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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 155
September 2001 - October 2001

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

Roberts v. Cardinal Services, Inc., ___ F.3d ___, (5th Cir. 2001)(Case No. 00-31232)(Oct. 2, 2001)

In this Jones Act case, the Fifth Circuit re-affirms its position that a worker who spends less than about 30 per cent of his time in the service of a vessel, in navigation, should not qualify as a seaman under the Jones Act. *See Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340 (5th Cir. 1999).

[Topic 1.4 LHWCA v. Jones Act]

In Re: Marine Asbestos Cases v. American Hawaii Cruises, Inc., ___ F.3d ___, (9th Cir. 2001)(D.C. CV-97-77777-HG)(September 10, 2001).

This is a consolidated appeal involving 174 separate but virtually identical civil actions which were filed in the district court by seamen who formerly worked aboard two ships. Each plaintiff claims to have been exposed to asbestos in the course of employment on board the vessels. None of these plaintiffs has been diagnosed with any asbestos-related medical condition.

The Ninth Circuit upheld the district court's conclusion that the Jones Act does not permit recovery for medical monitoring for plaintiffs who have not yet developed symptoms of disease. The circuit court added that even if it did, these plaintiffs had failed to present sufficient evidence to raise a triable issue of fact as to causation and damages. The court specifically stated that the plaintiffs have not shown that they will benefit from a single baseline examination where no abnormalities are yet apparent.

[ED. NOTE: This case was included for general informational value.**]**

Gilliland v. E.J. Bartells Co., Inc., ___ F.3d ___, (Case No. 00-70585)(9th Cir. 2001)(Oct., 16, 2001).

The issue here is how to compute the offset to which an employer owing benefits is entitled under Section 33(f) when a claimant receives a third-party tort recovery that includes ongoing, periodic payments funded by an annuity contract. Claimant argued that Employer was entitled to a one-time credit for the purchase price, or the present value, of the annuity that the third-party defendants purchased to fund their obligation to make the monthly payments. By contrast, Employer contended that it was entitled to a dollar-for-dollar credit against death benefits payable by it under the LHWCA for each monthly payment made pursuant to the third-party settlement, and it was entitled to such credit at the time Claimant received each payment. On appeal to the Board, the director supported the Employer's position. The Ninth Circuit deferred to the Director's method of allowing the employer to offset the amount of each periodic payment against benefits owed at the time the payment was made. The court noted that Congress' failure to mandate a present-value computation in Section 33(f) suggests that it did not intend an award of a stream of payments to be discounted to present value.

[Topic 33.6 Employer Credit for Net Recovery by "Person Entitled to Compensation"]

B. Benefits Review Board

Bolton v. Halter Marine, Inc., ___BRBS ___, (BRB No. 01-0182)(Oct. 2, 2001).

Citing *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105 (CRT)(5th Cir. 2000), *modifying on reh'g* 237 F.3d 407, 34 BRBS 44 (CRT)(5th Cir. 2000), Employer asserted that it was not liable for an attorney's fee since the pre-requisites for the applicability of Section 28(b) have not been met. Specifically, employer asserts that although an informal conference was held, there was never any recommendation made by the district director disposing of the disputed issues, and that even if there was, there was no evidence to show that Employer did not comply with the recommendation.

The Board, however, found this case to be analogous to *James J. Flanagan Stevedores, Inc. v.Gallagher*, 219 F.3d 426, 34 BRBS 35 (CRT) (5th Cir. 2000). "As in *Gallagher*, employer herein has not offered any record evidence supporting its allegation regarding the substance of the recommendations. Thus, the instant case does not turn on the issue of whether there was a written recommendation or not, but rather, whether claimant obtained greater compensation following a formal hearing than that paid or tendered by the employer."

[Topic 28.1.2 Attorney Fees–Successful Prosecution; 28.2 Attorney Fees--Employer's Liability]

Craig v. Avondale Industries, Inc., ___ BRBS ___, (BRB No. 00-0569)(Oct. 5, 2001)(*en banc*).

This is the consolidated *en banc* reconsideration of three previous Board decisions wherein the Board had held that where a claim form states only that the claimant alleged he suffered a "hearing loss" due to "exposure to injurious noise" with no degree of impairment alleged on the form, and no hearing test attached to the form, the claim is akin to an anticipatory filing inasmuch as it does not identify a specific degree of hearing impairment. The Board had additionally previously held that under such circumstances, the employer cannot be held for an attorney's fee under Section 28(a). [Nor was employer liable under Section 28(b) as the employer paid all benefits within 30 days after a claim (containing all pertinent information) was filed.]

On reconsideration, the Board agreed with the claimants and Director that the hearing evaluations attached to the claim forms were sufficient for the employer to discern whether the claimant had a compensable hearing loss. In each case, the attached evaluation indicated the claimant's hearing levels at 500, 1000, 2000, and 3000 Hz, which are the levels mandated by the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Applying the methodology prescribed by the AMA Guides, the hearing evaluation attached to the claim indicated a binaural loss. The Board found that the employer is not unduly burdened when presented with uninterpreted audiometric results since the level of hearing loss in each case was readily discernable by application of the methodology prescribed by the AMA Guides. When presented with a claim with an uninterpreted hearing test, the employer has 30 days after notice of the claim from the district director to have the test interpreted and analyzed.

Thus the Board held that the hearing tests attached to the claims for compensation were sufficient to put the employer on notice that it had to pay benefits or decline to pay under Section 28(a) within 30 days of its receipt of notice of the claims from the district director.

However, the Board then went further to hold that the initial claim forms, standing alone, triggered the 30-day time period following notice of the claim from the district director, in which the employer is required to pay benefits or decline to pay in order to avoid fee liability under Section 28(a). The Board explained that these claim forms specifically evince an intent to seek benefits for a work-related hearing loss and there is no evidence of any intent by Congress to treat hearing loss claims differently with respect to the information necessary for the claimant to file a "valid" claim or the applicability of the attorney's fee provisions of Section 28 of the LHWCA.

[Topics 8.13.1 Hearing Loss--Section 8(c)(13) Introduction and General Concepts; 8.13.10 Hearing Loss and Section 14(e); 19.1 Procedure–The Claim: Generally; 28.1.3 Attorney Fees–When Employer's Liability Accrues]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

By unpublished decision in *Pittsburgh & Midway Coal Mining Co. v. Sanchez*, 2001 WL 997947, Case No. 00-9538 (10th Cir. Aug. 31, 2001), the court declined to apply the causation standard set forth in the amended regulations at 20 C.F.R. § 718.204(c)(1) and stated, in a footnote, that "[a]s petitioners concede, . . . we apply the *Mangus* causation standard that was in effect when Sanchez filed for benefits in 1988."[1]

[**application of causation standard in effect at time claim filed**]

B. District Courts

Updated citation: *National Mining Ass'n. et al v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

C. Benefits Review Board

By unpublished decision in *Caudill v. Cumberland River Coal Co.*, BRB No. 00-1185 BLA (Sept. 26, 2001), the Board cited to its decisions in *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37, 1-40-42 (2000) (en banc) and *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173, 1-177-78 (1999)(en banc) to hold that it is within the administrative law judge's discretion to order that a claimant be re-examined on modification. The Board stated that the issue to be determined by the administrative law judge is whether the employer has raised a credible issue pertaining to the validity of the original adjudication such that an order compelling a claimant to submit to examinations or tests would be in the interest of justice.[2] Moreover, the Board held that, because the district director listed "modification" as an issue on the CM-1025, the parties need not move to amend the CM-1025 to specifically include the medical issues of entitlement. Rather, the Board concluded that a petition for modification "includes whether the ultimate fact of entitlement was correctly decided . . .."

[**re-examination of claimant on modification; contested issues on modification**]

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[1] *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531-32 (10th Cir. 1989).

[2] This holding is based on 20 C.F.R. § 718.404(b) which appears in similar form at 20 C.F.R. § 725.203(d) (2000).