U.S. Department of Labor

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

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

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 298
June 2019

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Counsel for Longshore

William S. Colwell
Associate Chief Judge for Black Lung

Alexander Smith
Senior Counsel for Black Lung

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

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

***Muhammad v. Norfolk Southern Railway Co.*, 925 F.3d 192 (4th Cir. 2019).**

The Fourth Circuit held that an injury on a bridge spanning navigable waters did not meet the situs requirement under Section 3(a) of the LHWCA.

Kenneth Muhammad was injured in the course of his employment as a carpenter with Norfolk Southern Railway Company while replacing railroad crossties on the South Branch Lift Bridge in Virginia. Muhammad's work crew traveled to the work site via truck, and their work never required the use of boats.

Muhammad filed a negligence claim against his employer under the Federal Employers' Liability Act ("FELA"). The district court dismissed the FELA claim based on a finding that his injury was covered under the LHWCA, which provided the exclusive remedy for his claim. It reasoned that the "situs" requirement was met because Muhammad was injured "upon navigable waters." Relying on *LeMelle v. B. F. Diamond Construction Co.*, 674 F.2d 296 (4th Cir. 1982), the court concluded that the situs requirement includes work both "upon" and "over" navigable waters, reasoning that a bridge over navigable waters that allows ships to pass underneath it facilitates and aids the navigation of maritime traffic. It further concluded that claimant also met the "status" requirement. Relying on *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989), the court found that Muhammad's work constituted "maritime

[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, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *__).

employment" because repairing the bridge was an essential and integral element of the loading or unloading process of the maritime traffic flowing under the bridge.

The Fourth Circuit disagreed. It stated that the method for construing and applying the status and situs requirements is informed by Congress's 1972 amendments to the LHWCA. Prior to the 1972 amendments, the LHWCA applied only to injuries occurring on navigable waters. *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40, 46, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989). In 1972, amendments to Section 3(a) expanded the definition of "upon navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," thereby extending coverage to the area adjacent to the ship that is normally used for loading and unloading. Congress also added the "maritime employment" requirement in order to limit its expansion of the Act shoreside. In adding the status requirement, Congress did not narrow the overall coverage of the LHWCA, but instead only limited its shoreside expansion. *Dir., OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 315, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Accordingly, when it is shown that an employee was injured "upon the actual navigable waters in the course of their employment" — *i.e.*, that the employee was injured working "on" navigable water and thus "traditionally covered" under the pre-1972 Act — the inquiry ends.

In this case, the situs of Muhammad's injury on a railroad bridge over navigable waters would not satisfy the pre-1972 requirement that his injury occur "upon navigable waters." Norfolk Southern pointed to no pre-1972 case holding that an employee working on a bridge over navigable waters was working upon navigable waters. In *Nacirema Operating Co. v. Johnson*, the Supreme Court made this distinction clear, observing that working on a pier, "like a bridge," would not be covered by a statute requiring that the employee work "upon navigable waters." 396 U.S. 212, 215, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969). By contrast, an employee working from a barge on navigable waters while constructing or maintaining a bridge would, under the pre-1972 standard, be on navigable waters, as that employee would then be physically working from a vessel on navigable waters.

Next, the court concluded that the site of the injury was not covered under Section 3(a) as amended in 1972. Because Muhammad's injury did not occur on an enumerated structure, the court had to determine whether his injury occurred in an "other adjoining area." And in order for an "other adjoining area" to constitute a covered situs, "it must be a discrete shoreside structure or facility" that is "'customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel,' as the statute provides." *Id.* at 198 (*quoting Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139–40 (4th Cir. 1995)). The court reasoned that:

> The undisputed facts in this case show that Muhammad was not injured on a facility contiguous to navigable waters that was customarily used for the loading, unloading, repairing, dismantling, or building of a vessel — i.e., a facility linked to traditional longshoremen's work on the water. Rather, the situs of Muhammad's injury was a railroad that was quite distinct from such a facility, and the location on the Bridge where Muhammad was injured was accessible only by land and was not contiguous to water.

> While the Bridge's center span did lift to allow vessels to pass underneath it, a land-based bridge's simple accommodation of ships is a far cry from a shoreside facility serving as "an integral or essential part of loading or unloading a vessel." Schwalb, 493 U.S. at 45, 110 S.Ct. 381. Norfolk Southern argues otherwise, asserting that a bridge allowing commercial navigation to travel underneath it provides a sufficient connection to "navigable waters" to support LHWCA coverage for injuries on that bridge. But the nexus to loading and unloading must not be so remote as to include any situs that is simply somehow related to navigable waters. Indeed, Norfolk Southern's argument would extend LHWCA coverage to injuries occurring on every bridge that allowed ships to pass under it. Congress clearly did not intend so broad a coverage. As the Supreme Court has noted, in enacting the 1972 amendments, Congress did not "seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading." Herb's Welding, 470 U.S. at 423, 105 S.Ct. 1421.

Id. at 198-199.

The court concluded that the two cases cited by the district court -- *LeMelle v. B. F. Diamond Construction Co.*, 674 F.2d 296 (4th Cir. 1982), and *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256 (4th Cir. 1991) -- did not support the finding of situs. In *LeMelle* (which only addressed the status requirement), the court stated that "bridge construction and demolition workers employed over navigable water were covered prior to the 1972 amendments," citing three pre-1972 cases.[2] However, this statement, which the district court took out of context, "referred to bridge work performed upon navigable waters insofar as the work was performed from barges, launches, and the like that were actually on navigable waters." *Id.* at 199. And in *Zapata*, the employee was working as an airplane pilot for a commercial fishing company, spotting fish from the air to aid commercial fishing boats. Thus, "[n]either of these cases support the proposition that working on a land-accessed railroad bridge over navigable waters to replace railroad crossties qualifies as working on a situs covered by the LHWCA. Rather, the law is clear that, for a land-based situs to be covered under the Act, it must be a shoreside facility that is 'an integral or essential part of loading or unloading a vessel' — a facility linked to traditional longshoremen's work on the water. The South Branch Lift Bridge is not such a facility." *Id.* at 200 (citations omitted).

Because Muhammad was not injured on a covered situs, the court did not reach the issue of status. Since his injury was not covered by the LHWCA, the district court erred in dismissing his FELA claim. The judgment of the district court was reversed and the case remanded for further proceedings.

[Section 3(a) – SITUS – "Over water," "Over land" (Other Adjoining Area; Seawalls, Bulkheads and Bridges)]

[2] In two of those cases, as well as in *LeMelle*, the work involved the extensive use of barges, on which the employees' injuries occurred. In the third case, instead of using barges, the contractor constructed a temporary causeway on the water solely to provide access toward the middle of the river.

B. Benefits Review Board

***Kiyuna v. Matson Terminals, Inc.*, __ BRBS __ (June 25, 2019).**

Claimant filed a motion for reconsideration of the ALJ's decision denying benefits, alleging an Appointments Clause violation pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. __, 138 S. Ct. 2044 (2018). The ALJ denied the motion. Claimant appealed, arguing that he is entitled to a new hearing before a different ALJ because the presiding ALJ was not properly appointed and took "significant action" before her appointment was ratified. He urged the Board to vacate the ALJ's decision and remand the case for a hearing before a different ALJ.

The Board affirmed the ALJ's ruling, agreeing with the OWCP Director. First, the Board rejected Claimant's contention that an Appointments Clause challenge is timely when raised to the Board, regardless of whether it was raised to the ALJ. The Board reasoned that, in *Lucia*, the Supreme Court held that a litigant who "timely" raises an Appointments Clause challenge regarding an improperly appointed judge is entitled to a new hearing before a new, constitutionally appointed ALJ. The Board stated that Appointments Clause challenges are "non-jurisdictional" and subject to the doctrines of waiver and forfeiture. The doctrines of waiver and forfeiture are discretionary: courts should proceed on a case-by-case basis to determine whether circumstances excuse the failure to timely raise an issue. Accordingly, the Board rejected claimant's contention that his Appointments Clause argument is one of "pure law" that must be addressed regardless of whether it was timely raised below.

In this case, the ALJ rationally found that claimant forfeited his Appointments Clause challenge. She emphasized that motions for reconsideration should not be used to raise arguments for the first time that could reasonably have been raised earlier in the litigation. Further, *Lucia* was decided two and a half months before the ALJ issued her Decision and Order and three months before claimant raised his Appointments Clause argument. Thus, claimant had sufficient time after the decision in *Lucia* to raise his challenge but did not do so until after an adverse decision was issued.

The Board further held that the ALJ properly exercised her discretion in refusing to excuse forfeiture. She properly found that claimant's counsel's admitted lack of awareness of the law is not a sufficient basis for excusing forfeiture. "With no other explanation to account for claimant's failure to raise the *Lucia* decision prior to her denial of the claim, the [ALJ] reasonably concluded that claimant's untimely Appointments Clause arguments constitute 'judge-shopping' and 'sand-bagging.'" Slip op. at 4. Claimant's contention that *Lucia* represents "new law" was incorrect.

Finally, the Board also rejected claimant's argument that he was not required to timely raise the issue below on the basis that an ALJ cannot address "facial challenges" to her own appointment. Claimant's challenge to the ALJ's appointment is an "as-applied" challenge that can be waived or forfeited. Moreover, claimant does not contest the ALJ's finding that a remedy was available to him had he timely raised the issue: she could have referred the case back to the OALJ for assignment to a different, properly appointed ALJ to hold a new hearing and issue a decision based on the record developed at that hearing.

[PROCEDURE – *Lucia v. SEC*]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Big Horn Coal Co. v. Sadler,* F.3d , 2019 WL 2346423 (10th Cir. June 4, 2019), the U.S. Court of Appeals for the Tenth Circuit addressed a consolidated appeal in a miner's claim and a survivor's claim. Below, although the employer conceded that the miner was entitled to benefits, it contended that the miner's claim was untimely, as the claim was filed more than three years after the miner had received a medical determination that he was totally disabled due to black lung. *See* 20 C.F.R. §725.308(c) (providing that the time limits for filing a black lung claim "are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances"). The triggering medical determination in the case was a medical report the miner received in September 2005. The ALJ awarded the now-deceased miner benefits, finding that extraordinary circumstances acted to toll the statute of limitations. The ALJ premised this extraordinary circumstances finding primarily on an erroneous representation he made to the miner on the record, in June 2008, as part of the miner's then-pending modification request in the prior claim: that the miner would be able to file a subsequent claim in the future because the withdrawal of the miner's modification request would act as a denial, when in fact a withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(a), (b). The employer moved for reconsideration, to disqualify the ALJ, and to vacate the earlier decision; the ALJ denied these motions and entered an award in the miner's claim. Subsequently, the ALJ also issued an order awarding benefits pursuant to amended Section 932(*l*), 30 U.S.C. §932(*l*), in the associated survivor's claim.

The employer appealed, arguing to the Benefits Review Board that Section 725.308 is invalid and that the ALJ erred in applying that provision to find the existence of extraordinary circumstances. In an October 2017 decision, the Board affirmed both awards and, in doing so, specifically affirmed the ALJ's determination that the miner's claim was timely filed based on extraordinary circumstances.

On appeal, before the Tenth Circuit, the employer contended that Section 725.308 of the black lung regulations is invalid. It also argued, in the alternative, that extraordinary circumstances did not exist in the present case such that the statute of limitations should have been tolled.

The court first concluded that Section 725.308 is a validly promulgated regulation. In upholding the regulation, the court applied the two-step analysis described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Looking to the statute's language and the legislative history, the court concluded that Congress did not speak directly to the issue of whether the statute of limitations may be tolled in particular circumstances. Second, the court concluded that the Secretary's interpretation that the statute of limitations may be tolled in the case of extraordinary circumstances was reasonable, as Section 932(f) of the Black Lung Benefits Act ("BLBA") is non-jurisdictional; thus, it is presumed that equitable tolling is permissible in black lung claims.

Next, the court concluded that it lacked jurisdiction to address whether extraordinary circumstances existed in the case to support a tolling of the statute of limitations. The court reasoned that the employer failed to raise to the Board the argument presented to it: that the ALJ's statements to the miner at the June 2008 hearing were, in essence, correct because the 2005 medical report was not contained in the record. Thus, the employer failed to appropriately exhaust its arguments and, indeed, "argued just the opposite to the agency, stating that [the ALJ] gave 'erroneous information to [Sadler] at the 2008 hearing.'" Slip op. at 16, *quoting* Supplemental Appendix at 16.

In light of the above, the court dismissed the employer's petition and affirmed the Board's decision below.

[Applicability of 20 C.F.R. §718.308, statute of limitations for filing a miner's claim: The statute and regulation; Circuit court jurisdiction]

In *Duty v. Dir., OWCP*, No. 18-1996, 2019 U.S. App. LEXIS 17551 (4th Cir. June 12, 2019) (unpub.), the U.S. Court of Appeals for the Fourth Circuit addressed the employer/carrier's appeal of a Board order denying en banc reconsideration of its April 27, 2017 decision affirming an award of benefits to the miner. In its unpublished per curiam decision, the court concluded that the administrative law judge's decision is supported by substantial evidence. It therefore denied the petition for review and upheld the award of benefits.

B. U.S. District Courts

Also this month, a federal magistrate judge issued proposed findings and recommendation on a motion for attorneys' fees. *See Vialpando v. Chevron Mining, Inc.*, No. 1:18-cv-00251-BRB-JHR, 2018 U.S. Dist. LEXIS 177594 (D.N.M. June 3, 2019). This motion related to an earlier decision in which the court concluded that the miner was entitled to additional compensation on overdue payments, plus interest, in accordance with Section 914(f) of the BLBA. In his decision, the magistrate judge recommended, subject to any to-be-filed objections by the parties, that the court fully approve the request of $13,620.88 for the attorneys' fees and costs. Of note, a portion of the fees requested by the attorney included law student time at $100.00 an hour. The magistrate judge found this request to be reasonable.

Finally, the magistrate judge issued a supplemental proposed findings and recommendation on June 25, 2019. In this supplemental recommendation, the magistrate judge proposed, subject to the consideration of any objections by the parties, that the district court award counsel an additional $962.50 in attorneys' fees incurred in defending his motion for fees.

[Entitlement to fees: Preparation of the fee petition, litigation of the fee petition; Fee Petitions: Fees awarded separately at each administrative level]

C. Benefits Review Board

No decisions to report.