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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 195 February 2008

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Cain v. Transocean Offshore USA, Inc., ___ F. 3d ___ (No. 05-30963)(**5th Cir.** February 21, 2008).

Fifth Circuit continues to hold that a watercraft under construction is not a "vessel in navigation" for purposes of the Jones Act. This case specifically held that the **Supreme Court's** decision in *Stewart v. Dutra Construction Co*., 543 **U.S.** 481 (2005), has not effectively overruled that precedent because the decision did not concern or address the point at which a vessel-to-be actually becomes a vessel. The court stated: "The language in *Stewart* is admittedly broad, and we have recognized that the Court's decision significantly enlarges the types of unconventional and special purpose watercraft that now must be considered vessels that might not have met the test before *Stewart*. (Citation omitted.) *Stewart* began, however, by framing the issue before it narrowly: "whether a dredge is a 'vessel' under [the LHWCA]."

[Topic 1.4.3 Jurisdiction/Coverage—LHWCA v. Jones Act--Vessel]

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*Electric Boat Corp. v. Blayman***,** (Unreported) (No. 06-5365-ag)(2nd Cir. Feb. 7, 2008).

At issue was whether the Claimant suffered a scheduled disability or a non-scheduled disability. The ALJ had determined that the claimant suffered a hip injury resulting in arthritis and that the claimant did not have a leg injury apart from the arthritis in the hip joint. Relying on a medical opinion which noted that the cartilage was worn off the femur and that the femoral head was elongated with spurs and bone cysts, the Board held that the claimant suffered a leg (schedule) injury. The circuit court upheld the ALJ's finding. In doing so it noted that the first diagnosis was a hip sprain, which is a "joint injury," and that all subsequent medical documents characterized the claimant's injury as right hip arthritis. The circuit court found substantial evidence to support the ALJ's findings.

[Topic 8.3.1 Permanent Partial Disability--Scheduled Awards—Some General Concepts]

C. Federal District Courts and Bankruptcy Courts

D. Benefits Review Board

M.T. v. Universal Maritime Service Corp., (Unpublished) (BRB No. 07-0766)(Feb. 29, 2008).

For the second month in a row the Board has struck down a settlement agreement involving Signal Mutual. *See J.H. v. Oceanic Stevedoring Co*., ___ BRBS ___, BRB No. 07-0430 (Jan. 31, 2008) reported in the January Digest. In the instant case the parties agreed that the employer would pay the claimant $25,000 to resolve all issues related to the claimant's shoulder injury, $5,000 of which was for future medical expenses. (Also agreed to was a $5,000 attorney fee.) In addition, $20,000 of the settlement "shall be designated as a credit toward any compensation benefits owed" if the claimant was to strain, sprain, or re-injure his right shoulder or neck while working for any of the members of the Signal Mutual Indemnity group during the 30 months following the approval of the agreement. The ALJ approved the settlement agreement and the Director appealed stating that it violated Section 8(i) and Section 702.241(g) of the regulations because it affects the rights of the parties and claims not yet in existence and gives rise to an extra-statutory credit. The employer disputed this contention and argued that the settlement merely prevented the claimant from obtaining a double recovery should he re-injure his shoulder.

In vacating the settlement, the Board compared this case to that of *J.H.* "Although the credit provision here differs from the one in J.H. in that it limits the type of injuries to which the credit applies and it sets an expiration date for application of the credit, it nevertheless applies by its very terms to potential future injuries not in existence at the time of the settlement and it limits claimant's right to a full recovery should he sustain an additional injury. Moreover, similar to the provision in *J.H*., it names other Signal Mutual members as potential beneficiaries of the credit. Thus, the settlement is not limited to the rights of the parties and the claims then in existence. In addition, the credit provision in the settlement attempts to expand the credit doctrine beyond its currently accepted application."

Additionally, the Board also noted that "[I]f the $20,000 credit is taken, and the $5,000 payment for medical benefits is subtracted from the $25,000 settlement recovery, employer would ultimately pay no compensation toward claimant's current disability. Thus, the settlement amount would be zero and would be inadequate, warranting a rejection of the settlement under Section 8(i)."

[Topic 8.10.1 Section 8(i) Settlements--Generally]

E. ALJ Opinions

F. Other Jurisdictions

McElheney v. Workers' Compensation Appeal Board (Kvaerner Philadelphia Shipyard), 940 A.2d 351 (S. Ct. Penn. Feb. 19, 2008).

Where a pipe fitter welder claimant was not injured over navigable water, the LHWCA did not have exclusive jurisdiction. Here the claimant worked on a ship in a graven dry dock performing traditional maritime work. A graven dry dock by definition is cut and dug out of the land. The periodic and artificial flooding of the dry dock was insufficient to change the site and render it exclusively within the LHWCA. The court distinguished this from a floating dry dock wherein the LHWCA has exclusive jurisdiction.

[Topics 85.3 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies, Federal/State Conflicts; Acceptance of Payments Under State Act]

II. Black Lung Benefits Act

Benefits Review Board

By unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), the Board held that legal pneumoconiosis was not demonstrated where the physician diagnosed silico-tuberculosis, but failed to attribute it to coal dust exposure. While the administrative law judge correctly noted that silico-tuberculosis was among the possible forms of legal pneumoconiosis under the regulations, a physician must attribute it to coal dust exposure or the administrative law judge will be considered to have "impermissibly shift() the burden of proof in requiring employer to rule out the presence of legal pneumoconiosis."

In addition, the Board remanded the claim for reconsideration of evidence pertaining to the existence of complicated pneumoconiosis. Specifically, the administrative law judge accorded greater weight to a positive x-ray interpretation of complicated pneumoconiosis by Dr. Patel on grounds that it was supported by Dr. Groten's CT-scan interpretation. The Board held that:

> . . . the administrative law judge engaged in circular reasoning by crediting Dr. Groten's CT scan interpretations, despite Dr. Groten's failure to set forth either an equivalency analysis or the dimensions of any large opacities observed . . ..

Slip op. at 4.

[**legal pneumoconiosis, defined; complicated pneumoconiosis and CT-scans**]

By unpublished decision in *Lester v. Royalty Smokeless Coal Co.*, BRB Nos. 06-0640 BLA and 06-0640 BLA-A (Mar. 27, 2007) (unpub.), the Board held that it is proper to apply collateral estoppel regarding the issue of pneumoconiosis where the miner's claim was awarded under regulations in effect prior to 2000, but the survivor's claim was filed after January 19, 2001 such the evidentiary limitations at 20 C.F.R. § 725.414 (2001) were in effect. In footnote 6 of its opinion, the Board stated:

> As noted by the administrative law judge, there were changes in the law since Judge Brenner's decision in the living miner's claim, based on the new regulations that became effective on January 19, 2001. (reference omitted). However, contrary to the administrative law judge's finding, the new evidentiary limitations at 20 C.F.R. § 725.414, and the amendment to the definition of pneumoconiosis at 20 C.F.R. § 718.201, did not change the method of proving pneumoconiosis under 20 C.F.R. § 718.202(a)(1)-(4).

Slip op. at 6, fn. 6.

[**collateral estoppel, application of**]