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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 193
December 2007

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Chief Judge

Stephen L. Purcell
Associate Chief Judge for Longshore

William S. Colwell
Associate Chief Judge for Black Lung

Kerry Anzalone
Senior Attorney

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Tahara v. Matson Terminals, Inc. (No. 05-17306)(**9th Cir.** December 27, 2007).

Ninth Circuit held that the LHWCA authorizes attorney's fees for work an attorney performs to secure a late payment award under Section 14(f). However, fees requested for time spent preparing a defense in an Office of Disciplinary Counsel (ODC) proceeding is separate from the district court action to enforce the supplementary order. Section 28(c) does not permit fees for any of the ODC related hours because work to prepare for the ODC proceeding was not done "before" the district court. After the claimant had been awarded benefits, the employer, who had 10 days to pay the claimant, had delivered the compensation check to the claimant's attorney. The attorney returned the check by mail stating that he was not authorized to accept it. The claimant received the check later than the 10 day grace period allowed by Section 14(f).

Thus, the **Ninth Circuit** has adopted the position of the **Fourth Circuit** in this matter, *see Newport News Shipbuilding & Dry Dock Company v. Brown* 376 F.3d 245 (**4th Cir.**2004), and rejected that of the **Second Circuit**. *See Burgo v. Gen. Dynamics Corp.*, 122 F. 3d 140 (**2d Cir.** 1997).

[Topic 28.3 Attorney Fees—Claimant's Liability]

C. Federal District Courts and Bankruptcy Courts

Triple A Machine Shop Inc. v. Olsen, ___ F. Supp. 2 ___(No. C 07-02371 CRB)(December 11, 2007).

After the Employer initiated Section 22 proceedings, the ALJ concluded that the Claimant "plainly intended to prevent or at least delay [the employer]'s efforts to exercise its statutory right to have a hearing on its claim." The ALJ tried to impose sanctions but the Board held that this could only be done under Section 27(b). The ALJ then certified the underlying facts to the federal district court pursuant to Section 27(d). The *pro se* claimant opposed the certification on several grounds and additionally moved for a competency hearing to determine whether he was sufficiently competent to proceed *pro se*.

The Pro se claimant's opposition to the certification was dismissed by the court. As to the competency hearing request, the court stated:

> "After reviewing the content of Olsen's pleadings submitted to this Court, the Court concludes that there is not a substantial question regarding Olsen's mental competence. As Judge Mapes found, Olsen's goal since 2000 has been to prevent or at least delay Triple A's efforts to exercise its right to have a hearing on its claim that Olsen's disability benefits should be reduced or terminated. See Certification at 3. In light of that goal, it is hard to imagine an advocate who could have more competently and successfully forwarded Olsen's interests. Through a series of cumbersome—yet capable—fillings and delay tactics, Olsen has successfully delayed a hearing on Triple A's claim for seven years. The competence of Olsen's representation cannot be questions."

However, out of an abundance of caution the Court allowed the claimant to present evidence of incompetence at a January meeting.

[Ed. Note: At the subsequent hearing dated January 11, 2008, the Court found that Olsen was competent and that the appointment of a guardian as litem was unnecessary. The Court further found that Olsen failed to present any evidence calling into doubt the facts certified by Judge Mapes and ordered the Department of Labor issue the compensation payments that Olsen currently receives directly to the Court until further notice. "Sanctioning Olsen by ordering the Department of Labor to direct Olsen's payment to the Court also reflects the character and magnitude of the harm threatened by continued contumacy. Without judging the merits of Triple A's termination claim, the obvious risk posed by Olsen's intentional delay is that Olsen will continue to receive disability benefits that may not be justified under the law. By precluding Olsen from receiving future payments, the harm threatened by continued stalling is thereby reduced." The Court then requested the presiding ALJ inform the Court when the ALJ believes that Olsen is participating in good faith in the resolution of the claim. At that time the court

will order DOL to recommence issuing checks in Olsen's name, provided he is still entitled to their receipt.]

[Topics 22.1 Modification—Generally; 22.1.1 Modification—Section 22 allows credit but no retroactive termination; 27.3 Powers of Administrative Law Judges--Federal District Court Enforcement]

D. Benefits Review Board

C.C. v. Techico Corp, ___ BRBS ___ (BRB No. 07=0550)(Dec. 18, 2007).

Where a sheet metal worker suffered bilateral deep-vein thrombosis and superficial phlebitis after prolonged sitting after traveling to Employer's Hawaii location, he was not entitled to LHWCA coverage because he could not satisfy the situs test. In denying coverage the Board distinguished fish-spotter cases and noted that coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. A commercial airplane is not an enumerated area under the LHWCA. As to air travel over water, the Board noted that "upon" does not always mean "over." Although the claimant studied blue prints while on the plane, the Board noted that the breadth of duties encompassed by an employee's course of employment does not enlarge the situs,

[Topics 1.4.3 Jurisdiction/Coverage—Vessel—Helicopters, Seaplanes, etc.; 1.6.1 Jurisdiction/Coverage—SITUS—"Over water"]

H.H. v. Newport New Shipbuilding & Dry Dock Co., (Unpublished)(BRB No. 07-0870)(Dec. 17, 2007).

Where a claimant's longshore appellate counsel's fee request of $420.00 per hour was challenged, the Board lowered the fee rate to $250.00 per hour—the prevailing hourly rate for claimants' attorneys in the geographic area where the case arose. The Board cited to 20 C.F.R. §802.203(d)(4). The attorney had argued that a "market" hourly rate cannot be based on a "micro-market" of rates paid only to longshore claimants' attorneys. He argued that an appropriate rate, such as that provided by the *Laffey* matrix, is one which takes into account rates applicable in an entire geographic region in all fee-shifting statutes. The Board rejected the proposition that the longshore claimants' bar in a relevant community, cannot set the prevailing market rate.

[Topic 28.6.1 Attorney Fees—Factors considered In Award—Hourly Rate]

J.W. v. Cooper/T. Smith Stevedoring Co., (Unpublished) (BRB No. 07-0480)(Dec. 17, 2007).

The Board found that an ALJ was well within his discretion in refusing to consider Claimant's counsel's fee petition which was not filed with the ALJ until nearly five years after the specified filing deadline. The Board stated that an employer is entitled to expect that it will not face attorney's fee proceedings an unknown number of years after expiration of the deadline imposed for filing of the claimant's attorney's fee petition.

[Topic 28.4.2 Attorney Fees—Application Process—Time Requirements]

J.B. Service Employers International, Inc., (Unpublished)(BRB No. 07-0582)(Dec.19, 2007).

In this Defense Base Act matter a claimant complained of dry itchy eyes while working in Iraq as a tank truck driver delivering jet fuel, diesel fuel, and gasoline throughout Iraq. The claimant was diagnosed with **bilateral pterygia**, an eye condition wherein fibrovascular growth extends from the conjuctiva of the eye onto the cornea. Claimant filed a claim and returned home for treatment. Employer controverted the claim contending that it was not related to employment in Iraq.

The ALJ invoked the Section 20(a) presumption and found that the claimant's condition was at least aggravated or exacerbated by environmental conditions associated with employment in Iraq. The ALJ credited Dr. Abdullah's report that pterygia is more common in people exposed to dry weather and sunlight, and Dr. McMahon's opinion that environmental conditions in Iraq caused the claimant's pterygia and that a genetic predisposition may have been a factor as well. The ALJ also noted the opinion of Dr. Garcia that there is "some possibility" that claimant's pterygia was "made worse" by the chronic dryness and irritation encountered in Iraq. The ALJ found that the claimant's working 13 hours a day and 7 days a week is equivalent to an environmental exposure accumulating over several years of normal use.

Although, in his pre-employment physical, the claimant had checked a box that he had experienced blurring, tearing and redness, he noted these symptoms to have been caused by stress and there was no evidence that he had been diagnosed with pterygia prior to commencing work in Iraq.

[Topics 2.2.18 Definitions—Representative Injuries/Diseases; 20.2.3 Presumptions—Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident; 20.5.1 Presumptions—Application of Section 20(a)—Causal Relationship of Injury to Employment; 60.2.1 Longshore Extension Acts—Defense Base Act—Applicability of the LHWCA]

R.I. v. Jones Stevedoring Co., (Unpublished)(BRB No. 07-0352)(Dec. 31, 2007).

In this Section 3(c) and Section 20(d) claim, the underlying issue is whether the claimant had intent to harm another when he accepted a challenge to meet in the parking lot. Under Section 3(c) no compensation is payable if the injury was the result of the willful intention of the employee to injure or kill another employee. The Claimant suffered a rhegmatogenous retinal detachment, splitting the fovea and he alleged that he further suffered from depression and anxiety due in part to his suspension from work.

The ALJ found that the Section 20(d) presumption had been rebutted. The most reasonable interpretation of the claimant's agreement was a willful intent to engage in a fight, and thus to injure another. The claimant had a history which demonstrated his inability to control his temper, including legal violations and a series of work-related incidents which resulted in disciplinary actions.

[Topic 3.2.2 Coverage—Other Exclusions—Willful Intention]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

The case of *Doe v. Chao*, ___ F.3d ___, Case No. 06-2015 (4th Cir. Dec. 28, 2007) stemmed from the Office of Administrative Law Judges' use of Social Security numbers on multi-captioned notices of hearings in black lung claims. As noted by the court, the Secretary of Labor acknowledged that "the DOL had run afoul of the limits set by the Privacy Act" at 5 U.S.C. § 552a(b). At issue on this third appeal to the circuit court was the propriety of the district court's award of attorney's fees to counsel for the Appellants. The circuit court affirmed the district court's finding that no attorney's fees would be awarded for work performed on the cross-motions for summary judgment "in light of the fact that Buck Doe recovered no damages."

On the other hand, the circuit court reversed the district court's award of $5,887.50 in attorney's fees for work performed on a contempt motion as well as an award of $10,000 for "work performed on the appellate phase of the merits litigation." In particular, it was determined that the district court violated the circuit court's mandate and "improperly went further and addressed two matters that were not before it for consideration"—namely, fees requested for work performed on the contempt motion and on appeal. The Fourth Circuit noted:

> This court remanded *Doe V* for the limited purpose of requiring the district court to assess the reasonableness of Buck Doe's fee award under the Privacy Act for work performed on summary judgment. Once the district court determined that the reasonable fee for that work was zero, the mandate rule required that it go no further.

[**Privacy Act**]

B. Benefits Review Board

By unpublished decision in *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board upheld an administrative law judge's exclusion of x-ray interpretations offered by Employer in excess of the evidentiary limitations as well as the judge's redaction of a physician's opinion that referenced the inadmissible x-ray interpretations. The Board held that "good cause" to exceed the evidentiary limitations was not established where Employer asserted that the "excess films are relevant" to the issue of whether Claimant suffered from complicated pneumoconiosis. Moreover, the fact that the physician "specifically requested to review additional x-rays in order to provide a reasoned opinion as to the presence or absence of complicated pneumoconiosis" did not compel a finding of "good cause." In this vein, the Board held that the administrative law judge "fashioned a permissible remedy for (the physician's) review of inadmissible evidence . . . by determining to redact only those portions of (the physician's) opinion that relied on the excluded x-ray readings."

With regard to an issue of admitting "other evidence" under 20 C.F.R. § 718.107, the Board cited to its decision in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006), *aff'd. on recon.*, 24 B.L.R. 1-1 (2007) (en banc) and held that "the regulations do not limit the number of separate CT scans that may be admitted into the record; rather, the parties are limited only to one affirmative reading of each separate scan." Moreover, the Board noted that each party is entitled to "one rebuttal reading (of each CT-scan), as necessary to respond to the opposing party's affirmative reading."

Finally, the Board remanded the case to the administrative law judge for further analysis of the merits of the claim, *i.e.* whether Claimant has presented evidence sufficient to demonstrate the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304 and *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000). The Board held that a finding of complicated pneumoconiosis on a chest x-ray requires a specific finding of Category A, B, or C opacities; the finding "is not determined solely by the dimensions of the irregularity." Specifically, the Board noted that "under the regulations, an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the 'Comments' section, but which does not diagnose pneumoconiosis with a size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304."

[**"good cause" not established; CT-scan evidence, admissibility of; complicated pneumoconiosis, diagnosis of on chest x-ray**]