# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

**FILED**
January 9, 2019

Lyle W. Cayce
Clerk

No. 18-30653
Summary Calendar

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

Requesting Parties - Appellants

v.

CLAIMANT ID 100333854,

Objecting Party - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-3821

Before KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

This appeal arises from the district court's denial of discretionary review under the Deepwater Horizon Economic and Property Damages Settlement Agreement. Finding no abuse of discretion in the district court's denial of review, we AFFIRM.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

## I.

The Economic and Property Damages Settlement Agreement governs claims against BP Exploration & Production, Inc., BP America Production Company, and BP, p.l.c. (collectively, "BP"), by a class of plaintiffs suffering economic and property damages in connection with the April 2010 Deepwater Horizon oil spill. *See generally In re Deepwater Horizon I*, 785 F.3d 986, 989 (5th Cir. 2015) (describing history of settlement agreement). Under the terms of the settlement agreement, as is relevant here, claimants in geographic "Zone D" can show that the oil spill caused their losses by satisfying the so-called V-Shaped Revenue Pattern. Put simply, this test compares revenue periods before (the "benchmark period"), immediately after, and a year after the oil spill. If a claimant can show that it suffered a downturn in revenue immediately after the oil spill, as compared to the benchmark period and the year after the spill, this revenue pattern supports an inference that the spill caused the claimant's loss.

If a claimant can show causation, the claims administrator then determines compensation for its losses. First, the claims administrator compares the claimant's variable profit in the post-spill period to the benchmark period. Next, the claims administrator also takes into account incremental profits or losses the claimant might have been expected to generate in the absence of the spill. This process is intended to compare the claimant's actual profit during the post-spill period to the profit the claimant might have expected to earn.

In this case, Claimant, a nonprofit that operates group homes for teenagers, filed a business economic loss claim with the settlement program. As a Zone D resident, Claimant submitted profits and losses statements ("P&Ls") to show that it satisfied the V-Shaped Revenue Pattern. The P&Ls indicated that Claimant received rental income and that nine of its facilities

had closed in the year before the oil spill. In addition, Claimant reported that some of its transactions involved "related parties." When asked for more information, Claimant explained that it both leased space from a third party and owned its own facilities. Claimant further explained that it leased space within its own facilities to tenants. The claims administrator granted the claim, awarding Claimant nearly $1.5 million.

BP appealed, arguing that the claims administrator erred by failing to examine and exclude rental income from the claim calculations, as required by Policies 328 v.2 and 373 v.2. BP also argued that Claimant did not comply with the attestation requirement because the spill did not cause its revenue losses. Finding the award appropriately supported by the record, the appeal panel affirmed the claims administrator's award. BP sought discretionary review from the district court, which the district court denied. BP now appeals the denial of review.

**II.**

"We review the district court's denial of discretionary review for abuse of discretion." *See Claimant ID 100212278 v. BP Expl. & Prod., Inc.*, 848 F.3d 407, 410 (5th Cir. 2017). We have made clear that discretionary review is not mandatory review. *E.g.*, *In re Deepwater Horizon II*, 785 F.3d 986, 999 (5th Cir. 2015) (noting that "turn[ing] the district court's discretionary review into a mandatory review[] . . . would frustrate the clear purpose of the Settlement Agreement to curtail litigation."). To that end, the district court abuses its discretion when:

> (1) the request for review raises an issue that has split the Appeal Panels and would substantially impact the Settlement Agreement's administration once resolved; (2) the dispute concerns a pressing question about how to interpret or implement the Settlement Agreement's rules; (3) the Appeal Panel misapplied or contradicted the Settlement Agreement, or had the clear

> potential to do so; or (4) the district court's decision was premised on an error of law.

*Claimant ID 100190818 v. BP Expl. & Prod., Inc.*, 718 F. App'x 220, 222 (5th Cir. 2018) (unpublished); *see also Claimant ID 100212278*, 848 F.3d at 410 (noting district court need not review claims challenging "the correctness of a discretionary administrative decision in the facts of a single claimant's case"); *Holmes Motors, Inc. v. BP Expl. & Prod., Inc.*, 829 F.3d 313, 315 (5th Cir. 2016).

## III.

We conclude that the district court did not abuse its discretion by declining to review the appeal panel's decision. We address BP's arguments in turn.

### A.

BP argues that Claimant did not submit evidence proving that its rental income was earned in the ordinary course of its business and, therefore, the claims administrator should have excluded this income from its analysis. BP also contends that the claims administrator's approach misapplied Policies 328 v.2 and 373 v.2 and has caused a split among appeals panels regarding the level of scrutiny required when evaluating whether a claimant's rental income should be included.

We need not engage in the sort of fact-specific review BP urges us to undertake. Claimant's rental revenue was supported by its P&Ls as well as its own statements affirming that the rentals were located within its group homes and the revenue was earned from renting spaces to residents and service providers of the homes. Thus, we cannot say that Claimant's rental revenue was entirely unsupported by the record, as BP claims. Nor has BP demonstrated that a party claiming rental income as a source of revenue must provide additional support for those claims. Although BP argues that the

decision contradicts Policy 328 v.2 and Policy 373 v.2, neither policy imposes the kind of heightened evidentiary requirement BP advocates for here.[1]

BP further contends that Policy 373 v.2 requires that rental revenue be earned at the same location as a claimant's main operations, citing two appeal panel decisions. But neither the policy nor the appeal panel decisions are so clear. Policy 373 v.2 suggests that a restaurant generating rental income from an apartment attached to the restaurant must include the rental income in its revenue, but it does not limit revenue to that incurred in a specific location. And neither of the appeal panel decisions BP cites limited the policy in that way. For example, 32 APD 2016-1395 considered whether a blue crab distributor's income earned from selling ice was in the course of its regular business. There was no discussion of whether the ice was produced at the same site of the crab distribution center or elsewhere. In fact, ice production was an entirely distinct "line of business" under BP's analysis, as it was wholly unrelated to the blue crab distributor's primary business. Yet the appeal panel included the revenue anyway.

Nor did the decision include the type of fact-intensive examination of whether the income was earned "from property at the facility for which claimant was seeking compensation," as neither decision mentioned the location as a factor in its analysis. *See* 20 APD 2015-880; 32 APD 2016-1395. Thus, BP's argument that this decision has created a split among appeal

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[1] Policy 328 v.2 excludes certain items from the definition of revenue, including "related party transactions that are not arm's length transactions." Policy 373 v.2 states, in whole:

> All recurring revenue streams that are deemed to be within the businesses' normal course of operations should be included in the analysis. For example, a restaurant that generates income from food service and also generates rental income by renting an apartment attached to the building.

panels is also without merit. Moreover, the appeal panel in this case applied the same level of scrutiny as the panels in the cases BP cites. Here, the appeal panel expressly stated that it conducted a de novo review, relying on Claimant's P&Ls, Claimant's admission that the P&Ls contained rental revenue, and its statement that the rentals were located within its group homes. Satisfied with Claimant's statement that the rental revenue was earned from renting spaces to residents and service providers of the group homes, the appeal panel concluded that the revenue was earned in Claimant's normal course of operations. Thus, there is no "split" on the care with which an appeal panel must treat the review.

Accordingly, because we find that BP has not presented a split in appeal panels or a misapplication of the settlement agreement, we are left with the fact-specific question of whether Claimant's rental revenue should have been included. The district court is not required to review this type of challenge to "the correctness of a discretionary administrative decision in the facts of a single claimant's case." *Claimant ID 100212278*, 848 F.3d at 410. Therefore, we decline to find an abuse of discretion.

**B.**

BP also contends that Claimant's decline in revenue is properly attributable to the closure of several of its facilities rather than the oil spill. BP argues that allowing Claimant to recover is a misapplication of the settlement agreement, citing our decision in *Claimant ID 100187856 v. BP Expl. & Prod., Inc.*, No. 17-30167, slip op. (5th Cir. Jan. 29, 2018) (unpublished). But in that case, the claims administrator found that the business had been dormant for the entire period of January 2010 to April 2011 because the business did not report any revenue during that period. Nor did the claimant show that it had been seeking work during that period. Thus, program accountants could not have calculated an award for the claimant

because it did not have any revenue to show for the compensable period. *Id.* at 4, 6-8. In contrast, Claimant here could provide documentation for the entire period. Although its documentation reflected that several of its locations had closed, if BP's logic were correct, Claimant's revenue would have continued to be depressed in the year after the spill as well. This was not the case. Therefore, under the framework prescribed by Exhibit 4B, the claims administrator could infer causation from Claimant's satisfaction of the V-Shaped Revenue Pattern.

Essentially, BP seeks to create an additional causation requirement—on top of the causation requirements set out in Exhibit 4B, BP argues that claimants must also show a clear connection between their harm and the oil spill. But in agreeing to the settlement agreement, BP agreed to the V-Shaped Revenue Pattern, which the claims administrator fairly applied.[2] Thus, we decline to find that the district court abused its discretion in denying discretionary review.

**IV.**

For the foregoing reasons, we AFFIRM the district court's decision to deny discretionary review.

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[2] In fact, BP has recognized that a hypothetical claim similar to Claimant's would be paid. During negotiations for the settlement agreement in the fall of 2012,

> [t]he claims administrator, in working through how the proposed claims processing would apply in specific situations, submitted a hypothetical to BP and others. It posited three accountants being partners in a small firm located in a relevant geographic region. One of the three partners takes medical leave in the period immediately following the disaster, thus reducing profits in that period because that partner is not performing services for the firm. At least some of the firm's loss, then, would have resulted from the absence of the partner during his medical leave. BP responded that such a claim should be paid.

*In re Deepwater Horizon III*, 744 F.3d 370, 377 (5th Cir. 2014) (discussing settlement negotiations and attestation requirement).