptore v. MASCO Construction Co.,* 643 So.2d 1213, 1218 (La. 1994); *Gleason v. State Farm Mutual Automobile Insurance Co.*, 660 So. 2d 137, 142 (La. Ct. App. 1995); *Dugas*, 504 So.2d at 1054. Nonetheless, we are unable to determine where the fees sought by employer in the present case fall within this legal authority, as to do so would require fact-finding, including contractual interpretation, which is clearly beyond the Board's statutory review authority. *See*

[3]Although Fidelity also maintains that *Gray* has been legislatively overruled by the 1984 Amendments, we decline to address this argument as it was not adequately briefed. *See Plappert v. Marine Corps Exchange,* 31 BRBS 104 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

generally Ceres Marine Terminal v. Director, OWCP [Allred], 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); 33 U.S.C. §921(b)(3). Fidelity's argument that it did not breach its duty to defend similarly cannot be addressed. The insurance contracts at issue are not in the record, and the administrative law judge has not made the relevant findings of fact. Inasmuch as these arguments require fact-finding, we cannot decide the case on this basis.

We thus must address the jurisdictional arguments raised by the parties in order to resolve this appeal. On appeal, employer does not dispute that there is no authority under Section 28 of the Act for awarding an employer an attorney's fee. Employer asserts that under the relevant insurance contracts and state law, it is allowed to recover its fees and costs from both the responsible carrier and the potentially responsible carriers based on their contractual duty to defend. Employer argues that the administrative law judge has jurisdiction to consider these contractual issues and award employer the requested fees under Section 19(a) of the Act, 33 U.S.C. §919(a), pursuant to the Board's decision in *Gray*.

Section 19(a) states that "a claim for compensation may be filed with the deputy commissioner ....and 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)(emphasis added). Inasmuch as all of the powers, duties, and responsibilities of deputy commissioners with respect to hearings under the Act were transferred to the administrative law judge pursuant to the 1972 Amendments to the Act, 33 U.S.C. §919(d), the issue currently before the Board in this case is whether an award of attorney's fees to employer based on an alleged breach of an insurer's duty to defend under the terms of its insurance policy with employer is a question "in respect of a claim" as is required to fall within the administrative law judge's jurisdiction under Section 19(a).

Employer is correct in asserting that the Board previously addressed the specific issue presented in this case in *Gray.* The administrative law judge erred in finding *Gray* distinguishable from the present case based on the fact that the potentially liable insurers objected to imposition of an attorney's fee payable to the employer. As employer avers, this fact is not dispositive. In *Gray*, 9 BRBS at 424, as in the present case, the administrative law judge found that he was not authorized by Section 28 or any other provision of the Act to address carrier's liability for employer's attorney's fees. On appeal, employer argued that the administrative law judge erred in failing to award it the requested attorney's fees and costs, pointing out that it was forced to prepare its own defense to the claim and thereby incurred the fees because each of the potentially responsible carriers denied liability. Noting that none of the carriers who participated in the litigation had objected to its request for

an attorney's fee award and that under each of its insurance policies the carrier was required to defend it, employer asserted that under Section 19(a) the administrative law judge possessed the authority to award attorney's fees to employer from its insurer. The Board majority agreed, relying on the decision of the United States Court of Appeals for the Third Circuit in *Harris*, 578 F.2d at 52, wherein the court held that under Section 19(a) an administrative law judge could properly decide the issue of whether a non-workers' compensation insurance carrier was entitled to reimbursement for payments it made from claimant's award under the Act. The Board noted that the court based its decision on a finding of a close factual relationship between the reimbursement and compensation claims and on policy considerations of avoiding duplicative litigation and high expenditures of time and money by the parties. Accordingly, in *Gray*, the Board vacated the denial of the fee and remanded the case to the administrative law judge to consider whether the responsible carrier breached a term of its contract of insurance with the employer and whether employer was thereby entitled to reimbursement of its attorney's fee and costs.[4]

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[4]One member dissented in *Gray,* agreeing with the administrative law judge that if a remedy regarding payment of attorney's fees is available to employer, it is in a different forum, noting that Section 28 of the Act, the only provision authorizing awards of attorney's fees, only applies to claimant's attorneys. In addition, Judge Kalaris disagreed that *Harris* was applicable, since in *Harris* the court concluded that the carrier's right to reimbursement for payments under its non-occupational injury policy was within the purview of Section 19(a) of the Act because by finding claimant's injuries to be work-related, the administrative law judge had, in operative effect, found that the payments should not have been made under the other policy. Inasmuch as the issue of employer's entitlement to an attorney's fee in *Gray* was

not factually similar to any other issue and required that the administrative law judge interpret a specific term in the insurance contract, Judge Kalaris stated that the fee award was outside the scope of the functions contemplated for an administrative law judge under Section 19(a) as construed in *Harris*.

It is apparent that *Gray* is on point with the issue presented in the present case, and the administrative law judge's rationale for distinguishing it is not persuasive. Nonetheless, we conclude that the administrative law judge did not err in the result he reached, as the holding in *Gray* does not withstand scrutiny in light of more recent decisions. In the 20 years since *Gray* was decided the Board has addressed the administrative law judge's authority to decide insurance contract disputes on a number of occasions. In *Rodman*, 16 BRBS at 126, the Board addressed the scope of the administrative law judge's authority to decide insurance contract disputes under the Act in light of appellate decisions issued after *Gray* which discussed the scope of authority which may constitutionally be delegated by Congress to a non-Article III tribunal. In *Rodman*, claimant worked at Bethlehem-Alameda Shipyard during World War II and in 1979 sought compensation under the Act, alleging an injury due to her exposure to asbestos during this employment. Bethlehem Steel Corporation, one of the named employers, raised numerous issues including insurance coverage, asserting that Commercial Union Assurance Company (Commercial Union) was the carrier responsible for any compensation due claimant. Prior to a formal hearing, Commercial Union entered into an agreement with the claimant whereby claimant would request remand of case to the deputy commissioner and, at that level, claimant would stipulate to those facts which would support a finding that claimant was not covered under the Act. Consequently, claimant would drop her claim under the Act and enter into a settlement under state law. Pursuant to this agreement, claimant and Commercial Union requested remand to the deputy commissioner. Bethlehem, however, opposed this request, asserting that it was entitled to a hearing before an administrative law judge to determine whether Commercial Union had entered into a contract to provide insurance coverage required by the Act during the years 1944 and 1945. After conducting a hearing limited to

determining whether he possessed jurisdiction to adjudicate the insurance issue, the administrative law judge concluded that he lacked jurisdiction.[5] Employer appealed that determination, and Commercial Union responded that since claimant had settled the claim under the Act, the administrative law judge and the Board were without jurisdiction to decide the issue of insurance coverage. In addition, Commercial Union argued that it was unconstitutional for the administrative law judge and the Board to adjudicate insurance contract disputes.

[5] The administrative law judge relied on the Board's decision in *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981). In *Busby*, benefits were voluntarily paid to the claimant and thereafter a dispute arose as to the liable carrier. All subsequent efforts to contact the claimant proved unsuccessful, however, and thus, the claim upon which the dispute arose was no longer active. The Board held that it could not address the insurance carrier's dispute as it did not involve a pending issue in an appeal with respect to a claim of an employee under the Act, citing 33 U.S.C. §921(b)(3).

Rejecting Commercial Union's argument that insurance contract rights are state-created rights which must be adjudicated by a tribunal established under Article III of the United States Constitution, the Board noted that the authority for Congress to promulgate a workers' compensation scheme for maritime employees is now undisputed, as is the authority of Congress to delegate the initial resolution of claims arising under this workers' compensation scheme to non-Article III tribunals. In addition, the Board stated that in promulgating this Act, Congress specifically required that all employers who engage in activities covered under the Act either seek insurance coverage or be self-insured, 33 U.S.C. §932. *See* 33 U.S.C. §§904, 934-938. Inasmuch as the adjudication of compensation liability under the Act may turn on the interpretation of the compensation insurance contract, the Board held that it is consistent with the adjudication of compensation claims arising under the Act, and in fact quite necessary, that the tribunal vested with the authority to determine compensation liability also have the authority to adjudicate insurance contract disputes which arise out of the Act and claims filed thereunder. In so concluding, the Board noted that its decision in this regard was consistent with the United States Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Company,* 458 U.S. 50 (1982),[6] as well as the opinions in *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), *cert. denied,* 462 U.S. 1119, *reh'g denied,* 463 U.S. 1236 (1983),[7] and *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir.1984),[8] in that it does not involve a

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[6]In *Northern Pipeline,* the Court held that the Bankruptcy Reform Act of 1978, 28 U.S.C. §1471(b)(1) (1976 ed., Supp. III), unconstitutionally granted to bankruptcy judges, who lacked life tenure and protection against salary diminution, jurisdiction over "all civil proceedings arising under title 11 [bankruptcy] or arising in or related to cases under title 11." The Court was divided, but a majority agreed that this Act was an unconstitutional infringement on Article III. Justice Brennan, writing for a plurality, concluded that Congress could not vest most, if not all, of the "essential attributes of the judicial power" in non-Article III judges. 458 U.S. at 50. Justice Rehnquist, with whom Justice O'Connor concurred, concluded that Congress could not vest the power to adjudicate traditional state law claims in a federal, non-Article III judge. Justice White, writing for the dissenting Justices, would have upheld the Act as a proper balance of Article I and Article III interests.

[7]In *Kalaris v. Donovan*, the United States Court of Appeals for the District of Columbia Circuit held that the Board is not an Article III tribunal.

[8] In *Pacemaker Diagnostic Clinic*, a patent infringement action was filed in which the defendant counterclaimed for a declaration of the patent's invalidity. The parties consented to have the case tried by the magistrate. The court, *en banc*, held that the section of the Federal Magistrate Act, 28 U.S.C.A. §636(c) (Supp. V 1981),

broad grant of authority which would exceed the powers of a non-Article III tribunal. Rather, the Board noted that at issue is the jurisdiction of the administrative law judge "to merely adjudicate those limited insurance contract disputes which arise out of or under the Act, the resolution of which are necessary in order to determine compensation liability in claims under the Act." *Rodman*, 16 BRBS at 126. Recognizing, however, that the administrative law judge's authority to adjudicate insurance contract disputes arising out of or under the Act is predicated on the authority of the administrative law judge to adjudicate compensation claims which arise out of or under the Act, and that where there is no claim for compensation, the administrative law judge lacks jurisdiction to adjudicate the insurance contract dispute, the Board instructed the administrative law judge that if on remand he found that claimant's claim had been properly withdrawn, then he did not possess jurisdiction to adjudicate the insurance contract dispute.

Following *Rodman,* the Board has recognized the administrative law judge's authority to resolve contract disputes between employers and insurance companies involving reimbursement of benefits wrongfully paid by a non-Longshore carrier. *See Weber v. Aetna Casualty & Surety Co.*, 28 BRBS 321 (1994). In addition, the Board has found that administrative law judges have jurisdiction to resolve questions regarding insurance contract coverage in the context of determining the responsible employer or carrier. *See Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993)(self-insured employer rather than subsequent insurance carrier held liable as the carrier at risk at the time of claimant's most recent exposure to injurious stimuli); *Griffin v. T. Smith & Son, Inc.*, 25 BRBS 196 (1991) (which of two carriers is liable as employer's carrier at the time of injury); *Busby*, 13 BRBS at 222 (which of two carriers is the responsible carrier). On several occasions, in finding jurisdiction, the Board has noted that resolution of the insurance contact issues

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which allows magistrates to conduct civil trials and enter final judgment with the consent of all parties does not violate the Constitution in that the statute contains sufficient protections against the erosion of judicial power to overcome constitutional objections, as the Article III judiciary has extensive administrative control over the management, composition, and operation of magistrate system, and has control over specific cases by the district court's resumption of jurisdiction on its own initiative.

would result in enhanced judicial economy. *See, e.g.*, *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997)(administrative law judge should resolve contractual indemnity and insurance issues between the lending employer, its insurer, and the borrowing employer where the arguments raised were ancillary to the responsible employer issue and it was not in the interest of judicial economy to defer adjudication of related issues to another place and time); *Brady v. Hall Brothers Marine Corporation of Gloucester*, 13 BRBS 854 (1981)(judicial economy mandates that administrative law judge have jurisdiction to determine whether insurance coverage existed at the time of injury). Moreover, the Board has held that the administrative law judge also has authority to order discovery regarding insurance contract rights inasmuch as compensation under the Act is a federally-created right, insurance coverage is mandated by the Act, the adjudication of compensation liability could turn on an interpretation of a compensation insurance contract, and a non-Article III tribunal can constitutionally exercise the limited authority to initially determine insurance contract rights which arise under the Act. *See Valdez v. Bethlehem Steel Corp.*, 16 BRBS 143 (1984). Finally, the Board has recognized that administrative law judge has the requisite jurisdiction to decide the responsible employer issue, including whether the borrowed employee doctrine is applicable, even if claimant is not an "active" participant in the adjudication proceedings. *See, e.g., Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997)*; Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *see also Total Marine Services, Inc. v. Director, OWCP [Arabie]*, 87 F.3d 774, 30 BRBS 62 (CRT) (5th Cir. 1996).

After considering *Gray* in light of *Marathon Pipeline* and the relevant decisions issued on insurance contract disputes in the intervening 20 years, we believe that its reasoning was faulty and that *Gray* accordingly should be overruled.[9] In retrospect, the holding in *Gray* is an anomaly in that it is the only case in which the Board found that the administrative law judge had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to, any other issue necessary to resolution of the claim. In each of the other insurance contract dispute cases where the Board found jurisdiction, the insurance contract right being adjudicated bore a relationship to an issue either necessary or related to the compensation award. In contrast, the issue of an employer's entitlement to an

[9]Although the administrative law judge in the present case found that the Board implicitly overruled *Gray* in *Medrano v. Bethlehem Steel Corp.*, 23 BRBS 223 (1990), this conclusion is incorrect. *Medrano* held that there is no authority under Section 28 of the Act to award employer an attorney's fee. *Gray* did not involve authority under Section 28, but was decided based on contract rights and the administrative law judge's jurisdictional authority under Section 19(a).

attorney's fee based on a breach of duty to defend is not necessary to the claim nor factually similar to any other issue.

Moreover, while the duty of an insurer to defend its insured exists irrespective of an ultimate finding of liability, *Dugas*, 504 So.2d 1053, in the cases where the Board has found ancillary jurisdiction to address insurance contract issues, the administrative law judge's resolution of the insurance contract issue was related to an issue involving compensation liability. Finally, in each of the cases where jurisdiction to address insurance contract issues exists, the remedy has arisen from the Act itself and its implementing regulations; for example, in *Harris*, the non-occupational carrier's right to reimbursement derived from a finding that the injury was work-related and thus that the workers' compensation insurer was liable for the benefits at issue. In contrast, neither Section 28 nor any other provision of the Act provides for an award of attorney's fee to an employer or addresses how the assessment of a reasonable fee is to be made. In short, an employer's right to reimbursement of attorney's fees based on a breach of contract relates to the compensation claim only in that the employer would not have incurred these expenses but for its carrier's refusal to defend the claim; thus, it is not a "question in respect of a claim" within the meaning of Section 19(a) of the Act because the resolution of this issue is not necessary for, or related to, any issue involving compensation liability. As we conclude that its holding is not consistent with the Act or case precedent, the Board's decision in *Gray is* overruled.

Having concluded that *Gray* is invalid, we hold that the administrative law judge in the present case properly found that he lacked jurisdiction to address employer's request for a fee payable by its carriers based on a breach of the insurers' contractual duty to defend. Inasmuch as the administrative law judge's authority is to adjudicate "those insurance contract disputes which arise out of or under the Act, the resolution of which are necessary in order to determine compensation liability in claims under the Act," *Rodman*, 16 BRBS at 125-126, and the insurance contract dispute at issue here is not such an issue, the administrative law judge's determination that he lacked jurisdiction to resolve this issue is affirmed.

Accordingly, the administrative law judge's Decision and Order-Denying Attorney Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM P. NELSON, Acting
Administrative Appeals Judge