U.S. Department of Labor

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

BRB No. 19-0090

DAVID G. NEWTON-SEALEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
G4S INTERNATIONAL EMPLOYMENT SERVICES (JERSEY) LIMITED (successor to ARMORGROUP SERVICES (JERSEY) LIMITED)	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY (successor to FIDELITY AND CASUALTY COMPANY OF NEW YORK c/o CNA GLOBAL)	)	DATE ISSUED: 06/28/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand and the Ruling on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Michael W. Thomas and Judith A. Leichtnam (Thomas Quinn, L.L.P.), San Francisco, California, for employer/carrier.

Brittany M. Williams (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand and the Ruling on Motion for Reconsideration (2011-LDA-00387, 2017-LDA-00935) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act or the DBA).[1] 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).

This is the third time this case has come before the Board. The prior decisions are published at *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.* (*Newton-Sealey I*), 47 BRBS 21 (2013), and *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.* (*Newton-Sealey II*), 49 BRBS 17 (2015). The underlying facts, which are undisputed, are well documented in those decisions but will be briefly reiterated.

Claimant was hired to provide security for Bechtel engineers working in Iraq. He was severely injured during a transport mission in March 2004. AG Jersey and its carrier, CNA, paid claimant temporary total disability benefits. In April 2007, claimant, a British citizen, filed a tort suit in the United Kingdom against three defendants, ArmorGroup Services (Jersey) Limited (AG Jersey), ArmorGroup Services Limited (AG UK), and ArmorGroup International, PLC (AG PLC) (collectively the "ArmorGroup").[2] In an

[1] While this case was on second remand, the parties agreed to modify the caption to accurately reflect the current corporate identity of employer/carrier.

[2] For continuity, we will continue to use the AG designations in the text, even though G4S PLC acquired AG PLC and each entity was renamed: AG Jersey became G4S

interim decision, a British court allowed the breach of contract claim against AG Jersey and the duty of care claim against all three defendants. Without obtaining CNA's approval, claimant entered into a confidential settlement with the defendants for an amount less than he would be entitled under the Act. Upon learning of the settlement, CNA ceased paying claimant temporary total disability benefits, invoking Section 33(g), 33 U.S.C. §933(g).

In his first decision, the administrative law judge found that AG Jersey was claimant's nominal employer, AG UK was claimant's borrowing employer, and AG PLC was a third party by virtue of the British court's ruling. Because claimant entered into an unapproved settlement with a third party, AG PLC, the administrative law judge applied Section 33(g) to preclude claimant's entitlement to benefits under the Act. On appeal, the Board vacated the findings as to AG UK and AG PLC and remanded the case for the administrative law judge to readdress the borrowed employee issue and, if necessary, whether the three companies are, effectively, a single entity such that none was a "third party." *Newton-Sealey I*, 47 BRBS 21. The Board explicitly stated AG Jersey, as claimant's employer, bore the burden of showing that one or more of the three companies is a third party in order to invoke the Section 33(g) affirmative defense. *Id.* at 23, 25.

On remand, the administrative law judge found that AG UK and AG PLC were not claimant's borrowing employers, AG Jersey and AG UK acted in a joint venture and were claimant's "employer," and AG PLC was a separate entity and, thus, a third party. The administrative law judge, again, applied Section 33(g) to deny claimant's claim.

On appeal, the Board affirmed the borrowing employer findings. Because the burden is on claimant's employer to prove the affirmative defense of establishing the existence of a settlement with a third party, the Board stated: "we start with the presumption that the named companies are all 'employers' until proven otherwise." *Newton-Sealey II*, 49 BRBS at 22. Consequently, it held the administrative law judge properly placed the burden of establishing third-party involvement, and lack of a single entity, on AG Jersey. After considering the undisputed factual history of the ArmorGroup companies and their acquisition by G4S, particularly testimony that the ArmorGroup is "entirely controlled by G4S," and the absence of evidence as to G4S's corporate structure after it engaged in restructuring and the relationship of the GS4 companies as of the time of the settlement, the Board held that AG Jersey did not meet its burden of showing the existence of a third party to the tort settlement. Therefore, it reversed both the finding that AG PLC was a third

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International Employment Solutions (Jersey), Limited (G4S IES) and AG UK became G4S Risk Management Limited (G4S RM).

party and the application of Section 33(g).[3] *Id.* at 23. The Board remanded the case for the administrative law judge to address any remaining issues. *Id*. at 26.[4]

On second remand, the administrative law judge interpreted *Newton-Sealey II* as holding that Section 33(g) does not apply as a matter of law, no credit is due for the settlement proceeds, and the only issues remaining for decision were injury- or impairment-related issues. However, he accepted the parties' agreement that the prior stipulations regarding the nature and extent of claimant's disability remained in effect and that claimant is temporarily totally disabled. Decision and Order on Sec. Rem. at 4-6. Consequently, he issued a compensation order awarding benefits reflecting the parties' stipulations. *Id.* at 6; Ruling on Motion for Recon. at 2-4.[5]

Employer appeals, contending, *inter alia*, the administrative law judge erred in denying application of Section 33(g) as a matter of law. Claimant and the Director, Office of Workers' Compensation Programs (the Director), urge the Board to affirm the administrative law judge's decision by applying the law of the case doctrine. We agree with claimant and the Director.

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[3] Because the Board found that employer failed to submit substantial evidence to establish that, at the time of settlement, one of the entities was a "third party," it determined it was unnecessary to address the administrative law judge's single entity analysis. However, it did address the issues of exclusivity and credit. It held that claimant's pursuit of his rights under the law of the United Kingdom, as a British citizen, did not preclude him from pursuing his claim under the Act. It also held that AG Jersey had not shown that any of the Act's credit provisions apply to permit employer/carrier to receive a credit for money paid in the tort settlement. *Newton-Sealey II*, 49 BRBS at 23-26.

[4] Employer appealed the Board's decision to the United States Court of Appeals for the Second Circuit. The court dismissed the appeal for lack of a final order, *see* 33 U.S.C. §921(c), and denied a request for reconsideration/rehearing en banc. Emp. Br. at 4, 17; *see Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, No. 15-2020 (2d Cir. Nov. 10, 2015, and Apr. 5, 2016).

[5] Both parties moved for reconsideration. The administrative law judge granted claimant's motion because he found claimant to be entitled to temporary total disability benefits but had inadvertently awarded permanent partial disability benefits. He again rejected employer's third-party arguments, applied the Board's order as a matter of law, and denied employer's motion. Ruling on Motion for Recon. at 2-4.

The Board's regulations state that it "shall affirm, modify, *vacate or reverse* the decision or order appealed from, and may remand the case for action or proceedings consistent with the decision of the Board." 20 C.F.R. §802.404(a) (emphasis added); *see also* 20 C.F.R. §802.405(a) (action on remand as directed by the Board). In *Newton-Sealey II*, the Board specifically held:

> AG Jersey has not put forth substantial evidence to establish that at least one of its related companies was a "third party" as of the date of their settlement with claimant. * * * Accordingly, we reverse the administrative law judge's finding that AG PLC was a "third person" with which claimant settled his tort suit. As claimant did not enter into a "third-party settlement," we reverse the administrative law judge's finding that Section 33(g) bars claimant's receipt of benefits under the Act.

Newton-Sealey II, 49 BRBS at 23 (citations and footnote omitted). The Board ordered:

> Accordingly, we reverse the administrative law judge's application of the Section 33(g) bar. We hold that claimant's recovery under the DBA is not precluded by the doctrines of election or exclusivity of remedies. Claimant's recovery under the DBA is not to be diminished by any credit for his recovery in tort. The case is remanded to the administrative law judge for consideration of any other remaining issues.

Id. at 26.

We reject employer's assertion that the term "reverse" is to be interpreted as "vacate," leaving the Section 33(g) issue unresolved and giving the administrative law judge the authority to revisit the issue of the relationships among the companies. *Newton-Sealey I* advised that AG Jersey bore the burden of proving the existence of a third party to support its affirmative defense. *Newton-Sealey II* held that AG Jersey did not satisfy its burden. Absent evidence of a settlement with a *third party*, Section 33(g) cannot apply. *See* 33 U.S.C. §933(a); *Newton-Sealey I*, 47 BRBS at 22-23. The Board reversed the administrative law judge's finding to the contrary and rendered additional holdings consistent with claimant's entitlement to benefits. In remanding the case to the administrative law judge, the Board clearly stated that remand was "for consideration of any *other* remaining issues." *Newton-Sealey II*, 49 BRBS at 26 (emphasis added). "Other" issues are different from those already addressed.

Contrary to employer's interpretation, in *reversing* the administrative law judge's finding that AG PLC was a third party due to AG Jersey's failure to carry its burden, the Board overturned the administrative law judge's decision "by contrary decision." Black's

Law Dictionary 1186 (5th ed. 1979) ("To reverse a judgment means to overthrow it by contrary decision, make it void, undo or annul it for error.").[6] The matter was not left open as it was following *Newton-Sealey I* wherein the Board *vacated* the administrative law judge's decision and remanded for consideration of the third-party issue. Therefore, the issue of the application of Section 33(g) was resolved in *Newton-Sealey II* and is the law of the case.[7] *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005). As employer has not offered a sufficient basis for departure from this doctrine, we affirm the administrative judge's award of benefits.

[6] *See also* Black's Law Dictionary 1320 (7th ed. 1999) ("reversal" is "[a]n appellate court's overturning of a lower court's decision"); www.law.cornell.edu/wex/reversal (viewed June 6, 2019) ("reversal" is when an appellate court rules that "the judgment of a lower court was incorrect").

[7] We reject employer's assertion that the dismissal of its appeal by the Second Circuit means the Board's decision was, in its entirety, "non-final." Employer confuses the finality of a decision and order for judicial review purposes pursuant to 33 U.S.C. §921(c) with the effectiveness, and finality, of the Board's conclusions on certain issues within the decision and order.

Accordingly, we affirm the administrative law judge's Decision and Order on Second Remand, his Ruling on Motion for Reconsideration,[8] and his award of benefits.[9]

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[8] In light of our holding, we need not address employer's remaining contentions. However, to the extent employer asserts the decisions of the Board and the administrative law judge fail to comply with the Act's exclusivity provision, 33 U.S.C. §905(a), employer is in error. As the Board stated: "it is the responsibility of those in the DBA scheme to ascertain its applicability, and it is in the other forum [i.e., the British court] where the exclusivity of the DBA remedy is to be raised. * * * A foreign court's decision cannot negate a claimant's right to compensation under the DBA." *Newton-Sealey II*, 49 BRBS at 24. Also, employer argues that G4S IES, the acknowledged successor to the undisputed primary employer AG Jersey, was a different entity than AG Jersey and, thus, itself a third party to the tort settlement. This contradicts its earlier representation that the change was in name only and is an argument raised for the first time on appeal. Consequently, we reject it. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *see* Emp. Br. at 19, 23.

[9] Because the parties entered stipulations, there is no dispute over the type or amount of benefits to which claimant is entitled.