U.S. Department of Labor

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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 180
March 2006 – April 2006

John M. Vittone
Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

The 2006 Appropriations Act (H.R. 3010; PL 109-149) signed into law on December 30, 2005, does not contain the language limiting funding for the Solicitor to participate in appellate reviews. Additionally, the Act does not contain language limiting the Board's appellate review of decisions pending for over 12 months. Therefore, there no longer is an automatic affirmance of cases that have been on appeal to the Board for over 12 months.

OWCP: Section 8(i) Settlements are not Assignable

Recently, Michael Niss, Director of the Longshore and Harbor Workers' Compensation Program, advised a Texas State Judge that it was the position of the Department of Labor that payments made or to be made pursuant to the terms of an agreed settlement approved under Section 8(i) are "compensation due or payable under the Act", and any assignment or transfer of such payments is invalid. Letter to Court dated Nov. 8, 2005 referencing *In re Transfer of Structured Settlement Payment Rights by Burl Nash*, Jr., Harris County Court at Law No. 4, Cause No. 846452. Director Niss cited to Section 16 of the LHWCA. Claimant Nash was seeking the state court's approval to transfer to a settlement funding ("factoring") company his right to receive certain payments under an agreed settlement approved by the Department of Labor.

COURTS

A. United States Supreme Court

B. Circuit Court Cases

Delaware River Stevedores v. Difidelto, ___ F.3d ___, (No. 04-4531)(**3rd Cir.** March 13, 2006).

. At issue here was whether an employer has authority under Section 8(j) to require an employee to report information as to his earnings when the employer is not paying the claimant compensation at the time it makes the request. After finding that Section 8(j) is ambiguous, it reasoned that an employer who was not paying a claimant would have little need for earnings information. The court further found that 20 C.F.R. § 702.285(a) governs the request made in this case and that the regulation was based on a reasonable construction of Section 8(j). The regulation states in pertinent part:

> An employer, carrier or the Director (for those cases being paid from the Special Fund) may require an employee *to whom it is paying compensation* [underscoring added] to submit a report on earnings from employment or self-employment…..

[Topic 8.12.1 Obligation to Report Work--Generally]

Operators & Consulting Svcs. Inc. v. Director, OWCP, (Unpublished)(No. 04-60598)(**5th Cir.** March 31, 2006).

When an injury worsens while a claimant is employed by a second employer, the first employer is still responsible when the condition is caused by the natural progression of the injury. This is in contrast to the situation where an employment injury is aggravated while working for a second employer. In the instant case, a neurosurgeon testified that pain flare ups suffered during the second employment did not necessarily indicate that the injured disc was further damaged, but, rather that the continuing pain was the natural progression of the original injury.

[Topics 2.2.6 Definitions—Aggravation/Combination; 2.2.7 Definitions—Natural Progression; 2.2.8 Definitions—Intervening Event/Cause Vis-à-vis Natural Progression]

Tibbitts Builders Inc. v. Director, OWCP, ___ F.3d ___ (No. 04-70575)(**9th Cir.** April 14, 2006).

The court found that a worker killed while excavating a utility line trench was covered as a "harbor worker." The excavation work was part of a project renovating submarine berths at Pearl Harbor. The employer had argued that trench digging did not have a specific maritime purpose. The court reasoned that if it followed that reasoning, there would be very few workers in harbors covered. "In sum, we hold that an interpretation of 'harbor worker' that includes workers directly involved in the construction of a maritime facility, even if their specific job duties are not maritime in nature, is both reasonable and consistent with the act's purpose."

[Topic 1.7.2 Jurisdiction/Coverage—STATUS—"Harbor-worker"]

C. Federal District Court Decisions/Bankruptcy Court

Robinson v. Apache Corp., ___ F. Supp. 2d ___ (Civ. Act. No. 04-3225 Section "N" (3))(E.D. La. March 8, 2006).

Provides a good discussion of borrowed employee doctrine in LHWCA context in the **Fifth Circuit**.

[Topics 2.2.16 Definitions—Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee Doctrine; 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability; 5.1.1 Exclusiveness of Remedy and Third Party Liability—Exclusivity of Remedy—Exclusive Remedy]

Curry v. Boh Bros. Construction Co., LL.C., ___ F. Supp. 2d ___, 2006 U.S. Dist. LEXIS 11702 (4:04cv474-WS)(March 2, 2006).

The federal district court denied this Motion for Summary Judgment filed by employer in reference to a 905(b) claim. The worker had recovered compensation benefits and began pursuing a negligence claim under 905(b). The worker, a supervisor on a bridge construction project, slipped and fell as he was walking on the riprap that lined the shore between the bridge and a spud barge that the employer used as a platform for crane operations during the bridge building process. In its motion, the employer argues that a 905(b) claim does not lie because the worker was injured when he slipped on the riprap lining the shore and not on the vessel. The claimant argued that the injury was attributable to the employer's failure to provide proper ingress and egress between the shoreline and the spud barge. The claimant contends that the barge was negligently moored and/or ramped, forcing the worker to step on sloping, loose riprap rocks as he moved from the shoreline onto the barge. The claimant cited well-established law that "federal admiralty jurisdiction extends to the means of ingress and egress, including but not limited to the gangway of a vessel in navigable waters," *Sherry D. White v. United States*, 53 F.3d 43, 47 (**4th Cir.** 1995). In denying the employer's motion, the court agreed with the claimant that the record evidence created a genuine issue of material fact regarding the alleged negligence of the employer in the operation of its spud barge.

[Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally]

Aguirre v. Greensport Industrial Park LP & Commercial Metals Co., ___ F. Supp. 2d ___ (S. D. Texas)(Civ. Act. No. G-05-586)(February 7, 2006).

A worker injured in an auto accident at the dock facility can not use Section 905(b) of the LHWCA in order to sue a third party under admiralty since 905(b) specifically allows a third party action to only be brought against a vessel. The 905(b) cause of action is not broad enough to create jurisdiction here.

[Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally]

Goldman v. Hartford Life and Accident Ins. Co., ___ F. Supp 2d ___, (Civ. Act. No.: 05-1835)(c/w 05-2121)(Sec. "R" (5))(E. D. La. April 4, 2006).

Claimant was unsuccessful in recovering treble damages under RICO after alleging that the employer's inconsistent positions concerning the claimant's status constituted mail fraud. Claimant alleged that the employer took inconsistent positions concerning his status in order to save money and that employer's change of position caused him to lose his LHWCA benefits. Shortly after the claimant's injury, the employer filed an LS-202 First Injury Report and a subsidiary of employer's longshore carrier began paying compensation. When the claimant filed third party suits in state court, the employer and its carrier intervened and asserted that they were entitled to reimbursement and indemnity under the Louisiana state workers' compensation statute. Eventually benefits were terminated. In proceedings before an ALJ, the employer alleged that the claimant was not entitled to coverage because he was a Jones Act seaman. In rejecting the claim, the court found that the claimant had failed to prove all elements of a RICO claim.

[Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones ACT—Generally]

D. Benefits Review Board Decisions

Morgan v.Cascade General, Inc., ___ BRBS ___ (BRB No. 05-0512)(March 8, 2006).

Here the Board overturned the ALJ's Order Granting Summary Dismissal of Claim for Death Benefits and remanded for an evidentiary hearing on the issue of the timeliness of the claimant's claim. The Board held that the claimant raised the existence of a genuine issue of material fact by supplying her affidavit stating that she was unaware for several months after the death of her husband, of the relationship between all the events and the work injury.

The claimant's husband, who had sustained a knee injury during the course of his employment, died in a car crash caused by his own inebriation. The claimant contends that her husband's death was due to his drinking which in turn was due to depression resulting from the knee injury.

With its Motion for Summary Dismissal, the employer had filed portions of the claimant's deposition stating that she was not surprised when she was told how her

husband had died, as he had been drinking a lot due to depression. The employer alleged that the depressed Condition was due to the work injury and that the claimant did not file a claim within one year of the death, as required by Section 13(a).

As to a secondary issue of whether the claimant was entitled to the two year statute of limitations for occupational diseases, the Board found that it need not decide whether depression and alcoholism are occupational diseases within the meaning of the LHWCA since the extended statute of limitations applies only to an occupational disease which "does not immediately result in death." In this case, the Board noted, the ALJ properly found that the car crash that claimed the employee's life was a traumatic event.

[Topics 13.1 Time For Filing of Claim—Starting the Statute of Limitations; 13.3 Time For Filing of Claim—Awareness Standard; Time For Filing of Claim—Effect of Diagnosis/Report]

[Ed. Note: When the Board originally issued the Order on the following case on February 28, 2006, it inadvertently failed to stamp the order "PUBLISHED."**]**

Pearson v. Jered Brown Brothers, ___ BRBS ___ (BRB No. 04-0964)(Feb. 28, 2006) (*En banc*).

This is an *en banc* denial of the employer's Motion for Reconsideration. In its original decision, *Pearson v. Jered Brown Brothers*, 39 BRBS 59 (2005), the Board held that the ALJ erred in applying **Fourth Circuit** precedent to the situs issue when this case arose in the **Eleventh Circuit**. In reversing the ALJ's finding that the claimant's injury did not occur on a covered situs, the Board had held that the undisputed facts established both the geographical and functional nexus required.

The Board, *en banc*, now notes that the **Eleventh Circuit** has explicitly acknowledged the differences in the **Fourth Circuit** and **Fifth Circuits'** construction of the term "adjoining" in Section 3(a) and specifically applied the less restrictive approach adopted by the **Fifth Circuit** in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (**5th Cir**. 1980)(*En banc*), *cert. denied*, 452 **U.S.** 905 (1981), in rendering its decision. The Board found that, as the employer fabricates ship components and cranes used to load and unload vessels, its facility adjoining the Brunswick River satisfies the "maritime function" requirement of *Winchester*. Additionally, the Board found that the use of the river to test pontoons, in addition to the small percentage of goods actually shipped via the river (1%), is sufficient to establish that employer's facility has the requisite geographic nexus with the river.

[Topic 1.6.2 Jurisdiction/Coverage—SITUS-"Over land"]

McGee v. Northrop Grumman Ship Systems, Inc., (Unpublished) (BRB No. 05-0533)(March 20, 2006).

This matter involves the application of Section 10(a). The ALJ accepted the parties' stipulation that Section 10(a) should apply and that the claimant worked 234 days as a five day per week worker, and had 29 additional paid vacation days and holidays. On appeal, the claimant argues that adding the 29 additional days to get 263 days worked is flawed because it exceeds the number of days available to a five day worker (260) and thus actually reduces the claimant's average weekly wage below his actual earnings.

The Board rejected the claimant's argument that only the days the claimant actually worked are included under Section 10(a). "Consistent with *Wooley [v. Ingalls Shipbuilding, Inc.,* 33 BRBS 88 (1999)(*decision on recon.*) *aff'd*, 204 F.3d 616, 34 BRBS 12 (CRT) (**5th Cir.** 2000), vacation days and holidays paid in lieu of regular work days are properly included in the Section 10(a) calculation." However, the Board found that there was merit to the claimant's argument that the resulting calculation of 263 days worked is flawed because it exceeds the number of days available to a five day worker and remanded the case for further consideration.

The Board noted that *Wooley* leaves it to the ALJ to determine whether a vacation day was paid in lieu of a work day or whether the claimant simply received additional pay. The Board found that in the instant case, the ALJ did not make the requisite findings but relied on an agreement between the parties as to the number of vacation days and holidays. The Board stated that a stipulation which evinces an incorrect application of law is not binding. *See Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

[Topics 10.1.3 Determination of Pay—Average Weekly Wage--Definition of Wages; 10.2.1 Determination of Pay—Average Weekly Wage--SECTION 10(a)--Generally]

II. Black Lung Benefits Act

Benefits Review Board

In a published decision, *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-__, BRB No. 05-0570 BLA (Apr. 28, 2005), the Board made the following holdings:

Two medical opinions defined. The Board agreed with the administrative law judge's finding that Dr. Broudy's 2001 and 2002 physical examination reports constituted two separate medical reports for purposes of Employer's affirmative case evidentiary limitations. The Board stated:

> Where a physician's reports constitute two separate written assessments of the claimant's pulmonary condition at two different times, an administrative law judge may properly decline to construe them as a single medical report under the evidentiary limitations.

Exclusion of evidence. On the other hand, the Board held that it was improper for the administrative law judge to strike all of a party's evidence in a category on grounds that the party submitted evidence in excess of the limitations at § 725.414. The Board stated:

> Although Section 725.456(b)(1) provides that medical evidence in excess of the limitations contained in Section 725.414 shall not be admitted into the hearing record in the absence of good cause, the regulations do not authorize an administrative law judge to exclude properly submitted evidence based upon the fact that a party has submitted excessive evidence. Consequently, an administrative law judge should not exclude all of a party's submitted evidence merely because that party submits evidence that exceeds the limitations set forth at 20 C.F.R. § 725.414.

Slip op. at pp. 5-6.

Waiver of "good cause" argument. In its appeal brief, Employer argued that the excess evidence should be admitted on grounds of "good cause." However, the Board agreed with the administrative law judge in finding that Employer waived this argument when it did not argue "good cause" at the time it sought admission of the excess evidence at the hearing.

Applicability of evidentiary limitations to district director. Finally, in a footnote, the Board cited to § 725.414(a)(3)(iii) and noted that, in cases where no responsible operator has been identified as potentially liable, the district director is entitled to exercise the rights of a responsible operator, *i.e.* the right to submit two medical opinions and two sets of objective testing, as affirmative evidence. However, if there is a designated operator, then the district director is not automatically entitled to exercise the rights of the responsible operator.

[**medical opinion defined; exclusion of evidence; "good cause" waived; evidentiary limitations on district director**]

By published decision in *Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-___, BRB No. 05-0595 BLA (Mar. 28, 2005), the Board held that, under § 725.414, each party is entitled to submit one x-ray *interpretation* for each x-ray *interpretation* offered by the opposing party. Under the facts of the case, Claimant offered two *interpretations* of a single x-ray *study*. The administrative law judge permitted one *rebuttal interpretation* of the study because § 725.414(a)(3)(ii) provides that Employer may "submit, in rebuttal of the case presented by the claimant, no more than one physician's *interpretation* of each chest X-ray . . . submitted by the claimant under paragraph (a)(2)(i) . . .." (emphasis added). Since Claimant submitted two interpretations of one study, the administrative law judge reasoned that the plain language of the regulations dictated that Employer was entitled to only one rebuttal interpretation of the study.

In vacating the judge's decision, the Board adopted the Director's position on appeal and held that, under the circumstances of the case and consistent with the *intent* of the chest x-ray rebuttal provisions at § 725.414(a)(3)(ii), Employer should be permitted to submit two rebuttal interpretations of the study.

[**rebuttal provisions at § 725.414, interpretation of**]

In *Fields v. Shamrock Coal Co.*, BRB Nos. 05-0603 BLA and 05-0603 BLA-A (Feb. 22, 2006) (unpub.), a case arising within the Sixth Circuit, the administrative law judge properly concluded that a 1993 medical opinion from Dr. Baker was insufficient to trigger the three year statute of limitations period for filing claims at 20 C.F.R. § 725.308 using the standard set forth in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In particular, Dr. Baker diagnosed the presence of coal workers' pneumoconiosis and concluded that the miner "should have no further exposure to coal dust" and that he would "have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions." The Board stated that, "[b]ecause a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment . . . Dr. Baker's opinion . . . is insufficient to support a finding of total disability." As a result, the opinion did not satisfy the requirements at § 725.308 for triggering the statute of limitations period.

[**three year statute of limitations**]