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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 266
September – October 2014

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

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

[there are no decisions to report for September and October]

B. Benefits Review Board

***Johnston v. Baker*, ___ BRBS ___ (2014).**

In vacating the ALJ's denial of death benefits under Section 9(b), the Board discussed the law governing the determination whether surviving spouse is a "widow or widower" for purposes of Section 2(16) of the Act.

Claimant, who was married but separated from decedent at the time of his death from lung cancer, sought death benefits under §9(b). Claimant and decedent were married in 1972. They separated on 8/31/04, following a domestic violence incident. On 5/30/05, they executed a legal separation agreement, which provided that the parties would live separately and each party would be free from interference, authority or control of the other as though they were unmarried. Under the terms of the agreement, claimant received her community share of decedent's retirement pension plan, and decedent was required to carry claimant on his health insurance. Decedent met his girlfriend in 2005 and began living with her in September 2007. Decedent filed for divorce from claimant in May 2009. According to decedent's girlfriend's testimony, decedent proposed to her in August 2009. They did not marry before his death on 9/10/09, as the divorce had not been finalized. The ALJ denied the claim on the ground that claimant was not decedent's "widow" under §2(16).

The Board stated that, to satisfy the §2(16) definition, a claimant must establish her status as a "wife" and at least one of the §2(16) criteria. If the married couple is not living together, then the spouse must be "dependent upon" the decedent, or be living apart from

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

the decedent for "justifiable cause" or by reason of the decedent's desertion.[2] If the separation was for justifiable cause, the Supreme Court has stated that the essential requirement for demonstrating the "widow" or "widower" status under the Act is the maintenance of a "conjugal nexus" between the decedent and the claimant. The existence of a "conjugal nexus" depends in large part upon the behavior of the claimant and not necessarily that of the decedent. Where justifiable cause exists for the initial separation, subsequent conduct of the parties may sever the conjugal nexus. These are questions of fact to be determined by the ALJ.

In this case, claimant asserted before the Board that she was dependent upon decedent at the time of his death based on the terms of the separation agreement. The Board concluded that claimant did not raise this contention before the ALJ, and thus the ALJ did not err in not addressing this issue. Agreeing with employer, the Board declined to address this contention, as it was raised for the first time on appeal.

It follows that, in order to be considered decedent's "widow" under the Act in this case, claimant must show that she lived apart from him for "justifiable cause" and that a "conjugal nexus" remained between them at the time of his death. The Board concluded that the ALJ's justifiable cause analysis was incomplete. Justifiable cause apparently existed initially, as decedent was arrested for physically abusing claimant on 8/31/04, and he removed claimant from her house without her belongings on the day of separation. However, employer asserted that, thereafter, the situation changed and their living apart was by mutual agreement. The Board noted the D.C. Circuit's statement that the effect of the original justification persists despite the change in circumstances. The Board instructed the ALJ, on remand, to address whether there was no longer justifiable cause for claimant and decedent to be living apart. If the ALJ finds that the original justification persisted to the date of death, then he must reconsider whether the conjugal nexus had been severed.

The Board further vacated the ALJ's finding that the conjugal nexus was severed at least as of May 2009 by virtue of decedent's divorce filing, as the ALJ gave greatest weight to decedent's actions in making this finding. Agreeing with claimant, the Board held that the focus is properly on whether claimant's conduct evidenced a continuing conjugal nexus. The Board instructed that, contrary to claimant's contention, the ALJ is not required to credit only her actions and wishes. Although the emphasis is on whether claimant's actions maintained or severed the conjugal nexus, the ALJ's finding should rest on all the relevant evidence of record. Thus, the ALJ must assess the weight and credibility of all relevant testimony and evidence, including claimant's testimony that she maintained a relationship with decedent, tried to get back together, has not been involved with anyone else, and was involved in his medical care; decedent's decision to remove claimant from his most recent will after she attempted to interfere in his pending worker's compensation claim; as well as decedent's girlfriend's testimony.

[Topic 2.16 DEFINITIONS – WIDOW OR WIDOWER; Topic 9.3.1 COMPENSATION FOR DEATH – Spouse and Child]

***Hunter v. Huntington Ingalls, Inc.*, __ BRBS __ (2014).**

Section 3(e) of the LHWCA provides a statutory credit for state workers' compensation benefits "paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act." 33 U.S.C. §903(e). It is well-established that employer's credit extends only to the net amount of compensation paid to claimant under a state compensation law. Thus, employer is not entitled to a credit for the amount of state attorney's fees, as such payments are not compensation for the claimant's injury. The

[2] No party argued that decedent deserted claimant.

Board has addressed the application of §3(e) on two occasions in this case. The Board first did so in an unpublished decision stemming from claimant's right knee injury. *See Hunter v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 06-0764 (May 24, 2007). The Board's present decision addressed the issue of §3(e) credit with reference to claimant's left knee injury.

Claimant injured her right knee while working for employer. She was awarded disability compensation benefits in 2006 by the Virginia Workers' Compensation Commission (VWCC) for this injury. The VWCC also awarded claimant's attorney a fee of $400 to be paid by claimant. Subsequently, an ALJ found that claimant's injury was covered by the LHWCA, and he awarded claimant compensation for the same period of disability, as well as a credit to employer for benefits paid under the state statute. Thereafter, claimant requested the issuance of an order requiring employer to pay her an additional $400 in compensation because the state attorney's fee may not be credited against employer's liability under the Act, pursuant to §3(e). The ALJ agreed that employer was not entitled to a credit for the attorney's fee under §3(e), but he declined to order employer to pay claimant $400. On appeal, the Board held that the ALJ had properly determined that employer is not entitled to a credit for the $400 state attorney's fee, pursuant to §3(e), as the credit applies only to amounts actually paid to claimant. However, the Board held that the ALJ erred in not also awarding claimant $400 so that she would receive her full recovery under the LHWCA undiminished by the state fee award.

Claimant separately sought benefits for her left knee condition. Employer eventually accepted this claim as compensable under the LHWCA and paid benefits in full. Subsequently, the VWCC awarded claimant compensation for the same period of disability and at the same rate as the LHWCA payments, stating that this award was "for record purposes only." Thus, the VWCC gave employer credit for the full amount of LHWCA payments. The VWCC also ordered claimant to pay her attorney a fee of $500. Claimant then sought an ALJ order requiring employer to pay claimant an additional $500 in LHWCA compensation on the ground that the state attorney's fee may not be offset against employer's compensation liability under the LHWCA. The ALJ granted employer's motion for summary decision, denying claimant's request for reimbursement.

The Board affirmed the ALJ's decision. The fact that the VWCC credited the federal benefits, which were paid first, and in full, and no payment was made to claimant pursuant to the Virginia workers' compensation law, precluded the result claimant sought in this case. The Board reasoned that, under the plain language of the Act, §3(e) credit applies to amounts paid to claimant pursuant to another workers' compensation law. As no amounts were paid to claimant under the Virginia law, §3(e) is not applicable. Accordingly, the Board distinguished prior decisions (including the Board's prior decision in this case), where payments actually were made to claimants under another workers' compensation law and the issue was the amount of the credit to be applied against the LHWCA liability.

[Topic 3.4 CREDIT FOR PRIOR AWARDS]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Navistar, Inc. v. Forester*, 767 F.3d 638 (6th Cir. 2014), the Sixth Circuit vacated an Administrative Law Judge's award of Black Lung benefits, holding that the Claimant's employment as a federal mine inspector with the United States Department of Labor's Mine Safety and Health Administration ("MSHA") could not be counted as qualifying coal mine employment for the purposes of the fifteen-year rebuttable presumption. The Court remanded the case to the Administrative Law Judge for an initial determination of whether the Claimant Terry Forester was entitled to an award of benefits for a previous five years of private coal mine employment, without the benefit of the fifteen-year presumption.

The ALJ had found that the Claimant's five years of private coal mine employment, combined with his sixteen years of employment as a federal mine inspector, rendered him eligible for the rebuttable fifteen-year. The ALJ relied on the BRB's holding in *Moore v. Duquesne Light Company*, 4 Black Lung Rep 1-40.2 (1981), aff'd, 681 F.2d 805 (3d Cir. 1982), which found that federal mine inspectors are "miners" for purposes of the BLBA. According to the BRB in *Moore*, a federal mine inspector's work satisfies the "situs" test, since the inspector spends a significant portion of each work day in underground coal mines. Furthermore, a federal mine inspector's work satisfies the "function" test, because the inspector's duties are an integral function of the operation of the coal mines; safety inspections are statutorily required, and mines cannot operate unless health and safety standards are met. *Moore*, 4 Black Lung Rep., at 1-44.

While it was undisputed that the Claimant's work as a federal mine inspector satisfied the "situs" test, the Sixth Circuit agreed with the Director that federal mine inspectors do not satisfy the "function" test and therefore fall outside the scope of the statutory definition of a miner. In so holding, the Sixth Circuit noted that:

> A federal coal mine inspector does not work "in the extraction or preparation of coal," or "in coal mine construction or transportation," as those terms are commonly defined. Nor is a federal mine inspector involved in "maintenance" tasks at the mine site. Rather, a federal mine inspector's duties are purely regulatory. Although the "function" test also encompasses "workers performing duties incidental to the extraction or preparation of coal," those "incidental duties must be an 'integral' or 'necessary' part of the coal mining process." *Falcon Coal*, 873 F.2d at 922.

The Sixth Circuit distinguished cases in which private coal mine inspectors had been found to be "miners" under the BLBA. In those cases, the claimants performed other tasks related to the maintenance and daily operation of the mines, in addition to their inspection duties. For example, one claimant was directly involved in the repair and replacement of pipes and pumps, while another was responsible for checking and refilling fire extinguishers and weighing coal cars. In contrast to these claimants, the Sixth Circuit explained:

> A federal mine inspector serves a purely regulatory function. He is not involved in the day-to-day overall operation of any particular mine; rather, he inspects each mine several times each year, issuing citations if he finds violations of federal mine health and safety standards. Merely because the federal mine inspector is charged with ensuring compliance with those standards, the violation of which may delay or halt the mining process, these incidental regulatory duties are not an "integral or necessary part of the coal mining process." *Falcon Coal*, 873 F.2d at 922 (internal quotation marks omitted). They therefore fail to satisfy the "function" test.

For these reasons, the Sixth Circuit concluded that the Director's position, that federal mine inspectors are not "miners" for purposes of determining eligibility for BLBA benefits, was well-reasoned and consistent with the intent of Congress. Because the Court found the Director's position to be persuasive, the position was given considerable deference, citing *Skidmore*, 323 U.S. 134 (1994). The Court therefore vacates the award of benefits and remanded the case to the Administrative Law Judge for an initial determination of whether the Claimant was entitled to an award of benefits without the benefit of the fifteen-year presumption.

[Coal Mining] [Miner or Not]

In *Jim Walter Res. v. Dir., OWCP*, 766 F.3d 1333 (11th Cir. 2014), the Eleventh Circuit held that a miner's surviving spouse was properly awarded benefits under the BLBA following amendments to 30 U.S.C. § 932(l) that eliminated the requirement that the spouse prove that pneumoconiosis was at least a substantially contributing cause or factor leading to the miner's death. The amended version applied to the spouse's new claim even though her claims filed prior to the amendment had been denied. This decision affirmed the holdings of the BRB and the ALJ below.

The Eleventh Circuit rejected Petitioner's argument that a claim must have been pending on March 23, 2010, for the amendments to apply, finding instead that such an argument is belied by the text of the statute itself, which indicates that the section affects claims "that are pending on *or after* the date of enactment of this Act." *See* § 1556(c), 124 Stat. at 260 (emphasis added). Because it was filed in April of 2010, the Court found that the survivor's claim was indeed pending "on or after" the date of enactment, and the post-ACA version of the statute therefore applied to her claim.

The Court similarly rejected arguments that the amendments apply only to first-time claims, noting that that the Court had already rejected the assertion that the ACA amendments apply to some claims but not others in *U.S. Steel Mining Co., LLC v. Dir., OWCP*, 719 F.3d 1275, 1280 (11th Cir. 2013). In rejecting that argument in *U.S. Steel Mining*, the Court had explained:

> The text of § 1556(c) refutes U.S. Steel's argument. Section 1556(c) applies the "amendments made by this section . . . to claims filed under [the benefits provisions] . . . after January 1, 2005, that are pending on or after" March 23, 2010. The "amendments made by this section" are the amendment to § 932(l) and an amendment to § 921(c)(4), a provision that creates an evidentiary presumption that applies in both miners' claims and survivors' claims. Section 1556(c) does not distinguish between miners' claims and survivors' claims. The plain meaning of § 1556(c) is that anyone—miner or survivor—who filed a claim for benefits after January 1, 2005, that remained pending on March 23, 2010, can receive the benefit of the amendments.

The Court further rejected Petitioner's argument that a survivor's application cannot be a claim for the purposes of establishing a filing date when the express language of the statute indicates that the widow is not "required to file a new claim." Again quoting *U.S. Steel Mining*, the Court reasoned:

> Section 1556(c) applies the amended § 932(l) to all claims filed between January 1, 2005, and March 23, 2010. During that period, both miners and survivors were required to file claims to receive benefits. Section 1556(c) therefore applies the amended § 932(l) to survivors' claims as well as miners' claims. Just because the application of the amended § 932(l) to a claim

operates to eliminate the need for that claim does not render its application illogical or unworkable.

Because the court in *U.S. Steel Mining* ultimately concluded that 932(l) merely "operates to eliminate *the need for* [a survivor's] claim," and not that the ACA eliminates the application procedure itself, or that it prevents previously denied claimants from benefiting from the ACA amendments, the Eleventh Circuit rejected the conclusion that the operative date for determining eligibility cannot be the date the survivor's claim was filed. The Court found nothing to preclude a new benefits claim by a survivor whose previous application was denied under the pre-ACA version of the BLBA, and therefore held that a survivor who filed a claim before January 1, 2005 may submit a new claim that must be adjudicated under the post-ACA statutory provisions.

[Survivor's Claims] [PPACA Automatic Award]

In *Fleetwood Trucking Co. v. Dir., OWCP*, 2014 U.S. App. LEXIS 18629 (unpub.), the Eleventh Circuit affirmed the ALJ and BRB's determinations that the Claimant had established entitlement to black lung benefits, holding that the employer was not deprived of due process in its unsuccessful challenge of its designation as the "responsible operator." The Court found instead that the employer simply neglected to exercise its rights under DOL regulations. The Court noted that the employer's owner was notified by the DOL that if it failed to respond, it would be deemed to have conceded its status as the "responsible operator" and to have waived its right to contest its liability in any further proceedings, pursuant to 20 C.F.R. § 725.412(a)(2).

The Court further found that the administrative record made clear that the claims examiner engaged in a thorough investigation. Specifically, the Court explained:

> [The claims examiner] interviewed [the Claimant] on several occasions to determine the nature of his work while he was self-employed and while he was working for Fleetwood. She asked [the Claimant] whether he had a supervisor while he was working as an independent contractor. . . . The examiner also corroborated [the Claimant's] employment history by reviewing his social security earnings record. That record confirmed that [employer] had been [the Claimant's] last employer before he became self-employed. Finally, the claims examiner also sought information directly from [employer] to determine whether it was the responsible operator. [Employer] never responded to that request for information.

In light of this evidence, the Eleventh Circuit found that DOL did not fail to comply with its own regulations and sufficiently investigated whether the employer was the liable operator.

[Responsible Operator][Dismissal of Operators][Procedure][Due Process]

B. Benefits Review Board

In *Rothwell v. Heritage Coal Company*, BRB No. 14-0044 BLA (September 3, 2014), the Board held that miners who are entitled to receive benefits payments under the regulations, even before their awards are final, are necessarily "determined to be eligible to receive benefits" under 20 U.S.C. § 932(l). The Board agreed with the Director that the Administrative Law Judge erred in concluding that an award of benefits in an underlying miner's claim must be final for a survivor to be entitled to receive benefits under § 932(l). In so finding, the Board noted that the Act makes no mention of a final determination and requires only that the miner "was determined to be eligible to receive benefits . . . at the time of his or her death . . . ." Because the plain text of the Act does not provide that the

miner must be finally determined to be eligible to receive benefits, the Board determined that the Act does not impose a finality requirement in § 932(l).

The Board further found such an interpretation of the statutory language to be consistent with the interpretation of similar language elsewhere in the Act, for example § 932(d), under which a miner who "has been determined to be eligible for benefits" may be eligible without a final determination. The Board also found this interpretation to be consistent with the way in which the Director administers the Act regarding the payment of benefits. The Board therefore held that § 932(l) provides automatic entitlement to survivor's benefits to eligible survivors of miners who were determined to be eligible for benefits, including those miners whose determinations of eligibility are not yet final, and are subject to potential appeal and reversal.

[Survivors Claims] [PPACA Automatic Award]