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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 225
September 2010

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

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

[there are no decisions to report for this month]

B. U.S. District Courts

Moore v. Bis Salamis, Inc., 2010 WL 3745023 (E.D.Tex. 2010).

BSI contracted to perform maintenance on the "Thunder Horse," a floating offshore oil production facility in the Gulf of Mexico. Moore, an employee of BSI, brought claims in a state court against BSI and the platform owners/operators under the Jones Act and general maritime law, based on injuries he allegedly suffered while working on the facility. BSI removed the case to the federal court, asserting that Moore's claims were governed by the Outer Continental Shelf Lands Act ("OCSLA"). The district court denied Moore's motion to remand the claims to the state court, holding that (1) Moore's Jones Act claim was fraudulently pleaded because the Thunder Horse is not a vessel, and, thus, Moore was not a seaman; and (2) OCSLA governed Moore's claims because they arose from his activities on a work platform permanently attached to the Outer Continental Shelf ("OCS").

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

In concluding that the Thunder Horse is not a vessel, the court reasoned as follows. Historically, the Fifth Circuit followed the test that focuses on the purpose for which the craft is constructed and the business in which it is engaged to determine if it is a vessel.[2] It also fashioned a separate test for distinguishing dry docks and floating work platforms from Jones Act vessels, which considered: (1) whether the structure is constructed to be used primarily as a work platform; (2) whether the structure is moored or otherwise secured at the time of the accident; and (3) whether, even though the platform is capable of movement and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose. Recently, however, the Supreme Court held that any watercraft "practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment," is a vessel under the LHWCA. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488-97 (2005). Thereafter, in *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441 (5th Cir. 2006), the Fifth Circuit concluded that "Stewart's definition of 'vessel' applies equally to the Jones Act and the LHWCA." *Id.* at 448. Without expressly overruling its prior jurisprudence,[3] the *Holmes* court acknowledged that, in light of *Stewart*, "the class of water-borne structures that are vessels for ... Jones Act purposes is broader that we have heretofore held." *Id.* at 449. While the Fifth Circuit has yet to apply this analysis to floating platforms, one district court has held that a similar floating oil production facility did not qualify as a Jones Act vessel under *Homes*.[4]

Here, the court held that "because of its extensive attachment to the ocean floor and long-term commitment to a single location, ... the Thunder Horse is a work platform that is permanently attached to the seabed and not a Jones Act vessel."[5] Slip. op. at *8. The platform was towed to location,

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[2] *See Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290 (5th Cir. 1990). Various factors were considered to determine the purpose, *i.e.*: (1) whether the owner assembled or constructed the craft to transport passengers, cargo, or equipment across navigable waters; (2) whether the craft is engaged in that service; (3) whether the owner intended to move the craft on a regular basis; (4) the length of time that the craft has remained stationary; and (5) the existence of other "objective vessel features," such as: (a) navigational aids; (b) lifeboats and other life-saving equipment; (c) a raked bow; (d) bilge pumps; (e) crew quarters; and (f) registration with the Coast Guard as a vessel.

[3] Indeed, it applied some of the pre-*Stewart* factors, *see id.* at 449 (examining "objective vessel features," including raked bow, flotation tanks, and anchors).

[4] *Jordan v. Shell Oil Co.*, 2007 WL 2220986 (S.D.Tex. 2007).

[5] The court noted that the same result would obtain under the pre-*Holmes* analysis.

but was then permanently fixed in place; it is fastened to the ocean floor by 16 mooring lines connected to 16 "suction piles" that are driven 90 feet into the subsoil, and is also tethered to the seabed by various pipelines and equipment. The court distinguished the Fifth Circuit precedent which found semi-submersible drilling rigs to constitute Jones Act vessels, stating that although it may share other characteristics with semi-submersible rigs, the Thunder Horse is not practically capable of the regular and extensive movement that typically characterizes these types of watercraft. The Thunder Horse's constrained range of motion is merely incidental to its function as a work platform and, thus, does not render it practically capable of maritime transportation (it has no system of self-propulsion, and is capable of being moved within a 350-foot radius laterally by manipulating the mooring system; while the radius is 700 feet when the platform is not in production, it has moved only once, by tow, within this outer perimeter.)

The court further determined that the OCSLA applies to Moore's claims, and therefore the removal to the federal court was proper. For reasons detailed above, the court rejected Moore's contention that the OCSLA does not apply to his claims because the Thunder Horse is a vessel, which is specifically excluded from the OCSLA's grant of jurisdiction, 43 U.S.C. § 1333(a)(1). Rather, the Thunder Horse is a work platform attached to the seabed; and it was undisputed that the Thunder Horse is attached to the OCS and is engaged in the exploration, development, or production of mineral resources.

[Topic 1.4.3 LHWCA v. JONES ACT – Vessel; Topic 2.21 DEFINITIONS – SECTION 2(21) VESSEL; Topic 60.3.1 OUTER CONTINENTAL SHELF LANDS ACT – Applicability of the LHWCA]

[**Ed. Note**: the following summary is provided for informational purposes only]

***In re KBR, Inc., Burn Pit Litigation*, __ F.Supp.2d __, 2010 WL 3543460 (D.Md. 2010).**

American soldiers, veterans, and former contractor employees brought action against Kellogg Brown & Root, Inc. ("KBR"), a private civilian contractor which was awarded contracts under the Logistics Civil Augmentation Program ("LOGCAP"), alleging that they suffered injuries resulting from exposure to contaminated water and to toxic emissions from "burn pits" while stationed on military basis in Iraq and Afghanistan. These cases were consolidated, and KBR filed a motion to dismiss for lack of subject matter jurisdiction. After a thorough discussion of the applicable case law, the district court denied the motion, holding that: (1) political

question doctrine did not, prior to additional discovery, preclude state tort law claims challenging the water treatment and waste disposal services provided by the government contractor in a manner not endorsed by the military;[6] (2) derivative sovereign immunity did not insulate the contractor from liability on state tort law claims; and (3) federal official immunity did not extend to the government contractor.

The district court's decision opens with the following commentary on the role of private civilian contractors in Iraq and Afghanistan:

> "Lieutenant Milo Minderbender, a fictional war profiteer during World War II, expressed the following capitalist sentiment in Joseph Heller's novel Catch-22: 'Frankly, I'd like to see the government get out of war altogether and leave the whole field to private individuals.' Joseph Heller, Catch-22 259 (1961). While not to the extent advocated by Lieutenant Minderbender, the role of government contractors in combat zones has grown to an unprecedented degree in recent years with the wars waged by the United States in Iraq and Afghanistan."

Slip. op. at *1.

The court observed that subjecting government contractors who provide services to the U.S. military in war zones to private civil suits under state tort law requires caution by the judiciary. Courts must not pass judgment on matters of national security, and are reluctant to burden the military with onerous and intrusive discovery requests. Failure to exercise such caution may threaten the success of military missions abroad. The court noted that out of these concerns emerged various defenses that may be asserted by contractors facing tort suits, including the three defenses asserted in this case. The court noted that another defense potentially available to contractors is the Defense Base Act, which precludes contractor employees from pursuing a negligence claim against their employer for injuries incurred while performing a government contract outside the U.S. The court further stated that the need for caution embodied in these legal defenses must be balanced against the legitimate concern that the judiciary may prematurely close courtroom doors to soldiers and civilians injured from wartime logistical activities performed by hired hands allegedly acting contrary to military-defined strictures. The court reasoned that courts must be prepared to adjudicate cases that ultimately expose defense contractors to appropriate liability where it is demonstrated that they acted outside the

[6] The court noted divergent treatment of this issue by the three circuits that have addressed it.

parameters established by the military and, as a result, failed to exercise proper care in minimizing risk to service members and civilians. In this case, while denying defendants' motion to dismiss, the court circumscribed discovery at this stage in the proceeding in order to limit the burden on the military and its personnel.

C. Benefits Review Board

***Sparks v. Service Employees Int'l, Inc.*, __ BRBS __ (2010).**

The Board denied employer's motion for reconsideration of its earlier decision in this case, in which the Board reversed the ALJ's determination that claimant was judicially estopped from pursuing her DBA claim as a result of her failure to disclose her pending DBA claim in bankruptcy proceedings. *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11 (2010). In that decision, the Board reasoned that Section 16 of the LHWCA prevents claimant's creditors from attaching the DBA benefits and, thus, claimant did not have a motive for concealing her DBA claim. Accordingly, the Board found that claimant gained no advantage over creditors by withholding information about her DBA claim from the bankruptcy court; and there was, therefore, no attempt by claimant to make a "mockery of the judicial process" – a prerequisite for applying judicial estoppels.

In its motion for reconsideration, employer argued that substantial evidence supported the ALJ's factual finding that claimant had motive to conceal, and benefited by withholding, information about her DBA claim; and thus the ALJ's application of judicial estoppels was within his discretion. In rejecting this argument, the Board reiterated its conclusion that "[a]s Section 16 precludes creditors from attaching any compensation claimant may obtain in her DBA case, claimant has no motive to conceal the claim, and judicial estoppels cannot apply." Slip. op. at 4. Contrary to employer's assertion, *Robinson v. Tyson Foods, Inc.*, 595 F.3df 1269 (11th Cir. 2010),[7] is distinguishable because "*Robinson* did not specifically bar the workers' compensation claim and did not address the effect a statutory provision, such as Section 16, would have on the status of the workers' compensation claim." Slip. op. at 4.

The Board also rejected employer's contention that the bankruptcy court may have denied claimant a discharge, if it had known of the DBA claim, on the ground that claimant abused the bankruptcy process. The

[7] In *Robinson*, the Eleventh Circuit affirmed the grant of a summary decision for the debtor's employer in an employment discrimination claim because of nondisclosure in bankruptcy court; the court relied on the nondisclosure of a workers' compensation claim as additional evidence of the debtor's motive.

Board stated that this argument is speculative at best. The Board reasoned that, under the Bankruptcy Code, a presumption of abuse exists if the debtor's current monthly income less allowable expenses is greater than a certain amount.[8] Here, claimant has not received, and is not receiving any "income" from the DBA claim, as employer has not paid disability benefits voluntarily and the claim has not been adjudicated and is in dispute. Citing the Bankruptcy Code and relevant case law, the Board concluded that, from this source, claimant has no "income" which is "known or virtually certain at the time of confirmation" and which would affect any bankruptcy abuse analysis. As neither the bankruptcy trustee nor the bankruptcy court was compelled to re-open claimant's case after learning of the DBA claim, there appears to be no evidence of abuse by claimant. Indeed, the trustee agreed that the claim either would be exempt or would be one that he would not pursue.

[Topic 85 RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, ELECTION OF REMEDIES; Topic 16.3 COMPENSATION IS EXEMPT FROM CREDITOR CLAIMS]

***Thompson v. Northrop Grumman Shipbuilding, Inc.*, __ BRBS __ (2010).**

The Board reversed the district director's award of attorney's fees pursuant to Section 28(b) of the LHWCA and remanded for the consideration of claimant's liability for the attorney's fee pursuant to Section 28(c). The Board held that there had been no written recommendation by the district director, which is a prerequisite to employer's liability for attorney's fees pursuant to § 28(b) under the governing Fourth Circuit precedent.

Employer voluntarily paid claimant temporary total disability ("TTD") compensation for a right knee injury, ending on 11/11/07. Claimant started working for a different employer on 11/13/07, and sought compensation for TTD on 11/12/07 and for temporary partial disability ("TPD") commencing 11/12/07. Claimant further averred that his left knee became symptomatic as a result of the work-related right knee injury. In a memorandum of informal conference, the district director declined to issue a recommendation on these issues as claimant did not timely raise his entitlement to additional compensation, and claimant's counsel requested that the issue of work-relatedness of the left knee condition be held in abeyance pending the deposition of Dr. Zaslav. After receiving Dr. Zaslav's deposition, the district

[8] Noting that the court cannot convert a Chapter 7 bankruptcy, such as claimant's, to a Chapter 13 bankruptcy without the consent of the debtor, the Board rejected employer's argument that the bankruptcy court was deprived of that option by claimant's failure to notify it of the DBA claim.

director sent a letter, dated May 20, 2008, to the parties, stating that claimant's left knee condition is a compensable consequence of the right knee injury and recommending that claimant is entitled to compensation for TPD commencing 11/12/07 for his right knee injury. While the letter resolved the disputed issues in claimant's favor, it also stated that claimant's weekly compensation rate could not be determined because insufficient wage information had been submitted. Rather than provide this information, claimant's counsel requested a formal hearing before OALJ. After claimant sent pay stubs to employer, employer stated in a letter of 7/26/08 that it was instituting TPD as of 11/12/07; and the case was not referred to OALJ. The district director awarded attorney's fees to claimant's counsel on the ground that employer did not timely accept the May 20, 2008 recommendation.

The Board concluded that "[b]ased on the circumstances presented here, we hold that the district director did not issue a written recommendation to pay compensation as she specifically stated that a compensation rate could not be calculated." Slip. op. at 5. The May 20, 2008 letter did not constituted a written recommendation for purposes of conferring on employer liability under § 28(b), as it specifically stated that a compensation rate could not be calculated. Claimant was no longer working for employer and did not provide the district director with sufficient wage information from which she could calculate a compensation rate. Under these circumstances, employer was unable to either accept or reject liability for the payment of temporary partial disability benefits. Moreover, while employer's liability under § 28(b) is triggered by its refusal of the written recommendation within 14 days "after its receipt by them," the district director did not address when employer received the May 20 letter. (Further, contrary to the district director's finding, it was not dispositive that employer did not pay compensation for 12 days after its letter of 7/26/08, as the Act says employer should "pay or tender" compensation.)

The Board instructed the district director, on remand, to fully discuss employer's objection to the requested costs and several time entries as being related solely to claimant's state workers' compensation claim. Under the applicable Board precedent, an attorney's fee may be awarded for services performed in a state claim where the services also are necessary to establish entitlement under the LHWCA; and the claimant has the burden of showing both that the services were necessary and that his attorney has not previously been compensated for these services under the state act. Here, the district director stated only that the "information" was used in both the state and longshore claims, and made no finding that counsel was not paid for these services and costs under the state law.

[Topic 28.2.3 ATTORNEY'S FEES – 28(b) EMPLOYER'S LIABILITY -- District Director's Recommendation; Topic 28.3 ATTORNEY'S FEES – 28(c) CLAIMANT'S LIABILITY]

***Christensen v. Stevedoring Services of America*, __ BRBS __ (2010).**

The Board denied employer's motion for reconsideration of its May 13, 2010 Order in this case. *Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying in part* 43 BRBS 145 (2009).

The Board rejected employer's contention that, in its decision modifying counsel's hourly rate, the Board erred in excluding from the calculation the rates recorded in the 2007 Oregon Bar Survey for state workers' compensation attorneys. Employer asserted that the Board misunderstood the nature of attorney's fee awards under the Oregon workers' compensation statute. The Board stated that

> "[a]ssuming, *arguendo,* that the Board's order reflects an incomplete assessment of the types of attorney's fee awards available under the Oregon statute, employer has not demonstrated error in the Board's exclusion of this category of work from its hourly rate calculation. Fees awarded by state administrative law judges are not necessarily based on market considerations, just as rates set by administrative law judges in longshore cases have been held to be non-market-based rates. *See Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, 0WCP, 557* F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). In addition, employer does not dispute that portion of the Board's Order stating that, to the extent the Oregon Bar Survey reflects rates payable to defense counsel, such are not market rates."

Slip. op. at 2 (additional citations omitted). The Board also noted that claimant's counsel has participated I only six state workers' compensation cases in the last three years and in only one has he been awarded a fee based on his fee petition as opposed to a fee schedule. Thus, by excluding such rates, the Board has not excluded fees from a significant part of counsel's actual practice.

The Board also rejected employer's contention that the recent Supreme Court decision in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), "calls into serious question" the assumption that claimant's counsel's years of experience should be compensated in every case by use of the 95th

percentile rates in the Oregon Bar Survey. Employer asserted that the Court's statement that the lodestar hourly rate should be adjusted "in accordance with specific proof linking the attorney's ability to a prevailing market rate," *Id.* at 1674, suggests that a single factor such as years since admission to the bar should not be the sole basis for the lodestar hourly rate. The Board stated that

> "[w]e do not disagree with employer that, generally, one factor, like yeas since admission to the bar, does not control an attorney's hourly rate in every case in which he participates. Hourly rates for the same attorney can vary from case to case and, within one case, from level to level. *See B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT)(6th Cir. 2008). However, if an attorney is very experienced and skilled, a higher hourly rate for fewer hours is usually warranted."

Slip. op. at 2. In this case, claimant ultimately was very successful in both the appeals on the merits and of the Board's attorney's fee award, and thus employer has not demonstrated error in the Board's selection of the 95th percentile rate from the survey.

[Topic 28.6.1 ATTORNEY'S FEES - 28(d) FACTORS CONSIDERED IN AWARD - Hourly Rate]

II. Black Lung Benefits Act

Benefits Review Board

In *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-__, BRB No. 09-0666 BLA (Sept. 22, 2010), the Board adopted the Director's position and upheld the constitutionality of § 1556(c) of the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148 (Mar. 23, 2010) providing for automatic entitlement in certain survivors' claims. Under the facts of that case, the miner was paid benefits until the time of his death on August 10, 2005. The survivor filed her claim for benefits on October 3, 2005, which was "pending on or after March 23, 2010." The Board noted the following:

> Employer agrees that amended Section 932(l) is applicable to this case, as claimant filed her claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was in payment status at the time of his death. (citation omitted). Thus, claimant is derivatively entitled to survivor's benefits pursuant to 30 U.S.C. § 932(l). Consequently, as amended Section 932(l) does not afford employer the opportunity to defend the claim once derivative entitlement has been established, ...

Slip op. at 7. Thus, the Board holds it is the date of filing of the survivor's claim, not the miner's claim, which controls applicability of Section 932(l), as amended by the PPACA.

[**§ 1556(c) of the PPACA held constitutional; date of filing of survivor's claim determinative**]

By unpublished decision in *Smith v. James River Coal Co.*, BRB No. 09-0859 BLA (Sept. 30, 2010)(unpub.), a case arising in the Sixth Circuit, the Board affirmed the Administrative Law Judge's holding that Claimant did not qualify as a "miner" under the Act. Based on deposition testimony of Claimant and his former supervisor, it was determined that Claimant worked as a mine engineer, licensed foreman, and administrative assistant for approximately 15 years at various surface mines. Claimant stated that he obtained permits, surveyed property, served as a foreman on an as-needed basis, and "spent approximately fifty percent of his time on site." Claimant further testified that, as an assistant foreman, he performed "core drilling and time studies", where "65% to 85% of his work was outside" with "some" underground mining. Claimant's supervisor confirmed that Claimant

assisted in obtaining permits, met with state mining officials to "walk" the permits, designed silt dams, assisted in reclamation, and consulted with lawyers regarding property leases. However, the supervisor also testified that "claimant's job did not require him to visit active coal mines and . . . his offices were no closer than a thousand yards to a tipple or mine." The supervisor stated that he "would see claimant almost every day, sometimes spending all day with him in an air conditioned office." Although Claimant was required to be present at "core drilling" once a week, the supervisor stated that Claimant was "never involved in the actual drilling process." The Administrative Law Judge properly credited the foreman's testimony that Claimant did not work around an active mine and, as administrative assistant, he was not involved in any coal production activity. The Board upheld the Administrative Law Judge's finding that he was more persuaded by the supervisor's testimony that Claimant did not work as a foreman and that Claimant's presence at the "coal drilling sites alone does not qualify him as a miner." The Administrative Law Judge properly concluded that Claimant's job duties were incidental, or merely convenient, to the extraction, preparation, and transportation of raw coal such that Claimant did not qualify as a "miner" under the Act.

[**definition of "miner"; incidental duties not qualify**]

The Board affirmed the Administrative Law Judge's weighing of medical evidence two unpublished decisions arising in the Fourth Circuit, *Reed v. Triple S Energy, Inc.*, BRB No. 09-0819 BLA (Sept. 29, 2010) and *Shrewsberry v. Itmann Coal Co.*, BRB Nos. 09-0864 BLA and 09-0865 BLA (Sept. 29, 2010). In both cases, the Administrative Law Judge properly accorded greater weight to positive x-ray interpretations of pneumoconiosis on grounds that physicians offering negative interpretations of the studies "applied criteria not included in the regulations." In *Reed*, some experts found Category 1 pneumoconiosis, whereas other physicians did not mark a category reading and commented that the miner suffered from "asbestosis." The Administrative Law Judge found that "asbestosis" is a form of clinical pneumoconiosis and, citing to a dictionary definition that asbestosis is "a form of pneumoconiosis (silicatosis) caused by inhaling fibers of asbestos," the Board affirmed this finding. As a result, the Board held it was proper to accord less weight to certain chest x-ray interpretations on this basis. In *Shrewsberry*, the Administrative Law Judge accorded little probative weight to a medical opinion regarding the existence of complicated pneumoconiosis where the physician testified that he preferred to rely on x-ray interpretations of radiologists who "require that any opacities found be representative of coal workers' pneumoconiosis." The Administrative Law Judge stated:

> [T]he selective reliance by (the medical opinion expert) upon the interpretations by (expert radiologists) because they required that any opacities found be representative of coal workers' pneumoconiosis (as opposed to pneumoconiosis in general, as envisioned by the statutory and regulatory scheme) reflected bias and affected (the medical opinion expert's) credibility and the amount of weight to which his opinion is entitled.

The Board noted that the ILO classification form "requires the reviewing radiologist to indicate whether the patient has any parenchymal or pleural abnormalities 'consistent with pneumoconiosis,' regardless of whether pneumoconiosis is caused by coal dust exposure."

[**weighing x-ray interpretations**]