BRB No. 05-0123

GARY L. KIRKPATRICK	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
B.B.I., INCORPORATED	)	
	)	
Employer	)	
	)	
and	)	
	)	
HOUSTON GENERAL INSURANCE COMPANY	)	DATE ISSUED: 10/12/2005
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Christopher Lowrance (Royston, Rayzor, Vickery & Williams, L.L.P.), Corpus Christi, Texas, for employer and Houston General Insurance Company.

Michael J. Kincade, Metairie, Louisiana, for employer and Insurance Company of North America.

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

PER CURIAM:

Insurance Company of North America, now known as Ace, USA (collectively referred to as INA) appeals the Decision and Order on Remand (2002-LHC-1656) of Administrative Law Judge Larry W. Price 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), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (OCSLA). 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).

This is the second time this case has been before the Board. Claimant was injured in 1989 while working in an office on an offshore oil platform that was still under construction. When he reached for the phone, he injured his back. Claimant underwent five surgeries, and he suffered a post-injury stroke; he is totally disabled. While the facts of this case are not in dispute, the issues were complex and highly disputed. Specifically, the Board affirmed the administrative law judge's initial decision and held that claimant satisfied the OCSLA status and situs requirements and is covered under the OCSLA, that Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, are inapplicable to Houston General's claim for reimbursement from INA and were satisfied by claimant when he originally filed his claim for benefits, that claimant is entitled to benefits under the Act, that none of INA's equitable defenses applies to this case, that the plain language of the insurance policies establishes that INA's policy covered work off the coast of Louisiana where claimant was injured and, thus, that INA is liable for claimant's benefits. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004). However, the Board vacated the administrative law judge's award of permanent disability benefits and the finding that he lacked jurisdiction to address the reimbursement issue between the two carriers,[1] and it remanded the case for further consideration of the nature of claimant's total disability and Houston General's right to reimbursement.

On remand, the administrative law judge summarized the Board's holding and found that Houston General is entitled to reimbursement from INA of all payments it made to claimant, a stipulated amount totaling $656,374.39. Additionally, the administrative law judge found that claimant is entitled to temporary total disability benefits from November 28, 1989, through May 2, 2001. Because the injury occurred in 1989 and claimant has been unable to return to work since then, and since claimant is in a wheelchair and can no longer communicate with anyone other than his wife, the

[1]Houston General Insurance Company, and its successor in interest following insolvency, Texas International Solutions, LLC (collectively referred to as Houston General), voluntarily paid claimant disability and medical benefits from 1989 until May 2, 2001, when it disputed its liability for benefits.

administrative law judge found that his condition will not improve and has reached maximum medical improvement. Therefore, he found claimant entitled to permanent total disability benefits as of May 3, 2001, and continuing. Decision and Order on Remand at 1-2.

On October 14, 2004, subsequent to the issuance of the administrative law judge's decision on remand, the district director approved a settlement between claimant and INA for future benefits due. The settlement provided for INA to pay claimant a lump sum of $284,000, $10,000 of which is for his attorney's fee and the remainder for permanent total disability and medical benefits commencing May 3, 2001. INA waived its rights to appeal the administrative law judge's and Board's decisions regarding the "responsible carrier" issue as they affect claimant; however, INA made no admission to being the responsible carrier and reserved its appellate rights regarding that issue as it pertains to Houston General's reimbursement claim. Settlement Agreement and Comp. Order (Oct. 14, 2004). The same day the settlement was approved, INA appealed the administrative law judge's Decision and Order on Remand.

On appeal, INA argues that its settlement with claimant constitutes a "change in underlying circumstances" affecting this case in two ways. First, INA argues that the settlement makes the law of the case doctrine inapplicable such that it would be necessary to revisit the responsible carrier issues related to the reimbursement claim.[2] Secondly, INA contends that the settlement divested the Board and the administrative law judge of the authority to resolve the reimbursement dispute between the two carriers pursuant to *Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), *rev'g* 33 BRBS 81 (1999), rendering the Board's holding that INA must reimburse Houston General, and its rejection of the equitable defenses, moot.[3] INA also argues that *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *aff'g* 37 BRBS 120 (2003), *cert. denied*, 125 S.Ct. 1696 (2005), constitutes intervening law addressing the issue of coverage under the OCSLA. Houston General responds, urging the Board to reject INA's arguments. Claimant has not responded.

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[2]Those issues include coverage under the OCSLA, the doctrines of equitable estoppel, laches, and "jurisdictional" estoppel, and whether claimant's work was "temporary" and therefore covered under Houston General's policy.

[3]INA seeks to have the reimbursement resolved under "federal common law," general maritime law, or Louisiana statutory law rather than under the Act, believing this result will enable it to assert negligence, untimeliness, or an equitable defense against Houston General's claim. In its prior decision, the Board rejected INA's attempt to raise equitable defenses under the Act. *Kirkpatrick*, 38 BRBS at 32-33.

Initially, we reject INA's assertion that the 2004 settlement agreement constitutes a change of the underlying circumstances of this case and prohibits the use of the law of the case doctrine.[4] Contrary to INA's allegation, the settlement cannot constitute an "underlying" circumstance because it was agreed upon *after* the decisions in this case were issued. Generally, to show a change in underlying circumstances, a party must demonstrate that new evidence related to the facts of the case has come to light. *See Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989); *Jeanine B. by Blondis v. Thompson*, 967 F.Supp. 1104 (E.D. Wis. 1997). In this case, the settlement, occurring after the fact, does not change the circumstances related to claimant's injury or the coverage of the insurance policies. Moreover, although INA settled with claimant and resolved his interest in this case, it did not admit to being the responsible carrier and it retained its right to dispute that issue as between the carriers for benefits owed prior to May 3, 2001. Thus, as to the dispute regarding the responsible carrier under the Act, the settlement changed nothing. As there has been no change in the underlying circumstances of this case, this exception to the application of the law of the case doctrine does not apply. *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J., dissenting).

Similarly, we decline to revisit the issue of whether claimant is covered under the OCSLA. Contrary to INA's contention, the decision of the United States Court of Appeals for the Fifth Circuit in *Tarver*, 384 F.3d 180, 38 BRBS 71(CRT), does not constitute intervening law, prohibiting application of the law of the case doctrine for the coverage issue.[5] *Tarver* arose under the Longshore Act and addressed the issue of whether a vacant area, adjoining navigable waters, under construction to be a maritime facility is a covered situs pursuant to Section 3(a), 33 U.S.C. §903(a). The Fifth Circuit affirmed the Board's decision that the site's future maritime use did not bring the land-based construction site under the Act's coverage. *Tarver*, 384 F.3d at 181-182, 38 BRBS at 72(CRT). The Section 3(a) situs requirement is not applicable in this OCSLA case. Thus, since *Tarver*, as Houston General argues, does not address OCSLA coverage, it is

[4]The Board has held that it will adhere to its initial decision when a case is before it for a second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See, e.g., Weber v. S.C. Loveland Co.*, 35 BRBS 75, 77 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

[5]INA argues that the Fifth Circuit's decision in *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002), in conjunction with the Fifth Circuit's more recent decision in *Tarver*, renders the Board's OCSLA coverage holdings erroneous. INA Brief at 26.

not applicable and cannot serve as intervening law undermining the Board's OCSLA coverage holding. *Compare Weber v. S.C. Loveland Co.*, 35 BRBS 75, 78 (2001), *aff'd on recon.*, 35 BRBS 190 (2002) (no intervening law) *with Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986) (intervening law). The Board's conclusion in its initial decision that claimant is covered under the OCSLA and, therefore, the Longshore Act, remains the law of the case. *Kirkpatrick*, 38 BRBS at 29-31.

Because INA has not established a change in underlying circumstances or identified intervening law that would prohibit the application of the law of the case doctrine, we hold that the law of the case doctrine applies. With the exception of the responsible carrier issue addressed below, there is no need to revisit the issues fully discussed and resolved in the Board's prior case and in the administrative law judge's decision. With regard to these issues, nothing has changed since the Board last considered this case except that the administrative law judge found the disability to be permanent and ordered reimbursement to Houston General pursuant to the responsible carrier finding, both of which are in accordance with the Board's previous decision. By virtue of the application of the law of the case doctrine, we affirm the Board's prior decision. *Boone*, 37 BRBS 1; *Weber*, 35 BRBS at 77-79.

Next, INA contends that, because the settlement resolved claimant's claim, the administrative law judge and the Board have no jurisdiction to address the carrier-reimbursement issue. It argues that anything remaining after resolution of claimant's claim for benefits is not "in respect of" his claim and decisions made concerning those issues are moot or invalid. We reject INA's argument that the carrier-reimbursement issue is no longer "in respect of" claimant's claim. The Fifth Circuit, within whose jurisdiction this case arises, stated in *Ricks* that, pursuant to Section 19(a) of the Act,[6]

> the disputed issue must be essential to resolving the rights and liabilities of the claimant, the employer, *and the insurer* regarding the compensation claim under the relevant statutory law.

Ricks, 261 F.3d at 463, 35 BRBS at 97(CRT) (emphasis added). INA would have us narrow this definition further by excluding the determination of the liability of the insurer and holding that the situation in this case presents "a dispute that does *not* involve the claimant's entitlement to benefits or the question who, under the LHWCA, is responsible for paying those benefits." *Id.*, 261 F.3d at 463, 35 BRBS at 97-98(CRT) (emphasis in original). We cannot agree, as the issue here is precisely that of determining who is responsible for the payment of benefits under the Act.

[6]Section 19(a), (d) of the Act, 33 U.S.C. §919(a), (d), provides that the administrative law judge "shall have full power and authority to hear and determine all questions in respect of such claim [for compensation]."

Because the present case involves the determination of the responsible carrier under the Act, it is not analogous to *Ricks*, *Equitable Equip. Co. v. Director, OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999), or *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981) (S. Smith, C.J., dissenting), cases cited by INA in support of its contention. In *Ricks*, the administrative law judge determined that Trinity Marine was the borrowing employer and was liable for claimant's benefits. This decision was affirmed by the Board and uncontested before the circuit court. Thus, the issue before the court did not concern the initial determination of the liable employer. Rather, the appeal to the Fifth Circuit concerned the issue of the Board's additional holding that, due to a contractual indemnity agreement between Temporary Employment Services and Trinity Marine, Trinity Marine was relieved of its liability under the Act. *Ricks*, 261 F.3d at 460, 35 BRBS 95(CRT). The court stated:

> Once all the LHWCA issues in respect of the compensation claim have been adjudicated, an adjudication of who else may be liable on other grounds is, therefore, unnecessary to the objectivity of the LHWCA proceedings.

Id., 261 F.3d at 464, 35 BRBS 98(CRT) (parenthetical omitted). Thus, the Fifth Circuit determined that the *contractual* dispute between Temporary Employment Services and Trinity Marine was not integral to the compensation claim and should not have been addressed by the administrative law judge and the Board. *Id.*, 261 F.3d at 465, 35 BRBS at 99(CRT). Trinity Marine was the entity liable under the Act, and if Trinity Marine had a contract executed under state law that would relieve it of its liability, then that issue had to be resolved in the state forum. *Id.*, 261 F.3d at 464-465, 35 BRBS at 98-99(CRT).

Similarly, in *Jourdan*, the claimant, the widow of the employee, was awarded benefits under the Act in 1988, and she died in 1997. The Longshore Act claim died with her. From the outset, Wausau, one of Equitable's insurers, disputed its liability for benefits. Eventually, two other insurers were joined as parties. In 1994, Aetna was found to be the responsible carrier, and that finding was affirmed in 1996. Meanwhile, Equitable filed a claim for attorneys' fees against the three insurance companies, claiming a breach of the insurer's duty to defend. The Fifth Circuit affirmed the Board's decision that it lacked jurisdiction as the issue involved no aspect of a claim under the Act and the sole issue in the case was a state law breach of contract issue beyond the jurisdictional reach of Section 19(a). *Jourdan*, 191 F.3d at 632, 33 BRBS at 169(CRT). Relevant to the instant case, the court stated, "The ALJ was not called upon to address an employee's right to compensation, to determine the carrier responsible to the payments of benefits, or to resolve a coverage dispute related to the payment of compensation." *Id.* Unlike *Ricks* and *Jourdan*, the instant case does not involve a contractual dispute between INA and Houston General. Rather, it involves a continued dispute over which carrier is liable for claimant's benefits under the Act.

The resolution of claimant's interest in this case did not eliminate the relationship between his claim and the issue of which carrier is liable for the benefits due him prior to May 3, 2001. As the Board stated in its initial decision, the administrative law judge's failure to address the reimbursement issue effectively left Houston General liable for benefits until May 2, 2001, despite the finding that INA is the responsible carrier liable for benefits due to claimant. Because there cannot be two responsible carriers for one injury,[7] the Board remanded the case for the administrative law judge to address the issue of reimbursement. As the determination of the responsible employer and carrier is an integral aspect of claimant's claim for benefits, the post-decision settlement resolving the amount of claimant's post-May 2, 2001, benefits cannot divest the administrative law judge or the Board of the authority to address the identity of the carrier liable for pre-May 2001 benefits. The issue is "in respect of" a claim under the Act because it addresses "who, under the LHWCA, is responsible for paying" claimant's benefits. 33 U.S.C. §919(a); *Ricks*, 261 F.3d at 463, 35 BRBS at 97(CRT); *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62 (CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996). INA's settlement with claimant specifically reserved its right to continue litigating the issue of the responsible carrier for pre-May 2, 2001 benefits.

On these facts, INA's attempt to analogize this case to *Busby*, 13 BRBS 222, also is faulty. In *Busby*, claimant sustained three injuries with two employers and carriers. Claimant was paid benefits and then left the state, leaving no forwarding address. The litigation arose when the insurer who had paid benefits filed a "Claim for Reimbursement." Since claimant had been fully compensated and could not be located, the Board held that the reimbursement dispute was solely between two insurers and the claimant was not a party-in-interest, making the proceedings before the administrative law judge inappropriate.[8] *Busby*, 13 BRBS at 224-225. In contrast, in the present case claimant was an active party in this case with an interest in continuing to receive his disability and medical benefits after Houston General disputed its liability for benefits in 2001. INA challenged its liability as the responsible carrier as well as disputing claimant's entitlement to benefits on the merits. The reimbursement issue arose as a natural result of the responsible carrier ruling.

[7]*See generally Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979).

[8]The Board distinguished *Mulligan v. Haughton Elevator*, 12 BRBS 99 (1980), stating that judicial economy warranted entertaining the claim for reimbursement in *Mulligan* along with the claim for benefits, as it arose out of a claim filed and actively pursued by the claimant. *See Busby*, 13 BRBS at 225.

Consequently, as the Board explained previously, *Kirkpatrick*, 38 BRBS at 36, this case is akin to *Total Marine* and the cases involving reimbursement between borrowing and lending employers, either of which is potentially the "responsible employer" under the Act. In *Total Marine*, CPS, a temporary labor service that supplied workers to Total Marine, employed the claimant. The claimant was injured while working at Total Marine, and he filed a claim for benefits against CPS. CPS controverted the claim, asserting that Total Marine, as the borrowing employer, was the liable employer; nevertheless, CPS settled the claim with claimant and paid disability and medical benefits pursuant to the settlement. Because Total Marine stipulated it was the claimant's borrowing employer, the Fifth Circuit held that Total Marine is the claimant's employer under the Act and is liable for the claimant's benefits. *Total Marine*, 87 F.3d 774, 30 BRBS 62(CRT). "Because CPS has already paid those compensation benefits, it is entitled to reimbursement from Total Marine[,]" absent "a valid and enforceable indemnification agreement. . . ." *Total Marine*, 87 F.3d at 779, 30 BRBS at 66(CRT). Although the claimant was fully paid, the reimbursement issue between the borrowing and lending employers remained a viable issue under the Act.

In the case currently before the Board, there is no question that BBI is the responsible employer. However, BBI had two insurers with OCSLA endorsements effective at the time of claimant's injury. Those insurers did not have a contractual relationship with each other, and one of them is liable for claimant's longshore benefits under the legal precedent established for resolving such liability issues under the Act. Unlike *Ricks*, there is no contractual dispute to resolve. The question evolving here as a result of claimant's original claim for benefits, and continuing despite the settlement agreement resolving post-May 2, 2001, benefits, concerns which of BBI's two carriers is the responsible carrier under the Act for pre-May 3, 2001, benefits. Pursuant to *Ricks*, this issue is clearly "in respect of" claimant's compensation claim. *Ricks*, 261 F.3d at 463, 35 BRBS at 97(CRT); *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). Therefore, we reject INA's assertion that the settlement between claimant and INA divests the Board of jurisdiction to address the reimbursement issue,[9] or renders any of the previous decisions in this case moot or invalid. The Board and the administrative law judge retain the authority to issue a decision on the responsible carrier issue. The administrative law judge's decision on remand is in accordance with the Board's initial decision, which we have held constitutes the law of the case, and INA has established no error in that decision. Therefore, we affirm the administrative law judge's decision on remand.

[9]As the reimbursement issue in this case remains one that is properly raised under the Act, there is no need to consider other federal, maritime, or state law in addressing this issue.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge