U.S. Department of Labor

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

BRB No. 15-0501

ANDREW S. JAKSIC	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PACIFIC CRANE MAINTENANCE COMPANY, L.P.	)	
	)	
	)	DATE ISSUED: Nov. 23, 2015
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	ORDER

Employer appeals the Order Denying Partial Summary Decision (2015-LHC-00625) of Administrative Law Judge Richard M. Clark 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). On November 9, 2015, the Board received employer's Petition for Review and brief. 20 C.F.R. §802.211.

Claimant sustained a left knee injury in 1999 while in the employ of Container Care, for which he received an award under the California workers' compensation statute of $45,422.50 for a 56 percent knee impairment. Claimant injured his left knee again in September 2013, during the course of his employment for employer. Following surgery in February 2014, claimant was released to full work duties in July 2014. Claimant filed a claim in August 2014 for a 37 percent left leg impairment. Employer countered the claim with evidence that claimant has a two percent left leg impairment. Employer subsequently filed a motion for partial summary decision with the administrative law judge, contending it is entitled to credit against its liability under the Act the $45,422.50 claimant previously received, pursuant to *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Claimant opposed employer's motion.

The administrative law judge denied employer's motion. The administrative law judge found the *Nash* credit doctrine applies to successive schedule awards when the aggravation rule is implicated, but that there remains a genuine issue of material fact as to whether the 2013 injury aggravated claimant's pre-existing knee condition. The

administrative law judge also stated that it is premature to rule on employer's entitlement to a credit as claimant has not yet received an award of benefits for his 2013 injury. Employer appeals the administrative law judge's Order Denying Partial Summary Decision, alleging the administrative law judge's denial of a *Nash* credit is contrary to law and that the administrative law judge is not precluded from ruling on this issue prior to the entry of an award of benefits.

The administrative law judge's Order Denying Partial Summary Decision is interlocutory, as it neither awards nor denies benefits to claimant. *See* 33 U.S.C. §919(c), (d); *see, e.g., Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). The Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable 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); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *see Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). 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 n.16, 15 BRBS 11 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed does not satisfy the 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 or because the issue is of significance to the industry. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *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).

We dismiss employer's appeal. The denial of a motion for partial summary decision is not a final order and is not appealable on an interlocutory basis because the order has not "resolved" any issues. *Suydam v. Reed Stenhouse of Washington, Inc.*, 820 F.2d 1506 (9th Cir. 1987); *Oppenheimer v. Los Angeles County Flood Control Dist.*, 453 F.2d 895 (9th Cir. 1972); *Green v. Ingalls Shipbuilding, Inc*., 29 BRBS 81 (1995); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85 (1974). The administrative law judge has only deferred ruling on employer's entitlement to a *Nash* credit; he has not denied employer a credit. In the course of the proceedings on the merits of claimant's claim, employer may raise before the administrative law judge the errors it perceives in the administrative law judge's analysis of the credit issue. After the administrative law judge issues a final order awarding or denying benefits, any party may file an appeal or cross-appeal of the final

and interlocutory orders within the constraints of 33 U.S.C. §921 and 20 C.F.R. §802.205.

Accordingly, employer's appeal is dismissed.

SO ORDERED.

_____

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

RYAN GILLIGAN
Administrative Appeals Judge

_____

JONATHAN ROLFE
Administrative Appeals Judge