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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 236
September 2011

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Chief Judge

Paul C. Johnson, Jr.
Associate Chief Judge for Longshore

William S. Colwell
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I. Longshore and Harbor Workers' Compensation Act and Related Acts

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

***Ceres Marine Terminals, Inc. v. Green*, __ F.3d __, 2011 WL 3891891 (4th Cir. 2011).**

Reversing the Board's decision, the Fourth Circuit held that, pursuant to *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ALJ erred by awarding disability benefits for binaural hearing loss based on the average of the two audiograms, deemed equally probative by the ALJ, with one audiogram showing 0% binaural hearing loss. Once the ALJ determined that the evidence as to whether a disability exits was "equally probative," claimant failed, as a matter of law, to meet his burden of proof to establish disability in light of the Supreme Court's rejection of the "true doubt" rule in *Greenwich Collieries*.

The court initially questioned the ALJ's unchallenged finding that the two audiograms were "equally probative" in light of claimant's audiologist's admissions that the disparate results indicated lack of reliability, and that the finding of 0% hearing loss could be correct or it could be that claimant

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

suffered from a temporary medical condition; as well as his recommendation for a third audiogram, which claimant refused.

The ALJ and the Board relied on prior Board caselaw as authority to average the results of the two audiograms. However, *Greenwich Collieries* compels the conclusion that claimant failed to meet his burden of proof to establish disability; "[t]he Supreme Court made this point abundantly clear: '[W]hen the evidence is evenly balanced, the benefits claimant must lose.'" Slip op. at *5, citing *Greenwich Collieries,* 512 U.S. at 281. Claimant's reliance on *Northrop Grumman Shipbuilding v. Kea*, 361 Fed.Appx. 519 (4th Cir.2010)(unpub.), was also misplaced, as this was an unpublished, nonprecedential decision; and, in that case, there was no finding that the evidence was in equipoise and the competing test results involved the level of disability, not its very existence. The court noted

> "we do not take the position that an ALJ can never average evidence presented by two medical professionals to make a determination as to the extent of disability. We simply hold that when there is contradictory, equally probative evidence as to whether a disability exists at all, an ALJ cannot average a 'zero' result with a higher result to find that a disability exists."

Slip op. at *5, n.2.

[Topic 8.3.2 PERMANENT PARTIAL DISABILTY - Scheduled Awards - Balancing or Weighing the Medical Ratings; Topic 8.13.1 HEARING LOSS – Introduction to General Concepts - Determining the Extent of Loss; Topic 23.7.1 EVIDENCE - The "True Doubt" Rule Is Inconsistent with § 7(c) of the Administrative Procedure Act]

***Dyncorp Intl. v. Dir. OWCP,* __ F.3d __, 2011 WL 3873793 (2th Cir. 2011).**

Agreeing with the Board, the Second Circuit held that substantial evidence did not support the ALJ's finding that claimant should have known within a year after being shot at work that she had suffered permanent impairment of her earning power due to psychological problems, for purposes of determining the timeliness of her claim under Section 13(a).

In March 2004, after several years of working for the Kansas Department of Corrections ("DOC") as a special enforcement officer, claimant accepted a three year contract with Dyncorp in Kosovo. She was shot and wounded on her first day on the job. Thereafter, she was placed on light duty due to her physical injuries. Claimant developed psychological symptoms that were treated with counseling and medications. She also

stopped working night shifts to enable a proper drug regimen. In 2004, she submitted to psychological evaluations together with the other survivors of the shooting. In April 2005, all the survivors were told by Dyncorp's successor that they were being sent home for their "mental well-being." After returning to Kansas DOC, claimant was deemed mentally unfit to carry a weapon and assigned a desk job. In April 2006, she filed a claim under the Defense Base Act ("DBA"), seeking benefits to cover the difference in salary between her former and current jobs at the DOC.

Applying the one year statute of limitations under §13(a) of the LHWCA, the ALJ found that the claim was time barred because claimant "should have been aware that her injuries would likely result in an impairment of her earning capacity at the time of Dr. Hough's evaluation of October 2004." The Board reversed and remanded. On remand, the ALJ awarded benefits, and employer appealed.

The Second Circuit initially adopted the Board's position that claims are presumed timely under §20(b). The court concluded that "the evidence in this case is not of the quantity or character that would allow a reasonable (reasoning) mind to conclude that Mechler had enough information—either from Dyncorp, her healthcare providers, or other sources—to realize more than one year before she filed her claims that her psychological problems would result in a permanent loss in earning capacity." Slip op. at *4. Claimant's placement on light duty did not contradict this conclusion, as it was due to her physical injuries and she later returned to full duty. Nor was constructive knowledge established at the time of Dr. Hough's evaluation, as he did not share his findings with claimant. The court reasoned that

> "[c]onsidered as a whole, the record shows that throughout the year following the shooting, Mechler's work was largely unaffected by whatever psychological problems she was then experiencing. It shows that she did seek therapy and medication related to these problems, but that neither of these treatments was of the sort typically associated with debilitating mental illness. Finally, it shows that Mechler, along with every other surviving member of her team, submitted to psychological evaluations, the findings of which were not shared with her. On this evidence, a reasoning mind could not conclude that Mechler knew or should have known that she had suffered a permanent impairment of earning power before April 2005."

Slip op. at *6.

[Topic 13.3.1 TIME FOR FILING OF CLAIMS – AWARENESS STANDARD – Effect Of Diagnosis/Report; Topic 13.3.1 TIME FOR FILING OF CLAIMS – AWARENESS STANDARD – Economic Factors; Topic 20.7 PRESUMPTIONS – PRESUMPTION THAT NOTICE OF CLAIM HAS BEEN GIVEN]

***Staubley v. Electric Boat Corp., et al.*, No. 10–3186–AG.Slip, 2011 WL 3849556 (2nd Cir. 2011)(unpub.).**[2]

The Second Circuit upheld the Board's decision affirming the ALJ's award of benefits to claimant, a voluntary retiree, under §8(c)(23) for a 10% permanent impairment of his lungs, agreeing that the ALJ's failure to take judicial notice of the AMA Guides was harmless error.

As a voluntary retiree, claimant's benefits were payable pursuant to §8(c)(23), based on a percentage of permanent impairment assessed under the AMA Guides, 33 U.S.C. §902(10), from the date his work-related permanent impairment commenced. The court initially agreed with the Board that the ALJ most likely erred by not taking judicial notice of the AMA Guides. Because §2(10) requires the use of the AMA Guides, "it stands to reason that an ALJ can rely on the Guides without the parties specifically introducing them into the record." Slip op. at *1. However, like the Board, the court deemed this error harmless.

Claimant argued that two consequences of this error warranted reversal. First, he asserted that had the ALJ consulted the Guides, she would have found they were consistent with Dr. Cherniack's finding of a 5% "permanent defect" in 1992. However, Dr. Cherniack's failure to apply the Guides was not the only reason that the ALJ rejected his assessment; the ALJ found that it lacked evidentiary support due to his exclusive reliance on the existence of pleural plaques, which the ALJ noted did not establish a pulmonary impairment. The latter finding was supported by three medical opinions and claimant's doctor's statement that his pleural plaques were "benign." The court also rejected claimant's assertion that the ALJ should have independently determined under the Guides whether the raw data from Dr. Cherniack's 1991 pulmonary function test ("PFT") showed abnormal diffusion capacity. Dr. Cherniack, a pulmonologist, concluded that diffusion capacity was normal, and the ALJ was not free to set her own expertise against that of a physician.

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[2] Some of the facts noted in this summary were gleaned from the Board's decision in this case, *Staubley v. Electric Boat Corp.*, BRB No. 09-0746 (March 24, 2010)(unpub.).

Second, claimant argued that the Guides would have demonstrated that the variability shown in Dr. Matarese's and Dr. Teiger's predicted values for claimant's diffusion capacity was based on their use of different standards to calculate those values.[3] The court found, however, that the ALJ was aware of this fact and, to account for this variation, limited her findings to Dr. Matarese's PFT results, as he used the same predicted value in all of his tests.

Finally, the ALJ's finding of permanency as of January 2008 was supported by substantial evidence. Claimant disputed this conclusion based on Dr. Cherniack's 1991 finding of pleural plaques, yet such evidence does not demonstrate impairment.

[Topic 10.5.2 DETERMINATION OF PAY - Occupational Disease--Sections 10(d)(2) and 8(c)(23); 1984 Retiree Provisions; Topic 23.8 EVIDENCE - ALJ MAY ACCEPT OR REJECT AMA GUIDES UNLESS REQUIRED; Topic 23.2 EVIDENCE - ADMISSION OF EVIDENCE; Topic 2.2.18 DEFINITIONS – INJURY – Representative Injuries/Diseases – Pulmonary Conditions]

A. U.S. District Courts

Martin v. Halliburton, et al.**, __ F.Supp.2d __, 2011 WL 3925404 (S.D.Tex. 2011).**

Granting in part defendants' motion to dismiss, the district court held that plaintiff's tort claims arising from the death of her father, Donald Tolfree, as a result of friendly fire during his employment with KBR as a heavy truck driver in Iraq, were barred pursuant to the DBA's exclusivity-of-remedy provision, 42 U.S.C. §1651(c).[4]

On 2/5/07, KBR instructed Tolfree and Glen Starry to act as chase truck drivers for a military supply convoy traveling from Camp Anaconda to Camp Warhorse. Tolfree and Starry were given oral instructions to follow the convoy until the recovery convoy driver, Kevin Studebaker, told them to

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[3] The Board had affirmed the ALJ's averaging of impairment ratings rendered by Drs. Matarese and Teiger, based on her finding that Dr. Matarese's rating overstated the impairment as it was based solely on claimant's diffusing capacity (DLCO) result and did not consider his activity level or symptomless clinical examination, while Dr. Teiger's rating understated the impairment since it did not consider the reduced DLCO.

[4] Plaintiff's claim of intentional infliction of emotional distress was not barred by the DBA, as it did not flow from the injury sustained by her father, but from the alleged injury to her as a result of Defendants' misrepresentation of the circumstances of her father's death.

exit. According to Studebaker, Tolfree and Starry were never supposed to leave the gate of Camp Anaconda. However, Tolfree and Starry followed the convoy outside of the gate. When Starry called for instructions, he was told to "go back" or "turn around," and assumed the speaker meant for him and Tolfree to return to Camp Anaconda. At this time, the U.S. Military was aware that insurgents had recently been hijacking convoy trucks and using them as explosive devices. As Tolfree and Starry's trucks were approaching the entrance of Camp Anaconda, the United States Military activated the escalation of force protocol for unannounced and unescorted vehicles, and a United States military gunner shot and killed Tolfree.

The DBA applies to claims for the "injury or death of any employee." 42 U.S.C. §1651(a). As the DBA does not define "injury," the court looked to the LHWCA's definition of injury in §(2) as an "accidental injury or death arising out of and in the course of employment ...." The DBA preempts a claim when the accidental injury or death arises out of and in the course of employment. In this case, in concluding that Tolfree's death was "accidental," the court relied primarily on the analytical framework adopted in *Fisher v. Halliburton,* 703 F.Supp.2d 639 (S.D. Tex. 2010). *Fisher* held that an "accident" under the DBA must be "undesired and unexpected." *Id.* at 646. Here, defendants presented evidence that they did not desire nor expect that Tolfree and Starry were attempting to reenter Camp Anaconda from outside the gate, and plaintiff presented no contrary evidence. As the court could not find that defendants "specifically expected" that Tolfree would be injured and killed, the court concluded that his death was an accident that occurred without foresight or expectation.

The court noted that some courts have found a narrow exception to the exclusivity-of-remedy provisions in the DBA and the LHWCA where an employer has a specific intent to injure the employee. This exception did not apply in this case, as plaintiff did not allege that defendants had any specific intent to cause Tolfree's injury.

[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 2.2.3 Injury (fact of)]

C. Benefits Review Board

***McDonald v. Aecom Technology Corp.*, __ BRBS __ (2011).**

Agreeing with the Director, OWCP, the Board held that, based on the plain language of Section 3(b) of the DBA, 42 U.S.C. §1653(b), the law to be

applied to the determination of employer's liability for an attorney's fee is determined in a DBA case by the location of the office of the district director that filed and served the ALJ's decision.

This claim was originally filed in the Second Compensation District in New York, pursuant to 20 C.F.R. §704.101(e), and, although claimant resided in Oklahoma, he hired counsel from San Francisco who had the case transferred to the district director's office in San Francisco. Despite employer's requests, the case was not reassigned to the district director in Houston, the one closest to claimant's residence. The ALJ concluded that, as his Decision and Order was filed and served by the San Francisco district director, the law of the Ninth Circuit applied, and awarded attorney's fees under §28(b), as interpreted by the Ninth Circuit. The Board affirmed the award.

The Board rejected employer's assertions that Fifth Circuit law should apply because the DBA is ambiguous and the applicable law should be determined by the location of the district director's office closest to claimant's residence; and that the choice of Fifth Circuit law is also appropriate as the ALJ is located in Louisiana.[5] With respect to employer's assertion that the case was improperly transferred to the San Francisco district director in contravention of §19(g) of the LHWCA, the Longshore Procedural Manual, and Industry Notice Number 122, the Board stated that "[a]s reassignment to another district is a discretionary act which requires approval of the Director, 20 C.F.R. §702.104, employer has no recourse at this late time for the district director's inaction on employer's request to transfer the claim." Slip op. at 7. The Board stated that the language in *Pearce v. Director, OWCP,* 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979), suggesting that the applicable law is determined by the location of the ALJ, is merely *dicta*. The Board concluded that "the better course is to follow the plain language of Section 3(b) as discussed in *Hice* [*v. Director, OWCP,* 156 F,3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998)] and *Lee* [*v. Boeing Co., Inc.,* 123 F.3d 801, 31 BRBS 101(CRT) (9th Cir. 1997)], and therefore we hold that the applicable law is determined by the location of the office of the district director that filed and served the [ALJ's] decision." Slip op. at *9. The Board noted that this holding is consistent with its decisions determining

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[5] The Board also rejected employer's suggestion that Tenth Circuit law applied as claimant's "secondary injuries" (*i.e.*, psychological condition) occurred in Oklahoma after he had returned from Afghanistan. The Board stated that "[b]y their very nature, secondary injuries are governed by the law governing the initial injury. Thus, benefits for claimant's psychological condition must be assessed in terms of the DBA, and an injury occurring within the jurisdiction of the Tenth Circuit would not be an injury covered by the DBA." Slip op. at 6, n.7 (citations omitted).

the law to apply in DBA cases, as well as the law regarding to which circuit or district court an appeal of a Board decision in a DBA case is taken.

The Board also rejected employer's challenges to the fee award. Unlike several other circuits, the Ninth Circuit does not require employer's rejection of a district director's recommendation.[6] The Board rejected employer's assertion that claimant did not obtain "greater compensation" than employer voluntarily paid. Although employer voluntarily paid claimant benefits for his lung condition, claimant obtained additional benefits for his work-related psychological condition, as well as medical benefits for his lung condition. The Board stated that

> "T[t]hat employer's voluntary payments were based on a compensation rate higher than the rate awarded by the [ALJ] does not alter the fact that claimant obtained 'additional compensation,' as even an inchoate right to additional benefits triggers the right to an employer-paid attorney's fee. Further, the Board historically has considered 'compensation' in Section 28 to be a 'generic term' incorporating 'all forms of relief' under the Act."

Slip op. at *11 (citations omitted).

The Board rejected employer's assertion that claimant's counsel did not submit sufficient documentation to establish hourly rates of $150 for law clerk work and $375 for attorney time awarded by the ALJ. Employer argued that using prevailing rates in San Francisco is inappropriate, as the hearing was held in Louisiana. The Board stated that "[b]ecause claimant's counsel is in San Francisco, we cannot say that the [ALJ] erred in finding that San Francisco constitutes the relevant market in this DBA case, which may have required expertise not available in Oklahoma." Slip op. at *12 (citations omitted). Additionally, the ALJ reduced the requested rate of $475 to $375, which is "within his discretionary authority and is supported by the evidence submitted, which demonstrated a range of prevailing rates. Absent any prevailing rate evidence for law clerks, the [ALJ], as is within his discretion, found that $150 is a reasonable hourly rate." *Id.* (citations omitted).

Finally, the ALJ did not err in not applying an across-the-board reduction based on claimant's limited success under *Hensley v. Eckerhart,*

[6] Also, in the Ninth Circuit, it is not dispositive whether the issues raised before the district director are the same on which claimant succeeded before the ALJ.

461 U.S. 424 (1983), in addition to his other reductions. The ALJ stated that claimant was unsuccessful on his claims for two of his three secondary injuries, and he "was successful on all the remaining issues" including obtaining continuing temporary total disability benefits. The Board observed that the ALJ discussed this point and employer has not established that the ALJ abused his discretion in this regard. Slip op. at *13, n.15, *see generally Barbera v. Director, OWCP,* 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

[Topic 60.2.6 DEFENSE BASE ACT – Appeals of Cases Determined Under DBA; Topic 28.2.3 28(b) ATTORNEY'S FEES - EMPLOYER'S LIABILITY - District Director's Recommendation; Topic 28.2.4 28(b) ATTORNEY'S FEES - EMPLOYER'S LIABILITY - Additional Compensation; Topic 28.6.1 ATTORNEY'S FEES - FACTORS CONSIDERED IN AWARD - Hourly Rate]

***Schwirse v. Marine Terminal Corp.*, __ BRBS __ (2011).**

The Board affirmed the ALJ's decision on remand denying claimant benefits under Section 3(c) of the LHWCA based on a finding that employer established, by a preponderance of the evidence, that claimant's injury was occasioned solely by his intoxication.[7]

After consuming alcohol throughout the workday, claimant suffered a head injury when he fell while relieving himself over the bull rail at employer's dock. The Board rejected claimant's contention that, pursuant to *Sheridon v. Petro-Drive*, Inc., 18 BRBS 57 (1986), employer's burden, after establishing rebuttal of the §20(c) presumption, is to "rule out" all other possible causes of injury other than intoxication. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994), the Supreme Court concluded that the Administrative Procedure Act ("APA") requires that the party with the burden of proof prove its case by a preponderance of the evidence. Further, in *Santoro v. Maher Terminals, Inc.,* 30 BRBS 171, 174 (1996), the Board stated that the preponderance of the evidence standard requires that the party having the burden of persuasion prove its position by more convincing evidence than the opposing party's evidence. Here, the ALJ rationally found that employer presented more convincing evidence than did claimant that his injury was occasioned solely by intoxication (e.g., evidence

[7] Because §3(c) is an affirmative defense, the burden of proof is on employer to establish that the injury was occasioned solely by the employee's intoxication. On prior appeal, the Board reversed the ALJ's finding that employer failed to rebut the §20(c) presumption that the injury was not due solely to intoxication, and remanded for consideration of the evidence as a whole on the issue of §3(c) defense. *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009).

that claimant was not only severely intoxicated, but that the route to the rail was free of any tripping or slipping hazards).

The Board also rejected claimant's contention that the focus was misplaced on intoxication as the sole cause of claimant's fall over the railing, rather than as the sole cause of his injury. In its prior decision in this case, the Board stated that if intoxication was the sole cause of the fall, then it also was the sole cause of the injury, and this decision constitutes the law of the case.

[Topic 3.2.1 Solely Due to Intoxication; Topic 20.8 Presumption That Employee Was Not Intoxicated]

***Williams v. Northrop Grumman Shipbuilding, Inc.*, __ BRBS __ (2011).**

Reversing the ALJ's determination, the Board held that the Section 3(a) situs requirement was met where claimant's injury occurred on employer's parking lot located within the perimeter of employer's shipyard that is adjacent to navigable waters, albeit separated from the shipyard's working areas by a fence and a security gate.

Claimant, a nuclear pipe worker, fell and injured his shoulder in employer's North Yard Parking Lot. The parking lot is situated on the premises of employer's shipyard; however, it is separated from the working areas by a fence. It is owned and maintained by employer for use by its employees, Navy personnel, and contractors who have business with employer, and is used solely for parking. There is no access to navigable waters from the parking lot, and employees must swipe their badges at a security turnstile at one end of the lot to enter the production area.

The Board reasoned that the Fourth Circuit, within whose jurisdiction this case arose, has defined "adjoining area" under §3(a) as a discrete shoreside structure or facility that is similar to the enumerated areas, actually contiguous with navigable waters, and customarily used for maritime activity. *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1139 29 BRBS 138, 143 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996) (additional citations omitted). Under *Sidewell*, a terminal adjoining water is covered in its entirety; it is not necessary that the location of an injury be used for loading or unloading.

Here, employer's property extended from navigable waters to the outer edge of the parking lot. The Board concluded that "claimant's injury

occurred in a shipbuilding area contiguous to navigable waters …." *Id.* at 3. The Board elaborated that

> "[l]ike the 'marine terminal' described in *Sidwell*, the shipyard adjoined navigable water, and the parking lot was contained within the shipyard, *i.e.*, the 'overall area which includes the location [of the injury] is part of a [shipyard] adjoining water.' *Sidwell*, 71 F,3d at 1140 n.11, 29 BRBS at 144 n.11(CRT). We find this significant because the Fourth Circuit stated that 'it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area. *Id.*, 71 F.3d at 1140, 29 BRBS at 144(CRT). Therefore, as the presence of a fence and security gate do not alter the fact that claimant's injury occurred within the boundaries of employer's shipyard, which is contiguous with navigable waters, claimant has satisfied the situs test."

Id. at 4 (additional citations omitted).

The Board distinguished its prior holdings in *McCormick*, *Griffin* and *Kerby*, as injuries in those cases occurred on sites that were physically separated from the shipyard by more than a fenced-off area, *i.e.*, public roads and privately-owned railroad tracks. Applying *Sidwell*, the Board held in those cases that the injuries did not occur within an overall shipyard area contiguous to water and were not covered. By contrast, "[t]he fence, unlike a public road, privately-owned railroad tracks, or other thoroughfare or divider, does not sever the contiguity between the North Yard Parking Lot and the rest of employer's shipyard which adjoins navigable waters." Slip op. at 5.

[Topic 1.6.2 SITUS – "Overland"]

II. Black Lung Benefits Act

[There are no published decisions to report for the month of September.]