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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 258 December 2013

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I. Longshore and related Acts

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

Venable v. Louisiana Workers' Compensation Corp., __ F.3d __, 2013 WL 6857992 (5th Cir. 2013).

The Fifth Circuit concluded that the federal district court lacked subject-matter jurisdiction over worker's state tort claims against his employer's LHWCA insurance carrier arising from the carrier's withdrawal of its consent to the settlement of the worker's third-party claim against the vessel owner for negligence and refusal to sign a consent form under Section 33(g)(1) of the LHWCA.

While employed by Greene's Energy Co. ("Greene's"), Timothy Venable suffered a heart attack at work in Louisiana waters aboard the Stingray drilling barge, which was owned and operated by Hillcorp Energy Co. ("Hillcorp"). Green's carrier LWCC provided benefits under the LHWCA. Timothy and Julia Venable sued Hillcorp for negligence in federal court, alleging that an unreasonable delay in obtaining medical care had resulted in further harm. At a subsequent settlement conference, Hillcorp and Venables tentatively agreed to settle for $350,000. Although LWCC was not yet a party, its representative was present and, as alleged by the Venables, expressed that LWCC would consent to this amount. Under the LHWCA, Venable would forfeit any future benefits from LWCC if he settled his claims

[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.

against Hillcorp without receiving written approval of the settlement from LWCC on a Department of Labor-issued form (LS-33), pursuant to § 33(g)(1). However, LWCC later refused to sign the LS–33 form. The Venables then joined LWCC as a party to enforce LWCC's purported consent to the settlement. In the alternative, the Venables requested the court to find that LWCC had waived § 33(g)'s written-approval requirement by consenting to the settlement. LWCC moved to dismiss for lack of subject-matter jurisdiction, but the court determined that the waivability of the § 33(g) written-approval requirement raised a substantial federal issue that conferred federal-question jurisdiction. Both parties then moved for summary judgment; LWCC contended that the written approval requirement of § 33(g) is not waivable, and, in any event, LWCC did not waive it. The district court granted LWCC's motion, holding that LWCC's decision to withhold consent on the settlement was a proper exercise of its power under the LHWCA.

The Fifth Circuit reversed, dismissing the claims for lack of jurisdiction. The court determined that the district court incorrectly found that it had federal-question jurisdiction under 28 U.S.C. § 1331, because the federal issue raised did not satisfy the well-pleaded-complaint rule.

Section 1331 vests lower federal courts with jurisdiction when: In a well-pleaded complaint (1) the party has asserted a federal cause of action, or (2) the party has asserted a state cause-of-action claim that "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," *see id.* at *2, citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Here, the Venables did not assert any federal cause of action against LWCC, but only state causes of action, and they could not rely on § 33 of the LHWCA, which does not create a private cause of action. In concluding that the state-law claim satisfied *Grable*, the district court reasoned that plaintiffs could not prevail on their state law claims because LWCC would argue, as an affirmative defense, that § 33(g)'s written-consent requirement would preempt any contrary state law.

The Fifth Circuit disagreed. It reasoned that, under the well-pleaded-complaint rule, to assess whether the case arises under federal law, the court must look only to the plaintiff's claim, and anticipated defenses may not be considered. Further, even assuming arguendo that the issue of waiver under § 33 raises a substantial federal issue, the well-pleaded-complaint rule forecloses federal-question jurisdiction. Thus, the court did not resolve whether the § 33 written-consent requirement poses a "substantial" federal issue. Finally, the court concluded that because the district court lacked subject-matter jurisdiction over the Venables' state claims, there was no need to decide whether the court correctly determined

that LWCC's decision to withhold consent on the settlement was a proper exercise of its power under the LHWCA.

[Topic 33.2 33(g) ENSURING EMPLOYER'S RIGHTS--WRITTEN APPROVAL OF SETTLEMENT]

***Island Operating Co. v. Director, OWCP*, __ F.3d __, 2013 WL 6717281 (5TH Cir. 2013).**

The Fifth Circuit held that the claimant established sufficient grounds to invoke modification of prior judgment under the LHWCA based on a mistake in a determination of fact by the ALJ, where the modification award was based on two physicians' testimony that had been available at the time of the original hearing; mistake was not limited to particular factual errors and did not have to be demonstrated by new evidence.

Claimant injured both knees while working for employer, and underwent bilateral knee surgery. The ALJ's initial decision included a scheduled permanent partial disability ("PPD") award. Claimant timely sought modification seeking PPD benefits based on an impairment rating provided by two physicians, and the ALJ modified the award. The BRB affirmed this decision, holding that the ALJ had properly modified the award based on a mistake, despite the fact that the evidence claimant presented in support was available prior to the initial hearing.

The Fifth Circuit agreed with the BRB. Bcause the BRB's conclusion that the ALJ correctly applied § 22 to reopen the claim is a question of law, it is subject to de novo review. The court observed that the Supreme Court decisions in *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968), and *O'Keeffe v. Aerojet–General Shipyards, Inc.*, 404 U.S. 254, 92 S.Ct. 405, 30 L.Ed.2d 424 (1971) (per curiam), clearly establish that, contrary to employer's position, mistakes of fact are not limited to newly discovered and previously unattainable evidence. In light of this precedent, the court concluded that a mistake of fact need not be demonstrated by new evidence and it may include facts which may have been known to the claimant. The court acknowledged employer's concern that the Court's interpretation ignores finality altogether, as claimant can theoretically create endless litigation. It stated, however, that the remedy lies with Congress and not with the court.

Next, the court addressed employer's alternative contention that the ALJ's modification award was not supported by the evidence. The BRB and the court will not disturb an ALJ's factual findings unless reasonable minds would not accept the findings as adequate to support a conclusion. Here, the ALJ's modification decision was properly supported by evidence as he

relied on testimony of two physicians who had examined claimant and reviewed his medical records.

[Topic 22.3.5 Mistake of Fact; Topic 21.3.4 21(c) REVIEW BY U.S. COURTS OF APPEALS -- Standard of Review]

B. Benefits Review Board

***Lake v. L-3 Communications*, __ BRBS __ (2013).**

Interpreting § 6(c) of the LHWCA, the Board held that in cases where the claimant's temporary total disability (TTD) changes to permanent total disability (PTD) during the fiscal year, the applicable maximum rate for the claimant's initial period of PTD benefits is the rate in effect at the time the claimant's entitlement to those benefits commences. In so holding, the BRB rejected its contrary holding in *Reposky v. Int'l Transp. Services,* 40 BRBS 65 (2006), and adopted the Ninth Circuit's reasoning in *Roberts v. Director, OWCP,* 625 F.3d 1204, 1208-09, 44 BRBS 73, 76(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.,* 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012).

The parties stipulated to claimant's entitlement to TTD benefits from 3/21/06 through 12/9/08, and to PTD benefits from the date he reached maximum medical improvement (MMI) on 12/10/08 and continuing. Relying on *Reposky*,[2] the ALJ held that claimant was limited to the fiscal year 2006 maximum rate that he had received for his previous TTD, rejecting claimant's position that he became entitled to the fiscal year 2009 maximum rate when his entitlement to PTD benefits commenced on 12/10/08. The ALJ recognized that the BRB's holding in *Reposky* was overruled in *Roberts* as both cases arose in the Ninth Circuit. However, the ALJ found that *Roberts* is not binding precedent in this case arising in the Fourth Circuit. Claimant appealed the ALJ's decision. Additionally, the ALJ determined that the applicable maximum rate for PTD benefits changed on 10/1/09 and each October 1 thereafter, until such time that the maximum rate exceeds two-thirds of claimant's average weekly wage (AWW). Employer challenged this finding in its cross-appeal.

[2] In *Reposky*, the BRB held that, where claimant's TTD changes to PTD during the fiscal year, the compensation rate is not increased on the date of MMI. It reasoned that while the date of MMI changes the nature of the claimant's disability, a claimant who was continuously receiving benefits was not "newly awarded" compensation at that time. The BRB consequently held that the § 6(b) statutory maximum rate in effect during the fiscal year that the claimant reached MMI does not apply to increase the claimant's compensation rate for PTD. Claimant was entitled to the new statutory maximum in effect on October 1 following the date of MMI, as she was "currently receiving compensation for [PTD]" at that time.

First, the BRB agreed with claimant, holding that he became entitled to the fiscal year 2009 statutory maximum compensation rate for his PTD benefits as of the date he became entitled to such benefits on 12/10/08. The BRB observed that *Roberts* addressed this very issue, and it agreed with the Ninth Circuit's determination that the "currently receiving" clause of § 6(c) refers to the period during which an employee is entitled to receive PTD compensation regardless of whether his employer actually pays it. The Board noted that while the Supreme Court granted Robert's petition for certiorari as to another issue, this construction of § 6(c) is consistent with the Court's decision. It is also consistent with circuit court decisions in *Roberts* and *Boroski v. Dyncorp Int'l [Boroski II],* 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012), which sought to harmonize the "currently receiving" and "newly awarded" clauses by focusing on an employee's entitlement to compensation. Thus, the BRB modified the ALJ's decision accordingly.

Next, the Board addressed employer's argument, on cross-appeal, that the maximum rate in effect at the time of the injury remains constant subject only to § 10(f) cost-of-living adjustments. The BRB stated that it rejected this very argument in *Marko v. Morris Boney Co.,* 23 BRBS 353 (1990), based on the plain language of § 6 and its determination that there is no basis in the Act for limiting PTD benefits based on the maximum rate applicable at the time of injury. Thus, it concluded that

> ". . . the Board will adhere to its longstanding position that, in a [PTD] case in which two-thirds of the claimant's actual [AWW] exceeds the Section 6(b)(3) statutory maximum rate, he is entitled to the benefit of the new maximum rate each fiscal year. Such a claimant is entitled to receive the new Section 6(b)(3) maximum rate each fiscal year until such time as two-thirds of his actual [AWW] falls below 200 percent of the applicable NAWW, and then annual adjustments under Section 10(f) apply."

Slip op. at 10 (citations and footnote omitted). Further, once two-thirds of the claimant's actual AWW is less than 200 percent of the applicable NAWW, the claimant's actual AWW becomes the basis for his PTD compensation rate, and he is then entitled to annual § 10(f) adjustments in the amount of the lesser of the percentage increase in the NAWW as determined under § 6(b)(3) or the § 10(f) five percent cap. Finally, the BRB rejected employer's contention that *Bowen v. Director, OWCP,* 912 F.2d 348, 24 BRBS 9(CRT)

(9th Cir. 1990), invalidates the precedent established in *Marko.* Accordingly, the BRB affirmed the ALJ's decision on this issue.

[Topic 6.2.1 Maximum Compensation for Disability and Death Benefits; Topic 6.2.3 Determining the National Average Weekly Wage; Topic 10.7.1 DETERMINATION OF PAY – 10(f) ANNUAL INCREASE - General]

II. Black Lung Benefits Act

U.S. Circuit Court of Appeals

In companion cases, *Big Branch Resources, Inc. v. Ogle*, ___ F.3d ___, Case No. 13-3251 (6th Cir. Dec. 17, 2013) and *Island Creek Kentucky Mining v. Ramage*, ___ F.3d ___, Case No. 12-3873 (6th Cir. Dec. 17, 2013), the same three-judge panel upheld the Administrative Law Judges' awards of benefits in claims involving invocation of the 15-year presumption. With regard to demonstrating the requisite 15 years of employment, the court in *Ramage* accepted the Board's holding in *Alexander v. Freeman United Coal Mining Co.,* 2 B.L.R. 1-497 (1979), and concluded that a miner need not demonstrate "substantially similar" conditions for work performed on the surface of an underground mine site. Thus, the miner in *Ramage* was entitled to invocation of the 15-year presumption where he worked five years underground and 23 years aboveground at an underground mine site.

Turning to rebuttal of the presumption, the court noted the plain language at 30 U.S.C. § 921(c)(4) provides the following:

> The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. § 921(c)(4). In *Ogle*, the West Virginia Coal Workers' Pneumoconiosis Fund (Fund) argued, based on the foregoing language, only the Secretary is limited to two forms of rebuttal, and the Fund should not be limited. The court disagreed, and concluded the Administrative Law Judge properly set forth the rebuttal standard as follows:

> [Employer must] demonstrate by a preponderance of the evidence either: (1) the miner's disability does not, or did not, arise out of coal mine employment; or (2) the miner does not, or did not, suffer from pneumoconiosis.

The court rejected the Fund's argument that a third rebuttal method exists as follows:

> . . . the Fund posits that it ought to be able to contend that a miner's pneumoconiosis is mild and that the totally disabling respiratory impairment is the product of another disease. This argument, however, is not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain—that pneumoconiosis caused total disability. Nothing in

> the record suggests that the Fund was prevented from making this argument.

With regard to disability causation, the *Ogle* court acknowledged that its precedent, at times, lacked clarity and the court specifically stated that it would apply the "rule out" standard:

> The regulation implementing the fifteen-year presumption states that 'the presumption will be considered rebutted' if the 'total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment. (citation omitted). A prior panel of this court equated this language with showing 'that the disease is not related to coal mine work.' (citation omitted). Other panels of this court, when interpreting identical language in an interim regulation, have not distinguished meaningfully between a 'play no part' or a 'rule-out' standard and the 'contributing cause' standard.

Thus, the court in *Ogle* clarified its standards as follows:

> Simply put, the 'play no part' or 'rule out' standard and the 'contributing cause' standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must 'rule-out' coal mine employment as a cause of the disability. Where the employee must affirmatively provide causation, he must do so by showing that his occupational coal dust exposure was a contributing cause of his disability. Because the burden here is on the Fund, the Fund must show that the coal mine employment *played no part* in causing the total disability.

Finally, in assessing medical opinions for the purposes of rebutting disability causation, the *Ramage* court held it was proper for the Administrative Law Judge to accord less weight to opinions of physicians who concluded the miner did not suffer from pneumoconiosis where the Administrative Law Judge found presence of the disease was not rebutted based on the evidence of record as a whole.

[**15-year presumption, invocation and rebuttal of**]

In *Dalton v. Director, OWCP and Frontier-Kemper*, ___ F.3d ___, Case No. 13-1243 (7th Cir. Dec. 20, 2013), the court held (1) the children of a deceased miner had standing to pursue modification of a denial of his claim, and (2) the Administrative Law Judge properly determined the date of onset for the payment of benefits. With regard to the miner's surviving children,

the court rejected Frontier's argument that the children were "not real parties in interest," and could not pursue the miner's claim for benefits. Citing to 20 C.F.R. § 725.360(b), the court held the rights of the children "may be prejudiced by a decision of an adjudication officer" and, as a result, they could pursue an award of benefits. The court reasoned:

> [E]ven if Mr. Dalton had received all payments to which he was entitled, save for a 20% penalty to which his estate is still entitled . . ., Frontier's request for modification made it necessary for the Children to defend the award Mr. Dalton already had received. As of then, there was a risk that the resulting modification could result in a reversal of the existing award. (citations omitted). The Children were and are entitled to benefits as Mr. Dalton's surviving relatives.

Slip op. at pp. 7-8.

Turning to the date of onset, on modification, the Administrative Law Judge *sua sponte* reviewed evidence underlying the onset date found by a prior deciding judge, and determined a mistake in a determination of fact was made such that the miner's claim was payable as of August 1991. This date was nearly eight years earlier than the June 1999 onset date found by the prior deciding judge, which resulted in additional benefits to payable to the surviving children on the miner's claim.

On appeal, the Benefits Review Board (Board) held the Administrative Law Judge had authority to *sua sponte* modify the date of onset, but the Board vacated the August 1991 onset date and it reinstated the June 1999 onset date. As noted by the Seventh Circuit:

> The Board wrote that because 'neither Dr. Beck nor Dr. Cohen opined that the miner was disabled *due to pneumoconiosis* in 1991' it had to vacate the ALJ's designation of August 1991 as the date for the commencement of benefits. The Board thought that there was no medical evidence that reflected the date upon which Mr. Dalton became totally disabled on account of pneumoconiosis, and thus that his benefits were limited to the period beginning with the month in which he filed his original claim.

Slip op. at p. 6.

The court disagreed with the Board and reinstated the earlier August 1991 onset date based on "ample evidence that Mr. Dalton was totally disabled (from a respiratory standpoint) as of the time he quit his job in August 1991." The court explained:

> Frontier submitted no evidence indicating that the totally disabling lung disease Mr. Dalton had by 1991 was caused by something different from the disabling lung disease from which he still suffered in 1995 and 1999. The regulations specifically recognize pneumoconiosis 'as a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure. 20 C.F.R. § 718.201(c). More to the point for this case, the Department of Labor has concluded that the risk of significant airway obstruction from coal-mine dust is additive with cigarette smoking. This provides further support for the ALJ's finding that the totally disabling breathing difficulties Mr. Dalton faced in 1991 were caused by both smoking and coal-mine dust, given his long exposure to both. That is all the regulations require.

Slip op. at p. 12. The court added:

> There is nothing wrong with circumstantial evidence, and so it is of no moment that Mr. Dalton did not have more direct evidence to support his case, such as a doctor in August 1991 who spelled out that Mr. Dalton suffered from totally disabling pneumoconiosis and that his condition was totally disabling.
>
> . . .
>
> Indeed, such a requirement would be in some tension with both the rebuttable presumption (at 20 C.F..R. § 718.203(b)) . . . and the rule that in cases where the onset date is not clearly established, the benefit of the doubt and back-dated benefits, go to the miner.

Slip op. at p. 13.

[**surviving children as real parties in interest; onset date for payment of benefits on modification**]