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***RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 281***
***May 2017***

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## I. Longshore and Harbor Workers' Compensation Act and Related Acts

### A. U.S. Circuit Courts of Appeals[1]

***Koch v. United States*, 857 F.3d 267 (5th Cir. 2017).**

The Fifth Circuit affirmed the district court's judgment in favor of the plaintiffs in a tort action brought pursuant to the third-party liability provision of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b).

On February 2, 2012, in the course of his employment as a foreman with Economy Iron Works, Ricky Koch fell on a staircase while participating in a walkthrough of a vessel owned by the United States in order to submit a bid for his employer on areas of the vessel in need of repair. When walking down a flight of stairs that was not fully illuminated, Mr. Koch missed the last step and fell backwards, striking his head, neck, and shoulders on the bulkhead. Mr. Koch and his wife brought action in federal district court against the United States under Section 5(b) of the LHWCA, alleging that the Government's negligent failure to provide adequate lighting of the stairwell caused Mr. Koch's accidental fall and his resulting disability.

It was undisputed that, prior to his injury, Mr. Koch suffered from osteoarthritic knee and degenerative spinal conditions. In 2002, he was diagnosed as suffering from degenerative disc disease. In 2004, he was diagnosed with multiple joint arthritis. In 2005, he was diagnosed with generalized osteoarthritis, and it was determined that he needed total knee replacement. In 2007, Mr. Koch's doctor recorded that he had a history of progressive lower back pain and documented carpal tunnel syndrome. In 2008, he underwent surgery for cervical spinal fusion of his C3-4 and C4-5. In January 2012, claimant's doctor noted that he needed total knee replacement surgery "in the worst way."

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *__) pertain to the cases being summarized and refer to the Westlaw identifier.

After his February 2, 2012 accident, Mr. Koch saw an orthopedic surgeon who concluded that his fall exacerbated his preexisting osteoarthritic conditions and caused the urgent need for surgical bilateral knee replacements. He then saw a neurosurgeon who concluded that claimant herniated his C6-7 disc and aggravated his cervical spondylosis in his C5-6 discs as a result of his fall. The surgeon performed an anterior cervical discectomy and fusion at C5-6 and C6-7 on August 17, 2012. Following this surgery, Mr. Koch experienced post-surgery complications, including carpal tunnel, which were worsened by his neck problems. On April 30, 2013, he underwent a right carpal tunnel release. On July 14, 2014, he underwent a right total knee replacement. At the time of the trial, claimant was scheduled to undergo left knee replacement and was recommended a posterior approach cervical fusion and a left carpal tunnel release.

Following a bench trial, the district court determined that negligence attributable to the Government—failure to provide adequate lighting of a stairwell—was the factual and legal cause of Koch's fall, resulting harm, and permanent disability and awarded the plaintiffs $2.83 million in damages, including $1.3 million for pain and suffering. In so holding, the district court rejected the Government's argument that Mr. Koch had been disabled by his preexisting conditions prior to his accident. Government appealed.

The Fifth Circuit initially affirmed the district court's finding that Mr. Koch was entitled to recover for all of his harm and disability, without any discount or reduction because of his preexisting osteoarthritic knee and degenerative spinal conditions. It rejected the Government's contention that the district court applied the wrong legal standard with regard to Mr. Koch' preexisting medical conditions. The district court correctly applied the following principles set forth in *Maurer v. United States*, 688 F.2d 98 (2d Cir. 1981):

> "It is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim. The defendant takes the plaintiff as he finds him. A plaintiff's recovery for damages caused by a defendant's wrongful act may not be proportionately reduced because of a preexisting weakness or susceptibility to injury such as an osteoarthritic condition or a weakness caused by a previous injury.
>
> However, there are two exceptions to the general rule. First, when a plaintiff is incapacitated or disabled prior to an accident, the defendant is liable only for the additional harm or aggravation that he caused. Second, when a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury, but the burden of proof in such cases is upon the defendant to prove the extent of the damages that the preexisting condition would inevitably have caused."

*Koch*, 857 F.3d at 273 (quoting *Maurer*, 688 F.2d 98 at 99-100)(internal citations omitted).

Applying these principles, the district court properly concluded that, because the defendant's negligent failure to safely illumine the stairwell was the factual and legal cause of Koch's accidental fall and its disabling consequences, the Government is fully liable for his resulting harm and disability, even though Mr. Koch's preexisting conditions made the consequences of the Government's negligence more severe than they would have been for an ordinary victim. The district court did not err in finding that neither of the two exceptions articulated in *Maurer* applies in the present case. The first exception does not apply because claimant "was not disabled or incapacitated *before* the accident," and "the

second exception does not apply here because the Government did not carry its burden to prove the extent, if any, of the damages that the preexisting conditions would *inevitably* have caused even in the absence of the accident." *Id*. The Government asserted that *Maurer* was inapplicable because it is an "eggshell skull" plaintiff case which, it argued, only applies if the plaintiff's preexisting condition had not manifested itself prior to the accident. The Fifth Circuit found that this argument was without merit, as the Government did not cite any authority and the court found no reported case so limiting the rule.

The Fifth Circuit further affirmed the district court's finding that Mr. Koch was not disabled prior to the accident as a result of his preexisting spinal condition and his osteoarthritic knee condition. A finding of disability *vel non* is a finding of fact. Thus, pursuant to Federal Rule of Civil Procedure 52(a), the district court's finding on this issue could only be set aside if clearly erroneous. Further, "[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Koch*, 857 F.3d at 275 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). In applying this standard of review,

> "'[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' . . . Similarly, 'when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.'"

*Koch*, 857 F.3d at 275-76 (quoting *Anderson*, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In this case, the district court's finding that Mr. Koch had not been disabled by his preexisting conditions prior to his accident was not clearly erroneous. The district court properly considered the testimony of claimant, his wife, his supervisor, his treating physicians, and the Government's expert witness in finding that claimant was not disabled prior to the accident. The district court's findings were a permissible view of the evidence that cannot be clearly erroneous.

Finally, the Fifth Circuit rejected the Government's contention that the district court erred in limiting the testimony of its expert, Dr. Hagemann, and by crediting the testimony of Mr. Koch's treating physicians over that of Dr. Hagemann because of that limitation. Evidentiary rulings of the district court are viewed under the deferential abuse-of-discretion standard. In this case, the district court did not abuse its discretion in limiting Dr. Hagemann's testimony. Dr. Hagemann examined Mr. Koch once and reviewed some of his medical records in preparing a pretrial report. Before his pretrial report, Dr. Hagemann had not personally reviewed the MRI films but based his opinion on the radiologist's reports of them. By the time of the trial, Dr. Hagemann had reviewed the films, and the Government sought to have him further testify on the films. The district court sustained the plaintiffs' counsel's objection to the enhanced testimony on the grounds that it was an attempt to amend the pretrial report after the discovery deadline had passed. The Government moved to make a proffer of the evidence, which the district court would have permitted at the end of the trial. However, the Government did not make the proffer. The Fifth Circuit concluded that

> ". . . the district court did not abuse its discretion in ruling to exclude the additional testimony… particularly in light of the court's offer to allow the Government to make a proffer of it at the end of the trial. But even if we were to assume, arguendo, that

> the district court erred . . ., we would still not reverse the district court's judgment because, under the circumstances, such an error clearly appears to have been be [sic] harmless. It was plain that even without Dr. Hagemann's excluded testimony on the subject that he and the radiologist, based on their reading of Koch's MRI films, differed from [Mr. Koch's physician's] findings that Koch sustained a herniated disc at C6–7 and suffered disabling exacerbating trauma as a result of his accident. But [Mr. Koch's physician's] opinion as the treating neurosurgeon who had, inter alia, performed two surgeries on Koch's cervical spine, was based on many other factors as well as his reading of the MRI films."

*Koch*, 857 F.3d at 277. Thus, the district court's decision to credit Mr. Koch's physician's testimony over the Government's expert was not unreasonable or clear error.

**[Topic 5.2 SECTION 5(b) – THIRD PARTY LIABILITY; Topic 23.2 ADMISSION OF EVIDENCE]**

### B. Benefits Review Board

[there are no published Board decisions to report]

## II. Black Lung Benefits Act

### A. U.S. Circuit Courts of Appeals

In *Grayson Coal & Stone Co. v. Teague*, ___ Fed. Appx. ___, 2017 WL 1732239 (6th Cir. May 3, 2017) (unpub.), the Sixth Circuit addressed an appeal involving a subsequent claim filed on April 22, 2010. Below, the Benefits Review Board had affirmed the administrative law judge's ("ALJ") award of benefits based on a finding that Claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment.

On appeal, Employer first challenged the ALJ's failure to render a specific finding as to Claimant's smoking history, arguing that such failure amounted to a violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §557. In addressing this issue, the ALJ found that Claimant "smoked cigarettes for a substantial amount of time" and addressed the conflicting and varied evidence of record on the issue of Claimant's smoking history. Before reaching his finding, the ALJ noted "Claimant's reported smoking history is varied" and that he was unable to "make an exact finding on Claimant's smoking history." The court found no merit to Employer's argument that a more specific smoking history finding was required. Indeed, the court noted its concern that "a more specific finding would have potentially misconstrued the evidence" and concluded that, based on the evidence that was before him, the ALJ conducted "a thoughtful analysis of the consistencies and inconsistencies in the record," while acknowledging "that the evidence pointed to a 'substantial' smoking history." The ALJ did not lay out an "inaccurate history" or fail to explain how he reached his finding. Therefore, the court concluded that the ALJ met his burden of determining "whether the medical evidence before him [was] sufficiently documented and reasoned, and to weigh the evidence accordingly."

Employer next challenged the ALJ's decision to credit Dr. Habre's report as "well-reasoned" in finding Claimant established the existence of legal pneumoconiosis. The court rejected this argument, concluding instead that the ALJ's finding was supported by substantial evidence, as he weighed "Dr. Habre's opinion in light of all the medical evidence presented and reach[ed] a conclusion supported by 'such relevant evidence as a reasonable mind might accept as adequate.'"

In light of the above, the court affirmed the Board's Decision and Order.

**[Decision of the Administrative Law Judge: Compliance with APA's requirements]**

In *Riley v. Island Creek Coal Co.*, ___ Fed. Appx. ___, 2017 WL 1821424 (4th Cir. May 5, 2017) (unpub.), which involved a claimant's appeal in a survivor's claim that had been denied below, Claimant contended that the ALJ "erroneously failed to consider relevant medical evidence related to [the miner's] final hospitalization in December 2002." Claimant further argued that this error was not harmless because the ALJ's "omission caused her to underestimate the extent of [the miner's] atrial fibrillation, hypoxemia, and chronic obstructive pulmonary disease" which, in turn, affected her "determination that Claimant failed to establish that [the miner's] death was caused or hastened by pneumoconiosis." In response, Employer alleged that any error committed by the ALJ was harmless.

The court concluded that a review of the ALJ's analysis showed "that she failed to consider the records from [the miner's] final hospitalization in December 2002, as she erroneously believed that they were not contained in the record before her." The court determined that it could not "conclude that the December 2002 hospitalization records could not have impacted her evaluation of the competing medical opinions of record or her decision on the penultimate causation issue." Therefore, a remand was warranted in order

to allow the ALJ "to consider the impact of the records of [the miner's] final hospitalization on her evaluation of the evidence."

In light of the above, the court granted the petition for review, vacated the Board's Decision and Order, and remanded the matter for further proceedings.

**[Survivors' claims filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982: Death due to pneumoconiosis]**

In *Energy West Mining Co. v. Blackburn*, 857 F.3d 817 (10th Cir. 2017), the Tenth Circuit addressed Employer's appeal in a deceased miner's claim filed on November 5, 2009.

In *Blackburn*, the first ALJ assigned to the case denied benefits, but on appeal the Board vacated the denial and remanded the matter to provide the ALJ with an opportunity to further explain his weighing of the medical opinion evidence. The case was reassigned on remand, and the new ALJ awarded benefits based on the rebuttable 15-year presumption at Section 411(c)(4). Employer appealed the award, and the Board affirmed. Employer then appealed to the Tenth Circuit.

In its decision, the court denied Employer's petition for review and affirmed the ALJ's decision awarding benefits on remand. The court initially rejected Employer's contention that the Board erred in vacating the first ALJ's decision. It then addressed the following six challenges Employer made to the award on remand: (1) that the second ALJ ruled beyond the scope of the Board's remand, (2) that his decision on remand was not supported by substantial evidence, (3) that he interjected his own medical opinions for the opinions of Employer's physicians, (4) that he erred in relying on the preamble to the 2001 amendments to the black lung regulations, (5) that he erred in being "overly generous" when considering the opinion of the physician who believed that the miner's disabling emphysema was caused by the miner's coal mine work, and (6) that he applied the incorrect legal standard in determining whether Employer rebutted the 15-year presumption. The court rejected each challenge in turn and thus denied the petition for review.

**[Decision of the Administrative Law Judge: Compliance with APA's requirements; The preamble to the amended regulations: Tenth Circuit [new]]**

**B. Benefits Review Board**

In *Tackett v. ICG Knott County, LLC*, BRB No. 16-0376 BLA (May 15, 2017) (unpub.), a case arising within the jurisdiction of the Sixth Circuit, the Board addressed Employer's appeal in a miner's claim filed on October 18, 2010. In *Tackett*, the ALJ awarded benefits based on a finding that Claimant had invoked the irrebuttable presumption of total disability due to pneumoconiosis by establishing the existence of complicated pneumoconiosis arising out of his coal mine employment. *See* 20 C.F.R. §§718.203, 304.

In determining whether the existence of complicated pneumoconiosis was established, the ALJ considered several different types of evidence. He found that the CT scan evidence was positive for clinical pneumoconiosis but negative for complicated pneumoconiosis. Similarly, he found that the three medical reports of record diagnosed simple, though not complicated, pneumoconiosis. There was no biopsy evidence of record. The ALJ also considered the x-ray evidence, which was comprised of 7 readings of 4 x-rays taken in December 2010, August 2012, September 2012, and February 2015. This most recent x-ray was read by three dually-qualified physicians. Drs. Crum and Seaman diagnosed simple and complicated pneumoconiosis based on this x-ray, while Dr. Meyer

interpreted the x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. The ALJ found that "the positive readings by Dr. Crum and Dr. Seaman overwhelm Dr. Meyer's negative [reading]," and thus found the x-ray evidence to be "preponderantly positive for complicated pneumoconiosis." ALJ's D&O at 10. Overall, the ALJ credited the February 2015 x-ray as outweighing the other contrary evidence to find the existence of complicated pneumoconiosis established, thereby relying on the x-ray's recency and the fact that the x-ray and CT scan evidence the physicians relied on in rendering their opinions predated this x-ray "by nearly three years and longer." *Id*. at 10, 12.

On appeal, Employer argued that the ALJ did not sufficiently explain how he weighed the x-ray evidence. Specifically concerning the February 2015 x-ray, Employer stated "that it 'urged the [administrative law judge] in its post-hearing brief to consider prestigious academic appointments in radiology when resolving the conflicts in the chest x-ray readings.'" *Tackett*, slip op. at 4, quoting Employer's Brief at 10. According to Employer, "academic credentials 'may not compel an outcome, but they merit meaningful consideration when the [administrative law judge] resolves the conflicts in the chest x-ray readings.'" Slip op. at 4, quoting Employer's Brief at 12.

The Board agreed, to the extent that the ALJ did not specifically note his consideration of Dr. Meyer's credentials beyond the physician being dually-qualified. At the outset, the Board noted that an ALJ "'should consider any relevant factor in assessing a physician's credibility, and each party may prove or refute the relevance of that factor.'" Slip op. at 4, quoting 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). The Board further pointed out that "[a] physician's professorship in radiology is one such relevant factor." Slip op. at 4, citing *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). The Board concluded that the ALJ's opinion did not comply with the APA, as he "did not indicate that he gave consideration to all of the radiological credentials of the physicians in rendering his findings at 20 C.F.R. §718.304(a) . . . ." Slip op. at 4. Accordingly, the Board vacated the ALJ's finding that the x-ray evidence established the existence of complicated pneumoconiosis and remanded the matter for further consideration.

The Board also gave further guidance to the ALJ in how to weigh the readings of the February 2015 x-ray:

> On remand, the administrative law judge must explain the weight accorded the conflicting readings of the February 11, 2015 x-ray, taking into account all of the relevant radiological qualifications of each physician. While the administrative law judge may give greater weight to the interpretations of a physician based upon his professorship in radiology, he is not required to do so. *See Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). Rather, the administrative law judge has discretion to determine the weight to accord Dr. Meyer's credentials and is required only to explain his findings in accordance with the APA. *See Staton v. Norfolk & W. Ry. Co*., 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); [*Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989)].

*Id.* at 5.

Finally, in the interest of judicial economy, the Board addressed and rejected Employer's contention that the ALJ "did not properly consider the contrary evidence and improperly relied on the most recent x-ray in determining whether claimant has complicated

pneumoconiosis." *Id.* Accordingly, the Board concluded that, if on remand the ALJ finds "the February 11, 2015 x-ray [to be] positive for complicated pneumoconiosis, he may rationally accord less weight to the contrary evidence." *Id.* at 5-6.

**[Elements of the x-ray report: Qualifications of the physician]**