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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 163
January - February 2003

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

New Orleans Stevedores v. Ibos, (No. 01-60480)(January 16, 2003), ___ F.3d ___ (5th Cir. 2003).

In this matter, where the worker had mesothelioma, the Fifth Circuit followed the Second Circuit's rule annunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure. Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the Fifth Circuit found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The Fifth Circuit has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (5th Cir. 1992).

The Fifth Circuit also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

[Topics 2.2.16 Occupational Diseases and the Responsible Employer/Carrier; 70.2 Responsible Employer--Occupational Disease and the *Cardillo* Rule; 33.6 Employer Credit For Net Recovery By "Person Entitled To Compensation"]

Norfolk Shipbuilding & Drydock Corp. v. Campbell, (Unpublished) (No. 02-1701)(4th Cir. January 30, 2003).

After the last opinion was issued Norfolk filed a notice of appeal to the Board seeking a final order so that it could file a petition for review with the Fourth Circuit. Without waiting for a final order, Norfolk then filed a petition for review with the circuit court. Noting that the petition for review predated the Board's final order, the Fourth Circuit found that it had no jurisdiction and dismissed the petition. "[A]dministrative decisions under the LHWCA are only reviewable by this court if they constitute a 'final order of the Board." 33 U.S.C. 921(c) (2000).

[Topic 21.3 Review By U.S. Courts of Appeals]

Loew's L'Enfant Plaza v. Director (Baudendistel), (Unpublished) 2003 WL 471917 (D.C. Cir).

Circuit Court upheld Board and ALJ's rulings that where an employer gives a blanket authorization to a claimant to seek proper medical treatment for "any problems" resulting from the 1977 incident, the claimant was entitled to medical compensation for his later discovered ailments. Here the employer gave the broad authorization in 1977 for an electrical shock. In 1988 the claimant suffered from venous stasis ulcerations and sought medical treatment.

[Topic 7.1 Medical Treatment Never Time Barred]

Woods v. Director, OWCP, (Unpublished) 2003 U.S. App. LEXIS 3590 (Ninth Cir. No. 01-71920) (February 25, 2003).

Where an employer makes voluntary payments and a claimant does not receive greater compensation from an ALJ Decision and Order, the claimant is not entitled to an attorney fee. The Ninth Circuit found that, "The record contains no evidence that the employer's advance payment made before [the claimant] filed her claim was conditional or contingent in nature. Because the [ALJ's] award did not exceed the amount of the advance payment, [the claimant] is not entitled to attorney's fees under the LHWCA."

[Topics 28.1.2 Attorney Fees–Successful Prosecution; 28.2.2 Attorney Fees–Tender of Compensation]

B. U.S. District Courts

In the Matter of The Complaint of Kirby Inland Marine, ___ F. Supp. ___ (S.D. Texas Jan. 15, 2003), 2003 WL 168673.

This proceeding under the Limitation of Vessel Owners Liability Act was filed in connection with a 905(b) action. The district court held that where a seaman performing longshore duties could have avoided an accident by watching his step more carefully, the vessel owner was not liable for injuries sustatined when the seaman fell from the main deck into a hopper.

[Topic 5.2.1 Third Party Liability–Generally]

Millet v. Avondale Industries, ___ F.Supp. ___ (E.D. La. 2003),2003 WL 548879 (Feb. 24,2003).

Federal District court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the compensation order. District Court Judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences. That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If Millet must bear the cost of enforcement of that final fee award then he cannot receive 'the full value of the fees to which [he is] entitled under the Act.'"

[Topics 18.1 Default Payments–Generally; 21.5 Review of Compensation Order--Compliance; 28.10.2 Attorney Fees–Timely Appeal/Finality]

C. Benefits Review Board

Patterson v. Omniplex world Services, ___ BRBS ____ (BRB No. 02-0332) (Jan. 21, 2003).

This Defense Base Act case has issues concerning the admission of evidence and the scope of the relevant labor market for suitable employment purposes. Here, the claimant from Missouri was injured while employed as a security guard in Moscow as an embassy construction site. He had previously worked for this same employer for approximately six years before this injury in various

locations.

After the close of the record in this matter, the employer requested that the record be reopened for the submission of "new and material" evidence which became available only after the close of the record. Specifically, the employer asserted that in a state court filing dated subsequent to the LHWCA record closing, the claimant stated that he had previously been offered and had accepted a security guard job in Tanzania.

The claimant argued that this evidence should not be admitted as it was outside the relevent Trenton, Missouria, labor market. The ALJ issued an Order Denying Motion to Reopen Record, stating that his decision would be based upon the existing record "due to the fact that the record was complete as of the date of the hearing together with the permitted post-hearing submissions, the complexity of the matters being raised post-hearing, the delays that would be encountered if further evidence is admitted, and the provisions of Section 22 of the Act which provide for modification of the award, if any."

In overturning the ALJ on this issue, the Board found the evidence to be relevant and material, and not readily available prior to the closing of the record. The evidence was found to be "properly admissible under Section 18.54(c) of the general rules of practice for the Office of Administrative Law Judges, as well as under the specific regulations applicable to proceedings under the Act. 20 C.F.R. 702.338, 702.339. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

The Board further noted that Sections 18.54(a) of the Rules of Practice and 20 C.F.R. 702.338 explicitly permit an ALJ to reopen the record, at any time prior to the filing of the compensation order in order to receive newly discovered relevant and material evidence.

While the Board affirmed the ALJ's conclusion that Missouri is the claimant's permanent residence, and thus his local labor market in the case, the Board opined that the ALJ should have considered the significance of the claimant's overseas employment in evaluating the relevant labor market. The Board concluded that, given the claimant's employment history, the labor market cannot be limited solely to the Trenton, Missouri, area. Additionally, the Board noted that, in fact, the claimant has continued to perform post-injury security guard work in the worldwide market.

[Topics 23.2 Admission of Evidence; 8.2.43 Suitable alternate employment: location of jobs]

D. State court

[ED. NOTE: The following is for informational purposes only.]

Stone Container Corp. v. Castle, Iowa Supreme Court No. 02/01-1291 (February 26, 2003).

The state supreme court found that a lap top computer is a reasonable and necessary appliance that must be provided to a double amputee who must stay in a temperature-controlled environment. In so holding, the court rejected the employer's argument that a covered appliance had to be necessary for medical care. The court ruled that an appliance is covered when it "replaces a function lost by the employee as a result of the employee's work-related injury. The court reasoned that the lap top provided the employee with access to the outside world.

II. Black Lung Benefits Act

Benefits Review Board

In *Braenovich v. Cannelton Industries, Inc.*, ___ B.L.R. ___, BRB No. 02-0365 BLA (Feb. 12, 2003), the Board upheld the ALJ's "equivalency determination" that a 1.5 centimeter lesion on autopsy would constitute a 1.0 centimeter or greater opacity on a chest x-ray, thus establishing the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304. In support of the ALJ's finding, the Director argued that the autopsy prosector and a reviewing pathologist found a lesion larger than one centimeter in the miner's lungs. The Director stated that, although another reviewing pathologist, Dr. Naeye, found a 0.9 centimeter lesion on the slides, this would not "disprove the existence of a nodule larger than one centimeter in the miner's lungs." The Director noted that one of Employer's experts, Dr. Kleinerman, "acknowledged that a tissue sample shrinks by about 10 - 15% when prepared for a slide . . .."

Moreover, with regard to the award of attorney's fees, an hourly rate of $200 was upheld where the ALJ properly considered the factors at 20 C.F.R. § 725.366(b), including the "high quality" of counsel's representation, her professional credentials and experience, and the complex issues involving complicated pneumoconiosis presented in the case.[1]

[**complicated pneumoconiosis; attorney's fees**]

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[1] Claimant was represented by the Washington and Lee University School of Law Legal Practice Clinic.

In *Collins v. Pond Creek Mining Co.*, ___ B.L.R. ___, Case No. 02-0329 BLA (Jan. 28, 2003), the Board held that, generally, an employer is collaterally estopped from re-litigating the issue of whether pneumoconiosis is present if (1) there is a prior decision awarding benefits in a miner's claim, and (2) no autopsy is performed in the survivor's claim. However, the Board upheld the ALJ's denial of application of collateral estoppel where, "the miner . . . was awarded benefits on February 25, 1988, at which time evidence sufficient to establish pneumoconiosis under one of the four methods set out at Section 718.202(a)(1)-(4) obviated the need to do so under any of the other methods." The ALJ properly noted that, since the award of miner's benefits, the Fourth Circuit issued *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) requiring that all types of evidence be weighed together to determine whether the disease is present. As a result, the Board held that "the issue is not identical to the one previously litigated" and collateral estoppel does not apply.

In assessing the x-ray evidence, the ALJ excluded certain interpretations submitted by Employer on grounds that the "employer had an opportunity to submit those readings in the living miner's claim." The Board held that this was error and reasoned that "[s]ince the survivor's claim is a separate claim . . . and this evidence was admitted into the record at the hearing without objection by any party pursuant to 20 C.F.R. § 725.456 (2000), it must be weighed with all other relevant evidence of record."

[**collateral estoppel in a survivor's claim; exclusion of evidence**]