U.S. Department of Labor

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

BRB No. 16-0072

JOSEPH CIACCIA Claimant-Petitioner v. SEA-LAND SERVICES, INCORPORATED c/o BROADSPIRE and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier- Respondents UNIVERSAL MARITIME SERVICE CORPORATION and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier- Respondents	)	DATE ISSUED: Aug. 29, 2016 DECISION and ORDER

Appeal of the Order Granting Motion for Employer Sea-Land's Motion for Summary Decision of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Andrew R. Topazio (Marciano & Topazio), Union, New Jersey, for claimant.

Robert R. Johnston and Lauren A. Guichard (Fowler Rodriquez), New Orleans, Louisiana, for Sea-Land Services, Incorporated and Signal Mutual Indemnity Association, Limited.

Christopher J. Field (Field & Kawczynski, LLC), South Amboy, New Jersey, for Universal Maritime Service Corporation and Signal Mutual Indemnity Association, Limited.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Motion for Employer Sea-Land's Motion for Summary Decision (2015-LHC-01027, 01028) of Administrative Law Judge Lystra A. Harris 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who retired from longshore employment in 2006, filed a claim on February 2, 2008, against Universal Maritime Service Corporation (UMS). Claimant alleged he suffers from an occupational disease, specifically a pulmonary condition, asthma, and an asbestos-induced disease, caused by his work-related exposures to dirt, dust, fumes, chemicals, and other deleterious substances. On December 28, 2012, claimant amended his claim by identifying six additional potentially liable employers, including Sea-Land Services, Incorporated (Sea-Land). When claimant's claim was referred to the Office of Administrative Law Judges, only UMS and Sea-Land remained as potentially liable employers.

After claimant was deposed, Sea-Land filed a motion for summary decision with the administrative law judge. In its motion, Sea-Land sought to be dismissed from the claim on the grounds that claimant testified via deposition that he had no exposure to asbestos while working for Sea-Land and that he had continued exposure to other harmful irritants in subsequent maritime employment after he left Sea-Land's employ. Claimant opposed Sea-Land's motion.

The administrative law judge granted Sea-Land's motion for summary decision and dismissed it from the claim. The administrative law judge determined there are no genuine issues of material fact because claimant testified that: 1) he was last exposed to asbestos in 1971/1972, 10 years before he commenced working for Sea-Land; and 2) he was exposed to injurious stimuli while employed by UMS from 2000 to 2006, subsequent to his employment with Sea-Land from 1981 to 1999. *See* Order at 4 – 5. The administrative law judge observed that these facts were not contradicted by either

claimant or UMS. Thus, the administrative law judge concluded that as there is no genuine issue of material fact with respect to claimant's exposure to injurious stimuli subsequent to his employment with Sea-Land, Sea-Land is entitled to summary decision in its favor.

Claimant appeals the administrative law judge's grant of summary decision to Sea-Land. Sea-Land responds, urging affirmance of the administrative law judge's Order. UMS responds that it takes no position with respect to the administrative law judge's dismissal of Sea-Land from the claim, but noting that the merits of claimant's underlying claim and its liability therefor have yet to be adjudicated.

Initially, we note that claimant's appeal is of an interlocutory order, as the administrative law judge neither awarded nor denied benefits to claimant. *See* 33 U.S.C. §919(e); 20 C.F.R. §702.348; *see generally Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). The Board is not bound by formal rules of procedure, 33 U.S.C. §923(a), and thus may decide interlocutory appeals when it is in the interest of judicial efficiency to do so or necessary for the Board to direct the course of the adjudicatory process. *See, e.g., L.D. [Dale] v. Northrop Grumman Ship Systems*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). We will decide claimant's appeal in this case in order to properly direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014). For the reasons stated below, we vacate the administrative law judge's dismissal of Sea-Land and remand the case for an evidentiary hearing with the participation of all parties.

We agree with claimant that the administrative law judge erred in granting Sea-Land's motion for summary decision. In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §18.72 (2015). In addition, the trier-of-fact must draw all inferences in favor of the non-moving party. *O'Hara,* 294 F.3d at 61; *Morgan*, 40 BRBS 9 (2006). If a rational trier-of-fact might resolve the issue in favor of the non-moving party, summary decision must be denied. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The rule for determining the responsible employer in occupational disease cases was enunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The responsible employer is the last employer during whose

employment claimant was exposed to injurious stimuli, prior to claimant's awareness that he was suffering from an occupational disease. *Id.*, 225 F.2d at 145. This is a judicially-created rule of liability allocation. If claimant establishes he had injurious exposure at a covered employer, he does not also bear the burden of proving no other employer is liable. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see, e.g., New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *cf. Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010) (claimant must establish a prima facie case under Section 20(a) against each potential employer as necessary, working backwards from the most recent).[1]

In this case, the administrative law judge erred in granting summary decision to Sea-Land because the determination of the responsible employer rests on genuine issues of material fact and Sea-Land is not yet entitled to be dismissed from the proceedings as a matter of law. *See Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon*., 46 BRBS 57 (2012). There remain genuine issues of material fact with respect to the disease from which claimant suffers and the work exposures that could have caused, contributed to or aggravated the disease.[2] Until the nature of claimant's occupational disease is identified, it cannot be determined which of claimant's allegedly injurious exposures are relevant to ascertaining the responsible employer. *See generally Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F.App'x 249 (4th Cir 2007). The parties apparently have developed some medical evidence concerning claimant's medical condition, but because it is necessary for the

[1] The administrative law judge recognized that claimant's employment in this case was in New York and New Jersey, and that neither the Second nor the Third Circuit has adopted the responsible employer formulation of the Ninth Circuit in *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

[2] In this respect, claimant does bear the burden of establishing a prima facie case by showing that he sustained a harm and that he was exposed to conditions at work which could have caused, aggravated, or accelerated the harm. If claimant makes out his prima facie case, Section 20(a), 33 U.S.C. §920(a), of the Act applies to presume that his harm is related to his work exposures, and the burden shifts to the employers to rebut the presumption with "substantial evidence to the contrary." *See C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

administrative law judge to determine the weight to be accorded to this evidence and make a finding of fact, it was error to grant summary decision. *See Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 587; *Han v. Mobil Oil Corp.*,73 F.3d 872 (9th Cir. 1995).

Moreover, the effect of the administrative law judge's ruling is to make claimant prove that UMS is the responsible employer instead of putting the burden on UMS to prove it is not the responsible employer. *Susoeff*, 19 BRBS 149. UMS may avoid liability for claimant's benefits under the Act if it can establish that it did not expose claimant to injurious stimuli, *see Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), or that claimant's condition is not work-related. *See Ibos*, 317 F.3d 480, 36 BRBS 93(CRT). As UMS indicates in its response brief to the Board that it intends to contest its designation as the responsible employer, the administrative law judge may be required to weigh claimant's deposition testimony regarding his alleged work-related exposures to injurious stimuli against evidence presented by UMS regarding such workplace exposures. Thus, fact-finding is required on this issue as well, precluding a grant of summary decision. *See Morgan*, 40 BRBS 9. If UMS establishes it is not the responsible employer, Sea-Land could potentially be liable for benefits. *See generally Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). Under these circumstances, the parties' rights to due process warrant that Sea-Land remain joined to the case and that all parties submit their evidence at the same proceeding so that the case is adjudicated only one time. Consequently, we vacate the administrative law judge's grant of summary decision to Sea-Land. *See Morgan*, 40 BRBS 9. We remand the case for an evidentiary hearing on all issues raised by the parties. 33 U.S.C. §919(d); 20 C.F.R. §702.331 *et seq.*

Accordingly, the administrative law judge's Order Granting Motion for Employer Sea-Land's Motion for Summary Decision is vacated and the case is remanded further proceedings in accordance with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge