U.S. Department of Labor

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

BRB No. 15-0142

LAZARO PANDOLFO Claimant-Respondent v. ELLER-ITO STEVEDORING COMPANY, L.L.C. and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Sept. 17, 2015 DECISION and ORDER

Appeal of the Order Cancelling Hearing and Order of Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Raul De La Heria (De La Heria, Glinn & Pedraza), Miami, Florida, for claimant.

James W. McCready, III (Seipp Flick & Hosley, LLP), Miami, Florida, for employer/carrier.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Cancelling Hearing and Order of Remand (2014-LHC-01612) of Administrative Law Judge Daniel F. Solomon 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On February 7, 2012, during the course of his employment at employer's facility, claimant was struck by a toploader vehicle, injuring his right leg and resulting in its amputation below the knee. Employer filed a Notice of Injury form and has voluntarily paid claimant over $600,000 in disability and medical benefits under the Act. 33 U.S.C. §§907, 908. On December 4, 2012, claimant's counsel submitted a notice of appearance to the district director, and on December 7, 2012, he requested an informal conference "regarding [claimant's] Longshore claim," particularly regarding medical prescriptions and home modifications. An informal conference was held on February 4, 2013, with another on April 25, following settlement negotiations.

Claimant also pursued a tort suit under state law, claiming he was an independent contractor and not an "employee." On June 25, 2014, employer filed an LS-18 Pre-Hearing statement and asked the district director to refer the case to the Office of Administrative Law Judges (OALJ) for a hearing under the Act. Claimant responded by filing a pre-hearing statement on July 7, 2014. The hearing was scheduled for January 7, 2015. On October 10, 2014, claimant filed a motion to remand the case to the district director, stating he had elected to pursue his claim in state court; employer replied on October 29, urging the administrative law judge to deny the motion. On October 30, the administrative law judge held a conference call with attorneys for both parties. During the call, the parties asserted they would be moving for summary decision on the issue of whether claimant was an employee or an independent contractor/vendor. On December 5, 2014, claimant filed a motion to dismiss "employer's claim," and employer responded, urging the administrative law judge to deny the motion. Thereafter, employer filed a motion for summary decision in its favor. Claimant responded that summary decision was inappropriate because there are genuine issues of material fact.[1]

[1] Claimant filed a "Motion for Summary Decision" with the administrative law judge simultaneously with employer's motion. Claimant, however, did not request summary decision; rather, he opposed employer's motion, arguing that genuine issues of material fact remain.

On December 29, 2014, the administrative law judge issued an Order cancelling the hearing and remanding the case to the district director. The administrative law judge stated that he understood discovery in the state claim was on-going but no decision had been issued in that forum. He also concluded that, while the state court may not retain jurisdiction once it considered the evidence of claimant's status, the "state claim constitutes a condition precedent to adjudication by the Department of Labor." Thus, as "[j]udicial economy is not served if more than one court renders a determination on the same issue[,]" he cancelled the hearing and remanded the case to the district director "until such time that it may be ripe for hearing." Order at 2. Employer appeals the administrative law judge's Order remanding the case to the district director.[2] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the Order, albeit on different grounds than those urged by employer. Employer and claimant filed reply briefs.[3]

Employer contends the administrative law judge erred in cancelling the hearing because the Department of Labor has "primary jurisdiction" with respect to coverage under the Act. It asserts that claimant filed documents indicating he was making a claim, and he has accepted all payments employer made pursuant to the Act. Thus, employer argues, it was improper for the administrative law judge to relinquish his duty to resolve the disputed issue of claimant's status under the Act and to await a state court decision on whether claimant is a covered employee. It urges the Board to vacate the Order and remand the case for a hearing. Claimant responds, arguing that employer knew he had elected to proceed first and only in state court, that employer has been a participant in the state court proceedings, that the state court has the authority to address the issue of claimant's status as an employee or independent contractor, and that it was proper for the

[2] Generally, for a non-final order, such as the one here, to be appealable it must conclusively determine the disputed question, resolve an important issue which is completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271 (1988) ("collateral order doctrine"); *Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004). This is a classic "collateral order" situation, and the Board accepts the appeal of this interlocutory order.

[3] Employer replied to claimant's response, and claimant responded to the Director's brief. Employer also filed a motion for additional time to file a reply to the Director's brief and a reply to the Director's brief. The Board accepts these documents as part of the record. 20 C.F.R. §§802.212, 802.213, 802.219. Additionally, employer filed a motion for oral argument, to which claimant responded; the motion is denied. 20 C.F.R. §802.306.

administrative law judge to allow the state court to resolve the issue first.[4] The Director responds to employer's appeal. While the Director agrees the administrative law judge's Order cannot stand, he disagrees with employer's assertion that "primary jurisdiction" lies with the administrative law judge; rather, he urges the Board to remand the case for the administrative law judge to address claimant's "motion to dismiss" as a "motion to withdraw his claim."

Initially, we reject claimant's assertion that he did not file a claim under the Act. In construing whether a claim has been made under the Act, the Board and the courts have given liberal construction to the term "claim" and determined that no particular form need be used to initiate a claim. 33 U.S.C. §913(a); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974) (memo by deputy commissioner of phone conversation with claimant's attorney discussing permanent total disability); *see McKinney v. O'Leary*, 460 F.2d 371 (9th Cir. 1972) (telephone call to deputy commissioner inquiring as to further entitlement sufficient where memo placed in file); *Crawford v. General Dynamics Corp./Electric Boat Div*., 7 BRBS 781 (1978) (claimant's written request for all forms necessary to protect his rights under the Act); *Simonson v. Albina Engine & Machine Works*, 7 BRBS 100 (1977) (three medical reports sent to district director: two attached to employer's notice of termination of compensation and one filed with employer's insurance carrier); 20 C.F.R. §702.221. A writing that discloses the intent to assert a right to compensation constitutes a "claim." *Id.*; *Base Billeting Fund, Laughlin Air Force Base v. Hernandez*, 588 F.2d 173, 9 BRBS 634 (5th Cir. 1979); *Bergeron*, 493 F.2d 545; *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998) (letter to district director requesting disability compensation); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990) (attending physician's report indicating continuing disability); *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988) (notice of injury form indicating intent to claim compensation).

Although claimant did not file an LS-203 claim for compensation form for the injury that took place on February 7, 2012, his first attorney took actions consistent with filing a "claim" for compensation under the Act. The attorney submitted a document, dated November 19, 2012, titled "Authority to Represent, Longshore and Harbor Workers' Compensation" to the district director. On December 4, 2012, that attorney submitted a notice of appearance to the district director, as well as a letter, dated December 7, 2012, requesting an informal conference "regarding [claimant's] Longshore

[4] As of September 8, 2015, the Court of the Eleventh Judicial Circuit of Florida has not issued a decision on claimant's tort claim. https://www2.miami-dadeclerk.com/ocs/Search.aspx

claim[.]"[5] Additionally, claimant participated in an informal conference. Based on these actions, employer and the Director are correct that claimant, via the actions of his first attorney, filed a claim under the Act. *McKnight*, 32 BRBS 165. Therefore, we reject claimant's contention that he did not file a claim under the Act.

Following the informal conferences, the district director, upon employer's request, properly forwarded this case to the OALJ for a hearing. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994); 20 C.F.R. §702.316. After referral, the administrative law judge was presented with several motions related to claimant's claim.[6] The administrative law judge appears to have addressed and implicitly granted only claimant's motion to remand, finding that "the state claim constitutes a condition precedent" to his deciding the claim before him.

To the contrary, pursuant to 33 U.S.C. §919(a), (d), the administrative law judge's duty is to "hear and determine all questions in respect of" claims filed under the Act and to conduct hearings in accordance with the Administrative Procedure Act, 5 U.S.C. §554; 20 C.F.R. §702.331 *et seq*. It is axiomatic that the Act applies only to "employees" and not to independent contractors. 33 U.S.C. §905(a); *see generally Fontenot v. AWI, Inc.*, 923 F.2d 1127, 24 BRBS 81(CRT) (5th Cir. 1991); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010). Thus, the issue of whether claimant in this case is an "employee" under the Act constitutes a "question in respect of a claim." *Irby*, 44 BRBS 17; *see, e.g., Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005) (administrative law judge properly addressed the question of which carrier is liable for a claimant's benefits, which is an issue "in respect of" a claim).

Moreover, pursuant to Section 19(c), (d) of the Act, where the parties are in disagreement over an issue that is "in respect of" a claim, the administrative law judge has a duty to hold a hearing upon the request of a party if the claimant has filed a claim for compensation under the Act. 33 U.S.C. §919(c), (d); *Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794, *reh'g denied*, 279 F.2d 75 (5th Cir. 1960); *Nix v. O'Keeffe*, 255 F.Supp. 752 (N.D.Fl. 1966); *see, e.g., Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). As we have determined that claimant filed a claim under the Act and the issue disputed by the parties is one which is "in respect of" that claim, it was improper, on the facts presented here, for the administrative law judge to label the state

[5] This action belies claimant's current assertion that he hired counsel only to respond to employer. Cl. Resp. to Dir. Br. at 4.

[6] Employer filed a motion for summary decision. Claimant filed a motion to dismiss, a motion to remand, and a response to employer's motion for summary decision. *See* n.1, *supra*.

court's decision a "condition precedent" to his deciding the issue. Therefore, although the tort suit was filed in state court prior to referral of the claim to the administrative law judge, by awaiting a state court decision and by remanding the case to the district director, the administrative law judge improperly found the resolution of the state claim supersedes the adjudication of this claim.[7] *See generally Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). Consequently, as there are disputed facts in respect of claimant's claim, we vacate the administrative law judge's order remanding the case to the district director.

Where a timely claim is filed, but it is not closed by an order awarding or denying the claim, an approved withdrawal, or a Section 8(i), 33 U.S.C. §908(i), settlement, it remains open and pending until it is resolved. 33 U.S.C. §§913, 919(c); *Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *see Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990); 20 C.F.R. §702.348. None of the above actions has been taken to close claimant's claim. In this regard, claimant's Motion to Dismiss remains unaddressed.

When a claimant files a motion to dismiss, it is generally viewed as a motion to withdraw his claim. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); *Graham v. Ingalls Shipbuilding/Litton Systems, Inc*., 9 BRBS 155 (1978). The administrative law judge's authority under Section 19(d) includes the authority to approve the withdrawal of claims under 20 C.F.R. §702.225(a). *Graham*, 9 BRBS 155; *see also Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996). In this case, claimant's motion to dismiss "employer's claim" is based on the incorrect basis that he does not have a claim pending under the Act. However, in his "Motion for Summary Decision," *see* n.1, *supra*, claimant acknowledged that he potentially does have a pending claim and, if so, he would be permitted to withdraw it. *See* Cl. Motion for Sum. Dec. at 3. Claimant, however, has not specifically requested a withdrawal of *his* claim. To avoid any confusion over the parties' intentions, the administrative law judge should order claimant to show cause as to whether he intends to withdraw or proceed with his claim under the Act. *Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998).

[7] An administrative law judge may remand the case to the district director when the employer withdraws its controversion to the claim, and the parties are in agreement as to the claim's disposition. 20 C.F.R. §702.351; *see Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21, 23 (2007). Additionally, an administrative law judge may remand a case to the district director for consideration of a new issue when evidence not considered by the district director is likely to resolve the case without a hearing. 20 C.F.R. §702.336. Neither situation applies in this case.

If claimant intends to withdraw his claim, the administrative law judge must determine, consistent with the regulatory criteria, whether the request for withdrawal is for a proper purpose and is in claimant's best interest. *Petit v. Electric Boat Corp.*, 41 BRBS 7 (2007); 20 C.F.R. §702.225(a).[8] As a claimant's choice of the forum in which to litigate his claim constitutes a "proper purpose," *Irby*, 41 BRBS 21; *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998), the administrative law judge here need only address whether withdrawal would be in claimant's best interest.[9] *Id.* If he finds claimant's claim should be withdrawn and grants the motion, then nothing remains for him to adjudicate.[10] *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993)

[8] 20 C.F.R. §702.225(a) provides that a claimant may withdraw his previously filed claim if he files a writing with the adjudicator, before the date of adjudication, stating his reasons for withdrawal, if he is alive at the time of the request, and if the adjudicator approves the request "as being for a proper purpose and in the claimant's best interest[.]" *See Irby*, 41 BRBS 21.

[9] In *Irby*, the Board affirmed the administrative law judge's finding that withdrawal was not in the claimants' best interests through consideration of factors such as the claimants' likelihood of success in their state suits, the amounts of their potential recoveries, and their ability to re-file their claims under the Act in the event they lost in state court on the merits. *Irby*, 41 BRBS at 27.

[10] In making this statement, we are addressing the matter currently before the administrative law judge and do not mean to preclude appropriate action under Section 14(h) of the Act, 33 U.S.C. §914(h), or any other provision of the statute. Pursuant to 20 C.F.R. §702.225(c), withdrawal is without prejudice to filing another claim under the Act. Specifically, if the state court determines claimant's rights are restricted to those under the Act because he is an employee and not an independent contractor or vendor, claimant would be able to pursue a claim for benefits under the Act because Section 13(d) of the Act, 33 U.S.C. §913(d), provides:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

Vodanovich v. Fishing Vessel Owners Marine Ways, Inc., 27 BRBS 286 (1994); *see also C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008) (Jones Act suit tolls the statute of limitations); *Ingalls Shipbuilding Div., Litton*

(Brown, J., dissenting on other grounds). If the administrative law judge determines it would not be in claimant's best interest to withdraw his claim, or if claimant opts to proceed with his Longshore claim, the administrative law judge must address employer's Motion for Summary Decision and claimant's objections thereto consistent with the law on granting or denying summary decision. *See Irby*, 41 BRBS at 28; *Brockington v. Certified Electric, Inc*., 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *see also O'Hara v. Weeks Marine, Inc*., 294 F.3d 55 (2d Cir. 2002); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Dunn v. Lockheed Martin Corp*., 33 BRBS 204 (1999); 29 C.F.R. §18.72 (2015). If the administrative law judge denies employer's motion for summary decision, he must proceed with a hearing on the disputed issues.[11]

Systems, Inc. v. Hollinhead, 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978) (state workers' compensation claim tolls the statute of limitations); *Calloway v. Zigler Shipyards, Inc.*, 16 BRBS 175 (1984) (reasons for dismissal are irrelevant, as the filing of the action tolls the statute of limitations); *c.f. Bath Iron Works Corp. v. Director, OWCP* [*Acord*], 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997) (expressing doubt that *Hollinhead* was decided correctly).

[11] In light of our decision, we need not address employer's primary jurisdiction argument. *But see Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991); *Irby*, 41 BRBS at 27 n.5.

Accordingly, the administrative law judge's Order Cancelling Hearing and Order of Remand is vacated, and the case is remanded to the administrative law judge for action in accordance with this opinion.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge