

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

United States Court of Appeals
Fifth Circuit

FILED

May 6, 2020

Lyle W. Cayce
Clerk

No. 19-30298

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

Requesting Parties - Appellants

v.

CLAIMANT ID 100179569,

Objecting Party - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-902

Before DENNIS, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:*

Once again, we address an appeal stemming from the Deepwater Horizon oil spill. Louisiana hired Johnson Bros. to build a bridge. Johnson Bros. built it, and Louisiana paid for it. But the Deepwater tragedy interfered with Johnson Bros.' construction, reducing its profits. Johnson Bros. successfully filed a Deepwater Horizon Settlement Agreement claim, and BP appealed to the district court, which refused to exercise its discretionary review. BP now appeals to us, asserting that the district court abused its

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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discretion by denying review. Because BP has not shown Johnson Bros.’ attestation implausible, the district court did not abuse its discretion, and we AFFIRM.

I

Louisiana hired Johnson Bros., a construction company, to build a bridge. But, as the bridge was being built, BP’s Deepwater Horizon oil spill occurred. Johnson Bros. nevertheless promptly completed the project and received payment in full, but BP’s clean-up efforts interfered with Johnson Bros.’ construction, increasing its costs and decreasing its profits. So Johnson Bros. filed a Deepwater Horizon Settlement Agreement¹ Start-Up Business Economic Loss (BEL) claim. Since Johnson Bros. was a Zone A claimant, one of those closest to the spill, causation was contractually presumed; Johnson Bros. simply provided data to the Claim Administrator, who applied the relevant formula and awarded Johnson Bros. nearly \$2.5 million.

BP appealed the award to the settlement Appeals Panel, expressly reserving its causation/attestation argument. The Panel affirmed, and BP’s subsequent request for discretionary review by the district court was denied. BP now appeals the district court’s denial to us.

II

We review the “district court’s denial of discretionary review for abuse of discretion.”² And denying review is only an abuse of discretion if the contested

¹ For an overview of the Deepwater Horizon oil spill and the resulting settlement, see, e.g., *In re Deepwater Horizon (“Deepwater Horizon III”)*, 744 F.3d 370 (5th Cir. 2014); *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014); *In re Deepwater Horizon*, 732 F.3d 326 (5th Cir. 2013).

² *Holmes Motors, Inc. v. BP Expl. & Prod., Inc.*, 829 F.3d 313, 315 (5th Cir. 2016).

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award misapplied or contradicted the Agreement, or had the clear potential to do so.³

BP urges that the district court abused its discretion by refusing to take another look at Johnson Bros.’ award that contradicted and misapplied the Settlement Agreement in two ways.⁴ First, Johnson Bros. isn’t an eligible claimant as it did not suffer an “actual loss” caused by the spill.⁵ Second, Johnson Bros.’ causation attestation is implausible.⁶ We disagree on both counts.

A

First, *West’s* actual-loss requirement doesn’t apply to Johnson Bros., a BEL claimant.⁷ In our recent *Trammo* decision, we recognized that *West* imposed an actual-loss requirement for Individual Economic Loss (IEL) claimants, but we refused to extend this requirement to non-IEL claimants.⁸ Thus, *West’s* actual-loss requirement doesn’t apply to Johnson Bros., a non-IEL

³ *Claimant ID 100212278 v. BP Expl. & Prod., Inc.*, 848 F.3d 407, 410 (5th Cir. 2017) (per curiam) (admonishing that we don’t review “the correctness of a discretionary administrative decision in the facts of a single claimant’s case” (citation omitted)). For examples of successful abuse of discretion challenges, see *Claimant ID 100235033 v. BP Expl. & Prod., Inc. (Florida Office)*, 941 F.3d 801, 806 n.8 (5th Cir. 2019) (collecting cases).

⁴ BP’s arguments raised below but not briefed on appeal are now forfeited. *BP Expl. & Prod., Inc. v. Claimant ID 100141850 (Electrical Transformers)*, 919 F.3d 887, 889 n.1 (5th Cir. 2019) (per curiam).

⁵ BP preserved its “actual loss” argument by presenting its basis before the district court. *Cf. In re Deepwater Horizon*, 814 F.3d 748, 752 (5th Cir. 2016) (finding forfeiture when “Claimants did not make this argument in their [briefing below]” (citation omitted)). And, in any event, we retain discretion to address issues not raised below. *BP Expl. & Prod., Inc. v. Claimant ID 100315902*, 774 F. App’x 169, 172 (5th Cir. 2019) (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

⁶ BP preserved its attestation argument by stipulation, as we have held proper. *Electrical Transformers*, 919 F.3d at 888.

⁷ *BP Expl. & Prod., Inc. v. Claimant ID 100191715 (Trammo)*, No. 19-30264, 2020 WL 1022983, at *1 n.1 (5th Cir. Mar. 3, 2020) (citing *BP Expl. & Prod., Inc. v. Claimant ID 100281817 (West)*, 919 F.3d 284, 288–89 (5th Cir. 2019)).

⁸ *Id.*

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claimant, and the district court did not abuse its discretion by denying review of Johnson Bros.’ award on this ground.

B

Second, Johnson Bros. plausibly attested that it “was injured by the Deepwater Horizon disaster.”⁹ To recover under the Agreement, eligible claimants must “attest . . . that the claim in fact was due to [Deepwater Horizon.]”¹⁰ Where “the [c]laimant’s attestation plainly gives rise to suspicion or BP has presented credible evidence of a sole, superseding cause for a claimant’s loss—an investigation into the plausibility of the attestation may be warranted.”¹¹ But the district court only errs in denying review on this ground if BP “demonstrate[s] that [the] [c]laimant’s attestation is implausible.”¹²

BP cannot meet its burden. In response to the attestation challenge, Johnson Bros. explained it lost profits because the spill’s clean-up efforts caused Johnson Bros.’ variable expenses to rise—a plausible causation explanation. BP doesn’t show that Johnson Bros.’ plausible loss could not have been caused at least in part by the spill; it never even points to other potential causes.¹³ BP only asserts that Johnson Bros. didn’t suffer *any* loss as evidenced by Johnson Bros.’ timely performance and Louisiana’s payment-in-full. Yet, in the face of Johnson Bros.’ plausible explanation of its claimed loss, this argument is simply insufficient to render Johnson Bros.’ loss attestation “suspicious,” let alone establish a credible “sole, superseding cause” of Johnson

⁹ *Electrical Transformers*, 919 F.3d at 890 (citation omitted).

¹⁰ *Deepwater Horizon III*, 744 F.3d at 377.

¹¹ *Electrical Transformers*, 919 F.3d at 891; *Trammo*, 2020 WL 1022983, at *1–*2.

¹² *Electrical Transformers*, 919 F.3d at 891.

¹³ *Cf. BP Expl. & Prod., Inc. v. Claimant ID 100261922*, 919 F.3d 942, 946 (5th Cir. 2019) (rejecting BP’s argument that a sign manufacturer “160 miles inland” made an implausible attestation because BP couldn’t show that the sign manufacturer’s losses weren’t “caused at least in part” by the spill).

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Bros.’ loss.¹⁴ In short, this is not a “real example[] of [an] implausible claim[].”¹⁵ The district court didn’t misapply the Agreement, and we affirm its denial of review on this ground as well.

* * *

Johnson Bros.’ award was not contradictory to, or a misapplication of, the Agreement. We thus AFFIRM.

¹⁴ *Cf. Electrical Transformers*, 919 F.3d at 890–91 (rejecting BP’s attestation argument because, “[w]hile the evidence BP presents may indicate additional, market-related causes for Claimant’s loss, the existence of these alternative causes does not eliminate the possibility that the oil spill contributed to cause Claimant’s loss”); *Trammo*, 2020 WL 1022983, at *1, *3 (reversing on attestation grounds because BP provided “credible evidence of a sole, superseding cause” of Trammo’s loss by showing “that [Trammo had a loss] due solely to a price spike and drop in the price of fertilizer that was unrelated to the oil spill”).

¹⁵ *Deepwater Horizon III*, 744 F.3d at 378.