

U.S. Department of Labor

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



BRB No. 22-0296

MICHAEL D. CADRECHA)

Claimant-Petitioner)

v.)

BEN M. RADCLIFF CONSTRUCTION,)
INCORPORATED)

and)

AMERICAN INTERSTATE INSURANCE)
COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: 11/23/2022

DECISION and ORDER

Appeal of the March 22, 2022 and April 1, 2022 Orders Denying Withdrawal of Claim of David Duhon, District Director, United States Department of Labor.

Franklin G. Shaw and Walter J. Leger, Jr. (Leger & Shaw), Covington, Louisiana, for Claimant.

Henry H. LeBas, Todd A. Delcambre, and Barry J. Rozas (Lebas Law Offices), Lafayette, Louisiana, for Employer/Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Director David A. Duhon's March 22, 2022 and April 1, 2022 Orders Denying Withdrawal of Claim (OWCP No. 07-431150) 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 Longshore Act or LHWCA). We must affirm the district director's conclusions unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.¹ *See Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

Claimant was employed as an iron worker by Favre's Steel Erections, LLC (Favre), an uninsured subcontractor of Ben M. Radcliffe Construction, Incorporated (BMRC). He sustained significant injuries as a result of a sixty-foot fall on February 13, 2020,² which occurred as he worked on the Bay II Rolling Cover Project at a shipyard owned and operated by Huntington Ingalls, Incorporated (HII), in Pascagoula, Mississippi. Favre's state insurance carrier immediately began paying Claimant benefits under the Mississippi state workers' compensation system. On September 29, 2020, Claimant, invoking Section 5(a) of the Act, 33 U.S.C. §905(a), filed a civil suit in Mississippi state court against Favre, BMRC, and HII, as well as two other subcontractors, Steel Service Corporation and Ranger

¹ As an initial matter, we grant Claimant's July 22, 2022 motion to submit the "entire complete record" and his August 2, 2022 and September 30, 2022 motions to submit supplemental memoranda in support of his petition for review and accept these documents into the record. 20 C.F.R. §802.219. Additionally, we deny Claimant's September 27, 2022 and October 6, 2022 motions and grant Employer's October 6, 2022 and October 11, 2022 motions relating to the inclusion or exclusion of the "sealed and confidential" corporate deposition of Huntington Ingalls, Incorporated. We do not admit this document into the record as it is not necessary for resolution of the current appeal before the Board. *Id.*

² Claimant fell sixty feet through a hole in a catwalk grating causing fractures to his skull, ribs, shoulder, leg, and ankle, as well as various soft tissue and internal organ injuries.

Cranes.³ Exh. A. On February 11, 2021, “out of an abundance of caution,” *see* n.3 *supra*, Claimant also filed a claim for benefits under the Longshore Act against BMRC.⁴ Cl. Br. at 3.

On March 16, 2022, pursuant to 20 C.F.R. §702.225, Claimant filed a motion with the district director to withdraw his Longshore Act claim to pursue his pending state-law tort action. In an order dated March 22, 2022, the district director denied Claimant’s withdrawal request on the grounds that Claimant conceded the Longshore Act covered his claim. He also stated that “[i]f the direct employer does not have LHWCA coverage, responsibility for benefits falls on the general contractor” whom he identified as HII, “an authorized self-insured Employer” under the Longshore Act. District Director’s March 22, 2022 Order (DD Order I) at 1.

Claimant moved for reconsideration, alleging Favre, not BMRC, is the employer, and that BMRC, not HII, is the general contractor. He further alleged BMRC has Longshore Act insurance coverage through American Interstate Insurance Company (American). *See* n.4 *supra*. In response, BMRC disputed jurisdiction but did not dispute that it has Longshore Act insurance coverage through American.

On April 1, 2022, the district director issued a second order again denying Claimant’s withdrawal request. District Director’s April 1, 2022 Order (DD Order II). He stated “[t]he parties agree that this claim should be covered under the LHWCA” and determined withdrawal of the claim is not proper because “[i]f the payroll employer did not have LHWCA coverage, the contractor who hired the payroll employer is liable for benefits,” so “[b]oth claimant and employer retain the right to litigate” the issue of insurance coverage under the Longshore Act. *Id.*

³ After Claimant filed his civil suit, Favre filed a motion to suspend Claimant’s state workers’ compensation benefits with the Mississippi Workers’ Compensation Commission (MS Commission). Exh. F. The MS Commission, based on Claimant’s representation that he does not yet know for certain whether any defendant in his civil suit secured Longshore Act insurance coverage, stated it “is not prepared to authorize a suspension of benefits under the state Act until such time as a jurisdictional determination is made.” *Id.* It also stated its ruling “is contingent on Claimant having filed a claim with the Department of Labor so those issues can be litigated.” *Id.*

⁴ Under Section 4(a) of the Act, 33 U.S.C. §904(a), Claimant maintained that his direct employer, Favre, had not procured LHWCA insurance coverage or otherwise secured the payment of benefits, but that its contractor, BMRC, had secured the appropriate coverage through American Interstate Insurance Company (American).

On appeal, Claimant challenges the district director's denial of his motion to withdraw his claim.⁵ BMRC responds, urging affirmance of the district director's orders. The Director, Office of Workers' Compensation Programs (the Director), responds, requesting the Board vacate the district director's orders and remand the case for further consideration because the district director did not apply the proper standard for determining whether Claimant's motion to withdraw should be granted.

Withdrawals of claims are not explicitly provided for by statute but are authorized by regulation, 20 C.F.R. §702.225, which allows a living claimant to withdraw his claim prior to its adjudication, if he files a written request stating the reasons for the withdrawal with the district director with whom the claim was filed on or before the date the Office of Workers' Compensation Programs (OWCP) makes a determination on the claim. The district director may approve the request if he determines it is "for a proper purpose and in the claimant's best interest." 20 C.F.R. §702.225(a)(3);⁶ *see generally Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998); *Downs v. Ingalls Shipbuilding, Inc.*, 30 BRBS

⁵ If the district director or administrative law judge disapproves a request for withdrawal, the parties have the option of proceeding with the claim or immediately appealing the disapproval. *Graham v. Director, OWCP*, 9 BRBS 155 (1978). As Claimant has opted to appeal, the Board has the discretion to decide the appeal if it is necessary to direct the course of the adjudicatory process. 33 U.S.C. §923(a) (Board is not bound by formal rules of procedure); *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). On that basis, we accept this interlocutory appeal.

⁶ 20 C.F.R. §702.225(a) states:

- (a) *Before adjudication of claim.* A claimant (or an individual who is authorized to execute a claim on his behalf) may withdraw his previously filed claim: *Provided, That:*
- (1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal;
 - (2) The claimant is alive at the time his request for withdrawal is filed;
 - (3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and
 - (4) The request for withdrawal is filed on or before the date the OWCP makes a determination on the claim.

99 (1996). Section 702.225(c) provides that where the district director approves a request for withdrawal, the withdrawal shall be without prejudice to the filing of another claim, subject to the time limitations of Section 13 of the Act and the regulations.⁷

In terms of whether a withdrawal is for a proper purpose, Section 5(a) of the Act, 33 U.S.C. §905(a), permits a claimant to pursue a state-law tort action against his employer, notwithstanding the general rule that compensation is the exclusive remedy available, when “an employer fails to secure payment of compensation as required” by the Act.⁸ Generally, prior to adjudication, if the claimant determines he would rather file a claim under the state law than under the Longshore Act, he is within his rights to do so. In this regard, the Board has stated that as a general proposition, “claimants have the right to choose the forum in which they first litigate their cases in order to avoid application of doctrines such as election of remedies and/or issue preclusion.” *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21, 26 (2007); *see also Stevens v. Matson Terminals, Inc.*, 32 BRBS 197, 199 (1998); *Langley v. Kellers’ Peoria Harbor Fleeting*, 27 BRBS 140, 145 (1993). The Board has therefore held a claimant’s decision to withdraw his Longshore Act claim to pursue a claim under state law is a proper purpose for withdrawing a claim. *Irby*, 41 BRBS at 27; *Stevens*, 32 BRBS at 199.

⁷ 20 C.F.R. §702.225(c) states:

Effect of withdrawal of claim. Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

⁸ In relevant part, Section 5(a) states:

if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. §905(a).

The district director's March 22, 2022 and April 1, 2022 orders reveal he neither expressly considered nor articulated the appropriate factors for deciding whether Claimant's withdrawal is for a proper purpose and is in his best interests as Section 702.225(a)(3) requires.⁹ Due to the absence of a proper consideration of the regulatory factors, we vacate his orders denying Claimant's motion to withdraw his claim. *See generally Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999). Claimant's motion to withdraw his claim under the Longshore Act in order to first seek a civil remedy under state law constitutes a "proper purpose" in accordance with Section 702.225(a) as a matter of law. *Irby*, 41 BRBS at 27; *Stevens*, 32 BRBS at 199. We remand this case for the district director to render adequate findings with respect to the second regulatory factor: whether it is in Claimant's best interests to grant the motion to withdraw his claim. In making this determination, the district director should consider factors such as Claimant's likelihood of success in his state suit, the amount of his potential recovery, and his ability to re-file his claim under the Act in the event he loses in state court on the merits.¹⁰ *Irby*, 41 BRBS at 27.

⁹ Prior to denying Claimant's motion to withdraw his claim, the district director did not reference the relevant regulation at Section 702.225(a) or its articulated standard at subsection (a)(3), nor explain why the conditions of subsection (a)(3) were not satisfied.

¹⁰ Pursuant to 20 C.F.R. §702.225(c), withdrawal is without prejudice to a claimant filing another claim under the Act. Specifically, if the state court determines Claimant's rights are restricted to those under the Act, he would be able to pursue a claim for benefits under the Act because Section 13(d), 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); *Ingalls Shipbuilding Div., Litton 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). The one-year limitation period begins to run from the date of termination of the suit. *See* 20 C.F.R. §702.222(b); *Vodanovich*, 27 BRBS 286 (1994).

Accordingly, we vacate the district director's orders denying Claimant's motion to withdraw, hold Claimant presented a proper purpose for withdrawing his claim, and remand the case to the district director for consideration of whether withdrawal of his claim is in his best interests in accordance with Section 702.225(a)(3).¹¹

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

¹¹ The district director should also consider whether the proper entities have been joined as parties, as it appears there is a question regarding Claimant's employment status with the various potentially liable employers (*i.e.*, was he a borrowed employee?) and whether those entities secured the payment of Longshore Act compensation with insurance or self-insurance.