IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 8, 2019

Lyle W. Cayce
Clerk

No. 18-30997
Summary Calendar

CLAIMANT ID 100068924,

Requesting Party - Appellant

v.

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

Objecting Parties - Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:18-CV-6841

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. We find that the district court did not abuse its discretion in denying review and therefore 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

Following the *Deepwater Horizon* oil spill, BP Exploration & Production, Inc., BP America Production Company, and BP, p.l.c. (collectively, "BP"), entered into a settlement agreement with a class of plaintiffs suffering economic and property damages in connection with the spill. *See generally In re Deepwater Horizon*, 785 F.3d 986, 989 (5th Cir. 2015) (describing history of settlement agreement). The settlement agreement sets forth different compensation frameworks for different types of claims. Claimants seeking compensation for business economic losses, depending on their geographic location, must show that the oil spill caused their losses. But rather than requiring each business economic loss claimant to put forth evidence that the oil spill caused its loss, the settlement agreement allows these claimants to demonstrate causation by satisfying one of several revenue tests set forth in Exhibit 4B. *See In re Deepwater Horizon*, 744 F.3d 370, 375-76 (5th Cir. 2014). If a claimant does not meet the requirements of the business economic loss framework, it may still qualify for compensation under an alternative framework, such as the failed business compensation framework or start-up business framework.

Claimant, a metal fabrication business organized as a limited liability company, submitted a business economic loss claim to the settlement program. Claimant argues that its "owner" (presumably, its sole member) is also the "owner" (presumably, the sole stockholder) of a muffler business separately organized as a corporation. Prior to this claim, the muffler business had filed its own business economic loss claim, which was denied.

In 2010, Claimant's owner began working with a new accountant who recommended "combining" Claimant and the muffler business's operations. Claimant argues that its owner had to combine the two businesses due to "financial difficulties caused by the Deepwater Horizon Oil Spill." Therefore,

when Claimant submitted its claim, its profit and loss statements ("P&Ls") reflected both companies' financial information.

In reviewing Claimant's claim, the claims administrator requested additional information about the relationship between Claimant and the muffler business. When asked what type of acquisition took place between the two entities, Claimant responded that it was an "'informal' asset transfer. [The muffler business's] operations ceased being accounted for as a separate entity and were instead accounted for in the records of [Claimant]." In its briefing, Claimant concedes that the entities were "ostensibly separate," but it argues that their accountant treated them as one "by necessity."

The claims administrator denied Claimant's claim because it failed all of Exhibit 4B's revenue-pattern tests. The claims administrator only used Claimant's financials, rather than Claimant's and the muffler business's combined financials, to determine causation. The administrator reasoned that although the businesses purported to have merged in 2010, the merger was an "'informal' asset transfer" and the businesses filed separate tax returns "until at least 2011." The appeal panel denied Claimant's appeal for similar reasons, noting that although Claimant and the muffler business "had been operated from the same location since their inception," their 2010 merger "was not a formal sale of business but the transfer of assets from [Claimant] to [the muffler business]." In addition, the appeal panel noted that Claimant and the muffler business "operate under separate [Employer Identification Numbers ("EINs")], maintain separate financial statements, and file separate business returns." The district court denied Claimant's request for discretionary review.

II.

We review the district court's denial of discretionary review for abuse of discretion. *Claimant ID 100212278 v. BP Expl. & Prod., Inc.*, 848 F.3d 407, 410 (5th Cir. 2017). 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). We have made clear that discretionary review is not mandatory review and the district court need not review claims challenging "the correctness of a discretionary administrative decision in the facts of a single claimant's case." *Claimant ID 100212278*, 848 F.3d at 410 (quoting *In re Deepwater Horizon*, 641 F. App'x 405, 410 (5th Cir. 2016) (unpublished)).

III.

We conclude that the district court did not abuse its discretion by denying Claimant's request for review.

Claimant does not argue that this case presents an issue that has split appeal panels. In fact, appeal panels seem to agree: BP points to three appeal panel decisions presenting similar facts, all of which declined to review multiple businesses' claims as a single consolidated claim. Like the appeal panel in this case, these appeal panels treated claimants separately when they had separate EINs and filed separate tax returns, despite the fact that they operated in the same locations or shared common ownership. *Cf. BP Expl. & Prod., Inc. v. Claimant ID 100169608*, 682 F. App'x 256, 260 (5th Cir. 2017) (unpublished) (rejecting argument that settlement agreement requires administrator to look to "underlying business operations regardless of how that business was transferred between two distinct entities" when evaluating business economic loss claim). Therefore, there was no need for the district court to take up review of the claim on this basis.

Nor does Claimant present a "pressing question" concerning the settlement agreement's rules or a misapplication of the agreement. At best, Claimant argues that the claims administrator failed to apply Policy 362 v.2, which requires the administrator to look at the "totality of the circumstances" when determining whether a business was in operation at the time of the spill. But in its briefing on appeal, Claimant admits that the policy only concerns start-up business claims. Because Claimant pursued a business economic loss claim, the claims administrator did not need to consider Policy 362 v.2 here.

Claimant's equitable arguments are likewise without merit. Claimant complains that the claims administrator already denied the muffler business's claim and it will be stuck in a "catch-22 situation" if its claim is also denied here. It further argues that it should be awarded damages as a matter of fairness and equity because the oil spill forced it to combine the two businesses. In making these arguments, Claimant ignores the settlement agreement itself. The parties agreed that the revenue tests set forth in Exhibit 4B would determine compensation for business economic loss claims—regardless of what other proof a claimant may (or may not) have to offer. *In re Deepwater Horizon*, 744 F.3d at 375. Thus, because Claimant's equitable arguments do not contend that the claims administrator misapplied the settlement agreement, the district court did not abuse its discretion in denying review here.

Finally, although Claimant urges the court to remand its claim to be considered as a start-up business or failed business, it did not brief this argument in its request for discretionary review. We therefore decline to pass judgment on this argument in the first instance. *See Claimant ID 100217021 v. BP Expl. & Prod., Inc.*, 693 F. App'x 272, 276 n.4 (5th Cir. 2017) (unpublished) (noting that a party forfeits an argument not raised below) (citing *Cinel v. Connick*, 15 F.3d 1338, 1342-45 (5th Cir. 1994)).

IV.

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