U.S. Department of Labor

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

BRB No. 18-0357
Case Nos. 2018-LHC-00391, 00392
OWCP Nos. 18-300869, 18-000392

FELIPE RUCOBO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: June 19, 2018
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	ORDER

On May 7, 2018, claimant filed an appeal of the Order Granting Respondent's Motion to Compel and for Protective Order of Administrative Law Judge Jennifer Gee. Claimant's brief is entitled "Petitioner's Interlocutory Appeal of an Order Excluding Claimant's Counsel from Defense's Vocational Expert's Interview." The Board acknowledged claimant's appeal on May 16, 2018, and assigned docket number BRB No. 18-0357. Employer responds to the appeal, urging the Board to dismiss it as interlocutory.

Claimant's claim for benefits, arising from injuries to claimant's left knee and bilateral wrists and an alleged injury to his right knee, is pending before the administrative law judge. On March 13, 2018, employer filed a motion to compel claimant to attend and cooperate with employer's vocational examination and a protective order prohibiting claimant's counsel from attending the examination. On April 4, 2018, the administrative law judge issued an Order wherein she ordered claimant to cooperate and participate in a vocational evaluation with employer's consultant, Ms. Gill, and prohibited claimant's counsel from being present during the evaluation. On appeal, claimant challenges the administrative law judge's Order prohibiting his attorney from attending the evaluation.

Claimant's appeal is of a non-final, or interlocutory, order. The Board ordinarily does not undertake review of non-final orders. *See, e.g., 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 articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless

appealable. 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). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. 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), it has relied on such rules for guidance where the Act and its regulations are silent. *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 from does not satisfy the three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The Board generally declines to review interlocutory discovery orders, as they fail to meet the third prong of the collateral order doctrine, that is, the discovery order is reviewable when a final decision is issued, under the abuse of discretion standard. *See generally 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). If, after a final order is issued, the aggrieved party establishes that the administrative law judge abused her discretion in ordering discovery, the case can be remanded for reconsideration with any wrongly obtained evidence excluded from the record. *Newton*, 38 BRBS 23; *Tignor*, 29 BRBS 135. This case falls within this category. Further, as the administrative law judge is afforded broad discretion in directing and authorizing discovery, it is not necessary for the Board to direct the course of the adjudicatory process in this case. *See Newton*, 38 BRBS at 25; *cf. Pensado*, 48 BRBS 37 (Board addressed appeal of order compelling claimant to attend employer's physical and psychological examinations at his own expense). Thus, we dismiss claimant's appeal of the administrative law judge's interlocutory order.[1]

[1]The Board previously dismissed an appeal of an identical order in *Ruiz v. National Steel & Shipbuilding Co.*, BRB No. 17-0639 (Oct. 31, 2017), *appeal dismissed*, No. 17-73223 (9th Cir. Apr. 26, 2018).

Accordingly, claimant's appeal is dismissed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge