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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 234 July 2011

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

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

***Langfitt v. Federal Marine Terminals, Inc.*, __ F.3d __, 2011 WL 3207771 (11th Cir. 2011).**

The Eleventh Circuit affirmed the district court's grant of a summary decision to FMT on a negligence claim brought by Langfitt as a result of his work-related injury, based on a finding that FMT was Langfitt's borrowing employer at the time of his injury and that, consequently, the Act's exclusivity provision in § 5(a) barred Langfitt's tort claim

Langfitt was employed by Able Body Temporary Services, Inc., a labor broker in the business of furnishing its day-laborer employees to clients on a temporary basis. On 12/13/07, Able Body supplied Langfitt and other employees to FMT, a longshoring company, to assist in FMT's loading of a cargo ship chartered by BBC. Early in the day, Langfitt was injured by a heavy piece of cargo and he was paralyzed from the waist down. Able Body's LHWCA insurer paid compensation benefits to Langfitt, who also filed this tort suit against FMT.

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

The court initially provided a thorough discussion of the borrowed-servant doctrine. The court noted that *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir.1969), a seminal case applying this doctrine to the LHWCA, presented nine factors, or evidentiary indicia, that it deemed probative of borrowed employment. The court further stated that

> "[a]fter *Ruiz*, however, we recognized that the policies that undergird the LHWCA necessitate a restatement of the common-law conception of the borrowed-servant doctrine when it is applied in cases arising under the Act. This is because the LHWCA, like all workers' compensation laws, represents a policy-based tradeoff, or a statutorily imposed 'industrial bargain.' The covered employee has surrendered the right to sue the employer for negligence, and thus has eschewed the possibility of a more significant damages award from the employer; the employer, similarly, has relinquished its common law defenses available in employee negligence actions. In consideration, the employee receives more certain compensation for injuries arising from the employment, regardless of fault; the employer, in turn, eludes litigation expenses and pays only scheduled LHWCA benefits.
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> In light of the Act's statutorily imposed bargain, we have acknowledged that *Ruiz* 's sole reliance on the common law's control test is misplaced. Rather than focusing only on whether a borrowing principal assumed control over the employee from the general employer, we also require that it be shown that the employee gave deliberate and informed consent to the borrowed-employment relationship before that relationship will be held to bar the employee's common law cause of action. It plainly would be unfair, we have acknowledged, to bar an employee from bringing tort actions against a negligent principal when the employee did not have an opportunity to evaluate the risks posed by the new employment and to assume them consciously."

Slip op. at *5-6(citations omitted).

The court elaborated that the test for consent is an objective one, and consent may be either expressly given or implied. Thus, regardless of the employee's subjective intent, consent may be gleaned from the employee's conduct and the nature of the employee's relationship with the borrowing principal. One factor probative of an implied consent is the duration of the relationship at issue. A long-term employment relationship with a borrowing principal strongly suggests that the employee consented to being a borrowed

servant. Yet, a brief employment relationship—*i.e*., where the injury occurred early in the relationship—does not necessarily mean that consent was not given.

The court went on to formulate the following standard for determining whether a borrowed-employment relationship exists in cases arising under the LHWCA:

> "When a general employer transfers its employee to another person or company, the latter is the employee's borrowing employer for purposes of the LHWCA, and thus is liable for the Act's compensation and has the benefit of the Act's tort immunity, if each of the following three criteria is satisfied:
>
> (1) Employee Consent to the New Employment Relationship. The employee must be shown to have given deliberate and informed consent to the new employment relationship with the borrowing principal. The test is objective, and the employee's consent may be shown to have been given either expressly or impliedly.
>
> (2) Borrowing Principal's Work Being Done. The work being performed by the employee at the time of the injury must be shown to have essentially been that of the borrowing principal—that is, that it was primarily the borrowing principal's interests that were being furthered by the employee's work.
>
> (3) Borrowing Principal Assumed Right to Control the Details of Employee's Work. The borrowing principal must be shown to have received, from the employee's general employer, the right to control the manners and details of the employee's work. This might be evidenced by: (a) an express agreement between the general employer and the borrowing principal that directly evidences a transfer of control over the employee to the borrowing principal; (b) the borrowing principal's actual exercise of control; (c) the borrowing principal's furnishing of the equipment and space necessary for the employee to perform the work; (d) the borrowing principal's right to terminate the employee's relationship with the borrowing principal; and (e) the method and obligation of payment for the employee's services."

Slip op. at *7-8, *cf*. 3 Lex K. Larson, *Larson's Workers' Compensation Law* § 67.01, at 67–1 to –2 (Matthew Bender, Rev. Ed.2011) (presenting a similar three-part framework).

In the present case, the court concluded that all three elements of the test were met (Langfitt conceded the second element). As a matter of law, Langfitt consented to employment as a longshoreman with FMT, notwithstanding the brevity of their relationship. The nature of Langfitt's relationship with FMT implied his consent because Langfitt, through his employment with a labor broker, knowingly agreed to work under the control of Able Body's various clients, in differing roles, including FMT's longshoring project. Courts almost invariably have determined that employees of a labor broker, by accepting their employment with the labor broker, consciously consented to being sent to work in varying employment situations, under the direction and control of their employer's various clients. Consent is even more apparent where, as here, the employee of a labor broker undertook the job assignment voluntarily. Langfitt had worked for other labor brokers; he was not a new employee of Able Body, and had learned that any job assignment could require him to perform work for which he had little or no experience or training. His assignment with FMT was voluntary, not compulsory. He accepted it despite having limited maritime work experience, as he needed money and hoped to become FMT's full-time employee.

The control element was also met. Langfitt argued that control was exercised by the BBC vessel's captain, as he gave instructions on how to load the cargo to the FMT supervisor, who in turn directed Langfitt. However, "Langfitt's focus on whether FMT exercised control is misguided. The relevant inquiry is whether FMT had assumed the *right* to control Langfitt's longshoring work on [12/13/07]." Slip op. at *12 (emphasis in original), citing Larson, *supra*, § 61.02, at 61–3 ("[T]he test is, and must be, based on the right, not the exercise."). The court stated that "[e]ven if the details of the employee's work are actually controlled by someone other than the employer—i.e., someone who did not have the right to exercise that control—that does not supersede the existing employment relationship; the employer with the right to control remains the employee's LHWCA employer." *Id.* Here, the evidence indicated that Able Body transferred to FMT—and only to FMT—the power to control the manner and details of Langfitt's work. First, the work order stated that FMT would be solely responsible for supervising FMT employees. Second, FMT had the right to terminate Langfitt's employment with FMT. *Id.*, citing Larson, *supra*, § 61.08[1], at 61–22 ("The power to fire ... is the power to control."). Third, the evidence of who furnished the equipment and work space was at most neutral: although Able Body provided the safety equipment and BBC supplied much of the loading equipment, the FMT provided the work space, at least in part, since the vessel was harbored at FMT's dock. Fourth, FMT had the obligation to compensate Langfitt for his services: FMT was to pay Langfitt's wages, via Able Body, based on the number of hours Langfitt

worked for FMT. *Id*. at *13, citing Larson, *supra*, § 67.06, at 67–17 to –18 ("[W]hether the [borrowing] employer pays the general employer who in turn pays the employee ... or whether the [borrowing] employer pays the employee direct, the difference for [borrowed-employment] purposes is one of mechanics and not of substance."). Finally, FMT did, in fact, exercise control: an FMT supervisor controlled and directed Langfitt's work on the vessel with full discretion; the vessel's captain did not direct Langfitt's tasks. Slip op. at *12-13 (additional citations omitted).

As FMT was Langfitt's borrowing employer for purposes of the LHWCA, Langfitt's negligence claim was barred by §5(a).

[Topic 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability—Borrowed Employee Doctrine; Topic 5.1.1 Exclusive remedy]

***Dir., OWCP v. Matson Terminals, Inc.*, 2011 WL 2689355 (9th Cir. 2011)(unpub.).**

Rejecting a challenge by the Director, OWCP, the Ninth Circuit upheld the Board's holding in *G.K. [Kunihiro] v. Matson Terminals*, *Inc.*, 42 BRBS 15 (2008) that, for purposes of obtaining Section 8(f) relief in a hearing loss case, the regulations at 20 C.F.R. §§702.321, 702.441 do not require pre-existing hearing loss to be documented by an audiogram that meets all the criteria of Section 702.441; and, specifically, the fact that claimant was not provided copies of the prior audiograms and reports is not determinative of employer's entitlement to §8(f) relief.

The Board in *Kunihiro*, *supra*, vacated the ALJ's denial of Section 8(f) relief and remanded the case for the ALJ to evaluate the 1978 to 2002 audiograms to determine the extent of claimant's manifest pre-existing hearing loss and if 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. On remand, the ALJ awarded employer §8(f) relief; the Board granted a summary affirmance, and the Director appealed.

In upholding the Board's decision, the Ninth Circuit rejected the Director's argument that the Board's ruling contravenes the plain language of Section 8(f)'s enabling regulations at §§702.321 and 702.441. The ALJ found that employer provided reliable and probative evidence of claimant's hearing loss under §8(f). Indeed, the Director conceded that the audiograms complied with the requirements of §702.441(b)(1), the only

provision that directly and specifically addresses the requirements for audiograms. Pursuant to Section 702.441(b), an audiogram shall be presumptive evidence of the amount of hearing loss if it meets certain requirements, including the requirement in §702.441(b)(2) that the employee was provided the audiogram and a report thereon. The court noted that the legislative history reflects that the requirement that an employee receive a copy of his audiogram was related to notice and statute of limitations provisions. The court concluded that

> "Under the plain language of the statute, § 908(c)(13)(C) of the LHWCA and supporting regulation § 702.441(b)(2) are guidelines by which an employer can ensure that an audiogram will constitute *presumptive* evidence of hearing loss for Section 8(f) purposes. An employer seeking relief from the Section 8(f) Special Fund, who does *not* comply with § 8(c)(13)(C) requirements, must depend on the fact finding authority of the administrative law judge to certify whether its evidence for Special Fund relief is reliable and probative.
>
> Because the undisputed audiogram evidence demonstrated that the employee suffered a hearing loss, we deny the petition for review."

Slip op. at *1-2 (emphasis in original).

[8.7.3.3 SPECIAL FUND RELIEF – A Pre-Existing Disability Must Have a Physical or Mental Foundation – Examples of Specific Diseases/Conditions – Hearing Loss; Topic 8.13.5 HEARING LOSS – 8(c)(13) and 8(f)(1)]

***California United Terminals v. Towne*, 414 Fed.Appx. 941, 2011 WL 573501 (9th Cir. 2011)(unpub.)[2]**

The Ninth Circuit denied employer's petition for review of *S.T. [Towne] v. California United Terminals*, 43 BRBS 82 (2009), in which the Board concluded that, consistent with the Ninth Circuit precedent, the ALJ properly applied the last employer rule in determining liability for attorney's fee, and properly held employer liable for all attorney's fees, including those incurred prior to its notice of the claim (via joinder) and controversion.

[2] This decision was issued on 2/16/11.

The Ninth Circuit provided minimal discussion, stating that employer conceded before the Board that the ALJ's order of joinder was the equivalent of the filing and notification of a claim before the District Director for purposes of Section 28(a). For example, CUT acknowledged that the statute's references "to the [District Director] also refer to the ALJ in a case where the employer or carrier has been joined as a party defendant by the ALJ." Because employer conceded that the ALJ complied with § 28(a), it has waived the opportunity to now argue the contrary position. The court found no exceptional circumstances that would warrant consideration of employer's argument for the first time on appeal. Further, employer's remaining claims failed because the Ninth Circuit had held that § 28(a) authorizes the award of pre-controversion attorney's fees. *See Dyer v. Cenex Harvest States Coop.,* 563 F.3d 1044, 1050–52 (9th Cir.2009).

[Topic 28.1.3 ATTORNEY'S FEES – 28(a) – When Employer's Liability Accrues]

B. U.S. District Courts

[There are no decisions to report for this month.]

C. Benefits Review Board

[There have been no published Board decisions under the LHWCA in July 2011.]

II. Black Lung Benefits Act

U.S. Circuit Court of Appeals

In *Morrison v. Tennessee Consolidated Coal Co.*, ___ F.3d ___, Case No. 10-3008 (6th Cir. July 15, 2011), the court vacated a denial of benefits and remanded the claim for further consideration in the wake of enactment of the Patient Protection and Affordable Care Act § 1556 (2010) (PPACA). Although the court directed that the Administrative Law Judge reweigh evidence on the issue of total disability, it accepted the Director, OWCP's position that the 15-year presumption revived by the PPACA would apply to Morrison's claim:

> . . . because Morrison's February 22, 2007, claim was filed and pending within the applicable time period, Morrison worked underground for more than twenty-two years, and the ALJ found Morrison to be totally disabled . . ..

Slip op. at p. 7.

The chest x-ray evidence was negative for the presence of clinical pneumoconiosis, but the court held that, standing alone, negative x-ray evidence is insufficient to rebut the presumption. The court further declined to find that the medical opinion evidence, which did not contain a diagnosis of pneumoconiosis, was sufficient to rebut the presumption:

> [I]n this circuit, it is not enough to simply show that the medical evidence does not include a well documented opinion of pneumoconiosis.

Rather, the court cited to its opinion in *Hatfield v. Sec'y. of Health and Human Services*, 743 F.2d 1150, 1157 (6th Cir. 1984), *overruled on other grounds by Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987), and stated:

> [R]ebuttal requires an affirmative showing . . . that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work.

Slip op. at p. 8 (italics in original). The *Morrison* court concluded that, "[b]ecause the record . . . does not contain an affirmative showing that Morrison does *not* suffer from pneumoconiosis, or that the disease is not

related to coal mine work, the medical opinion evidence is insufficient to rebut the § 921(c)(4) presumption."

If, on remand, the Administrative Law Judge determines that total disability is established, then the 15-year presumption would apply. Under these circumstances, the court directed that the parties be afforded an opportunity "to submit additional medical evidence" on remand that is "consistent with the evidentiary limitations imposed by 20 C.F.R. § 725.414."

[**rebuttal of the 15-year presumption; reopening the record on remand**]