BRB No. 12-0625

MIGUEL CRUZ PIMENTAL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEKSTAR, INCORPORATED	)	
	)	DATE ISSUED: 07/29/2013
and	)	
	)	
ALASKA NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Summary Decision as to Toxic Contamination Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Shirley M. Monge (Law Offices of Shirley M. Monge), San Juan, Puerto Rico, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Summary Decision as to Toxic Contamination Claim (2012-LDA-00302) of Administrative Law Judge Daniel F. Solomon 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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, a wastewater treatment plant operator at Roosevelt Roads Naval Base, Ceiba, Puerto Rico, filed a claim on May 17, 2004, alleging the injury of "toxic contamination." Claimant alleged respiratory and skin exposure to aluminum, antimony, arsenic, cadmium, lead, nickel, thalium and tin. At the time he filed his claim, claimant was employed by Tekstar, Incorporated, which was then insured by Alaska National. On April 2, 2010, Zurich North America became Tekstar's insurer.[1] Sometime in late 2010 or early 2011, Power Cooling became claimant's employer at the Naval Base.

Alaska National propounded interrogatories to claimant. Pertinent to this appeal, claimant was asked, with respect to each alleged exposure: "Do you allege exposure to [element] after 4/2/10?" Claimant responded to each question: "My exposure to [element] has been uninterrupted, since I started working at the Base." The interrogatories were signed on September 13, 2010.

Alaska National filed with the administrative law judge a Motion for Summary Judgment. It sought to be dismissed from the claim on the ground that claimant's continued (alleged) exposure to toxic substances after it no longer insured Tekstar absolved it of liability as the responsible carrier. Alaska National also contended that as claimant was not claiming disability due to his exposure, claimant's "date of awareness" for purposes of ascertaining the responsible carrier has yet to occur such that it could not be held liable.

Claimant opposed the motion for summary judgment. Claimant contended that it is Alaska National's burden to establish either that the injurious exposures did not cause claimant's occupational disease or that claimant was exposed to injurious stimuli for a subsequent covered employer or carrier. Claimant averred that his exposure to contaminants while working for Power Cooling has been in lower quantities than his previous exposures had been. Claimant stated his exposures have resulted in chronic obstructive pulmonary disease (COPD) and he claimed entitled to a nominal award of disability benefits. In response, Alaska National contended that claimant never filed an amended claim for COPD and that summary decision was proper because claimant admitted continued exposure after Alaska National was off the risk.

The administrative law judge found that as claimant did not allege on his pre-hearing form filed on February 15, 2012, that he has work-related COPD, a claim for that condition is not properly before him. With respect to the responsible carrier, the administrative law judge found that claimant failed to put forth specific facts to counter Alaska National's contention that he was not yet disabled and continued to be exposed to injurious stimuli after Alaska National went off the risk. The administrative law judge

[1]Claimant has worked at the waste water treatment plant since 1992. In claimant's Opposition to Request for Summary Decision, it is stated that claimant settled a claim for toxic exposure with a prior employer, J. A. Jones.

concluded that "this Employer cannot be charged with the obligation to pay benefits" and that Tekstar is entitled to summary decision in its favor.

Claimant appeals the administrative law judge's grant of summary decision. He contends the administrative law judge failed to allocate to employer/carrier the burden of establishing that it is not the responsible employer/carrier. He contends the administrative law judge did not view the evidence in the light most favorable to him, as the non-moving party, or draw inferences in his favor, as required. Alaska National responds that the administrative law judge properly found there are no genuine issues of material fact with respect to claimant's continued exposure after it went off the risk and that therefore it was entitled to summary decision. Alaska National contends, however, that the administrative law judge's decision should be modified to reflect that only it, and not Tekstar, was dismissed from the claim.

Initially, we observe 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 address 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 this appeal in order to avoid piecemeal litigation and to ensure protection of the due process rights of subsequent carriers and employers. *See* discussion, *infra.*

Next, we agree with Alaska National that the administrative law judge erred in dismissing Tekstar from the claim. Alaska National's motion for summary decision sought only its own dismissal from the action on the ground that a subsequent carrier insured Tekstar during claimant's continued period of alleged injurious exposure. Thus, we vacate the dismissal of Tekstar and hold that claimant's claim against Tekstar remains pending.

Moreover, we agree with claimant that the administrative law judge erred in granting Alaska National'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. §§18.40(c), 18.41(a). 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).[2] 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. The responsible carrier is the one that insured employer on claimant's date of awareness. *Id.* at 145; *see also General Dynamics Corp., Electric Boat Division v. Benefits Review Board*, 565 F.2d 208,7 BRBS 831 (2d Cir. 1977). Courts have held that the word "suffering" in the *Cardillo* formulation means "disability;" that is, the responsible employer or carrier is the one who last exposed the claimant to injurious stimuli prior to the claimant's awareness that he is disabled by a work-related disease. *See Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988*); Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

We hold that the administrative law judge erred in granting summary decision to Alaska National as he applied an incorrect standard in assessing whether a genuine issue of material fact existed. Contrary to the administrative law judge's finding, it was not claimant's burden to establish the existence of a genuine issue of material fact concerning injurious exposure after Alaska National's coverage ended.[3] The responsible employer/carrier rule is one of liability allocation, not compensability. *See, e.g., Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999). Thus, in order to be absolved of liability, it is the burden of the named employer/carrier to establish that claimant's condition is not related to his exposures or that claimant was exposed to injurious stimuli by a subsequent covered employer or carrier. *See id.; Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Alaska National alleged, based on claimant's interrogatory answers, that claimant was exposed to injurious stimuli in employment subsequent to its period of coverage. However, Tekstar's subsequent carrier, Zurich North America, and claimant's subsequent employer, Power Cooling, apparently have not been made parties to this

[2]This Defense Base Act case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit. *See McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011); *see also Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464 (1st Cir. 2000).

[3]The parties each submitted evidence on the issue of claimant's exposure in fact to toxic substances. Thus, a summary decision cannot be granted on the basis of this issue. *See Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

case.[4] These are the parties who must respond to Alaska National's motion for summary decision on the issue of subsequent injurious exposure. *See Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). To hold otherwise would result in piecemeal litigation; the administrative law judge's ruling has the deleterious effect of making claimant proceed individually against his employer and each of its carriers.

Moreover, to the extent the administrative law judge granted summary decision because claimant did not establish the existence of facts with respect to the "disability" component of his "awareness," we note that claimant's physician states he needs medical treatment for his toxic exposure. *See* EX 1 to Cl. Opp. to Summary Decision. Assuming claimant's claim is found to be compensable on the merits and medical treatment is necessary for a work-related injury, a responsible employer/carrier must be determined with respect to liability for that medical treatment irrespective of the existence of economic disability.[5] *See generally Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010). If claimant subsequently becomes disabled and has had exposure to injurious stimuli with a subsequent carrier or employer, the responsible employer/carrier finding can be modified pursuant to Section 22, 33 U.S.C. §922. *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

In addition, we hold that the administrative law judge erred in finding he does not have jurisdiction over a claim for COPD. Claimant's 2004 claim merely alleged the injury of "toxic contamination." In response to Alaska National's 2012 motion for summary decision, claimant submitted a medical report dated April 6, 2009, in which Dr. Alcala Munoz diagnosed claimant with COPD.[6] Alaska National was well aware of the

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[4]*See Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006) concerning the joinder of subsequent employers by either prior employers or the claimant. *See also Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981); *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986).

[5]The administrative law judge did not address claimant's contention that he is entitled to a nominal award. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Alaska National's suggestion that nominal awards cannot be entered in occupational disease cases is not correct. *See LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989). However, if the claimant is not presently economically disabled by his occupational disease, the time for filing a claim has not commenced. 33 U.S.C. §913(b)(2); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); 20 C.F.R. §702.222(c).

[6]This report is in Spanish.

claim for this condition, as it sent claimant to New York to be examined for, inter alia, COPD. Following this examination on December 3, 2010, Dr. Karetzky opined that claimant does not have objective evidence of any pulmonary disease. Thus, it is clear that, by the time the case was referred to the administrative law judge in 2012, the parties viewed the toxic contamination claim as including COPD. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

In sum, we hold that claimant's claim against Tekstar remains pending. We vacate the administrative law judge's grant of summary decision to Alaska National. We remand the case for further proceedings with all necessary parties; the administrative law judge must grant any motions to join necessary additional parties. The administrative law judge must hold a hearing and receive evidence if genuine issues of material fact are raised by the parties. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

Accordingly, the administrative law judge's Order Granting Summary Decision as to Toxic Contamination Claim is vacated and the case is remanded for further proceedings in accordance with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge