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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 290
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I. Longshore and Harbor Workers' Compensation Act and Related Acts

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

Christie v. Georgia-Pacific Co., 898 F.3d 952 (9th Cir. 2018).

Reversing the Board's published decision in *Christie v. Georgia-Pacific Co.*, 51 BRBS 7 (2017), the Ninth Circuit held that claimant's voluntary early retirement did not, standing alone, preclude his entitlement to permanent total disability ("PTD") benefits under the LHWCA, and that substantial evidence supported the ALJ's award of PTD benefits.

Claimant suffered a work-related back injury and continued to work for employer in a less physically demanding position. In 2010, after learning that employer was likely to eliminate its early retirement option, claimant retired early because he believed that his injury would preclude him from working until full retirement age. On December 3, 2012, claimant's doctor concluded that claimant had reached maximum medical improvement ("MMI") and that he could not return to his regular job. Claimant then filed a claim for benefits under the LHWCA.

The ALJ awarded PTD benefits based on his finding that claimant's retirement was involuntary. The Board reversed the ALJ's award of PTD benefits; it reasoned that an employee is not entitled to receive a total disability award after he retires for reasons unrelated to the work injury because there is no loss of wage-earning capacity ("WEC") due to the injury, as required under § 2(10) of the LHWCA. The Board cited *Moody v.*

[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 citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *__).

Huntington Ingalls, Inc., 50 BRBS 9 (2016) ("*Moody I*"), *rev'd*, *Moody v. Huntington Ingalls Inc.*, 879 F.3d 96 (4th Cir. 2018) ("*Moody II*"); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989); and *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). It reasoned that claimant's work-related injury did not preclude his continued work for employer at the time he took early retirement, and he had no earning capacity two years later when increased work restrictions were imposed. The Board reasoned that retirement necessarily causes a loss of WEC.

The Ninth Circuit rejected the Board's interpretation of § 2(10).[2] Section 2(10) defines disability under the LHWCA as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). Agreeing with the Fourth Circuit, the court held that "retirement status alone, in and of itself, is not dispositive to determining disability under the Act." *Id.* at 960. It reasoned that:

> The plain language of § 902(10) makes no reference to retirement or its timing, nor to whether an employee decides to retire voluntarily or involuntarily. Rather, § 902(10) states that disability under the Act means an inability, resulting from an injury suffered at work, to earn the wages an employee was earning from his employer at the time he was injured. Nowhere in § 902(10) is an employee's decision to retire mentioned.
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> Indeed, the Board's reading of § 902(10) assumes that retirement categorically results in a person's incapacity to work. Yet, the language of § 902(10) does not give any indication that retirement is to be treated in that manner. Neither is it the case that retirement, in all instances, means that a retiree is incapable of working. Retirement simply means that a person is no longer working a particular job. In short, although retirement and incapacity to work may be linked, they are not necessarily one and the same. We conclude that the Board's reading of § 902(10) is overly restrictive and unsupported by the plain language of the statute.

Id. at 958.

The Ninth Circuit agreed with the Fourth Circuit's rationale in *Moody II*. The *Moody II* court correctly concluded that the Board misconstrued the plain meaning of "incapacity" and the real-world significance of retirement; "incapacity" means "inability," "incompetence," and "incapability." *Id.* at 959 (*quoting Moody II*, 879 F.3d at 99). As that court observed, by focusing on the voluntary nature of employee's retirement, the Board confused being unwilling with being unable to work. Further, *Moody II* correctly held that the Board erroneously equated loss of earning capacity with loss of actual earnings; the law compensates an employee's inability to make the choice to work when it is caused by workplace injury. Retirement status, standing alone, is irrelevant to earning capacity and

[2] The court reviews the Board's interpretation of the Act *de novo* because such interpretations are questions of law. Further, because the Board is not a policymaking agency, its interpretation of the Act is not entitled to any special deference.

the determination of "disability" under § 2(10). Thus, claimant's decision to retire early does not make him ineligible for benefits.

Further, substantial evidence supported the ALJ's findings that claimant is permanently and totally disabled within the meaning of the Act: he attained MMI, he can no longer return to his previous employment, and employer has failed to establish that SAE exists.

[DEFINITIONS – Section 2(10) – Disability]

***Parfait v. Director, OWCP*, 903 F.3d 505 (5th Cir. 2018).**

The Fifth Circuit concluded that claimant did not comply with the approval and notice requirements of § 33(g) (1) and (2) with respect to a settlement and a judgment he obtained in his tort suit against third parties, requiring termination of any right to compensation or medical benefits under the LHWCA.

Claimant filed a claim for benefits under the LHWCA. The ALJ awarded him $1,493.60 in disability compensation for his chest injury and denied his claim for back injury. The Board affirmed and claimant appealed to the Fifth Circuit. Claimant also filed a third-party tort action against Apache and Wood Group in a district court arising out of the same accident. He settled his suit against Apache for $325,000. He also obtained a judgment against Wood Group for a net recovery of $41,542.17. Upon learning of these developments in the tort case, employer moved to dismiss the appeal of the ALJ/BRB's decision alleging that claimant failed to obtain their approval of the third-party settlement, or to notify them of the third-party judgment, as required by § 33(g) of the LHWCA.

Section 33(f) provides that, if a claimant maintains a civil action against a negligent third party, employer is entitled to reimbursement of all benefits paid from claimant's net third-party recovery; the employer can credit any remainder against its future liability under the LHWCA. It ensures that the employee does not receive a double recovery. Further, subsections 33(g)(1) and (g)(2) protect employer's rights under § 33. Subsection 33(g)(1) requires that the person entitled to compensation obtain employer's approval of settlements with third parties for an amount less than the compensation due under the Act; failure to obtain approval is an absolute bar to the receipt of benefits. Under subsection 33(g)(2), if no written approval of a settlement is obtained as required in (g)(1), or if the employee fails to notify employer of any settlement obtained from or judgment against a third-party, claimant's rights to compensation and medical benefits under the LHWCA are terminated.

In this case, the court concluded that *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), mandated termination of all benefits. The bar applied even though claimant appealed the ALJ/BRB decision and his ultimate entitlement had not been determined. If the settlement amount is less than his ultimate entitlement, § 33(g)(1) required him to obtain his employer's written approval, which he failed to do. And if the settlement amount is greater than the compensation to which he would ultimately be entitled, § 33(g)(2) required him to give his employer notice of the settlement. The court rejected claimant's contention that sufficient notice of the settlement was provided because his counsel invited counsel for employer-insurer to a mediation session where settlement

was being discussed with Apache. Claimant's notice that he was trying to settle his tort claim did not provide adequate notice of the settlement that was ultimately made. The court observed while there is a dearth of federal circuit court opinions on the type of notice that must be given in order to satisfy § 33(g)(2), the Board has given a strict interpretation to that section. It quoted the Board's holding in *Fisher v. Todd Shipyards Corp.,* 21 BRBS 323 (1988), that the plain language of § 33(g)(2) places on claimant an affirmative duty to notify employer of any third-party settlement or judgment, and that employer's mere knowledge of settlements or the absence of prejudice to employer will not suffice to prevent the absolute bar to compensation.

In addition, claimant failed to give employer notice of the judgment he received against Wood Group, as required under § 33(g)(2). Claimant's argument that the district court's filing of the judgment obtained against Wood Group in the public record amounted to the required notice to employer contradicts the clear meaning of § 33(g)(2) and the affirmative duty to notify.

[Section 33 - COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE; Subsection (g)(1) - Prior Written Approval; Subsection 33(g)(2) - Notice Provision]

B. Benefits Review Board

***Guess v. Electric Boat Corp.,* ___ BRBS ___ (2018).**

The Board held that the deceased employee's estate was not entitled to scheduled permanent partial disability ("PPD") benefits pursuant to § 8(d) of the LHWCA, because he was permanently and totally disabled by his bilateral hand injuries at the time of his death.

In January 2014, the decedent was awarded temporary total disability ("TTD") benefits for his work-related wrist injuries from 12/19/2012, and he continued to receive such benefits until his death on 07/23/2015. Claimant, the estate of the decedent, sought modification of the prior award, asserting entitlement to scheduled PPD benefits pursuant to § 8(d). The ALJ denied this claim. He found that decedent's bilateral hand condition became permanent and total on 04/10/2014, and awarded PTD benefits from this date until his death, modifying the prior PTD award.

The Board affirmed the ALJ's decision. It observed that § 8(d) mandates the disbursement of a deceased employee's scheduled PPD benefits in the event he dies prior to the payment of the full amount of those benefits. For § 8(d) to apply, the decedent must have been "receiving" PPD benefits under the schedule, and the party claiming entitlement to unpaid benefits must be a statutory survivor or the Special Fund. 33 U.S.C. § 908(d). The Board previously held that the phrase "is receiving compensation" in § 8(d)(1) means "is entitled to compensation" (and this interpretation accords with subsequent decisions interpreting "currently receiving" clause in § 6 to mean "entitled to"). In addition, an injured employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered.

In this case, decedent was neither "receiving" nor "entitled to" PPD benefits at the time of his death. The ALJ found that decedent's condition became permanent as of April 2014. However, for a disability to change from total to partial in a scheduled injury case, there must be evidence that the employee can return to work, *i.e.*, his usual work or SAE, and that he has a permanent physical impairment. Once those facts are established, the employee who sustained an injury to a scheduled member is entitled to PPD benefits under the schedule. Absent a showing of the ability to return to work, the employee's disability is total. Here, the fact that decedent was assessed as having permanent impairments to his hands did not entitle his estate to scheduled PPD benefits under § 8(d). It has not been shown that decedent could have returned to his usual work and the record lacked any evidence regarding SAE. Therefore, decedent was not partially disabled prior to his death. The ALJ properly concluded that decedent's disability remained total upon reaching MMI in April 2014, and he properly awarded decedent's estate accrued PTD benefits plus annual adjustments from that date. As decedent was entitled to PTD benefits at the time of his death, he was not entitled to PPD benefits under the schedule; a claimant cannot receive concurrent awards for total and partial disability because he cannot be more than totally disabled. Thus, absent either accrued or unaccrued PPD benefits at the time of death, the ALJ properly found that § 8(d) was inapplicable.

[Section 8(d) – Payment of scheduled PPD compensation after employee's death]

***Robinson v. AC First, LLC,* BRBS (2018).**

Overruling its prior precedent, the Board held that claimant's voluntary resignation from his job with employer does not preclude him from receiving disability compensation if he suffered a loss of WEC as a result of his work-related injury.

Claimant worked for employer in Kuwait and Afghanistan until his resignation in 2014. In 2014, claimant returned to the U.S. and obtained a job as a machinist with Union Pacific. In 2015, he was diagnosed with Post-Traumatic Stress Disorder ("PTSD") and filed a claim for benefits. The ALJ found that claimant has work-related PTSD, but he denied the claim for compensation because he found that claimant voluntarily resigned his position with employer for reasons unrelated to his PTSD. The ALJ concluded that claimant did not establish that he is disabled "because of injury," pursuant to § 2(10) of the LHWCA.

The Board held that the ALJ erred by relying on claimant's voluntarily leaving his overseas work with employer to deny compensation, adopting the rationale in *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96 (4th Cir. 2018), *rev'g* 50 BRBS 9 (2016); *accord Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018), *rev'g* 51 BRBS 7 (2017).[3] Section 2(10) of the Act states:

[3] The Board noted that while this case arose in the Fifth Circuit, the Board's remaining precedent, *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989), is inconsistent with *Moody* and *Christie* and is overruled on this point.

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

33 U.S.C. § 902(10). The Board summarized as follows the recent decisions in *Moody* and *Christie*:

> In *Moody*, the claimant was disabled after surgery for a work-related injury, which he chose to undergo shortly after he voluntarily retired. He sought temporary total disability compensation for the approximately eight-week period of his recuperation from surgery. The United States Court of Appeals for the Fourth Circuit stated that the ordinary meaning of "incapacity" is "inability" and that economic harm under the Act has been defined as the lost capacity to earn wages, not actual economic loss. The court held that the law compensates for deprivation of economic choice when it is caused by a workplace injury. Accordingly, the court held that the relevant inquiry is only whether claimant's work injury precludes his return to his usual work, irrespective of any choice he made to not work. As the claimant was unable to work post-surgery because of his work-related injury, the court held that he is entitled to compensation during this recovery period. In *Christie* [. . .], the United States Court of Appeals for the Ninth Circuit agreed that the plain language of Section 2(10) contemplates an award of compensation when the claimant's injury causes the inability to work, notwithstanding the claimant's retirement.

Slip op. at 3 (citations omitted).

> In the present case, the Board concluded that:
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> Although this case involves a claimant who continued to work after leaving the employment that caused his injury, the courts' interpretation of Section 2(10) is applicable here. Thus, the pertinent inquiry in this case is whether claimant established his inability to return to work for employer due to his work-related PTSD. Although claimant voluntarily chose to obtain lower paying work in the United States, he alleges that his work injury precludes his returning to work for employer at higher wages than he is currently earning with Union Pacific. If claimant is unable to return to his former work for employer, he is entitled to compensation for any loss of wage-earning capacity based on the "deprivation of economic choice" due to his work-related PTSD.

Id. at 3-4 (citation and footnotes omitted). The Board also rejected employer's contention that claimant's usual employment is his job at Union Pacific, for whom he worked when his PTSD became manifest, and thus he has no loss of WEC. Claimant's usual work is his work with employer, who was the last covered employer to expose him to the hazardous conditions that caused his PTSD, and any loss of WEC due to the PTSD is properly based on his earnings with employer. The case was remanded for the ALJ to address whether

claimant established his *prima facie* case of total disability and, if necessary, any remaining contested issues.

[DEFINITIONS – Section 2(10) – Disability]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

Nothing to report.

B. Benefits Review Board

In *Cottrell v. Deby Coal Co., Inc.* BRB No. 17-0592 BLA (Sept. 28, 2018) (unpub.), the Board addressed an appeal of an administrative law judge's Decision and Order denying benefits in a miner's claim. The administrative law judge found that the claimant failed to establish that the miner (1) worked for at least fifteen years in qualifying coal mine employment ("CME"), or (2) suffered from a totally disabling respiratory or pulmonary impairment prior to his death. Accordingly, she concluded the claimant failed to both invoke the fifteen-year rebuttable presumption and establish a necessary element of entitlement. She accordingly denied benefits.

In the appeal, which was filed by the unrepresented claimant, the Board first addressed the administrative law judge's finding that the claimant failed to establish that the miner worked for at least fifteen years in qualifying CME. Below, the administrative law judge determined that the miner's income-based records, in the form of Social Security statements, represented the most reliable evidence as to his CME. For pre-1978 CME, the administrative law judge permissibly credited the miner with a quarter of a year of CME for each quarter in which he earned at least $50.00. For employment post-1977, and because the beginning and ending dates of the miner's CME were unclear, the administrative law judge applied the following formula: dividing the miner's income for each year by the daily earnings rate for miners as listed in Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual. *See* 20 C.F.R. §725.101(a)(32)(iii).[4] For each year, the administrative law judge then divided the result by 250, as she found nothing in the record to contradict her using "a standard five[-]day work week with two weeks of vacation to calculate a 250 day work year . . . ." Decision and Order at 6. She thus "credited the miner with portions of the years worked" using this method. Decision and Order at 6. Applying these two methods of CME calculation, the administrative law judge concluded that the miner worked for 8.83 years of CME. The Board concluded that the administrative law judge's finding that the claimant established less than fifteen years of CME was supported by substantial evidence. It therefore affirmed her finding that the claimant failed to invoke the fifteen-year rebuttable presumption of total disability due to pneumoconiosis.

Next, the Board concluded that the administrative law judge permissibly found that the evidence as a whole failed to establish that the miner was totally disabled pursuant to

[4] The regulation specifically states that when, *inter alia*, "the evidence is insufficient to establish the beginning and ending dates of the miner's [CME]," an adjudicator "may divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)." 20 C.F.R. §725.101(a)(32)(iii). The regulation does not further specify what figure should be compared to this result, which represents an estimated number of working days, in order to determine whether the miner worked for a full year within that calendar year.

20 C.F.R. §718.204(b). It therefore noted that "benefits are precluded," as the claimant failed to establish "a requisite element of entitlement . . . ." Slip op. at 7.

Accordingly, the Board affirmed the administrative law judge's denial of benefits.

[Bureau of Labor Statistics table: Exhibit 610]