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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 233 June 2011

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

A. U.S. Supreme Court[1]

[***Ed. Note*:** While the following decision does not involve the LHWCA, it is relevant to the OALJ's adjudication of attorney's fee disputes]

***Fox v. Vice*, 563 U.S. __ (2011).**

The Supreme Court unanimously held that when a plaintiff's suit involves both frivolous and non-frivolous claims, a court may grant reasonable fees to the defendant pursuant to 42 U.S.C. §1988, "but only for costs that the defendant would not have incurred but for the frivolous claim." Slip op. at 1. The fee-shifting provision in §1988 allows the award of "a reasonable attorney's fee" to "the prevailing party" in certain civil rights cases; while §1988 authorizes an award of fees to prevailing plaintiffs, the Court previously had held that a defendant may also receive such an award if the plaintiff's suit is frivolous.

The Court acknowledged that "in the real world, litigation is … complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits," and courts must "deal with this

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

untidiness in awarding fees." *Id.* at 6. A plaintiff may receive fees for the time his attorney reasonably spent on achieving the favorable outcome, even if he failed to prevail on every contention; however, work performed on claims that are not related to the grant of relief should not be reimbursed, for the work cannot be deemed to have been expended in pursuit of the ultimate result achieved. *Id.*, citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Analogizing to *Hensley*, the Court concluded that "[f]ee shifting to recompense a defendant (as to recompense a plaintiff) is not all or nothing." *Id.* at 7. The Court concluded that §1988 allows a defendant to recover reasonable attorney's fees incurred because of, but only because of, a frivolous claim. *Id.* at 8.[2] Under this standard, in some cases, a defendant may be compensated for "attorney work related to both frivolous and non-frivolous claims;" the dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation. *Id.* at 10-11.

In allocating the award, trial court "must apply the correct standard, and the appeals court must make sure this occurred." *Id.* at 11. From there, the trial court has great discretion in determining the actual amount of fees paid to an attorney:

> "We emphasize, as we have before, that the determination of fees 'should not result in a second major litigation.' *Hensley*, 461 U. S., at 437. The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet 'the burden of establishing entitlement to an award.' *Ibid.* But trial courts need not, and indeed should not, become green-eyeshade accountants.

[2] The Court noted that this standard differs from the one adopted in *Hensley* to govern fee awards to plaintiffs in cases involving both successful and unsuccessful claims, elaborating that:

> "Congress authorized fees to plaintiffs to compensate them for the costs of redressing civil right violations; accordingly, a plaintiff may receive fees for all work relating to the accomplishment of that result, even if 'the plaintiff failed to prevail on every contention raised.' Hensley, 461 U.S., at 35. By contrast, Congress authorized fees to defendants to remove the burden associated with fending off frivolous claims; accordingly, a defendant may recover for fees that those claims caused him to incur. In each context, the standard for allocating fees in 'mixed' cases matches the relevant congressional purpose."

Id. at 9, n.3.

> The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of 'the district court's superior understanding of the litigation.' *Ibid.; see Webb v. Dyer County Bd. of Ed.*, 471 U. S. 234, 244 (1985). We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it."

*S*lip op. at 11. In this case involving both frivolous and non-frivolous claims, the district court awarded Vice fees for all work performed by his attorneys; and the Fifth Circuit affirmed the award. The Supreme Court concluded that the district court did not apply the correct but-for standard, and, accordingly, vacated the judgment of the Fifth Circuit and remanded the case.

[Topic 28.6.4 Losing on an Issue - Board Position - <u>Hensley</u> and Its Aftermath; Topic 28.5.1 AMOUNT OF AWARD – Sufficient Explanation]

B. U.S. Circuit Courts of Appeals

***Joseph v. Dir., OWCP*, 2011 WL 2268065 (5th Cir. 2011)(unpub.)**

The Fifth Circuit upheld the Board's decision affirming the ALJ's denial of benefits to claimant based on a finding that his diagnoses of septic shock and bacterial community-acquired pneumonia were unrelated to his exposure to smoke and fumes from nearby welding during his employment as an electrician with Northrop Grumman.

The ALJ found that claimant made a *prima facie* case due to the close timing between his symptoms and his exposure to the welding fumes. However, the ALJ found that Northrop had presented substantial evidence to the contrary, as all physicians who examined claimant agreed that his illness was not caused by his exposure to smoke and fumes at Northrop. Thus, the court concluded that there was "no medical evidence linking Joseph's illness to his workplace, and the timing of his illness is purely coincidental."

The court also rejected various challenges raised by claimant with respect to his medical records. First, claimant alleged that his privacy rights under the Health Insurance Portability and Accountability Act ("HIPPA") were violated when the medical records documenting his treatment were provided to his employer. The court stated that "[a]s a condition of an employee's recovery against his employer, the treating physician must provide the employer with a report of the employee's injuries within ten days. 33 U.S.C. § 907(d)(2). Moreover, Northrop obtained the records by subpoena which Joseph has not shown was invalid." Slip op. at *2, n.2. Second, claimant failed to substantiate his assertions that his medical records were incomplete, had been tampered with, or stolen. The ALJ gave claimant thirty days to produce the allegedly missing documents, yet claimant failed to do so. Third, claimant failed to provide a coherent argument or cite any legal authority in support of his assertion that the medical records were not admissible evidence. Finally, the court declined to entertain claimant's accusations that his treating physicians, the ALJ, and Northrop conspired to deny him medical care and benefits and that the ALJ and the BRB engaged in "corrupt and unethical conduct," as the court deemed these assertions frivolous and entirely unsupported.

[Topic 2.2.18 DEFINITIONS – INJURY - Representative Injuries/Diseases - Pulmonary Conditions; Topic 23.2 EVIDENCE - ADMISSION OF EVIDENCE]

C. Benefits Review Board

***Johnson v. Del Monte Tropical Fruit Company*, __ BRBS __ (2011).**

The Board affirmed the ALJ's finding that claimant was not entitled to receive scheduled permanent partial disability ("PPD") benefits for his work-related hearing loss concurrently with either his temporary or permanent total disability award for his work-related back injury.

Claimant was initially awarded temporary total disability ("TTD") benefits from 10/11/90 through 9/5/91 and permanent total disability ("PTD") benefits from 9/6/91 onward for a work-related back injury. Thereafter, on 5/8/08, claimant filed a claim for PPD benefits for his binaural hearing loss, based on a 1/22/08 audiogram. Although the ALJ found that claimant had sustained a work-related 24.4 percent binaural hearing loss, the ALJ determined that this scheduled PPD award was subsumed in claimant's total disability award for his back injury. The ALJ determined that any entitlement to PPD benefits for claimant's hearing loss would commence on 10/10/90, the date he stopped working for employer due to his back injury. This date represented the time of injury for the hearing loss claim

due to the absence of audiograms prior to this date, despite claimant's assertion that he was exposed to the injurious noise for twelve years prior to this date while working for employer. The ALJ therefore denied the claim for PPD benefits but found claimant entitled to all necessary medical care for his work-related hearing loss.

In affirming the ALJ's decision, the Board observed that the ALJ properly relied on the longstanding principle that a claimant may not receive concurrently a scheduled PPD award for one injury and a total disability award for another injury, as claimant cannot receive compensation greater than that for total disability. Slip op. at 3, citing *Thornton v. Northrop Grumman Shipbuilding, Inc.,* 44 BRBS 111, 113 n.4 (2010)(additional citations omitted); *see also* slip op. at 7. A claimant may only receive a scheduled award in addition to total disability if the scheduled injury predates the totally disabling injury, in which case claimant may receive compensation for the time before the onset of total disability benefits. Since claimant could not produce any audiograms predating the onset of his total disability, he did not establish that he sustained a PPD injury prior to the onset of his total disability on 10/10/90.

The Board rejected claimant's reliance on *Bogden v. Consolidation Coal Co.,* 44 BRBS 43 (2010), where a claimant asserted entitlement to concurrent scheduled and total disability awards.[3] The Board stated that it did not address this contention in *Bogden*, as claimant in that case prevailed on his alternative argument, *i.e.*, the Board held that claimant was entitled to the resumption of his scheduled hearing loss award on the date that his PTD disability award for his back injury converted to a PPD award for that injury. Thus, claimant in *Bogden* was entitled to two PPD awards, not concurrent scheduled hearing loss and total disability awards.

Claimant also cited *Henry v. George Hyman Constr. Co.,* 749 F.2d *65,* 17 BRBS 39(CRT) (D.C. Cir. 1984) in support of his contention that his award of TTD benefits does not preclude his entitlement to a concurrent scheduled award. In *Henry*, interpreting the preface of Section 8(c), the court DC Circuit Court held that "[i]n light of the plain language of the statute,. . . a scheduled award for permanent partial disability under Section 8(c)(4) may be paid concurrently with an allowance for temporary total disability." *Id.*, 749 F.2d at 72, 17 BRBS at 44(CRT). The Board, however, distinguished *Henry* on the ground that, in *Henry*, claimant's entitlement to TTD and scheduled PPD benefits arose *from the same injury* and, thus, the court did not consider the issue presented here: whether a claimant may

[3] The Board noted that claimant did not specifically argue that his scheduled award could run concurrently with his PTD award, and the ALJ properly found that it may not.

receive concurrent awards of TTD and scheduled PPD for two distinct injuries. Slip op. at 6. The Board concluded that the court's interpretation of §8(c) in *Henry* "can be attributed to the particular facts of that case, in which the employee was temporarily totally disabled and had an *underlying* scheduled permanent partial disability *from the same injury* at the time of his death." *Id.* The Board further noted that this case arose within the jurisdiction of the Eleventh Circuit, which had not spoken on this issue, and thus the Board was not constrained to apply the holding of the DC Circuit in *Henry*.

The Board additionally concluded that the legislative history of the 1934 Amendments to the Act, which amended the preface of Section 8(c) and 8(c)(22), indicate that the court's holding in *Henry* does not control this case, which involves two separate and distinct injuries. As originally enacted, §8(c)(22) of the Act provided that in a case involving TTD and a scheduled PPD resulting from the same injury, claimant was entitled to TTD benefits only for the period that the TTD continued in excess of the period specified in the schedule. This provision led to incongruous results in some cases and was therefore amended. The 1934 Amendments added to the Section 8(c) preface that PPD benefits "shall be in addition to" TTD benefits. The Board concluded that:

> "[T]he legislative history indicates that the purpose of the amendments of the preface of Section 8(c) was to allow for the payment of temporary total disability and temporary partial disability benefits *in addition to,* rather than concurrent with, scheduled permanent partial disability benefits *for the same injury.* In other words, the Section 8(c) preface and Section 8(c)(22) were amended to ensure that a claimant receives full compensation for all disability resulting from the same injury."

Slip op. at 7. Accordingly, the Board refused to construe the phrase "in addition to" in §8(c) to permit a claimant to receive concurrently a scheduled PPD award for one injury and a TTD award for a separate and distinct injury. A claimant cannot receive compensation greater than that for total disability, and therefore cannot be compensated concurrently with scheduled disability benefits and total disability benefits. Slip op. at 7.

[Topic 8.4.2 CONFLICTS BETWEEN APPLICABLE SECTIONS – Permanent Partial v. Permanent Total; Topic 8.4.3 CONFLICTS BETWEEN APPLICABLE SECTIONS - Concurrent Awards of Permanent Disability]

***Luttrell v. Alutiiq Global Solutions, et al.*, __ BRBS __ (2011).**

The Board held that the ALJ properly found that claimant's wages under a one-year contract with employer in the South Pacific, a non-combat zone, provided the best basis for determining his average weekly wage ("AWW"), rejecting claimant's assertion that the AWW determination should take into account his prior higher-paying job in the Middle East which he had voluntarily left to accept less hazardous work overseas or his post-injury employment offer in Bahrain. The Board further held that, where the parties stipulated that claimant was temporarily totally disabled at the time of the hearing and only presented the issue of AWW for a formal hearing, the ALJ erred in limiting his order on reconsideration to the issue of AWW, as he had a duty under Section 19(c) to make an award to claimant of continuing TTD compensation.

Claimant injured his neck during his employment as a security officer on the Kwajalein Atoll in the South Pacific, and employer voluntarily paid him compensation for temporary total disability ("TTD"). Claimant worked exclusively overseas with various employers since 1996; beginning in 2004, he worked for the Department of Justice, International Criminal Investigative Training and Assistance Program ("ICITAP"), training Iraqi police officers, and received hazardous duty pay. Claimant testified that he left Iraq and worked for a company in the Bahamas, at an hourly rate of $10, for about three months prior to obtaining work with employer, because he wanted to take a break after working a number of years in hazardous areas. Claimant further testified that he intended to return to the Middle East and work under the ICITAP in a less hazardous location, and that he was offered such employment in Bahrain, which he declined due to his recuperating from surgery for his work injury with employer.

The parties stipulated that claimant has been temporary totally disabled since 6/30/08, and the only issue before the ALJ was claimant's AWW. The ALJ found that claimant's AWW should be calculated based solely on his contract wages with employer, and ordered employer to pay claimant continuing TTD compensation and to provide medical benefits. Employer moved for reconsideration on the basis that the ALJ erred in ordering it to pay ongoing compensation and medical benefits, as only claimant's AWW was at issue at the hearing. The ALJ granted employer's motion and modified his order to omit the award of continuing TTD and medical benefits.

The Board initially rejected claimant's assertion that the ALJ erred in finding that his contract wage with employer was the appropriate basis for calculating his AWW under Section 10(c). The ALJ rejected claimant's position that his earnings in the 52 weeks prior to the work injury, including

those he received while working under the ICITAP in Iraq, should be used to calculate his AWW, reasoning that claimant was injured while working under a one-year contract at a different type of job and "under drastically different conditions, than he had done earlier, or than he might have done later." The Board concluded that this finding was supported by substantial evidence and consistent with cases in which the Board has stated that the claimant's higher wages in a combat zone provide the framework within which the ALJ must calculate the AWW under §10(c). Slip op. at 4, citing *K.S [Simons] v. Service Employees Int'l, Inc.,* 43 BRBS 18, *aff'd on recon.,* 43 BRBS 136 (2009); *Proffitt v. Service Employers Int'l, Inc.,* 40 BRBS 41 (2006). The ALJ properly found that the facts in this case are "the mirror image" of the war zone cases. Claimant testified that he voluntarily chose to leave his higher-paying job in the Middle East and accept lower-paying work overseas, first in the Bahamas and then for employer in the South Pacific. Although claimant testified he received an offer to work in Bahrain, he had a one-year contract with employer which included a $2,500 completion bonus. This employer was not paying claimant a premium for any hazardous duty. Thus, the ALJ rationally found that claimant's rate of pay with employer realistically reflected claimant's wage-earning potential at the time of his injury. The ALJ's AWW calculation accounted for the extrinsic circumstances of claimant's employment on the Atoll and the language of §10(c) in that he gave "regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury."

The Board next held, agreeing with claimant and the Director, OWCP, that the ALJ erred in vacating his initial award of continuing TTD on the ground that only claimant's AWW was at issue at the hearing. The Board reasoned that

> "Section 19(c) provides that an administrative law judge 'shall' by 'order' 'make an award' or 'reject the claim.' 33 U.S.C. §919(c); *see also* 33 U.S.C. §919(e). The implementing regulation, Section 702.348, provides that: 'the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of fact and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge....' 20 C.F.R. §702.348. Pursuant to Section 19(c) and Section 702.348, the Board has noted that the administrative law judge's compensation order must include an 'order' directing the payment of benefits. *Aitmbarek* [*v. L-3 Communications*]*,* 44 BRBS [115,] 120 n.8 [(2010)]; *see also*

Hoodye v. Empire/United Stevedores, 23 BRBS 341, 344 (1990). In *Davis v. Delaware River Stevedores, Inc.,* 39 BRBS 5 (2005), the Board similarly held that any agreements between the parties must be embodied in a formal order issued by the district director or an administrative law judge. *Davis,* 39 BRBS at 6."

Slip op. at 6.[4] In this case, "[g]iven the parties' stipulation that claimant remained temporarily totally disabled as of the date of the hearing, once the ALJ determined the appropriate compensation rate, he had the duty under Section 19(c) to make an award to claimant of continuing temporary total disability compensation. *Aitmbarek*, 44 BRBS 115; *Davis*, 39 BRBS 5." Slip op. at 7 (footnote omitted).[5] Accordingly, the Board vacated the ALJ's finding on reconsideration that he did not have the authority to award TTD benefits in this case and reinstated the order that employer pay continuing compensation for TTD.[7] *Aitmbarek,* 44 BRBS 115; *Davis,* 39 BRBS 5; *see also Seguro v. Universal Maritime Service Corp.,* 36 BRBS 28, 31(2002). The Board noted that an award based on the parties' stipulations is subject to modification, and thus either party may seek modification of the ALJ's award of TTD benefits under §22.

[Topic 10.4.5 DETERMINATION OF PAY - SECTION 10 (C) - Calculation of Average Weekly Wage Under Section 10(c); Topic 19.3.6.1 19(c) ADJUDICATORY POWERS – Issues at Hearing]

***Young v. Newport News Shipbuilding and Dry Dock Co.*, ___ BRBS ___ (2011).**

Claimant sustained knee injuries while working for employer as a chipper in 1983. At the original hearing, the parties stipulated that claimant could not return to his usual work, and ALJ Sarno awarded claimant permanent total disability ("PTD") benefits based on his findings that employer failed to establish the availability of suitable alternate employment ("SAE") and, in any event, claimant diligently, yet unsuccessfully, attempted

[4]The Board rejected employer's assertion that, under 29 C.F.R. § 18.43, the ALJ may only decide issues that are raised by the parties, in this case AWW. The Board stated that, assuming, *arguendo,* that this regulation should be interpreted as advocated by employer, it is superseded by the program-specific provisions in Section 19 and Section 702.348. *See* 29 C.F.R. §18.1(a).

[5]The Board noted that, given the parties' stipulation that medical benefits have been paid to claimant and the absence of evidence that claimant sought payment for unpaid medical expenses, there was no basis in the record to support an award of specific medical benefits. Nonetheless, employer was liable for medical treatment for claimant's work injury, pursuant to Section 7 of the Act.

to find alternate work. In 1997, employer asserted its entitlement to §8(f) relief; and, in 1998, employer sought modification of the PTD award and again raised the §8(f) issue. In 2000, based on the agreement of the parties, ALJ Campbell issued a stay of compensation order, as claimant was unable to participate in a hearing due to his incarceration. Claimant was released from prison in 2004 and a hearing was held in 2009 before ALJ Krantz.[6] Judge Krantz lifted the stay of payments and awarded claimant PTD benefits from 8/17/00, when benefits were stayed, through 7/1/07, when employer established SAE by means of a labor market survey ("LMS"); and also awarded benefits under the schedule. Various issues addressed by the Board on appeal are detailed below.

Claimant's Credibility: The Board held that the ALJ did not err in finding that, although claimant's testimony related to his criminal conviction conflicted with statements made at a Rule 11 hearing, his testimony was credible with respect to his knee condition. The Board stated that the fact of a criminal conviction does not negate a claimant's right to benefits or require an ALJ to discredit the claimant's testimony in its entirety. Rather, evidence of a conviction may be submitted to attack the credibility of a witness. 29 C.F.R. §18.609; *see also* Fed. R. Evid. Rule 609. As in all cases under the Act, the ALJ has the authority to make credibility determinations, and it is solely within his discretion to accept or reject all or any part of any testimony. Here, the ALJ properly credited claimant's testimony regarding his knee condition based on a finding that claimant's medical records over the span of more than 25 years showed consistent complaints regarding his knees.

Causation: The Board rejected employer's contention that the ALJ erred in applying the §20(a) presumption, as he considered whether claimant's knee injuries were work-related instead of whether there was any continuing disability related to the work injuries. Based on claimant's knee injuries at work and his complaints of continuing pain, the ALJ properly invoked the §20(a) presumption. The ALJ correctly found that the opinion of employer's examining physician rebutted the presumption that claimant's current symptoms are related to his 1983 injuries. In considering the entire record, the ALJ did not err in crediting the opinion of Dr. Stiles, claimant's treating physician, over that of employer's examining physician, based on the ALJ's findings that Dr. Stiles had treated claimant for a long time and was familiar with his long-standing complaints, and his opinion was supported by the medical reports. The Fourth Circuit, within whose jurisdiction this case arose, has given a treating physician's opinion "great" but "not necessarily dispositive weight."

[6] Judge Krantz' denial of §8(f) relief was not appealed.

Extent of Disability: The Board rejected employer's contention that the ALJ erred in concluding that claimant's illegal activities (claimant pleaded guilty to conspiracy to distribute crack cocaine), job in prison, and jobs singing in church establish the availability of SAE before the 2007 LMS. The ALJ properly relied on *Licor v. Washington Metropolitan Area Transit Authority*, 879 F.2d 901, 22 BRBS 90(CRT) (D.C. Cir. 1989), to find that any illegal income claimant earned is not indicative of SAE available on the open labor market. Further, employer did not establish that the maintenance work claimant performed in prison was available on the open market prior to July 2007, or that the singing jobs were sufficiently regular and continuous to establish a wage-earning capacity. Nor did the ALJ err in not addressing on modification the diligence of claimant's job search prior to the initial award of benefits, as the ALJ properly found that employer did not establish SAE prior to July 2007, and thus the issue of claimant's diligence in seeking employment prior to this date was irrelevant.[7]

Further, the Board rejected employer's contention that the ALJ erred in awarding scheduled benefits as no party raised this issue, the ALJ failed to notify the parties it would be an issue, and neither party had the opportunity to submit evidence on the matter. Employer argued that although a claim for PTD naturally subsumes a claim for a lesser impairment, that only applies to PPD under §8(c)(21), as benefits under the schedule require different evidence. The Board disagreed, stating that a claim for total disability implicitly includes a claim for a lesser degree of disability, and thus an ALJ may award PPD benefits even if only PTD was at issue. The schedule is the exclusive remedy for PPD for parts of the body enumerated therein, and scheduled benefits begin on the date SAE is shown to be available to a permanently disabled claimant. Here, employer knew claimant's injury was to his knees, and it asserted the availability of SAE; permanency was established at the original hearing and reaffirmed on modification. Moreover, it was the employer that raised the schedule as the appropriate way to calculate the award.

Section 8(j): The Board held, agreeing with the Director, OWCP, that the ALJ erred in finding that any earnings from illegal activities need not be reported on the LS-200 earnings reports and that claimant's benefits for that time period need not be forfeited pursuant to Section 8(j). The Board, accordingly,

> "reverse[d] the [ALJ's] finding that income from illegal activities need never be reported on an LS-200 earnings reporting form,

[7] The Board affirmed as unchallenged on appeal the ALJ's finding that claimant did not diligently seek work after July 2007.

> and [held] that, 'earnings,' as that term is used in Sections 8(j) and 702.285(b), does not exclude income obtained from illegal activities. Therefore, when an appropriate request has been made, a claimant must report all earnings, including income obtained from illegal enterprises; knowing and/or willful failure to report, or to accurately or timely report, such earnings may result in the forfeiture of benefits."

Slip op. at 14-15.

The Board reasoned that 20 C.F.R. §702.285(b) reflects that §8(j) contemplates a claimant's reporting "all monies" from "any employment" and "all revenue" from "self-employment," as well as "fees for services."[8] There is no exclusion for earnings from illegal activities. In addition, the regulation specifically states that the earnings are "not limited to" the list given. Accordingly, the Director's interpretation of the regulation is reasonable: the definition of "earnings" is sufficiently broad to include any earnings from a claimant's illegal activity. The decision in *Licor* does not preclude this result.[9] As the ALJ did not make the necessary findings of fact, the Board remanded this case for the ALJ to determine whether claimant had earnings from illegal activities during the periods covered by the LS-200s and whether he knowingly or willfully failed to accurately report such earnings.[10] The Board stated that if the ALJ concludes claimant's benefits should be suspended, the case must be remanded to the district director for consideration of claimant's financial situation and establishment of the forfeiture schedule.[11]

[Topic 23.6 EVIDENCE - ALJ Determines Credibility of Witnesses; Topic 23.5 EVIDENCE - ALJ Can Accept Or Reject Medical Testimony;

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[8] The Board noted that further support for including illegal earnings in the report comes from the Tax Code, as 26 U.S.C. §61(a) provides that "gross income" includes "all income from whatever sources derived;" and further illegal activity has been held to constitute "substantial gainful activity" under the Social Security Act so as to prohibit someone earning money in criminal activity from receiving benefits under that act.

[9] The Board noted that the Director incorrectly suggested that any earnings reported on the LS-200 form are to be credited against claimant's disability compensation. The Act does not contain any credit provisions of this kind. An employer is entitled only to a credit of previously paid compensation against compensation due. 33 U.S.C. §914(j), 922. If an employer wishes to decrease or terminate a compensation *award,* Section 22 of the Act provides the mechanism for doing so. Slip op. at 14, n.9.

[10] The Board noted that, pursuant to 20 C.F.R. §702.286(b), an employer who believes a violation has occurred must present evidence of the earnings that have been omitted.

[11] The Board noted that the forfeiture provisions contemplate a suspension of prospective benefits and not an action against a claimant for the reimbursement of benefits paid.

Topic 8.2.4.2 EXTENT OF DISABILITY - Suitable alternate employment: Employer must show nature, terms, and availability; Topic 19.3.6.1 19(c) ADJUDICATORY POWERS – Issues at Hearing; Topic 8.12.1 OBLIGATION TO REPORT WORK – Generally; Topic 20.2.1 SECTION 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA - *Prima Facie* Case; Topic 20.2.4 SECTION 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA - ALJ's Proper Invocation of Section 20(a)]

***Obadiaru v. ITT Corp.*, __ BRBS__ (2011).**

Claimant began working for employer in 2004 as a heavy mobile equipment mechanic on a base in Kuwait. He injured his back in August 2005, but returned to his usual job a few days later until May 2006, at which point he saw a doctor on the base and was permitted to return home for two months for medical treatment. He was then put on light duty in July of 2006 because of the pain, but had to resign from his job in October 2007. An MRI revealed disc protrusions and degenerative discs. Slip op. at 2.

The ALJ found that claimant established the existence of working conditions that aggravated his back condition. Liability was assigned to ICoSP, employer's carrier from July 2007, based on a finding that claimant's injury was aggravated at work between July 2006 and 2007. Claimant was awarded TTD benefits as he has not reached maximum medical improvement. He was not able to return to "light duty work," and the ALJ also found that the alternate employment opportunities proffered by employer were unsuitable. Claimant's average weekly wage ("AWW") was determined to be $1,873.85, and claimant's attorney was awarded his requested fees.

Injury: The Board held that the ALJ did not err in finding claimant to be a credible witness, and in concluding that claimant's testimony and medical records gave rise to a §20(a) presumption of aggravation. The ALJ found that the "light duty" work assigned to claimant after his initial injury required him to stand, climb, bend, and work in cramped areas on occasion when performing inspections on vehicles. Although there was no specific new injury, claimant stated that the repetition of these activities made his back pain worse until he resigned. The ALJ properly found that carrier had not put forth substantial evidence to rebut the presumption, as all doctors reasoned that claimant's employment activity did aggravate or could have aggravated his condition and there was not substantial evidence to the contrary. Further, employer's attempt to discredit claimant due to his possible motive to fabricate a claim was "misplaced" as a rebuttal.

Responsible Carrier: The Board affirmed the ALJ's finding that ICoSP was the responsible carrier, as claimant's traumatic injury was aggravated when ICoSP was on the risk. Although claimant had stated that he experienced continuous pain since the original incident, these statements did not require the ALJ to conclude that his injury was the natural progression of the original injury, rather than an aggravation. Substantial evidence supported the ALJ's finding of aggravation, as claimant also stated that after therapy he felt well enough to return to work, but when doing his job, his condition deteriorated, and his medical records confirmed this testimony.

Extent of Disability: The Board held that the ALJ did not err in finding that claimant could not return to his usual work, and thus was totally disabled. Claimant's usual light-duty work included standing, climbing, bending, occasionally working in cramped spaces, and carrying 25-75 pounds, while his doctor's restrictions included lifting no more than 10 pounds and avoiding continuous sitting, standing or walking. Therefore, claimant's work exceeded his restrictions, and the ALJ correctly held that claimant could not return to work. Also, carrier was not able to establish SAE, as it had not identified where the suggested jobs were located and contact information for the employers was not provided. Further, the jobs, including customer service representative answering phone calls, dispatcher for a transportation service company, production worker, salesperson, and mechanic, were unsuitable for claimant because they required computer skills which he did not have, and also required communication in English, which would be difficult for Claimant given his heavy Nigerian accent. In addition, the jobs were not sedentary, as required by claimant's physician. The ALJ did not err in giving great weight to claimant's vocational evaluator who rebutted employer's vocational report, as the ALJ's stated reasons for doing so were rational, including the vocational evaluator's stronger credentials and greater experience. Slip op. at 9.

Average Weekly Wage: The Board found that, in determining claimant's AWW, the ALJ incorrectly included $600 that Claimant would have received for vacation travel expenses at a date after he resigned from his position. Under claimant's most recent contract renewal, he was to receive $1,200 at the 6-month mark and $600 at 12 months. The Board did not agree with ICoSP's categorization of this $1,800 total as a "fringe benefit," generally defined as those benefits which cannot be readily converted into a cash equivalent as they are too speculative or unpredictable. Slip op. at 11. On the contrary, in this case, "the contract clearly enumerates the amount employer will pay and when it will pay" the vacation expenses. *Id*. at 12. Therefore, it is not a fringe benefit and should not be disallowed in its entirety, as ICoSP urged. Rather, the Board agreed with the ALJ that $1,200 was correctly included in claimant's AWW, because he actually received that

amount. However, since claimant was no longer working for employer in January when he would have received the $600 second installment, it was an error to include this amount in his AWW because "the contingent right to a post-injury bonus is too speculative to include in Claimant's average weekly wage." *Id.* at 12.

Attorney's Fee: The Board affirmed the ALJ's award of attorney's fees. The Board rejected carrier's assertion that the fee award was premature, stating that, while an award cannot be enforced until all appeals have been exhausted, a judge may still issue the award before that time. Nor did the ALJ err in rejecting employer's challenges to specific time entries and costs, as he properly deemed them reasonable and necessary. Contrary to employer's assertion, the ALJ properly determined that §28(a) and not §28(b) applied: although employer voluntarily paid benefits for the first injury, claimant suffered a second injury and filed a new claim for which no compensation was paid within 30 days of receiving notice of the claim. Further, the ALJ properly found that the award did not have to be reduced for partial success, as claimant's was wholly successful. The Board also rejected carrier assertion that the awarded hourly rate of $425 per hour was excessive. The ALJ did not violate due process by refusing to hold a "prevailing rate hearing." Claimant had submitted the 2009 *Survey of Law Firm Economics* showing that attorneys in the South Atlantic Region have a median billing rate of $340 with the top 10 percent at $475. Carrier had submitted prior fee awards, including *Patrick v. SEII*, 2009-LDA-00313, 0042 (June 1, 2010) which set forth the "prevailing rate in Florida" at around $350. The Board stated that the ALJ has great discretion in awarding a fee for work performed before him and he gave rational explanations for rejecting carrier's evidence. Slip op. at 14, *see generally Stanhope v. Electric Boat Corp.*, __ BRBS __ (2010)(Order). The Board affirmed the hourly rate of $425, "[a]s ICoSP presented no hourly rate evidence other than the prior cases without a market rate analysis, and claimant submitted evidence demonstrating regional hourly billing rates as of 2009 on which the [ALJ] rationally relied." *Id.*

[Topic 2.2.6 DEFINITIONS – INJURY – Aggravation/Combination; Topic 70.3 RESPONSIBLE EMPLOYER - SUCCESSIVE INJURIES AND THE AGGRAVATION RULE; Topic 8.2.4.2 EXTENT OF DISABILITY - Suitable alternate employment: Employer must show nature, terms, and availability; Topic 10.4.5 DETERMINATION OF PAY - SECTION 10 (C) - Calculation of Average Weekly Wage Under Section 10(c); **Topic 10.1.3 DETERMINATION OF PAY - AVERAGE WEEKLY WAGE IN GENERAL - Definition of Wages; Topic 2.13 SECTION 2(13) DEFINITIONS – WAGES; Topic 28.6.1 Attorney's Fees - Hourly Rate;**

Topic 28.4.3 ATTORNEY'S FEES - APPLICATION PROCESS - Due Process Hearing Requirements]

II. Black Lung Benefits Act

[There are no black lung decisions to report for the month of June.]