

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 August 2019

Case No.: 2015-LHC-692

OWCP No.: 07-177911

In The Matter Of:

HENRY WINCHESTER,
Claimant

v.

HUNTINGTON INGALLS INCORPORATED
(AVONDALE OPERATIONS),
Employer

and

EVE S. REARDON, ESQ.
Party-In-Interest

and

THE KEATING LAW FIRM, LLC/JULIE-ANN DUHE-KEATING, ESQ.,
Party-In-Interest.

APPEARANCES:

LAWRENCE CENTOLA, ESQ.
For The Keating Law Firm, LLC and Julie-Ann Duhe-Keating

CHARLOTTE MEADE, ESQ.
For Eve S. Reardon

FRANK J. T OWERS, ESQ.
For Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

**ORDER TO DISMISS AND VACATE
APPROVAL OF SETTLEMENT**

PROCEDURAL BACKGROUND

This case arises from a 2003 injury and subsequent claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), brought by Claimant against Employer.¹ I found Claimant to be temporarily totally disabled and awarded benefits in 2008.² In 2013, I granted Employer's Motion to Modify that compensation order to reflect partial disability.³

Employer then filed another modification motion that was referred to the Office of Administrative Law Judges on 4 Feb 15. Claimant was represented by Attorney Eve S. Reardon of The Keating Law Firm, LLC. The parties eventually submitted a petition to settle and close the claim under Section 8(i) of the Act. The petition included a page that represented to have been signed by both Claimant and Reardon on 5 Jun 15. It also included an affidavit that represented it had been sworn to and signed by Claimant and Reardon before Notary Public Julie-Ann Duhe-Keating, also on 5 Jun 15.

Reardon appended to the petition her fee request for \$28,200 (ninety-four hours of work at an hourly rate of \$300). Her request stated that she had been a practicing litigation attorney for more than nine years and had actively practiced under the Act for five years. On 18 Jun 15, I approved the petition, the terms of which provided that Employer would pay Claimant \$112,800 and Reardon \$28,200.⁴

More than three years later, on 13 Jul 18, Employer filed a Motion to Vacate. In its Motion, Employer alleged that the settlement was procured by fraud, because Claimant was already dead when it submitted the petition to Claimant's counsel for his signature. Employer alleged that although her client was dead, Claimant's Counsel procured his notarized signature, returned the completed petition, and accepted attorney's fees. Employer noted that Claimant's Counsel never disclosed his death and the settlement check was endorsed and cashed. Employer argued that based on the fraud perpetrated, the compensation order approving the settlement should be vacated, an order should be issued for full reimbursement, and the case should be referred for criminal prosecution. I ordered counsel to show cause why I should not grant the Motion to Vacate and order the requested relief. Both Reardon and Duhe-Keating filed responses to the Show Cause Order.

Attorney Reardon's Response

Reardon responded through her counsel and stated that, at the relevant time, Claimant was gravely ill and living in Colorado with a caregiver. She explained that she drafted a power of attorney for Claimant authorizing Attorney Patrick Keating, Duhe-Keating's spouse and also a member of the firm, to approve and sign the settlement on Claimant's behalf. The Power of Attorney was sent to a Colorado notary, who obtained and notarized Claimant's signature. Reardon further stated that Claimant died before Employer was able to complete the petition documents and submit them to her for signature. She alleged that although she, Keating, and

¹ 33 U.S.C. § 901 *et seq.*

² 2007-LHC-809 (Claimant was represented by attorney Greg Unger).

³ 2012-LHC-1131 (Claimant was again represented by attorney Greg Unger).

⁴ 2015-LHC-692.

Duhe-Keating were all aware of Claimant's death, Keating nevertheless signed Claimant's name to the petition and after Duhe-Keating notarized it, submitted it to the court for approval.

Reardon explained that she was under the mistaken belief that the Power of Attorney remained valid even upon the death of the principal and had even observed to Keating that it was a good thing they had already obtained a power of attorney before Claimant died. Reardon also noted that Employer's check payable to Claimant in the amount of \$112,800 was sent to the Colorado probate attorney she understood to be retained to handle Claimant's estate. The check payable to Claimant's counsel in the amount of \$28,200 was retained by The Keating Law Firm. Citing Federal Rule of Civil Procedure 60, Reardon argued that the Motion to Vacate was untimely and therefore must be denied.

Attorney Duhe-Keating's Response

Duhe-Keating responded by noting that Reardon was under Keating's supervision and the firm's primary workers' compensation attorney. She denied having any involvement with Claimant's file, including effecting the settlement and disbursing any funds. She agreed that Reardon had arranged for Claimant to execute a power of attorney in favor of Keating, but noted that it specifically stated that the Power of Attorney expired upon the death of the principal.

She also stated that Reardon received a copy of Claimant's Last Will and Testament from a mortuary on 2 Jun 15 and received the settlement petition from Employer on 5 Jun 15. However, she insisted that she neither notarized the signature reported to be Claimant's nor authorized anyone to do it on her behalf. She alleged that Keating admitted to her that he forged her name. She also submitted evidence from a handwriting expert showing that the notary signature is a forgery. Finally, she clarified that, although the firm may have initially received the entire check for \$28,200, Reardon was given a check for half of that amount.

Employer's Reply

Employer replied by arguing that its Motion to Vacate was not untimely, as it involves a direct fraud perpetrated upon the court. Employer requested an evidentiary hearing, noting that factual questions remained as to who notarized the fraudulent signature and the extent of involvement of the various attorneys and the firm as a whole. Employer therefore moved to add Keating as an indispensable party.

Ruling on the Motion to Add a Party

I initially noted that I have no authority to order any claimant to reimburse his employer and no more authority to refer the case for criminal prosecution than any other individual. I therefore denied those parts of Employer's motion. I then found that although vacating the settlement might impact Keating's interests in his individual capacity, that impact would be indirectly derivative and not irrevocable. I therefore denied the motion to add him as a party. That left only the request for an order vacating the previous approval. I directed the parties to confer to schedule any necessary discovery and a hearing date. In recognition of the Claimant's

estate's ambiguous status, I directed Reardon or her counsel to appear for the limited purpose of clarifying who currently represents Claimant's estate.

In a subsequent conference call with all counsel, I asked if there was a need for any discovery in order to litigate factual disputes related to the motion. Employer stated it did desire to engage in discovery, but counsel for Reardon and Duhe-Keating indicated they did not believe discovery would be necessary for their clients. They also noted that neither of their clients represented Claimant's estate. We discussed whether it was therefore necessary to provide notice to Claimant's estate and Employer indicated it intended to do so. The parties agreed to set the evidentiary hearing on the matter for 16 Jan 19 and subsequently continued the case to 12 Apr 19.

Employer's Motion for Summary Decision

Employer filed a Motion for Summary Decision. It noted that there is no dispute that, at the time his name was signed to the settlement and the settlement was submitted for approval, Claimant was dead and known by his counsel to be dead. It argued that the resultant fraud upon the court justified not only considering the Motion to Vacate after a year, but granting the Motion to Vacate.

Reardon responded that summary decision would be premature without discovery, noting that Employer had not issued any written discovery or taken any depositions. Reardon did not identify the discovery she had propounded. Reardon agreed that Claimant died on 29 May 15, but argued that the parties had agreed to a settlement on 22 May 15 and disputed who signed the settlement papers and with what authority. Duhe-Keating filed no response to the Motion for Summary Decision either in her individual capacity or as a representative of The Keating Law Firm.

Interim Order

I noted that there was no genuine factual dispute that although there was an oral agreement while Claimant was still alive, he died before his settlement was signed by him or on his behalf. I also noted Duhe-Keating's offered no response to Employer's Motion for Summary Decision beyond her initial opposition.

Since the time for vacating the order would have expired in the absence of clear and convincing evidence of fraud, I declined to grant the Motion for Summary Decision, but cancelled the hearing date in order to reschedule additional briefing dates on the Motion for Summary Decision and a new full hearing date on the merits, should that be necessary. I also ordered Duhe-Keating to show cause why she filed no response to Employer's Motion for Summary Decision and clarify whether she opposed such motion. Duhe-Keating filed a response explaining that (1) since Claimant is dead and his estate did not retain her or her firm, they have no client in this matter, and (2) she does not dispute any of the facts alleged by Employer.

I noted that the record indicated that James Austin appeared to have been Claimant's executor or personal representative in Colorado and had sought the assistance of local Attorney James Darnell. Attorney Darnell then emailed The Keating Law Firm to help expedite the settlement

process. The Keating Law Firm accepted service of the settlement and sent the check to the estate. I found that at least a colorable argument could be made that The Keating Law Firm had been retained by the estate to continue representation on the claim and in the absence of any withdrawal, they remain counsel of record on behalf of Claimant's estate. However, I also noted that since the basis of the Motion to Vacate includes allegations of fraud and/or malpractice by members of The Keating Law Firm, the interests of Claimant's estate could be contrary to the interests of The Keating Law Firm.

I then ordered Duhe-Keating to show cause why The Keating Law Firm does not represent Claimant's estate. I also notified Claimant's estate, in the person of James Austin and represented by Attorney Darnell, of the Employer's pending Motion to Vacate. I directed Claimant's estate to advise the parties of its intentions in response to the motion and whether it considers The Keating Law Firm to be its representative. I also ruled that because of the pecuniary interest represented by the attorney fees, Duhe-Keating, Reardon, and The Keating Law Firm, remained real parties in interest.

Responses to the Interim Order

James Austin did not respond to my written order or my staff's telephone calls. Attorney Darnell filed a response in which he stated that he represented Mr. Austin in a limited capacity regarding procurement of burial expenses during June 2015. Attorney Darnell asserted that the scope of his representation was limited to payment of funds for burial costs alone and he was never given authority by Mr. Austin to act in a probate capacity on behalf of Claimant's estate. He conceded that he entered into discussions with Reardon about burial costs, but added that Reardon understood there was no formal probate action filed in Colorado. He emphasized that his involvement was limited to communicating with Reardon about burial funds and their discussions did not encompass any matters related to substantive settlement negotiations, the terms of any settlement, or his acceptance of any settlement funds.

Duhe-Keating filed a response citing Louisiana law providing that a decedent's estate is a separate legal entity from the decedent. She noted that there was no indication that The Keating Law Firm ever undertook representation of the estate.

Employer then filed its response arguing that since no estate was opened on behalf of Claimant and no order may issue requiring repayment, there is no estate interest to protect. It then urged reconsideration of the Motion for Summary Decision, arguing that the record presents no genuine issue of material fact in opposition to its position.

Discussion

Petitions to settle a claim must be signed by all parties and submitted in writing.⁵ There is no dispute that Claimant died before he signed, either personally or through a valid power of attorney, the settlement petition that was submitted. Thus, there is no genuine issue of material fact that would allow for a finding that the settlement should not be vacated on substantive grounds.

⁵ 20 C.F.R. § 702.242.

In terms of procedure, a decision may only be vacated after a year if the evidence demonstrates clear and convincing evidence of fraud, misrepresentation, or misconduct by an opposing party.⁶ Consequently, the central question becomes whether the record creates a genuine issue of material fact that would allow a finding that the settlement approval was not obtained by fraud, misrepresentation, or misconduct.

Even taking all inferences against the moving party, the record clearly establishes that Claimant was dead and known to be dead by at least Keating and Reardon when the settlement petition was submitted. Reardon denies having engaged in any fraud or misconduct, submitting that her inexperience and inadequate knowledge of basic agency law prevented her from understanding the legal meaning of her and Keating's actions. While that explanation is inconsistent with the recitation of her experience in her attorney fee petition, in this procedural posture I must make all credibility assessments against the moving party. Thus the record is sufficient to create a genuine issue of material fact that could allow a factfinder to find that Reardon did not engage in fraud, misrepresentation, or misconduct.

However, the same is not true for the involvement of Keating. The record indicates that he was the supervising attorney and admitted to Duhe-Keating he forged her name as the notary. Accordingly, the record presents no genuine issue of material fact that would allow a finding that he did not engage in fraud, misrepresentation, or misconduct to obtain approval of the petition.

Accordingly, I find my previous Order approving the settlement petition was obtained by fraud and hereby vacate that Order, including those parts directing Employer to pay Claimant \$112,800 and his counsel \$28,200. As it appears that there is no representative of an estate to further prosecute the claim, it is dismissed as abandoned.⁷ A copy of this order will be provided to the Chief Administrative Law Judge of the United States Department of Labor Office of Administrative Law Judges for his consideration of possible disqualification of the counsel involved.⁸

ORDERED this 22nd day of August, 2019, at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

⁶ *Saenz v. Kenedy*, 178 F.2d 417, 419 (5th Cir. 1949); *Gilmore v. Strescon Industries, Inc.*, 66 F.R.D. 146, 153 (E.D.Pa.1975), *aff'd without opinion*, *Bucks County Const. Co. v. P. Agnes, Inc.*, 521 F.2d 1398 (3d Cir.).

⁷ Without prejudice.

⁸ See 29 C.F.R. § 18.23. Since Employer indicated that the involved counsel's state licensing authority has been informed, I have taken no action in that regard. As previously noted, Employer is free to seek criminal prosecution by the Department of Justice.