U.S. Department of Labor

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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 306
May 2020

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

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

***Troutman v. Seaboard Atlantic Ltd.*, 958 F.3d 1143 (11th Cir. 2020).**

Longshoreman sued shipowners for negligence under Section 905(b) of the LHWCA, seeking to hold the shipowners liable for injuries he sustained when he tripped on an elevated walkway and fell to the deck below. The district court granted the shipowners' motion for summary judgment. Longshoreman appealed.

The Eleventh Circuit affirmed. As a matter of first impression, the court held that, generally, a shipowner does not breach its duty to turn over a vessel in safe condition when the injurious hazard was open and obvious and could have been avoided by a reasonably competent stevedore. Although this rule is not absolute, plaintiff could not show any exception to the rule.

In this case, the elevated walkway with six-to-eight foot drop on ship's upper deck was an open and obvious hazard that the longshoreman could have avoided by waiting to use the walkway until the bay below it was filled with cargo topping out even with the walkway. He had worked on the vessel over 20 times and knew that the walkway was unsafe and that he was not obligated to put himself in danger to perform his job. Thus, the exposed walkway was an open and obvious hazard that could have been avoided with the exercise of reasonable care. Accordingly, the district court properly dismissed the claim.

[Section 905(b) - THIRD PARTY LIABILITY]

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[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, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *__).

B. Benefits Review Board

No decisions to report.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

There were no published or unpublished black lung decisions in May.

B. Benefits Review Board

There were no published BRB black lung decisions in May. Brief summaries of some of the unpublished decisions are below:

Lucia-related Decisions

In *Cunningham v. Prospect Mining & Development, Inc.*, BRB No. 19-0217 BLA (May 8, 2020) (unpub.), Employer argued that the ALJ did not have authority to decide the claim. It made three arguments in support of its position. First, the Employer alleged that the Secretary's ratification was insufficient as there was no prior valid appointment to ratify and because the Secretary did not engage in a "general…thoughtful consideration of potential candidates." The BRB found that the Employer had not rebutted the presumption of regularity and held that Secretary's ratification is valid. It also noted that the fact that the Secretary's use of an autopen did not overcome the presumption of regularity. Second, the Employer argued that the ALJ took significant actions prior to his proper appointment. The BRB found that the ALJ only issued a Notice of Hearing and an Order granting Employer's motion to reschedule the hearing, neither of which required any consideration of the merits of the claim. Third, the Employer argued that the two levels of removal protections for ALJs violates the separation of powers doctrine. The BRB found that Employer failed to brief this issue and declined to address it.

In *Combs v. Cumberland River Coal Co.*, BRB No. 19-0360 BLA (May 27, 2020) (unpub.), the Board vacated the ALJ's decision where he had presided over a telephonic hearing and received evidence prior to the ratification of his appointment by the Secretary. The case was remanded for a new hearing before a new ALJ.

Substantially Similar Employment

In *Scott v. Miller Brothers Coal, LLC*, BRB Nos. 19-0241 BLA/ 20-0265 BLA (May 15, 2020) (unpub.), the Board upheld the ALJ's reliance on the testimony from the claimant (widow of the miner) in finding that the miner's work conditions were "substantially similar" to those in an underground mine. The employer argued that her testimony was not sufficient as it was not based on first-hand knowledge. The Board pointed out that the claimant only had to show that the miner was regularly exposed to coal dust. Further, it found that the claimant's testimony was corroborated by evidence that the miner gave in the LM claim and affirmed the ALJ's application of the 15 year presumption.

Untimely Evidence

Varney v. Director, OWCP, BRB No. 19-0286 BLA (May 15, 2020) (unpub.), the claimant did not file submit any evidence at the hearing on June 8, 2016 nor did he request additional time to submit evidence post-hearing. Nevertheless, he submitted medical evidence on one month later, but then did not mention it in his post-hearing brief. The ALJ found that the claimant did not explain or provide a good cause reason for this delay and excluded the evidence. The Board found that the ALJ did not err in his decision to exclude this evidence.

Weighing ABG Evidence

In *Ramey v. TRC Mining Corporation*, BRB No. 19-0204 BLA (May 22, 2020) (unpub), the Board upheld the ALJ's weighing of the exercise ABG evidence in finding total disability. Four different physicians performed four different ABGs. Two of the tests rendered non-qualifying results at rest, but qualifying results upon exercise. The remaining two did not show qualifying results at rest or at exercise. The ALJ found that the qualifying exercise results were more persuasive than the non-qualifying exercise studies as the exercise was shorter and less strenuous in the non-qualifying tests than the exercise performed during the qualifying tests.

Responsible Operator

In *Cook v. Wellmore Energy Company, LLC*, BRB No. 19-0261 BLA (May 27, 2020) (unpub.), the Board remanded the case for further consideration of the RO designation. Generally, the RO is the last coal mine employer of a year's duration unless there is proof that the miner had complicated CWP prior to working for the last coal mine employer. In that instance, the RO would be the company the miner was working for on the onset date of complicated CWP. In this case, the employer obtained an x-ray interpretation indicative of complicated CWP that was taken as part of its pre-employment physical. In the PDO, the DD nevertheless found that the employer was the RO. On appeal, the ALJ stated that the x-ray evidence was never admitted at the DD level and would not be admitted at the OALJ level absent "extraordinary circumstances" under 20 CFR §725.456(b)(1). The named RO argued that the evidence was submitted to the DD and should have been in the record. The DD agreed and produced the documents. As the ALJ did not know that this evidence was submitted to the DD, the Board vacated his finding that the RO was correctly named and remanded for reconsideration of the RO issue.

OWCP Evaluation

In *Hall v. Del Rio, Inc.*, BRB No. 19-0282 BLA (May 29, 2020) (unpub.), the Board held that the ALJ erred in not granting the director's request for a new OWCP pulmonary evaluation. Although the director did not raise the issue until her motion for reconsideration of the ALJ decision, the Board held that the director can raise the issue of whether the OWCP evaluation was complete at any time during the processing of a claim.