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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 189
August 2007

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Richardson), ___ F.3d ___, (No. 05-2418)(**4th Cir.** August 14, 2007).

At issue here is the application of Section 33(g). Claimant had filed two separate claims, one for asbestosis and another for COPD. He received third party settlements for the asbestosis. Eventually his longshore claims were consolidated. He then moved to amend his claim and sought only benefits for his COPD, stating that his doctor had determined that he did not suffer from asbestosis. The ALJ originally found that the claimant suffered from a single disability caused by his simultaneous exposure to asbestos fibers, smoke, dust and fumes while welding and denied the claim based on Section 33(g).

The Board reversed and remanded. On remand, the ALJ found coverage for the COPD as a separate disability. The **Fourth Circuit** has upheld the Board's rationale stating: "If an employee suffers from distinct injuries creating distinct disabilities, then Section 33(g) will only protect the employer from having to provide benefits for the specific disability that was the basis for the settlement obtained without the employer's approval."

The employer had argued that the term disability is an economic construct that defines an inability to earn wages and is only tangentially related to the underlying injury. It argued that the claimant's disability is his inability to work because of lung ailments,

all of which are related in part to asbestos and for which he was already compensated in an unapproved settlement. However, the **Fourth Circuit** found that the argument could not stand in the face of precedent. It noted that the concept of injury is inextricably linked to the injury that causes it., but that one claimant can suffer two disabilities, even if those disabilities affect the same organ system and have similar symptoms.

[Topics 33.1 Compensation for Injuries Where Third Persons Are Liable—Section 33(a): Claimant's Ability to Bring Suit Against a Potentially Negligent third Party; 33.7 Compensation for Injuries Where Third Persons Are Liable—Ensuring Employer's Rights—Written Approval of Settlement]

C. Federal District Courts and Bankruptcy Courts

D. Benefits Review Board

G.I.K. v. Washington Group International, (Unpublished)(BRB No. 06-0983)(August 29, 2007).

In these consolidated Defense Base Act claims the prime U.S. contractor attempted to use Section 33 as a bar. The employees wwere South Korean nationals working in Iraq for Olm Electric, a South Korean corporation, which had a partnership agreement with Shiloh International Group, a Philippine-based contractor which provided personnel to Washington Group International (WGI), an American corporation. WGI was the prime contractor for a U.S. Corps of Engineers reconstruction project, for the purpose of surveying power transmission lines and towers in Iraq. After the employees' deaths, the surviving spouses and children received "consolation money" from Olm Electric. The claimants subsequently filed claims under the Defense Base Act against WGI. WGI then claimed Section 33 protection.

The Board upheld the ALJ's denial of Section 33 protection. The ALJ had found that the payments made by Ohm to the claimants did not fall within the provisions of Section 33 as they were not obtained from a third party as a result of a civil suit for tort damages. Furthermore, it was undisputed that Ohm was the decedents' direct employer, and it therefore cannot be deemed a third party. The Board and ALJ noted that the fact that WGI was responsible for the payment of benefits in this case was wholly due to the failure of its subcontractors to secure the payment of compensation. WGI's liability cannot alter the employment relationship between Ohm and the decedents. As the Board noted, Section 33 is premised on a suit in damages against a party "other than employer":

> "Thus, as it is undisputed that Ohm was decedents' employer in this case, the payments made by Ohm to claimants cannot, as a matter of law, fall with the provisions of Section 33, as they were not received from a third party. As Section

33 as a whole is inapplicable, we affirm the [ALJ's] findings that subsections (g) and (f) are also inapplicable."

WGI also argued that it should be due a credit under either Section 3(e) or Section 14(j). Section 3(e) provides an employer liable for benefits under the LHWCA with a credit against disability or death benefits the claimant receives under another workers' compensation law for the same injury. The Board upheld the ALJ's finding that there was no credible evidence to establish that the payments made to the claimants by Ohm were based on Korean, or any other workers' compensation law.

Section 14(j) permits an employer who has made advanced payments of compensation to be reimbursed out of any unpaid installments of compensation due. The Board summarily dismissed WGI's argument as to Section 14(j) since it has long held that an employer will not receive a credit under Section 14(j) unless it can show the payments were intended as advance payments of compensation.

[Topics 3.4 Coverage—Credit for Prior Awards; 14.5 Payment of Compensation--Employer Credit for Prior Payments; 33.1 Compensation for Injuries Where third Persons Are Liable—Section 33(a): Claimant's Ability to Bring Suit Against a Potentially Negligent Third Party]

D.Q. v. Shaver Transportation, (Unpublished)(BRB No. 07-0151)(August 28, 2007).

This unpublished Board decision addresses the issue of average weekly wage calculations comprehensively noting national case law on sick leave, vacation pay and holiday pay. It also put to rest a claimant's argument that there is a "fundamental policy" of allowing claimants to be overcompensated under Section 10(a).

[Topics 10.1 Determination of Pay—Average Weekly Wage in General; 10.2.5 Determination of Pay—Calculation of Average Weekly Wages Under § 10(a)]

E. ALJ Opinions

F. Other Jurisdictions

[Ed. Note: The following case is noted for informational purposes only.**]**

Associated Marine Equipment, LLC v. Jones, ___ F. Supp 2d ___, 2007 WL 2402540 (E.D. La. Aug. 16, 2007).

The claimant here had filed Jones Act, maritime negligence claims, and a 905(b) claim. All were ultimately dismissed due to the claimant's failure to obey court orders in reference to discovery. On August 14, 2006 the court entered judgment in favor of

Associated Marine. The claimant requested relief pursuant to Federal Rule of Civil Procedure 60(b) and asked that the court consider his failure to comply with discovery and orders "in the context of a post Katrina environment."

In denying relief the court noted the record reflected that after Katrina, both the court and opposing counsel were able to contact claimant's counsel and that not once during the thirteen month period that elapsed from the time the action was filed until the time judgment was rendered did the claimant advise the court of his inability to get in touch with his attorney, nor did he call the court or the clerk's office to inquire about the status of the case. The court noted that in civil matters it has long been held that the mistakes of counsel are chargeable to the client.

II. Black Lung Benefits Act

Benefits Review Board

By unpublished decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007), the Board issued instructive holdings regarding application of certain evidentiary limitation provisions at 20 C.F.R. § 725.414. Citing to its decision in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (*en banc*) (J. Boggs, concurring), *aff'd. on recon.*, 24 B.L.R. 1-___ (Mar. 25, 2007) (*en banc*), the Board addressed the admissibility of multiple interpretations of a single CT-scan. Under the facts of the case, four readings of an April 2, 2001 CT-scan were proffered as evidence. The Administrative Law Judge admitted (1) one reading as a "treatment" record under 20 C.F.R. § 725.414(a)(4); (2) one readings offered by Claimant as his case-in-chief reading under 20 C.F.R. § 725.414(a)(2)(i); and (3) one reading offered by Employer as its rebuttal to Claimant's case-in-chief reading. The Administrative Law Judge then excluded a second reading of the CT-scan proffered by Employer on grounds that it exceeded the evidentiary limitations and that rebuttal of the "treatment" record is not permitted.

While the Board concluded that the Administrative Law Judge properly admitted three readings of the CT-scan, it held that it was error to exclude the Employer's second reading. The Board held that "[c]ontrary to the administrative law judge's ruling, . . . employer was entitled to submit, in addition to its rebuttal reading, one affirmative CT scan reading." Further, the Board held that a party proffering evidence under § 718.107 must demonstrate that the evidence is "medically acceptable and reliable" under § 718.107(b).

The Board then turned to the Administrative Law Judge's consideration of x-ray evidence under the provisions related to complicated pneumoconiosis at 20 C.F.R. § 718.304. Specifically, the Board held that that "an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the 'Comments' section, but which does not diagnose pneumoconiosis with an opacity size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304(a)." Moreover, CT-scan evidence is weighed under § 718.304(c) and the Administrative Law Judge "must determine whether the CT scan evidence under Section 718.304(c) tends to independently establish both a chronic dust disease of the lung, and an opacity or mass that would appear as greater than one centimeter if seen on x-ray, which would satisfy the regulatory definition of complicated pneumoconiosis." The Board affirmed the Administrative Law Judge's decision to weigh medical opinion evidence addressing the existence of complicated pneumoconiosis under § 718.304(c).

Finally, the Board instructed that once the Administrative Law Judge weighs evidence separately under subsections (a), (b), and (c) of § 718.304, then s/he must "weigh the entirety of the evidence . . . together before determining whether claimant has complicated pneumoconiosis and before finding that claimant is entitled to invocation of the irrebuttable presumption."

[**evidentiary limitations at § 725.414; complicated pneumoconiosis at § 718.304**]