IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
June 28, 2019

Lyle W. Cayce
Clerk

No. 18-30904

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,

Requesting Parties - Appellants

v.

CLAIMANT ID 100157225,

Objecting Party - Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-6213

Before OWEN, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

In this appeal from the Deepwater Horizon Settlement Program, BP challenges the district court's denial of discretionary review. BP's challenges are factual determinations by the Appeal Panel not warranting district court review. AFFIRMED.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

FACTUAL AND PROCEDURAL HISTORY

We have previously described the April 2010 Deepwater Horizon oil rig disaster and the Settlement Agreement claims process for businesses that suffer economic loss. *See In re Deepwater Horizon*, 732 F.3d 326, 329 (5th Cir. 2013). Youngquist Brothers, Inc. submitted a claim under the Agreement in December 2012. The Claims Administrator awarded a sum for business economic loss. The Appeal Panel affirmed. BP then sought discretionary review in the district court, which was denied. BP has appealed here, claiming the denial of review was an abuse of the district court's discretion.

DISCUSSION

We review the district court's denial of discretionary review of a Settlement Program decision for an abuse of discretion. *BP Expl. & Prod., Inc., v. Claimant ID 100281817*, 919 F.3d 284, 287 (5th Cir. 2019). That discretion is abused when the district court refuses to review a claim in which the Appeal Panel decision "actually contradicted or misapplied the Settlement Agreement[] or had the clear potential to" do so; error may also occur if the claim "raises a recurring issue on which the Appeal Panels are split [and] the resolution of the question will substantially impact the administration of the Agreement." *Id.* (citations omitted).

BP argues that the Settlement Agreement was misapplied in several ways. BP asserts that Youngquist is in a class of parties excluded from recovery under the Settlement Program. BP alternatively asserts that even if Youngquist is not in an excluded class, the Claims Administrator improperly calculated its award by considering locations for Youngquist's business that should have been excluded from the evaluation of the claim and by misclassifying vehicle costs as fixed. Youngquist argues that even if the award calculation was wrong, the "baseball process" at the Appeal Panel acts as a

harmless error standard on which we should affirm the district court's denial of review.

I. Exclusion of oil and gas industry claimants

The Settlement Agreement excludes multiple classes of claimants from recovery, including entities in the "Oil and Gas Industry." The Claims Administrator decides if a claimant is in that industry by determining its North American Industry Classification System or NAICS code. These are codes that "federal statistical agencies use to classify business establishments in order to collect, analyze, and publish data related to the U.S. economy." *Claimant ID 100153748 v. BP Expl. & Prod., Inc.*, 708 F. App'x 812, 815 n.1 (5th Cir. 2017). The codes are also used to classify businesses for federal administrative purposes such as on tax returns. *Id.* at 816.

To determine a claimant's NAICS code, the Claims Administrator considers "(a) the NAICS code shown on [the] . . . claimant's 2010 tax return, (b) 2010 business permits or license(s), and/or (c) other evidence of the business's activities." Multiple NAICS codes are excluded under the Settlement Agreement as related to the oil and gas industry. The Claims Administrator classified Youngquist as a "Water and Sewer Line and Related Structures Construction" business. BP argues Youngquist falls under an excluded code for "Drilling Oil and Gas Wells."

The factual support for BP's argument that Youngquist was an oil and gas industry claimant includes that OSHA assigned Youngquist the NAICS code "Drilling Oil and Gas Wells" in an investigation of an incident involving a Youngquist employee. Further, one of Youngquist's largest clients by revenue is an oil and gas company. On the other hand, Youngquist submitted thousands of pages of records to the Claims Administrator that documented the company's business concerns for several years. Those records are some

evidence that it was not in the business of drilling oil and gas wells. Fundamentally, BP wanted the district court to reweigh the evidence surrounding Youngquist's NAICS code determination. That, though, is the sort of "discretionary administrative decision in the facts of a single claimant's case" that the district court may rightfully refuse to review. *Claimant ID 100281817*, 919 F.3d at 287.

BP also argues that the Appeal Panel "ignored the evidence that Youngquist Brothers engaged in business activities that fall under" the NAICS code "Drilling Oil and Gas Wells." The Appeal Panel, however, specifically stated that it conducted a "review of the record" and found that BP had not provided sufficient proof that the decision reached by the Claims Administrator was incorrect. We do not see that the Appeal Panel ignored the evidence.

There was not a misapplication or clear potential misapplication of the Settlement Agreement by the Appeal Panel decision, and thus no abuse of discretion by the district court on that basis in refusing to grant review.

II. Award calculation

A. Locations of Youngquist activities

The business economic loss compensation process of the Settlement Agreement compares a claimant's profits from a time period before the Deepwater Horizon disaster (the "Benchmark Period") to one after it (the "Compensation Period"). The profit calculation is made by using the claimant's revenues and costs from the relevant timeframes. When a claimant is an entity with multiple "Facilities," the Settlement Agreement requires that only revenues and expenses from Facilities located in "the Gulf Coast Areas" be accounted for in the compensation calculation. Youngquist had trailers set up at locations around Florida that it does not dispute were outside the Gulf Coast

Areas. BP argues that those trailers meet the Settlement Agreement's definition of "Facility" such that the revenues and costs associated with them should have been excluded from the award calculation.

The Settlement Agreement defines "Facility" to mean "[a] separate and distinct physical location of a Multi-Facility Business at which it performs or manages its operations." Policy 467 v.2 provides further guidance. It requires that a Facility be a location at which "the Business Entity performs and/or manages its operations." This includes, for example, a location where the claimant "in the normal course of its business . . . has employees . . . who perform their work" or where "it provides services or products." Specifically referencing "construction office trailers," Policy 467 states "[a] trailer placed at a construction site and used as a permanent office for the duration of the construction project will typically be considered a Facility if the claimant . . . performs or manages its operations there."

Youngquist sought to prove these trailers did not match the relevant definitions. An affidavit from its CFO asserted the trailers were "used merely for the storage of product and a meeting room for consultants and government compliance officers" and "[a]ll business decisions [and] management . . . are handled out of" a location within the covered area. BP does not identify any evidence that contradicts the CFO's statement. Instead, BP attacks the "Appeal Panel's uncritical acceptance" of the CFO's affidavit. BP has a point that the affidavit does not necessarily preclude the trailers from being, for example, locations where "in the normal course of its business, [Youngquist] has employees . . . who perform their work" and further investigation may have been useful. Once more, however, BP's contention is simply a disagreement with the Appeal Panel's assessment of the evidence regarding a factual question. We conclude that the district court's refusal to examine this factual question was not an abuse of discretion.

B. The Appeal Panel's supposed deferral to expense labeling

In comparing the revenues, expenses, and profits between the Benchmark and Compensation Periods, the Settlement Program utilizes only variable costs, not fixed costs. That is, the profit calculated for each period is the result of a "claimant's revenue less its variable costs." Exhibit 4D to the Settlement Agreement lists costs determined to be either fixed or variable. Here, the costs are those associated with Youngquist vehicles that the Settlement Program and the Appeal Panel labeled as fixed. BP argues the Settlement Program "without any inquiry into their nature . . . . simply accepted [Youngquist's] classification of the vehicle expenses as fixed."

We have held "the Settlement Agreement requires claims administrators to use their independent judgment and classify expenses as 'fixed' or 'variable' according to their substantive nature, rather than rational basis review of the claimants' own descriptions." *BP Expl. & Prod., Inc. v. Claimant ID 100094497 (Texas Gulf Seafood)*, 910 F.3d 797, 802 (5th Cir. 2018). In determining whether the Appeal Panel applied that directive, we quote that part of its written decision, which utilized far more words to resolve other issues than it did for classifying expenses:

> Relative to the remaining two issues regarding the treatment and classification of revenues and expenses, the panel concludes the three expense items were correctly classified as fixed costs consistent with Exhibit 4D since they related to auto expenses, payroll and overhead. Likewise, the panel concludes "Other Income" was correctly treated as revenue since it consisted of refunds and reimbursements.

BP interprets this analysis to be no more than the Appeal Panel's adoption of the labels used by the claimants. That is an unwarranted interpretation. The Appeal Panel found that those expenses did relate to the appropriate categories and thus were fixed costs. Just as we do with other fact-findings under this Settlement Agreement process, we will not assume absent

any supportive evidence that the Appeal Panel failed to examine the record and determine the nature of these expenses as it is required to do. Throughout its opinion, the Appeal Panel refers to a review of the record. That it failed to make such a statement here does not disqualify those findings.[1]

C. The baseball process

The claimant injected the so-called "baseball process" in his brief, and BP responded in its reply brief. That is the term applied to the situation when the compensation amount is in dispute at the Appeal Panel stage, and the claimant and BP both submit proposed award amounts. The Appeal Panel "must choose to award the Claimant either the Final Proposal by the Claimant or the Final Proposal by the BP Parties but no other amount." *In re Deepwater Horizon*, 785 F.3d 986, 989 n.1 (5th Cir. 2015) (citation omitted).

Though arguments about the operation of that process were joined somewhat late in the briefing, we agree with BP that it is a procedure that has no bearing on the case. The dispute regarding the award by the Appeal Panel involves the issues we have already discussed. Those issues were considered by the Appeal Panel and rejected on their merits. We too have examined the merits and hold the district court did not abuse its discretion in refusing to grant further review. Whatever effect on the final amount of the award that the baseball process may have had is not an independent issue in this case.

AFFIRMED.

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[1] In a Rule 28(j) letter, BP cites a recent application of *Texas Gulf Seafood*. *See BP Expl. & Prod., Inc. v. Claimant ID 100301594*, No. 18-30747, 2019 WL 2477212 (5th Cir. June 12, 2019). We determined that the Appeal Panel failed to use "'independent judgment' to classify expenses 'according to their substantive nature.'" *Id*. at *2. Instead, it had held that all expenses labeled as "professional services" were fixed costs. The Appeal Panel decision itself revealed that it did not exercise independent judgment. Not so here.