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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 190
September 2007

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Grant v. Director, OWCP, ___ F.3d ___ (No. 06-60439)(**5th Cir.** September 28, 2007).

At issue is whether the Board properly interpreted what constitutes the "filing" of a compensation order in the District Director's Office under the LHWCA and its implementing regulations. Here the ALJ had sent a dismissal order to the parties via regular mail and to the District Director by express mail. The District Director's office received the ALJ's order on 14 December 2005. Upon receipt of the order however, the District Director took no further action; he did not formally date and file the order, nor did he serve it on the parties, all contrary to 20 C.F.R. § 702.349. When the claimant's counsel inquired whether the District Director had served the order, the District Director responded: "The dismissal of your case was served directly by the [OALJ] and was therefore not 'filed' in my office." The Board agreed and summarily dismissed.

In deciding this matter, the **Fifth Circuit** stated that it would afford deference to the OWCP's interpretation of what, under the LHWCA constitutes the filing of a compensation order by the District Director. Referencing 20 C.F.R. §702.349, the court stated that "the regulation's plain meaning reveals: (1) filing a compensation order requires a 'formal act' by the District Director; and (2) the District Director can only file the order after it is received. Stated differently, mere receipt of the order is insufficient to trigger the 30-day appeals period." The court dodged the issue of service by the District Director: "As discussed supra, filing requires, at a minimum, formal action by the District Director. Because such action was not completed in the proceeding at hand, it is

immaterial for purposes of this appeal whether 'filing' under section 19 of the LHWCA also requires service of the order upon the parties by the District Director." The Board's decision was vacated and remanded with instructions to require the District Director to file the ALJ's order of dismissal consistent with the opinion.

[Topic 14.4 Payment of Compensation--Compensation Paid Under Award; 19.6 Procedure—Formal Order Filed With District Director]

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*Nabors Offshore Drilling Inc. v. Smoot***,** (Unpublished)(No. 06-61172)(**5th Cir.** September 25, 2007).

The court found that under the Section 20(a) presumption, there was sufficient evidence on which the ALJ could base a finding of psychological problems being causally related to a workplace accident. It is not the role of the court to re-weigh the evidence or make credibility determinations.

[Topic 20.2.4 Presumptions--ALJ's Proper Invocation of Section 20(a)]

Franks Casing Crew & Rental Tools Inc. v. Dupre, (Unpublished)(No. 06-60968)(**5th Cir.** September 26, 2007).

In this Section 20(a) issue matter, the Employer/Carrier argued that the claimant's story was not believable because he did not tell anyone his back injury was work-related until he made his claim for benefits. However, the court noted that he testified otherwise and offered reasonable explanations for his actions and that therefore, there existed evidence to support both side's claims. The court went on to say that the ALJ, as the fact finder, was entitled to select between inferences and make credibility determinations as long as his decision was supported by the evidence and the law.

[Topic 20.2.4 Presumptions--ALJ's Proper Invocation of Section 20(a)]

ADM/Growmark River System, Inc. v. Director, OWCP, (Unpublished)(No. 06-60923)(**5th Cir.** September 26, 2007).

The court found that there was sufficient evidence for the ALJ to reach his conclusions on causation as well as the inability of the claimant to return to his previous employment. The employer had not rebutted the claimant's prima facie case that he suffered an undisputed knee injury at work and that the knee injury caused another accident at work which lead to a serious back injury. Additionally, the court found that the ALJ was justified in concluding that the claimant's alleged work in short bursts did not contradict the expert testimony that he could not return to the same job where the work is sustained over a much longer duration.

[Topic 20.2.4 Presumptions--ALJ's Proper Invocation of Section 20(a)]

C. Federal District Courts and Bankruptcy Courts

Magnon v. Forest Oil Corp., ___ F. Supp. 2d ___ (Civ. Act. No. 06-0587)(W.D. La. September 18, 2007).

At issue in this summary judgment matter was whether the defendant was the borrowed employer of the plaintiff making the defendant immune from tort liability under the LHWCA. In deciding the matter, the court looked to the **Fifth Circuit's** "*Ruiz* test" and noted that the test's principle focus was (1) was the second employer itself responsible for the working conditions experienced by the employee, and the risks inherent therein; and (2) was the employment with the new employer of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced thereto. *Ruiz v. Shell Oil Co.*, 413 F. 2d 310 (**5th Cir.** 1969).

[Topics 2.2.16 Definitions—Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee Doctrine; 4.1.1 Compensation Liability Employer Liability—Contractor/Subcontractor Liability; 5.1.1 Exclusiveness of Remedy and Third Party Liability—Exclusive Remedy]

Breaux v.Halliburton Energy Services, Inc., ____ F. Supp 2d ____ (Civ. Act. No. 04-1636 Sec. "S" (4))(E.D. La. September 24, 2007).

In this Section 33(a) subrogation matter, Employer's carrier rightfully intervened to recover what it had paid in compensation, death and funeral expenses from a third party who had settled with the claimant. Summary judgment for the carrier was granted.

[Topic Compensation For Injuries Where Third Persons Are Liable—Section 33(a): Claimant's Ability to Bring Suit Against A Potentially Negligent third Party]

D. Benefits Review Board

R.R. v. Marine Terminals Corp., (Unpublished)(BRB No. 07-0920)(September 17, 2007).

The Employer's appeal of an ALJ's Interlocutory Order was dismissed and Employer was denied a stay where the ALJ found that the claimant's counsel, licensed elsewhere, may appear as the claimant's representative in a state in which he is not licensed without affiliating himself with local counsel. In finding that there was "no apparent error" with the ALJ's reasoning, the Board noted that 29 C.F.R. §18.34 gives claimant's counsel this right to practice.

[Topics 19.3.6 Procedure—Formal Hearing; 19.3.7 Procedure—ALJ Disqualifying Attorney]

S.K. v. Service Employers International, Inc., (Unpublished)(BRB Nos. 06-0591 and 07-0710).

In this Defense Base Act case, average weekly wage was addressed. The Board found that a Section 22 Modification request was a proper way for the claimant to seek a higher AWW than that first allotted her by the ALJ. The ALJ's denial of modification was vacated with instructions to consider the claimant's Section 10(c) contentions. On remand the ALJ is to consider the probative value of the other employees' wage records submitted by employer in response to the claimant's request. The Board noted that the ALJ may address the claimant's request for an adverse inference against the employer for its alleged failure to produce detailed wage records of other employees. [Originally, the employer's records listed only gross monthly wage amounts for periods post-dating the claimant's injury. The records did not state the terms of employment or indicate the number of hours worked. Subsequently other records were admitted and the employer stated that all but one of these employees had substantially the same employment contract as the claimant, including their base pay, except that the "uplifts" (foreign service bonus, area differential and hazard/danger pay) had increased to 75 percent. Claimant's uplifts had totaled 55 percent.]

Claimant had been employed as a laundry service worker in Baghdad for five weeks prior to being injured in an auto accident. Previously she had been a pre-school teacher in Houston. The employer had argued that her AWW should be based on her wages for the year preceding the injury, including the amounts earned as a teacher. The ALJ had determined that neither Sections 10(a) nor 10(b) applied since she had not worked in the same employment for substantially all of the year prior to the injury.

The Board also agreed with the claimant that the ALJ erred in dividing the claimant's actual earnings by 5 3/7 weeks to determine the weekly amount the claimant earned prior to her injury. Although the claimant began working for the employer on August 26, 2004, she did not arrive in Iraq until August 28, and the parties stipulated that the claimant had worked for the employer for only five weeks before she was injured. Thus, her earnings should be divided by five rather than 5 3/7.

[Topic 60.2.9 Longshore Act Extensions—Defense Base Act--Wages]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

Benefits Review Board

In *M.L.K. v. Expansion Coal Co.*, BRB No. 06-0933 BLA (Sept. 25, 2007) (unpub.), Employer filed a petition for modification and submitted a physician's report that reviewed evidence in the record at the time the claim was originally adjudicated. The Board noted that:

> . . . the administrative law judge found that, because (the physician's) opinion was not based upon any new evidence, employer could have submitted (the physician's) report when the case was previously before Judge Smith. (citation omitted).

Slip op. at 6. The Board then concluded that "the administrative law judge did not abuse his discretion in considering the fact that employer could have developed and submitted (the physician's) report at an earlier date."

Although the administrative law judge considered the physician's opinion, he accorded the opinion diminished weight based on the foregoing reason as well as the fact that the opinion was equivocal and the physician only offered a peremptory rejection of certain medical literature submitted in the case. The Board affirmed the administrative law judge's finding that Employer failed to demonstrate a mistake in a determination of fact based on consideration of all evidence of record.

[**medical opinion evidence on modification**]