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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 191
October 2007

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

[Ed. Note: The following case is for informational purposes only.**]**

Abt v. Dickson Company of Texas, (Unpublished)(No. 06-41227)(**5th Cir.** Oct. 17, 2007).

At issue here was whether or not a longshoreman cane operator's federal claim for negligence fell within admiralty jurisdiction under Fed. R. Civ. P. 9(h)(asserting claims of negligence, gross negligence, premises liability, and other torts). The worker operated a water-front crane that was specifically modified and positioned to load and unload vessels at a particular area. After he unloaded a vessel he was instructed to "walk" the crane down the dock so that a vessel scheduled to arrive the next day could safely dock. In completing this maneuver he was injured. The district court granted a motion to dismiss for lack of subject matter jurisdiction stating that he was merely moving the crane from one end of the dock to another; he was not servicing or even preparing to service a vessel at the time of the incident.

The circuit court agreed with the district court. "Had [Claimant] actually been servicing a vessel when this incident occurred, the … argument would be considerably stronger. But that is not the factual situation we are presented with in this case. It is uncontested that [the worker] was walking the crane on the dock and that there were no vessels on or near the dock at the time of the incident. As such, [his] land-based

movements which gave rise to the incident do not fit within traditional definitions of maritime activity. To find that the … claims fall within the admiralty and maritime jurisdiction of federal courts would greatly expand that jurisdictional grant to include cases and controversies that have been historically and purposefully excluded. This we will not do."

C. Federal District Courts and Bankruptcy Courts

[Ed. Note: While the confidential settlement referenced below is from August 2007, it is noted as perhaps a harbinger of things to come. Breach of contract claims, both in lieu of LDA claims and as third-party claims, have been slightly increasing in numbers lately.**]**

Wood v. Dyncorp and Dyncorp International FZ-LLC, (Case No. 1;06-CV-01616)(District Court of the District of Columbia)(August 7, 2007).

Here the Defense Base Act claimant was working in Baghdad for Worldwide Network Services LLC (WWNS), which entered into a subcontract with Dyncorp and Dyncorp International FZ-LLC (Dyncorp, collectively) wherein Dyncorp would provide transportation and security for WWNS's employees. Claimant was injured in an auto accident and sued Dyncorp for breach of contract and negligence. Terms of the settlement are confidential.

[Topic 60.2 Longshore Extension Acts--Defense Base Act--Generally]

Becker v. Tidewater, Inc., ___ F. Supp. 2 ___ (Civ. Act. No. 99-1198)(W.D. La. Oct. 30, 2007).

In the **Fifth Circuit** version of this case, the circuit court reversed a jury verdict which had found Jones Act coverage. The circuit court held that the worker was a longshoreman and remanded the case for further proceedings. On remand the court found that a time charterer of the vessel can be responsible for Section 905(b) benefits against the vessel.

[Topic 5.2.1 Third Party Liability--Generally]

[Ed. Note: The following case is for informational value only.**]**

Jambon v. Northrop Grumman Ship System, Inc., ___ F. Supp. 2 ___ (Civ. Act. No: 07_6056)(Oct. 10, 2007).

Here a wife sued the shipyard in state court after having been diagnosed with mesothelioma as a result of exposure to asbestos brought home from work on the clothes of her husband and two sons who worked at the shipyard. Avondale removed the case to

federal district court asserting the federal officers removal statute was applicable. The district court found that Avondale had not carried its burden that it was acting as a person under color of federal authority when it committed the alleged acts that led to Jambon's injuries. To satisfy that requirement, "the officer must show a nexus, a causal connection between the charged conduct and asserted official authority."

The "asserted official authority" was that the United States entered a contract with Avondale to construct federal vessels, which required the installation of specific asbestos-containing materials. However, the court found that Avondale had not established that there was a causal connection between the injuries and construction of vessels for the government. Avondale builds many types of vessels for commercial as well as governmental needs and Avondale did not present evidence that Jambon's husband and sons worked on any of the vessels that were constructed under contracts with the government. Therefore, Avondale has not established that it was acting as a person under color of federal authority and that it directed Jambon's husband and sons to perform duties involving asbestos installation aboard a federally contracted vessel that ultimately led to Jambon's alleged injuries. The matter was returned to state court.

Carillo v. Reliance National Indemnity Co. D/B/A Louisiana Insurance Guarantee Assoc. (LIGA), ___ F. Supp 2 ___ (Civ. Act. No: 07-4060)(E.D. La. Oct. 22, 2007).

This litigation is for penalties in connection with a Section 8(i) settlement. LIGA and Claimant entered into a Section 8(i) agreement which was approved by the District Director on February 27, 2006. On March 17, 2006 LIGA issued a check for the amount agreed to by the parties in the settlement. On March 16, 2007 Claimant filed a written request for a 20% penalty under Section 14(f) since the settlement had not been paid in 10 days.

LIGA argues that it did not pay the penalty on grounds that the order was not properly served by certified mail. Subsequently an ALJ held a formal hearing and granted Claimant's summary judgment motion. Claimant then filed a complaint and sought enforcement of the District Director's order and attorney's fees.

LIGA claims that Claimant has no claim for penalties because a penalty is not a "covered claim" for which LIGA is responsible under La. Rev. Stat. 22:1379(3)(d). That state statute provides:

> "Covered claim" shall not include any claim based on or arising from a pre-insolvency obligation of an insolvent insurer, including but not limited to contractual attorneys' fees and expenses, statutory penalties and attorneys' fees, court costs, interest and bond premiums, or any other expenses incurred prior to the determination of insolvency.

The court found that LIGA did not point to any language in the statute that excludes post-insolvency costs and interest and found that the factual allegations raised a right to relief under the supplementary default order issued pursuant to Section 14(f).

Next LIGA contends that the 10 day period within which the compensation order was to be paid did not begin to run because the order was not sent by certified mail. In finding that Claimant has a cause of action, the court stated that Section 14(f) is self-executing, and that the statute is clear—the award is due and payable 10 days following the filing, and the period is not determined by mailing or service. Thus the court denied LIGA's Motion to Dismiss.

[Topic 14.4 Payment of Compensation--Compensation Paid Under Award]

D. Benefits Review Board

B.C. v. Stevedoring Services of America, ___ BRBS ___ (BRB No. 07-0162)(Oct. 17, 2007).

The Board declined to overturn its longstanding precedent that, under normal circumstances, pre-judgment interest awards under the LHWCA should be calculated on a simple basis and not compounded. In the eighteen years since *Santos v. General Dynamics Corp*., 22 BRBS 226 (1989)(General American rule is that interest, when allowable, should be calculated on a simple, rather than compound, basis in the absence of express authorization otherwise.), was issued, the Board consistently has held that, absent particular facts or circumstances that would warrant an award of compound interest, interest on past-due compensation should be calculated on a simple basis. *See Meardry v. Int'l Paper Co*., 30 BRBS 160 (1996). The Board noted that there are no United States Court of Appeals decisions in cases arising under the LHWCA to the contrary.

[Topic 65.8.3 Interest—Applicable Rate of Interest]

W.D. v. Bath Iron Works Corp., ___ BRBS ___ (BRB No. 07-0257)(Oct. 30, 2007).

In these consolidated cases, the Board addressed the "manifest" requirement contained in the jurisprudence of Section 8(f). It first noted that the requirement is not found in the statute and then defined it as follows: "In order to establish the manifest requirement for Section 8(f) relief, an employer must show that it was actually aware of the claimant's pre-existing permanent partial disability or that the condition was objectively determinable from medical records existing before the worker suffered the work-related second injury."

The Board rejected the Director's contention that the pre-existing disability must be manifest prior to the dates claimants were last exposed to asbestos. The Board found that the Director's reliance on the *Cardillo* rule (last responsible employer rule) to define

a time of "injury" under the LHWCA was misplaced. Specifically addressing the **First Circuit**, wherein these injuries occurred, the Board stated that "[I]n order for employer to satisfy the manifest requirement and be eligible for Section 8(f) relief in a case where its employee becomes aware of his work-related occupational disease after he has retired from employment, the pre-existing permanent partial disability must have been manifest to the employer prior to the date the employee left that employment."

The Board went on to note that the evidence relied upon by the employer in the instant case pre-dated the claimants' retirements and may satisfy the manifest requirement if it is sufficient to demonstrate the employer's actual or constructive knowledge of a serious lasting condition. When the Board analyzed the two cases consolidated here, it found that the evidence in only one case contained information which might motivate a cautious employer to consider terminating a claimant because of the risk of compensation liability. Thus, the manifest requirement was only satisfied in one of the two cases.

[Topic 8.7.4 Special fund Relief--Pre-Existing Disability Must Be Manifest to Employer]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

Benefits Review Board

In *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007), a case arising in the Sixth Circuit, the Board affirmed the administrative law judge's determination that the miner's claim was timely filed under 20 C.F.R. § 725.308. Employer argued that three physicians' opinions in the record pre-dated filing of the miner's claim by more than three years such that the claim was time-barred. The administrative law judge disagreed and the Board affirmed his holdings.

Initially, the miner testified that Dr. Modi told him that he was totally disabled. The administrative law judge determined, however, that the physician did not indicate whether the total disability was respiratory or pulmonary in nature such that the medical opinion was insufficient to trigger the statute of limitations.[1]

The second physician, Dr. Sutherland, wrote two letters to Claimant's counsel wherein he diagnosed the miner as totally disabled due to pneumoconiosis. The Board affirmed the administrative law judge's conclusion that Dr. Sutherland's opinion was not sufficiently reasoned to trigger the statute of limitations. Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), the Board held that, in defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the court in *Kirk* specifically stated that the statute relies on the "trigger of the reasoned opinion of a medical professional."[2] The Board noted that "the Sixth Circuit has categorically emphasized that it is for the administrative law judge as a fact-finder to 'decide whether a physician's report is sufficiently reasoned, because such a determination is essentially a credibility matter.'"

Moreover, the Board affirmed the administrative law judge's determination that the limitations period was not triggered because the record did not establish that the opinions of Drs. Forehand, Sutherland, or Robinette were *communicated to the miner*. Employer argued that the statute contains no such requirement. The Board nonetheless affirmed the judge's holding and stated:

> Contrary to employer's assertion, the administrative law judge did not err by refusing to impute knowledge of the contents of the medical reports of Drs. Sutherland, Forehand, and Robinette to claimant simply because the reports were made a part of the record in his prior claim or were sent to his

[1] Notably, Dr. Modi diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and back pain. He concluded that the miner was totally disabled and advised against further exposure to coal dust, but he did not specify the nature of the disability.

[2] The third physician, Dr. Robinette, diagnosed coal workers' pneumoconiosis and concluded that the miner suffered from a "significant respiratory impairment." The Board held that this opinion was also insufficiently reasoned to trigger the limitations period.

> attorney. The Board has held that a medical report must be provided directly to claimant to commence the Act's limitation period, *Daughtery* [*v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95, 1-99 (1993)], and, therefore, information possessed by claimant's attorney does not constitute communication to claimant.

Slip op. at 6.

Finally, the Board affirmed the administrative law judge's attorney fee award to Claimant's counsel, Mr. Wolfe, at an hourly rate of $300.00. The administrative law judge noted that Claimant's counsel was "highly experienced" in the area of federal black lung and that his office was "one of the few in the area that accepted these types of cases." In affirming the attorney fee award, the Board cited to *Whitaker v. Director, OWCP*, 9 B.L.R. 1-216 (1986) and held that fee decisions in other cases wherein the administrative law judge awarded a lower hourly rate to Claimant's counsel were not binding in this case.

[**statute of limitations at § 725.308; hourly rate for attorney's fees**]

In *R.L. v. Consolidation Coal Co.*, BRB No. 07-0127 BLA (Oct. 31, 2007), the Board held that it was error to exclude Employer's re-readings of certain CT-scans found in treatment records. The administrative law judge excluded Employer's proffer of the evidence on grounds that rebuttal of treatment records is not permitted under *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.). The Board adopted the Director's position and concluded that Employer's proffer did not constitute "rebuttal" of treatment records in contravention of *Henley*. Rather, as noted by the Director, Employer was entitled to submit the CT scan re-readings as its "affirmative" evidence. The Board reiterated that the regulations do not limit the number of separate CT scans that may be admitted into the record, but "a party can proffer only one reading of each separate scan." The Board also directed that, with regard to consideration of the CT-scan evidence on remand, the administrative law judge must "initially consider whether the party proffering the CT scan evidence has established its medical acceptability under Section 718.107."

[**admission of "other evidence" under § 718.107**]