BRB No. 03-0643

HUBERT HYMEL	)	
	)	
Claimant (Deceased)-Respondent	)	
	)	
v.	)	
	)	
McDERMOTT, INCORPORATED	)	DATE ISSUED: Nov. 25, 2003
	)	
Employer/Respondent	)	
	)	
H.W. BAILEY	)	
	)	
and	)	
	)	
J. DENNIS DAVID	)	
	)	
Putative Intervenors-Petitioners	)	DECISION and ORDER

Appeal of the Order Denying Third Party Petition of Intervention of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Andrew L. Plauché, Jr. and Wendy K. Lappenga (Plauché Maselli Landry & Parkerson L.L.P.), New Orleans, Louisiana, for intervenors.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

H.W. Bailey and J. Dennis David (hereinafter intervenors) timely move for reconsideration of the Board's Order dated July 25, 2003, dismissing their appeal. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). We grant the motion for reconsideration, 20 C.F.R. §802.409, reinstate the appeal, and address the appeal on the merits.

Claimant, Hubert Hymel, now deceased, filed a claim for compensation under the Act in May 1995. He also filed suit in state court, against employers and others, for negligence and intentional exposure to toxic substances in the work place. Intervenors were executive officers of employer during claimant's employment; they were named as

defendants in the state court suit. Claimant died in 1997, and his son continued both the compensation claim and the tort suit.

In July 2002, intervenors filed a petition to intervene in the hearing before the administrative law judge. They were advised that the case was pending before the district director, where employer requested a conference on the intervention issue. In November 2002, claimant's son filed a motion to withdraw the compensation claim, but also filed an LS-18 pre-hearing statement, as did employer and intervenors. The case was transferred to the administrative law judge, and intervenors filed a motion to intervene, seeking to have the administrative law judge adjudicate their rights under the Act, *i.e.*, their immunity from a suit in tort by an employee alleging he sustained a work-related injury. Intervenors sought to prevent claimant from withdrawing the claim for this reason.

The administrative law judge denied the motion to intervene, finding that the issue raised by intervenors was not "in respect of" a compensation claim pursuant to Section 19(a) of the Act, 33 U.S.C. §919(a). In a subsequent Decision and Order Granting Claimant's Motion for Summary Decision, the administrative law judge granted claimant's motion to dismiss claimant's claim with prejudice, pursuant to Section 33(g), 33 U.S.C. §933(g), as he settled a part of his state tort claim for less than his compensation entitlement without employer's prior written approval.[1]

Intervenors filed a timely appeal with the Board after the administrative law judge issued his final decision and order dismissing the claim. By Order dated July 25, 2003, the Board dismissed the appeal, on the ground that as claimant's claim was no longer pending, the intervenors were not adversely affected or aggrieved by the denial of their motion to intervene. Intervenors have filed a timely motion for reconsideration of the Board's order of dismissal.

We grant the motion for reconsideration, as intervenors are adversely affected or aggrieved by the administrative law judge's denial of their petition to intervene. Section 21(b)(3) of the Act states that the Board is authorized to hear and determine appeals that raise a "substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the Act. 33 U.S.C. §921(b)(3). The Board's regulation at 20 C.F.R. §802.201(a) limits standing to "any party or party-in-interest adversely affected or aggrieved by a decision or order issued . . . ." The Supreme Court has stated that one who is allegedly "adversely affect or aggrieved" must, upon appeal, show "that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 127, 29 BRBS 87, 89(CRT) (1995), quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Intervenors contend that they are

[1] Claimant settled with 3M Corporation for $25,000, and the compensation entitlement was calculated at approximately $69,000.

entitled to an adjudication of their rights and immunities under Section 33 of the Act irrespective of the dismissal of claimant's claim. The administrative law judge denied them this adjudication and therefore, as this right is arguably within the zone of interests to be protected by the Act, *see* discussion, *infra*, intervenors are adversely affected or aggrieved by the administrative law judge's denial of their petition to intervene. *See generally Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59 (1996) (McGranery, J., dissenting on other grounds). Therefore, we vacate the Board's July 25, 2003, Order dismissing intervenors' appeal, and we reinstate intervenors' appeal on the Board's docket.

We turn now to the merits of intervenors' appeal. The administrative law judge denied the motion to intervene, finding that the issue raised by the intervenors was not "in respect of" a compensation claim pursuant to Section 19(a) of the Act. Intervenors sought to have the administrative law judge find that they are immune from a tort suit by virtue of Section 33(i) of the Act, 33 U.S.C. §933(i). The administrative law judge declined to address the issue, relying on *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), and *Equitable Equip. Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999). The administrative law judge stated that his authority extends only to deciding the issues surrounding claimant's entitlement to benefits and the party liable for such benefits. The administrative law judge stated that intervenors may seek the Act's immunity from the state court adjudicating the tort suit.

On appeal, intervenors contend that the administrative law judge erred in denying their petition to intervene and in refusing to hold that they are immune from suit in state court, by virtue of the fact that the Longshore Act pre-empts contrary state law. The Board 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).

The Longshore Act, where applicable, provides immunity to employer, its officers and claimant's co-workers against tort suits based on the work injury. Section 5(a) of the Act states: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, . . ."[2] 33 U.S.C. §905(a). In addition, Section 33(i) immunizes co-workers and company officers from tort suits:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong

[2] The employee may sue the vessel, as a third party, pursuant to Section 5(b), 33 U.S.C. §905(b), under certain circumstances.

> of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. §933(i). *See Perron v. Bell Maintenance & Fabricators*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993); *Traywick v. Juhola*, 922 F.2d 786 (11th Cir. 1991); *Bynum v. S.S. Mormacteal*, 188 F.Supp. 763 (E.D. Pa. 1960) (discussing the purpose Section 33(i)). The Fifth Circuit, in *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972), expressly upheld the constitutionality of Section 33(i), and accordingly upheld the dismissal of a third-party suit against the employer and its corporate officers.

The administrative law judge, however, stated that since intervenors are seeking immunity from a suit filed in the Louisiana state courts, there is no reason that intervenors' claim of immunity cannot be addressed by the state courts. *See generally Fillinger v. Foster*, 448 So.2d 321 (Ala. 1984); *Smalls v. Blackmon*, 239 S.E.2d 640 (S.C. 1977). Specifically, the administrative law judge found that the issue raised is not "in respect of" a compensation claim under the Act, pursuant to Section 19(a). We hold that the administrative law judge's decision is legally correct, and we affirm his denial of the petition to intervene.

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 [for compensation]." *See also* 33 U.S.C. §919(d). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which twice has addressed the issue of the administrative law judge's authority to adjudicate issues ancillary to a claimant's compensation claim. In *Equitable Equip. Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999), the court held that an administrative law judge does not have the authority to adjudicate a breach of contract claim between an insurance company and its insured, as this cause of action is "wholly unrelated to an underlying claim for compensation" and therefore is not within the scope of Section 19(a). Rather, for the administrative law judge to have the authority to address an issue, the issue must be "integral to deciding the compensation claim." *Id.*, 191 F.3d at 632-633, 33 BRBS at 169-170(CRT). In *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), the Fifth Circuit held that the administrative law judge does not have the authority to adjudicate liability between borrowing and lending employers based on indemnification contracts between these parties. The court stated that "a plain reading of the text [of Section 19(a)] indicates that the ALJ's authority extends *only* to questions that are in respect of the LHWCA claim of an injured or deceased worker" and to disputed issues "essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the relevant statutory law." *Id.*, 261 F.3d at 461-462, 35 BRBS at 96(CRT) (emphasis in original). Based on this case law, the administrative law judge properly determined that he is without jurisdiction to rule on intervenors' entitlement to tort immunity in a state

court suit, as this issue is not essential to resolving issues relating to claimant's claim for compensation under the Longshore Act.

The decisions in *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978), and *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), cited by intervenors in support of their appeal, are not to the contrary. In *Aetna Life*, the Third Circuit held that a general medical insurer could intervene in the claimant's compensation claim to recover amounts paid out for injuries or illnesses that are found to be work-related. The court held that the insurer's claim for reimbursement is "in respect of" a compensation claim under Section 19(a):

> Aetna's claim for reimbursement is derived from the same nucleus of operative facts as Harris' claim for compensation. A finding that a claimant's injuries are work-related is, in operative effect, a finding that payments should not have been made under a policy covering non-occupational injuries. Deciding reimbursement claims at the same time as compensation claims avoids essentially duplicative litigation thus reducing the expenditure of time and money by the parties and the courts. Facilitating reimbursement of improperly paid benefits also encourages insurance companies such as Aetna to make swift payment of legitimate claims. Thus on the basis of these policy considerations and the close factual relationship between reimbursement and compensation claims, we hold that claims for reimbursement are questions in respect of compensation claims and may therefore be decided in the same proceedings in which the compensation claims are decided.

578 F.2d at 54. It is clear that the instant case is factually distinguishable, as intervenors' claims of immunity are not tied or related to the disposition of any issues relating to claimant's compensation claim under the Act. Rather, even if claimant's claim were still pending, their claim, while based on a provision of the Act, is independent of any issue concerning claimant's entitlement to compensation and/or medical benefits and the party liable for such.

In *Hunt*, the Ninth Circuit held that medical providers were "persons seeking benefits" within the plain language of Section 28(a), 33 U.S.C. §929(a), as they were "part[ies] in interest" petitioning the Secretary for an award of "the reasonable value of [] medical or surgical treatment" provided to an injured longshore worker pursuant to Section 7(d)(3), 33 U.S.C. §907(d)(3). Thus, the providers were entitled to a reasonable attorney's fee under Section 28(a), payable by employer. *Hunt*, 999 F.2d at 423-424, 27 BRBS at 89-91(CRT). The intervention in *Hunt* is based on sections of the Act, namely Sections 7(d)(3) and 28(a), allowing "parties in interest" to the compensation claim to participate in the claim. *See also Equitable Equip. Co.*, 191 F.3d at 632-633, 33 BRBS at 169(CRT) (discussing Section 28(a) language permitting a "person seeking benefits" to petition for an attorney's fee). While the immunity claim of intervenors herein is based

on a statutory provision, namely Section 33(i), that section does not provide the right of intervention as do the provisions at issue in *Hunt.* Thus, the administrative law judge properly stated that the intervenors must press their case for immunity in the state court where claimant's suit is pending. The fact that state law may be inconsistent with the Longshore Act does not vest the administrative law judge with jurisdiction to rule on the claim of immunity under the facts presented here.[3]

Accordingly, intervenors' motion for reconsideration is granted, and their appeal is reinstated on the Board's docket. 20 C.F.R. §802.409. The administrative law judge's Order Denying Third Party Petition of Intervention is affirmed as it is in accordance with law.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

_____
PETER A. GABAUER, Jr.
Administrative Appeals Judge

[3] Prior to 1990, Louisiana law permitted a land-based claimant to elect to pursue a state remedy, including a suit in tort against the employer and its officers. In *Poche v. Avondale Shipyards, Inc.,* 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977), the Louisiana Supreme Court held that if a claimant elected to pursue a remedy in the state forum, the entirety of state law applied and not just that which is less restrictive than federal law. Louisiana no longer has concurrent jurisdiction, La.R.S. 23:1035.2, and a state claimant now can sue his employer and/or its officers only for intentional torts. *See generally Abadie v. Metropolitan Life Ins. Co.*, 784 So.2d 46 (La. Ct. App. 2001).