U.S. Department of Labor

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

BRB No. 19-0518
Case Nos. 2019-LHC-00764, 2019-LHC-00767, 2019-LHC-00841, 2019-LHC-00842
OWCP Nos. 05-121265, 05-135558, 05-013159, 05-300287

TERRY D. REESE Claimant-Petitioner v. VIRGINIA INTERNATIONAL TERMINALS, LLC and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED, c/o SAGE ADJUSTING, LLC Employer/Carrier-Respondents CP & O, LLC and PORTS INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents	)	DATE ISSUED: 12/18/2019 ORDER

Claimant appeals Administrative Law Judge Dana Rosen's Order Granting Employer's Motion for Protective Order from Discovery Regarding Past Mediations.

Virginia International Terminals (VIT) filed a motion to dismiss claimant's appeal as interlocutory. Claimant subsequently filed a brief in support of his appeal.

This case involves various injuries claimant allegedly sustained to his back, neck, arms, shoulders, knees, feet, and elbows in 2005, 2006, 2011, and 2014 during the course of his employment with either VIT or CP & O. The parties participated in three mediations occurring on May 31, 2016, November 7, 2016, and November 2, 2017, which eventually resulted in three settlement agreements that the district director approved on February 2, 2018. 33 U.S.C. §908(i). The first settlement covered injuries claimant sustained at VIT on or about July 8, 2005 and May 22, 2006. The parties settled these claims for $140,000 comprising compensation of $70,000 each for the 2005 and the 2006 injuries. EX 1. The second settlement covered injuries at VIT on July 11, 2011; claimant received $10,000 in this settlement. EX 2. The third settlement covered injuries claimant suffered on January 4, 2014, while working for CP & O; claimant received $164,900 in this settlement, plus the waiver of CP & O's lien of $43,000.[1] EX 3.

In April 2019, claimant, now without counsel,[2] filed LS-18 Pre-Hearing Statements alleging that the settlements were fraudulent and procured by duress, and he has been subjected to retaliation. To prevent claimant from attempting to discover and introduce confidential documents, CP & O filed a motion to exclude allegedly privileged and confidential statements generated in conjunction with the mediation sessions. It argued that prior to each mediation session, the parties signed an agreement that all statements made in the course of mediation are privileged and inadmissible for any legal proceeding. Claimant did not object to employer's motion to exclude privileged information, per se, but instead filed a "motion for modification" under Fed. R. Civ. P. 7(b)(1) arguing that the information in the mediation sessions contained necessary elements of his "defense" and should also be admitted under Fed. R. Evid. 408. The administrative law judge found claimant did not present any argument why he should not be bound by his signed confidentiality statements and settlement agreements, and CP & O showed good cause to

[1] Claimant also filed third-party suits in the United States District Court for the Eastern District of Virginia against the owner and operator of the ship that was docking at the time of his January 4, 2014 injury. *See* 33 U.S.C. §933(a). He obtained the gross amount of $435,000 in settlement of these actions.

[2] Claimant was represented by counsel at each of the mediation sessions. He fired his first counsel after the first two sessions and was represented by another counsel at the third mediation session on November 2, 2017, which eventually resulted in the three settlements. Claimant is alleging, in part, fraudulent behavior by his own counsel at the mediation session(s).

protect against disclosure of confidential matters discussed in the mediations. *See* Order Granting Employer's Motion at 8. She therefore granted CP & O's motion for a protective order to prevent disclosure of any confidential mediation documents. *Id.* (citing 29 C.F.R. §18.52). Claimant appeals the administrative law judge's Order. VIT moves to dismiss the appeal as interlocutory. For the reasons set forth below, we dismiss the appeal.

Claimant's appeal is of a non-final, or interlocutory, order and the Board ordinarily does not undertake review of non-final orders. *See, e.g., Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994). The Board, however, will accept an interlocutory appeal if it meets the three-prong test of the "collateral order doctrine," *see Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987), or if, in the Board's discretion, it is necessary to direct the course of the adjudicatory process. *See, e.g., Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *see* 33 U.S.C. §923(a) (Board not bound by formal rules of procedure). Under the collateral order doctrine, the following three factors are prerequisites to interlocutory review: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue which is separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from final judgment. *Zaradnik v. The Dutra Group*, 52 BRBS 23 (2018).

The Board generally declines to review interlocutory discovery orders, as they are reviewable when a final decision is issued, and therefore fail to meet the third prong of the collateral order doctrine. *See Newton v. P&O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995). The United States Supreme Court has held that even discovery orders that compel the disclosure of privileged material do not justify an interlocutory appeal of that order. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) (holding that despite the importance of the attorney-client privilege, a discovery order to disclose privileged material is not subject to interlocutory review as the usual post-judgment appeal process will suffice). Thus, in this case where the administrative law judge acted to protect allegedly confidential information, the order is not subject to interlocutory review. The administrative law judge's ruling is fully reviewable upon the issuance of a final compensation order. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997). Moreover, the protective order does not raise any due process considerations, *see, e.g., Niazy*, 19 BRBS 266, and the Board does not need to direct the course of the adjudicatory process, *see, e.g., Watson v. Huntington Ingalls Industries, Inc.*, 51 BRBS 17 (2017). Thus, we grant VIT's motion to dismiss claimant's appeal of the administrative law judge's interlocutory Order Granting Employer's Motion for Protective Order from Discovery Regarding Past Mediations.

Accordingly, claimant's appeal is dismissed.[3]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[3] Thus, we deny as moot VIT's motion for an extension of time in which to file a substantive response to claimant's appeal.