U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0037
Case No. 2013-LHC-00637
OWCP No. 13-105664

MARGARET McCUE (Widow of STANLEY McCUE) Claimant-Petitioner v. COLBERG, INCORPORATED and FREMONT COMPENSATION GROUP Insolvent Employer/ Insolvent Carrier CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (CIGA) Putative Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: July 23, 2015 ORDER

HALL, Chief Administrative Appeals Judge:

Claimant appeals Administrative Law Judge William Dorsey's "Order Dismissing CIGA" from the proceedings in claimant's claim for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). CIGA responds in support of the administrative law judge's order of dismissal. Claimant filed a reply brief in support of her appeal. Employer filed a motion to strike a portion of claimant's reply brief, to which claimant responded.

Claimant's appeal is of an interlocutory order, as the administrative law judge dismissed a party from the proceedings, but neither awarded nor denied benefits to claimant. 33 U.S.C. §919(e); *see Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). "Typically, a 'final order' is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 1137, 22 BRBS 156, 157(CRT) (9th Cir. 1989) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The Board ordinarily does not entertain appeals of non-final orders so as to avoid piecemeal review. *See, e.g., Arjona v. Interport Maintenance*, 24 BRBS 222 (1991); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985). The Supreme Court has articulated a three-pronged test to determine whether a district court order that does not finally resolve litigation is nonetheless appealable to the court of appeals under 28 U.S.C. §1291. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue which is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271 (1988) ("collateral order doctrine"); *see Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146(CRT) (9th Cir. 1991); *Bish*, 880 F.2d 1135, 22 BRBS 156(CRT). While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), the Board may rely on general federal practice for guidance where the Act and its regulations are silent.[1] *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16, 15 BRBS 11, 21 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed does not satisfy the aforementioned three-pronged test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to direct the course of the adjudicatory process. Circumstances warranting the Board's interlocutory review have involved issues of significance to the industry, cases in which a party's right to due process has been abridged, or cases in a procedural stalemate. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

[1] Neither the statute nor its implementing regulations state that only "final orders" may be appealed to the Board. *See* 33 U.S.C. §921(a), (b); 20 C.F.R. §§702.391, 802.201. In contrast, only "final" orders of the Board may be appealed to the courts of appeals, unless the order appealed falls under the collateral order doctrine. 33 U.S.C. §921(c); *Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146(CRT) (9th Cir. 1991); *Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 22 BRBS 156(CRT) (9th Cir. 1989).

In his Order, the administrative law judge granted CIGA's motion to be dismissed from the claim, as the administrative law judge determined that, under California law, CIGA cannot be held liable for any death benefits due claimant in this case. The administrative law judge rejected the contention of the Director, Office of Workers' Compensation Programs (the Director), that CIGA should remain a party so as to facilitate the adjudication of the Section 33(g) issue, 33 U.S.C. §933(g), or because CIGA might have liability under the California workers' compensation statute.[2] The administrative law judge stated that the Director may pursue a Section 33(g) defense to the Longshore Act claim and may move to compel discovery if claimant does not comply with his discovery requests.

On appeal, claimant contends the administrative law judge erred in dismissing CIGA from the claim. Claimant avers that her claim is a "covered claim" under the California statute addressing CIGA's responsibility for the liability of insolvent insurers.

We dismiss claimant's appeal. The appeal does not satisfy the collateral order doctrine as the issue raised is not unreviewable after a final order is issued. *See Butler v. Ingalls Shipbuilding, Inc.,* 28 BRBS 114 (1994). Application of the policy against piecemeal review is warranted here, as it is not certain that claimant's claim is compensable. *See Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368 (1981); *see also Butler*, 28 BRBS 114 (noting the competing interests in determining whether to decide appeal on interlocutory basis). The administrative law judge has yet to rule on whether the employee's death was related to his employment or whether claimant's claim is barred pursuant to Section 33(g). It would be imprudent to address the issues raised in claimant's appeal now, when the issue might, in fact, be moot in view of other necessary findings. *Id.; see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (order disqualifying counsel in a civil case is not a collateral order subject to immediate appeal). The administrative law judge's dismissal of CIGA is fully reviewable after he rules on the merits of the claim and issues a final decision which "adversely or affects or aggrieves" any party. 33 U.S.C. §921(b); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy,* 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied,* 133 S.Ct. 2825 (2013); *Rochester v. George Washington University*, 30 BRBS 233 (1997); *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995); *see also Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); 20 C.F.R. §802.201(a).

[2] The Director agreed that CIGA cannot be held liable for the claim under California law. In cases such as this, where the employer and its carrier are insolvent, the Special Fund may accept liability for the claim. 33 U.S.C. §918(b); *see Weber v. S.C. Loveland Co.,* 35 BRBS 190 (2002).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

On October 9, 2014, an administrative law judge granted California Insurance Guarantee Association's (CIGA)[4] motion to be dismissed from this case, based on his determination that 1987 amendments to California state law preclude recovery against CIGA for federal Longshore Act claims. Order at 4. As a result of that decision, there are no potentially-responsible employers or insurance carriers remaining in the case, as claimant's[5] employer and employer's insurance company are defunct. *Id.* at 2. If the administrative law judge's decision stands, claimant must litigate her claim against the Director, Office of Workers' Compensation Programs (as administrator of the Special Fund) and, if successful, will receive an award of benefits only to the extent that the Secretary of Labor, in his discretion, deems it "advisable." 33 U.S.C. §918(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 144 n.2 (1989).

[3] In view of our disposition of this case, employer's motion to strike a portion of claimant's reply brief is moot.

[4] CIGA is a "mandatory association of insurers [created by the California legislature] to pay 'covered claims' for 'member insurers' who become insolvent." Order at 2.

[5] Claimant in this case is the widow of an employee who allegedly died as a result of on-the-job exposure to asbestos. This opinion refers to both claimant and her husband as "claimant."

On appeal, claimant argues that it was improper for the administrative law judge to dismiss CIGA as a responsible insurance carrier, while CIGA responds, urging affirmance.[6] As it relates to the issue raised *sua sponte* by the majority – whether an administrative law judge's grant or denial of a motion to dismiss a potentially-responsible employer is reviewable on an interlocutory basis – the limited Board case law available on this topic reflects a preference for addressing these appeals early in the adjudicatory process. I, therefore, respectfully dissent from the decision to dismiss this appeal.

In *Carmona v. Maersk Pacific*, BRB No. 05-0624 (Jan. 30, 2006) (unpub.), the Board vacated an administrative law judge's decision to grant employer Container Stevedoring's motion to be dismissed from a Longshore Act case. Despite the fact that a decision had not yet been reached on the merits of the underlying claim, the Board "accepted Maersk's appeal of the administrative law judge's interlocutory orders [granting dismissal of Container] on the grounds of due process and judicial efficiency, stating that it was inadvisable for the case to proceed on the merits without the participation of all potentially liable employers." *Id.*, slip op. at 2 n.1.[7] Similarly, in the context of the Black Lung Benefits Act, the Board held in *Crabtree v. Bethlehem Steel*, 7 BLR 1-354 (1984), that "due process, and the efficient administration of the Act, compels" the Department to identify and resolve disputes among all potentially-responsible employers in one preliminary proceeding, or otherwise proceed against all such employers at every stage of adjudication. In reaching this conclusion, the Board reasoned that requiring a claimant to bring multiple claims against several potentially-responsible employers amounts to "piecemeal litigation [that] is obviously not compatible with the efficient administration of the Act and expeditious processing of claims." *Id.*, 7 BLR at 1-357.

The principles of due process and judicial economy cited in *Carmona* and *Crabtree* apply equally to the case at hand, if not more so. Under the majority's decision, claimant must first litigate her claim against the Director and then, after a decision on the merits, raise the issue of CIGA's liability for a second time on appeal to the Board. If

[6] The Director has not filed a brief before the Board in this matter; however, he did argue before the administrative law judge that CIGA should not be dismissed from the case, but for reasons unrelated to the issues raised by claimant in this appeal. *See* Director's Memorandum at 7-8.

[7] In a more recent Longshore Act case, *Lentz v. Matson Terminals*, BRB No. 12-0306 (Jan. 29, 2013) (unpub.), the Board affirmed an administrative law judge's interlocutory order granting employer McCabe, Hamilton & Renny's motion to be dismissed from the case, without any reference to the issue of whether such motions are properly before the Board prior to a decision on the merits of the underlying claim.

claimant is denied benefits by the administrative law judge, CIGA's liability for this Longshore Act claim will clearly be among the issues that she would raise again on appeal. The same may be true even if she is awarded benefits by the administrative law judge because, in the words of the Director, "the Special Fund's payment of a claim under [33 U.S.C. §918(b)] is always discretionary and is never required."[8] Director's Memorandum at 5. Under either scenario, the Board will be called upon to answer the question of whether CIGA can be held liable for this Longshore Act claim, meaning that judicial economy will not be served by dismissal of the appeal at this time. If the Board ultimately agrees with claimant on appeal, the possibility exists that the matter will have to be remanded to the administrative law judge for additional proceedings on the underlying claim, which is the type of piecemeal litigation that the Board sought to avoid in *Carmona* and *Crabtree*.

For these reasons, it would be prudent for the Board to decide the issue of whether the administrative law properly dismissed CIGA from the case, prior to the administrative law judge's decision on the merits of the underlying claim.

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GREG J. BUZZARD
Administrative Appeals Judge

[8] Dismissal of the only remaining potentially-responsible employer/insurance carrier may also implicate claimant's ability to recover attorney's fees, giving rise to another reason claimant would appeal the administrative law judge's decision even if she is awarded benefits. The Special Fund cannot be held liable for attorney's fees, *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980), whereas, depending on state law, guarantee associations can be liable for attorney's fees in Longshore Act claims. *See generally Zamora v. Friede Goldman Halter*, 43 BRBS 160 (2009) (under state law, Texas guarantee association is liable for some attorney's fees).