U.S. Department of Labor

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

BRB No. 17-0653

JIMMY NEAFUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Aug. 31, 2018
ARTISAN INDUSTRIAL METALS	)	
	)	
Defunct Uninsured Employer	)	
	)	
JEFFBOAT, L.L.C.	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Amended Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Melissa Riley (Embry and Neusner), Groton, Connecticut, for claimant.

Douglas P. Matthews (King, Krebs & Jurgens, P.L.L.C.), New Orleans, Louisiana, for Jeffboat, L.L.C.

Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

BOGGS, Administrative Appeals Judge:

Employer Jeffboat appeals the Amended Decision and Order Awarding Benefits (2015-LHC-00641) of Administrative Law Judge Alice M. Craft 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 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 was exposed to injurious noise during his employment with both Jeffboat and Artisan. From 1972 to 1985, and again in 1993, claimant worked for Jeffboat as a welder, tacker, steel fitter, rigger, and crane operator, building vessels at the Jeffboat shipyard in Indiana. From 1993 until he was laid off in 2010, claimant worked for Artisan both at its shop and at various other locations. Of relevance to this case, during his employment with Artisan, claimant was sometimes dispatched to the Jeffboat shipyard where he constructed I-beams on which barges sat while under construction, a grating system for drainage, and a canopy over Line 1, the primary building line, to enable work to continue on rainy days. Tr. at 39-47. Claimant underwent an audiogram in 2014 conducted by Dr. Eisenmenger which revealed a 28.4 percent binaural impairment. Dr. Eisenmenger recommended hearing aids. CXs 1-2. Claimant filed claims under the Act against Artisan and Jeffboat.

Jeffboat responded to the claim, asserting Artisan is the responsible employer. Because Artisan is a defunct employer without longshore insurance, the Director, Office of Workers' Compensation Programs (the Director), responded. The Director urged the administrative law judge to find Jeffboat liable, asserting that claimant's work for Artisan met neither the Act's status nor situs requirement, 33 U.S.C. §902(3), 903(a), and that his work for Artisan on Jeffboat property was excluded under 33 U.S.C. §902(3)(D) as a supplier temporarily on Jeffboat's premises. The administrative law judge rejected the Director's coverage contentions, but held Jeffboat liable under 33 U.S.C. §904(a) as an insured contractor of a defunct and uninsured subcontractor. Both claimant and Jeffboat moved for reconsideration.

On the parties' motions, the administrative law judge vacated her Decision and Order and issued an Amended Decision and Order. Pertinent to this appeal, she found that claimant's work for both Jeffboat and Artisan at the Jeffboat facility met the status and situs requirements for coverage under the Act, 33 U.S.C. §§902(3), 903(a). She also found

that Artisan was claimant's last maritime employer. Amended Decision and Order at 11-13.[1] The administrative law judge also reiterated her finding that Jeffboat is liable to claimant pursuant to Section 4(a) as a contractor due to Artisan's failure as a subcontractor to secure insurance. *Id.* at 14-15. She awarded claimant benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 28.4 percent binaural impairment. *Id.* at 16, 19-20.

Jeffboat contends there is no evidence of record to support the administrative law judge's conclusion that it is a contractor within the meaning of Section 4(a). Claimant responds, urging affirmance and stating that, generally, Jeffboat is in the business of constructing and repairing vessels, and Artisan's work supported, and, effectively, completed a portion of, Jeffboat's overall duty to build ships. Claimant, therefore, argues there was a "double set of contractual obligations" such that Jeffboat is liable to claimant pursuant to Section 4(a). Cl. Resp. Br. at 3. The Director also responds, urging affirmance. She asserts she raised the applicability of Section 4 in her post-hearing brief to the administrative law judge, who drew reasonable inferences from credible testimony to conclude there was a contractor/subcontractor relationship between Jeffboat and Artisan.[2] Jeffboat filed a reply brief, asserting that neither claimant nor the Director identified any evidence to support the administrative law judge's findings regarding Jeffboat's contractual obligations and its status as a contractor pursuant to Section 4(a). For the reasons that follow, we reverse the administrative law judge's finding that Jeffboat is liable to claimant as a contractor under Section 4(a).[3]

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[1] The administrative law judge found that claimant's other maritime work for Artisan, constructing mooring dolphins, was not performed on a covered situs. Amended Decision and Order at 12.

[2] The Director cites claimant's hearing testimony describing his being dispatched to Jeffboat's property on a regular basis. However, she also cites claimant's deposition testimony that was not admitted into evidence. Dir. Resp. Br. at 8 (citing Opp. to M/Join Amerisure exh. 5 at 24); Reply Br. at 3 n.4. The Director also cited this deposition testimony in her brief to the administrative law judge, to which clamant and Jeffboat jointly objected on the ground that it was not admitted into evidence. Jeffboat correctly notes in its reply brief to the Board that this evidence may not be considered by the Board. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301.

[3] Because we have determined that the evidence of record is insufficient to support a finding that Jeffboat is liable for claimant's benefits as a contractor under Section 4(a), we need not address Jeffboat's alternative procedural argument that the issue of its liability under Section 4(a) was not properly raised before the administrative law judge. *See, e.g., Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008).

Section 4(a) of the Act provides:

> 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) (emphasis added). In *Director, OWCP v. National Van Lines, Inc*., 613 F.2d 972, 986-987, 11 BRBS 298, 316 (D.C. Cir. 1979), the claimant was injured in New York while driving a truck hauling goods from Washington, D.C., Maryland, and Virginia; this task had been delegated to his employer, Eureka, by National Van Lines. At the time the claim for benefits was made, Eureka was a defunct employer that had failed to secure workers' compensation insurance in jurisdictions other than Virginia. The United States Court of Appeals for the D.C. Circuit held that an employer would be deemed a "contractor" under Section 4(a) where "the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors." As National Van Lines was itself under a contractual obligation to perform those driving duties, National Van Lines was held secondarily liable for the claimant's benefits. *Id.*

In *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000), the United States leased an oil and gas tract off the Louisiana coast to Exxon, and Exxon contracted with Dolphin Titan to drill the tract. The claimant, an employee of Dolphin Titan, was injured during the course of his employment on the Exxon tract. Dolphin Titan's insurer, and then Dolphin Titan itself, paid the claimant benefits until each became insolvent. The claimant filed a claim against Exxon. The United States Court of Appeals for the Fifth Circuit stated that the Act "distinguishes between employers who are owners and those who are general contractors working under contractual obligations to others." *Id.*, 188 F.3d at 599, 33 BRBS at 154(CRT); *compare National Van Lines*, 613 F.2d 972, 11 BRBS 298, *with Dailey v. EHT Constr. Co.*, 20 BRBS 75 (1986).[4] The Fifth Circuit held that in order to be liable there must be "a double

[4] In *Dailey*, the claimant was shot while working as a carpenter for EHT on a property owned by Starlit. Neither Starlit nor EHT had workers' compensation insurance. The administrative law judge found both liable for the claimant's temporary total disability benefits. The Board reversed as to Starlit because, applying *National Van Lines* to the undisputed facts, the Board held that Starlit, an investment group which owned the property

set of contractual obligations," that is the principal must be under some contractual obligation, which it in turn passes in whole or in part to the subcontractor. *Sketoe*, 188 F.3d at 598, 33 BRBS at 153(CRT). It concluded that Exxon's status as an oil and gas lessee of the United States conferred on it ownership rights; while Exxon had some drilling obligations under the terms of the lease, the court held that Exxon's contractual obligations to the United States and with Dolphin were not related. Therefore, this was not a "two-contract" case as contemplated by Section 4(a) and Exxon was not liable to the claimant.[5] *Id.*, 188 F.3d at 599, 602, 33 BRBS at 153-156(CRT); *see also National Van Lines, Inc*., 613 F.2d at 987 n.58, 11 BRBS at 317-318 n.58 (noting the difference between owners and contractors); *Touro v. Brown & Root Marine Operators*, 43 BRBS 148 (2009);[6] *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005).[7]

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as an investment, was under no contractual obligation to perform the duties the claimant was performing and did not have any employees who would normally perform those duties. Thus, Starlit was not a "contractor" but was an "owner," and it could not be held secondarily liable under Section 4(a). *Dailey*, 20 BRBS 75.

[5] The Fifth Circuit rejected the notion that either *National Van Lines* or *Chavers v. Exxon Corp.*, 716 F.2d 315 (5th Cir. 1983), announced a "test" for applying the statute, as the court stated that "the statute is plain as written." *Sketoe*, 188 F.3d at 599, 33 BRBS at 153-154(CRT).

[6] In *Touro*, the decedent was exposed to asbestos while on a one-week assignment for his employer, HOC, to do carpentry work on a barge owned by Brown & Root. HOC was insolvent, so the claimant filed a claim for benefits against Brown & Root under Section 4(a). The Board affirmed the administrative law judge's findings that HOC was not a subcontractor of Brown & Root, and Brown & Root cannot be held liable for benefits pursuant to Section 4(a) as a result of HOC's insolvency. This case did not involve a "two-contract" situation similar to *National Van Lines*, but, rather, was more akin to the ownership situations delineated in *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005), and *Dailey*.

[7] In *Boyd*, the decedent was allegedly exposed to asbestos while working on renovations to a ship shed at a facility owned by Newport News Shipbuilding. The Board affirmed the administrative law judge's finding that Newport News was not under a contractual obligation to renovate its shed, it was not in the business of renovating buildings, and it had no employees engaged in this type of work. Therefore, Hodges & Bryant for whom the decedent worked, was not a subcontractor, and Newport News was not liable for benefits as a contractor.

In this case, the evidence claimant and employer submitted addressed the nature and place of claimant's work and the timing of his exposure to injurious noise to establish the identity of his last maritime employer. Neither submitted evidence relating to the contractor/subcontractor issue, nor did the Director point to any evidence pertinent to this issue.[8] Rather, claimant testified as to the work he performed on Jeffboat's property as an Artisan employee: constructing I-beams to support barges during construction; building a grate system for drainage; attaching a canopy on the side of a building; and constructing a canopy to cover the main line where barges were built. Tr. at 41-46. Additionally, the record reflects that Jeffboat does not dispute the administrative law judge's reasonable inference that vessels were constructed pursuant to contracts with clients. Based on this evidence, the administrative law judge stated:

> The Claimant testified that sometimes he would be assigned to Jeffboat and sometimes he would be assigned somewhere else. Tr. at 47. Thus, Artisan was . . . a subcontractor and Jeffboat was the contractor. Section 904(a) governs Jeffboat's liability for payment of the Claimant's compensation benefits. It provides an alternate for means of liability for a contractor where the subcontractor is the true employer but fails to secure the payment of compensation.

Amended Decision and Order at 14-15. The administrative law judge correctly cited *Sketoe* for the proposition that in order for a contractor-subcontractor relationship to have existed under Section 4(a), "Jeffboat must have been subject to the same contractual obligation that Artisan contracted with Jeffboat to perform." *Id.* at 15. She concluded that this criterion was met because:

> Jeffboat was responsible for the construction of the vessels for various companies and Artisan provided labor to build and maintain the line, canals, and canopies. The construction of the vessels could not continue without the line, canals, or canopies. Thus, the Claimant worked pursuant to a double set of contractual obligations.

Id. The administrative law judge's conclusion that Jeffboat is a "contractor" pursuant to a "double set of contractual obligations" is not supported by substantial evidence of record.

[8] The parties also did not address or submit evidence on a borrowed employee issue that was summarily mentioned by the administrative law judge, Amended Decision and Order at 15-16, and the Director, Dir. Br. at 13 n.8. As no party disputes the finding that Artisan was claimant's last maritime employer, the borrowed employee issue is irrelevant.

Sketoe and *National Van Lines*[9] require some credible evidence of the employer's contractual obligations in order for Section 4(a) to apply.[10] The evidence on which the administrative law judge based her conclusion – claimant's testimony that he was dispatched to work at the Jeffboat facility to perform yard projects and Jeffboat's concession that it has contracts to build vessels – is insufficient evidence from which she could conclude there are two contractual obligations and thus a contractor/subcontractor relationship between Jeffboat and Artisan. *Sketoe*, 188 F.3d at 599, 602, 33 BRBS at 153-156(CRT); *Touro*, 43 BRBS 148. As Jeffboat avers, there is no evidence of record that it was contractually required to renovate its shipyard or that its own employees usually performed this type of work. *See National Van Lines*, 613 F.2d at 986-987, 11 BRBS at 316; *Boyd*, 39 BRBS 17. Further, the record lacks evidence from which the administrative law judge could infer that repairs or renovations to the Jeffboat facility are required by Jeffboat's contracts to build vessels and, therefore, that there is a "double set of contractual obligations." *Sketoe*, 188 F.3d at 599, 602, 33 BRBS at 153-156(CRT); *Touro*, 43 BRBS 148; *Boyd*, 39 BRBS 17; *Dailey*, 20 BRBS 75; *see generally Peabody Coal Co. v. Hale*, 771 F.2d 246 (7th Cir. 1985). The mere fact that Artisan was hired to perform work at Jeffboat's shipyard is, standing alone, insufficient to establish that Jeffboat was anything more than an "owner" contracting for work on its property. *Touro*, 43 BRBS 148; *Boyd*, 39 BRBS 17; *Dailey*, 20 BRBS 75. As the administrative law judge's finding that Jeffboat is a "contractor" within the meaning of Section 4(a) is not supported by substantial evidence, we reverse the finding that Jeffboat is liable for claimant's benefits.[11] *Sketoe*, 188 F.3d at 599, 602, 33 BRBS at 153-156(CRT); *Touro*, 43 BRBS 148; *Boyd*, 39 BRBS 17; *Dailey*, 20 BRBS 75; *see generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS

[9] The United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this case arises, has not addressed this issue. Therefore, the Board looks to both *Sketoe* and *National Van Lines* for guidance. *Boyd*, 39 BRBS 17.

[10] It is not necessary that the actual contracts be admitted into evidence if other credible evidence exists from which the administrative law judge can make findings and draw inferences. *See generally Sketoe*, 188 F.3d 596, 33 BRBS 151(CRT); *National Van Lines*, 613 F.2d 972, 11 BRBS 298.

[11] As we have determined that Artisan, a defunct entity without Longshore insurance, is liable for claimant's benefits, claimant may request that the Special Fund pay his benefits. 33 U.S.C. §918(b). Benefits under Section 18(b) may be paid from the Special Fund at the Secretary's discretion. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *see also Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

28(CRT) (D.C. Cir. 1994); *Director, OWCP v. General Dynamics Corp. [Fantucchio]*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986); *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968).

Accordingly, the administrative law judge's finding that Jeffboat is liable as a contractor pursuant to Section 4(a) of the Act is reversed. Artisan is the responsible employer under the Act. In all other respects, the administrative law judge's Amended Decision and Order is affirmed.[12]

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's finding that Jeffboat is liable as a contractor. Rather, I would vacate that finding and remand the case to allow the parties to submit evidence relevant to the contractor/subcontractor issue and for the administrative law judge to reconsider the matter in light of the newly submitted evidence.

It is premature to address the substantive issue in this case because, procedurally, the parties were not afforded the opportunity to submit evidence and argument concerning Jeffboat's potential liability under Section 4(a) of the Act, 33 U.S.C. §904(a). An administrative law judge may not address in her Decision and Order a new issue of which

[12] The administrative law judge found that claimant is entitled to 56.8 weeks of benefits under Section 8(c)(13) at the weekly compensation rate of $395.93, commencing March 27, 2014. She also awarded reasonable and necessary medical expenses, interest, and an attorney's fee. Amended Decision and Order at 20-21. These findings were not appealed.

the parties had insufficient notice. *Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985); 20 C.F.R. §§702.336(b), 702.338. When an issue is first identified by a party or the administrative law judge, all parties must be notified of the issue and given the opportunity to present argument and evidence. *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); *see Esposito v. Universal Terminal & Stevedoring Corp.*, 9 BRBS 796 (1978); 20 C.F.R. §702.336(b). Where such notice is not provided, the decision must be vacated and the case remanded. *Velez*, 856 F.2d 402, 21 BRBS 155(CRT); *Klubnikin*, 16 BRBS at 184; *Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983).

Section 4 was first referenced in the Director's post-hearing brief in support of her assertion that Jeffboat, and not the Special Fund, should be liable for claimant's benefits. Although the Director's general Section 4 argument was made while the case was before the administrative law judge, it was raised after the hearing at a time when the parties could not submit additional evidence. Moreover, the Director's "argument" did not alert the parties to a contractor/subcontractor issue because the Director did not cite the section for that purpose or cite any relevant law.[13]

As the administrative law judge resolved this claim by addressing a new issue without notifying the parties of her intention to do so, I would vacate her finding that Jeffboat is liable for claimant's benefits pursuant to Section 4(a). *See Bukovac*, 17 BRBS 122; *Klubnikin*, 16 BRBS at 184. I would remand the case for the administrative law judge to notify the parties of her intent to address the Section 4(a) contractor/subcontractor issue, to re-open the record to allow the parties to submit evidence and argument relevant to the

[13] In her brief before the Board, the Director states that she "clearly contended to the ALJ that Jeffboat, and not Artisan, was liable. The failure to specifically identify Section 904(a) as a basis for that conclusion in no way precludes the ALJ from making her own findings upon a review of the evidence and does not preclude the Director from relying on that basis on appeal." Dir. Resp. Br. at 11 n.7. This proposition, while generally true, does not apply here because the administrative law judge is limited to addressing issues properly raised before her, and the Director's contention was not raised until after the hearing. *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509 (1979).

issue of whether a contractor/subcontractor relationship existed between Jeffboat and Artisan, and to apply the relevant facts to the applicable law. For this reason, I dissent.

RYAN GILLIGAN
Administrative Appeals Judge