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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 235 August 2011

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

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

***Stevedoring Servs. of Am., Inc. v. Dir., OWCP [Christensen]*, No. 10–73574, 2011 WL 3267679 (9th Cir. 2011)(unpub.)**

The Ninth Circuit affirmed the Board's decision denying reconsideration of its attorney fee award to claimant and his attorney, Charles Robinowitz, in *Christensen v. Stevedoring Servs. of Am.*, 44 BRBS 75 (2010),[2] on remand from *Christensen v. Stevedoring Servs. of Am.,* 557 F.3d 1049 (9th Cir.2009)("Christensen III").[3]

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

[2] The following full citation corresponds to this decision: *Christensen v. Stevedoring Servs. of Am.*, 44 BRBS 75 (2010), *denying recon. of* 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009), *aff'd mem. sub nom. Stevedoring Servs. of Am., Inc. v. Director, OWCP*, No. 10-73574, 2011 WL 3267679 (9th Cir. Aug. 1, 2011).

[3] Prior Ninth Circuit decisions in this case are found at: Christensen *v. Stevedoring Servs. of Am., Inc.,* 430 F.3d 1032 (9th Cir.2005) (Christensen *I*), and Christensen *v. Dir., OWCP,* 171 Fed. App'x 162 (9th Cir. Mar. 15, 2006) Christensen II).

The Board rejected employer's contention that the Supreme Court's decision in *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010), demonstrates error in the Board's finding that claimant's counsel should be compensated in every case by use of the 95th percentile rates in the Oregon Bar Survey. The Board agreed that, generally, one factor, like years since admission to the bar, does not control the hourly rate determination in every case in which the attorney participates. However, higher rates generally are warranted for experienced and skilled attorneys, and employer has not demonstrated that use of the 95th percentile rate was inappropriate in this case given claimant's high degree of success.

In rejecting employer's analogous challenge on appeal, the Ninth Circuit stated that

> "[p]etitioners' contention that the Supreme Court's decision in *Perdue v. Kenny A.,* 130 S.Ct. 1662 (2010), alters our precedent in Christensen *III* lacks merit. No language in *Perdue* disturbs *Christensen III's* holding that the Board should use 'prevailing market rates in the relevant community' based on the lawyer's practice area, skill, and experience. *See Christensen III,* 557 F.3d at 1053 (rates should be 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation') (quoting *Blum v. Stetson,* 465 U.S. 886, 896 n. 11 (1984)); *see also B & G Mining, Inc. v. Dir., OWCP,* 522 F.3d 657, 663 (6th Cir.2008) ('To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.'). *Perdue* addressed the 'rare circumstances' in which a properly calculated lodestar may nevertheless be 'enhanced,' and that simply was not an issue in this litigation. 130 S.Ct. at 1669, 1673."

Slip op. at *1.

The court further held that the Board did not abuse its discretion in awarding fees from the Oregon Bar Survey based on the average rates of general civil litigation attorneys. Under *Christensen III*, a reasonable attorney's fee must be based on the relevant community and prevailing market rate. The Board reasonably concluded that the relevant community was Portland, Oregon and that insurance defense rates were not 'market,' especially in light of the volume discounts involved in such work. Each factor the Board relied on was corroborated by evidence in the record in the form of affidavits and surveys. *Id.*, citing *United Steelworkers of Am. v.*

Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir.1990) ("Affidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the community, and rate determinations in other cases ... are satisfactory evidence of the prevailing market rate.").

[Topic 28.6.1 Hourly Rate]

***Goins v. Director, OWCP*, No. 10–60702, 2011 WL 3501763 (5th Cir. 2011)(unpub.).**

The Fifth Circuit upheld the Board's decision affirming an ALJ's denial of a *pro se* claimant's claim against his former employers -- Lake Charles Stevedores, Incorporated ("LCS") and J.J. Flanagan Stevedores ("JJF") -- alleging violations of Sections 31(c) and 48a of the LHWCA.

In 2007, an ALJ awarded claimant temporary total disability ("TTD") benefits for injuries suffered during his employment with LCS and JJF. Claimant then filed a second claim alleging that both employers violated § 31(c), which prohibits a person from "knowingly and willfully mak[ing] a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee," by withholding from the ALJ in the 2007 proceeding wage and medical records, and other documentation; and further alleging violation of § 48(a), which prohibits employers from discriminating against an employee because of pursuit of his rights under the LHWCA.

The court initially determined that, although *pro se* briefs are to be liberally construed, claimant's inadequate briefing waived his challenges to the BRB's order, as he provided no citations to the record or relevant legal authority, submitted no supporting documentation, and his record excerpts provided no basis for his claims. Furthermore, even if claimant had preserved a challenge to the BRB order, the ALJ's decision was supported by substantial evidence. The ALJ properly granted employers' motion for summary decision with respect to the § 31(c) claim against both employers. Claimant failed to submit evidence that employers made a material misrepresentation for the purpose of reducing, denying, or terminating his benefits. While claimant submitted evidence that he believed entitled him to a higher average weekly wage for purposes of the ALJ's 2007 order, that order was not subject of the BRB's decision at issue, and thus outside the court's jurisdiction. Further, the ALJ properly dismissed claimant's § 48a claim against LCS in his summary decision, as claimant failed to identify a discriminatory act by LCS.

Finally, while the ALJ found that claimant made out a *prima facie* case of a 48a violation against JJF based on two potentially discriminatory acts -- JJF's discharge of claimant and its refusal, despite claimant's seniority, to assign him to traveling gangs -- substantial evidence supported the ALJ's determination that JJF had demonstrated that discriminatory animus played no role in those decisions.

[Topic 31.4 PENALTY FOR MISREPRESENTATION--PROSECUTION OF CLAIMS -- EMPLOYER'S MISREPRESENTATION; Topic 48a.1 DISCRIMINATION AGAINST EMPLOYEES WHO BRING PROCEEDINGS – GENERALLY]

A. U.S. District Courts

***Continental Insurance Co. v. Sandi Group, Inc.*, __ F.Supp.2d __, 2011 WL 3648253 (D.D.C. 2011).**

Two Iraqi nationals filed claims under the Defense Base Act ("DBA") naming CorporateBank Financial Services/The Sandi Group as the employer and Continental as the carrier. Prior to a formal hearing, the Sandi Group took the position that the claimants were working under its subcontract with DynCorp, for the benefit of the prime contract between DynCorp and the State Department; and that the DBA policy issued by Continental to DynCorp[4] covered claimants. Continental, however, denied liability on the grounds that the policy did not cover foreign nationals, and it sought a declaratory judgment from the district court with respect to this insurance coverage dispute. The Sandi Group thereafter sought to join DynCorp to the ALJ proceedings, arguing that, if Continental's policy does not cover claimants, then, under Section 4(a), DynCorp is liable for the DBA benefits. The Sandi Group also moved to dismiss, or stay, Continental's declaratory judgment action, arguing that the court should first allow the ALJ to rule on the coverage issue and raising the possibility of inconsistent rulings; in response, Continental argued that the ALJ lacks jurisdiction over this issue.

The district court did not reach the issue of whether the ALJ has jurisdiction to resolve the insurance coverage dispute, and held instead that, even if the ALJ has concurrent authority to consider the scope of a DBA insurance policy, dismissal (or stay) was not required under the primary

[4] The policy was issued by Continental to Computer Sciences Corporation, the parent company to DynCorp International.

jurisdiction doctrine.[5] Slip op. at *2. While the Sandi Group relied on § 19(a) of the LHWCA, it did not point to any federal court cases holding that this provision grants the ALJ the authority, much less exclusive jurisdiction, to decide a contested insurance coverage issue; the court did note that the Sandi Group's brief to the ALJ cited opinions of the Benefits Review Board ("BRB") recognizing the ALJs' authority to resolve such issues. Nor did the Sandi Group provide authority for the proposition that the court should defer to the ALJ's assessment of the scope of an insurance policy; the court distinguished *Makris v. Spensieri Painting, LLC,* 669 F.Supp.2d 201, 205 (D.P.R. 2009) on the grounds that, in that case, the court stayed its proceedings to allow ALJ to rule on the issue of DBA coverage, and, unlike in *Makris*, it was not clear that the ALJ in this case would rule on the question raised before the court.

*T*he court also discussed *Temporary Employment Services v. Trinity Marine Group, Inc.,* 261 F.3d 456 (5th Cir. 2001), which held that the parties' claims regarding contractual indemnification provisions were beyond the scope of the statutory authority granted to the administrative tribunal. The Fifth Circuit construed § 19(a)'s language granting ALJs the power to resolve all questions "in respect of" an employee's claim as referring to all questions "integral to" the employee's claim against the employer. Slip op. at *3, citing *id.* at 462. The district court observed, *in dicta*, that it is "inclined to agree with the reasoning of the Fifth Circuit and its construction of the statute and to conclude that the insurance coverage dispute is collateral to the only issue the statute assigns to the ALJ to resolve: the claimant's entitlement to payment." Slip op. at *3. The court further stated:

> "It is important to note, though, that the Department of Labor Benefits Review Board has ruled that 'the administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act.' *Weber v. S .C. Lobeland Co.,* 28 BRBS 321, 1994 WL 712512, *9 (Nov. 29, 1994). But the D.C. Circuit has not weighed in on this issue, and the Court need not resolve the jurisdictional question to rule on the motion to dismiss. Even if the ALJ has concurrent authority to consider the scope of a DBA insurance policy, there is no basis to conclude—and the Sandi Group has not argued—that the resolution of the legal question will require specialized knowledge that is resident at the Department of Labor, or that it

[5] Under this doctrine, a district court may dismiss a case on the ground that an administrative agency is best suited to make the initial decision on the issues in dispute, even though the district court has subject-matter jurisdiction. Slip op. at *2, n.1.

> will turn upon an examination that the ALJ is particularly suited to undertake. So, there is no reason to decline to exercise the jurisdiction that this Court clearly possesses and defer to the agency. Nor is the Court persuaded that the ALJ has undertaken to decide the coverage issue, or that it will be decided promptly, so it is not necessary to stay this action."

Id. In their pre-trial briefs to the ALJ, the parties set forth their views on the coverage issue. However, while the ALJ vacated the trial date and issued a show cause order directing the parties to brief the question of whether DynCorp should be joined as an indispensable party, the ALJ's order did not indicate that she has agreed to resolve the coverage issue.

[Topic 27.1.11.1 POWERS OF ADMINISTRATIVE LAW JUDGES -- Resolving Contract Disputes—Generally; Topic 4.1.1 COMPENSATION LIABILITY – 4(a) Contractor/Subcontractor Liability]

[***Ed. Note*:** The following decision does not involve the LHWCA and is included for informational purposes only]

***In re OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON" IN THE GULF OF MEXICO, on April 20, 2010*, __ F.Supp.2d __, 2011 WL 3805746 (E.D.La. 2011).**

The district court ruled on a motion to dismiss in this multi-district litigation ("MDL") involving hundreds of consolidated cases, with thousands of claimants. These cases arise from the April 20, 2010 explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit, which resulted in the release of millions of gallons of oil into the Gulf of Mexico before it was finally capped approximately three months later. The consolidated cases include claims for death and personal injury, as well as various claims for environmental and economic damages. Defendants moved to dismiss all claims brought pursuant to either general maritime law or state law. The court's order addressed various issues involving choice of law, and especially the interplay among admiralty, the Outer Continental Shelf Lands Act, the Oil Pollution Act of 1990, 33 U.S.C. § 2701, et seq., and various state laws.

C. Benefits Review Board

There have been no published Board decisions under the LHWCA in August 2011.

II. Black Lung Benefits Act

Benefits Review Board

By published *Order of Dismissal* in *Miller v. Associated Electric Cooperative, Inc.*, BRB No. 11-0360 BLA (Aug. 17, 2011), the Board dismissed Employer's appeal of an Administrative Law Judge's order remanding a black lung claim for a new Department of Labor-sponsored pulmonary evaluation of Claimant. In the remand order, the Administrative Law Judge determined that the 20 C.F.R. § 725.406 examination report "failed to address the issues of total disability and disability causation."

In dismissing Employer's appeal of this order, the Board concluded that the Administrative Law Judge had not "made a final determination on the merits of this case" and, as a result, Employer's "appeal is interlocutory." The Board distinguished its holding in *R.G.B. [Blackburn] v. Southern Ohio Coal Co.*, 24 B.L.R. 1-129 (en banc), *appeal dismissed*, Case No. 09-4294 (6th Cir. Feb. 22, 2010), where the Administrative Law Judge remanded five black lung claims for complete pulmonary evaluations. The Board explained:

> In *Blackburn*, the Board accepted the employers' interlocutory appeals of a series of remand orders, issued in five cases by (the Administrative Law Judge), in order to resolve the important procedural issue of whether an administrative law judge may properly exercise his or her remand authority, pursuant to 20 C.F.R. § 725.456(e), without notice to the parties and prior to the assembly of the evidentiary record at the hearing.

Slip op. at 3. In *Miller*, however, the Administrative Law Judge issued an order to show cause why the claim should not be remanded for a new pulmonary evaluation prior to issuing the order of remand.

[**remand for a complete pulmonary evaluation; interlocutory appeal**]

In *Groves v. Vision Processing, LLC*, BRB Nos. 09-0780 BLA and 09-0780 BLA-A (Sept. 29, 2010)(unpub.), the Administrative Law Judge awarded benefits in the miner's claim, but denied survivor's benefits. Employer did not appeal the Administrative Law Judge's consolidated decision.

On the other hand, Claimant appealed the denial of her claim for survivor's benefits. Because the survivor's claim was filed after January 1, 2005, the Board adopted the position of the Director, OWCP and reversed the denial of survivor's benefits on grounds that the Patient Protection and Affordable Care Act § 1556, Pub. L. No. 111-148, 124 Stat. 119 (2010) applied and the survivor was automatically entitled to benefits based on the award of benefits in the miner's lifetime claim. Employer maintained that it was denied due process; *to wit*, it did not have notice or an opportunity to be heard on the new enactment providing derivative entitlement. The Board held, to the contrary, Employer had notice and an opportunity to be heard in conjunction with its litigation in the miner's lifetime claim and this satisfied the due process requirement for purposes of the survivor's claim. The Board stated:

> The fact that employer chose not to appeal the award in the miner's claim, on which an award in the survivor's claim now rests, does not mean that employer's due process rights have been violated.

Slip op. at 6.

[**consolidated claims, automatic entitlement under the PPACA**]