U.S. Department of Labor

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

BRB No. 16-0682

SHARON REAGAN (Widow of WILLIAM REAGAN) Claimant-Petitioner v. THAMES SHIPYARD AND REPAIR and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: May 11, 2017 DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Aida Carini and Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

John E. Kawczynski (Field & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Decision (2016-LHC-01433) of Administrative Law Judge Colleen A. Geraghty 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).

Decedent was exposed to asbestos over the course of his work as a ship-fitter. Decedent's last maritime employment was with Electric Boat Corporation (EBC) in 2001.[1] Emp. Motion for Summary Decision Exhibit 3, Decedent's Dep. at 56. Decedent, during his years with EBC, stated he also worked part-time, off and on, with Thames Shipyard and Repair (employer) starting sometime "around 1975," though he could not say for how long. *Id.* at 56-58. Employer, however, could not verify through its own records or decedent's Social Security Administration statements that it ever employed decedent in any capacity. Emp. Motion for Summary Decision Exhibits 2, 4. On June 23, 2013, decedent was diagnosed with lung cancer, which was attributed to his occupational exposure to asbestos. Decedent died on October 17, 2014, due to his lung cancer.

On November 5, 2014, claimant, decedent's surviving spouse, filed a claim for disability and death benefits under the Act, alleging that decedent's lung cancer was due to asbestos exposure with all his covered employers, including EBC and employer. *See* n. 1, *supra*. On July 14, 2015, the district director issued a compensation order based on the stipulations of claimant and EBC. 20 C.F.R. §702.315. The parties agreed that decedent developed lung cancer, from which he died on October 17, 2014, as a result of his occupational exposure to asbestos with EBC. The district director ordered EBC to pay disability, medical, funeral and death benefits. 33 U.S.C. §§907, 908(c)(23), 909. The district director's compensation order was not appealed.

As a result of the district director's order, employer requested that claimant voluntarily withdraw her claim against it. Claimant, however, refused and the case was referred to the Office of Administrative Law Judges (OALJ) for adjudication. Employer filed a motion for summary decision, asserting the claim against it should be dismissed because decedent was never its employee and because claimant's claim had already been completely resolved through the compensation order entered against the last maritime employer, EBC. In response, claimant asserted that although EBC is the "responsible employer," employer should not be dismissed from the claim as it could be liable for claimant's benefits in the event of EBC's insolvency and a subsequent refusal by the Special Fund to assume liability pursuant to Section 18(b) of the Act, 33 U.S.C. §918(b).

The administrative law judge granted employer's motion for summary decision. The administrative law judge determined that the district director's July 14, 2015

[1]Decedent also worked for Ingalls Shipbuilding, Newport News Shipbuilding, Butler Service Group, and Stone and Webster Engineering Corporation. Emp. Motion for Summary Decision Exhibit 2.

stipulated compensation order, in which EBC, as the last covered employer to expose decedent to injurious stimuli, was held liable for the full amount of the award of benefits, precludes employer's liability for any benefits relating to claimant's claim. The administrative law judge thus found claimant could not seek, "now or in the future, to hold [employer] responsible for the claim." Order at 5. She therefore dismissed employer as a party to the claim.

On appeal, claimant challenges the administrative law judge's decision to grant employer's summary decision and dismiss it from the claim. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred by granting employer's motion for summary decision because the issue of whether employer may be liable for benefits in this case is not ripe for decision. Claimant contends that while EBC is fully liable to claimant under *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), EBC's continued existence and ability to satisfy the order is speculative and unpredictable, such that, in the event of EBC's insolvency, claimant would be entitled to benefits from employer under the Act. Claimant cites *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2002), for the proposition that if, for any reason, the initially liable employer cannot pay the compensation due, claimant may then seek satisfaction and accord from those secondarily liable. Moreover, claimant avers that the administrative law judge incorrectly interpreted the holding of *Cardillo* as precluding other entities, like employer, from all future liability for benefits.

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); 29 C.F.R. §18.72(a). 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. If a trier-of-fact might rationally 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).

As the administrative law judge correctly states, the district director's 2015 Compensation Order conclusively determined, and claimant does not dispute, that EBC, as the last covered employer to expose decedent to injurious stimuli, is liable for all benefits relating to claimant's claim. No party appealed the district director's 2015

Compensation Order. Thus, there is no genuine issue of material fact as to which employer is solely liable for claimant's benefits. Procedurally, the only means for changing that otherwise final compensation order would involve the filing of a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.[2] Claimant, however, did not file a petition for modification in this case, and thus, the district director's determination that EBC is liable for claimant's benefits is dispositive of the factual issue of who is the responsible employer.

Contrary to claimant's contentions, there is no basis in law for her supposition that she could recover compensation from employer if EBC became insolvent. As the administrative law judge correctly stated, pursuant to *Cardillo*, "the applicable rule [in this occupational disease case] is to assign all liability to the last responsible employer," such "that there can only be one responsible employer in occupational disease cases."[3] Order at 5 (emphasis in original). In *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991), the Board addressed a contention similar to that raised in this case. The decedent had worked for both Bath Iron Works and Peerless. The administrative law judge found that Peerless was the decedent's last employer to expose him to asbestos and thus was the responsible employer under the rule of *Cardillo*, notwithstanding that Peerless was in bankruptcy proceedings and apparently uninsured for coverage under the Act. Claimant, the decedent's widow, appealed, contending that Bath Iron Works was the liable employer, "presumably based on a concern that because Peerless is involved in bankruptcy proceedings, claimant will not receive the benefits awarded by the administrative law judge." *Id.*, 24 BRBS at 203. The Board affirmed, rejecting claimant's contentions that decedent was not exposed to asbestos at Peerless, was not

[2]Claimant's only avenue for modification in this case is showing proof of a mistake in a determination of fact with regard to the district director's resolution of the responsible employer issue. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting on other grounds). However, as claimant concedes in her brief, the decedent's "last maritime exposure to asbestos was in the course of his employment with [EBC]," such that EBC is, under the rule of *Cardillo*, liable for all the benefits awarded by the district director. Cl. Resp. Brief at 1.

[3]In reaching this conclusion, the administrative law judge properly found that *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2002), is inapplicable because it involves the aggravation rule in instances where there are multiple traumatic injuries with separate employers, as opposed to this case which involves an occupational disease. Accordingly, as *Lake* is distinguishable from this occupational disease case, we reject claimant's contention that *Lake* supports any future right to pursue contingent liability against employer in this case.

injured on a covered situs, and was not a maritime employee. The Board noted that in the case of an employer's insolvency the Special Fund may pay the claimant's benefits pursuant to Section 18(b), 33 U.S.C. §918(b). *Id.* at 204-206. Thus, in this case, the administrative law judge properly rejected claimant's contention that her claim against employer should remain open on a contingent basis.

The Act contains several provisions relating to an employer's obligation to secure and pay benefits, as well as to the situation where the entity responsible for the payment of benefits becomes insolvent. The Act mandates that an employer secure its obligations to pay compensation either by obtaining insurance or being designated as a self-insured employer upon "furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation." *See* 33 U.S.C. §932(a); *see also* 33 U.S.C. §§904(a), 914(i), 934, 935, 936(a). Section 36(a) provides that the carrier remains liable for benefits despite the insolvency of the liable employer.[4] 33 U.S.C. §936(a). Additionally, the Act provides that if a default judgment cannot be paid due to the insolvency of the employer "or for some other reason," the Secretary of Labor may exercise his discretion to pay the claimant's benefits from the Special Fund. 33 U.S.C. §§918(b), 944; *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001). Thus, the Act contains safeguards should EBC become insolvent.

The administrative law judge properly found there is no genuine issue of material fact regarding the responsible employer and that employer is entitled to a decision in its favor as a matter of law. Consequently, as there is no evidence from which the administrative law judge could conclude that employer, rather than EBC, is or could be liable for claimant's benefits, we affirm the administrative law judge's order granting employer's motion for summary decision and dismissing employer as a party to claimant's claim. *Buck*, 37 BRBS 53; 29 C.F.R. §18.72.

[4]If the carrier is insolvent, the employer remains primarily liable for benefits. *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989), *aff'g* 20 BRBS 151 (1987). In some instances, a state insurance guaranty fund may be liable for benefits in the event of the carrier's insolvency. *See, e.g., Louisiana Ins. Guar. Assoc. v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Decision is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge