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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 261 March 2014

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I. Longshore and related Act

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

***Lincoln v. Director, OWCP*, __ F.3d __, 2014 WL 929367 (4th Cir. 2014).**

Affirming the Board, the Fourth Circuit held that claimant was not entitled to employer-paid attorney's fees under Section 28(a) where employer, within 30 days of receiving written notice of claim, voluntarily paid claimant $1,256.84, amounting to compensation for 0.5% binaural hearing loss and the equivalent of one week of permanent partial disability (PPD) pay under the maximum compensation rate.

Claimant filed a claim for hearing loss. Employer's notice of controversion acknowledged that his hearing loss was noise-induced, but stated that additional information was needed to determine the correct disability payment. Thereafter, employer received official notice of the claim and paid claimant $1,256.84 within 30 days thereof. During subsequent medical examination/audiogram, claimant was assessed with a 10% binaural hearing loss, and the parties proceeded to settle the claim under § 8(i) based on this assessment. Thereafter, the District Director, OWCP, denied claimant's request for attorney's fees under §§ 28(a) and (b), and the BRB affirmed.

[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.

Section 28(a) provides that employer is responsible for a reasonable attorney's fee when it "declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter" and "thereafter" claimant utilizes the services of an attorney in the successful prosecution of his claim. On appeal, claimant raised three arguments in support of his asserted entitlement to attorney's fees under § 28(a). First, he asserted that the term "any compensation" in § 28(a) means all compensation due, and therefore cannot include employer's payment of a mere one week of disability benefits. The court disagreed, concluding that "§ 928(a)'s plain language requires fee-shifting only when an employer has paid no compensation within 30 days of receiving the official claim." It reasoned that the term "any compensation" is unambiguous. Additionally, § 28(a) indicates that employer's refusal to pay must be based on a complete denial of liability. Further, claimant's interpretation would mean that employers must pay the full claim within 30 days of receiving the official notice to avoid potential fee liability. However, as this claim demonstrates, "the medical evidence establishing the extent of the claimant's injury, and thus the amount of his benefits, is often in flux and cannot be ascertained with any degree of certainty within 30 days of his claim." *Id.* at *3. The court concluded that "Section 928 provides an employer a safe harbor: if it admits liability for the claim by paying some compensation to the claimant for a work-related injury and only contests the total amount of the benefits, it is sheltered from fee liability under § 928(a)." This safe harbor is not permanent, as claimant could still recover fees under § 28(b). In this case, employer voluntarily paid claimant one week's compensation within 30 days of receiving his claim, "thereby admitting to liability for the injury" for the purposes of § 28(a). Claimant then had the right to request an informal conference, which is a prerequisite to employer's fee liability under § 28(b); instead, he proceeded to settle the claim.

Second, claimant contended that employer's payment was not "compensation" in any true sense under § 28(a) because it was merely an attempt by employer to avoid fee liability, citing *Green v. Ceres Marine Terminals, Inc.,* 43 BRBS 173 (2010), *rev'd on other grounds,* 656 F.3d 235 (4th Cir.2011). The court distinguished *Green*, stating that in the present case employer's payment calculation was based on claimant's alleged disability, while the $1 payment in *Green* was clearly untethered to the underlying claim and therefore was not "compensation" at all. By contrast,

"Ceres's payment of one week's benefits at the maximum compensation rate, being directly tied as it was to Lincoln's alleged injury, qualifies as 'compensation' within the meaning of § 928(a)." *Id.* at *5.

Lastly, claimant asserted that when employer filed a notice of controversion, it irrevocably triggered § 28(a). The court stated that claimant did not raise this argument before the Board, and, in any event, this contention was without merit. Claimant relied on § 14(d), which requires that an employer seeking to challenge an employee's benefits claim file a notice "on or before the fourteenth day after [it] has knowledge of the alleged injury or death." The court reasoned, however, that § 28(a) nowhere incorporates § 14(d) or its 14 day time limit, or references notices of controversion generally. Rather, § 28(a) contains only one explicit trigger: the payment of "any compensation" within 30 days of the notice of the claim. Here, employer met this requirement and was therefore entitled to the protections afforded by § 28(a).

In conclusion, the court observed that "[t]he LHWCA is one of those statutes that adjust employer and employee interests through multiple tradeoffs and compromises. Far be it from courts to disturb the balance." *Id.* at *5.

[Topic 28.1.4 ATTORNEY'S FEES – 28(a) -- Decline to Pay]

***Naquin v. Elevating Boats, LLC*, __ F.3d __, 2014 WL 917053 (5th Cir. 2014).**

Relevant to this review, the court of appeals concluded that the jury did not err in its determination that plaintiff was a seaman entitled to Jones Act coverage.

Plaintiff brought Jones Act action stemming from the injuries he suffered while employed at EBI's shipyard when land-based crane he was operating fell off its base because of a defective weld. On appeal, EBI argued that the jury erred in its determination that plaintiff was a seaman entitled to Jones Act coverage. EBI asserted that plaintiff was a land-based ship-repairman (expressly covered under the LHWCA) who performed classic land-based harbor worker duties, and thus he was not connected to vessels in navigation and cannot qualify as a seaman. EBI maintained that because

the LHWCA and Jones Act are mutually exclusive, plaintiff's coverage under the LHWCA precludes his coverage under the Jones Act.

The Fifth Circuit initially noted the Supreme Court's holding and the Jones Act covers any worker who qualifies as a "seaman," without regard to whether he may also qualify for coverage under the LHWCA. To determine if a worker is a seaman or member of a vessel's crew, the Supreme Court has established a two-prong test: first, an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; and, second, a seaman must have a connection to a vessel in navigation that is substantial in terms of both duration and nature. *Chandris v. Latsis*, 515 U.S. 347, 355–56, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995). An individual can still qualify for seaman status even if he divides his time among multiple vessels under common ownership or control.

Here, plaintiff easily met the first prong: he spent the majority of his time repairing, cleaning, painting, and maintaining the 26–30 lift-boat vessels that EBI operated out of the Houma shipyard; and the remainder of his hours aboard EBI lift-boats was spent operating the marine crane and securing the deck for voyage. The court stated that equipment operators and mechanics performing such tasks are necessary to the function and operation of any vessel; vessel repair is classic seaman's work.

Turning to the second prong of the *Chandris* test, the court concluded that plaintiff's connection with the EBI fleet was substantial in terms of both duration and nature. As the Supreme Court explained, the fundamental purpose of the substantial connection to a vessel requirement is to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea. *Id*. at *3, citing *Chandris*, 515 U.S. at 368. Thus, a worker seeking seaman status must separately demonstrate that his connection to a vessel or fleet of vessels is, temporally, more than fleeting (a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act), and, substantively, more than incidental.

Here, the durational requirement was met, as plaintiff spent approximately 70 percent of his time repairing and operating cranes and other equipment on EBI's fleet of lift-boats. With regard to the nature of

claimant's connection to EBI's vessels, EBI argued that plaintiff did not qualify as a seaman because his duties did not regularly expose him to the perils of the sea, considering that he was rarely required to spend the night aboard a vessel, that the vessels he worked upon were ordinarily docked, and that he almost never ventured beyond the immediate canal area or onto the open sea. The court disagreed, stating that "courts have consistently rejected the categorical assertion that workers who spend their time aboard vessels near the shore do not face maritime perils. While these near-shore workers may face fewer risks, they still remain exposed to the perils of a maritime work environment." *Id.* at *4 (citations omitted). The court analogized this case to *In re Endeavor Marine Inc.*, 234 F.3d 287, 291 (5th Cir .2000), which held that, although the port-bound crane operator did not face some of the maritime dangers faced by seamen on moving vessels in the open sea, he was regularly exposed to the perils of the sea and qualified as a seaman. The court reasoned that

> "[l]ike the crane operator in that case, Naquin's primary job duties were performed doing the ship's work on vessels docked or at anchor in navigable water. In doing this work, Naquin faced precisely the same type and degree of maritime perils faced by the port-bound derrick barge crane operator in Endeavor Marine. Additionally, we have dozens of cases finding oilfield workers and other 'brown-water' workers on drilling barges and other vessels qualified as seamen even though they spent all their work time on these vessels submerged in quiet inland canals and waterways. Accordingly, we conclude that Naquin's connection to the EBI vessel fleet was substantial in terms of nature."

Id. at *4-5 (citations and footnotes omitted). Thus, the court concluded that the evidence supported the jury's finding that plaintiff was a seaman. The court further upheld the jury's determination that employer was negligent and thus liable under the Jones Act; however, it vacated the damages award and remanded for a new trial on damages.

In a dissenting opinion, Circuit Judge Jones opined that plaintiff failed to meet the second prong of the *Chandris* test. With regard to its duration component, Judge Jones opined that plaintiff's work as a repair supervisor on vessels docked in a canal or in drydock did not constitute service of a vessel in navigation. Unlike the plaintiff in *Chandri*s, Naquin did not sail on a ship that was temporarily docked; rather, he worked almost exclusively on

vessels that were moored, jacked up, or docked in the shipyard undergoing repair, and rarely found himself on a navigable vessel. Judge Jones stated that

> "[t]o allow Naquin to accrue the 30 percent minimum temporal connection while solely working on docked vessels under repair essentially removes the duration component for other land-based repairmen who are fortunate enough to work on vessels that do not require long-term repairs. According to the majority, these repairmen could always claim that they spent their time working on vessels 'in navigation' despite the fact they do all of their work on or tied to land, safely removed from maritime dangers. To me, this outcome defies logic and disregards the overarching purpose of the Jones Act as stated in *Chandris*."

Id. at *10.

As to the nature of claimant's connection to EBI's vessels, Judge Jones stated that the majority cited no facts showing that plaintiff, who spent nearly all of his time on boats moored to a dock, faced any maritime perils in the ordinary course of his duties. The cases cited by majority have no bearing on what circumstances, if any, entitle a dockside worker like plaintiff to Jones Act coverage. Unlike the plaintiff in *Endeavor Marine*, Naquin spent nearly all of his time dockside. His employment was substantially similar to that of other land-based employees whose seaman status has been denied by the courts. Similarly, employees in the "brown water" cases performed their work while their vessel was operating on water, while Naquin worked nearly always in the shipyard.

[Topic 1.4 JURISDICTION/COVERAGE – LHWCA v. JONES ACT; Topic 1.4.2 JURISDICTION/COVERAGE – LHWCA v. JONES ACT -- Master/member of the crew (seaman); Topic 1.4.3 JURISDICTION/COVERAGE – LHWCA v. JONES ACT -- "In Navigation"]

***Chenevert v. Travelers Indemnity Co.*, __ F.3d __, 2014 WL 902873 (5th Cir. 2014).**

Plaintiff, a crane operator, was injured in the course of his employment when he fell on employer's barge. Employer's insurer paid him benefits under the LHWCA (totaling $277,728.72). Plaintiff then brought action against employer under the Jones Act, alleging that at the time of his injury he was working as "seaman" rather than "longshoreman." Carrier moved to intervene to assert a lien against any money recovered by employee for the amount of LHWCA benefits it had paid. Following a settlement between employee and employer (for $1,725,000), the district court held that carrier had no right of subrogation and denied intervention. The Fifth Circuit reversed and remanded.

In a matter of first impression, the Fifth Circuit held that an insurer who makes voluntary LHWCA payments to an injured employee on behalf of a shipowner/employer is entitled to recover these payments from the employee's settlement of a Jones Act claim against the shipowner/employer based on the same injuries for which the insurer has already compensated him. Such an insurer acquires a subrogation lien on the employee's Jones Act recovery for the amount of LHWCA benefits paid. Here, carrier acquired a subrogation lien on the proceeds from the employee's settlement of his Jones Act claim, and was entitled to intervene.

The court relied on the case law addressing double recoveries under the LHWCA compensation scheme and third-party vessel suits under 33 U.S.C. § 905(b). Section 5(b) provides that a worker covered by the LHWCA whose injury is "caused by the negligence of a vessel" may bring an action against the vessel. The LHWCA generally preserves an injured worker's remedies against third parties who may have caused the injury. It is therefore possible for an injured worker to obtain a tort recovery from a third party based on injuries for which he has already been compensated by his employer under the LHWCA. Courts have uniformly held that an employer has a subrogation right to be reimbursed from the worker's net recovery from a third party for the full amount of compensation benefits already paid. And, if carrier paid benefits, it is subrogated to the employer's reimbursement rights under the LHWCA. Further, an injured longshoreman and a third party defendant cannot settle around the employer's lien. The same principle applies when a longshoreman is injured by a vessel owned by his employer: if he receives LHWCA benefits from his employer's carrier and

later sues the employer as vessel owner under § 5(b) and settles the claim, the carrier can recover under the employer's lien against the settlement proceeds.

The court concluded that those same principles are applicable in the context of a Jones Act settlement. A worker who has received LHWCA benefits may obtain a double recovery for the same injury under the Jones Act. The Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to sea-based maritime workers, while the LHWCA provides workers' compensation to land-based maritime employees. A worker whose job title fits within one of the enumerated occupations of the LHWCA may nevertheless be a "seaman" excluded from LHWCA coverage and entitled to sue his employer under the Jones Act. Furthermore, an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act because the question of LHWCA coverage has never been litigated. Amounts paid under the Jones Act shall be credited against LHWCA liability, and vice versa. The court reasoned that:

> "[w]e perceive no sound reason why an insurer's right of reimbursement against a Jones Act recovery should be different from its right of reimbursement against a § 905(b) recovery. Arguably, the insurer has an even stronger equitable claim to repayment from a Jones Act recovery. A worker who recovers against a third party under § 905(b) is necessarily covered by the LHWCA and therefore entitled to compensation benefits; nevertheless, the worker must still use the proceeds of the recovery to repay the employer or insurer for the benefits. On the other hand, a worker who succeeds in a Jones Act claim is necessarily a seaman, and therefore not entitled to LHWCA benefits. It would be particularly unfair to deny the insurer the right to recover the benefits it has paid in such a situation."

Id. at *4 (footnote omitted). While the district court evidently viewed carrier's attempt to assert a lien as an attempt to subrogate against its own insured, this prohibition applies to claims arising from the very risk for which the insured was covered by that insurer. It has no application here, since carrier did not insure employer against Jones Act liability.

An insurer's right of reimbursement from an employee's tort recovery is derived from the employer's right of reimbursement; that is, by paying the employee LHWCA benefits on behalf of the employer, the insurer is subrogated to the employer's right of reimbursement. Here, the district court reasoned that employer should not be allowed to assert a repayment lien against a settlement that it agreed to pay. The Fifth Circuit rejected this concern, stating that, at the time of settlement, it is the insurer, not the employer, who has the lien. By paying LHWCA benefits on behalf of employer, carrier acquired a repayment lien that is independent of, and cannot be nullified by, employer. Otherwise, an employer and employee could settle around the insurer's lien.

[Topic 1.4 LHWCA v. JONES ACT; Topic 33 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE -- CARRIER SUBROGATED TO EMPLOYER'S RIGHTS]

B. Benefits Review Board

There have been no published Board decisions under the LHWCA in March 2014.

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In affirming the award of benefits in *Peabody Coal Co. v. Director, OWCP [Opp]*, __ F.3d __, Case No. 12-70535 (9th Cir. Apr. 1, 2014), a claim involving nearly 40 years of coal mine employment and over 50 years of smoking cigarettes, the court held "the ALJ simply—and not improperly—considered the regulatory preamble to evaluate conflicting expert medical opinions," and it stated:

> A preamble may be used to give an ALJ understanding of a scientific or medical issue.

The court concluded the preamble was consistent with the Black Lung Benefits Act and its implementing regulations. With regard to weighing the medical expert opinions, the court found:

> The ALJ rationally discounted the testimony of Peabody's medical experts, who based their opinions on the premise that coal dust exposure never, or very rarely, causes COPD. The ALJ permissibly looked to the preamble to determine that Peabody's medical experts proffered only one of several interpretations of the evidence.
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> . . .
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> Because 'there is considerable basic scientific data linking coal mine dust to the development of obstructive airways disease,' the ALJ properly discounted the contrary view advanced by Peabody's experts. 65 Fed. Reg. at 79943.

Slip op. at 17.

[**consideration of the preamble when weighing medical opinions**]