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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 302
January 2020

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

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

***Bourgeois v. Director, OWCP*, 946 F.3d 263 (5th Cir. 2020).**

In affirming the ALJ/BRB's award of benefits, the Fifth Circuit rejected claimant's contention that his shoulder and back injuries were more severe than the ALJ had found.

Claimant suffered an accident while working for employer and sought benefits under the LHWCA. The ALJ found that claimant suffered injuries to his right shoulder, right ankle, and lower back as a result of the accident and ordered employer to pay a closed period of disability benefits. Claimant appealed, arguing that the ALJ erred in concluding that he did not suffer more severe shoulder and back injuries, including a labrum tear and lumbar facet arthrosis. The Board affirmed the ALJ's decision and denied claimant's motion for reconsideration. Claimant appealed.

The court initially stated that it reviews a decision of the Board under the same standard as it reviews the decision of the ALJ: Whether the decision is supported by substantial evidence and is in accordance with the law. Substantial evidence is relevant evidence that is more than a scintilla but less than a preponderance. The court may not substitute its judgment of the facts for that of the ALJ or reweigh or reappraise the evidence. It will affirm as long as the evidence provides a substantial basis of fact from which the fact in issue can be reasonably inferred.

In this case, the ALJ did not err in concluding that claimant did not suffer a labral tear to his right shoulder as a result of the accident. Under § 20(a) of the LHWCA, a claimant is entitled to a presumption that an injury is causally related to his employment as

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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, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *__).

long as he proves (1) that he suffered harm, and (2) that conditions existed at work, or an accident occurred at work, that could have caused, aggravated, or accelerated the condition. The employer may rebut that presumption by pointing to "substantial evidence" establishing the lack of a causal nexus. Here, the ALJ did not err in concluding that Dr. Sweeney, employer's medical expert, presented a more thorough and credible opinion than claimant's treating physician, Dr. Johnston, thus rebutting the presumption of a causal nexus. Though a 2014 MRI suggested that claimant suffered a small ventral tear immediately after the accident, Dr. Johnston testified that he treated claimant for a superior tear three years later, in 2017. Based on these disparities, Dr. Sweeney opined that Dr. Johnston found tears in structures that were not present in 2014, and thus the accident did not cause claimant's labral tear.

The court rejected claimant's contention that Dr. Sweeney was bound to accept Dr. Johnston's conclusion that claimant suffered a single tear at the time of the accident, which progressed over time as a result of normal use. Dr. Johnston himself admitted that claimant's labral tear could have been caused by an intervening injury. Contrary to claimant's position, the ALJ was not required to credit Dr. Johnston's testimony. *Id.* at 265 (*citing Ceres Gulf, Inc. v. Director, OWCP*, 143 F. App'x 589, 593 (5th Cir. 2005) ("The ALJ [is] well within his province to reject [a treating physician's] testimony, especially [where] there [is] no other medical evidence presented to corroborate the doctor's position.")). The ALJ properly considered the testimony and opinions of both experts and found Dr. Sweeney's explanation more credible. The court may not disturb this determination, even if the ALJ could have plausibly drawn an alternate conclusion from the evidence.

Second, the Board did not err when it refused to consider claimant's new argument, presented for the first time in his motion for reconsideration, that the 2017 shoulder surgery was intended to address an AC joint sprain. Though claimant argued that this theory was supported by evidence, he did not assert this claim before the ALJ. By failing to brief the issue, claimant also waived any objections to the ALJ's conclusions that his AC joint sprain was resolved by November 2014. Furthermore, to the extent that claimant believed that the ALJ made a mistake in fact, he failed to file a motion for modification, as instructed by the Board.

Finally, the ALJ's finding that claimant did not suffer from lumbar facet arthrosis was supported by substantial evidence. Though a low-resolution MRI suggested that claimant might have sustained facet arthrosis, the later higher resolution MRI presented no evidence of the condition. Moreover, as the factfinder, the ALJ was exclusively entitled to assess both the weight of the evidence and the credibility of the witnesses. Substantial evidence supported the ALJ's determination that claimant's statements about his pain were not credible, especially given Dr. Sweeney's physical examination of claimant and his determination that claimant exhibited no objective lumbar problems.

[Section 21 – APPELLATE PROCEDURE - Review by U.S. Courts of Appeals - Standard of review, Deference; Application of Section 20(a) - Rebutting the Presumption, Evaluating the Evidence]

B. Benefits Review Board

***Hall v. Ceres Gulf, Inc.*, __ BRBS __ (2020).**

In a split decision, the Board affirmed the ALJ's conclusion that the site of claimant's injury did not constitute a coved situs under § 3(a) of the LHWCA.

Claimant worked for employer delivering cargo from the Port of Houston Barbours Cut Container Terminal ("Terminal") to the Gulf Winds Warehouse ("Warehouse"). He was

injured when he slipped and fell in the parking lot of the Warehouse. The parking lot is located inside the fenced-in boundaries of the Warehouse facility, outside the fenced-in boundaries of the Terminal, and there is a boulevard that runs between the two facilities. Claimant sought benefits under the LHWCA. Employer filed a motion for summary decision, contending claimant was not injured on a covered situs under § 3(a). The ALJ found that the parking lot is not contiguous with navigable water as required in the Fifth Circuit, in which this case arose. Accordingly, the ALJ granted employer's motion and dismissed the claim. Claimant moved for reconsideration based on "new evidence" that he argued he could not obtain before the issuance of the initial decision, namely testimony and affidavit of a union official who described the Warehouse as integral to the loading and unloading of ships at the Terminal. The ALJ denied the motion, and claimant appealed.

The Board initially observed that, in determining whether to grant a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. A fact is "material" if it might affect the outcome of the suit under the governing law. An issue of fact is "genuine" where the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party. To defeat a motion for summary decision, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. If the ALJ could find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations, summary decision is inappropriate. Here, the facts were not in dispute and the issue of situs was a legal issue.

As claimant's injury did not occur on one of the sites enumerated in § 3(a), he had to establish that the site of his injury qualifies as an "other adjoining area." 33 U.S.C. § 903(a). The Fifth Circuit has held that a site is an "other adjoining area" only if it satisfies a two-part test: it must border on, or be contiguous with, navigable water (geographic component), and it must be customarily used for loading, unloading, repairing, dismantling, or building a vessel (functional component). The court has adopted the Fourth Circuit's strict interpretation of the geographic component. *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996); *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc). This approach considers property lines, and both courts have stated that in order for an area to constitute an "other adjoining area," it must be a discrete shoreside structure or facility that adjoins navigable water.

The Board rejected claimant's contention that the entire area, including the road and the Warehouse, should be considered to be one parcel with the Terminal based on usage. Claimant's evidence would address the functional component of the site, which is not at issue. For example, he described the boulevard as a port access road, but did not dispute it is a public road, not used exclusively for port traffic. Claimant also did not specifically contend the road is in fact part of a larger parcel that constitutes the port or terminal adjoining navigable water. The Board concluded that:

> Geographically, there is no dispute claimant was injured in the Gulf Winds parking lot within the boundaries of the [Warehouse] facility, separated from the [Terminal] and navigable water by two property fences and a public road. The evidence claimant offered to defeat employer's motion for summary decision cannot change these geographical facts or, in this case, their legal significance. He has not shown the properties to be one continuous area or parcel contiguous with navigable water.

Slip op. at 7-8 (citations and footnotes omitted).[2] Moreover, it is legally insufficient to satisfy the geographic component by showing that an injury occurred in a "general maritime area" or that the injury site is used for maritime purposes. Establishing the former violates *Zepeda*. Establishing the latter conflates the two "other adjoining area" criteria, effectively eliminating the geographic component in favor of the function component. While "proximity and interconnectedness" of an area may be relevant in certain situations, it should not be used to include separate parcels of property beyond those which border on navigable water. As the Warehouse parcel of property lacks contiguity with navigable water, it fails the geographic element necessary for coverage under § 3(a). The ALJ's summary decision was therefore affirmed.

In a dissenting opinion, Administrative Appeals Judge Greg J. Buzzard opined that the undisputed facts established that the Warehouse is part of the Terminal, a covered enumerated situs. Judge Buzzard reasoned that by relying on fence lines and a public road as determinative of situs, the majority's analysis lacks a necessary inquiry into the proximity and interconnectedness of the Terminal and the Warehouse, and the indispensability of the Warehouse to the loading and unloading of ships at the Terminal. Coverage under the Act is not defined according to fence lines and local designations. Rather, the test is whether the situs is within a contiguous area which adjoins the water. Here, the Terminal and the Warehouse are interconnected geographically and functionally such that they constitute one covered maritime situs. The proximity of the Warehouse 50 to 75 feet from the entrance to the Terminal, and the interconnectedness of their locations and functions for loading and unloading ships, establishes that the two are part of the same maritime situs. There are no non-maritime businesses or residences separating one from the other, and the road that lies between the two is itself used for maritime purposes and in no way restricts truck drivers' access to the Terminal or navigable water. The functions performed by the Warehouse – receiving, storing, and warehousing cargo to and from ships – place it squarely within the definition of "terminal" in the maritime industry. Moreover, these functions are essential to the loading and unloading process. Employees transport shipping containers back and forth between the Warehouse and the Terminal multiple times per day and, if necessary, travel all the way down to the waterline. Claimant was injured while performing this task. Declining coverage impermissibly renders him the paradigmatic longshoreman who walked in and out of coverage during his workday.

[PROCEDURE - Summary Decision; Section 3(a) SITUS - Other Adjoining Area]

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[2] The Board noted that a witness's opinion cannot resolve a legal issue, citing *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) ("expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law") (emphasis in original). Slip op. at 8, n.11.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

Island Creek Coal Co. v. Young, 947 F.3d 399 (6th Cir. 2020). **Holding:** *Lucia* challenges may not be raised for the first time before the Benefits Review Board in supplemental briefs after the merits briefing period closes.[3]

Procedural History: The claimant worked at least fifteen years as a coal miner and invoked the rebuttable presumption of disability due to pneumoconiosis. The ALJ determined that the employer did not successfully rebut that presumption and awarded benefits to the claimant. The employer appealed the decision to the BRB. Four months after the merits briefing period closed, the employer made a *Lucia* challenge in a supplemental brief for the first time in the case. The BRB affirmed the award of benefits.

Reasoning: It is improper for an employer to make a *Lucia* challenge for the first time after the merits briefing period closes because 20 C.F.R. § 802.211(a) requires all substantive issues in an ALJ's determination be raised in the opening briefs. This case is guided by *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, (6th Cir. 2019), which held that a *Lucia* challenge cannot be made for the first time on a reconsideration motion. Thus, the *Lucia* challenge is forfeited for not being timely.

B. Benefits Review Board

Noble v. B & W Resources, Inc., BRB No. 18-0533 (January 15, 2020). **Holding:** An ALJ issuing a Notice of Hearing before being properly appointed or ratified under *Lucia* does not require reassignment of the case to a new ALJ for adjudication.[4]

Procedural History: The presiding ALJ issued a Notice of Hearing before his appointment was ratified by the Secretary of Labor but, otherwise, took no actions before the ratification. The ALJ ultimately denied benefits, and the claimant appealed the decision, challenging the factual findings and arguing the case should have been reassigned under *Lucia*.

Reasoning: Typically, the remedy for an adjudication by an ALJ not properly appointed according to *Lucia* is reassignment to a different and properly appointed ALJ. *Lucia* requires that judges be properly appointed before considering and adjudicating a matter. But, a Notice of Hearing simply reiterates statutes and regulations, and does not involve any consideration of the merits. Issuing a Notice of Hearing will not affect an ALJ's ability to "consider the matter as though he had not adjudicated it before"[5] as required by *Lucia*. Thus, issuing a pre-ratification Notice of Hearing is not sufficient to require the case to be remanded and assigned to another ALJ for hearing.

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[3] The Sixth Circuit affirmed the ALJ and BRB determinations that the presumption of legal pneumoconiosis applies, the Employer did not successfully rebut that presumption, and three doctors' opinions did not meet the rebuttal threshold. These holdings carry less precedential importance they are case specific and do not seem to offer any new understanding of governing law. Accordingly, the discussion of those holdings is minimal.

[4] The BRB also affirmed the ALJ factual findings supporting the denial of benefits without offering any new understanding of governing law. Accordingly, the discussion of those holdings is minimal.

[5] *Lucia v. SEC*, 138 S Ct. at 2044, 2055 (2018).