U.S. Department of Labor

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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 309
September 2020

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

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

***G4S International Employment Services (Jersey), Ltd. v. Newton-Sealey*, 975 F.3d 182 (2nd Cir. 2020).**

The Second Circuit affirmed the ALJ/BRB's determination that employer failed to establish that claimant entered into a settlement with third parties for purposes of proving its affirmative defense to liability under 33 (g).

Claimant, a British citizen, was hired by ArmorGroup Services (Jersey), Ltd. ("AG Jersey") to provide security in Iraq for engineers working for Bechtel, a U.S. company. In 2004, claimant was seriously injured while on the job, and he was paid some benefits. In 2007, he filed a claim under the Defense Base Act ("DBA"). He also filed a suit in the United Kingdom against AG Jersey, AG UK, and AG PLC.[2] In 2009, claimant entered into a settlement with AG Jersey, AG UK, and AG PLC for an amount less than he would be entitled to under the DBA. He did not obtain the written permission of "the employer and the employer's carrier" prior to entering into the settlement under § 33(g)(1) (providing that "[i]f the [employee] enters into a settlement with a third person . . . the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier[ ] before the settlement is executed").

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[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 *__).

[2] The court noted that U.K. law, unlike U.S. law, permits claimants to pursue both a workers' compensation claim and a tort remedy.

The matter of employer/carrier's continued liability was submitted to an ALJ. The ALJ found that while both AG UK and AG Jersey were employers within the meaning of § 33(g), AG PLC was a third party and thus claimant was barred from receiving further benefits under the Act. On appeal, the Board vacated the ALJ's decision finding that the analysis of the employer-employee relationship was vague, and remanded the case for the ALJ to consider which employment relationship test best applied and then to apply that test.[3] The ALJ again concluded that AG PLC was a third party and that the claim was barred under § 33(g). Claimant appealed and, in 2015, the Board held that because § 33(g) is an affirmative defense, AG Jersey bore the burden of proving that AG UK and AG PLC were third parties and that it had failed to do so.[4] The ALJ entered an order in favor of claimant, and the Board affirmed. G4S Jersey, as successor-in-interest to AG Jersey, and Continental Insurance Company, as successor-by-merger to Fidelity & Casualty Company of New York, appealed the Board's decision to the Second Circuit.

The court stated that the basic purpose of the LHWCA is to provide prompt relief for employees, and limited and predictable liability for employers. The DBA extends coverage under the LHWCA to employees of American contractors engaged in construction related to military bases in foreign countries and establishes a uniform, federal compensation scheme for civilian contractors and their employees for injuries sustained while providing functions under contracts with the United States outside its borders. Employees injured under the LHWCA who may also have a cause of action against a third party as a consequence of sustaining that injury are not required to elect one remedy over another. *See* 33 U.S.C. § 933(a). If the employee, however, seeks damages from a third party, the LHWCA protects the derivative rights of the employer and the carrier. § 33(g) provides a bar to receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining employer's prior written consent from employer and carrier. Further, § 20(a) of the LHWCA provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary -- . . . [t]hat the claim comes within the provisions of this chapter." *Id.* at § 920(a). A *prima facie* claim for compensation requires that the employee allege an injury or death that arose out of and in the course of his employment.

The court stated that § 33(g) provides an affirmative defense, and it has been interpreted as requiring the employer to demonstrate that named defendants are not employers. Here, claimant alleged that his injuries arose out of and in the course of his employment, thereby establishing a *prima facie* case for benefits under the Act pursuant to § 20(a). Petitioners bore the burden of proving that the named defendants in the U.K. proceedings were not employers for the purposes of the Act. Reviewing the record available to the ALJ, the Board concluded that petitioners had not met this burden, noting that although at the time of the settlement the AG companies had been acquired by G4S, most of the testimony in the record predated the acquisition and so shed very little light on the structure of, and relationship among, the G4S companies after the acquisition. The court rejected petitioners' argument that depositions conducted after the relevant Board decision provided uncontroverted evidence that the named defendants were not employers. The Board's 2015 decision resolved this issue and became the law of the case, and the ALJ was bound to follow this finding. The record thus supported the Board's conclusion that petitioner failed to present sufficient evidence to prove that the named defendants were not employers. Accordingly, the Board did not err when it affirmed the ALJ's finding that claimant's claims were not barred under 33(g).

[3] *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013).
[4] *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

[Employer-Employee Relationship; Section 33(g)(1) – Prior Written Approval; Section 20(a) Presumption]

B. Benefits Review Board

***Kniceley v. Michael Rybovich and Sons Boat Works*, __ BRBS __ (2020).**

The Board affirmed the ALJ's order granting employer's motion for summary decision on the ground that claimant was excluded from the LHWCA's coverage under § 2(3)(F).

Employer opened for business in April 2011 as a recreational boat builder and repair facility. Claimant, hired by employer as a marine carpenter in 2011, sustained a work-related injury on 10/12/2012, while working on the construction of a sixty-four foot recreational vessel known as *Lizzy Bee*. He performed some light-duty work for employer in 2014, and returned to work for employer in 2016. Employer paid claimant benefits under Florida's workers' compensation law through May 2015. Claimant thereafter sought benefits under the LHWCA, and employer filed a motion for summary decision asserting that claimant lacked "status" under the Act. An ALJ denied employer's motion because he found a "credibility dispute" existed as to whether claimant worked or had to work on vessels in excess of sixty-five feet in length. A formal hearing was conducted. The case was thereafter assigned to another ALJ, and employer filed a second motion for summary decision. The ALJ found that claimant is excluded from coverage under § 2(3)(F), and granted employer's motion. Employer appealed.

For a claim to be covered under the Act, a claimant must meet the "situs" and "status" requirements; only the latter was at issue in this case. To meet the status requirement under § 2(3), a claimant must establish that he was a maritime employee (e.g., a ship repairman) and is not subject to any specific statutory exclusions. Section 2(3)(F) excludes from coverage "individuals *employed to* build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel," as long as such individuals are subject to coverage under a State workers' compensation law. 33 U.S.C. § 902(3)(F) (emphasis added).

The Board initially held that, contrary to claimant's contention, the ALJ was not bound by the prior interlocutory order denying employer's first motion for summary decision. The ALJ had the discretion to address anew employer's second motion, which was based, in part, on evidence adduced at the formal hearing.

The Board next rejected claimant's contention that the ALJ erred in finding he is excluded from coverage under § 2(3)(F). Claimant argued that his overall work history with employer determined his status under the Act. Employer, from its inception, had the capacity to construct vessels greater than sixty-five feet in length and his post-injury, light-duty work for employer included work on such vessels. Claimant asserted that these facts established that employer engaged him to build recreational vessels over sixty-five feet in length.

The Board reasoned that, because § 2(3)(F) uses the phrase "employed to," it must look at the nature of job duties to which claimant could have been assigned through the date of his injury to determine if this exclusion applies. This approach is consistent with the case law interpreting the similar "employed to" language in § 2(3)(A). In this case, employer constructed only recreational vessels less than sixty-five feet in length from the date of its opening through the date of claimant's injury. Thus, claimant was, in his pre-injury work with employer, "employed to build" only the *Lizzy Bee*, a recreational vessel under sixty-five feet. As such, he was not "engaged in" qualifying maritime employment at any point through the time of injury. Additionally, the claimant could not have been assigned to work on vessels

exceeding sixty-five feet in length prior to his injury because employer did not have any projects involving construction of such vessels until February 2013, after claimant returned to work post-injury. The fact claimant performed post-injury work on vessels in excess of sixty-five feet did not alter the conclusion that his only assignable duties with employer through the time of his injury involved building a "recreational vessel under sixty-five feet in length." That employer, at the time it created the business, intended to engage in new construction of vessels in excess of sixty-five feet, and that it was expected claimant would work on such vessels, did not undermine the conclusion employer did not engage in such work, and thus it was not assignable to claimant, until months after his work injury.

[Exclusions From Coverage - § 2(3)(F)]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

There were no published or unpublished black lung decisions in September.

B. Benefits Review Board

There were no published BRB black lung decisions in September. Brief summaries of some of the unpublished decisions are below:

Weighing Evidence: Complicated CWP

Short v. White Flame Energy, Inc., BRB No. 19-0410 BLA (September 9, 2020): Claimant appealed the ALJ's finding that he did not establish complicated pneumoconiosis by CT scan evidence. There were 6 readings of 4 CT scans in the record. Each were interpreted as showing a nodule greater than 1 cm. However, none of the experts indicated whether the nodule would show an opacity greater than 1 cm on chest x-ray. In the Fourth Circuit, an ALJ must determine whether the findings on biopsy, autopsy, or "other means" under 20 CFR §718.304(c) would appear as an opacity that is greater than 1 cm on chest x-ray. An ALJ can also find complicated pneumoconiosis if a physician diagnoses massive lesions. Since the readers did not indicate what the size of the opacity would be on chest x-ray, the ALJ was correct in finding that complicated pneumoconiosis had not been established.

Calculating the Duration of Coal Mine Employment

Sluss v. Matt Mining Company, BRB Nos. 2014-BLA-05422, 2019-BLA-05318 (September 9, 2020): Employer appealed the ALJ's determination of 15.97 years of employment. In making this finding, the ALJ, after stating that he could not ascertain the starting and ending dates of the miner's employment, divided his yearly earnings listed on the SSA earnings statement with the yearly average earnings for miners in Exhibit 610. Employer argued that the ALJ was required to find that the miner had a calendar year of coal mine employment for each year before he could utilize Exhibit 610. The Board rejected this argument since it stated that the ALJ's finding that the SSA records reflected yearly employment with each employer was supported by substantial evidence.

Brown v. Cumberland Coal Resources, LP, BRB No. 19-0445 BLA (September 18, 2020): The Board held that an ALJ cannot adopt the Director's determination regarding the duration of coal mine employment. Per 20 CFR §725.455(a), the ALJ cannot consider the Director's determinations. Rather, the ALJ must review the case *de novo* and render his or her own findings of law and fact.

Rebuttal Standard

Clutter v. Leivasy Mining Corporation, BRB No. 19-0512 BLA (September 18, 2020): The Board found that, in his rebuttal analysis, the ALJ erred in applying a "no part" standard on the issues of legal pneumoconiosis and a "rule out" standard on disability causation. Instead, the Employer must disprove legal pneumoconiosis by proving that the miner does not have a chronic lung disease or impairment "significantly related to or substantially aggravated" coal dust exposure. Further, in order to rebut disability causation, the Employer must prove that "no part" of the miner's total disability is due to coal dust exposure.

Adult Disabled Child

Parsley v. Excel Mining, LLC, BRB No. 19-0392 BLA (September 28, 2020): Employer appealed the ALJ's award of augmented benefits for the miner's adult disabled daughter. Employer argued that the miner waived his right to augmented benefits since he did not raise the issue when the case was first before the Director. The Board held that the regulations do not preclude the modification of an award due to changes in dependency status. The Board further held that the ALJ was not required to perform an independent evaluation of the dependent's disability. Rather, it affirmed the ALJ's reliance upon the disability determination of the SSA.

Due Process

Gregory v. Heritage Coal Company, BRB Nos. 19-0337 BLA; 19-0338 BLA (September 29, 2020): In addition to raising appointment clause arguments regarding the District Director and the ALJ, the Employer argued that the procedures for adjudicating responsible operator liability deprived it of due process. Specifically, Employer argued that the DOL's duty to name the responsible operator is in conflict with its role as the administrator of the Black Lung Disability Trust Fund. The Board found that since Congress stated that liability should be placed on responsible operators, the DOL's designation of the responsible operator is consistent with Congressional intent. Further, the Employer was incorrect in arguing that the District Director makes the final determination of the responsible operator issue since her opinion is appealable to the OALJ and so on. The Board also rejected Employer's argument that it was incorrectly named as responsible operator upon dismissal of Patriot Coal Corporation. Employer had sold its mining operation to Patriot, who subsequently went bankrupt. Employer argued that the ALJ misapplied the successor liability rule; that the DOL approved of its agreement with Patriot to shift responsibility for any black lung claims; and that there was no exhaustion of the bond that Patriot paid to the Fund. Although the Board did find that the ALJ misapplied the successor operator rule since Employer was a predecessor, it was a harmless mistake since Employer was the next most recent coal mine employer of a year's duration and was capable of paying benefits. The Board further found that the DOL's letter of credit to Patriot did not preclude it from naming Employer or exclude Employer from liability. The Board also found that the DOL does not have to exhaust the bond paid by bankrupt employers in order to name another responsible operator.