U.S. Department of Labor

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

BRB No. 16-0545

LAMAINE T. WATSON	)	
	)	
Claimant	)	
	)	
WARDELL ORTHOPAEDICS, P.C.	)	
	)	
Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	DATE ISSUED: June 30, 2017
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Denying Motion to Dismiss and the Order Denying Motion for Reconsideration of Monica Markley, Administrative Law Judge, United States Department of Labor.

David M. Gettings (Troutman Sanders), Virginia Beach, Virginia, for Wardell Orthopaedics, P.C., medical provider.

Bradley D. Reeser and Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Helen H. Cox (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals

Judges.
PER CURIAM:

Employer appeals the Order Denying Motion to Dismiss and the Order Denying Motion for Reconsideration (2015-LHC-01497) of Administrative Law Judge Monica Markley 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 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).

Claimant injured his right knee in September 2013, and he filed a claim under the Act. Employer voluntarily paid claimant temporary total disability, permanent partial disability, and medical benefits. 33 U.S.C. §§907, 908(b), (c). Wardell Orthopaedics (Wardell) provided medical care for claimant's work-related injury and submitted the charges for services rendered between October 28, 2013, and August 13, 2014, to employer in the amount of $8,113. Employer disputed the bill and paid only $3,133.60. Wardell requested payment in full, and employer refused, asserting that a series of contracts among Wardell, United Healthcare and its affiliates, including OneNet, Procura, MCMC, and employer entitled it to the benefit of a reduced fee for Wardell's services. *See* n.3, *infra*. Wardell filed a claim with the district director seeking payment in full. In May 2015, the district director calculated that employer paid Wardell less than what is allowed under the Office of Workers' Compensation Programs (OWCP) Medical Fee Schedule and owed Wardell an additional $1,374.26.[1] Employer disagreed with the recommendation and requested the case be transferred to the Office of Administrative Law Judges (OALJ).[2]

[1] Wardell seeks this amount and no longer asserts entitlement to the full amount originally billed. Wardell Br. at 5.

[2] This case was referred to the OALJ by letter dated June 18, 2015. On November 24, 2015, Wardell filed a Motion for Summary Decision, asserting there are no issues of material fact. Employer responded, objecting to the motion. Wardell filed a reply brief on January 14, 2016. The administrative law judge addressed, and denied, the Motion for Summary Decision in her Order dated July 19, 2016. The denial was issued after the notice of appeal was filed in this case on July 6, 2016, and is not a part of this appeal. Adjudication on the merits of the case is pending before the administrative law judge but will be affected by the Board's decision herein.

On January 15, 2016, employer filed a Motion to Dismiss Wardell's claim, asserting that the dispute centers on the interpretation of private contracts.[3] Employer alternatively argued that Wardell does not have standing to bring an independent claim for payment of medical fees. Wardell opposed the motion, and employer replied. The administrative law judge found that Wardell has standing to bring a claim, the OALJ has jurisdiction over the claim, and the contract matter is ancillary to the claim for compensation such that it is within her authority to address it. Order at 5-8. Thus, she denied employer's Motion to Dismiss.

On May 23, 2016, employer filed a Motion for Reconsideration of the administrative law judge's denial of its Motion to Dismiss, asserting the administrative law judge erred in finding she had subject matter jurisdiction over the dispute. Wardell responded in opposition. The administrative law judge denied employer's Motion for Reconsideration, finding there were no errors in her original denial. Employer appeals these orders, and Wardell and the Director, Office of Workers' Compensation Programs (the Director) have responded. Employer filed a reply brief.

Although not addressed by employer or Wardell, the Director urges the Board to accept this interlocutory appeal so as to properly direct the course of adjudication. The Director asserts that this medical reimbursement issue has been raised in other cases, two of which are also pending before the Board. Additionally, the Director asserts that the question raised addresses the breadth of the phrase "questions in respect of [a] claim" in Section 19(a), 33 U.S.C. §919(a), as well as the constitutional limits of Article I proceedings.

[3] Wardell contracted with United Healthcare for prompt payment of medical services rendered to individuals under programs offered by United Healthcare and its affiliates in exchange for his charging them only co-pays, co-insurance, or deductibles. OneNet is an affiliate of United Healthcare. The reimbursement provision of the agreement requires providers be reimbursed for services based on the lesser of the OneNet fee schedule, the provider's customary charge, or the applicable workers' compensation fee schedule. Procura Management contracted with OneNet to access the medical re-pricing contracts between United Healthcare and medical providers. MCMC contracted with Procura for access to the agreement, and employer then contracted with MCMC to obtain access to the United Healthcare agreement through its agreement with Procura. Emp. Br. at 4-5. Employer argues that the amount it must reimburse Wardell is governed by these contracts and fee schedules; thus, its defense against paying the amount recommended by the district director lies within the contracts. As the contracts were executed under the laws of Virginia, employer contends the administrative law judge does not have the authority to interpret them to determine the amount of its liability for Wardell's medical services.

The Board ordinarily does not undertake review of non-final orders. *See, e.g., Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). Generally, for a non-final order 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). If the order appealed does not satisfy the aforementioned criteria, the Board, in its discretion, may grant review if it finds it necessary to properly direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). In light of the issues raised and that other cases are potentially affected, we grant review. *Id*.

On appeal, employer contends the administrative law judge erred in finding she has subject matter jurisdiction over this issue. Employer asserts that Article III of the United States Constitution does not permit an administrative agency to adjudicate state contract rights, it has not given consent for this issue to be addressed in an Article I court, and Section 19(a) does not encompass jurisdiction over "medical re-pricing litigation" because it does not involve the rights of any injured worker. Wardell responds, urging the Board to affirm the administrative law judge's decision that she has jurisdiction to address the issue of the amount of employer's liability, including employer's contractual defense, which is related to claimant's claim for compensation. Wardell notes that it is disingenuous for employer, who sought transfer of the case to the OALJ, to now assert that it did not give consent for this issue to be addressed by the administrative law judge. The Director agrees with Wardell that the administrative law judge has jurisdiction to address the medical rates dispute, as the Act and the regulations address both fees for medical services and the parties' right to litigate disputes over such fees. *See* 33 U.S.C. §907(g); 20 C.F.R. §§702.407(b),[4] 702.413-702.417. However, the Director asserts the

[4] Section 702.407 provides:

> The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:
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> (b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act.

administrative law judge has no authority to address employer's defense involving the private contracts with non-parties, and he disagrees with employer's assertion that this lack of authority to address the contracts divests the administrative law judge of authority to address this reimbursement claim entirely.

Section 19(a) of the Act states that the administrative law judge "shall have full power and authority to hear and determine all questions in respect of such claim." *See also* 33 U.S.C. §919(d).[5] The administrative law judge has the power to hear and resolve contractual issues which are necessary to the resolution of a claim under the Act, such as whether a contract for workers' compensation insurance covered the employer under the Act. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984). The United States Court of Appeals for the Fifth Circuit has held, however, that Section 19(a) does not vest jurisdiction in an administrative law judge to interpret a contract dispute when the cause of action is wholly unrelated to the underlying claim for compensation. *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (the parties' claims regarding their indemnification contract are not "questions in respect of" a longshore claim); *Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999) (where the claim involved neither a determination of which carrier must pay compensation benefits nor a dispute over potential coverage, but instead involved the employer's claim for attorney's fees, the administrative law judge lacked jurisdiction to adjudicate it); *see also Sea "B" Mining Co. v. Director, OWCP*, 45 F.3d 851 (4th Cir. 1995) (administrative law judge lacked jurisdiction over computation of interest assessed on reimbursements to Black Lung Disability Trust Fund for medical benefits it paid before the responsible operator was identified); *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 F. App'x 415 (5th Cir. 2004) (claim of tort immunity is not an issue essential to resolving the rights and liabilities of the claimant and the employer regarding the compensation claim).

In this case, there is no dispute that claimant is entitled to disability and medical benefits under the Act, that the medical treatment provided for his work injury was

[5] Section 19(d) 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 deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

reasonable and necessary, and that employer is liable for claimant's benefits. The sole issue is the amount employer must reimburse the provider, Wardell, for the medical services rendered. A medical provider may bring his own claim for reimbursement of the cost of medical services provided to the claimant, as his entitlement to reimbursement is derivative of the claimant's entitlement to benefits. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993); *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997); *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986), *modified on recon.*, 19 BRBS 52 (1986). Section 7(d)(3) of the Act 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." 33 U.S.C. §907(d)(3) (emphasis added). The Act and regulations state that the provider is limited to receiving the prevailing community rates for his services. 33 U.S.C. §907(g);[6] *Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); 20 C.F.R. §702.413.[7] If there is a dispute over

[6] Section 7(g) provides:

> All fees and other charges for medical examinations, treatment, or service shall be limited to such charges as prevail in the community for such treatment, and shall be subject to regulation by the Secretary. The Secretary shall issue regulations limiting the nature and extent of medical expenses chargeable against the employer without authorization by the employer or the Secretary.

[7] Section 702.413 addresses fees for medical services:

> All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community in which the medical care provider is located and shall not exceed the customary charges of the medical care provider for the same or similar services. Where a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 CFR 10.805 through 10.810) to the extent appropriate, and where not appropriate, may use other state or federal fee schedules. The opinion of the Director that a charge by a medical care provider disputed under the provisions of section 702.414 exceeds the charge which prevails in the community in which said medical care provider is located shall constitute sufficient evidence to warrant further proceedings pursuant to section 702.414 and to permit the Director to direct the claimant to select another medical provider for care to the claimant.

whether the provider's requested fees exceed the prevailing rates, the regulation at 20 C.F.R. §702.415 provides for the district director to investigate and the OALJ to hold a hearing to resolve any remaining dispute.[8] *Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (physician who seeks an order compelling full payment of the costs of his medical services bears the burden of establishing that his rates are within the prevailing community rates); 20 C.F.R. §§702.413-702.417.

Employer contends the administrative law judge erred because claimant's entitlement to benefits and its liability therefor have been resolved, and any other issues are independent of claimant's claim and beyond the administrative law judge's jurisdiction. The Director urges the Board to hold that the administrative law judge's role in this case, on this issue, is limited to determining the medical fees permitted by the Act and regulations. Specifically, the Act provides that Wardell is "limited to such charges . . . as prevails in the community in which the medical care provider is located. . . ." 20 C.F.R. §702.413. Thus, the Director asserts, the district director properly used the OWCP Medical Fee Schedule to calculate the additional amount owed by employer, beyond what it had paid to Wardell.

Contrary to employer's argument, there is a dispute related to claimant's claim as to how much employer must pay Wardell for claimant's medical benefits *under the Act*. The Act and implementing regulations make clear that the amount of medical benefits owed to a provider is a question "in respect of" a claim for benefits over which the administrative law judge has authority. 33 U.S.C. §907(g); 20 C.F.R. §§702.413-702.417. Accordingly, we reject employer's contention that the existence of the contracts relieves the administrative law judge of jurisdiction entirely, and we affirm the administrative law judge's finding that she has the authority to address the issue of the amount employer must reimburse Wardell for medical services under the Act.

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20 C.F.R. §702.413. Sections 702.414 through 702.417 address the procedures for resolving disputes over whether the provider's charges exceed the prevailing charges. 20 C.F.R. §§702.414-702.417.

[8] Section 702.415 states in pertinent part:

> After issuance of specific findings of fact and proposed action by the [District Director,] any affected provider[,] employer[,] or other interested party has the right to seek a hearing. . . . Upon written request for such a hearing, the matter shall be referred by the District Director to the OALJ for formal hearing. . . .

However, we agree with employer and the Director that the administrative law judge lacks the authority to resolve any party's rights under the private contracts, as the interpretation of those contracts is not "in respect of" a claim for compensation under the Act. Therefore, it is not within the administrative law judge's authority to address whether the series of non-party contracts commencing with Wardell and United Healthcare entitles employer to pay Wardell reduced rates for his services. *Temporary Employment Services*, 261 F.3d 456, 35 BRBS 92(CRT). In *Temporary Employment Services*, the Fifth Circuit considered a contract wherein Temporary Employment Services supplied Trinity Marine with temporary workers and agreed to indemnify it from claims arising from the employment of those borrowed employees. Temporary Employment Services also had a longshore workers' compensation insurance policy that contained a waiver of subrogation in favor of Trinity Marine. The issue before the court was whether these contract provisions were "in respect of a claim" under the Act such that they could be addressed when the rights and liabilities of the claimant and the (responsible) borrowing employer under the Act had already been resolved. *Temporary Employment Services*, 261 F.3d at 457-460, 465, 35 BRBS at 94-95, 98(CRT). The court determined the contracts could not be addressed in proceedings under the Act. *Id.*, 261 F.3d at 464-465, 35 BRBS at 98-99(CRT). The Fifth Circuit explained that "[o]nce all the LHWCA issues in respect of the compensation claim have been adjudicated (as they have been in this case), an adjudication of who else may be liable on other grounds is, therefore, unnecessary to the objective of the LHWCA proceedings." *Id.*, 261 F.3d at 464, 35 BRBS at 98(CRT).[9]

Employer's defense against paying the medical fees calculated by the district director and claimed by Wardell is based on private contracts. *See* n.3, *supra*. Interpretation of these contracts goes beyond that which is necessary to resolve the claim *under the Act*. Under the Act, employer is liable, at most, for medical charges at the prevailing rates set forth in the OWCP Medical Fee Schedule. Any other rates, pursuant to private contracts, are beyond the scope of the claim under the Act and are "unnecessary to the objective of the LHWCA proceedings." *Temporary Employment Services*, 261 F.3d at 464, 35 BRBS at 98(CRT). Thus, employer's defense is not an

[9] The Fifth Circuit also explained that its conclusion is consistent with its holding in *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996). In *Total Marine*, the Fifth Circuit held that, as the borrowing employer is liable for benefits under the Act and must reimburse the formal employer any benefits it had paid to the injured worker, Total Marine was liable for the employee's benefits and had to reimburse CPS, his formal employer. *Id.* Thus, the contract between the two employers in *Total Marine* addressed liability under the Act and "bore directly on the compensation claim." *See Temporary Employment Services*, 261 F.3d at 464, 35 BRBS at 98(CRT).

issue "in respect of [a] claim" under Section 19(a) of the Act. *Equitable Equipment*, 191 F.3d at 632, 33 BRBS at 169(CRT) (administrative law judge has no jurisdiction over dispute regarding the employer's claim for attorney's fees against its insurers); *Sea "B" Mining*, 45 F.3d at 854-855. Accordingly, we hold that employer's contract-based defense cannot be adjudicated by the administrative law judge.[10] *Temporary Employment Services*, 261 F.3d at 465, 35 BRBS at 99(CRT).

Therefore, we grant review of the administrative law judge's interlocutory orders and affirm them to the extent the administrative law judge found she has the authority to address employer's liability for medical treatment under the Act. 33 U.S.C. §907(d)(3), (g); 20 C.F.R. §§702.407(b), 702.413-702.417. The administrative law judge does not have the authority in this case to address the rights of any party pursuant to the private contracts. On remand, the administrative law judge must limit any proceedings to the issues concerning the amount of employer's liability to Wardell as permitted by the Act and its implementing regulations.

Accordingly, the administrative law judge's Order Denying Motion to Dismiss and Order Denying Motion for Reconsideration are affirmed in part and vacated in part. The case is remanded for further proceedings consistent with this decision.

SO ORDERED.

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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[10] As the administrative law judge may not address the contractual issue pursuant to Section 19(a), the Board need not reach the constitutional issue raised.

JONATHAN ROLFE
Administrative Appeals Judge