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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 188
July 2007

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Prestenbach v. Global International Marine Inc., (Unpublished)(No. 06-30941)(**5th Cir.** July 12, 2007).

The **Fifth Circuit** upheld a Summary Judgment Order issued in district court wherein the injured worker sued both under the Jones Act and the LHWCA (905(b)) claiming the company he was working for was negligent and caused his injury by failing to provide him with a fully English-speaking crew.

As the worker presented no genuine issue of material fact in regards to his Jones Act injury, the court affirmed the summary judgment on that issue. For the LHWCA issue, the court noted its historical analytical approach as to determining if a worker was an employee covered by the LHWCA. Here it noted that this was a one-shot job raising a sunken barge, that barge raising was not a regular part of the company's work, and that the worker had considered himself to be a consultant who was paid by invoice and not by pay check as a regular employee would be paid. The court, thus found he was not an employee as defined by the LHWCA. However, the court noted that the fifth Circuit historically extends Section 905(b) protection to independent contractors covered by the LHWCA and noted three duties owed by a ship owner to an independent contractor working on his vessel. It affirmed the district court's finding that the employer had not breached any of these duties. The court noted that these duties relate primarily to the

physical conditions of the ship and that the worker pointed to no cases to support a finding of negligence because of an inadequate crew, let alone one whose only alleged inadequacy was the presence of two members who did not speak English.

[Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Generally]

The St. Paul Travelrs Companies, Inc. v. Corn Island Shipyard, Inc., ___ F.3d ___ (No. 06-2137)(**7th Cir.** July 18, 2007).

At issue here is whether Travelers is the umbrella carrier and obligated to pay benefits in a LHWCA claim since the employer's DOL carrier went bankrupt. Travelers has argued that it is not obligated to pay benefits, under the policy contract with employer, and that even if it would normally be obligated to pay benefits under the circumstances presented, it was under no such obligation in this particular case because the employer failed to provide timely notice of a claim.

Although the court stated that it was unable to determine whether Travelers is a "carrier" as defined in the LHWCA, it concluded that it still must determine if Travelers qualifies as the employer's carrier. It found that the language of Section 35 of the LHWCA requires analysis of the policy itself to determine whether a carrier provides coverage under the LHWCA to a company. "Therefore, if the policy creates a relationship whereby an insurance company becomes an employer's LHWCA carrier, then that company is subject to the LHWCA as it relates to insurance carriers, including the notice provision set forth in Section 35."

After analyzing the contract, the court concluded that the employer's DOL carrier was to provide unlimited LHWCA coverage. Therefore, there was nothing in excess of the carrier's liability under its policy for which Travelers was liable because the other policy provided "total" coverage. "An excess policy like [Travelers] provides coverage in excess of what is covered by a primary policy, and when a primary policy, like [the one in place] provides full coverage for particular liabilities there is no excess to cover." The court specifically noted that the contract used terms such as "covered" and "not covered" rather than terms such as "collectible" and "recoverable." "Simply stated, when used in this context the terms 'covered' and 'not covered' refer to whether the policy insures against a certain risk, not whether the insured can collect on the underlying policy."

Additionally, the court found that had there been coverage via the policy, the claim would be barred as a matter of law due to late notice.

[Topic 2.5 Definitions--Carrier; 70.12 Responsible Employer—Responsible Carrier]

Smith v. Seacor Maine LLC, ___ F.3d ___ (No. 06-30992)(**5th Cir.** August 1, 2007).

The principle issue here was one of indemnity. British Petroleum (BP) engaged Seacor for vessel transportation to help it drill for oil on the Outer Continental Shelf (OCS). BP entered into a separate contract with Greystar to provide labor services on its platform. The indemnity provisions in both the BP/Seacor and the BP/Greystar contracts are identical. In its contract with BP, Seacor agrees that it will indemnify BP and BP's contractors for any liability resulting from injuries to Seacor employees Similarly, Greystar, in its contract with BP, agrees that it will indemnify BP and BP's contractors for any liability resulting from injuries to Greystar's employees.

Smith, an employee of Greystar, was injured during a personnel basket transfer from Seacor's vessel to BP's platform. Smith filed a LHWCA claim against Greystar and a damage action against Seacor for alleged vessel negligence under Section 905(b). Seacor made an indemnity request against Greystar seeking indemnity. The district court accepted Greystar's argument that the BP/Greystar contract was a non-maritime contract, governed by Louisiana law, and therefore the indemnity provisions were unenforceable under the Louisiana Oilfield Indemnity Act. Seacor argued that Smith's suit aganst it under Section 905(b) triggers the application of Section 905(c) and Louisiana law does not apply. However, the court found that Section 905(c) only applies when an indemnity contract is between the employer (Greystar in this case) and the vessel (Seacor). Thus, Section 905(c) does not apply to the present case. Here, "[t]he non-maritime nature of the contract under which the vessel seeks indemnity requires application of state law." Because Louisiana law, including the LOIA applies to the BP/Greystar contract, the court correctly dismissed Seacor's third party demand.

[Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Generally; 5.3 Exclusiveness of Remedy and Third Party Liability--Indemnification in OCSLA Claims]

C. Federal District Courts and Bankruptcy Courts

D. Benefits Review Board

Devor v. Department of The Army, ___ BRBS ___ (BRB Nos. 06-0872 and 07-0412)(July 25, 2007).

In this Nonappropriated Fund Instrumentalities Act case, the claimant worked as a bartender and was injured when he tripped while carrying two cases of beer. He was diagnosed with chronic rotator cuff tendonitis/tear and underwent surgery. His shoulder was re-injured during physical therapy following surgery.

The employer initially contended that the ALJ's decision did not comport with the APA as he did not address all of the relevant evidence in rendering his decision.

Specifically, the employer argued that the ALJ failed to address the claimant's being left-hand dominant and whether the surveillance videotapes support the claimant's claim of being in "constant pain." The Board rejected this contention noting that the ALJ had discretion to credit and rely on the claimant's complaints of pain and to find that his complaints were supported by medical documentation. Thus the finding was supported by substantial evidence.

Employer next argued that it had found suitable alternate jobs. In upholding the ALJ, the Board noted that the ALJ had found that the jobs identified by the employer took into account the claimant's physical and anatomical restrictions but were not suitable because of the claimant's persistent pain: "Although claimant is left-hand dominant, whereas the injury was to his right shoulder, and the videotapes could support a finding that claimant is not in 'constant pain,' there is substantial evidence of record supporting the [ALJ's] finding that claimant is totally disabled by his pain."

Next the employer challenged the ALJ's denial of Section 8(f) relief. The ALJ had found that the claimant did not have a pre-existing permanent partial disability. In vacating the ALJ on this issue, the Board noted, "As the definition of 'disability' in Section 8(f) is not limited to an economic disability, a pre-existing injury need not result in an inability to return to work. Rather, there need only be a serious lasting condition that could motivate an employer to discharge the employee due to the increased risk of compensation liability. In this case, claimant had two prior shoulder surgeries, his shoulder condition had been deemed 'chronic' as early as 1998 and he had been given permanent lifting restrictions in 1999." These facts demonstrate that the claimant did not recover from his prior injuries without any restrictions. The Board noted that denying Section 8(f) relief here would, in effect, restrict a pre-existing permanent partial disability to one causing economic disability while ignoring the evidence of a chronic condition which limited the claimant's overall physical capabilities.

Finally, noting that the **Third Circuit**, wherein this case arose, had not addressed the specific requirements for an employer's liability for attorney fees under Section 28(b), the Board adopted the position held by the majority of circuits and found that it would require an informal conference in order for Section 28(b) to apply.

[Topics 23.1 Evidence—APA—Generally; 23.3 Evidence—Surveillance Evidence; 8.2.4.2 Extent of Disability--Suitable Alternate Employment: Employer must show nature, terms, and availability; 8.2.4.7 Extent of Disability--Factors affecting/not affecting employer's burden; 28.2 Attorney's Fees—Employer's Liability]

Lee v. Bath Iron Works Corp. (Unpublished)(BRB Nos. 06-0147 and 06-0509)(July 30, 2007).

Here the employer argued that its failure to file a first report of injury as required by Section 13(a) of the LHWCA should not toll the one year statute of limitations pursuant to Section 30(f) of the LHWC since the employer had no knowledge of an

alleged work-related injury until after the limitations period had expired. The Board found that the relevant issue with respect to the applicability of Section 30(f) is whether the employer received notice or gained knowledge of the alleged injuries during the relevant filing period, i.e., after the claimant became aware of the relationship between the decedent's death and her disability and the employment. The ALJ was instructed on remand to determine whether the claimant's correspondence with the employer provided the employer with knowledge for purposes of Section 30(a), and if so, the relevant limitations periods would be tolled by Section 30(f) from employer's receipt of that correspondence until an injury report was filed by the employer.

[Topics 30.7 Reports—Employer's Knowledge of Injury; 30.8 Reports—Tolling Section 13(a)]

E. ALJ Opinions

F. Other Jurisdictions

[Ed. Note: The following three cases are included for informational purposes only.**]**

Coppola v. Logistec Connecticut, 283 Conn. 1, ___ A.2d ___, (SC 17604)(Supreme Court of Connecticut July 3, 2007).

The state has concurrent jurisdiction with the federal government over claims involving injuries sustained on navigable waters when the employer and the employee are locally based, the employment contract is performed locally, the injury occurred on the state's territorial waters and the employer was required under the state act to secure compensation for any land based injuries sustained by the employee.

Diblase v. Logistec Connecticut, Inc., 925 A.2d 311 (SC 17670)(Supreme Court of Connecticut July 10, 007).

Citing *Coppola*, above, the Supreme Court of Connecticut overturned the compensation review board (which had upheld a commissioner) and found that the workers compensation commission had concurrent jurisdiction over a claim where the injury occurred on the navigable waters of the United States. The Supreme Court found that the federal government did not have exclusive jurisdiction.

Ashjian v. Orion Power Holdings, Inc., (NY 51425U)(New York Sup. Ct. July 13 2007).

A utility worker injured on a barge during a gas conversion project was awarded workers' compensation and later brought suit on negligence grounds against third parties. He had been working on a barge, which along with other barges, formed part of a floating power plant. They were only moved for repairs every several years. When the worker

moved to amend his complaint to include New York labor law, the third party defendants argued that the New York labor laws were pre-empted by the LHWCA. The court found that New York labor law was not preempted and allowed the worker to amend his complaint.

II. Black Lung Benefits Act

NOTE: Due to timing of the issuance of *Recent Significant Decisions* #187 for June 2007, significant black lung decisions issued in July were included at that time.