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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 223 July 2010

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

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

***Marathon Ashland Petroleum v. Williams*, No. 09-3317, 2010 WL 2711316 (6th Cir. 2010)(unpub.)**

Claimant alleged that he sustained a long thoracic nerve injury to his shoulder while working for employer as a barge welder. The Sixth Circuit vacated the BRB's decision affirming the ALJ's award of disability benefits on the ground that the ALJ's basis for establishing the date of maximum medical improvement ("MMI") was not sufficiently explained. 5 U.S.C. § 557(c)(3)(A). According to employer's examining physician, Dr. Best, claimant reached MMI on March 1, 2005. The parties stipulated that, according to claimant's treating physician, Dr. Goodwin, claimant has yet to reach MMI. Yet, Dr. Goodwin's office notes indicated that he did not anticipate that claimant's shoulder would ever improve. The ALJ found that claimant's attempt to return to work on May 31, 2005, established that this was his date of MMI. The court questioned whether this was appropriate. While claimant's inability to perform his prior job duties may indicate that he was permanently disabled as of that date, it does not necessarily indicate that this was the date he reached MMI. Considering, in particular, that claimant was examined by Dr. Goodwin on two occasions subsequent to May

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

31, 2005, the ALJ's MMI determination needed to be more thoroughly explained.

[Topic 8.1.1 NATURE OF DISABILITY (PERMANENT V. TEMPORARY – In General]

***Morgan v. Cascade Gen., Inc.*, Nos. 08-73371, 08-73463, 2010 WL 2835751 (9th Cir. 2010)(unpub.).**

Vicki Morgan, a widow of Dennis Morgan, brought two claims under the LHWCA arising from his injury and death. She sought additional benefits resulting from decedent's on-the-job knee injury on behalf of his estate. She also brought her own claim for death benefits as decedent's widow, on the theory that decedent's knee injury and inability to return to his old job led to his depression and excessive drinking and thus resulted in his drunk driving death two years after his injury. The ALJ and BRB denied both claims, and the Ninth Circuit affirmed.

The court affirmed as supported by substantial evidence the ALJ's determination that parking lot cashier jobs constituted suitable alternate employment available to Dennis Morgan, and that he could have been hired if he had diligently applied. Evidence in the record indicated that he would not have been psychologically incapable of performing a low-paying job, and that his alcohol use did not make him unemployable. *See Rhine v. Stevedoring Servs. of Am.,* 596 F.3d 1161, 1166 (9th Cir.2010) (holding that a claimant's employment preferences are irrelevant to the question whether alternative employment is available).

The court further concluded that Vicki Morgan's claim for death benefits was time-barred under Section 13(a) of the LHWCA, as it was filed more than one year after employee's death. The court rejected claimant's argument that she is entitled to tolling of the filing deadline under Section 13(c) because her grief rendered her mentally incompetent for several months after her husband's death. The ALJ weighed the evidence and determined as a factual matter that the lack of any medical diagnosis or any treatment for mental disorder and the absence of an appointment of a guardian outweighed the lay testimony supporting Vicki Morgan's claim that she was mentally incompetent. She provided no medical evidence of disability, had obtained counsel within weeks of the death, and had obtained appointment as administrator of his estate within a short time after Mr. Morgan's death in April 2002. The BRB reviewed the evidence and reasonably concluded that at no time during the year was she mentally

incompetent. As this factual finding was supported by substantial evidence in the record, it could not be disturbed on appeal.

[Topic 13.1.3 TIME FOR FILING OF CLAIMS – Minors and Legal Incompetents]

***Stallworth v. Northrop Grumman Ship Systems, Inc.*, No. 09-60865, 2010 WL 2836126 (5th Cir. 2010)(unpub.).**

The Fifth Circuit affirmed the BRB's decision upholding the District Director's fee award to claimant's counsel under the LHWCA. On appeal, claimant argued that 1) the District Director's decision to reduce the fee award as a result of claimant's "losing on an issue" contravened *Hensley v. Echerhart,* 461 U.S. 424 (1983); and 2) the District Director's decision to use a "fractional multiplier to reduce a fee award" was arbitrary, capricious and/or abuse of discretion.

The court observed that, pursuant to *Hensley*, an adjudicator "may simply reduce the award to account for the [attorney's] limited success." *Id.* at 436-37. The District Director observed that before an ALJ, claimant was successful in obtaining an ongoing award of permanent partial disability, but lost on the issue of increasing his average weekly wage ("AWW); in fact, his AWW was decreased. Thus, the District Director reasoned that although claimant's attorney argued two issues, he lost on the main issue he litigated before the District Director, *i.e.*, the issue of his AWW. Accordingly, the Board's conclusion that claimant's attorney achieved only partial or very limited success was supported by substantial evidence, and the District Director's decision was consistent with *Hensley.*

The court also rejected claimant's assertion that the District Director's reduction of the fee award by one-half -- instead of meticulously calculating the exact number of hours claimant's attorney spent on the "successful" versus the "non-successful" issue -- constitutes a decision that is arbitrary, capricious, and/or an abuse of discretion. With respect to determining the amount of a fee reduction, the Supreme Court has held that "[t]here is no precise rule or formula for making these determinations." *Id.* at 436. Consequently, "[t]he [adjudicator] may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37. Here, although counsel argued two issues, he lost on the main issue he litigated before the District Director. As such, a reduction of the fee award by one-half was fully supported by the substantial evidence in the record. To conclude otherwise would undermine

the *Hensley* Court's edict that "[t]here is no precise rule or formula for making these determinations." *Id.* at 436.

[Topic 28.6.4 ATTORNEY'S FEES – Losing on an Issue – *Hensley* and Its Aftermath]

B. Benefits Review Board

***Urso v. MVM, Inc.*, __ BRBS __ (2010).**

The Board reversed the ALJ's denial of dependency benefits to decedent's parents under Section 9(d). Decedent worked as a contractor for a classified government agency in Beirut, Lebanon and lived on the grounds of the U.S. Embassy. The ALJ found that decedent died from an accidental overdose of Tramadol, a pain medication he had purchased from a pharmacy and used while getting a tatoo. The ALJ concluded that the claim was not barred under Section 3(c) based on his determinations that intoxication was not the sole cause of death as decedent's pre-existing heart condition contributed to his death and that there was no evidence that decedent intended to harm himself. Applying the "zone of special danger" analysis, the ALJ concluded that the recreational activity of getting a tattoo and the self-administered, accidental lethal dose of an over-the-counter medication were reasonably foreseeable and arose out of the conditions of decedent's employment in Lebanon. The ALJ awarded funeral expenses, but denied decedent's parents benefits under Section 9(d) on the ground that they did not qualify as "dependents" pursuant to Section 152(d) of the Internal Revenue Code.

The Board initially dismissed employer's cross-appeal as untimely, holding that failure of the claimant and the Director to serve employer's counsel with their notices of appeal did not toll the Section 21(a) time for filing a cross-appeal pursuant to 20 C.F.R. §802.205(b), and that notices served on carrier constituted sufficient notices to employer. The Board cited case precedent supporting the Director's contention that proper service on counsel is not required for the appeal time to commence. The Board noted, nevertheless, that the ALJ properly concluded that decedent's death is compensable. It further affirmed the ALJ's determination that the claim was not barred under Section 3(c), as employer failed to rebut the Section 20(c) presumption that the injury was not occasioned solely by intoxication.

Reversing the ALJ's denial of dependency benefits to decedent's parents under Section 9(d), the Board held that the test for dependency applicable to claimants turns upon whether they were dependent on the

decedent at least in part at the time of the injury for maintenance of their "accustomed standard of living." Slip. op. at 7, 9, citing *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223 (1976). Thus, the ALJ erred in considering whether they met a more stringent requirements for dependency pursuant to Section 152 of the tax code. The plain language of Section 9(d) establishes three groups of potential claimants: 1) grandchildren or brothers and sisters, if dependent upon the deceased at the time of injury, who receive 20 percent of the decedent's wages; 2) any other persons who satisfy the definition of the term "dependent" in section 152 of title 26, but are not otherwise eligible under this section, who receive 20 percent of the deceased's wages; and 3) each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, who receive 25 percent of the deceased's wages. Moreover, the Board had previously rejected the application of the tax code test for parental dependency, holding that the pre-1972 amendment test remains applicable for parents. Citing the Fifth Circuit precedent, the Board stated that "[p]artial dependency is sufficient, the test is whether the contributions were needed and relied upon to maintain the alleged dependent in the position in life to which she or he was accustomed." Slip. op. at 8 (citations omitted). The determination of dependency must be based on all the circumstances of a particular case.

Here, the ALJ's findings of fact established that claimants were partially dependent upon decedent to maintain their standard of living. Employer contended that claimants were not dependent as they receive at least $3,791 per month in income, including their Social Security benefits, food stamps, as well as rental income from their own and from decedent's rental property. The Board rejected employer's contention that decedent's contributions such as dentures, appliances and cell phones should be considered gifts and as such excluded from dependency determination, stating that it is appropriate to consider gifts in determining dependency. The proceeds from decedent's rental property could not be considered the parents' "income," but were clear evidence of decedent's support. Further, although claimants have income from their own rental property, the ALJ found that they have expenses such as a mortgage, utilities and taxes on this property. The decedent made consistent, substantial contributions to his parents in his lifetime, including them as dependents on his tax returns for the three years prior to his death. The focus of the analysis is whether the claimants were, at least in part, dependent on the decedent, not whether the amount of their income exceeded their expenses without the decedent's assistance.

[Topic 21.4.1 TIMELINESS OF APPEAL – Appeal to Benefits Review Board; Topic 60.2.7 DEFENSE BASE ACT – "Zone of Special Danger;"

Topic 9.3.6 COMPENSATION FOR DEATH - Payments to Other Dependents]

***Wakeley v. Knutson Towboat Co.*, __ BRBS __ (2010).**

Claimant worked for employer as a carpenter. He split his time between employer's downtown facility and its Millington facility, repairing and remodeling buildings at those sites. The Millington facility is a 40-acre parcel situated on the Isthmus Slough; the only building on the facility is the truck shop, or Millington shop, which sits approximately 100 yards from the water. Claimant was injured while repairing the roof of the Millington shop.

The Board affirmed the ALJ's determination that the Millington shop is a maritime situs under Section 3(a). Since claimant was not injured upon navigable waters or on an enumerated site, the issue was whether his injury occurred on an "other adjoining area." This case arose in the Ninth Circuit, which holds that an "adjoining area" must have a functional and geographical relationship with navigable waters but need not be contiguous with those waters. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141, 7 BRBS, 409, 411 (9th Cir. 1978). In this case, "[a]s the property is adjacent to a navigable body of water and the administrative law judge found that at the time of injury, maritime activities occurred on the property and in the building in conjunction with the use of the navigable slough, the administrative law judge properly found that the entire property is a covered situs." Slip. op. at _6 (citations omitted). The ALJ found that the Millington shop sits in an enclosed facility that is part of one contiguous property adjacent to the navigable slough on which barges were unloaded during claimant's employment. Further, equipment used in unloading logs from barges was repaired on the property. Having considered conflicting testimony, the ALJ reasonably inferred that the shop is used to house tools used to repair such equipment. Thus, the shop is not functionally separate from the rest of the property. The Board noted that the Milligan property is not a "multi-purpose facility" or manufacturing site which would require considering covered versus non-covered areas. "Rather, it is more like a terminal loading operation where the entire facility is covered." Slip. op. at __ n.__. The Board rejected employer's contention that the *Herron* factors had to be specifically analyzed in this case, as the site had a geographic and functional relationship with navigable water.

The Board, however, reversed the ALJ's determination that claimant was not a "maritime employee" and thus failed to meet the status requirement of Section 2(3). The ALJ found that claimant's construction/carpentry work on the building was not related to the unloading

of the log barges. The Board reviewed the relevant precedent and concluded that, contrary to the ALJ's conclusion, "employees who maintain structures involved in maritime activities are covered employees; the administrative law judge's distinction of such work from the direct repair of longshore equipment has no basis in law." Slip. op. at 8. The ALJ found that the Millington building was used to carry out maritime operations because it housed tools for the repair of maritime equipment. "As claimant spent at least some of his time in the repair of a structure used for a maritime purpose, his work constitutes covered employment." Slip. op. at 9 (citations omitted). Having thus found status, the Board did not address whether claimant's periodic performance of other activities, such as cleaning tugs and barges or replacing dock planks, conveyed coverage. The Board remanded the case for the consideration of any remaining issues.

[Topic 1.6.2 SITUS – "Over land;" Topic 1.7.1 STATUS – "Maritime worker" ("Maritime Employment")]

***Wilson v. Bethlehem Steel Corp.*, __ BRBS __ (2010).**

The decedent sustained a work-related neck injury in 1981, and entered into stipulations with employer which were incorporated in a compensation order issued by the deputy commissioner in 1985. The parties agreed that decedent was entitled to permanent partial disability benefits, and employer was awarded Section 8(f) relief. After decedent's death from lymphoma in 2008, his widow filed this claim seeking benefits pursuant to Section 8(d)(3) of the LHWCA, 33 U.S.C. §908(d)(3) (1982) (repealed 1984).[2] Specifically, claimant sought to enforce a letter written in 1983 by employer's workers' compensation administrator ("the Heggie letter") stating that, upon the death of the employee, his widow would receive benefits pursuant to §8(d)(3).

Upholding the ALJ's grant of a summary decision for employer, the Board held that claimant was not entitled to additional benefits under the Act because the 1984 Amendments eliminated survivors' rights to recover, pursuant to Section 8(d)(3), additional benefits in a case where an employee receiving unscheduled permanent partial disability benefits dies from unrelated causes. The Board affirmed the ALJ's finding that neither the Heggie letter nor the deputy commissioner's compensation order binds employer or the Special Fund to pay benefits pursuant to Section 8(d). The Heggie letter merely recited the law as it existed in 1983 and did not entitle

[2] Claimant has not asserted her entitlement to death benefits pursuant to Section 9.

claimant to benefits given the repeal of §908(d)(3). The letter did not reflect an agreement between the parties that employer or the Special Fund was bound to pay such benefits in the future. In addition, the decedent was legally precluded from bargaining for payments to his widow during his lifetime, as her right to such payments did not exist at that time. Nor did the 1985 compensation order indicate that the parties entered into a Section 8(i) settlement; and, prior to 1984, claims for death benefits could not be settled pursuant to Section 8(i). The Board also noted that 20 C.F.R. §702.241(g) precludes settlement of any claim for death benefits prior to the employee's death.

Finally, assuming, *arguendo*, that either the Heggie letter or the stipulated compensation order reflects a compromised agreement, the unsigned agreement and the compensation order are both silent as to the widow's entitlement to benefits. If such benefits had been part of the bargaining process, the ALJ properly found that, as the employee's death had not yet occurred, no rights had vested in the widow as of the date the Act was amended in 1984 to eliminate the recovery claimed.

[Topic 8.5 DEATH BENEFITS FOR SURVIVORS; Topic 8.10.2 SECTION 8(i) SETTLEMENTS - Persons Authorized]

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

In *Energy West Mining Co. v. Hunsinger,* 2010 WL 2982910, Case No. 09-9550 (10th Cir. July 29, 2010)(unpub.), the Administrative Law Judge properly determined that Claimant, who had a 25 pack year smoking history and a 24 year history of coal mine employment, was totally disabled due to legal coal workers' pneumoconiosis. In affirming the award, the court held that it was proper to rely on a medical expert's "fifteen years of experience and several epidemiological studies" in crediting his opinion that "it was the significant coal dust exposure that caused Mr. Hunsinger's lung disease despite the absence of any fibrotic changes visible via x-ray." Citing to the Sixth Circuit's decision in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Tenth Circuit agreed that a physician is not required to apportion relative causes of the miner's lung disease (smoking and coal dust exposure) and the miner is not required to demonstrate that coal dust exposure is the "only cause" of his respiratory condition.

[**legal coal workers' pneumoconiosis**]

B. Benefits Review Board

By published decision in *Spangler v. Donna Kay Coal Co.*, ___ B.L.R. 1-__, BRB No. 09-0725 BLA (July 30, 2010), the Board denied Employer's motion for dismissal as the operator responsible for payment of benefits. In a letter to the Administrative Law Judge, Employer withdrew its controversion of the miner's claim stating that "autopsy evidence establishe[d] complicated pneumoconiosis" and the "miner's entitlement to the irrebuttable presumption" at 20 C.F.R. § 718.304. The Board held that "employer stipulated to its own liability by conceding that the autopsy report established complicated pneumoconiosis and entitlement to the irrebuttable presumption at 20 C.F.R. § 718.304."

However, where the miner died during pendency of the claim, the Board held that it was not proper to substitute the miner's daughter-in-law as a party to the claim without adequate consideration of the factors at 20 C.F.R. § 725.545(e). Under the facts of the case, the Administrative Law Judge held that Employer failed to present "any evidence that claimant was not acting on behalf of the miner's estate" such that the daughter-in-law was permitted to proceed with the miner's claim for benefits. The Board cited to 20 C.F.R. §§ 725.360 and 725.545 to hold:

> Because the administrative law judge did not properly consider whether claimant qualified as a legal representative under 20 C.F.R. § 725.545(e), we must vacate the administrative law judge's determination that claimant is a proper party to these proceedings.
>
> . . .
>
> Whether claimant is a proper party is a question of fact for the administrative law judge to resolve based upon the application of the regulations.

Slip op. at 7. The Board noted that, on remand, the "administrative law judge may reopen the record for the submission of evidence relevant to this issue, or entertain motions from any other person who claims the right to proceed on behalf of the miner or his estate."

[**conceding the presence of complicated pneumoconiosis, effect of; qualifying as a party entitled to pursue a claim**]

By unpublished decision in *Saylor v. Mullins & Sons Coal Co.*, BRB No. 09-0727 BLA (July 3, 2010) (unpub.), a claim involving a petition for modification of the denial of a subsequent claim, the Board held that the Administrative Law Judge "was not required to limit his consideration of evidence designated by claimant on the most recent evidence summary form only." To the contrary, an Administrative Law Judge is permitted to consider evidence that does not exceed the limitations, even if the evidence is not designated on a party's evidence summary form. The Board stated:

> [T]he proper inquiry is whether the evidence considered by the administrative law judge falls within claimant's allowable evidence pursuant to the combined evidentiary limits of 20 C.F.R. § 725.414 and 20 C.F.R. § 725.310.

Slip op. at 5.

[**evidence summary form designations, effect of**]