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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 230 March 2011

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

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

***Carey v. Ormet Primary Aluminum Corp. et al.*, 2011 WL 1089601 (5th Cir. 2011)(unpub.)**

The Fifth Circuit held that it has the authority to award claimant attorney's fees under Section 28(b) for work performed before the court in connection with claimant's successful appeal of a Board decision, which did not address claimant's entitlement to additional compensation, but only his entitlement to attorney's fees.[2] The court reasoned that *Boland Marine & Mfg. Co. v. Rihner,* 41 F.3d 997, 1000 (5th Cir.1995), dictates this conclusion. *See also Kerns v. Consolidation Coal Co.,* 247 F.3d 133, 133 (4th Cir.2001) (granting motion for fees on appeal where petitioner was not awarded enhanced benefits as a result of the appeal). Accordingly, the court granted claimant's motion for an award of attorney's fees.

[Topic 28.2.4 28(b) EMPLOYER'S LIABILITY -- Additional Compensation]

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

[2] The underlying decision, *Carey v. Ormet Primary Alum. Corp.,* 627 F.3d 979 (5th Cir. 2010), is summarized in the Recent Significant Decisions Monthly Digest #228 – December 2010 – January 2011.

B. U.S. District Courts

ITT Industries v. S.K., 2011 WL 798464 (S.D.Tex. 2011).[3]

The district court held that (1) the BRB did not err as a matter of law in ruling that the ALJ is not required to use the DSM-IV in assessing the existence of a psychiatric injury; (2) the ALJ's finding that claimant suffered from post-traumatic stress disorder ("PTSD") was not supported by substantial evidence; (3) the ALJ's finding that claimant suffered from depression was supported by substantial evidence; (4) claimant was entitled to Section 7 medical benefits for depression, but not for PTSD.[4]

While working for employer as a heavy equipment mechanic in Kuwait from February 2005 until March 2007, claimant was verbally harassed by his co-workers and supervisors, though he was never physically injured. Claimant testified that his coworkers called him names such as "terrorist," "Taliban," "al Qaeda," and "Hezbollah" almost daily because of his Arabic heritage. His supervisors did not try to stop the name-calling, and claimant testified that he did not report the behavior because his own supervisor participated in it. Claimant obtained psychiatric counseling in Kuwait for an extended period until he returned to the U.S. in 2007 for care. Upon returning to the U.S., he continued to seek medical care and sought benefits under the Defense Base Act, asserting that harsh and stressful work conditions caused him severe depression and also aggravated or accelerated his PTSD.

The ALJ found claimant's testimony credible and consistent with the reports he made to his psychiatrists. The ALJ found that claimant invoked the §20(a) presumption by showing that he sustained a work-related psychiatric injury (based on the medical opinions that diagnosed him with depression or PTSD), and by showing that this injury arose out of his employment (based on claimant's testimony, corroborated by witnesses and consistent with his reports to psychiatrists, as well as medical opinions). The ALJ further found that employer rebutted the §20(a) presumption based on the opinion of Dr. Mercier that claimant did not have PTSD but likely had schizophrenia, and that neither his schizophrenia nor any other psychological

[3] Only the Westlaw citation is currently available.

[4] The court initially determined that it had appellate jurisdiction over this case based on the location of the District Director in Houston, Texas, under 33 U.S.C. § 921(c) and 42 U.S.C. § 1653(b), as confirmed by *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111 (5th Cir. 1991)(holding that determinations by the BRB on claims originating under the DBA are appealed to the United States District Court for the district in which the deputy commissioner's office is located).

injury resulted from his working conditions in Kuwait. After weighing the evidence in its entirety, the ALJ found that claimant suffered from depression and PTSD because of his coworkers' harassment, and awarded him benefits.

Rejecting employer's assertion that the ALJ erred as a matter of law by granting disability benefits where the DSM-IV diagnostic criteria were not established, the court stated that

> "[p]etitioner cites to numerous ALJ cases providing persuasive authority that a finding of the existence of a psychological injury must be premised on the criteria outlined in the DSM-IV. However, while many courts have used the DSM-IV as a reference when determining whether to affirm the decision of an ALJ, this court finds no authority for the proposition that the ALJ must not award benefits for a psychological injury that does not follow the criteria outlined in the DSM-IV."

Slip. op. at *11. Although the court found no appellate court decision directly on point, it noted that the U.S. Supreme Court and the Fifth Circuit have each discussed the DSM-IV in various other contexts and cautioned against its strict application; thus, the Supreme Court reasoned that science has not reached finality of judgment with respect to knowledge and therapy regarding mental disease, and also noted that the DSM-IV itself cautions against total reliance on its contents. Here, the district court concluded that "[i]n light of these cases cautioning against requiring a rigid use of psychiatric diagnostic tools such as the DSM-IV when making legal determinations, the court holds that the criteria of the DSM-IV need not be established or even discussed by the ALJ in every instance." *Id.* at *13. The court noted that "[this] ruling is in no way meant to diminish the importance of the DSM-IV in assessing the existence of psychiatric injury. The court only rules that the DSM-IV, a non-legal authority, is not binding and need not be referenced or have its criteria strictly applied in every decision made by an ALJ or the BRB." *Id.*, n.122.

Next, the court determined that the ALJ's finding that claimant suffered from PTSD was not supported by substantial evidence, as the psychiatric diagnoses upon which the ALJ relied were unsupported by the evidence. Thus, one of the two physicians who diagnosed claimant with PTSD, provided no opinion as to the cause of that condition, and his diagnosis was, therefore, unsupported. The second physician claimed to base his diagnosis of PTSD on the DSM-IV, but failed to state why the requirement of actual or threatened physical harm was unnecessary to his diagnosis. While use of the DSM-IV is not required, "if a physician explicitly claims to base his diagnosis on the criteria in the DSM-IV, then he must

either support those elements or state why, in his opinion, a particular element need not be supported under the facts of the particular diagnosis." *Id.* at *13. The court, therefore, overruled the ALJ's award of medical benefits for PTSD.

At the same time, contrary to employer's assertion, the ALJ's finding that claimant was inflicted with depression as a result of the harassment by his coworkers during his employment with employer in Kuwait was supported by substantial evidence. Three physicians diagnosed claimant with various forms of depression attributed to occupational stress claimant suffered from his coworkers' harassment. The only challenge raised by employer was that these diagnoses were made without applying the DSM-IV. However, the court has determined that "strict application of the DSM-IV criteria is not a prerequisite for finding that a psychiatrist's diagnosis constitutes substantial evidence." *Id.* at *15.

The court concluded that the ALJ's award of medical benefits for a foot injury was a typographical error, and accordingly overruled the award. Noting that the ALJ evidently intended instead to award medical benefits for work-related depression, the court ordered employer to pay such benefits.

[Topic 2.2.18 Representative Injuries/Diseases; Psychological Problems]

***Grab v. Traylor Bros., Inc.*, 2011 WL 941260 (E.D.La. 2011).[5]**

Plaintiffs, two iron workers employed by Boh Bros, were injured while working on construction of the new I-10 twin span bridge over Lake Pontchartrain, when the crew boat in which they were traveling from the work site to shore at the end of the day hit a survey tower placed in the lake by defendant companies. The workers sought damages under the Jones Act, contending that they were seamen, and sought a summary decision on this issue; the defendants filed a cross-motion, arguing that the workers were longshoremen covered under the LHWCA. The court applied the test enunciated in *Chandris, Inc. v. Latsis,* 115 S.Ct. 2172, 2189-90 (1995), which prescribes two prerequisites to seaman status: (1) the employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission"; and (2) the employee "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." The court found that one of the iron workers involved in the bridge construction

[5] Only the Westlaw citation is currently available.

satisfied the seaman test; while material question of fact existed as to whether the second worker satisfied the *Chandris* duration test.

Of note is the court's discussion of whether plaintiffs had a connection to the vessel that was substantial in nature. Boh Bros. argued that plaintiffs were not assigned to the vessel, but were instead iron workers assigned to build a bridge, while the vessel was a tool they used to perform this work. The court reasoned that "[a]lthough plaintiffs' work on the BIG MAC consisted of offloading cargo, Boh Bros. assessment that they engaged in traditional longshore work is not dispositive of seaman status. Plaintiffs have demonstrated that they were exposed to the perils of the sea because they worked aboard the BIG MAC in Lake Pontchartrain every day. Also, plaintiffs were assigned to set girders on the bridge working from the BIG MAC for an extended period of time until the job was complete. Plaintiffs have presented deposition testimony that establishes that they were transported to the BIG MAC by a crew boat every day and that the barge was their base of operations. The iron worker crew would have a safety meeting on the barge and then work together use (sic) the crane to lift the girders into place. This work required some iron workers to be on the barges to connect the spreader beam to the girders and to direct the movement of the girder. Martin testified that the iron workers' jobs are interchangeable. Considering the 'total circumstances' of the plaintiffs' employment, they had a substantial connection to the BIG MAC in nature, and meet this portion of the *Chandris* test." (Internal citation omitted).

[Topic 1.4.2 LHWCA v. JONES ACT – Master/member of the Crew (seaman)]

***Vega v. Tradesmen Int'l, Inc.*, 2011 WL 1157683 (S.D.Cal. 2011).**[6]

The district court awarded plaintiff Vega attorney's fees under §28(a) for work performed by his attorney in obtaining a judgment enforcing the OWCP's award of benefits under the LHWCA. In concluding that attorney Jeffrey Winter's requested hourly rate of $350 was reasonable in this case, the court relied on the following considerations. While the fee request complied with the minimal requirements of 20 C.F.R. § 702.132(a), it did not explain why an hourly rate of $350 is the prevailing one in this district. The court noted that the fee surveys cited by claimant were not particular to this district, but instead included areas such as Los Angeles and San Francisco

[6] Only the Westlaw citation is currently available.

where fees are typically higher. The court noted that counsel's own rate is a relevant factor, but is not determinative. The court noted that it

> "agrees [with defendants] that the petition did not present particularly novel or complex questions of law. At the same time, it is evident filing the petition required basic federal litigation skills, and some specialized knowledge of admiralty law, disability law, and administrative law. It is not every legal practitioner who can file such a petition, at least not without a good deal of research. The additional expertise required raises the prevailing rate above what would be appropriate in an ordinary disability or worker's compensation case."

Slip op. at *2. The court also noted that defendants misconstrued the nature of the legal work as being the same as the underlying claim for benefits. The court next considered Attorney Winter's experience, skill, and reputation, noting that he presented strong qualifications. He has over twenty years of experience, has tried a large number of cases, has handled a significant number of appeals, and has expertise in admiralty and maritime law. Additionally, Vega obtained an award of over $43,000, and it was reasonable for him to hire an attorney with Mr. Winter's experience to enforce this judgment.

The court also addressed defendants' argument that disability law or worker's compensation law is the best analog to the legal work done in this case. The court noted that while in simple disability cases, hourly fees of roughly $170 and up are common in this district, in more complex cases, hourly rates of up to $375 may be considered reasonable. While defendants cited cases where attorney's fees for practice before the BRB were awarded at lower hourly rates ($200-$285), the court noted that these cases did not take place in this district and did not involve federal litigation to enforce awards.

In determining a reasonable number of hours expended by counsel, the court determined, *inter alia*, that, without additional explanation, 5 hours claimed for "Work on Petition" was excessive, bearing in mind both how short the petition was and Mr. Winter's level of expertise. Further, the task of filing the petition was ministerial and thus was not appropriately billed as attorney work time.

[Topic 28.6.1 Hourly Rate]

C. Benefits Review Board

There have been no published Board decisions under the LHWCA in March 2011.

II. Black Lung Benefits Act

Benefits Review Board

By unpublished decision in *Taylor v. Manalapan Mining Co.*, BRB No. 10-0403 BLA (Mar. 11, 2011)(unpub.), the Board declined to affirm the Administrative Law Judge's weighing of certain medical opinion evidence on grounds that he did not consider whether such evidence was inconsistent with the Department's position as set forth in the preamble to the amended regulations. Specifically, the Administrative Law Judge accorded greater weight to the medical opinion of Dr. Rosenberg because "he persuasively links the objective medical data to the medical literature to show that Claimant's reduction in FEV_1/FVC ratio is more consistent with a smoking-induced impairment than with a coal-dust-induced impairment."

The Director, OWCP argued that Dr. Rosenberg's opinion appeared to be inconsistent with statements n the regulatory preamble "indicating that a reduction in the FEV_1/FVC ratio is a marker for obstructive lung disease including that cause[d] by coal mine employment" at 65 Fed. Reg. 79943 (Dec. 20, 2000). The Board agreed and stated:

> The administrative law judge's role encompasses a determination of whether medical opinions are supported by the medical literature they cite, and whether they are consistent with the DOL's comments to the regulations. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 227 F.3d 829, 22 BLR 2-230 (6th Cir. 2002). Significantly, the administrative law judge found that Dr. Rosenberg's medical opinion was supported by the 'medical literature' he referenced in his report. Therefore, while we are mindful that an administrative law judge may validly credit a medical opinion despite its flaws, . . . his role as fact-finder requires him to recognize and evaluate the strengths and weaknesses of a medical opinion in order to rationally assess credibility and assign probative weight. (citation omitted). Because the regulations recognize that coal dust can cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ration, we conclude that the administrative law judge must reconsider Dr. Rosenberg's opinion. *See Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 999, 23 BLR 2-302, 2-318 (7th Cir. 2005) (administrative law judge may discount a medical opinion that is influenced by the physician's 'subjective

> personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions').

Slip op. at 7-8.

[**consideration of the preamble to the amended regulations**]

By unpublished decision in *Gosnell v. Eastern Associated Coal Corp.*, BRB No. 10-0384 BLA (Mar. 11, 2011)(unpub.), a case arising in the Fourth Circuit, the Board affirmed the Administrative Law Judge's award of benefits under 20 C.F.R. § 725.304. Notably, the Administrative Law Judge did not find complicated pneumoconiosis present under any of the individual prongs at § 718.304(a)-(c), which includes x-ray evidence, biopsy or autopsy data, or "other means" of diagnosing the disease. On appeal, the Director, OWCP urged that the Board affirm the decision. The Board noted:

> While all of the physicians interpreting the x-rays identified a large mass in claimant's right upper lung, they disagreed as to whether the mass represented a Category A large opacity or another disease process, such as tuberculosis, histoplasmosis, pneumonia, or cancer.

Slip op. at 4.

The Administrative Law Judge found that chest x-rays produced conflicting interpretations and, standing alone, this evidence did not establish the presence of complicated pneumoconiosis under § 718.304(a). Moreover, biopsy data of the large mass yielded some evidence of pneumoconiosis, but was insufficient, in isolation, to demonstrate complicated pneumoconiosis under § 718.304(b). Under § 718.304(c), the Administrative Law Judge weighed available CT-scan and PET-scan evidence and associated medical opinions. He found that this data yielded conflicting interpretations by medical experts and, therefore, was inconclusive.

As a last step, however, the Administrative Law Judge weighed all of the evidence together, including the series of medical opinions by the miner's treating physician, Dr. Robinette. It was at this juncture that "several potential causes of the large mass in claimant's right lung were eliminated, such that the evidence that was inconclusive when viewed in isolation was no longer inconclusive, but rather, supported a finding of complicated pneumoconiosis." *Slip op.* at 7. The Administrative Law Judge

emphasized the examinations and testing of the miner's treating physician, Dr. Robinette, over time. As observed by the Board:

> Specifically, the administrative law judge noted that both a bronchial washing and a skin test were negative for tuberculosis. (citation omitted). In addition, the administrative law judge noted that a serology test was negative for fungal infection. The administrative law judge also found that the CT scan evidence did not reveal calcification associated with the large mass, a condition that Dr. Scott observed would indicate granulomatous disease. The administrative law judge also relied upon Dr. DePonte's opinion that the September 27, 2005 CT scan did not reveal the fine, calcified nodular opacities associated with histoplasmosis.

Slip op. at 8. Dr. Robinette based his diagnosis of complicated pneumoconiosis on the foregoing testing as well as a needle biopsy of the lung mass, which did not demonstrate malignancy, but did produce evidence of anthracosis and associated fibrosis.

Employer argued that, because Claimant did not sustain his burden under any one of the individual prongs at § 718.304(a)-(c), the Administrative Law Judge erred in finding the disease present based on Dr. Robinette's medical opinions. The Board disagreed and held that Dr. Robinette's opinion was not based on a single test, "but rather upon a comprehensive review of all of the evidence, viewed in the context of claimant's complete clinical presentation."

Employer further argued that Dr. Robinette did not "specifically address whether the large opacity that he diagnosed as complicated pneumoconiosis would appear as a greater-than-one-centimeter opacity on x-ray" and, without this equivalency finding, complicated pneumoconiosis cannot be established. The Administrative Law Judge found that some medical experts classified the mass as Category A, whereas other experts provided measurements of the mass. None of the measurements of the mass was less than two centimeters in one dimension and the Administrative Law Judge observed that CT-scan images revealed a four centimeter mass. Thus, the Judge concluded that it was "self-evident the mass would appear on a chest x-ray as a pulmonary opacity greater than 1 cm" and an equivalency determination was unnecessary. The Board noted that Employer did not challenge the accuracy of the measurements of the mass and it agreed with the Administrative Law Judge's finding.

[**complicated pneumoconiosis, weighing the record as a whole**]