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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 249 December 2012 – January 2013

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Notice regarding OALJ's Rules of Practice and Procedure: The Department of Labor has published proposed revisions to the Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18. The text of the proposed rules is available from www.federalregister.gov and www.regulations.gov.

A. U.S. Supreme Court[1]

[***Ed. Note*:** The following decision does not involve the LHWCA, but may be relevant to the adjudication of Longshore claims, see, e.g., **Topic 1.4.3 JURISDICTION/COVERAGE -- LHWCA v. JONES ACT -- "Vessel;" Topic 2.21 DEFINITIONS – "VESSEL"**]

***Lozman v. City of Riviera Beach, Florida*, __ U.S. __, 133 S.Ct. 735 (2013).**

In a 7 to 2 decision, the Supreme Court held that a structure does not qualify as a "vessel," as that term is defined in the Rules of Construction Act, 1 U.S.C. §3, unless a reasonable observer, looking to structure's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water. In this case, a floating home was not a vessel, as it had no rudder or steering mechanism, had unraked hull, and was incapable of self-propulsion; and, accordingly, the district court lacked admiralty jurisdiction.

The City brought a federal admiralty lawsuit *in rem* against a floating home, seeking a lien for dockage fees and damages for trespass. The owner of the home moved to dismiss for lack of admiralty jurisdiction. The district court found that the floating home was a "vessel" and that, accordingly, admiralty jurisdiction was proper; and further awarded the

[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.

fees and nominal damages to the City. The Eleventh Circuit affirmed, agreeing that the home was a "vessel" because it was "capable" of movement over water.

A "vessel" is defined in 1 U.S.C. §3 as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Supreme Court noted an uncertainty among the Circuits in the application of the term "capable," and observed that its decision would focus primarily on this issue. The Court concluded that the Eleventh Circuit's definition is too broad, since "[n]ot *every* floating structure is a 'vessel.'" *Id.* at 740 (emphasis in original). The court emphasized that, for a structure to be a "vessel," the statutory definition requires that it be capable of being used as a means of transportation, which involves "conveyance (of things or persons) from one place to another." *Id.* at 741 (quoting Oxford English Dictionary). This definition must be applied in a practical, not a theoretical way. *Id.* at 741 (citing *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 496 (2005)).[2] Accordingly, a structure does not fall within the scope of the statutory definition unless a reasonable observer, looking to structure's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

In this case, "[b]ut for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water." *Id.* It had no rudder or other steering mechanism, had unraked hull, had no capacity to generate or store electricity, and its rooms looked like nonmaritime living quarters. Although lack of self-propulsion is not dispositive, it is a relevant factor; here, the home was able to travel over water only by being towed, which took place on only four occasions in seven years.

The Court concluded that its view of the statute is consistent with its text, precedent, and relevant purposes (as well as state statutes). In particular, the Court discussed its prior precedent holding that a warfboat was not a vessel, and its holding in *Stewart* that a dredge was a "vessel" under §3. In *Stewart*, the dredge was found to be a "vessel" as it was regularly used (and designed in part to be used) to transport workers and equipment over water. Additionally, the Court's examination of the purposes of major federal maritime statutes (including Jones Act) revealed little reason to classify floating homes as "vessels."

The Court instructed that, although its test involves consideration of a structure's "purpose," consideration of evidence of subjective intent must be eliminated in determining whether a structure is a vessel. The Court elaborated that "we have sought to avoid subjective elements, such as owner's intent, by permitting consideration only of objective evidence of a waterborne transportation purpose. That is why we have referred to the views of a reasonable observer. And it is why we have looked to the physical attributes and behavior of the structure, as objective manifestations of any relevant purpose, and not to the subjective intent of the owner." *Id.* at 744-745 (citation omitted). The Court acknowledged that its approach is neither perfectly precise nor always determinative. For example, satisfaction of a design-based or purpose-related criterion is not always sufficient (or required) for the application of the term "vessel," as in the case of later physical alterations (such as when a vessel is permanently attached to the land for use, say, as a

[2] In *Stewar*t, the Court held that the Super Scoop, a floating platform with a dredging bucket used to dig a trench beneath Boston Harbor, was a "vessel" under the Jones Act. Because the Super Scoop was engaged in maritime transportation at the time of claimant's injury, it was a "vessel" within the meaning of both the Jones Act and the Longshore Act, specifically, Sections 2(3)(G) and 5(b).

hotel). Further, assuming that sometimes it is possible to use for water transportation a structure that is not designed for that purpose, this was not the case here.

Writing for the dissent, Justice Sotomayor agreed that the Eleventh Circuit's definition was overinclusive, and that an objective assessment of a watercraft's purpose or function governs whether that structure is a vessel. However, she further concluded (following an overview of case precedent) that the novel "reasonable observer" reformulation of the established principles introduces a subjective component into the vessel-status inquiry, when what is needed are "clear and predictable legal rules for determining which ships are vessels." *Id.* at 754. She further opined that the record was not sufficiently developed in this case, and thus a remand for additional fact-finding was warranted.

B. U.S. Circuit Courts of Appeals

***Nadheer v. Insurance Co. of the State of Pennsylvania*, No. 12-50164, 2013 WL 69343 (5th Cir. 2013)(unpub.)**

The Fifth Circuit held that claims brought by Omar Nadheer against his former employer, his workers' compensation insurance carrier, and his insurance adjuster for breach of contract, breach of fiduciary duty, fraud, and conspiracy to defraud were preempted by the exclusivity provisions of the Defense Base Act ("DBA") and LHWCA. 42 U.S.C. § 1651(c); 33 U.S.C. § 905(a). Nadheer was seriously injured in a roadside bomb attack in the course of his employment with L-3 Communications Corporation. As a basis for his claims, Nadheer asserted that his insurance provider denied his request to be transferred from a hospital in Iraq to a hospital in Jordan, and failed to inform him of his right under the LHWCA to select his own physician. He further asserted that, as a result of deficient medical treatment he received in Iraq, he had suffered horrific pain and a degree of potentially permanent disability to his right arm.

The court rejected the three arguments advanced by Nadheer for why his claims were not preempted by the DBA and LHWCA. First, he argued that the exclusivity provisions of the DBA and LHWCA did not apply because they do not immunize insurers from damages caused by intentional misrepresentations to insured employees that cause injury outside the scope of the DBA and damages not recoverable under the DBA. The court, however, relied on its prior precedent holding that claims for bad faith withholding or termination of compensation benefits are preempted by the LHWCA; the court concluded that the same reasoning applies to torts arising from the alleged bad faith mis-administration of benefits at issue here.

Second, Nadheer asserted that the exclusivity provisions of the DBA and LHWCA do not immunize insurance carriers from breach of contract claims when the breach causes consequential damages not recoverable under the DBA. The court concluded that allowing plaintiffs to recover separately for breach of contractual provisions invoking the LHWCA would subvert the very purpose of the LHWCA, as this Act is designed to preclude liability in excess of that provided for by its comprehensive benefits scheme.

Third, the court declined Nadheer's invitation to revisit its long line of cases which held that claims against insurers (in addition to claims against employers) are implicitly preempted by the LHWCA's exclusivity provision, in light of the Supreme Court's strict construction of the Act in *Pacific Operators Offshore LLP v. Valladolid,* 565 U.S. __, 132 S.Ct. 680 (2012). The court reasoned that the provision at issue in *Valladolid* was wholly different than the one at issue here, and that case did not involve preemption.

[Topic 5.1 Exclusivity of Remedy; Topic 60.2 DEFENSE BASE ACT]

***Blackwater Security Consulting, L.L.C. v. Director, OWCP*, No. 11-71587, 2012 WL 6759998 (9th Cir. Dec. 19, 2012)(unpub.), *aff'g Raymond v. Blackwater Security Consulting, L.L.C.*, 45 BRBS 5 (2011).**

In this DBA case, the Board held, agreeing with the Director, OWCP, that the ALJ's decision awarding claimant a two-tiered award for his back injury – *i.e.*, permanent partial disability ("PPD") benefits through the date of his planned departure from Afghanistan, followed by a nominal award premised on essentially equivalent pre- and post-injury stateside earnings -- did not comport with law.[3]

On appeal, the Ninth Circuit initially rejected employer's contention that the Board overturned the ALJ's factual finding that claimant planned to cease his overseas employment. Rather, the Board properly found this finding to be legally irrelevant. Next, the court rejected employer's assertion that the ALJ should have been allowed to take account of claimant's plans to return stateside, stating that the Board correctly concluded that the LHWCA does not permit this result. Section 8(c)(21) governs claimant's unscheduled PPD and it provides that an ALJ shall award two-thirds of the difference between a claimant's average weekly wages ("AWW") "*at the time of injury*" and his post-injury wage-earning capacity. *Id.* at *1 (emphasis in original). The court stated that nothing in the statutory scheme allows for an ALJ to disregard or modify this formula. The court observed that it had "repeatedly held that the LHWCA does not grant an ALJ any discretion to re-calibrate a claimant's [AWW] at the time of injury based on future events that would have changed that wage regardless of injury." *Id.* (citations omitted). Finally, the court concluded that employer's assertion that applying the plain language of the LHWCA to overseas contractors creates "absurd" results misapprehended the role of the judiciary. The courts must apply the LHWCA and DBA as written, as these statutes embody legislative choices that the courts have no authority to disregard.

[Topic 8.9.1 WAGE-EARNING CAPACITY – Generally; Topic 8.2.1 EXTENT OF DISABILITY – No Loss of Wage-Earning Capacity; Topic 8.2.2 *De Minimis* Awards; Topic 10.1 AVERAGE WEEKLY WAGE IN GENERAL]

C. U.S. District Courts

***Global Management Enterprise, LLC v. Commerce & Industry Ins. Co. (Chartis)*, No. 2:11–1681, 2013 WL 312786 (W.D.La. 2013)(mem.)**

The district court granted a summary judgment in favor of Chartis in a lawsuit brought against Chartis by Global, concluding that Chartis properly denied a claim for benefits filed under the Louisiana workers' compensation statute by an employee of Global who was allegedly injured while performing beach cleaning work following the BP oil spill, as the employee was covered under the LHWCA. Under the Louisiana statute, as well as the Chartis policy at issue, employees covered by the LHWCA are excluded from coverage.

Librado De La Cruz, was hired by Global to perform beach cleaning work following the BP oil spill on Grand Isle and on small satellite islands. He was injured while lifting a

[3] *See* Recent Significant Decisions Monthly Digest # 231 – April 2011.

sack of sand to throw onto a pile of such sacks located on the beach. Relevant to this review, the court concluded that De La Cruz's injury was covered under the LHWCA.

The court initially determined that De La Cruz met the situs requirement under § 3(a) of the LHWCA, because he was injured on an area adjoining navigable waters customarily used by an employer in un/loading a vessel. De La Cruz was working on a beach which was accessible by a 25 minute boat ride from Grand Isle, LA. The workers were living on a barge and were transported by boat to a pier located on the beach of G1 Island. The beach was located approximately one half mile from a pier where it would dock; no other structures were present. De La Cruz worked on the beach at least 5 to 10 feet from the waterline of the Gulf of Mexico. His job included removing sand contaminated with oil, placing the sand in bags and then stacking the bags in a pile. The bags were then transported to a construction loader for transport near the pier where the bags were then loaded onto a vessel for transport off of the island. De La Cruz participated in loading the bags as part of a loading team—a chain or line of men—that loaded the boat with bags of contaminated sand by passing each bag down the line toward the boat. On these facts, the court concluded that "the evidence clearly shows that for approximately six weeks, the pier where the involved vessel was docked, was customarily used for loading and unloading cargo, i.e. bags of contaminated sand. Such use for this period of time, in the opinion of the court makes it customary usage for maritime purposes." *Id.* at *3.

The court further concluded that De La Cruz also satisfied the status requirement under § 2(3) of the LHWCA (the court noted that the OWCP claims examiner had reached the contrary conclusion). The court reasoned that:

> "De La Cruz participated every morning and every evening in unloading and/or loading a vessel. The court does not feel, under established precedent that De La Cruz was required to stand on the pier or the vessel in order to be considered a longshoreman. Unquestionably the chain-gang of which he was a member, when it transferred empty bags, water, supplies, and loaded contaminated sand to and from the pier at which the vessel docked, which material either had been on the vessel or was being loaded onto the vessel, was clearly an integral part of the loading and unloading of a vessel, the gravamen of the longshoreman test. The court agrees with counsel for Chartis that the 30–45 minutes in the morning and a like time in the afternoon spent in loading and unloading operations was adequate to make De La Cruz a longshoreman, notwithstanding that a much larger portion of his labor was devoted to filling and stacking sand bags on the beach."

Id. at *4.

[Topic 1.7.1 JURISDICTION/COVERAGE -- STATUS - "Maritime Worker" ("Maritime Employment"); Topic 1.6.2 JURISDICTION/COVERAGE -- SITUS – "Over land"]

D. Benefits Review Board

***Armani v. Global Linguist Solutions*, __ BRBS __ (2012).**

Agreeing with the Director, OWCP, the Board held that the ALJ abused his discretion in issuing a subpoena for claimant's deposition in an undisputed DBA claim pending before the district director, as the subpoena was unnecessary in light of claimant's willingness to participate in an informal conference; and, moreover, the sole purpose of the subpoena was

to ascertain employer's eligibility for reimbursement under the War Hazards Compensation Act ("WHCA"), which is irrelevant for resolving the DBA claim.

In this DBA claim, which has not been referred to OALJ for a formal hearing, employer requested a subpoena from the ALJ ordering claimant to attend a deposition so that employer could investigate its potential claim for reimbursement under the WHCA. The ALJ relied on 29 C.F.R. §18.24 and *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986)(en banc), to reject claimant's assertion that the OALJ is not authorized to issue a subpoena while the claim is pending before the district director. The ALJ further rejected claimant's assertions that the subpoena was unnecessary and that the cost to claimant justified denying the subpoena request. The BRB vacated the ALJ's order and quashed the subpoena.

The Board initially determined that it did not have to address the ALJ's authority in general to issue a discovery subpoena while the case is before the district director, as this case could be decided on more narrow grounds. The Board further concluded that the ALJ was without authority to issue the subpoena because the *Maine* criteria for issuing a subpoena in a case pending before OWCP have not been met. The Board reasoned that

> "[i]t is clear from *Maine* that an [ALJ] may issue a subpoena upon application from a party, whose case is still at the informal level before the OWCP and has not been referred to the OALJ, only when it is 'necessary' to do so. In order to be 'necessary,' there must be a refusal to produce the evidence requested by the opposing party."

Slip op. at 5, quoting *Maine*, 18 BRBS at 132-133. Here, the subpoena was unnecessary, as claimant was willing to participate in an informal conference on the matter on which employer sought information. Claimant has not refused to produce any evidence or frustrated the processing of her DBA claim. The BRB observed that "[w]hile employer may be correct in stating that it need not exhaust all informal methods, it appears employer did not attempt to obtain the information by any informal methods." *Id.* Thus, this case is not one of "the few cases where the informal nature of the pre-hearing investigatory process [has broken] down," as contemplated in *Maine*. *Id.*, quoting *Maine* 18 BRBS at 133.

Moreover, the Board concluded that, as employer had stated that the only purpose for its subpoena request was to ascertain eligibility for reimbursement of compensation under the WHCA, such purpose is not "in respect of" the undisputed DBA claim and, accordingly, the ALJ did not have the authority to address it. Under Section 19(a) of the Act, ALJs in DBA claims have authority to address only matters which are "in respect of" compensation claims. Further, 29 C.F.R. §18.14 limits discovery to information that is not privileged and "which is relevant to the subject matter involved in the proceeding." In holding that the information sought by employer was not relevant to the DBA claim, the Board summarized the WHCA process and concluded that the ALJ in a DBA claim does not have any authority over the WHCA decision. Furthermore, the Board reviewed the WHCA requirements for an application for reimbursement (which include statements of the employee or employer), and noted that the WHCA does not require a "statement" to be in deposition form; thus, claimant's offer to make a statement in an informal conference should suffice. The BRB noted that the ALJ's analogy to a case in which a claimant withholds information relevant to an employer's § 8(f) claim is imperfect, as issues concerning § 8(f) are "in respect of" a claim under the Act. The Board concluded that "[t]he subpoena is unnecessary, as claimant has offered to give her statement using informal measures, and the information employer seeks to obtain via the deposition is not 'in respect of,' and therefore not relevant to, the resolution of the DBA claim." Slip op. at 8.

[Topic 27.1.3 POWERS OF ADMINISTRATIVE LAW JUDGES – PROCEDURAL POWERS GENERALLY -- ALJ Issues Subpoenas, Gives Oaths; Topic 27.2 POWERS OF ADMINISTRATIVE LAW JUDGES -- DISCOVERY]

***Cathey v. Service Employees International, Inc.*, __ BRBS __ (2012).**

The Board affirmed the ALJ's order granting employer's motion for summary decision in this DBA case involving claimant's request for medical treatment to be provided by employer. The Division of Federal Employees' Compensation ("DFEC") had approved employer's application for reimbursement of compensation and medical benefits paid to claimant for his war hazard injuries under the War Hazards Compensation Act ("WHCA"), 42 U.S.C. §1701 *et seq*. Additionally, the DFEC opted to pay claimant directly for his future medical needs. Accordingly, the Board concluded that the Federal Government, not employer, was liable under the WHCA for claimant's medical benefits, and it was proper for the ALJ to dismiss claimant's claim against employer.

Claimant was injured in Iraq when a rocket-propelled grenade exploded above the truck he was driving. He was initially paid disability and medical benefits by employer; the parties subsequently settled the claim for disability benefits under § 8(i) of the Act, without including medical benefits in the settlement. In 2011, claimant's doctor recommended he undergo neck surgery, and claimant requested an informal conference before the OWCP on this issue. In response, the OWCP informed claimant that the claim had been accepted under the WHCA, and that his medical treatment and bills would be processed in accordance with the WHCA, and, therefore, the Federal Employees' Compensation Act, 5 U.S.C. §101 *et seq.* ("FECA"). *See* 20 C.F.R. §61.105(d). Claimant then requested a hearing before an ALJ on the matter of employer's liability under the Act for his medical treatment and surgery.

The Board upheld the ALJ's conclusion that he had no authority to address claimant's contention that the transfer of liability for his medical benefits from employer to the Federal Government under the WHCA was improper. Claimant had no basis to challenge this transfer pursuant to any provisions of the LHWCA or DBA. Under the WHCA and implementing regulations, if a claim is accepted under the WHCA, the Director has the authority to administer the claim as a reimbursement or a direct payment. Thus, the Board rejected claimant's contention that the WHCA does not provide for direct payment to claimants. Further, decisions of the DFEC are final, and there is no mechanism for review by any other official of the United States or by any court. Therefore, the ALJ had no authority to address the propriety of the transfer of claimant's claim under the WHCA.

The Board further rejected claimant's assertion that he is without any source of relief with respect to his request for medical treatment and neck surgery. Rather, pursuant to the WHCA, claimant must follow the procedures under the FECA to obtain medical benefits. Nonetheless, regardless of the transfer of payments to DFEC, a claimant retains his procedural rights under the Act if a dispute in the DBA claim arises. If DFEC were to deny recommended treatment or surgery, claimant could request a hearing before the OALJ under the WHCA for a decision on the necessity, reasonableness, etc., of the requested treatment. Here, claimant had not requested authorization for neck surgery, and, thus, the DFEC had neither authorized nor rejected this treatment. Accordingly, there was no factual dispute surrounding the proposed surgery, and the ALJ properly granted employer's motion for summary decision.

[Topic 60.5 WAR HAZARDS COMPENSATION ACT; Topic 27.1.4 POWERS OF ADMINISTRATIVE LAW JUDGES – PROCEDURAL POWERS GENERALLY – Authority to Grant Summary Decision]

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

In *Buck Creek Coal Co. v. Director, OWCP [Sexton]*, ___ F.3d ___, Case No. 11-4304 (6th Cir. Jan. 10, 2013), involving subsequent miner's claim governed by the amended regulations, the court held the Administrative Law Judge is no longer required to find newly submitted evidence is "qualitatively" different from evidence submitted with the prior claim. Citing its decision in *Cumberland River Coal Co. v. Billie Banks and Director, OWCP*, 690 F.3d 477 (6th Cir. 2012), and representing a departure from its pre-amendment holding in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the court reiterated:

> [W]e construe the term 'change' to mean 'disproof of the continuing validity' of the original denial, rather than the 'actual difference between the bodies of evidence presented at different times.' Under this definition, the ALJ need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.

Slip op. at 4 (citing *Cumberland*, 690 F.3d at 486). Moreover, the court held disability causation is an element capable of change under 20 C.F.R. § 725.309:

> In the prior unsuccessful claim, the ALJ did not find that the pneumoconiosis substantially contributed to Mr. Sexton's disability at the time the claim was filed; however, new evidence developed subsequent to the denial established a change in condition, specifically that the pneumoconiosis substantially contributed to his total disability in 2001, when the last claim was filed. As this Court recognized in *Sharondale*, a miner's physical condition changes over time, and thus the presence of the disease at one point in time in no way precludes future proof that the disease has become present or has become so severe as to become totally disabling.

Slip op. at 6.

[**subsequent claim under 20 C.F.R. § 725.309**]

In *Vision Processing, LLC v. Director, OWCP [Groves]*, ___ F.3d ___, Case No. 11-3702 (6th Cir. Jan. 30, 2013), the Sixth Circuit upheld the award of benefits in a survivor's claim under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Under the facts of the claim, the miner was finally awarded benefits in his lifetime claim, and died four months later of a heart attack in July 2006. The widow filed a claim for benefits on August 1, 2006, which was denied by the Administrative Law Judge for failure to demonstrate death causation. The widow appealed the denial of her claim, and her appeal was pending at the time of enactment of the PPACA. The Board applied the PPACA, and awarded benefits in the claim. In upholding applicability of the PPACA's automatic entitlement provisions, the court rejected Employer's position that the PPACA violates "several constitutional guarantees," including guarantees related to due process, takings, and substantive due process.

[**automatic entitlement in survivor's claim under the PPACA upheld**]

B. Benefits Review Board

No cases to report for this month.