U.S. Department of Labor

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

BRB No. 16-0549

PAULA WALTON Claimant v. SSA CONTAINERS, INCORPORATED and HOMEPORT INSURANCE COMPANY Employer/Carrier-Petitioners PORTS AMERICA and PORTS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Mar. 30, 2018 DECISION and ORDER on RECONSIDERATION EN BANC

Appeal of the Order Granting Summary Decision Dismissing All Claims by SSA and the Order Denying Summary Judgment of William Dorsey, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and David L. Doeling (Aleccia & Mitani), Long Beach, California for SSA Containers, Incorporated, and Homeport Insurance Company.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for Ports America and Ports Insurance Company.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS, BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Ports America (Ports) has filed a timely motion for reconsideration en banc of the Board's decision in this case, *Walton v. SSA Containers, Inc., et al.*, BRB No. 16-0549 (May 30, 2017) (Buzzard, J., dissenting). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a), (b). SSA Containers (SSA) responds, urging the Board to deny the motion. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to grant the motion. Claimant has not responded. We grant the motion for reconsideration en banc. 20 C.F.R. §802.407(d). Upon reconsideration, a majority of the Board has voted to grant the motion for reconsideration. Therefore, for the reasons stated below, we vacate the Board's decision and affirm the administrative law judge's dismissal of SSA's claim and grant of summary decision in favor of Ports. 20 C.F.R. §§801.301(c), 802.409.

To briefly reiterate the pertinent facts, claimant injured both knees and her lower back while working as a lasher for SSA in February 2011, for which she filed a claim under the Act. Claimant returned to work for some time but ceased working in October 2011 due to unbearable pain. As she was employed by Ports on her last day of work, claimant filed a claim against Ports for cumulative trauma injuries to her back and both knees.

In August 2013, the administrative law judge approved a Section 8(i), 33 U.S.C. §908(i), settlement wherein SSA and Ports agreed to pay claimant $23,000 in exchange for a discharge of all liability for disability benefits relating to her February and October 2011 injuries. Ports agreed to be responsible for future medical treatment for claimant's left knee condition related only to her February and October 2011 work injuries, reserving the right to dispute any injury occurring after October 2, 2011. The parties did not resolve liability for claimant's past medical treatment, except that SSA and Ports did agree to "hold claimant harmless with respect to same." SSA EX 7. However, prior to executing the settlement under the Act, SSA and Ports entered into an indemnity agreement in which Ports agreed to defend, indemnify, and hold SSA harmless in relation

to claimant's Longshore claim for the February 2011 injury, in exchange for SSA paying Ports $10,000.[1]

Several years later, claimant filed a state workers' compensation claim for her injuries at SSA on February 18, 2011, as well as for injuries to the same and additional body parts that occurred at Long Beach Container Terminals on February 23, 2014, and at SSA on March 6, 2014. *See* Ports EX 2. After the employers and claimant settled the state claim, claimant's private health care provider, the Motion Picture Industry Health Plan (MPIHP), filed a lien against SSA in state court for medical benefits it had paid that were related to claimant's February 2011 injury.[2] Ports EX 3. The lien dispute has not been resolved.

On November 7, 2015, after Ports refused to defend SSA in the state proceedings, SSA requested an "emergency informal conference" with the district director to address the issue of reimbursement for past medical benefits paid by MPIHP. P EX 8. Ports and MPIHP objected to the informal conference, arguing that the proper remedy is in the state forum. Ports EX 12. The district director concluded he could not enforce the indemnity agreement but recommended SSA be held liable for medical benefits for the period of February 18 through October 1, 2011, and Ports, as the responsible employer under the Act, be held liable for medical benefits beginning October 2, 2011. *Id*. Rejecting the recommendation, SSA requested the case be referred to the Office of Administrative Law Judges (OALJ) for a hearing.

SSA filed a Motion for Summary Decision, asking the administrative law judge to order Ports, as the last employer, to reimburse MPIHP the nearly $80,000 it paid for claimant's back and knee treatment. The administrative law judge ultimately denied SSA's motion for summary decision, stating he lacked jurisdiction to resolve the reimbursement dispute, because there was no claim for medical reimbursement under Section 7(d)(3), 33 U.S.C. §907(d)(3), the Section 8(i) settlement disposed of claimant's interest in this case and did not authorize him to assign liability to Ports, and enforcement of an indemnity agreement between employers is not a question "in respect of" a Longshore claim. SSA appealed the denial of its motion for summary decision and the dismissal of its claim.

---

[1] The indemnity agreement was not submitted in support of the approved settlement agreement.

[2] The lien amount included monies for past medical treatment that SSA and Ports disputed and had specifically left unresolved under the Act in the Section 8(i) settlement agreement. SSA EXs 7, 9.

The Board reversed the administrative law judge's finding that he lacked jurisdiction to resolve the responsible employer issue, vacating his denial of SSA's motion for summary decision and dismissal of the claim. Although the Board agreed that the administrative law judge lacked jurisdiction to address the indemnity dispute and to order either employer to reimburse MPIHP, the Board held that the administrative law judge had jurisdiction to resolve which employer is liable under the Act for the benefits MPIHP paid. The Board reasoned that liability for medical benefits is an issue "in respect of" claimant's claim that was specifically preserved in the parties' Section 8(i) settlement agreement; therefore, the settlement of claimant's interests did not divest the administrative law judge of jurisdiction to resolve the responsible employer issue. *Walton*, slip op. at 6-7 (citing *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Schaubert v. Omega Services Industri*es, *Inc.*, 31 BRBS 24 (1997)). The Board remanded the case for the administrative law judge to address the merits of SSA's motion for summary decision, i.e., whether SSA demonstrated the absence of a genuine issue of material fact and whether it is entitled to a decision in its favor as a matter of law as to which employer is liable for the past medical benefits at issue.[3] *Id*., slip op. at 7. Judge Buzzard dissented, stating he would affirm the administrative law judge on the grounds that there is no issue "in respect of" a claim under the Act because the parties' settlement agreement resolved claimant's interest in her claim and no claim for reimbursement of medical expenses has been filed under Section 7(d)(3). As none of the parties asserted an entitlement right that could give rise to liability under the Act, Judge Buzzard concluded that the liability dispute presented in this case is theoretical and unripe for adjudication. *Id*., slip op. at 8.

In its motion for reconsideration, Ports contends the Board erred in holding that the administrative law judge has jurisdiction to address the responsible employer issue in this case. Ports agrees with Judge Buzzard's dissent, arguing that the question regarding which employer is liable for reimbursing MPIHP is theoretical and unripe for adjudication because no claim for reimbursement has been filed under the Act. SSA responds that the Board cannot address the ripeness issue raised by Ports because it was not raised before the administrative law judge.[4] SSA argues in the alternative that the responsible employer issue is ripe for adjudication. The Director responds, asserting that the majority opinion erred in focusing on whether a "question in respect of" claimant's

[3] The Board noted that, on remand, the administrative law judge may assess whether he should stay the proceedings under the Act until the lien issue is resolved in the state forum. *Walton*, slip op. at 7 n.8.

[4] Contrary to SSA's argument, an issue regarding the alleged lack of subject-matter jurisdiction may be raised at any time. *See Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.,* 303 F. App'x 928 (2d Cir. 2008).

claim was left unresolved rather than whether a "claim" had been presented for adjudication at all. The Director agrees with Ports that the issue of which employer is liable for past medical benefits is theoretical, and its resolution is not compelled by any claim under the Act. The Director additionally notes that, unlike this case, *Kirkpatrick* and *Schaubert*, which the majority cited in support of its decision, are distinguishable as they involved properly-raised reimbursement claims for the administrative law judge to resolve.

Pursuant to Section 19(a) of the Act, 33 U.S.C. §919(a), an administrative law judge has "full power and authority to hear and determine all questions in respect of" a claim made under the Act.[5] *Watson v. Huntington Ingalls Industries, Inc.*, 51 BRBS 17 (2017) (medical services and medical fee rates); *Kirkpatrick*, 39 BRBS 69 (reimbursement by responsible carrier); *Schaubert*, 31 BRBS 24 (reimbursement by responsible employer); *see Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (court explains that jurisdiction exists only over issues that are integral to deciding compensation claims). If a claim is before him, the administrative law judge has the authority to "inquire fully into matters at issue" so as "to best ascertain the rights of the parties." 20 C.F.R. §§702.338-702.339. Nevertheless, despite the existence of a compensation claim, the administrative

[5] Section 19(a) states:

> Subject to the provision of section 913 of this title a claim for compensation may be filed with the [district director] in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the [district director] shall have full power and authority to hear and determine all questions in respect of such claim.

33 U.S.C. §919(a); *see* 20 C.F.R. §701.301(a)(7) (changing the title from deputy commissioner to district director). Section 19(d) of the Act, 33 U.S.C. §919(d), transferred the adjudicatory duties of the district directors to administrative law judges. This section states:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by an administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the [district directors] with respect to such hearings shall be vested in such administrative law judges.

law judge does not have jurisdiction to resolve collateral disputes that do not affect the disposition of the parties' rights and liabilities regarding the claim. *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT) (parties' claims regarding insurance contract indemnification are not questions in respect of a claim; issue of borrowed employee is); *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd sub nom. Bailey v. Hymel,* 104 F. App'x 415 (5th Cir. 2004) (corporate officers' motion to intervene in claim to raise Section 33(g) for state tort immunity is not "in respect of" claimant's claim under the Act; parties' rights and liabilities are); *Watson*, 51 BRBS 17 (employer's defense based on private re-pricing contracts for medical fees is not "in respect of" the claim for reimbursement of medical fees under the Act; employer's liability to physician for services rendered is).

In the absence of a justiciable claim asserting a right arising out of or under the Act, the administrative law judge does not have jurisdiction to resolve any disputes. *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012) (where DBA claim is still before district director, employer's request for a subpoena for purposes of investigating its potential claim for reimbursement under the War Hazards Compensation Act not "in respect of" a claim under the Act); *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981) (S. Smith, C.J., dissenting) (no authority to resolve carrier's reimbursement claim because claimant ceased to be active in the case and his entitlement under the Act was not decided, making the reimbursement dispute solely between the two insurers); *see also Employers Liability Assur. Corp. v. Donovan*, 279 F.2d 76, 78-79 (5th Cir.), *cert. denied*, 364 U.S. 884 (1960) (no authority to hold a hearing absent any claim under the Act); *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994) (where no claims were filed, issues raised were not ripe for adjudication); *see generally Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985), *cert. denied,* 475 U.S. 1019 (1986) (where claim is moot, case should be dismissed; advisory opinions generally outside scope of the Act). For the reasons discussed below, on the facts of this case, we agree there is no claim arising out of or under the Act to be addressed and, therefore, the responsible employer question presented is theoretical, and the administrative law judge is without authority to resolve it.

To begin, the only claim that has been filed under the Act in this case is claimant's original claim for compensation, which was settled in 2013. It is not subject to modification. 33 U.S.C. §922. As stated previously, this agreement resolved the liability of SSA and Ports to claimant for payment of all past and future compensation benefits arising from her alleged injuries in February and October 2011, as well as all future medical benefits related to those injuries. Only liability for past medical treatment was left unresolved:

> SSA/Homeport and Ports deny liability for any and all past medical care and shall pay, adjust or litigate any [and] all claims for payment of same, and hold Claimant harmless with respect to same.

Settlement Agreement at 3. By settling with claimant, the parties eliminated any controversy with claimant.[6] *See* 33 U.S.C. §908(i)(3). Thus, claimant does not have an extant claim or interest in the dispute over liability for past medical benefits. *See Parker*, 28 BRBS 339; *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254, *modified on recon.*, 19 BRBS 52 (1986) (claimant does not have standing to pursue a third-party insurer's right to reimbursement under the Act); *see also generally Murphy v. Hunt*, 455 U.S. 478 (1982) (where there is no reasonable expectation that an action will occur again, the test for the "capable of repetition, yet evading review" doctrine fails, and the issue is considered moot).

Although SSA and Ports explicitly denied liability for claimant's past medical care in the settlement agreement, and reserved, for later resolution, their dispute regarding which employer must pay for that treatment, neither employer paid for those medical services such that it may seek reimbursement from the other. Consequently, neither SSA nor Ports has filed a claim for reimbursement so as to bring this claim before the administrative law judge.[7]

Indeed, the only benefits at issue in this case are those that were paid by MPIHP, giving only MPIHP a derivative right to reimbursement under the Act. Only MPIHP has standing to pursue that right, and only a claim by MPIHP could give rise to the

[6] The existence of a settlement, alone, is insufficient to preclude the administrative law judge's authority to address disputes concerning rights and obligations arising out of or under the Act that persist post settlement. *Kirkpatrick*, 39 BRBS 69. In this case, however, claimant did not pay for any past medical treatment and is not entitled to personally recover the costs of any of that treatment. *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010); *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43, 46 (1986). By also holding claimant harmless for medical care, the parties eliminated any future reimbursement interest claimant might have. 33 U.S.C. §907(d); *Nooner*, 19 BRBS at 46.

[7] Neither employer has been subrogated to the obligations and duties of the responsible employer such that it has a right to reimbursement under the Act.

responsible employer's liability to reimburse it. 33 U.S.C. §907(d)(3)[8]; *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015); *Quintana*, 18 BRBS 254; *see also Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (en banc) (a claim for medical benefits is never time-barred). At this juncture, MPIHP has not filed a claim for reimbursement *under the Act*. Absent such, no rights arising under or out of the Act are currently at issue, neither employer faces liability under the Act, and the dispute regarding which employer must reimburse MPIHP is theoretical and not justiciable under the Act.[9]

In this regard, we agree with the Director that the facts of this case may be distinguished from those in *Kirkpatrick* and *Schaubert*, wherein the responsible employer disputes were raised within the context of justiciable reimbursement claims under the Act, allowing the administrative law judge to resolve the disputes.[10] *Kirkpatrick*, 39 BRBS 69; *Schaubert*, 31 BRBS 24. By contrast, here, MPIHP did not claim a derivative right to reimbursement under the Act pursuant to Section 7(d)(3); MPIHP filed its lien for medical benefits in state court. Thus, in the federal forum, SSA seeks to resolve a factual dispute between itself and Ports, which arises in a state forum, by asserting the rights of MPIHP for use in the state forum.[11] However, SSA does not have standing to pursue

[8] Section 7(d)(3) states: "The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee."

[9] Although MPIHP has filed a lien in state court for reimbursement of the medical benefits at issue, which may result in liability for SSA and/or Ports, that controversy, which involves contract interpretation of the indemnity agreement, arises in a state cause of action over which the administrative law judge has no jurisdiction. *Watson*, 51 BRBS 17.

[10] The employers/carriers had standing to pursue claims for their derivative right to reimbursement by virtue of having been subrogated to the obligations of the respective responsible employer under the Act. *Kirkpatrick*, 39 BRBS 69; *Schaubert*, 31 BRBS 24.

[11] In asking for a determination regarding which employer is liable for past medical benefits, SSA does not assert an interest under the Act, nor does it allege any dispute between itself and Ports independent of that regarding MPIHP's lien in state court. Rather, SSA inappropriately seeks declaratory relief in this forum in an effort to defend against liability in state court. *See Hymel*, 37 BRBS 160. However, even assuming *arguendo* that declaratory relief may be an available remedy under the Act, it may not be granted for the sole purpose of interfering with litigation pending in another forum. *See generally Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971); *Texas Employers'*

MPIHP's "claim" under the Act. *See generally Quintana*, 18 BRBS 254; *see also American Psychiatric Assoc. v. Anthem Health Plans, Inc.*, 50 F. Supp. 3d 157, 162 (D. Conn. 2014), *aff'd*, 821 F.3d 352 (2d Cir. 2016) ("The prudential limitations on jurisdiction require that a plaintiff establish that he or she is the proper proponent of the rights asserted; a litigant may not raise the rights of a third-party. . . ."). Thus, the facts of this case are more akin to those in *Hymel*, wherein the intervenors' claim of immunity, though rooted in a statutory provision of the Act, was not essential to the disposition of the parties' rights and liabilities regarding the compensation claim; *Busby*, wherein the carrier seeking reimbursement could not claim a derivative right to reimbursement because the claimant's entitlement under the Act was undecided; and *Quintana*, wherein the claimant lacked standing to pursue the insurer's right to reimbursement. *See Hymel*, 37 BRBS at 163; *Quintana*, 18 BRBS at 257-258; *Busby*, 13 BRBS at 225-226.

As the purported responsible employer dispute presented in this case does not affect the disposition of the parties' rights and liabilities regarding any extant claim under the Act, we agree with Ports and the Director that, on the facts of this case, the administrative law judge lacks jurisdiction to resolve the dispute. 33 U.S.C. §919(a); *see generally Parker*, 28 BRBS 339; *see also Sample*, 771 F.2d 1335, 18 BRBS 1(CRT). Therefore, we vacate the Board's decision, and we affirm the administrative law judge's finding that he lacks jurisdiction to resolve the responsible employer dispute. We affirm the administrative law judge's denial of SSA's motion for summary decision and dismissal of its claim.

Ins. Ass'n v. Jackson, 862 F.2d 491, 506 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989).

Accordingly, Port's motion for reconsideration is granted. 20 C.F.R. §802.409. The Board's decision in this case is vacated. The administrative law judge's decisions are affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to grant the motion for reconsideration and vacate the Board's prior decision in this case. For the reasons stated in the Board's original decision, I would hold that SSA raised a justiciable issue in asking the administrative law judge to determine which employer is liable for past medical benefits under the Act, as that issue was specifically preserved in the parties' settlement agreement. As claimant's meritorious claim in this case included the past medical benefits that were paid by MPIHP, I disagree with my colleagues' holding that the responsible employer issue in this case is theoretical and unripe for adjudication.

The parties' Section 8(i) settlement agreement established claimant's entitlement to disability and medical benefits. MPIHP's entitlement to reimbursement and the

corresponding liability of the responsible employer for same have also been established under the Act.[12] The only remaining issue, raised as a result of claimant's claim, is which employer is the responsible employer. This dispute is solely between the potentially liable employers,[13] and it was explicitly preserved for future litigation by the settlement agreement. The administrative law judge's authority under Section 19(a) extends to all questions that are in respect of the claim of an injured or deceased worker. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). Further, pursuant to the Board's decisions in *Kirkpatrick* and *Schaubert*, the question regarding who is responsible for paying a claimant's benefits under the Act is a question in respect of the claimant's claim that survives the resolution of the claimant's interests in his claim. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Schaubert v. Omega Services Industri*es, *Inc.*, 31 BRBS 24 (1997).[14] Similar to *Kirkpatrick*, the settling of claimant's interests in her claims does not eliminate the relationship between her claims and the issue of which employer is liable for past benefits due her under the Act. *Kirkpatrick,* 39 BRBS 69. Although the administrative law judge, on remand in this case, could decline to exercise jurisdiction and stay proceedings pending the outcome of the state court action, such is the consequence of concurrent jurisdiction under the Longshore Act and the state workers' compensation statute, not the absence of jurisdiction under the Act. *See Sun Ship, Inc. v. Pennsylvania*,

---

[12] In this regard, the facts of this case are distinguishable from those in *Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76 (5th Cir. 1960), and *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981) (S. Smith, C.J., dissenting), wherein the employees did not have fully meritorious claims under the Act. In *Donovan*, the claimant did not file a claim under the Act. In *Busby*, the claimant's claim was effectively withdrawn by virtue of his disappearance before the reimbursement dispute between insurers arose.

[13] Neither claimant nor MPIHP have any role to play in the resolution of this issue. In determining the responsible employer in a case involving traumatic injury, the question turns on whether the claimant's disability results from the natural progression of the initial injury, in which case the employer at the time of the initial injury is responsible, or whether a subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, in which case the subsequent employer is responsible. *See Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp.*, 7 F. App'x 547 (9th Cir. 2001). Each employer has the burden of establishing that it is not the responsible employer. *Id.*

[14] The Board did not hold that the resolution of a claimant's interests moots the administrative law judge's jurisdiction to resolve a responsible employer dispute until a claim for reimbursement is filed.

447 U.S. 715, 12 BRBS 890 (1980). Accordingly, I would deny the motion for reconsideration and affirm the prior decision in full.

_____

RYAN GILLIGAN
Administrative Appeals Judge