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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 307
June 2020

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

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

No decisions to report.

B. Benefits Review Board

***Sabanosh v. Navy Exchange Service Command/NEXCOM*, __ BRBS __ (2020).**

The Board affirmed the ALJ's application of the "zone of special danger" doctrine in a case arising under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*., ("the Act"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq*. ("the NFIA"), based on the facts of this case.

Claimant sought benefits under the Act alleging the death of her husband ("decedent") was causally related to his work for employer at Naval Station Guantanamo Bay, Cuba. Decedent was engaged in a 24 month "tour of duty." Decedent's job required him and his family to live on base, and they were encouraged to participate in on-base community events. On 01/09/15, decedent and claimant attended a "Hail and Farewell" party at the base's Officer's Club to honor both the outgoing and incoming executive officers. At the party, a verbal altercation arose between decedent, his wife, and Captain John R. Nettleton, the base commander, when decedent accused his wife and Captain Nettleton of having an extramarital affair. Later that night, decedent appeared at Captain Nettleton's residence and a physical altercation between them ensued. Decedent never returned home. On 01/11/15, decedent's body was recovered from the Atlantic Ocean. Two autopsies were performed: one listed the decedent's cause of death as "probable drowning in the setting of ethanol and fluoxetine [an ingredient in Prozac] toxicity;" the

[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 *__).

other listed it as "drowning with recent blunt injuries (circumstances unknown)," with "recent alcohol and Prozac intoxication" as contributing causes.

In 2017, claimant filed a claim under the Federal Employees' Compensation Act, which was denied due to lack of jurisdiction. In response to this claim, employer filed a First Report of Injury under the LHWCA on 01/31/18. On 02/12/18, claimant and her two children with decedent filed a claim for death benefits under the Act.

The ALJ found claimant's claim for death benefits timely filed and covered under the NFIA. He found the circumstances of decedent's employment placed him within a "zone of special danger" out of which his death arose, and claimant's claim compensable under the Act. The ALJ therefore awarded death benefits to claimant and her daughters. Employer appealed.

Section 13(a)

The Board initially affirmed the ALJ's determination that the claim was timely filed. Section 13(a) applies in traumatic death cases and provides that the right to compensation is barred unless a claim is filed within one year of the date the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the death and the employment. In the absence of contrary substantial evidence it is presumed, pursuant to § 20(b), the claim was timely filed. To rebut the presumption, an employer must establish either the claimant gained "awareness" of the work-relatedness of the death before employer did and that the proscriptive period has expired, or the employer complied with the requirements of § 30(a) by filing a first report of injury or death. Under § 30(f), where an employer has been given notice or has knowledge of the death and fails to file the § 30(a) report, the statute of limitations does not begin to run until the report is filed. Knowledge of the work-relatedness of an injury or death may be imputed where the employer knows of the injury or death and has facts that would lead a reasonable person to conclude compensation liability is possible and further investigation is warranted.

In this case, employer contended that it rebutted the § 20(b) presumption by presenting substantial evidence it had no knowledge of the work-relatedness of decedent's death until after claimant filed her claim. The ALJ determined the ambiguous circumstances surrounding decedent's death on a restricted, isolated island base should have led a reasonable man to conclude that compensation liability is at least possible. The Board held that this finding was within the ALJ's discretion. Decedent had arguments and a physical altercation with the base commander, commencing at a base social event, on the night he disappeared. At least part of decedent's alcohol consumption occurred at this work-related social event. Moreover, decedent's death prompted a contemporaneous investigation by the U.S. Navy. Thus, the ALJ reasonably found employer had adequate knowledge of the possible work-relatedness of decedent's death to warrant further investigation and to require the filing of a § 30(a) report. Because employer did not file a § 30(a) report until 01/31/18, § 30(f) tolled the time for claimant to file her claim until that date. Accordingly, claimant's claim, filed on 02/12/18, was timely.

Zone of Special Danger Doctrine and Overseas NFIA Cases

Employer further argued that Board precedent establishes that the "zone of special danger doctrine" applies to claims arising under the Defense Base Act ("DBA"), 42 U.S.C. § 1651 *et seq.*, but not those arising under the NFIA. The Supreme Court has held, in cases arising under the DBA, an employee may be within the course of employment even if the employee's injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" overseas create a "zone of special danger" out of which the injury arose. Agreeing with the Director, Office of Workers' Compensation

Programs the Board held that the zone of special danger doctrine can apply to overseas employment under the NFIA.

The Board noted the shared purposes and history of the DBA and NFIA. Prior to the NFIA's enactment in 1952, overseas employees of nonappropriated fund instrumentalities working on military bases were covered by the DBA. The later-enacted NFIA pre-empts the DBA for overseas citizen employees of a nonappropriated fund instrumentality and applies as their exclusive remedy. The zone of special danger doctrine includes coverage for injuries, without any direct causal connection to an employee's particular job duties, so long as those injuries fall within the foreseeable risks occasioned by or associated with the claimant's employment abroad. The Board observed that, "[a]s the Supreme Court has articulated, a key element regarding the applicability of the zone of special danger doctrine is 'the exacting and unconventional conditions' of the overseas employment, [*O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965)]; conditions which, in certain instances, may be as equally 'exacting and unconventional' for employees working for nonappropriated fund instrumentalities outside the United States as they are to employees covered by the DBA." *Id.* at 8.

The Board further determined that its prior decisions do not preclude the application of the zone of special danger doctrine in overseas NFIA cases. *See Harris v. England Air Force Base*, 23 BRBS 175 (1990); *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989). In *Harris* and *Cantrell*, the Board limited application of the zone of special danger doctrine to DBA cases. However, neither *Harris* nor *Cantrell* involved overseas employment; both claimants were injured on domestic air force bases. The Board concluded that "[w]hile a distinction in employment circumstances may foreclose application of the zone of special danger doctrine to domestic claimants, it disappears for overseas claimants the doctrine would have covered under the DBA prior to enactment of the NFIA." *Id.* at 9. The Board's logic in *Harris* and *Cantrell* applies equally to similarly-situated employees under the NFIA.

The Board concluded:

> We therefore hold the zone of special danger doctrine applies to NFIA cases involving overseas employment occurring under 'exacting and unconventional' conditions. Nothing in the NFIA precludes such an application, no legal precedent prohibits the application to overseas employment, and no reason exists to treat individuals the doctrine previously covered differently after enactment of the NFIA.

Id. (citation and footnote omitted). Because application of the zone of special danger doctrine turns on the totality of circumstances in each case, merely working overseas for a nonappropriated fund instrumentality will not result in automatic entitlement to benefits under the Act.

The "Obligations and Conditions of Decedent's Employment"

Employer alternatively asserted that if the zone of special danger doctrine applies, the specific facts of this case -- including decedent's intoxication, personal altercation concerning an alleged extramarital affair, and subsequent death under questionable circumstances -- qualify as "astonishing risks" thoroughly disconnected from decedent's employment.

The Board has defined the "zone of special danger" as the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability. "'Special' is best understood as 'particular' but not necessarily 'enhanced.'" *Id.* at

11 (*quoting Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 220, 49 BRBS 57, 60(CRT) (1st Cir. 2015), *aff'g* 48 BRBS 19 (2014)). Inquiries into the employee's work location, transportation arrangements, housing conditions, availability of recreational activities, as well as the control the employer exerts over the employee's living conditions, help define the "obligations or conditions" of employment and the scope of the zone of special danger. The Supreme Court "drew the line only at cases where an employee had become '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 11 (*quoting O'Keeffe*, 380 U.S. at 362)(additional citation and footnote omitted). The determination of whether an injury falls within foreseeable risks associated with the employment abroad turns on the totality of the circumstances, and the ALJ's findings are subject to review based on the substantial evidence standard.

In this case, the isolated and insular nature of the Naval Station supported the ALJ's finding that the zone of special danger could apply to an off-duty injury. Further, the ALJ reasonably found that the specific events resulting in decedent's death fell within foreseeable risks of his employment. Decedent's presence at Naval Station Guantanamo Bay, including his proximity to the Atlantic Ocean, and his attendance a base social event were due solely to the obligations and conditions of his overseas employment. Further, the limited recreation and socialization opportunities at the Naval Station, and decedent's job requirement to develop strong relationships with command, made decedent's attendance at the Hail and Farewell party and his alcohol consumption at the event foreseeable consequences of his work for employer at the base. The Board noted that, had the ALJ determined decedent died because of his physical altercation with Captain Nettleton rather than drowning, the outcome would likely be the same: injuries resulting from physical altercations have been found covered under the zone of special danger doctrine.[2] Finally, the ALJ rationally relied on case law holding that drowning, even during off duty hours, is within the zone of special danger, especially where, as here, the employee is restricted to a remote geographic area for the benefit of his employer.

[Section 13 - Timely Claim - Section 30 Reports; The Nonappropriated Fund Instrumentalities Act; Zone of Special Danger]

[2] The ALJ's finding that § 3(c) does not bar this claim was affirmed, as it was unchallenged on appeal.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

There were no published or unpublished black lung decisions in June.

B. Benefits Review Board

There were no published BRB black lung decisions in June. Brief summaries of some of the unpublished decisions are below:

Admission of Untimely Evidence

In *Gentry v. Roxanna Transport, Inc.*, BRB No. 19-0291 BLA (June 5, 2020) (unpub.), the employer argued that the claimant's evidence was not timely and should be excluded from the record. The claimant had requested an extension of proof time in order to obtain x-ray films from the employer for re-reading. Proof time was held open until January 20, 2019 with 30 days thereafter for the employer's response. On January 18, 2019, the claimant advised that it had received the x-rays and was sending them for review. The claimant filed the x-ray reports on January 26, 2019. The Board found that the ALJ did not abuse his discretion in allowing this evidence to come into the record.

Uncontradicted Evidence

In *Lucas v. Director, OWCP*, BRB No. 19-0339 BLA (June 9, 2020) (unpub.), the ALJ found that the claimant's evidence, which was the only evidence in the record, did not establish disability due to coal dust exposure. The claimant argued on appeal that the ALJ should have relied on this evidence as it was uncontradicted. The Board affirmed the ALJ's decision discrediting the evidence and stated that an ALJ is not required to rely upon a medical report that is unreasoned and inadequately documented even when it is uncontradicted.

Calculating the Length of Coal Mine Employment

In *Hagy v. Wellmore Coal Co.*, BRB No. 19-0362 BLA (June 12, 2020) (unpub.) and *Price v. Olga Coal Company*, BRB No. 18-0570 BLA (June 30, 2020) (unpub.), the Board vacated the ALJ's calculation of the miner's length of employment. The ALJ divided the miner's yearly earnings by the average earnings of miners listed on exhibit 610. The Board found that a threshold finding that the miner worked for the employer for a full year is required before this method can be used. These claims arose in the 4th Circuit. In contrast, the 6th Circuit Court of Appeals has rejected the position that a threshold finding of a full year of employment is required before Exhibit 610 can be utilized to calculate length of employment. See *Shepherd v. Incoal*, 915.3d 392 (6th Cir. 2019). Specifically, the Court there found that the "plain language of the regulation [20 CFR Section 725.101(a)(32)(iii)] unambiguously permits a one-year employment finding without a 365-day requirement." *Id.* at 402.

Timeliness of Claim

In *Uzzle v. Island Creek Coal Company*, BRB No. 19-0317 BLA (June 25, 2020) (unpub.), the Board held that the ALJ appropriately weighed the miner's testimony on the issue timeliness. The employer argued that the miner's claim was untimely based upon medical evidence from his state claim indicating total disability due to CWP. The ALJ found that the miner's testimony on whether he was informed of this medical opinion was entitled to less weight as he contradicted himself multiple times. In addition, the medical documents

in the record undermined his testimony. The Board upheld his finding that the employer had not rebutted the presumption of timeliness.

Responsible Carrier

Clothier v. Heritage Coal Company, BRB No. 19-0192 BLA (June 30, 2020) (unpub.): Claimant worked for Peabody until 1995 or 1996. It was self-insured. Peabody changed its name to Heritage. In 2007, Heritage was sold to Patriot who agreed to release Heritage from liability for any claims filed by its miners. Patriot, now bankrupt, was also self-insured. Heritage argued that it should not be liable for the payment of the claim in its response to the SSAE. It requested 2 motions for extensions of time in order to take evidence on the issue. The Director did not respond to these motions. Instead, she issued the PDO awarding benefits and finding that Heritage was the RO. Heritage appealed. It filed, for the first time, the separation agreement between it and Patriot as well as Patriot's self-insurance authorization. It also filed a request for the production of documents from the DOL regarding Patriot's self-insurance authorization. In his decision, the ALJ found that the identification of the RO/carrier must be made at the Director's level. He excluded Heritage's evidence regarding the liability issue as it was not submitted while the claim was before the Director's level. On appeal, the Board held that although the ALJ's exclusion of the liability evidence was in his decision rather than prior to it, this did not change the fact that the evidence was not filed before the Director as required by 20 CFR § 725.456(b)(1). It further held that extraordinary circumstances did not exist that would allow this evidence to be submitted for the first time at the ALJ level as Heritage did not request Patriot's documents from the DOL until the claim was at the ALJ level. Finally, the Board held that Heritage's due process rights were not violated as Heritage was given notice of the claim and the opportunity to respond.