



Issue Date: 02 May 2012

*In the Matter of:*  
**RICHARDO BAILEY,**  
*Claimant*

v.

Case No. 2011-LHC-01867  
OWCP No. 06-204487

**ELLER-ITO STEVEDORING COMPANY,**  
*Employer*

and

**SIGNAL MUTUAL INDEMNITY ASSN. LTD.,**  
*Carrier.*

Clifford R. Mermell, Esquire  
Representative for the deceased Claimant  
Lawrence B. Craig III, Esquire  
For Employer

**ORDER**  
***DENYING EMPLOYER'S MOTION TO STRIKE CLAIM***  
***AND REMANDING CASE***

A hearing was scheduled under the Longshore and Harbor Workers' Compensation Act in Miami on March 22, 2012. Claimant has passed away, and while the file was assigned to another administrative law judge, a letter was sent to counsel for Claimant by the District Director, with enclosed forms for death benefits. Subsequently, the claim was reassigned to me and a Pre-hearing Order was published on January 3, 2012. On March 14, 2012, Employer/Carrier filed a Motion to Strike and/or to continue the case, based on a failure of counsel to file documents or comply with requests to comply with my Pre-hearing Order. After Claimant did not submit prehearing compliance,<sup>1</sup> the hearing was cancelled and I requested briefs.

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<sup>1</sup> The Order references an exhibit list:

The exhibit list shall contain the exhibit number, a brief description of the exhibit, and the number of pages comprising of the exhibit. Each exhibit shall be marked with the letter designation CX for claimant and EX for respondents, followed by the number designation of the exhibit. Each page of multiple page exhibits not internally paginated shall be numbered.

PRE-HEARING EXCHANGE - The parties shall deliver to the opposing parties, on or before February 1, 2012, copies of all exhibits each intends to offer into evidence unless the exhibit is known to be in the possession of the opposing party or unless the exhibit is intended to be used solely for impeachment. DO NOT FILE EXHIBITS IN ADVANCE OF THE HEARING. Originals of papers, documents and other evidence previously submitted to the

I attempted to hold a telephone conference and sent the Claimant's representative an email, with copy to the Employer's attorney, containing a copy of the docket which showed that he did not file a witness or exhibit list, and I attached a copy of the rule involving substitution of parties.<sup>2</sup> I entered the email into the docket of this case.

I held a telephone conference on March 19. Claimant's representative stated that he was not pursuing death benefits but would seek attendant care benefits for putative attendant Terrance Smith, and an adjustment in the average weekly wage. *See* transcript, at 8.

On March 27, the deceased Claimant's counsel filed a Proposed Notice of Substitution of the Parties which noted that the Claimant passed away September 2, 2011, without any dependents, without assets, and requested that Mr. Smith be named *executor de son tort* "until such time that an estate is opened." Employer responded with an Employer/Carrier's Reply and Memorandum of Law in Opposition to Claimant's Counsel's

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District Director that a party now wants to be considered by the undersigned Administrative Law Judge must be obtained by the party and introduced at the hearing. *See* 20 C.F.R. § 702.319.

1. After the parties exchange documents that they will proffer, the parties are directed to stipulate as to authenticity and content all documents which they mutually agree should be made a part of the record. Each of the stipulated documents must be properly marked prior to hearing for identification, using Exhibit numbers, page and line numbers, where appropriate.

2. Exhibits should be date stamped and copies should be provided for all parties. I prefer that the exhibits be placed into a binder. Any exhibits that are difficult to manage (large items or non-documentary evidence such as machinery or equipment), should be photographed for the record.

3. Any exhibits that will be in dispute should be accompanied by a memorandum of law.

4. The parties will meet to consider stipulations to crucial elements of the case or to findings of fact.

5. A Memorandum of Law should accompany any motion presented.

<sup>2</sup> I indicated:

As you can see, the Docket sheet in the case does NOT show any Claimant response to my Notice of Hearing. In fact, based on the file as it presently exists, the Claimant is deceased and there has been no substitution of party.

#### Rule 25. Substitution of Parties

##### (a) Death.

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

I will be on the road and will not be able to receive documents until my hearings set for Monday at Barry University School of Law in Orlando. If the parties agree, I may be able to discuss this matter in person at the US Tax Court in Miami, on Wednesday.

Before the parties discuss this matter with me, they must confer.

“Motion for Re-hearing, Motion for Expedited Trial, and Motion to Limit Further Discovery from the Employer/Carrier” and in Further Opposition to Claimant’s Counsel’s “Proposed Notice of Substitution of Parties.”

#### MOTION TO STRIKE

As to the request that I strike the claim based on counsel’s failure to comply with my Order, that request is denied, as there is a dispute as to the facts. *See* 29 C.F.R. §§ 18.40(d), 18.41(a). Although I held a telephone conference that may have provided more clarity, a review of the transcript shows that the parties argued simultaneously, so that part of the colloquy is lost. The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts. While all of the evidence must be viewed in the light most favorable to the nonmoving party, the mere existence of some evidence in support of the non-moving party’s position is insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

#### SUBSTITUTION OF PARTY – SECTION 8 BENEFITS

As set forth above, deceased Claimant’s counsel filed a Proposed Notice of Substitution of the Parties and requested that Mr. Smith be named *executor de son tort* “until such time that an estate is opened.” In support of the request, Claimant’s counsel asserts that “[t]o the best of our knowledge, Mr. Bailey died without any dependents. Mr. Bailey died without any assets. No estate has been formally opened with regard to Mr. Bailey. Mr. Smith, as Mr. Bailey’s closest friend and attendant care giver, is seeking to become the personal representative of Mr. Bailey’s estate and is so named as the executor de son tort acting in that capacity until such time that as (sic) an estate is opened. . . . Wherefore, Mr. Smith hereby requests that he be named the party in interest in this matter with regard to claims for attendant care services provided by him and for any benefits that would accrue to the estate of Ricardo Bailey, deceased.”

Employer objected to Claimant’s counsel’s request on the ground that “Mr. Terrance Smith has no standing to bring a claim for any benefits under the Longshore Act” (Emp. Reply at 6) and, more generally, “there does not appear to be an individual with sufficient standing in order to maintain the claim under the Longshore Act” (*id.* at 10).

After having been fully advised in this matter by both of the parties, I find that the Notice of Substitution of Parties, as submitted, does not substantiate Mr. Smith’s request to proceed with deceased Claimant’s claim for compensation benefits in Mr. Smith’s asserted capacity as an *executor de son tort*.<sup>3</sup> In general, except for situations where a named party dies and a successor is substituted, there is no substitution of parties in matters before OALJ. Successors to deceased claimants in Black Lung and Longshore cases are common; these may be covered under specific provisions. *See, e.g.*, 20 C.F.R. § 725.360, 33 U.S.C. § 919(f). 20 C.F.R. § 702.333 sets forth that under the Longshore Act, the necessary parties are the claimant, the employer/carrier and the administrative law judge. Generally, there are two possible scenarios that may follow a claimant’s death:

- (1) Executor or personal representative of deceased claimant’s estate may request to be substituted as a party and seek payment of benefits that accrued to claimant during

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<sup>3</sup> The claim for *inter vivos* compensation benefits is evidently based on a contention that Claimant is entitled to an upward adjustment of his average weekly wage. Telephone Hearing Tr. at 17-18.

his lifetime (for an example, see *Hamilton (Executor) v. Ingalls Shipbuilding, Inc.*, BRB No. 91-1035 (1994) (unpub.));

(2) Survivors who are entitled to benefits of their own right under the LHWCA (e.g., pursuant to Section 9 or Section 8(d)) may file a claim for benefits. Mr. Smith does not seek these benefits. See Transcript of telephone conference of March 19.<sup>4</sup>

Section 19(f) explicitly provides that an award of compensation for disability may be made after the death of an injured employee. An employee's survivors thus may file for survivor's benefits and also for disability compensation accruing prior to the employee's death. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 830 (1978). These cases, arising from Section 8(d), illustrate the interplay between the Longshore Act and the law governing estates. Section 8(d) provides for the payment of unpaid portions of scheduled permanent partial disability (PPD) awards to survivors.<sup>5</sup> Section 8(d)(1) specifies the classes of survivors to receive the total amount of a scheduled award unpaid at the time of the death. Section 8(d)(3) provides that an award for disability may be made after the death of the injured employee; this section is not limited to PPD awards. Where an employee dies prior to the payment of his scheduled PPD benefits, for reasons unassociated with his work-related injury, Section 8(d) provides for the disbursement of those benefits in full. The Board held, in accordance with a long-recognized concept, that an employee has a vested interest in benefits which accrue during his lifetime; thus, upon his death, his estate is entitled to those accrued benefits. Further, as unaccrued benefits abate unless otherwise provided by statute, the Board held that the term "unpaid" in Section 8(d) means "unaccrued," and upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go to either his statutory survivors under Section 8(d)(1) or to the Special Fund upon his death without statutory survivors [§8(d)(3)]. The Board also held that where the employee was survived by his widow who later died prior to the adjudication of the claim, the operative time for determining survivorship under Section 8(d) was the date of the employee's death. Because the employee's widow survived him, she was a statutory survivor within the meaning of Section 8(d)(1). Had there been any unaccrued benefits in this case, the widow would have been entitled to them and, upon her death, her right to the payments would have passed to her estate. However, as all benefits in these cases accrued prior to the employees' deaths, their estates were entitled to them. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, modified on other grounds on recon., 28 BRBS 156 (1994); *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994). Under the governing law, a formal hearing on the issue of Claimant's entitlement to benefits (including AWW adjustment) cannot occur without a claimant or someone who can legally take his place. Here, Mr. Smith has

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<sup>4</sup> In *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983), the Board held that a claim filed by decedent's estate for average weekly wage adjustments and Section 8(d) benefits was not time-barred, because the estate was merely substituted for the decedent in his timely-filed claim. The Board nevertheless denied continuing benefits under Section 8(d) because the decedent's survivors, his sisters, were not dependent upon him as required by the Act. The Board held that Section 8(d) does not provide for payment of unaccrued benefits to decedent's estate, but only to specified survivors. Decedent's estate was entitled only to unpaid benefits accruing prior to death and thus was not entitled to permanent partial disability compensation, as decedent had received payments for total disability before his death. The estate did recover compensation due to the increase in his average weekly wage for the period prior to death, as such awards do not abate at death. See also *Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985), *aff'd sub nom.*, *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986) (award for permanent total benefits accrued prior to death payable to estate).

<sup>5</sup> *Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985), *aff'd sub nom. Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986) (award for permanent total benefits accrued prior to death payable to estate).

established no valid basis for his attempt to proceed with Claimant's claim for compensation benefits under Section 8 of the Act. Mr. Smith did not set out facts that show that he would be entitled to benefits "that would accrue to the estate of Ricardo Bailey, deceased." Although Claimant's counsel did not provide me with any testimony or affidavits, it is reasonable to expect that Mr. Smith is a creditor for medical benefits under Section 7.<sup>6</sup> Mr. Smith has not set forth any evidence to show that he is an executor or personal representative of the deceased Claimant's estate on any other basis. Claimant's counsel's argument that the claim should be decided before a decision is made whether or not an estate should be established for Claimant is without merit. I have not been provided any explanation how Mr. Smith could legally claim any indemnity benefits owed to the inchoate estate, or whether the estate could pursue arguable indemnity benefits.

#### **SUBSTITUTION OF PARTY – ATTENDANT CARE BENEFITS**

As noted above, in his Notice of Substitution of Parties, Mr. Smith also seeks to be named a "party in interest" in this matter with regard to his claim for attendant care expenses under Section 7 of the Act. In response, Employer asserts that "Mr. Terrance Smith has no standing to bring a claim for any benefits under the Longshore Act." Emp. Reply at 6. Employer elaborates that "[a]ny attendant care belonged to the deceased Mr. Bailey" (*id.* at 5); that "[t]his attendant care is a benefit that belongs directly to the Claimant" (*id.* at 9), and that "there is no estate or proper survivor existing for the decedent Claimant in order to maintain any claim under Section 7 for attendant care" (*id.* at 9). Employer asserts that "Claimant's counsel has not identified any survivors or any parties with standing to maintain any claims under the Longshore Act," thereby exposing Employer to unfair surprise. *Id.* at 8, 12. Employer asserts that

"in the event this claim is not stricken or dismissed, the Employer/Carrier must be permitted to undertake further discovery regarding successors to Mr. Bailey, and others (such as Mr. Smith) as they may relate to a surviving claim, if any. Notwithstanding Mr. Mermell's repeated assertions that counsel for the Employer/Carrier was 'fully aware of exactly what the claims are and who the real parties in interest are,' it is not reasonable for counsel for the Employer/Carrier to assume that a state LS-18 filed prior to the death of Claimant will suffice as being compliant with the Court's clear Pre-Hearing Order, particularly with Claimant's counsel's failure to provide information regarding any individuals with standing to succeed to the claim."

*Id.* at 12.

Notably, despite my request during the March 19, 2012, status conference that the parties brief this issue, Claimant's counsel has cited no pertinent authority, statutory or otherwise, on the issue of Mr. Smith's standing and procedural basis for proceeding with his claim for attendant care expenses following Claimant's passing. I note, in the interests of justice, that Section 7(d)(3) provides that "[t]he Secretary, may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee." 33 U.S.C. § 907(d)(3). The Ninth Circuit cited Section 7(d)(3) for the proposition

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<sup>6</sup> It is also possible that counsel for the deceased may be a creditor, but no affidavits or other argument in this vein have been submitted and he has not asked to be considered as the putative executor or personal representative. I will not consider Employer's allegation that counsel has a conflict of interests and cannot represent the estate and a creditor simultaneously.

that a “party in interest” may petition the Secretary for an award of “the reasonable value of [] medical or surgical treatment” provided to a claimant. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993) (holding that claimant’s medical provider is a “person seeking benefits” within the meaning of Section 28(a), entitling the provider’s counsel to an attorney’s fee payable by employer). The court determined that medical providers seeking reimbursement of medical expenses have no independent entitlement to medical benefits but do have a derivative right based on claimant’s entitlement to recover medical benefits. Consequently, they can seek medical benefits under Section 7(d)(3). Following *Hunt*, the Board has rejected an employer’s contention that the ALJ lacked jurisdiction to hear a claim brought by claimant’s medical provider to recover claimant’s medical benefits to the extent that the benefits were owed to the provider in satisfaction of unpaid bills, a right it had under Section 7(d)(3). *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997). The Board observed that the Ninth Circuit in *Hunt* adopted the Director’s interpretation that Section 7(d)(3) of the Act grants medical providers standing to “seek benefits” on behalf of an employee where the benefits are owed to the provider for medical services rendered. The Board also observed that the medical provider’s action against employer for medical benefits is clearly derivative of claimant’s claim for benefits.

Furthermore, whatever substantive basis a person may assert for proceeding with a claim before OALJ, it must be properly and timely articulated to the OALJ and opposing party. For example, Rule 29 C.F.R. § 18.10, which deals with a right to intervene, provides that “other persons or organizations” may intervene if the ALJ “determines that the final decision could directly and adversely affect them or the class they represent, and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.” The person/organization must file a petition containing info set forth in Rule 18.10(c) within 15 days after it has knowledge or should have known about the proceeding. If objections to the petition are filed, the ALJ “shall then determine whether petitioners have the requisite interest to be a party in the proceedings as defined in paragraphs (a) and (b) ....” Meanwhile, neither Mr. Smith nor counsel for the decedent Claimant has taken such action. As set forth above, counsel was noticed of the pendency of this claim by the District Director on or about November 22, 2011. The Pre-hearing Order was sent to the parties on January 3, 2012.

Based on the record before me, the existence of a party with a standing to proceed with one or both aspects of this claim (*i.e.*, Section 7 attendant care benefits and Section 8 disability compensation) has emerged as a central issue after this matter had been referred to the OALJ for a formal hearing. I have previously rejected Claimant’s counsel’s assertion that Mr. Smith has established an adequate basis for proceeding with Claimant’s claim for Section 8 compensation. I have also recognized Employer’s valid concern with Mr. Smith’s failure to provide adequate notice of the basis for his claim for attendant care. Both these issues emanating from Claimant’s passing crystallized after this matter had been referred for hearing; and counsel of record appear to have been talking past each other in attempting to clarify these issues before me. Based on the foregoing, I find that a remand to the district director is the most appropriate course of action at this time. *See* 20 C.F.R. § 702.336 (“Formal hearings; new issues.”); *see also* 20 C.F.R. § 702.333 (“Formal hearings; parties.”).

Based on the foregoing, Employer/Carrier's motion to strike claim is **DENIED**; and

The case is hereby **REMANDED** to the District Director.

SO ORDERED

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Daniel F. Solomon  
Administrative Law Judge