U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 153
May 2001 - June 2001

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

Norfolk Shipbuilding & Drydock Corp. v. Garris, ___ U.S. ___ (2001) (U.S. No. 00-346)(June 4, 2001).

The Court noted that the LHWCA provides a non-seaman maritime worker, like the decedent in the instant case, a no-fault workers compensation claim against his employer [§ 2(3)], and negligence claims against the vessel [§ 905(b)], whether for death or injury. Referencing Section 33 of the LHWCA, the Court further noted that the LHWCA expressly preserves all claims against third parties. In the instant case, the petitioner is a third party: It neither employed the decedent nor owned the vessel on which he was killed.

Also significant, the Court noted that it has consistently interpreted Section 33 to preserve federal maritime claims and not reserve wrongful-death actions to the States, as petitioners sought to argue here. Specifically, the Court stated, "We do not find, as petitioner does, an anti-maritime-wrongful-death policy implicit in the amendment to 905(b)."

[Topics 5.2.1 Third Party Liability: 33.1 Claimant's Ability to Bring Suit Against a Potentially Negligent Third Party]

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, ___ U.S. ___, (2001)(U.S. No. 99-1848)(May 29, 2001).

[ED. NOTE: This is not a LHWCA case, but merits coverage nevertheless.**]**

Petitioners requested attorney fees as the prevailing party under the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disability Act of 1990 ((ADA), basing their entitlement on the "catalyst theory," which posits that a plaintiff is a prevailing party

if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. The Court held that the catalyst theory is not a permissible basis for the award of attorneys fees under the FHAA and ADA since it allows an award where there is no judicially sanctioned change in the parties legal relationship. The Court found that while a defendant's voluntary change in conduct may accomplish what a plaintiff sought to achieve by suit, it lacks the necessary judicial imprimatur on the change.

[Topic 28.1.2 Attorney fees–Successful Prosecution]

B. Circuit Courts of Appeals

[ED. NOTE: For a significant circuit court decision addressing the weighing of medical/scientific evidence, conflicts among expert opinions, and attorney fees, see *Peabody Coal Co. v. McCandles*, ___ F.3d ___, (7th Cir. 2001)((nos. 95-3291, 00-1449 & 00-2788), annotated in the Black Lung section of this issue of the Digest. While this is a Black Lung decision, its holding is pertinent in the Longshore arena as well.**]**

[Topics 23.5 ALJ Can Accept or Reject Medical Testimony; 23.7 ALJ May Draw Inferences Based on Evidence Presented; 28.6 Attorney Fees–Factors Considered in Award]

Sorchini v. City of Covina, ___ F.3d ___ (9th Cir. 2001)(No. 99-56257)(May 4, 2001).

[ED. NOTE: This non-LHWCA case is included for general edification as to the Ninth Circuit's position on citing unpublished cases in that circuit.**]**

Unpublished dispositions are neither persuasive nor controlling authority. The limited exceptions to the non-citation rule contained in Ninth Circuit Rule 36-3 permit the citation to an unpublished disposition where the very existence of the prior case is relevant as a factual matter to the case being briefed.

[Topic 21.4.2 Review of Compensation Order–Appeal to Court of Appeals]

Newport News Shipbuilding & Dry Dock Company v. Stallings, ___ F.3d ___, (4th Cir. 2001)(No. 00-1154)(May 23, 2001).

The Fourth Circuit held that a small disability award that reflects an actual loss in wage earning capacity does not preclude an employer from seeking relief under Section 8(f) of the LHWCA. The court distinguished this case from one in which the award was "nominal" (A "nominal" disability award is a "mechanism for taking future effects of disability into account

when present wage-earning ability remains undiminished."*Rambo II*, 521 U.S. at 136). The Director had argued that the award of $3.78 per week was so "utterly insubstantial, that for Section 8(f) purposes it should be treated the same as are nominal awards. The Board had accepted the Director's argument and had specifically held that because the award was so small, the "employer would be legally unable to establish that claimant's disability is not due solely to the work injury, and is, in fact,'materially and substantially greater' than that caused by the last injury alone." In vacating the Board, the Fourth Circuit recognized that the $3.78 per week is insubstantial and that the claimant's disability does not greatly affect his wage-earning capacity. Nevertheless, the court noted that the small size of the award does not answer the statutory question of whether the claimant's current disability is "materially and substantially" greater than the kind of disability he would be facing if he had only metal fume fever and did not suffer from COPD and Hypertension. Important to the court was the fact that Employer had been ordered to pay compensation calculated on the basis of an actual loss in wage-earning capacity, to an employee with a permanent partial disability.

[Topics 8.7.6 Special Fund Relief–Disability Must Be Materially and Substantially Greater; 8.2.2 De Minimis Awards]

Garcia v. Amfels, Inc., ___ F.3d ___ (5th Cir. 2001)(No. 00-41037)(June 19, 2001).

The LHWCA does not provide a basis for federal [question] jurisdiction when raised as a defense. In the instant case, the worker, working in the Amfels shipyard, received an electric shock and died. His dependants filed suit in Texas state court for negligence and premises liability. Employer raised the LHWCA as an affirmative defense, arguing the suit was preempted and removed the matter to federal district court on the basis of federal question jurisdiction. The dependents were successful in having the matter remanded to the state court.

[Topics 1.4.1 LHWCA v. Jones Act; 1.4.6 Jurisdictional Estoppel]

Snowden v. OWCP, ___ F.3d ___ (D.C. Cir. 2001)(No. 00-1318)(June 19, 2001).

Held, the Board lacks jurisdiction to review a supplementary compensation order issued as per Section 18 of the LHWCA, since that order is final when issued, and therefore, unreviewable by the Board. Review of a supplemental order is available only in an enforcement proceeding in federal district court. The instant case goes on to spell out the prime distinctions between Section 18 orders and Section 21 orders: (1) Orders issued under Section 18, unlike Section 21 orders, are not appealable to the Board; (2) Section 18 orders are final when issued, unlike Section 21 orders which do not become final until after 30 days or, if appealable after appeal; and (3) as a result, Section 18 supplementary orders can immediately be filed with the federal district court for enforcement.

[Topics 18.1 Default Payments–Generally; 21.1 Review of Compensation Order–Composition and Authority of BRB]

Newport News Shipbuilding & Dry Dock Co. v. Riley, ___ F.3d ___,(4th Cir. 2001) (4th Cir. 2001)(No. 00-1591)(May 29, 2001)(Motion to publish was granted by the court on June 29, 2001).

Once a claimant presents a prima facie showing of disability, it is the employer's burden to show that there was suitable alternate employment. An employer cannot simply show that a claimant was terminated for cause. Here the employer had the burden of showing that there was suitable alternate employment, either within or without the company.

[Topic 8.2.4 Partial disability/Suitable Alternate Employment]

American Stevedoring v. Marinelli, ___ F.3d ___ (2nd Cir 2001)(No. 00-4180)(April 26, 2001).

The Second Circuit found that (1) a shop steward is entitled to LHWCA benefits since his position does qualify as "maritime employment," and (2) his employment with his employer does not cease upon him becoming a shop steward. The court found that the relevant question was whether Claimant's shop steward duties were integral or essential to Employer's stevedoring operations–operations that were carried out by unionized employees–not whether shop steward duties are integral or essential to stevedoring operations in general. Furthermore, citing *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 (1989), the court further noted that it is irrelevant that Claimant's contribution to the loading process was not always needed.

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

Demette v. Falcon Drilling Co., ___ F.3d ___, (5th Cir. 2001)(No. 00-30165)(June 12, 2001).

This oil exploration indemnity case, on appeal from the federal district court, is principally concerned with defining the phrase "by virtue of," which appears at Section 1333(b) of the Outer Continental Shelf Lands Act (OCSLA). However, it does provide a good general discussion of OCSLA coverage as well as a reference point for LHWCA Sections 905(b) (bars employers from indemnifying the vessel from LHWCA liability) and 905(c)(OCS exemption to LHWCA's current proscription of indemnity agreements under §905(b)).

Here the worker was injured on a jack-up rig while doing casing work. The Fifth Circuit noted that, "[c]asing work is the model case of injuries 'occurring as a result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the material resources ... of the [OCS]. '" The Fifth Circuit noted, "If the injured

employee is entitled to the benefits of the LHWCA "by virtue of" section 1333(b) of the OCSLA, then section 905(c) of the LHWCA states that "any reciprocal indemnity provision between the vessel and the employer is enforceable."

[Topics 5.2.1 Third Party Liability–Generally; 5.2.2 Indemnification; 5.3 Indemnification in OCSLA Claims; 60.3.1 OCSLA–Applicability of the LHWCA]

C. Benefits Review Board

Williams v. Ingalls Shipbuilding, Inc., ___ BRBS ___ (2001)(BRB No. 00-908).

Held, Employer not entitled to a Section 33(g) defense because there was never a "settlement" within the meaning of that section, only a fixed payment under a reorganization plan–similar to a judgment and remittitur. *See Banks v. Chicago Grain Trimmers' Assn.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968)(remittitur is not the equivalent of a mutual agreement among the parties but is "a judicial determination of recoverable damages").

[Topic 33.7 Ensuring Employer's Rights–Written Approval of Settlement]

Logara v. Jackson Engineering Co., ___ BRBS ___ (2001)(BRB No. 00-0887)(June 4, 2001).

Held, a treaty of friendship between Greece and the United States does not act to prevent commutation of benefits to a citizen of Greece under provisions of Section 9(g) (which the Board also found to be constitutional). However, computation of such commutation requires an accounting for future Section 10(f) adjustments.

Also, the doctrine of laches is not applicable where delay in implementing reduction in benefits was beneficial to Claimant.

[Topics 9.3.8 Compensation for Death–Aliens; 10.7.2 Determination of Pay–Annual Increase, Computation Under Section 10(f); Time for Filing Claims–Laches]

Nelson v. Stevedoring Services of America, ___ BRBS ___ (2001)(BRB No. 99-1056)(May 10, 2001).

The instant matter is a reconsideration of the previous decision in this case published at 34 BRBS 91 (2000)(Held: that the purpose of § 8(i)(4) was satisfied as, **prior** to the time that the settlement agreement was entered into by the parties, the Director was provided with the opportunity to defend and in fact conceded, the liability of the Special Fund for permanent partial disability benefits based on an appropriate order, whether entered after a hearing or upon

agreement of the parties.) The Director had agreed that Section 8(f) would apply if the parties reached agreement as to the extent of permanent disability and/or the level of Claimant's loss of wage-earning capacity. The Director presently argues that the agreement was not a stipulation, but rather was a settlement and therefore, employer's settlement of its liability extinguished, as a matter of law, the Special Fund's derivative liability pursuant to Section 8(i)(4).

In re-affirming its original ruling, the Board, here, holds that even if the ALJ's decision was an approval of a settlement [rather than approval of stipulations], "the peculiar facts of this case nevertheless support the [ALJ's] finding that Section 8(f) relief is appropriate." The Board stated:

> "First, as previously discussed in the Board's initial decision, the Director herein explicitly, in writing, conceded employer's entitlement to Section 8(f) relief for any permanent partial disability, in his pre-hearing statement, stating that an appropriate order, whether after a hearing or upon agreement of the parties, could be entered. Thus, the Director gave his specific approval to the parties' resolving this claim by agreement, and nothing in the Director's document restricts this approval to agreements based on stipulations as opposed to one contained in a settlement. In addition, the Director provided this approval prior to the time that the parties entered into their agreement and sought and received approval by the [ALJ]. Section 8(i)(4) prohibits reimbursement from the Special Fund where employer seeks Section 8(f) relief *after* the parties enter into a Section 8(i) settlement. Additionally, the ALJ noted, on reconsideration, that his determination regarding Section 8(f) relief was made independently of his approval of the parties' settlement agreement, and was based on the Director's concession, although he added that a review of the evidence of record further supported employer's entitlement to Section 8(f) relief. Moreover, as the Board held [previously], the purpose of Section 8(i)(4) was satisfied in this case as the Director was provided with, and in fact participated in the case, albeit in a cursory manner, prior to the time the settlement agreement was entered into."

See also, Director, OWCP v. Coos Head Lumber & Plywood Co., 194 F.3d 1032, 33 BRBS 131 (CRT) (9th Cir. 1998).

[Topics 8.7.9.6 Special Fund Relief–The Effect of Settlements and Stipulations; 8.10.9 Section 8(f) Relief]

Ibos v. New Orleans Stevedores, ___ BRBS ___ (2001)(BRB Nos. 00-828 and 00-828A)(May 9, 2001).

In this mesothelioma death case, Employer argued that it was not the responsible employer since the decedent's exposure to asbestos while employed by it "had no causal link to

his disability or death." However, the Board noted that the decedent had no employer subsequent to Employer and thus could only establish that it was not the responsible employer by demonstrating that the decedent's exposure to asbestos while working for Employer did not have the *potential* to cause his disease. The Board stated that the ALJ "properly noted that there is no deminimis standard for exposure to injurious stimuli in order to hold an employer liable under the Act."

As long as decedent's exposure at Employer had the potential to cause mesothelioma, that exposure is considered to be injurious and Employer is responsible for the claim.

As to Employer receiving credit for the settlements that two other prior longshore employers entered into with the decedent, the Board found that the credit doctrine supports Employer's entitlement to a credit since these employers had no legal obligation to contribute to claimant's compensation and any payments made by them could only result in claimant's receiving a double recovery.

[Topics 2.2.16 Occupational Diseases and the Responsible Employer/Carrier; 13.1 Time for Filing of Claims–Starting the Statute of Limitations]

Roberts v. Custom Ship Interiors, ___ BRBS ___ (2001)(BRB No. 00-832)(May 15, 2001).

Held, law of circuit in which injury occurs is applicable. See 33 U.S.C. § 921(c); and, applying interpretation of law in the Fourth Circuit, per diem payments are to be included in wages in calculating average weekly wage. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT)(4th Cir. 1998)("Wages" also include the reasonable value of "any advantage" which is received from employer and is included for purposes of tax withholding.). Claimant could not, however, have both per diem and value of room and board included in such calculation.

[Topics 2.13 Section 2(13) Wages; 10.1.3 Definition of Wages; 21.3.1 Proper Circuit for Appeal]

Brinkley v. Department of the Army/NAF, ___ BRBS ___ (2001)(BRB No. 00-0866)(May 14, 2001).

In a decision dealing solely with attorney fees, the Board: (1) Disallowed an amount claimed by counsel under New Mexico's gross receipts tax. Amounts received as attorney fees are subject to this tax. The Board found that the tax is a part of counsel's overhead suggesting that the billing rate claimed could have been adjusted upward to permit him to pay the tax without diluting his fee; (2) Disallowed both fees and costs incurred in the preparation of an unsuccessful motion for sanctions; and, (3) Disallowed 10 hours claimed by attorney for

familiarizing himself with general provisions of the LHWCA.

[Topics 28.6.1 Attorney Fees–Hourly Rate; 28.6.2 Attorney Fees–Compensable Services; 28.10.1 Attorney Fees--Standard of Review]

Gilliam v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (2001)(BRB Nos. 00-0854 and 00-0854A)(May 16, 2001).

A request for a Section 22 Modification may be in the form of a letter. Claimant's request for modification here is valid because it specifically notes that the party is seeking modification; claims a deteriorating condition and references a claimed disability purportedly in existence at the time that the request was made.

The Board also discussed under what circumstances a claimant is entitled to a "*nominal award*." Here, the ALJ had rationally found that the credible evidence of record did not support a finding that there was a significant possibility that the claimant would sustain future economic harm as a result of his injury. This finding was supported by substantial evidence, i.e., the ALJ found determinative the absence of any direct statement by claimant's doctor attesting to the significant possibility of surgery in the future and the presence in another doctor's written record of a statement approving claimant's decision not to have surgery.

[Topics 22.3.1 Requesting Modification–Determining What Constitutes a Valid Request; 22.3.3 De Minimis Awards]

Sheerer v. Bath Iron Works, ___ BRBS ___ (2001)(BRB No. 00-0778)(May 1, 2001).

In this case of first impression, the Board found that an employee's injury sustained during recreational activity on an employer's premises [playing ping-pong] while on his lunch break is compensable under the LHWCA. Employer's knowledge and acquiescence in the playing of ping-pong in the break room evidenced that the activity had achieved some standing as a custom or practice in the workplace. In the instant case Employer paid for and provided the ping-pong table and equipment, and placed them in the break room. Claimant was injured during a scheduled work break and thus was "on-the-clock" although he did not get paid for the time he was on his break. In so holding, the Board primarily relied on Larson's Workers' Compensation Law §§ 20.00 and 22.00 (2000).

[Topic 2.2.9 Course of Employment]

Weber v. S.C. Loveland Co., ___ BRBS ___ (2001)(BRB Nos. 00-838, 00-838A and 00-838B)(May 17, 2001).

When asked to reverse its prior holding that a worker injured in the port of Kingston, Jamaica has situs, the Board stated its policy of adhering to its initial decision when a case is before it for a second time "unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice." After once again examining cases which extended the LHWCA's coverage to include injuries occurring on the high seas, the Board upheld its prior finding that Claimant's injury occurred on a covered situs. In doing so it noted the "developing case law (Jones Act, Death of the High Seas Act and LHWCA), as well as "the policy concern for providing uniform coverage and protection for American Workers working in foreign waters when all contacts except the site of injury are with the United States.

[Topics 1.5.2 "Navigable Waters,"1.6.1 Situs–"Over water"]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Peabody Coal Co. v. McCandless*, ___ F.3d ___, Case Nos. 95-3291, 00-1449, and 00-2788 (7th Cir. June 29, 2001)[1], the ALJ accorded greater weight to the opinion of an autopsy prosector, who found anthracotic pigment with reactive fibrosis and diagnosed the presence of pneumoconiosis, over the contrary opinions of reviewing pathologists. While the Seventh Circuit held that autopsy evidence was the most probative evidence of the presence of pneumoconiosis, it disagreed with the ALJ's weighing of such evidence and stated the following:

> A scientific dispute must be resolved on scientific grounds, rather than by declaring whoever examines the cadaver dictates the outcome. (citation omitted). If there were a medical reason to believe that visual scrutiny of gross attributes is more reliable than microscopic examination of tissue samples as a way to diagnose pneumoconiosis, then relying on the conclusions of the prosector would be sensible. But neither the ALJ nor the BRB made such a finding. The mine operator contends–and on this record we have no reason to doubt–that examining tissue samples under a microscope and testing them for silica, is the best wasy to diagnose black lung disease. What we have, therefore, is a conflict among physicians based on their analysis of tissue samples. Bockelman's visual examination of the whole lung played little or no role.

The court stated that "[b]ad science is bad science, even if offered by the first expert to express a view" and that it is incumbent upon the ALJ to use his or her expertise to evaluate technical evidence. In this vein the court noted that "[a]n agency must act like an expert if it expects the

[1] It is noted that the Seventh Circuit does not mention the amended regulations in its decision.

judiciary to treat it as one."

The court then turned to the ALJ's disability analysis. The court stated that, even assuming the miner suffered from pneumoconiosis, it was difficult to find him totally disabled by the disease:

> Given his many other ailments it is hard to see how it could have been, for the other problems appear to be sufficient to cause disability (implying that pneumoconiosis was not a necessary condition of disability). (citations omitted).

Moreover, the court found that it was "irrational" to accord greater weight on this issue to the opinion of a treating physician, who may not be a specialist. The court stated:

> Treating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views.

Finally, the court disapproved of the ALJ's award of $200.00 per hour for attorney's fees in the case which would exceed what the attorney would charge his paying clients. The court noted that the ALJ did not address the employer's argument that "the rate chargeable against the mine operator must be market-based, . . . without a premium for the contingent nature of the compensation." Rather, the court noted that the hourly rate of $200 was merely "a number plucked from a hat."

[**weighing autopsy evidence; treating physician's opinion; attorney's fees**]

B. Administrative Law Judge

In *Sproles v. Bullion Hollow Coal Co.*, 1995-BLA-2167 (ALJ, June 29, 2001), the ALJ held that Employer was collaterally estopped from re-litigating the issue of whether the miner suffered from pneumoconiosis in a widow's claim. Applying the Board's decisions in *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134 (1999) and *Young v. Sewell Coal Co.*, BRB No. 98-1000 BLA (Aug. 26, 1999) (unpub.), the ALJ determined that because (1) a finding of pneumoconiosis was necessary to the award of benefits on the living miner's claim, and (2) there was no autopsy evidence presented in the survivor's claim, then Employer was barred from re-litigating the presence of the disease. *See also Villain v. Zeigler Coal Co.*, 1998-BLA-703 (ALJ, Dec. 7, 1999).

[**collateral estoppel**]