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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 246 September 2012

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

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

***Price v. Stevedoring Services of America, Inc., et al.*, __ F.3d __, 2012 WL 3799775 (9th Cir. 2012)(*en banc*).**

In an *en banc* decision, the Ninth Circuit held that (1) neither the Board's decision nor the OWCP Director's litigating position in interpreting the Longshore Act was entitled to *Chevron* deference; (2) the maximum compensation rate under § 6 had to be applied from the fiscal year in which claimant became entitled to compensation, not the fiscal year in which he received a formal compensation award; (3) the ALJ/BRB correctly determined that interest on past due payments under the LHWCA had to be awarded at the general statutory post-judgment interest rate defined in 28 U.S.C. § 1961 instead of the rate set forth in 26 U.S.C. § 6621; and (4) if

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations ("*id.* at *__") pertain to the cases summarized in this digest and refer to the Westlaw identifier.

interest is to be awarded at the § 1961 rate, compound interest must be awarded, and the ALJ/BRB erred in awarding simple interest.[2]

Chevron deference:[3] Overruling its prior precedent and joining other circuits, the Ninth Circuit held that the litigating position of the Director, OWCP in interpreting the LHWCA was not entitled to *Chevron* deference. The Supreme Court has held that *Chevron* deference applies only when: (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." The Director's litigating positions do not rise to the level of lawmaking. They are not adopted through any relatively formal administrative procedure, but through internal decisionmaking not open to public comment or determination. Nor are there any other indicia that Congress intended them to carry the force of law; on the contrary, it is the BRB's published decision that are precedential and determine the rights of future parties. The Director previously advocated using § 6621, but later agreed with the BRB on the applicability of § 1961; yet, never promulgated regulations on this issue. Further, withholding *Chevron* deference from the Director's litigation positions is consistent with the principle that agencies' interpretations of their own regulations are entitled to deference, even when their interpretation of statutes is not. Without a basis in agency regulations or other binding agency interpretations, there is usually no justification for attributing to an agency litigating position the force of law. Furthermore, deferring to agencies' litigating positions on statutory interpretation would create a danger that agencies would avoid promulgating regulations altogether. As for the Board's interpretations of the LHWCA, they are not accorded any special deference as the BRB is not a policymaking entity.

Skidmore deference:[4] Under Supreme Court precedent, an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires. Here, as detailed below, the court concluded that the Director was entitled to *Skidmore* respect as to the application of the § 1961 rate, but not with respect to application of simple interest. Further, the court deemed it unnecessary to definitively resolve whether the BRB may be entitled to *Skidmore* respect because, as detailed below, it concluded that the BRB's explanations as to

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[2] The court initially affirmed the BRB's determinations regarding the applicable interest, see *Price v. Stevedoring Servs.of Am.*, 627 F.3d 1145 (9th Cir. 2010), and claimant successfully petitioned for *en banc* review.

[3] *See Chevron, U.S.A., Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[4] *See Skidmore v. Swift*, 323 U.S. 134 (1944).

the contested issues were not persuasive. The court acknowledged its prior statements that the BRB may be entitled to *Skidmore* respect, but observed that, in light of the BRB's lack of policymaking authority, it is "questionable" whether it should be entitled to any special deference, however persuasive its reasoning.

Maximum compensation rate: Pursuant to *Roberts v. Sea–Land Servs., Inc.*, 132 S.Ct. 1350 (2012), the court affirmed the ALJ/BRB's determination that the maximum compensation rate under § 6 had to be applied from the fiscal year in which claimant became entitled to compensation, not the fiscal year in which he received a formal compensation award.

Interest rate: Affirming the ALJ/BRB, the court held that interest on past due payments under the LHWCA has to be calculated using the general statutory post-judgment interest rate defined in 28 U.S.C. § 1961 (*i.e.*, the Treasury bond rate which is applied to district court judgments), not the higher rate set forth in 26 U.S.C. § 6621 (which is used by the IRS with respect to compensation for over/underpayment of taxes). The court was not persuaded by the BRB's reasons for adopting this approach.[5] Thus, the BRB's concern that, unlike § 1961 rate, the six-percent fixed rate used by the IRS was not responsive to economic conditions no longer applies, as § 6621 is now tied to the federal short-term rate. Also, the BRB's analogy to post-judgment interest in civil matters was undermined by *Roberts*, *supra*: under the compensation rate rule approved in *Roberts*, interest on payments is more analogous to pre-judgment interest, as it accrues as of a claimant's date of injury rather than the date of a BRB order. Further, the court was not convinced by the Director's argument that the § 6621 rate is unnecessary because § 14(e) prevents under-compensation and prompts quick and informal dispute resolution.

The court, nevertheless, concluded that the § 1961 rate was the most appropriate because it "does reflect market rates and thereby fully compensates aggrieved parties." *Id.*, at *13 (internal citation omitted). The court rejected claimant's argument that the § 6621 rate should be used by analogy to the Black Lung Act, stating *inter alia* that the BLA and its implementing regulations expressly apply this rate. It concluded that

> "[b]ecause Congress has not expressed an intent on the matter and the considerations favoring adoption of one statutory rate versus the other are in near equipoise, whether the § 1961 or § 6621 rate better approximates the value of prompt payments to claimants is in large part a policy determination best left to the agency. Here, the agency has expressed a preference for the §

[5] *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984); *see also B.C. v. Stevedoring Servs. of Am.*, 41 BRBS 107 (2007).

> 1961 rate, as reflected in the Director's assertion in his brief that he has consistently applied that rate for at least twenty years, following the BRB's decision in Grant, 16 BRBS 267. The Director's assertion is substantiated by incorporation of the § 1961 rate into the Longshore Manual. Ultimately, the agency's interpretive position [] provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under Skidmore."

Id., at *16 (internal citations omitted).

The court further held, reversing the ALJ/BRB, that if interest on past due compensation is awarded at the § 1961 rate, compound rather than simple interest must be awarded. The conclusion that simple interest is inadequate alone to compensate parties for the decrease in a judgment's value over time is reflected in § 1961 itself, as § 1961(b) requires that interest "shall be compounded annually." The Director's position that simple interest at the § 1961 rate is appropriate was not persuasive and thus not entitled to *Skidmore* respect, notwithstanding its inclusion in the agency's manual and its consistent application for some time, due *inter alia* to its selective adoption of § 1961. While the Director correctly asserted that § 1961 requires compounding only of post-judgment interest, this distinction has no significance here, as it would be arbitrary to deny compound interest only to workers who have resolved their claims through informal means.

The court also rejected the reasons advanced by the BRB for not compounding interest. While the BRB relied on *inter alia* the common law presumption against compound interest, many courts have begun to move away from this rule, reflecting recognition that compound interest can be necessary to compensate plaintiffs fully based on changing economic reality.[6] In addition, concern with benefiting "negligent creditors" hardly applies here. Rather, "disabled workers struggling to make ends meet had more to lose than to gain from delays in their compensation payments and were more likely to encounter those delays not because of their own lassitude but because of opportunities available to employers under Act's administrative scheme for putting off payment until final adjudication." *Id.*, at *18. The court concluded that "the movement in the case law away from the 'American rule' against compounding pre-judgment interest reflects a growing consensus that the attitudes underlying the common law presumption are being displaced by the modern recognition that compound interest fosters fairness and efficiency." *Id.* Further, prejudgment interest is

[6] The court observed that "[a]nyone with a savings account, credit card, mortgage, or student loan knows that the modern financial world employs compound interest as a general rule." *Id.* at *18.

not awarded as a penalty; it is merely an element of just compensation. In this regard, the court rejected the BRB's unpublished decision holding that compound interest may be levied only as a punitive measure against a party that engages in egregious conduct. Similarly, the court rejected the Director's assertion that simple interest combined with the § 14 penalty ensure full compensation. It concluded that "[k]eeping in mind the humanitarian purposes of the LHWCA and our mandate to construe broadly its provisions so as to favor claimants in the resolution of benefits cases, we hold that the Board erred in awarding Price simple interest on his past due payments at the § 1961 rate." *Id.* at *20 (internal citations omitted).

In a dissenting opinion, Circuit Judge O'Scannlain agreed that the § 1961 rate should be applied, but further opined that "[p]roper application of Skidmore requires us to defer to the Director's long-standing, consistent practice of awarding simple interest, recognizing that the Director is in the best position to determine whether, as a policy matter, the method of computing interest should be changed better to align with modern circumstances." *Id.* at *22. Fully compensating employees is not the Act's only purpose, as it represents a compromise between the competing interests of disabled laborers and their employers.

[Topic 65 INTEREST; Topic 6.2.3 COMMENCEMENT OF COMPENSATION – Maximum Compensation for Disability and Death Benefits]

***Keller Foundation/Case Foundation, et al. v. Tracy*, __ F3d __ (9th Cir. 2012).**

The Ninth Circuit affirmed the ALJ/BRB's determinations that (1) claimant did not satisfy the status requirement; (2) claimant's injuries as a worker in foreign ports do not satisfy the situs test for coverage; and (3) claimant has not shown that he is entitled to equitable estoppel.

Claimant became disabled as a result of cumulative trauma sustained during his employment with Keller and Global, his last employer. Claimant argued that he qualified for coverage under the LHWCA during his employment with Global based on: (1) his assignment to the Iroquois barge, and (2) his assignment in the port of Indonesia and Singapore. The court concluded that, although during the first three weeks of his assignment to the Iroquois, before the barge set sail, claimant worked in the Louisiana shipyard and assisted with loading other vessels, he was a Jones Act seaman under the *Chandris* test during the entirety of his assignment, and thus excluded from coverage under the LHWCA pursuant to § 2(3)(G). His duties contributed to the function of the barge and the accomplishment of its mission, including during the three-week period at issue. Further, the court found no basis for claimant's assertion that his first three weeks of work on

the Iroquois should be viewed as a separate assignment: he was hired as a barge foreman of the Iroquois, his work in the shipyard was in service to the Iroquois, and he set sail on the Iroquois. Nor did he spend less than about 30 percent of his time in the service of the vessel. The court also rejected claimant's assertion that during the three-week period he was merely an expectant sailor.

The court further affirmed the ALJ/BRB's determination that claimant's injuries as a worker in the ports of Indonesia and Singapore did not satisfy the situs test for coverage. Section 3(a) of the LHWCA limits coverage to injuries that occur "upon the navigable waters of the Unites States." Claimant argued that (1) "navigable waters of the United States" include the "high seas;" (2) the high seas include "foreign territorial waters,"[7] and thus (3) § 3(a) makes the land areas adjoining foreign territorial waters part of the navigable waters of the U.S. While noting that claimant's first premise is correct, the court further found that his reasoning did not overcome the strong presumption that enactments of Congress do not apply to foreign territorial water or a foreign sovereign's lands; the Director's contrary position was not persuasive, as it was not supported by any textual evidence of Congress' clear intention to authorize the extraterritorial application of the Act. The court concluded that

> "we hold that foreign territorial waters and their adjoining ports and shore-based areas are not the 'navigable waters of the United States' as the Act defines that phrase. . . . . By extension, the BRB did not err in concluding that injuries to a 'long-term, contractual, Global employee who was based overseas' and whose assignments 'commenced and terminated in foreign territories on foreign waters' did not occur upon the 'navigable waters of the United States.'"

Id. at *9.

Finally, the court upheld the ALJ/BRB's rejection of claimant's argument that Global should be estopped from denying coverage because his employment contract provided that "[e]mployee is covered for worker's compensation benefits, if any, payable under the laws of the Employee's country of origin." Equitable estoppel prevents a party from asserting a strict legal right after another party has been led to form a reasonable belief that the right would not be asserted. Because this doctrine does not create

[7] The court found no circuit court decisions reaching this conclusion, but noted *Weber v. S.C. Loveland Co.*, 28 BRBS 321 (1994) (longshoreman injured in a Jamaican port while unloading grain from a vessel that had been loaded in the U.S., and who performed 90-95 percent of his work within the U.S., was covered).

new rights and bars a party from asserting a legal rights, its application is strictly limited. Here, there was no evidence that Global represented to claimant that he would be covered by the LHWCA; and no evidence that he was even aware of the contractual provision, let alone that he relied on it to his detriment. The court rejected claimant's contention that his estoppel argument was "more closely related to (though still distinct from) promissory estoppel" and thus he did not have to show detrimental reliance. The court stated that the state workers' compensation cases claimant cited considered evidence of reliance. Further, the court refused to depart from precedent requiring evidence of detrimental reliance as a prerequisite to the application of equitable estoppel. The court "decline[d] to extend this doctrine, which both we and the Supreme Court have interpreted and applied very narrowly, where not one of the essential elements has been shown and when doing so would defeat the express eligibility requirements of a federal statute." *Id.* at *11.

[Topic 1.4.2 Master/member of the crew (seaman); Topic 2.9 DEFINITIONS - SECTION 2(9) UNITED STATES; Topic 85 RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, ELECTION OF REMEDIES (DOCTRINES OF PRECLUSION/Equitable Estoppel)]

B. Benefits Review Board

***Smith v. Labor Finders*, __ BRBS __ (2012).**

The Board affirmed the ALJ's order granting employer's motion for summary decision and dismissing claimant's claim for lack of jurisdiction based on a finding that claimant, who was hired to clean the beaches of Horn Island, Mississippi by collecting oil debris following the oil spill resulting from the Deepwater Horizon explosion, did not satisfy the status requirement of § 2(3).[8]

If claimant, as in this case, is not injured on navigable waters, in order to establish coverage, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. The Board stressed that §2(3) defines the term "employee" as "any *person engaged in maritime employment* …." Slip op. at 4 (emphasis by BRB). A claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. A claimant need only spend at least some of his time in indisputably covered

[8] The ALJ further found that the situs requirement was not met based on his finding that Horn Island is used only for recreational purposes, as there is no un/loading, building, repairing, or dismantling of vessels. The ALJ rejected claimant's analogy to the beach in *Nelson v. Am. Dredging Co.*, 143 F.3d 780 (3rd Cir. 1998), as the instant case arose in the Fifth Circuit. The BRB did not reach this issue.

operations. Here, claimant's beach-cleaning job did not satisfy the status requirement.

Removing oil from the beaches and water: The Board concluded that these duties did not satisfy the status requirement, reasoning that

> "[c]laimant was hired to clean up the Horn Island beaches from the effects of an oil spill. The oil he picked up was eventually loaded onto a vessel for disposal. However, as in *Hough*[9], claimant's work duties were not in furtherance of 'maritime commerce' because claimant's purposes in cleaning up the island were to protect the wildlife preserve and to enable re-opening of the island for recreational purposes. Unlike the facts in *Schwalb*[10], claimant's duties in removing oil from the beaches or the water's edge were not essential to any loading or unloading process or to maritime commerce."

Id. at 6 (citing *Fusco v. Perini North River Associates*, 622 F.2d 111 (2nd Cir. 1980)(nature of work not related to navigation or maritime commerce))(additional citations omitted). The BRB noted claimant's argument that if he did not perform his job there would have been nothing to load onto the vessel, and that he was putting the oil debris into "maritime commerce" because companies made a profit from the cleanup project. The BRB rejected this argument "as extension of this analogy would grant coverage to any workers whose products ultimately are loaded onto vessels for shipment." *Id.* at 6, n.4 (citations omitted).

Loading/Unloading Tools & Supplies: In concluding that these activities did not confer coverage, the BRB discussed *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), and *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994). The BRB stated that the *Munguia* court recognized a limit to conferring coverage by loading (or construction), as the court stated that these activities can be unconnected with maritime commerce and that they become maritime employment when undertaken with respect to a ship or vessel to enable it to engage in maritime commerce. The BRB concluded that

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[9] *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011)(claimant who used a vacuum to clean a bridge and deposit debris onto a barge not covered; storage of collected debris did not enable the barge to engage in maritime commerce and neither the debris not claimant's vacuuming the debris was integral to any maritime purpose).

[10] *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989).

> "[i]n this case, claimant loaded and unloaded his tools and supplies which included his lunch and drinks, a tent for shade, his HazMat gear, and his scoop and shovels – all with the purpose of enabling him to pick up oil detritus from the beaches. As these items are not items that enable a vessel to engage in maritime commerce, their loading or unloading does not confer coverage."

Slip op. at 7 (citations omitted).

Loading Buckets or Bags of Waste: Claimant alleged that he occasionally loaded buckets or bags of oil waste onto trailers or backhoes to be transported to the dock for loading onto the debris vessel, or loaded bags of oil debris directly onto the vessel. The Board concluded that "[a]s loading collected oil onto the debris vessel was not part of claimant's regularly-assigned duties, and it was not a duty he could even be assigned pursuant to the cleaning contract, the [ALJ] rationally found that the status element is not satisfied on this basis." *Id.* at 8.

Driving the "Gator:" To the extent claimant shuttled other workers around the island, this work was not covered employment. The BRB relied on a Third Circuit decision holding that a courtesy van driver, who shuttled workers within the employer's loading facility, was helpful, but not indispensable, to the loading process and, thus, not covered.

[Topic 1.7.1 STATUS - "Maritime Worker" ("Maritime Employment")]

II. Black Lung Benefits Act

Special notice: On September 13, 2012, the U.S. Department of Health and Human Services (HHS) issued a final rule amending 42 C.F.R. Part 37 titled, "Specifications for Medical Examinations of Underground Coal Miners." As noted by HHS in its summary:

> The revised standards modify the requirements to permit the use of film-based radiography systems and add a parallel set of standards permitting use of digital radiography systems.

Currently, interpretations of analog chest x-rays are weighed under 20 C.F.R. §§ 718.202(a)(1) and 718.304(a), whereas digital x-ray interpretations are weighed as "other evidence" under 20 C.F.R. §§ 718.107, 718.202(a)(4), and 718.304(c). *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring).

As the HHS correctly notes, the impact of its rulemaking is that "[t]he U.S. Department of Labor (DOL) will likely amend its Black Lung Benefits Act (BLBA) program regulations to correspond to this final rule." However, until the black lung regulations are amended, Administrative Law Judges may wish to consider continuing to weigh digital x-rays in accordance with the Board's guidance in *Webber*.

A. U.S. Circuit Court of Appeals

In *A&E Coal Co. v. Director, OWCP [Adams]*, ___ F.3d ___, Case No. 11-3926 (6th Cir. Sept. 11, 2012), the court affirmed the Administrative Law Judge's award of benefits based on a finding of total disability due to legal coal workers' pneumoconiosis. In a miner with 17 years of coal mine employment and a 25 pack year smoking history, the court held that it is within the discretion of the Administrative Law Judge to consider the preamble to the regulations in weighing expert medical opinions:

> [T]he preamble merely explains why the regulations were amended. It does not expand their reach. Although the ALJ was not required to look at the preamble to assess the doctors' credibility, we agree with the Fourth Circuit 'that the ALJ was entitled to do so and the Board did not err in affirming [his] opinion.

The court noted that "[i]n the preamble to the amended regulations, the Department explained the medical and scientific premises for the changes" to the regulations. And, contrary to Employer's argument, the court held that public documents, such as the regulations and preamble, do not need to

be made part of the formal record in order for the ALJ to rely on them. The court stated that the Administrative Procedures Act "imposes on the ALJ a duty to accurately and specifically to reference the evidence supporting his decision." In the end, the court affirmed the Administrative Law Judge's decision to accord Dr. Jarboe's opinion less weight on grounds that he cited to a lack of x-ray changes to conclude that legal pneumoconiosis was not present, and his view that the miner's respiratory condition was "too severe" to be caused by coal dust exposure.

[**use of the preamble permitted**]

B. Benefits Review Board

By unpublished decision in *Fox v. Elk Run Coal Co.*, BRB No. 11-0793 BLA (Sept. 18, 2012)(J. Hall, concurring and dissenting)(unpub.), the Board held that referral of an attorney for disciplinary review by a state licensing board based on alleged violations of rules of professional conduct does not, standing alone, constitute grounds for disqualification of the Administrative Law Judge from adjudicating the claim on the merits. The Board noted that the Administrative Law Judge relied only on the record before him in referring counsel for disciplinary review and he sent counsel a copy of the referral.

The Board further held that Federal Rule of Civil Procedure 60(d)(3) is applicable to black lung adjudications:

> As both the administrative law judge and the Director note, a 'decision produced by fraud on the court is not in essence a decision at all and never becomes final.' (citation omitted). And here, the issue of whether claimant's prior denial ever became final relates to a relevant issue the administrative law judge must determine in this subsequent claim, namely, the date for the commencement of benefits. 20 C.F.R. § 725.309(d)(5). We, therefore, agree with the Director that an administrative law judge possesses the authority to consider whether an otherwise final decision was procured by fraud on the court.

Slip op. at 6. However, the Board declined to affirm the Administrative Law Judge's finding of "fraud on the court" in this claim because the noted behavior "falls short" of "undisputed perjury and outright fabrication of evidence" such that it was not "sufficiently egregious to constitute fraud on the court." *Slip op.* at 9.

[**referral of counsel for disciplinary review and recusal; applicability of FRCP 60(d)(3); standard for finding "fraud on the court"**]

By unpublished decision in *Neace v. Adena Processing Corp.*, BRB No. 11-0798 BLA (Aug. 29, 2012)(unpub.), the Board held that the Administrative Law Judge properly declined to recuse herself from adjudication of a black lung claim on the merits. Notably, the Administrative Law Judge convened a conference call with the parties to discuss a letter written by Employer's counsel to a treating physician questioning the physician's coding of treatments for the miner. In the letter, counsel stated, "We also with to point out to you that intentionally miscoding a bill to obtain payment from the United States may be a federal crime."

The Administrative Law Judge convened a conference call to discuss the matter and she allowed the parties an opportunity to brief the issue. Ultimately, the Administrative Law Judge "agreed with claimant's counsel that employer's counsel did not commit a reportable offense." In affirming the Administrative Law Judge's denial of Employer's motion to recuse, the Board held that "judicial recusal must be predicated on extrajudicial conduct rather than on judicial conduct, and on a personal bias arising out of the judge's background and association, and 'not from the judge's view of the law.'" The Board held that Employer did not present evidence sufficient to demonstrate bias or prejudice from extrajudicial sources in this claim.

[**consideration of referral for disciplinary review and recusal**]