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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 248
November 2012

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

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

***Truczinskas v. Director, OWCP, et al.*, 699 F.3d 672 (1st Cir. 2012).**

The First Circuit held, agreeing with the Director, OWCP, that initial judicial review in Defense Base Act ("DBA") cases lies in the circuit court (rather than in the district court), and thus the court had subject matter jurisdiction over this matter. In so doing, the court aligned itself with the Second, Seventh and Ninth Circuits, and parted ways with the Fourth, Fifth, Sixths and Eleventh Circuits. The court next upheld the denial of death benefits by the ALJ and the Board on the ground that the widow of the decedent, who was employed by GD Arabia as a military trainer in Saudi Arabia when he was found dead inside his villa due to "asphyxiation by hanging," did not establish that his death arose from his employment or from a "zone of special danger" related to his employment.

The court reasoned that the DBA could be legitimately read to confer jurisdiction upon the circuit court, and such reading accords with the congressional policy reflected in the 1972 Longshore Act amendments. When the DBA was enacted in 1941, the DBA adopted the LHWCA by cross-reference, saying that "[e]xept as herein modified, the provisions of the [LHWCA], as amended, shall apply in respect to the injury or death of any

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[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 refer to the Westlaw identifier.

employee" within the scope of the DBA. 42 U.S.C. § 1651(a). At that time, the LHWCA provided for review of compensation decisions by the district court located in the district where the injury or death occurred. But because the harm under the DBA would in many cases occur outside the US, the DBA provided that judicial review of DBA awards should commence "in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved." 42 U.S.C. § 1653(b). In 1972, Congress amended the LHWCA to provide for direct review of compensation orders by the circuit court, with the underlying policy intention of reducing expense and delay. A plausible reading of § 3(b) of the DBA is that it did no more than identify a different venue for DBA award – the locus of the award rather than the locus of the injury. When so read, the only element "frozen in amber" by the "[e]xcept as herein modified" clause of the DBA is the specification of the reviewing court's location; consistent with this reading, the 1972 amendments provide for review of decisions by a circuit court with authority where the compensation order was filed. This approach maintains the congruence between the two schemes.

The court further affirmed the denial of death benefits to decedent's widow and children. Decedent's co-worker testified that decedent's alleged girlfriend called him to decedent's villa stating that he had hanged himself; and that he discovered decedent hanging from a cross-beam with a nylon rope tied around his neck, but with his feet on the ground, wearing toenail polish and women's makeup. Section 3(c) of the LHWCA provides that "[n]o compensation shall be payable if the injury was occasioned solely . . . by the willful intention of the employee to injure or kill himself or another," although a rebuttable presumption exists under § 20(d) that the injury was not due to suicide. Once claimant established a prima facie case, she enjoyed the benefit of the § 20(a) presumption of coverage as well as the § 20(d) presumption.

The court first addressed the presumption against non-coverage, stating that, although Saudi Arabia may well pose dangers, the compound was guarded and there was no indication of any intrusion by outsiders.[2] It further reasoned that:

> "[a]t this point the two obvious substantial possibilities were two non-covered causes: suicide and misadventure. This was entirely sufficient to counter the presumption against coverage and, as the suicide possibility was a realistic one (and no covered alternative was obvious), to refute that presumption as well. Although the 'substantial evidence' test sounds demanding, it

[2] The court observed that there was nothing to inculpate decedent's girlfriend, and further noted that murder by a jealous mistress would not constitute a covered cause.

> merely requires evidence that 'could satisfy a reasonable factfinder' that the claimant's injury was attributable to a non-covered cause."

Slip op. at 16 (citations omitted).[3] Once the presumption dropped out of the case, the burden rested on the claimant to show a covered cause by a preponderance of the evidence. Here, some evidence weighed against the suicide explanation. But neither suicide nor misadventure was ruled out by the fact that decedent was discovered with his head in a noose but his feet on the floor, nor by the absence of a suicide note. The court stated that the probability of a covered cause, as against realistic possibilities plainly present in this case, depended on whether hypothetical possibilities had support in evidence. The court found no evidence of a covered cause. Claimant theorized that her husband may have been killed because his alleged extramarital affair or alleged cross-dressing offended conservative Muslim vigilantes, because he learned of a co-worker's possible arms smuggling, or because he was involved in an investigation of a threat to Americans. However, claimant admitted having no evidence of arms smuggling or espionage or attacks on GD employees by roving vigilantes. She presented testimony from an "expert" in Middle Eastern studies opining that these theories were "not far-fetched," but offering little more. The court concluded that, given the protected environs of the base and lack of evidence, the ALJ and BRB could not easily have credited all or any of these theories in preference to those positing that decedent had caused his own death, whether deliberately or not.

The court also rejected claimant's reliance on the zone-of-special-danger doctrine. Under the DBA, a harm may be covered as employment related if it derives from the employee's presence in a "zone of special danger" created by "the obligations or conditions of employment." However, neither suicide in the ordinary case, nor harm resulting from recreational activities that are neither reasonable nor foreseeable, fall within the scope of the zone-of-special-danger doctrine.

In the court's opinion, the dissenting Board member's reasoning did not undermine the evidence and inferences supporting the majority's conclusion. The dissenter thought (incorrectly) that the position of decedent's body wholly negated the possibility of suicide; and anyway suicide was not the only plausible non-covered explanation. The dissenter also expressed doubts about the testifying co-worker's credibility but cited

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[3] The court cited *Del Vecchio v. Bowers*, 296 U.S. 280, 56 S.Ct. 190, 80 L.Ed. 229 (1935), *rev'g Bowers v. Hoage*, 76 F.2d 996 (D.C.Cir.1935). In that case, the D.C. Circuit Court reasoned that, because evidence was consistent with either accident or suicide, the presumptions in §§ 20(a) and 3(d) turned the scale for claimant. The Supreme Court disagreed, stating that the "only office" of the § 3(d) presumption is "to control the result where there is an entire lack of competent evidence."

no substantial evidence. Finally, the dissenter suggested that the fact that the Saudi police had not closed their investigation was determinative, as it indicated that the police force was unable to conclude that the death was due to suicide. However, the failure of the claim depended not on proof that the death was suicide but on claimant's inability to establish a likely covered cause.

[Topic 60.2.6 DEFENSE BASE ACT – Appeals of Cases Determined Under DBA; Topic 3.2.2 COVERAGE – OTHER EXCLUSIONS - Willful Intention; Topic 20.3 PRESUMPTIONS – § 20(a) – CLAIM COMES WITHIN PROVISIONS OF THE LHWCA - EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE]

B. Benefits Review Board

***Stork v. Clark Seafood, Inc.*, __ BRBS __ (2012).**

The Board held that, as this case arose in the Fifth Circuit, claimant was excluded from coverage under Section 2(3)(E) of the LHWCA because he was employed by a commercial processor of fish – an aquaculture operation, irrespective of the nature of his duties with employer.

The Board initially rejected claimant's assertion that the ALJ erred in not applying the § 20(a) presumption to the coverage issue. The BRB stated that, to the extent § 20(a) applies to the Act's coverage provisions, it is limited to questions of fact and not those of law. In this case, the facts were undisputed, and the issue of coverage was a legal one to which the § 20(a) presumption did not apply.

In concluding that claimant was excluded from coverage as an aquaculture worker under § 2(3)(E), the ALJ relied on his determinations that claimant's employer was a commercial processor of fish, and that claimant's duties were not maritime in nature. The BRB affirmed the ALJ's conclusion, albeit on a different rationale. On appeal, claimant asserted that because "at least some" of his duties were "indisputably maritime," he was covered under the Act pursuant to *Alcala v. Director, OWCP*, 141 F.3d 942, 32 BRBS 82(CRT) (9th Cir. 1998), and *Ljubic v. United Food Processors*, 30 BRBS 143 (1996). The Board disagreed, stating that the Fifth Circuit has rejected this test in cases involving other statutory exclusions to coverage that are based on the nature of the employing entity; e.g., the court rejected the BRB's application of the "some of the time" test under §§ 2(3)(B) and (C). The BRB noted the Fifth Circuit's reliance on the legislative history to the 1984 Amendments, and further noted that 20 C.F.R. §701.301(a)(12)(iii)(E) defines an aquaculture worker by his employer. In this case, the BRB affirmed the ALJ's determination that employer is an aquaculture operation, stating that "although claimant did not perform fish

house functions at the end of his career, these activities are central to employer's business." Slip op. at 8. The Board concluded that

> "[o]nce the employer's business has been identified as an excluded entity, the Fifth Circuit has held it is unnecessary to address the nature of the employee's activities in determining whether the [aquaculture] exclusion to coverage applies. . . . . That is, claimant was employed by employer, an aquaculture operation, and, therefore, was an aquaculture worker excluded from the Act's coverage."

Id. at 8-9 (citations omitted).

[Topic 1.11.11 EXCLUSIONS TO COVERAGE - Aquaculture workers]

***Walker v. Todd Pacific Shipyards*, __ BRBS __ (2012).**

The Board affirmed the OWCP district director's approval of claimant's vocational rehabilitation plan, and further affirmed the ALJ's award (on a motion for summary decision) of total disability benefits for the duration of the plan, notwithstanding that employer had identified suitable alternate employment ("SAE") and fully compensated claimant under the schedule prior to the commencement and approval of the rehabilitation plan.

The Board initially concluded that employer had failed to demonstrate that the district director's approval of the vocational rehabilitation plan constituted an abuse of discretion, stating:

> "[e]mployer does not allege that the plan does not comply with the regulatory criteria, as claimant's impairment is permanent, and his retraining program was relatively 'short' with the goals of remunerable employment and restoring claimant's wage-earning capacity. 20 C.F.R. §§702.501-702.508. Further, the district director adequately addressed each of employer's objections to the plan. Contrary to employer's assertion, its identification of alternate jobs that pay approximately the same as entry level electronics positions, that claimant is not qualified for every available job in the electronics market, or that claimant's treating physician approved only categories of jobs rather than the specific jobs identified, have no bearing the propriety of the vocational rehabilitation plan. A vocational rehabilitation plan need not qualify a claimant for a particular job identified in a labor market survey. The purpose of [the DOL–selected vocational counselor's] labor market survey was to assess whether there was a viable market in claimant's geographic area for electronics assemblers and technicians, not to identify

specific jobs for claimant that would be immediately suitable upon completion of the program; moreover, claimant's treating physician, Dr. Blauvelt, approved both types of jobs."

Slip op. at 5 (additional citations omitted).

Next, the Board rejected employer's contention that an award of total disability benefits was not permissible because employer had presented SAE and fully compensated claimant under the schedule prior to the commencement and approval of claimant's rehabilitation program. Case law holds that a claimant can establish his entitlement to total disability benefits if SAE identified by employer is not reasonably available to him due to his participation in a rehabilitation program sponsored by the Department of Labor ("DOL"). In making this inquiry, an ALJ should consider factors such as whether: (1) enrollment in a rehabilitation program precluded any employment; (2) an employer agreed to the rehabilitation program and to continued payment of benefits; (3) completion of such a program would benefit a claimant by increasing his wage-earning capacity; and (4) the claimant demonstrated diligence in completing such a program. None of the factors is determinative. Further, case law holds that an award of total disability is permissible after partial disability has been established, and that the same standards apply to the issue of total disability in all cases. The Board refused to distinguish this case on the ground that scheduled benefits had been paid in full for purposes of determining whether a claimant may thereafter be considered totally disabled. In this case, the ALJ properly concluded, in light of the regulatory criteria, that claimant established that the SAE was not reasonably available to him during his participation in the full-time rehabilitation program. Nor did the ALJ err in resolving this issue in a summary decision, as the ALJ properly viewed SAE in the light most favorable to employer, and concluded that claimant established inability to work during his vocational program.

[Topic 8.2.3.2 EXTENT OF DISABILITY - Disability While Undergoing Vocational Rehabilitation; Topic 39.3 SECRETARY'S AUTHORITY TO DIRECT VOCATIONAL REHABILITATION]

***Leyva v. Service Employees Int'l, Inc.*, __ BRBS __ (2012).**

The Board vacated the ALJ's denial of benefits on the grounds that (1) the ALJ did not make detailed findings of fact on the issue of whether the DOL-appointed independent medical examiner ("IME") was qualified to act as an impartial examiner under § 7(i) of the LHWCA, and (2) the ALJ's finding that claimant's degenerative shoulder condition is not work-related was not supported by substantial evidence.

Claimant sustained a work-related injury to both shoulders in 2007, was diagnosed with bilateral rotator cuff tendinitis, and underwent surgery on his left shoulder. Employer stopped paying benefits after its expert opined that claimant could return to work, and claimant sought additional benefits. At the hearing, claimant challenged the qualifications of Dr. Brown to act as a DOL-appointed IME in this case. The ALJ found that Dr. Brown had performed an examination for an insurance carrier within the two years preceding claimant's evaluation and, thus, should not have been appointed as an IME pursuant to § 7(i). While the ALJ stated that the standard remedy in such case is to appoint another IME, he found that claimant had discovered this information less than two weeks prior to the hearing and instead sought to have Dr. Brown's report and testimony stricken or given less weight. The ALJ denied this request, stating that he would give Dr. Brown's opinion less weight than he normally would give an IME's opinion. The ALJ further denied additional benefits based on his finding that claimant's shoulder pain and inability to return to his usual work were due to the natural progression of a preexisting degenerative condition.

Section 7(i): Section 7(i) of the LHWCA provides:

> "[u]nless the parties to the claim agree, the Secretary *shall not* employ or select any physician for the purpose of making examinations or reviews under subsection (e) of this section who, during such employment, or during the period of two years prior to such employment, has been employed by, or accepted or participated in any fee relating to a workmen's compensation claim from any insurance carrier or any self-insurer."

33 U.S.C. § 907(i) (emphasis added); 20 C.F.R. § 702.411(c). The Board vacated the ALJ's summary finding that Dr. Brown was unqualified to be an IME, and remanded the case for further findings of fact on this issue. In particular, the ALJ should address employer's contention that Dr. Brown was qualified as an IME under § 7(i), as he performed examinations through an independent company and was not paid directly by employer or carrier, and there is no evidence the examinations were in workers' compensation cases.[4] The Board instructed that:

> "[i]f the [ALJ] finds that Dr. Brown should not have been appointed as an IME, then, because Section 7(i) provides that a doctor who has performed examinations for an employer or carrier 'shall not' be an impartial examiner, the [ALJ] must strike Dr. Brown's reports and testimony from the record and remand the case for the district director to appoint another IME, or he must arrive at another remedy to which the parties agree."

[4] Dr. Brown testified that he believed that the majority of the evaluations he performed for MES Solutions were requested by insurance companies.

Slip op. at 6 (citations and footnote omitted). In addition to the IME issue, on remand, the ALJ may address the significance, if any, of claimant's introducing Dr. Brown's reports and testimony into evidence and defense counsel's request for a second opinion from Dr. Brown.

Disability: The ALJ's finding that claimant's current bilateral shoulder condition and disability are due solely to the natural progression of a preexisting non-work-related degenerative condition was not supported by substantial evidence. Section 20(a) presumption applies to relate a degenerative condition to the work injury. Slip op. at 6, citing *Meehan Serv. Seaway Co. v. Dir., OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8 th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Uglesich v. Stevedoring Servs. of Am.*, 24 BRBS 180 (1991). With or without Dr. Brown's opinion, there was no evidence in the record establishing that claimant's degenerative condition pre-dated his work injury. As the ALJ did not apply the § 20(a) presumption to claimant's current bilateral shoulder condition, the BRB vacated his finding that claimant's disability is due to a non-work-related condition.

[Topic 7.11 § 7(i) MEDICAL BENEFITS - WORKERS' COMPENSATION CLAIMS; Topic 20.2.5 PRESUMPTIONS - § 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA - Failure to Properly Apply Section 20(a)]

***Buttermore v. Electric Boat Corp.*, ___ BRBS ___ (2012).**

Rejecting the OWCP Director's position, the Board held that an ALJ's compensation order accepting the parties' stipulation that claimant's disability was temporary in nature was subject to § 22 modification based on a mistake of fact in the ALJ's determination of permanency, and that modification was not precluded by the doctrine of judicial estoppel. Accordingly, the BRB affirmed a 2010 ALJ order modifying claimant's 2002 award of temporary total disability ("TTD") benefits to reflect that claimant had reached maximum medical improvement ("MMI") in 2000 and was entitled to permanent total disability ("PTD") benefits thereafter; awarding employer § 8(f) relief; and ordering the Special Fund to reimburse employer for any payments made to claimant, including interest, after the expiration of 104 weeks from the date of MMI.

The Board initially rejected the Director's assertion that because claimant's PTD award on modification was based on a change in condition, PTD benefits could not be awarded retroactive to a date predating the order being modified. Contrary to the Director's assertion, the 2010 ALJ order reflects that the 2002 finding regarding the nature of claimant's disability was modified based on a mistake of fact, based on review of medical evidence.

The Director conceded that § 22 modification based on a mistake of fact in a case where claimant's compensation is being increased may be made retroactive to the date of the injury. The Director contended, however, that the doctrine of judicial estoppel precluded modification on the ground of a mistake in fact because claimant and employer stipulated in 2002 that claimant's disability was not yet permanent, and the 2002 ALJ order accepted that stipulation. The Board disagreed. It reasoned that a determination based on stipulations is subject to § 22 modification based on grounds of either a change in condition or a mistake of fact. Further, "Section 22 modification, which reflects a statutory preference for accuracy, displaces equitable doctrines of finality such as judicial estoppel." Slip op. at 6 (citations omitted). In this case, "the [ALJ] stated that it was only with the benefit of hindsight that the parties realized that claimant's condition had, in fact, been permanent in September 2000. Under these circumstances, the [ALJ's] grant of modification to correct a mistake in fact renders justice under the Act, and is not barred by the equitable doctrine of judicial estoppel." *Id.* (citations omitted).

[Topic 22.3.5 MODIFICATION - Mistake of Fact; Topic 85 RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, ELECTION OF REMEDIES (DOCTRINES OF PRECLUSION/Equitable Estoppel)]

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

In *Dixie Fuel Co. v. Director, OWCP [Hensley]*, ___ F.3d ___, Case No. 11-4298 (6th Cir. Nov. 28, 2012), the Sixth Circuit followed *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997). Although 20 C.F.R. § 718.202(a) sets forth four distinct methods of establishing pneumoconiosis, the court adopted the position of the Director and held the Administrative Law Judge ultimately must weigh all of the evidence together under 20 C.F.R. § 718.202(a) when determining whether the miner suffers from the disease.

Under the facts of the claim, the circuit court observed that the Administrative Law Judge found chest x-ray evidence was preponderantly positive, but the biopsy data was negative, the CT-scans were inconclusive, and "several physicians testified against an award of benefits." The circuit court stated:

> This is not to say that the ALJ must reconsider his prior judgment with respect to any one piece of contrary evidence or end up with a different conclusion. All of that is up to the ALJ in the first instance.

Slip op. at 2.

[**weighing all evidence together under 20 C.F.R. § 718.202(a)**]

B. Benefits Review Board

No cases to report for this month.