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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 227 November 2010

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

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

***Roberts v. Director, OWCP*, __ F.3d __, 2010 WL 4483972 (9th Cir. 2010).**

The Ninth Circuit held that for purposes of determining which fiscal year's national average weekly wage ("NAWW") to apply in calculating maximum compensation rate under Section 6(c) of the LHWCA, (1) an employee is "newly awarded compensation" within the meaning of § 6(c) when he first becomes entitled to compensation, *i.e.*, when he becomes disabled, not when the ALJ issues his formal compensation order; and (2) claimant was "currently receiving compensation for permanent total disability" within the meaning of § 6(c) when he was entitled to receive benefits, irrespective of whether benefits were paid by employer.

Claimant sustained an injury on 2/24/02. The ALJ determined that her disability was temporary total ("TTD") from 3/11/02 to 7/11/05; permanent total ("PTD") from 7/12/05 to 10/9/05; and permanent partial ("PPD") beginning on 10/10/05. For all periods of disability, the ALJ applied the maximum compensation rate for the fiscal year 2002. On reconsideration,

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

the ALJ changed the rate for the PTD for the period 10/1/05-10/9/05 to reflect the maximum rate for fiscal year 2006. The Board affirmed.

The Ninth Circuit observed that § 6(c) provides that "[d]eterminations [of the NAWW] with respect to a period shall apply to employees ... currently receiving compensation for permanent total disability ... during such period, as well as those newly awarded compensation during such period." First, agreeing with the ALJ and the Board, the court held that "newly awarded compensation" in § 6(c) means "newly entitled to compensation." As claimant first became disabled in 2002, the ALJ properly applied the 2002 fiscal year maximum to her compensation for TTD and PPD. The court rejected claimant's argument that she was not "newly awarded compensation" until the ALJ issued his award in 2007. The court reasoned that its interpretation of the term "awarded" as used in § 6 is consistent with the use of that term in §§ 8 and 10 to refer to employee's entitlement to compensation, irrespective of a formal order. Further, the express limitation of the term "award" in § 33 to refer only to formal orders implies a broader meaning of that term in other sections. Looking to the year when a disability first arises is also consistent with the Act's pattern of basing calculations on the time of injury (e.g., for AWW and WEC). The court found unpersuasive the Fifth Circuit's decision in *Wilkerson v. Ingalls Shipbuilding, Inc.,* 125 F.3d 904, 906 (5th Cir.1997)(holding that an employee is "newly awarded compensation" at the time of a formal compensation order), stating that *Wilkerson* resolved the issue summarily. Further, claimant's proposed construction would potentially lead to inequitable results, as two claimants injured on the same day could be entitled to different amounts of compensation depending on when their awards are entered. The court rejected claimant's assertion that this would encourage employers to expedite administrative proceedings, noting that § 14 of the Act already provides penalties for delay by an employer.

Turning next to the issue of the maximum rate for claimant's total disability, the Ninth Circuit

> "construe[d] section 6(c)'s reference to the period 'during' which an employee is 'currently receiving compensation for permanent total disability' to mean the period during which an employee is *entitled* to receive such compensation, regardless of whether his employer actually pays it. By doing so, we render interpretation of section 6(c)'s 'newly awarded' and 'currently receiving' clauses consistent: Under both clauses, the inquiry into the applicable maximum rate focuses on an employee's *entitlement* to compensation."

Slip. op. at *4 (italics in original).

The court reasoned that the LHWCA obligates employers to pay compensation regardless of whether a claim is filed and expects employees entitled to compensation to receive payment during their period of disability. Here, since claimant was entitled to receive compensation for PTD during the period between 7/12/05 and 9/30/05, he was "currently receiving compensation for [PTD] ... during such period" for purposes of § 6(c), even though his employer did not actually pay the benefits. Thus, the ALJ erred by applying the NAWW for the fiscal year 2002, rather than fiscal year 2005, in calculating the maximum rate for this period; the ALJ properly concluded that the NAWW for the fiscal year 2006 governs the maximum rate for claimant's PTD from 10/1/05 to 10/9/05.[2]

[Topic 6.2.3 COMMENCEMENT OF COMPENSATION – Determining the National Average Weekly Wage]

***Great Southern Oil and Gas Co. v. Director, OWCP*, 2010 WL 4643248 (5th Cir. 2010)(unpub.)**

Agreeing with the Board and the Director, OWCP, the Fifth Circuit held that a claimant who was injured while working as a mechanic on a work-over rig mounted on a barge which was spudded at an oil well location in Louisiana state waters, was injured while working on a vessel in navigable waters, and thus met the "status" requirement of the LHWCA, without having to establish that he was engaged in traditional maritime employment.

Claimant had been working on the barge for 4-5 days before the accident, and was told that he could expect to remain on the barge for months or possibly years. Prior to this assignment, he had performed analogous work on work-over rigs on land. The ALJ concluded that claimant was not a covered employee under the LHWCA because the barge was a fixed platform and not a vessel and claimant was not engaged in a traditional maritime activity. The Board reversed.

The Fifth Circuit upheld the Board's determination that claimant was injured on navigable waters in the course of his employment on such waters and, therefore, was a covered employee, without having to establish that he was engaged in traditional maritime work described in § 2(3), citing *Director v. Perini North River Associates*, 459 U.S. 297, 306-07 (1983), and *Bienvenue v. Texaco, Inc.*, 164 F.3d 901, 906-907 (5th Cir. 1999). The

[2] Section 3(b)(3) directs that the NAWW with respect to each new fiscal year take effect on October 1.

court reasoned that it had previously recognized that a barge of the exact configuration of the barge in this case was a vessel and that the employee permanently assigned to that barge was a seaman. *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998). The court rejected as immaterial employer's contention that claimant lacked status because oilfield work does not qualify as maritime employment under *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), as that case addressed the status of workers injured on stationary platforms and not on vessels. The court also rejected employer's argument that claimant's presence on navigable waters at the time of his injury was transient or fortuitous, as the contrary determination was supported by substantial evidence. The court declined to consider employer's argument that claimant was a member of a crew of the barge and thus excluded from coverage under § 2(3)(G), as it was never raised before the ALJ.

[Topic 1.7.1 JURISDICTION/COVERAGE – STATUS – "Maritime Worker" ("Maritime Employment"); Topic 1.6.1 JURISDICTION/COVERAGE - SITUS - "Over water;" Topic 1.4.3 JURISDICTION/COVERAGE - LHWCA v. JONES ACT - "Vessel;" Topic 2.21 DEFINITIONS – SECTION 2(21) VESSEL]

B. U.S. District Courts

***Graf v. Inglett & Stubbs Int'l*, 2010 WL 4810240 (N.D.Ga. 2010)(unpub.).**

The district court dismissed various negligence-based tort claims arising from plaintiff's employment as a journeyman electrician for defendant in Afghanistan, on the ground that the Defense Base Act ("DBA") provides the exclusive remedy and the worker's DBA claim had been resolved before the DOL. *See Ross v. DynCorp,* 362 F.Supp.2d 344 (D.D.C.2005). The court noted that it was unclear whether plaintiffs' intentional infliction of emotional distress claim, alleging pretextual termination, would be barred by the exclusivity of the DBA; however, the court dismissed this claim as it had been adjudicated through a union grievance process. The court further imposed limited Rule 11 sanctions on claimant's counsel, finding the claims to be baseless and noting counsel's lack of good faith effort to resolve them.

[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy]

***Mayo v. Halliburton Co.*, 2010 WL 4366908 (S.D.Tex. 2010)(unpub.).**[3]

Plaintiff filed various tort and contract claims arising out of her employment with Service Employees International, Inc. ("SEII") in Iraq, alleging that during her employment a sub-contract worker for Kellogg Brown & Root ("KBR") broke into her room, then beat and raped her. Defendants maintained, *inter alia*, that plaintiff's state law claims are barred by the DBA. Pertinent to this review, the district court stayed plaintiff's negligence and fraud claims pending decision by the Fifth Circuit interpreting the relevant portion of the DBA.
See Fisher v. Halliburton, 703 F.Supp.2d 639, 665 (S.D.Tex.2010), appeal filed, No. 10-20202 (Mar. 26, 2010), pet. for permission to file appeal filed, No. 10-11 (Apr. 5, 2010), reconsideration denied, 2005 WL 2196268 (S.D.Tex. May 27, 2010). The court observed that, while the DBA is silent as to what qualifies as an "injury" under the act, the LHWCA defines "injury" as follows:

> "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

33 U.S.C. § 902(2) (emphasis added). The court stated that the extent to which "arising out of and in the course of employment" differs from "because of employment" is the issue currently pending before the Fifth Circuit in *Fisher*, *supra*. In *Fisher*, the Southern District Court of Texas stayed its own proceedings and certified, *sua sponte*, an interlocutory appeal to the Fifth Circuit on the following issues:

> Whether the DBA covers only accidents, how to define an accident under the act, whether the willful act of a third party should be narrowly or broadly construed, or if all the foregoing

[3] This decision was issued on 10/26/10.

> inquiries should be subsumed in an intentional tort exception, the scope of which must also be determined without regard to the facts of the instant case.

Fisher, *supra* at 665.

[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 2.2.3 Injury (fact of)]

***Smith v. Marine Terminals of Arkansas, Inc.*, 2010 WL 4789167 (E.D. Ark. 2010)(unpub.).**

Relevant to this review, in granting a summary judgment for Marine Terminal on Smith's Jones Act claim, the court concluded that plaintiff whose primary duties consisted of hauling by truck iron and steel from a dock barge to a scrap yard was not a "seaman," as his duties were not of a seagoing nature but rather land based and, therefore, were not substantially connected to the dock barge in nature.

Smith worked for Marine Terminals driving 50-90 ton trucks, hauling loose iron or steel from a dock barge owned by Marine Terminals to a scrap yard owned by Nucor Corporation. The dock barge was a floating dock near the riverbank connected to land by suspension cables and a ramp. Smith would back the truck down the ramp onto the dock barge where a crane operator would transfer iron or steel from river barges to the truck using a hydraulic crane fitted with a clamshell bucket; sometimes he also assisted in unloading barges from the floating dock. He was injured when the clamshell bucket closed on his hand.

The court observed that several cases support the proposition that for a worker to be deemed a "seaman," his duties must be of a seagoing nature or expose him to the perils of the sea, and noted that this case law comports with the language in *Chandris, Inc. v. Latsis,* 515 U.S. 347, 368 (1995)(stating that the purpose of the substantial connection requirement is to separate maritime employees from land-based workers "whose employment does not regularly expose them to the perils of the sea.") Similarly, in *In re Endeavor Marine Inc.,* 234 F.3d 287, 291 (5th Cir.2000), the Fifth Circuit noted the need to show regular exposure to the perils of the sea. The court noted, but chose not to rely upon, decisions by the Southern District of Iowa holding that workers employed on a river boat casino were "seamen." The court stressed that both the Supreme Court and the Fifth

Circuit have instructed the courts to focus on "the essence of what it means to be a seaman" and "the congressional purpose" in enacting the Jones Act," rather than on tests that "tend to become ends in and of themselves." *Chandris,* 515 U.S. at 369. In this case, apart from "tests that tend to become ends in and of themselves," no reasonable person would classify Smith's job as that of a seaman. He was a land-based worker whose primary job was driving a truck and who also assisted in unloading barges from a floating dock. He was therefore a truck driver and a longshoreman.[4] He faced the perils of a truck driver and a dock worker, not those of a seaman. Stretching the judicially created tests to classify his job as that of a seaman would not effectuate congressional intent in enacting the Jones Act.

[Topic 1.4.2 LHWCA v. JONES ACT – Master/member of the Crew (seaman)]

C. Benefits Review Board

***Gelinas v. Electric Boat Corp.*, __ BRBS __ (2010).**

In upholding the ALJ's grant of a summary decision for employer, the Board affirmed the ALJ's determination that claimant lacked Section 2(3) status because her duties as an occupational health nurse for employer were not integral to employer's shipbuilding process, where claimant had presented no evidence that her failure to perform her nursing duties would disrupt employer's shipbuilding activities.[5] Claimant's work involved treating injured employees in employer's medical clinic; responding to ambulance calls in the shipyard; performing physical examinations, audiograms and EKGs; stocking RADCON (radiological control) supplies; and participating in RADCON training drills. She was employed in this capacity from 1974 until her retirement in 2007, and sought benefits under the Act for a work-related, noise-induced hearing loss.

The Board initially quoted the Supreme Court pronouncements *Chesapeake & Ohio Ry. Co. v. Schwalb* that employees "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act," and that "it has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-

[4] The court noted that "[t]he job of longshoremen is to load and unload vessels," citing Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-10 (4th ed.2004).

[5] The ALJ found that the facts relevant to the issue of coverage were undisputed; and claimant did not appeal the ALJ's findings of fact.

based activity . . . will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. 40, 45-47, 23 BRBS 96, 98-99(CRT)(1989); *see P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 82, 11 BRBS 320, 328 (1979). After discussing relevant circuit and Board decisions,[6] the Board concluded that

> "as claimant has presented no evidence that could support a finding that the failure to perform her duties as a nurse would disrupt employer's shipbuilding operations, the [ALJ] properly found that, like the claimants in *Ellis, Buck*, and *Gonzalez,* claimant's job was not such that her failure to perform it would have impeded employer's shipbuilding activities. *See Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT); *Rock,* 953 F.2d 56, 25 BRBS 112(CRT); *Coloma,* 897 F.2d 394, 23 BRBS 136(CRT); *Ellis,* 42 BRBS 35; *Gonzalez,* 33 BRBS 146. As Congress did not seek to cover all those who breathe salt air[,]" *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 17 BRBS 78, 82(CRT) (1985), employees who are on a shipyard site but do not perform duties essential to the shipbuilding process are not covered by the Act. The [ALJ] properly applied the applicable law to the undisputed facts in this case. As these facts establish that claimant's work as a nurse was not integral to the shipbuilding process, we affirm the [ALJ's] finding that claimant was not a maritime employee pursuant to Section 2(3) and the resultant determination that employer is entitled to summary decision as a matter of law. *Buck,* 37 BRBS 53*."*

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[6] *I.e.*, *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992)(pursuant to *Schwalb*, courtesy van driver at a marine terminal lacked "status;" claimant's duties were helpful, but not indispensable to the loading process); *see also Coloma v. Dir., OWCP*, 897 F.2d 394, 400, 23 BRBS 136, 142(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990)(pursuant to *Schwalb,* duties of a messman/cook at a wharf not essential to the loading process; longshoring operations continued uninterrupted when the mess hall was closed down); *B.E. [Ellis] v. Electric Boat Corp.,* 42 BRBS 35 (2008)(affirming the ALJ's finding that a janitor who cleaned offices, bathrooms and the cafeteria in a shipyard, was not a covered employee under § 2(3)); *Gonzalez v. Merchants Building Maint.,* 33 BRBS 146 (1999)(affirming the ALJ's finding that the duties of a janitor who cleaned restrooms in a shipyard and onboard ships were not integral to shipbuilding operations as the maintenance duties did not involve any equipment used in the shipbuilding process, and thus claimant lacked § 2(3) status); *Buck v. Gen. Dynamics Corp.*, 37 BRBS 53, 57 (2003)(affirming the ALJ's determinations that workers' compensation claims adjusters lacked § 2(3) status, as their jobs were not integral to shipbuilding in that claimants' failure to perform their jobs would not impede the shipbuilding process).

Slip. op. at 4. The ALJ properly found that, similar to *Buck*, while claimant's duties were undoubtedly useful to employer in providing medical care for injured employees and performing pre-employment medical evaluations, claimant's duties were not integral to the shipbuilding process. *Id.* at 3.

[Topic 1.7.1 STATUS - "Maritime Worker" ("Maritime Employment")]

***Kay v. Fugro Geosciences, Inc.*, __ BRBS __ (2010).**

The Board affirmed the ALJ's denial of death benefits to decedent's live-in fiancée under Sections 9(b) and (d) of the Act, as well as the ALJ's denial of additional death benefits to decedent's dependent child under Section 9(c).

At the time of his death, decedent was living in Louisiana with his fiancée, Linda Kay Welch, their child, Daylon Boswell, and with Ms. Welch's child from a prior relationship, Kyler Welch. Decedent also had an ex-wife with whom he had one child, Brandon Boswell. Employer voluntarily paid death benefits to decedent's three children under § 9. A lawsuit was then filed in a state court on behalf of the three children pursuant to the Jones Act and general maritime law. Thereafter, an ALJ issued a decision withholding any further payment of death benefits pursuant to the LHWCA, pending a determination in Louisiana state court as to decedent's status as either a longshoreman under the LHWCA or seaman under the Jones Act. Employer eventually settled the tort suits with Brandon and Daylon Boswell. With respect to Brandon's claim, the parties filed a § 8(i) settlement application, which outlined the terms of the state court tort settlement, in order "to foreclose any and all future claims for compensation under the [Act]," and acknowledged that the net sum he received was in excess of the greatest amount he could receive under the Act. Similarly, the parties stipulated that the net recovery received by Daylon was in excess of the greatest amount which he could receive under the Act. Carrier then sought, pursuant to § 33(f) of the LHWCA, a credit in the amount of the third-party recoveries against its liability for any additional compensation under the Act. Carrier's § 33(f) claim was settled with Daylon Boswell, who returned to carrier $250,118.06 in payments previously made to him under the Act. After the court had determined that decedent was a longshoreman at the time of his death, Kyler Welch received from employer an additional amount in death benefits, interest, and assessments under the Act. Linda and Kyler Welch thereafter continued pursuit of their claims for death benefits at issue in this case.

Widow/Other Dependent

Decedent's fiancée, Linda Welch, sought death benefits as a "widow" under § 9(b), or alternatively, as an "other dependent" pursuant to § 9(d). Addressing first her § 9(b) claim, the Board stated that the definition of "widow or widower" in § 2(16) requires one to be either a "wife" or "husband" of the decedent. Because the Act does not define "marriage," the issue of whether a marriage existed at the time of decedent's death is controlled by state law.[7] As claimant and decedent did not participate in a marriage ceremony, a prerequisite for a valid marriage contract in Louisiana, claimant was not decedent's wife at the time of his death for purposes of § 9(b) and thus was not entitled to death benefits under § 9(b).[8]

Next, in affirming the ALJ's determination that decedent's fiancee was not entitled to death benefits as an "other dependent" under § 9(d), the Board concluded that substantial evidence supported the ALJ's determination that claimant was not decedent's "dependent" under the definition of this term in Section 152 of the Internal Revenue Code, expressly incorporated into § 9(d).[9] The Board concluded that, to satisfy the Section 152(a) definition, "an individual must have received over one-half of her support from the taxpayer and have resided with the taxpayer," and thus the dependency issue in this case centered on whether over half of claimant's support came from decedent in the year preceding his death. Slip. op. at 4 (emphasis in original). The Board noted its prior holdings that claimant's testimony regarding decedent's level of financial support may constitute sufficient evidence of dependency, and there is no requirement under the Act or § 152 of the Tax Code that a claimant substantiate her testimony with documentation. Here, however, the record lacked any statements by claimant,[10] or documentation, showing that decedent paid

[7] The Board noted that although there is federal law relating to marriage, it does not define marriage for these purposes. *See* 1 U.S.C. §7; 28 U.S.C. §1738C.

[8] The parties conceded that common law marriages are not recognized in Louisiana.

[9] The Board rejected claimant's reliance on a line of Louisiana state cases beginning with *Henderson v. Travelers*, 354 S.2d 1031 (La. 1978), noting that that case concerned whether decedent's common law spouse could receive benefits not as a "widow" but rather as an "other dependent" under the Louisiana workers' compensation law. Thus, *Henderson* does not stand for the proposition that a common law spouse is entitled to state worker's compensation benefits as the decedent's "wife;" nor does Louisiana recognize common law marriage. Further, unlike § 9(d), the state provision at issue in *Henderson* did not reference the definition of "dependent" § in 152 of the Tax Code.

over half of their expenses, and claimant's other testimony supported the ALJ's finding.

Child

Claimant Kyler Welch argued on appeal that he is entitled to additional death benefits under § 9(c),[11] based on the ALJ's determination that there was no "widow" and further based on his being the only child still entitled to benefits, the others having settled their claims. The Board concluded that claimant's assertion, that he is entitled to death benefits at the rate of 50 percent of decedent's wages from the date of death through the date he turns 23 years old, was not consistent with the Act. Decedent left three dependent children at the time of his death, each of whom was entitled to one-third of 66 2/3 of decedent's AWW at the time of his death as prescribed by § 9(c). The fact that the other claimants settled their claims does not alter this formula. When employer, as vessel owner, entered into third-party settlements with decedent's other children for the specific purpose of having them "forever forgo any claim under the Act," it was not required to increase the payment of the death benefit due under § 9(c) to another eligible claimant, Kyle Welch, who was not involved in the settlement. Slip. op. at 5. The Board reasoned that § 9 states that there is to be one death benefit; and, therefore, employer has settled the portion of the single death benefit attributable to the other children, and the settlement replaces the benefits due by way of a § 33(f) credit.[12] *Id.*

The Board also rejected Kyler Welch's contention that his benefits should be calculated based on the "maximum" compensation rate, stating that § 9(e) provides that death benefits are to be based on decedent's AWW at the time of death, not to exceed 200 percent of the NAWW. Further, the ALJ properly found that Kyler did not establish entitlement to death benefits until age of 23, as he was past the age of 18 and no longer a fulltime student. Moreover, as he had already received total death benefits in excess of his asserted entitlement, employer was entitled to a § 14(j) credit for the

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[10] Claimant merely responded "yes" to the question as to whether she relied on decedent for support at the time of death.

[11] Employer conceded that Kyler satisfied the definition of "child" in § 2(14), as decedent stood *in loco parentis* in relation to him. Section 9(c) of the Act provides for the payment of compensation for death of an employee to a child or children of the deceased employee where there is no surviving spouse, and establishes that children of decedent shall share in equal parts of 66 2/3 percent of decedent's average wage, unless there is only one child, in which case he/she receives 50 percent of such wage.

[12] To the extent employer settled the Jones Act suit, it was entitled to a § 3(e) credit.

advance payments of compensation it made to Kyler in excess of any additional death benefits he sought.[13]

[Topic 9.3.1 COMPENSATION FOR DEATH - SURVIVORS - Spouse and Child; Topic 9.3.2 COMPENSATION FOR DEATH - SURVIVORS – Amounts of Compensation Payable; Topic 9.3.5 COMPENSATION FOR DEATH - SURVIVORS - Surviving Children/No Surviving Spouse; Topic 9.3.6 COMPENSATION FOR DEATH - SURVIVORS – 9.3.6 Payments to Other Dependents; 14.5 PAYMENT OF COMPENSATION - EMPLOYER CREDIT FOR PRIOR PAYMENTS; Topic 33.6 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE - EMPLOYER CREDIT FOR NET RECOVERY BY "PERSON ENTITLED TO COMPENSATION"]

[13] The ALJ erred in finding that employer was entitled to a § 33(f) credit for the settlements it reached with Brandon and Daylon Boswell against any additional compensation owed to Kyler Welch, because no part of those settlements was apportioned to him. The ALJ's reference to employer's entitlement to a § 33(f) credit for the overpayment made to Kyler was also incorrect. However, this error was harmless, as employer was entitled to a § 14(j) credit.

II. Black Lung Benefits Act

Benefits Review Board

As a reminder, several months ago, the Board issued companion published decisions in *Bowman v. Bowman Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0320 BLA (Apr. 15, 2010) (governed by Fourth Circuit case law) and *Maggard v. International Coal Group, Knott County, LLC*, 24 B.L.R. 1-__, BRB No. 09-0271 BLA (Apr. 15, 2010) (governed by Sixth Circuit case law), allowing Claimant's counsel, Joseph Wolfe, 30 days in which to submit amended fee petitions. In particular, the Board stated that counsel did not present evidence sufficient to support a finding that his hourly rate was the "market rate". The Board noted:

> Although claimant's counsel identifies the hourly rates that he seeks in this case, claimant's counsel has failed to make any declaration regarding the normal hourly rates that its lawyers seek for cases similar to this one. At a minimum, this defect must be cured before the Board addresses counsel's fee petition.

Bowman, slip op. at 4; *Maggard*, slip op. at 4. Further, in *Maggard*, the Board held that, if work is performed by a "legal assistant", then the "normal billing rate" of the legal assistant must be set forth in a declaration.

The Board found that counsel had not "provided sufficient information relevant to the market rate for services in the geographic jurisdiction of the litigation." *Bowman*, slip op. at 5; *Maggard*, slip op. at 4. According to the Board, counsel relied "exclusively upon a 2006 Altman Weil 'Survey of Law Firm Economics' to justify his requested hourly rates." *Bowman*, slip op. at 5; *Maggard*, slip op. at 4. However, in both cases, the Board stated:

> [B]ecause the survey alone does not provide sufficient information for the Board to determine that the listed rates are for similar services as those provided by claimant's counsel's firm, it is of little assistance in determining the prevailing market rate. (citations omitted).
>
> In addressing the difficulty of determining a reasonable hourly rate, claimant's counsel states that he knows of 'no other firms in Virginia and very few across the nation taking new [federal black lung] cases. (citation omitted).

Bowman, slip op. at 5; *Maggard*, slip op. at 5. In both cases, the Board suggested that "[h]ourly rates charged by similarly situated attorneys in Kentucky may assist in establishing a market rate." *Bowman*, slip op. at 5; *Maggard*, slip op. at 5.

The Board stated that "the goal is to establish a market rate paid by paying clients in the requesting attorneys' geographic area." *Bowman*, slip op. at 5-6; *Maggard*, slip op. at 5. It determined:

> [I]n order to be entitled to a rate claimed, it is claimant's counsel's burden to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. (citation omitted).

Bowman, slip op. at 6; *Maggard*, slip op. at 6.

On November 8, 2010, the Board considered counsel's amended fee petition and issued a three page published order in *Maggard v. International Coal Group, Knott County, LLC*, 24 B.L.R. 1-__, BRB No. 09-0271 BLA (Nov. 8, 2010) approving counsel's request for fees in the amount of $975.00, which was comprised of 3.25 hours of services at $300.00 per hour. The Board stated the following:

> We . . . reject employer's contention that claimant's counsel has not provided sufficient information relevant to the applicable market rate. In his amended fee petition, claimant's counsel provides an extensive list of black lung cases from 2006 to 2008, in which he was awarded an hourly rate of $300.00. In *Cox*, the United States Court of Appeals for the Fourth Circuit recognized that evidence of fees received in the past is an appropriate method of establishing a market rate. *Cox*, 602 F.3d at 290. In support of his requested hourly rate, claimant's counsel also provides evidence of his expertise and experience in the field of black lung litigation. (citations omitted). We, therefore, find that claimant's counsel has provided sufficient evidence of a market rate in his geographic area for an attorney of his expertise and experience, for appellate work before the Board.

Slip op. at 2. On the other hand, the Board found that counsel "failed to identify the training, education, and experience of his legal assistants" such that the fee amount requested for their services was disallowed.

[**representative's fees, establishing the "market rate" of**]