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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 278
January 2017

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

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

[**Ed. Note:** The following unpublished decision is included for informational purposes only.]

***Triple Canopy, Inc. v. U.S. Dep't of Labor*, No. 3:16-cv-739, 2017 WL 176933 (M.D. Fla. Jan. 17, 2017)(unpub.),[2] *aff'g sub nom. Ritzheimer v. Triple Canopy, Inc.*, 50 BRBS 1 (2016).**

Affirming the Board,[3] the district court concluded that the ALJ properly applied the "zone of special danger" doctrine under the Defense Base Act (DBA) to find that claimant sustained a compensable injury when he slipped on a wet floor after getting out of the bathtub in his employer-assigned apartment in Israel.

The court noted that the only binding authority directly addressing this doctrine under the DBA consists of *O'Keeffe v. Pan Am. World Airways, Inc.*, 338 F.2d 319 (5th Cir. 1964),[4] and three Supreme Court decisions recently analyzed in *Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214 (1st Cir. 2015) (analyzing *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965), and *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965)).

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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.

[2] The court adopted the Magistrate Judge's Report and Recommendation, *see Triple Canopy, Inc. v. Ritzheimer*, 2016 WL 7826705 (M.D. Fla. Dec. 16, 2016).

[3] *See* Recent Significant Decisions – Monthly Digest # 269 (Sept. 2015 – Feb. 2016).

[4] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting all decisions of the former Fifth Circuit announced prior to October 1, 1981, as binding precedent in the Eleventh Circuit).

The court restated the following three principles articulated in *DiCecca*. First, to be covered an injury must fall within the foreseeable risks occasioned by or associated with the employment abroad. Although the requisite "special danger" covers risks peculiar to the foreign location or risks of greater magnitude than those encountered domestically, the zone also includes risks that might occur anywhere but in fact occur where the employee is injured. "Special" is best understood as "particular" but not necessarily "enhanced." The range of cognizable risks, however, stops short of astonishing risks "unreasonabl[y]" removed from employment (e.g., cosmetic skin peels and asphyxiation from auto-erotic practices). Second, the determination of foreseeable risk is necessarily specific to context and thus turns on the totality of the circumstances. Third, the agency is given deference in applying the doctrine to the particular case at hand. The agency's rational determination is treated as far as possible as a finding of fact, for which a reviewing court considers only whether the agency had a substantial basis in the record, even if the court may not have reached the same conclusion. The Board has applied the doctrine broadly (e.g., to injuries sustained while traveling for recreational purposes, rescue attempt, traveling to a grocery store, fighting in a bar, having a midnight rendezvous in a vehicle, fishing, and boating).

In this case, the ALJ rationally found that the conditions and obligations of claimant's employment created a zone of special danger based on substantial evidence, i.e., the hot, dirty environment in which he worked; the employment contract provision requiring him to maintain a professional appearance, including his personal hygiene; his 24-7 on-call status; and the requirement that he live in the furnished apartment provided by employer. The ALJ reasonably concluded that these employment conditions and obligations made it reasonable and foreseeable that claimant might slip and fall while showering in that apartment. Claimant showering after work was not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *Id.* at *4, *quoting O'Leary*, 340 U.S. at 507.

By arguing that claimant's showering was personal in nature and unrelated to his employment, employer was essentially asking the court to improperly re-weigh the evidence. Further, it is not required that claimant live in a dangerous area and receive hazardous duty pay; as the court observed in *DiCecca*, this factor is relevant but not required. Moreover, claimant's contract referenced hazardous work conditions. While employer asserted that the bathroom where claimant was injured was no different from his bathroom in the U.S., the court concluded that the "special danger" need not be unique to or enhanced by the foreign location, citing *DiCecca*. Further, necessary acts can be covered as incident to overseas employment. The court rejected employer's assertion that applying the doctrine to a routine daily act such as showering would create unlimited liability under the DBA. Rather, as the *DiCecca* court observed, the determination whether such ubiquitous activities are covered is a case-specific determination of foreseeable, reasonable incidence to the foreign employment, left largely for the agency. The court distinguished *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009), where claimant's use of chemical peel was found to be personal in nature and unrelated to his employment because he had a long history of undergoing cosmetic skin treatments, and had been diagnosed as being obsessed with his skin.

[Topic 60.2.7 DEFENSE BASE ACT – Course and Scope of Employment, "Zone of Special Danger]

B. Benefits Review Board

There have been no published Board decisions under the LHWCA in January 2017.

C. Other Jurisdictions

[**Ed. Note:** The following case summary is provided for informational purposes only.]

***In re Dwyer*, No. 149 WDA 2016, 2017 WL 384113 (Pa. Super. 2017)(unpub.)**

Dwyer injured his back while working as a security specialist for Academi LLC in Afghanistan. Allied World Assurance Company was the workers' compensation insurance carrier for Academi. Dwyer filed a claim for benefits under the LHWCA, and the parties entered into a Settlement Agreement under Section 8(i), wherein Dwyer would receive a lump sum of $134,000.00; a weekly payment of $787.00 for 520 weeks (totaling $390,000.00); and $26,000.00 for future medical benefits. Pursuant to the terms of the Settlement Agreement, Allied entered into a two-party Reinsurance Agreement with National Indemnity Company wherein Allied ceded its responsibilities for the weekly payments to National. The Department of Labor approved the settlement. Dwyer subsequently entered into a Security Agreement with DRB, a factoring company, wherein Dwyer would assign his weekly payments to DRB in exchange for a lump sum of $203,754.27. Dwyer and DRB filed in a state court a Petition to Transfer pursuant to the Security Agreement, which was approved. National appealed, arguing that the assignment contravenes the LHWCA and the Pennsylvania Structured Settlement Protection Act (SSPA), and exposes it to duplicative payment obligations to both Dwyer and DRB.

On appeal, the Superior Court of Pennsylvania initially determined that the trial court erred in concluding that the underlying payments due to Dwyer were the result of an annuity agreement, contrary to the evidence that they were the result of the Reinsurance Agreement. However, the issue remained whether the transfer of the weekly payments, whether an annuity or a structured settlement, was proper.

The court further held that the trial court erred in approving the requested transfer of Dwyer's structured settlement payment rights, as it contravenes the non-assignment provision in § 16 of the LHWCA and, by implication, the SSPA. The court disagreed with the interpretation of § 16 in *In re Sloma*, 43 F.3d 637 (11th Cir. 1995), which held that a Longshore claimant's assignment to a bank of the annuity payments he was to receive as part of a structured § 8(i) settlement was valid and not barred by § 16. The Eleventh Circuit interpreted the phrase "due or payable under this chapter" in § 16 to allow a claimant to assign an already purchased annuity, as the claim under the LHWCA was finally resolved, and the payments were being made to him by a third party pursuant to a contract. It reasoned that the purpose of the anti-assignability provisions of § 16 to benefit an injured employee was served and ended once the amount of the award was paid to Sloma by the payment of the initial lump sum and the purchase of an annuity on his behalf, under the terms of the § 8(i) settlement.

In the present case, the court concluded that the plain language of § 16 prohibits the assignment of benefits where the employer/insurer entered into a re-insurance agreement with another insurer to pay the structured settlement payments. Dwyer's claim under the LHWCA was not resolved when the Reinsurance Agreement was entered. The LHWCA prohibits the assignment of any compensation or benefits owed or being paid pursuant to a claim under the LHWCA. Section 16 places no limitation on the type or method of compensation, whether by an annuity or structured settlement payment, that cannot be assigned. Moreover, the plain language of § 16 does not suggest that the anti-assignment clause only applies to future payments. In fact, the plain language of § 16 applies to any benefits or compensation, either being paid or owed in the future.

In this case, Dwyer entered into the Settlement Agreement with his employer/insurer arising out of his claim under the LHWCA. Allied entered into the Reinsurance Agreement with National, which required National to pay the structured settlement weekly payments as set forth in the Settlement Agreement. The DOL approved the settlement. Thus, based upon the plain language of § 16, Dwyer's receipt of the weekly structured settlement payments from National under the Reinsurance Agreement are "due or payable" under the LHWCA.

Further, the structured settlement payments to Dwyer derive directly from the LHWCA. As part of the Settlement Agreement, the parties expressly agreed to enter into the Reinsurance Agreement as the method to pay Dwyer's weekly payments. Contrary to DRB's assertion that Dwyer's claim under the LHWCA was finally disposed because his receipt of the structured settlement payments arose out the Reinsurance Agreement, not the LHWCA, the plain language of both the Settlement Agreement and the Reinsurance Agreement state that the payments derive from the settlement of claims arising out of the LHWCA.

Moreover, it would be absurd to allow a party, who expressly settled a LHWCA claim, to avoid the anti-assignment clause of the LHWCA merely by engaging in the common practice of purchasing an annuity or having a separate insurance company pay the structured settlement payments. To utilize the DRB's interpretation of § 16 would effectively render the LHWCA inapplicable, as any form of reinsurance agreement or annuity would be considered a payment of the outstanding claim. Thus, based upon the Settlement and Reinsurance Agreements, Dwyer's structured settlement payment rights are a "due or payable" award under the LHWCA, and cannot be assigned pursuant to § 16. Accordingly, the Security Agreement contravenes the LHWCA and, by implication, the SSPA, 40 P.S. § 4003(a)(1).

[TOPIC 16.2 Compensation Cannot be Assigned]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

There are no notable black lung decisions to report.

B. Benefits Review Board

In *Hylton v. Itmann/Consolidation Coal Co.*, BRB No. 15-0321 BLA (Jan. 30, 2017) (unpub.), the Board vacated the ALJ's decision awarding benefits. In *Hylton*, which involved a subsequent claim, the ALJ found that Claimant established 15.23 years of qualifying coal mine employment ("CME") and the existence of a totally disabling respiratory or pulmonary impairment. The ALJ, therefore, found Claimant invoked the 15-year rebuttable presumption of total disability due to pneumoconiosis arising out of his CME. The ALJ also found Employer failed to rebut the presumption, and she therefore awarded benefits.

On appeal, Employer contended that the ALJ did not use a reasonable method to calculate Claimant's length of CME; therefore, Employer alleged that her finding that Claimant invoked the 15-year presumption must be vacated.[5] In addressing Employer's contention on appeal, the Board summarized the ALJ's length of CME calculation as follows:

> Noting that claimant's Social Security earnings records are "mostly consistent" with claimant's employment summary, the [ALJ] found them to be the most accurate evidence regarding the dates of claimant's [CME]. Using claimant's yearly income from the Social Security earnings records, the [ALJ] calculated the length of claimant's [CME] based on the average "yearly" earnings for miners for 125 days, as reported by the Bureau of Labor Statistics (BLS) in Exhibit 610. Thus, the [ALJ] divided claimant's reported yearly earnings in underground [CME] for each year by the industry average "yearly" earnings for 125 days, and added each proportional amount together to conclude that claimant worked a total of 16.51 years in coal mine employment from 1973 to 1993. Then, based on claimant's testimony that he worked above ground at Amigo Smokeless Coal (Amigo), a coal preparation plant, the [ALJ] subtracted the 1.28 years claimant worked at Amigo to find that claimant established 15.23 years of qualifying [CME].

Slip op. at 4 (internal citations omitted).

The Board agreed with Employer that the ALJ's method for calculating the length of Claimant's CME could not be affirmed. Initially, the Board referred to the two-part test for determining length of CME as described in Section 725.101(a)(32) and *Clark v. Barnwell Coal Co.,* 22 BLR 1-277, 1-280 (2003). Furthermore, the Board noted that "[p]roof that a miner's earnings exceeded the average 125-day earnings as reported by BLS for a given year does not, in itself, establish the threshold one year of coal mine employment." Slip op. at 5, citing *Clark*, 22 BLR at 1-281. The Board then concluded as follows:

> Here, the [ALJ] did not conduct the threshold inquiry of whether claimant established a calendar year of [CME] prior to determining if claimant worked as a miner for at least 125 days within that year. Further, the regulations provide that, if the beginning and ending dates of the miner's employment

[5] On appeal, Employer did not challenge the ALJ's finding that Claimant established he suffers from a totally disabling respiratory impairment and, therefore, a change in an applicable condition of entitlement.

> cannot be ascertained, the [ALJ] may, in his or her discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average "daily" earnings for that year, as reported by BLS at Exhibit 610. In the instant case, as employer asserts, the [ALJ's] failure to conduct the threshold inquiry of whether claimant established a calendar year of employment prior to determining if claimant worked at least 125 days, together with her use of the incorrect column at Exhibit 610, resulted in claimant being credited with 365 days of employment if his income exceeded the industry average for just 125 days of work. Thus, the method employed by the [ALJ] in determining claimant's length of [CME] is not reasonable.

Slip op. at 5 (internal citations omitted). The Board therefore vacated (1) the ALJ's finding of 15.23 years of CME, (2) her finding that Claimant invoked the 15-year rebuttable presumption of total disability due to pneumoconiosis, and (3) her finding that Employer did not rebut the presumption. Accordingly, the Board remanded the matter to the ALJ in order to further address the issue of Claimant's length of qualifying CME.

In providing the ALJ with additional guidance for addressing the length of CME issue on remand, the Board noted that the ALJ need not use the daily rate table at Exhibit 610. Instead, use of this table is within her discretion, if she "finds that the record does not contain sufficient evidence of the beginning and ending dates of claimant's employment." The Board stated that, in fact, "documentary evidence of claimant's coal mine work history exists[,] for some periods of his employment, that could provide the basis for computing the fractional years of that employment." Furthermore, it reiterated its holding in *Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA (Oct. 5, 2016), that the preference for reliance on direct evidence of length of CME is consistent with Section 725.101(a)(32)(ii). The Board then reviewed particular periods of Claimant's employment, stating that the ALJ should consider whether such employment constitutes qualifying CME under the regulations and specifically noting that, in order for CME to be qualifying, there is no requirement that the CME be performed underground.

In the interests of judicial efficiency, the Board also addressed whether the ALJ erred in finding Employer did not rebut the 15-year presumption, specifically at the first prong of rebuttal.

Pursuant to the above, the Board remanded the matter to the ALJ for further consideration consistent with its opinion.

[Bureau of Labor Statistics table: Exhibit 610]