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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 197 April 2008

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I. Longshore

A. U.S. Circuit Courts of Appeals

***Mar-Con/Thunder Crane, Inc. v. Nelson*, 2008 WL 1709006, *1 (5th Cir. Apr. 10, 2008).**

The Fifth Circuit upheld the Board's finding that an ALJ had correctly determined the claimant's Average Weekly Wage (AWW) using 33 U.S.C. § 910(c). The petitioner argued that the ALJ erred in its AWW calculation because it was based exclusively on the claimant's salary earned during his extremely brief employment with the petitioner.

The Court noted the broad discretion an ALJ has "in deciding what reflects the earning capacity of the injured worker," and held that the ALJ reasonably concluded that the claimant's salary at the time he was injured, despite the short duration of his employment, best indicated his earning capacity (quoting *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

B. Benefits Review Board

***G.K. v. Matson Terminals, Inc.*, (BRB Nos. 05-0893 and 07-0643)(Apr. 18, 2008).**

The claimant in this case worked for employer between 1964 and 1995 as a container maintenance repairman and then from 1995 until

he retired on November 1, 2002 as a security guard. He was exposed to loud noise throughout his employment period, and, with the exception of 1990 and 1994, the claimant received annual audiograms from 1978 to 2002 at employer's request. On February 14, 2002, before retirement, the claimant was diagnosed as having a 48.4 percent binaural hearing loss. On January 20, 2003, after retirement, the claimant was shown to have a 53.1 percent binaural hearing loss.

Matson Terminals, Inc. appealed a June 25, 2005 ALJ decision and order in which the ALJ denied relief under Section 8(f) of the Act but approved stipulations for a compensation order based on a 53.1 percent binaural hearing loss and awarded attorney fees. While the matter was pending before the Board, the employer requested the case be remanded for modification proceedings pursuant to Section 22 of the Act. On remand, the ALJ granted modification and awarded Special Fund relief in an order dated May 30, 2006 based on his determination that the prior decision was a result of a mistake in his determination of fact regarding whether the 2002 and 2003 audiograms reflected results which were within the range of test/retest variability.

The Director thereafter appealed the ALJ's award of Special Fund relief, but then, like the employer, requested the claim be remanded to the ALJ for modification of the May 30, 2006 order. The ALJ subsequently granted the Director's request for modification and once again found that the employer was not entitled to Section 8(f) relief based on newly submitted evidence which, to the ALJ, established that there was no substantial or material difference in the results of a 2002 and a 2003 audiogram. The ALJ further rejected employer's alternate contention that Section 8(f) relief could be established based on pre-2002 audiograms of record. The employer then appealed the original June 25, 2006 decision and order, as well as the May 30, 2006 order, both of which had denied Special Fund relief.

On appeal, the Board rejected employers argument that the ALJ abused his discretion by admitting evidence provided to employer by the Director one day prior to the formal hearing in violation of the ALJ's pre-hearing order inasmuch as employer had been given the opportunity to respond to the evidence post-hearing and had actual or constructive notice of the evidence long before the hearing. *G.K. v. Matson Terminals, Inc.*, *supra*, slip op. at 5.

The Board similarly rejected employers contention that Section 702.321 of the regulations establishes the technical requirements for

presumptive evidence of the extent of a claimant's hearing loss and that the ALJ thus erred in considering medical opinion evidence addressing the test/retest variability between the 2002 and 2003 audiograms. *Id*. at 5-6. The evidence at issue consisted of three physicians' reports which concluded that the 2002 and 2003 audiogram results were within the range of test/retest variability and that the 2003 audiogram results thus did not represent an increase in claimant's hearing loss since the 2002 audiogram. *Id*. at 6-7. According to the Board, Section 8(c)(13)(C) of the Act and Section 702.441(b) of the regulations establish standards for determining hearing loss and for establishing presumptive evidence of hearing loss, and nothing in the statute or regulation precludes an expert from interpreting audiometric data or rendering opinions relevant to whether the contribution element for Section 8(f) relief has been satisfied. *Id*. at 7.

With respect to employers argument that the ALJ erred by allowing the Director to submit additional evidence after the Director sought modification of the order awarding Special Fund relief, the Board noted that the modification process under Section 22 of the Act is "flexible, easily invoked, and intended to secure accuracy and justice under the Act." *Id*. at 8 (citations omitted). The Board thus held that the ALJ properly granted the Director's request to present additional evidence on modification. *Ibid*. The Board similarly rejected employer's contention that the new evidence was cumulative and submitted only for the purpose of allowing the Director to advance a new legal theory, and it affirmed the ALJ's denial of Section 8(f) relief based on his determination that the additional evidence established that the claimant did not sustain a second injury between 2002 and 2003. *Id*. at 8-9.

Finally, the Board noted that the ALJ had denied Section 8(f) relief in part based on his finding that the pre-2002 audiograms and interpreting reports of record did not comply with the requirements of Sections 702.321 and 702.441 of the regulations. *Id*. at 9. The Board agreed with employer that the ALJ erred in his interpretation of the regulations as requiring that employer provide claimant with a copy of the audiogram and interpreting report in order for the test to be valid for purposes of establish entitlement to Section 8(f) relief. Citing *Fucci v. General Dynamics Corp*., 23 BRBS 161 (1990) (Brown, J., dissenting), the Board noted that it has rejected the contention that a claimant must be informed of the prior test results for an employer to be entitled to Section 8(f) relief. *G.K. v. Matson Terminals, Inc.*, *supra*, slip op. at 10. The Board similarly cited *Harris v. Bath Iron*

Works Corp., ___ BRBS ___, BRB No. 07-0739 (Mar. 28, 2008), noting that it had recently rejected the Director's contention that an employer's entitlement to Section 8(f) relief must be predicated on an audiogram that meets all of the criteria of Section 702.441(b)-(d).

Based on the foregoing error, the Board vacated the ALJ's denial of Section 8(f) relief and remanded the case for: (1) an evaluation of the 1978 to 2000 audiograms; (2) a determination regarding the extent of claimant's manifest pre-existing hearing loss; and (3) a determination regarding whether the claimant's ultimate hearing loss is materially and substantially greater as a result of the pre-existing loss than it would be from the second injury alone. *Id*. at 11.

[Section 8(f) Special Fund relief; Section 22 modification; presumptive evidence establishing hearing loss; admissibility of evidence in violation of prehearing order; cumulative evidence]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Sewell Coal Co. v. Director, OWCP [Dempsey]*, ___ F.3d ___, Case No. 06-1592 (4th Cir. Apr. 22, 2008), the Fourth Circuit concluded that the three year statute of limitations at 20 C.F.R. § 725.308 applies to subsequent claims filed under 20 C.F.R. § 725.309. In so holding, the court noted that "neither the statute, 30 U.S.C.A. § 932(f), nor the regulation makes any distinction between initial or subsequent claims." As a result, the administrative law judge's award of benefits was vacated and the claim was remanded for the judge to determine whether it was timely filed. In a footnote, the court noted that the judge should also determine "whether or not the statute of limitations has been tolled."

[**statute of limitations applicable to subsequent claims**]

In *B&G Mining, Inc. v. Director, OWCP [Bentley]*, ___ F.3d ___, Case No. 06-0304 BLA (6th Cir. Apr. 16, 2008), the court affirmed awards of attorney's fees by the district director, administrative law judge, and Benefits Review Board in the amount of $16,618.75 for 69.25 hours of work. The approved hourly rates were $200.00 per hour by the district director, $250.00 per hour by the administrative

law judge, and $225.00 per hour by the Benefits Review Board. In approving the awards, the court upheld the adjudicators' use of the "lodestar" method in calculating fees, *i.e.* a reasonable hourly rate times the number of hours reasonably expended in successful prosecution of the claim.

To determine the appropriate hourly rate, the Sixth Circuit noted that "courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." The court further stated that "[t]he appropriate rate, therefore, is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." Finally, the court concluded that "[a]n adjustment can then be made to the lodestar rate of the attorney's efforts resulted in 'exceptional success.'"

In upholding the approved hourly rates in this case, the court reasoned that fee determinations in other claims, while not binding, may provide guidance:

> As a general proposition, rates awarded in other cases do not set the prevailing market rate—only the market can do that. Rates from prior cases can, however, provide some inferential evidence of what a market rate is, just as state-bar surveys of rates provide evidence of a market rate, but themselves do not set the rate. (citations omitted).

The court stressed that "'the market' for legal counsel is not a commodity market with a single price, but rather a service market with various price points based on education, experience, specialty, complexity, etc." The court declined to find that the adjudicators abused their discretion in awarding different hourly rates at different levels of prosecution of the claim.

Employer submitted evidence that attorneys performing work for insurance companies in black lung claims typically earn $125.00 per hour such that Claimant's counsel should not be entitled to a higher hourly rate. The court disagreed and stated:

> [T]he rates received by (insurance) attorneys are undoubtedly affected by several factors, including volume of work and prompt payment. Attorneys who represent claimants, on the other hand, likely do not benefit from the

> same high volume of work. Moreover, as evidenced by the briefs and letters submitted by claimant's attorney asking for expedited payment, attorneys who represent claimants often face a significant delay in getting paid. A delay in payment can justify a higher hourly rate.

Turning to the number of hours requested, the court upheld the administrative law judge's reduction of time spent "receiving and filing correspondence," as this constituted clerical work. Reviewing correspondence, on the other hand, "can constitute legal work" and may be billed.

The court then upheld use of the "quarter hour" billing method and concluded that the regulatory provisions at 20 C.F.R. § 802.203(d)(3) require that fees be submitted in such increments. The court noted that "[w]hile attorneys who record their time in quarter-hour increments might overbill their clients, attorneys who bill in tenth-hour increments might also overbill—the risk exists under both methods." The court concluded that "[a]s long as the total number of billable hours is reasonable in relation to the work performed, the award should be affirmed."

[**attorneys' fees and costs**]

B. Benefits Review Board

By unpublished order in *K.J.M. v. Clinchfield Coal Co.*, BRB No. 07-0655 BLA (Apr. 30, 2008)(unpub.), the Board noted that the administrative law judge "extrapolated the appropriate FEV1 for a miner who was 70.1 inches tall and 75 years old from the table values for a 71 year old male of that height" in accordance with the Board's earlier remand instructions in the case. However, the Board subsequently changed in its position and stated:

> In a case recently decided by the Board, . . . the majority of the panel deferred to the position of the Director, Office of Workers' Compensation Programs (the Director), that it was improper for the administrative law judge to take judicial notice of a 'linear mathematical formula' and then use it to extrapolate an FEV1 value for a male over 71 years old. *M.D.R. v. Peabody Coal Co.,* BRB No. 06-0923 BLA, slip op. 8-9 (Dec. 23, 2007)(unpub.) (Smith, J., concurring and dissenting). The Director asserted that the

> formula assumes disability determinations for older miners, but is not supported by any medical evidence in the record. (citation omitted). The majority also concurred with the Director's position in *M.D.R.*, that it was appropriate to instruct the administrative law judge to treat the pulmonary function studies in question as qualifying because the results were below the table values for a 71 year old male. (citation omitted).

Given conflicting positions on the issue and because the Director "is the party responsible for the proper administration of the Federal Coal Mine Health and Safety Act of 1969," the Board ordered the Director in *K.J.M.* to submit a brief on appeal addressing "whether an administrative law judge can extrapolate appropriate pulmonary function study values for miners who are more than 71 years old and, if not, whether an administrative law judge should treat such studies as qualifying if the values are qualifying for a 71 year old."

[**calculating ventilatory study values for miners over 71 years old, appeal pending with the Board**]