

The Scope of an ALJ's Authority Under the LHWCA

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Section 19(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA) provides the agency official who conducts hearings on claims for benefits "full power and authority to hear and determine all questions in respect of such claim." 33 U.S.C. § 919(a).¹ Although courts have addressed the meaning of that phrase in the past, three recent administrative decisions explore the breadth of that authority in new and different contexts. A review of the three cases underscores the limited scope of an ALJ's authority under the LHWCA.

The three cases are *Watson v. Wardell Orthopaedics*, 51 BRBS 17 (2017), *Walton v. SSA Containers, Inc.*, BRB No. 16-0549, May 30, 2017 (2017 WL 2497119), and *Thibedeau v. SSA Pacific, et al.*, BRB No. 17-0448 (pending), OALJ Case No. 2016-LHC-01651.² In *Watson*, the Benefits Review Board (BRB) issued a published decision, *Walton* is an unpublished decision currently pending reconsideration by the BRB, and the third case, *Thibedeau v. SSA Pacific, et al.*, BRB No. 17-0448, OALJ Case No. 2016-LHC-01651, has yet to be initially decided by the BRB. All three coincidentally involve liability for medical expenses. All three consistently hold that a specific issue disputed by one of the parties did not amount to a "question in respect of a claim." However, the precise matter deemed not to constitute a "question in respect of a claim" varies widely in each case.

The cases address the scope of the phrase "question in respect of a claim" in the following contexts: a dispute regarding the OWCP medical fee schedule reimbursement rate owed by an employer directly to its injured employee's medical provider under LHWCA section 7(d)(3) and that employer's right to defend against liability for medical expenses based on a series of

¹ LHWCA Section 19(d), 33 U.S.C. § 919(d), provides:

Provisions governing conduct of hearing; hearing examiners. Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code [5 USC §§ 554]. Any such hearing shall be conducted by a [an] administrative law judge qualified under section 3105 of that title [5 USC § 3105]. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 [enacted Oct. 27, 1972], in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

² The order addressing the section 19(a) question in *Thibedeau* which is before the Board was an interim order issued at a preliminary stage of the ALJ proceeding.

medical bill “re-pricing” agreements between service providers - (*Watson*); whether a LHWCA employer can force the joinder of a state guarantee insurance association (IGA) to an ALJ proceeding after the IGA has determined that the employer’s claim falls outside the definition of a covered claim under the IGA statute - (*Thibedeau*); an attempt to enforce an indemnity agreement between an injured employee’s two successive employers who are each potentially liable to pay medical expenses - (*Walton*).

TESI

The recent cases do not arise in a vacuum. Case precedent has addressed the question previously. The most comprehensive treatment of the “question in respect of a claim” issue is in *Temporary Employment Services v. Trinity Marine Group, Inc.* [*TESI*], 261 F.3d 456 (5th Cir. 2001). Since it was decided, *TESI* has provided the analytical framework for assessing whether a particular matter is a “question in respect of a claim.”

In *TESI*, the Fifth Circuit held that to constitute a question in respect of a claim, “the disputed issue must be essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the relevant statutory law.” 261 F.3d at 463. As a general matter, an ALJ’s authority does not extend to contractual issues. *Id.* at 464-65. Questions involving contractual disputes are generally beyond the expertise of DOL ALJs, and requiring ALJs to resolve them would “hinder[] the mission of the LHWCA.” *Id.* at 464. *See also Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 632-33 (5th Cir. 1999); *Sea B. Min. Co. v. Director, OWCP*, 45 F.3d 851, 854-55 (4th Cir. 1995). Moreover, “common law contract disputes generally “involve ‘private rights’ which are at the ‘core’ of ‘matters normally reserved to Article III courts [and thus beyond the purview of non-Article III entities].” *TESI*, 261 F.3d at 465, quoting *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 578-79 (1989) (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853 (1986)).

Because DOL ALJs are not Article III judges, proceedings before them under the LHWCA are Article I adjudications. As *TESI* notes, this constitutional status limits the scope of matters which an ALJ may decide only to those provided for by statute. An erroneously overbroad application of Section 19(a)’s “question in respect of a claim” language would run afoul of the Constitution. *Cf., Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 81 (1982) (Article I bankruptcy judges could not constitutionally exercise Article III judicial power over disputes involving private rights concerning liability of one individual to another under law which may only be conducted by an Article III court).

TESI involved an indemnification contract between a temporary labor supplier firm (*TESI*) which provided employees to shipyards, and Trinity Marine, a shipyard which accepted and employed workers sent to it by *TESI*. The indemnification contract was part of the larger agreement under which *TESI* supplied Trinity Marine with temporary laborers. *TESI*’s LHWCA

insurance policy contained a waiver of subrogation in favor of Trinity Marine. When a borrowed TESI employee was injured in the course of employment for Trinity Marine, one dispute before the ALJ centered on whether TESI's agreement to indemnify Trinity Marine from claims arising from the employment of those borrowed employees obligated TESI, rather than Trinity Marine, to pay the injured worker's LHWCA benefits. The Fifth Circuit held that because the employee was working for Trinity Marine at the time of his injury, Trinity Marine was liable for the LHWCA benefits. Given that the benefits liability issue had been determined, the court found it unnecessary for the ALJ proceeding to further determine whether TESI may be liable on other contractual grounds. *TESI* at 464. Thus, the court held that the indemnity agreement's contract provisions were not a "question in respect of a claim" under the LHWCA such that the ALJ could address them when the rights and liabilities of the injured worker and the responsible employer (Trinity Marine as the borrowing employer) under the LHWCA had already been resolved. The further question whether TESI was required to reimburse Trinity Marine was not "essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the LHWCA." *Id.* Accordingly, the court concluded that the ALJ did not have authority to decide the contractual issue because it was not integral to deciding the compensation claim. *Id.* at 465.

WATSON

Against the backdrop of *TESI's* interpretation of the scope of LHWCA section 19(a), *Watson* involved an interlocutory appeal to the Board of an ALJ order denying the employer's motion to dismiss a medical provider's (Wardell Orthopaedics') claim seeking reimbursement of medical treatment costs incurred by an injured worker. The employer contended that the ALJ lacked authority to adjudicate the medical reimbursement dispute because to do so the ALJ would have to interpret a series of contractual arrangements to which the medical provider was a party. 51 BRBS at 18 n. 3. The employer argued that the amount it was required to reimburse the medical provider was not governed by the OWCP medical fee schedule, 20 C.F.R. § 10.805 *et seq.*, <https://www.dol.gov/owcp/regs/feeschedule/accept.htm>, but was instead governed by the "re-pricing" contracts. The ALJ denied the employer's motion and the employer appealed.

First, the Board affirmed the ALJ's determination that a medical provider has a statutory right to seek an award for the reasonable value of medical treatment obtained by an injured employee, *see* 33 U.S.C. § 907(d)(3), and that such a medical reimbursement dispute between a medical provider and an employer is a "question in respect to a Longshore claim" and therefore properly within the ALJ's jurisdiction under section 19(a). However, the Board further held that in making that determination, the ALJ lacked authority to consider the employer's defense to the extent it was based on private "re-pricing" contracts between the medical provider and other parties not an employee, employer, carrier, or another entity whose rights are necessary to the determination of the LHWCA claim. Agreeing with the Director, the Board held that an ALJ lacks the authority to resolve rights under private contracts as the interpretation of contracts is not a "question in respect of a claim." Because the employer's defense to the medical provider's

reimbursement claim was based on private contracts between private parties, interpretation of those contracts exceeded the scope of what was necessary to resolve the LHWCA claim and exceeded the ALJ's jurisdiction. 51 BRBS at 20-21.

THIBEDEAU

In *Thibedeau*, a former union longshoreman for several waterfront employers retired in 1991 after performing his last covered employment with the only employer named in this proceeding. Over the course of that employment, the worker sustained an occupational binaural hearing loss and filed a claim for compensation. The worker and employer entered into a settlement agreement under LHWCA section 8(i), 33 U.S.C. § 908(i), discharging the employer's liability for his hearing loss disability but reserving his right to future medical benefits. The employer's LHWCA insurer at the time of the settlement thereafter became insolvent. In 2013, the employee required new hearing aids and filed a LHWCA claim. He paid for them and was later reimbursed in full by the ILWU-PMA Welfare Plan. Thereafter, the Welfare Plan intervened in the LHWCA proceeding to recover payment for the medical expenses it made on the Claimant's behalf. The employer ultimately paid the Welfare Plan a lump sum to settle the Plan's claim leaving the employer's liability as the only disputed issue.

In light of the insolvency of the employer's LHWCA insurer, the Office of the District Director joined the Oregon Insurance Guaranty Association (OIGA) as a party to the case. After referral of the claim to OALJ, OIGA requested the ALJ dismiss what it described as the employer's "claim" against it for reimbursement of the amount owed to the Welfare Plan. The employer contended OIGA was responsible for the insolvent insurer's obligation for medical benefits as the guarantor of the insolvent insurer's LHWCA liabilities pursuant to the scope of OIGA's obligations as set forth in the state Guaranty Act. *See* Or. Rev. Stat. Ann. §§ 734.510-734.710. The employer urged the ALJ to determine whether this case involved a "covered claim" within the meaning of the state Guaranty Act. Or. Rev. Stat. Ann. § 734.510(4)(a). OIGA denied this was a covered claim within the meaning of the Guaranty Act but, more pertinently, argued that the ALJ lacked jurisdiction to determine OIGA's liability under the Guaranty Act because the resolution of that question is not integral to deciding the merits of the LHWCA claim. OIGA noted that under LHWCA section 4(a), the employer bore direct primary responsibility for whatever benefits might be due.

The ALJ issued an order dismissing OIGA. The ALJ found that under LHWCA section 19(a), the issue whether the employer has a "covered claim" under the Oregon insurance guaranty statute was not a "question in respect of a claim." Citing *TESI*, the ALJ determined that his jurisdiction extended only to those issues integral to deciding the claim – *i.e.* those issues essential to resolving the rights of the claimant, employer, and insurer regarding the LHWCA claim. He found that the question whether the Employer had a covered claim under the state insurance guarantee law did not involve the Claimant's entitlement to benefits or who is responsible for those benefits under the LHWCA; rather, it involved a dispute only between the

employer and OIGA regarding OIGA's liability under Oregon law. Concluding that he did not have jurisdiction to decide whether OIGA was required to assume the insolvent insurer's liability under Oregon law, the ALJ granted OIGA's motion. The employer appealed to the Board and that appeal remains pending. BRB No. 17-0448.

WALTON

In *Walton*, a longshoreman injured her knees and back while working for SSA Containers, Inc. (SSA) in early 2011. Later that year, she filed a LHWCA claim against SSA before working another eight days for Ports America (Ports) between July 26, 2011 and October 2, 2011. Subsequently, she filed a LHWCA claim against Ports alleging that cumulative trauma suffered in those eight days constituted a new injury. In early 2012, she underwent total left knee replacement surgery. In August 2013, the parties entered into a LHWCA section 8(i) settlement agreement which resolved the claims for disability compensation. The settlement included an agreement to hold the injured worker harmless for past medical benefits, but left open the question of which employer was liable for those past medical benefits, including the left knee replacement surgery. The agreement specifically reserved SSA's and Ports' rights to litigate liability for past medical benefits. Meanwhile, in June 2013, the two employers entered into a separate indemnity agreement in which SSA paid Ports \$10,000 for "complete indemnity" from "potential liability arising out of the [LHWCA] claim" filed against SSA for the early 2011 injury. The employers' indemnity agreement was not submitted in support of the parties' LHWCA settlement agreement.

Nothing more transpired for several years, until, after performing additional work for SSA and other employers, the worker allegedly sustained additional injuries and filed a claim in the California state workers' compensation system. That claim sought compensation for the injuries sustained with SSA in 2011 (that were also the subject of the LHWCA claim); injuries sustained at Long Beach Container Terminals (LBCT) in 2014; and injuries sustained with SSA in 2014. In 2015, the injured worker, SSA, and LBCT settled the state workers' compensation claims in their entirety.

In 2016, the injured worker's non-occupational private health insurer, the Motion Picture Industry Health and Welfare Plan (MPIHP), filed a lien with the California Workers' Compensation Appeals Board (CWCAB) against SSA seeking reimbursement of \$81,450.79 it had paid on behalf of the claimant for medical expenses, but that it believed were due to injuries sustained in her Longshore employment. The sum included charges for medical services SSA and Ports had left unresolved in their 2013 LHWCA section 8(i) agreement. On October 8, 2015, SSA tendered defense of the lien to Ports in the state proceeding, relying on the 2013 indemnity agreement. Ports rejected the tender, arguing that the indemnity agreement applied only to LHWCA and not state claims.

SSA then sought an informal conference before the Longshore district director, which both Ports and MPIHP opposed. MPIHP contacted the district director to object to SSA's informal conference request, stating that it had filed its lien only with the CWCAB, which had jurisdiction over the matter, and had already scheduled a trial. It further noted that it had not submitted anything to, or requested relief from, the U.S. Department of Labor, did not wish to proceed in the LHWCA forum and requested that the district director take no action on SSA's request. The district director held an informal conference, and concluded that he did not have jurisdiction to interpret or enforce the indemnity agreement between SSA and Ports.

SSA requested that the case be referred to OALJ for "enforcement of indemnity agreement dated June 24, 2013." Before the ALJ, SSA requested summary decision, asking the ALJ to find Ports responsible and order it to reimburse MPIHP for back and knee treatments provided to the claimant after October 2, 2011, the claimant's last day of work for Ports. SSA argued that the ALJ had authority to order Ports to reimburse MPIHP under the section 8(i) settlement agreement entered into by the parties. Ports responded, arguing that MPIHP, not SSA (which never paid or provided the medical benefits in question), was a party in interest under 7(d)(3), and that MPIHP had not sought reimbursement under the Longshore Act. It further argued that the dispute over which employer was liable for the amounts sought by MPIHP had already proceeded to hearing in the state proceeding, and that any issues under the LHWCA should be stayed.

The ALJ denied SSA's motion for summary decision, and dismissed its claim. He found that MPIHP had not filed a claim for reimbursement under LHWCA section 7(d)(3). He further noted that the injured worker had made no claim for medical benefits under section 7, having settled her interests in the case under section 8(i), and that the settlement agreement held her harmless for any medical payments. Finally, the ALJ found that he did not have jurisdiction to enforce the indemnity agreement because it was not a "question in respect of a Longshore claim," as required under section 19(a). Accordingly, the ALJ dismissed the case. SSA appealed to the BRB.

In an unpublished decision issued on May 30, 2017, the Board affirmed the ALJ's finding that he had no jurisdiction to enforce the indemnity agreement because it was not a matter in respect of a Longshore claim. BRB No. 16-0549. Despite consensus on the scope of authority conferred by section 19(a) on this point, other issues proved contentious. Although the Board also found that the ALJ could not order reimbursement to MPIHP under the LHWCA when MPIHP had neither sought such reimbursement nor intervened in the case brought by SSA, the majority of the Board panel deciding the case held that the ALJ did have jurisdiction to determine which employer was the responsible employer with regard to medical benefits, and remanded for resolution of that issue. It conceded, however, that the ALJ lacked authority to order reimbursement to MPIHP. Bd. Dec. at 7 and n. 8.

Administrative Appeals Judge Buzzard dissented, stating that he would have affirmed the ALJ's dismissal of the entire case for lack of jurisdiction. He noted that there was no claim before the ALJ under section 7(d)(3) – because MPIHP had not filed one in the Longshore proceedings, and indeed had expressed its desire to seek reimbursement in the state proceedings – and that the injured worker had not claimed medical benefits because her interests in the Longshore claim had been settled. “Absent any claim for benefits under the Act, the issue of which employer is responsible for medical benefits is a theoretical one, unripe for adjudication.” Bd. Dec. at 8. He found that, while the settlement agreement allowed for further litigation over which employer was liable for past medical benefits, the ALJ had no jurisdiction to resolve that issue where no claim seeking medical benefits or reimbursement had been presented to him. Ports has filed a motion for reconsideration with the BRB that remains pending.