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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 310
October - November 2020

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

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

***Raicevic v. Fieldwood Energy, LLC*, 979 F.3d 1027 (5th Cir. 2020).**

The Fifth Circuit held that an offshore platform mechanic was a "borrowed employee" of the platform owner, as required for the owner to invoke the LHWCA's exclusive remedy provision as a bar to the mechanic's negligence claim. The court further held, as a matter of first impression, that employer could invoke the LHWCA's exclusive remedy provision without showing that it paid benefits under the LHWCA.

Milorad Raicevic sustained a back injury while working as a mechanic on an offshore platform owned by Fieldwood Energy, located on the outer continental shelf in the Gulf of Mexico. He was employed by Waukesha Pearce Industries, Inc. Raicevic sued Fieldwood (and the platform operator) for negligence. Following a jury trial, the district court entered a judgment for defendants. It found that Raicevic was Fieldwood's borrowed employee, and thus the LHWCA's exclusive-remedy provision gave Fieldwood tort immunity. Raicevic appealed.

The Fifth Circuit stated the, following a trial, it reviews questions of law de novo, while questions of fact are reviewed for clear error. Under the Outer Continental Shelf Lands Act, an employee's exclusive remedy for a work-related injury is the LHWCA. 43 U.S.C. § 1333(a)(1) and (b); 33 U.S.C. § 905(a). But this exclusivity provision only applies to (1) employers who (2) "secure payment of compensation" under the LHWCA. 33 U.S.C. § 905(a).

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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 *__).

The court reviewed anew the core legal question: whether Raicevic was Fieldwood's borrowed employee. It reviewed for clear error the key factual finding: that Fieldwood secured benefits under the LHWCA.

To determine whether an injured employee is a "borrowed employee," the court considers the following nine factors articulated in *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969): (1) whether the borrowing or the original employer had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation; (2) whose work was being performed; (3) was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate his relationship with the employee; (6) who furnished tools and place for performance; (7) was the new employment over a considerable length of time; (8) who had the right to discharge the employee; and (9) who had the obligation to pay the employee? Determining borrowed-employee status, particularly in the LHWCA context, is a complex question of law. A court must consider not only the nine factors, but the implications to be drawn from them. In different cases, certain of these factors may be more important than others. However, no factor can be categorically excluded from the analysis.

Although the coverage of the LHWCA is not contractual and does not depend upon the consent of the parties, nonetheless when an employee begins work for an employer under the coverage of the LHWCA, he is presumed to have consented to the Act's trade-off of possibly large common law damages for smaller but certain LHWCA benefits. By the very act of continuing in employment, he may be assumed to agree that, considering the likelihood of injury and the likely severity of injury within the working conditions he experiences, the benefits offered by the LHWCA in the event of injury are acceptable. Thus, in assessing the nine factors, the court focuses on whether the employee has consented (implicitly or explicitly) to this statutory trade-off.

In this case, the Fifth Circuit affirmed the finding that Raicevic was Fieldwood's borrowed employee, albeit for reasons different than those articulated by the district court. Factors two, four, and six clearly favored Fieldwood's position. The fifth factor favored Raicevic.

For the remaining factors, the court drew the following implications from the jury's findings. The first factor -- who controlled the employee's work -- favors borrowed-employee status where, as in this case, employee takes orders from borrowed employer about what work to do and when and where to do it. The jury's finding—that Fieldwood didn't control Raicevic—did not preclude, or even necessarily weigh against, borrowed-employee status.

With respect to the third factor, the jury found that Waukesha Pearce and Fieldwood had a written agreement that said Raicevic was an independent contractor, not Fieldwood's employee. However, this type of contract does not prevent borrowed employee status. The parties' actions can waive or modify an independent-contractor provision, *e.g.*, when there is evidence showing that all parties understood that the employee would be taking his instructions from the borrowed employer. Without deciding whether the parties modified the contract, the court held that the evidence demonstrating Fieldwood's supervision of and instruction to Raicevic is enough to make this factor neutral.

Turning to the seventh factor, the court acknowledged its prior case law holding that the length of the new employment is a neutral factor unless it lasted for years. Here, the jury found that Raicevic's one year on the platform was not a considerable length of time. The court disagreed, reasoning reasoned that, in the LHWCA context, one year seems long enough to accept the risks of the job and consent to the statutory trade-off of receiving benefits in lieu of the possibility of winning a tort suit. Thus, this factor weighed in Fieldwood's favor.

Factors eight and nine were also indicative of borrowed employee status. The jury found that Fieldwood did not have the right to discharge or the obligation to pay Raicevic, suggesting that these factors weighed in favor of Raicevic. The Fifth Circuit reasoned that these factors are weighed differently in the LHWCA and respondeat-superior contexts. As to the right to discharge, the focus is on whether Fieldwood had the right to terminate Raicevic's services for Fieldwood, not whether it had the right to terminate his employment in general. Because Fieldwood had the right to remove Raicevic from working on its platform at any time, factor eight favored borrowed-employee status.

Further, the obligation to pay—factor nine—does not focus on who paid Raicevic. The more helpful question was: Where did the funds originally come from? Here, Fieldwood paid Waukesha Pearce for Raicevic's work, then Waukesha Pearce paid Raicevic. That was enough to skew the factor in Fieldwood's favor.

Next, the court addressed Raicevic's argument that his tort claim was not barred because Fieldwood "fail[ed] to secure payment of compensation as required by" the LHWCA. 33 U.S.C. § 905(a). Raicevic argued that to invoke the LHWCA as a defense, an employer must prove not just that it had LHWCA insurance, but that it paid benefits under that insurance to the employee. As a matter of first impression, the court held that employer could invoke the LHWCA's exclusive remedy provision without showing that it paid benefits under the LHWCA. The statute makes clear what it means to "secure payment"—buy insurance or receive approval to pay compensation benefits directly. 33 U.S.C. § 932(a). Here, both Fieldwood and Waukesha Pearce had LHWCA insurance at the time of the injury, and that was sufficient for Fieldwood to invoke the LHWCA's exclusive-recovery provision.

The court concluded that, because Fieldwood had tort immunity, the district court correctly entered judgment for the defendants.

[Employer-Employee Relationship - Borrowed Employee; Section 5(a) – Exclusive Liability]

B. Benefits Review Board

There were no published BRB longshore decisions in October - November.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

Consol of Ky., Inc. v. Madden, No. 19-4089 (6th Cir. Oct. 5, 2020) (unpub.): The employer argued that this claim should have been dismissed as untimely or, in the alternative, that liability for the claim should have been transferred to the Trust Fund due to Director's failure to provide the parties with files from the miner's previous claims. The miner's first claim was filed on December 9, 2002, denied on November 24, 2003, and deemed abandoned on February 3, 2004. The miner filed a second claim on February 5, 2005. Dr. Rasmussen, who performed the DOL-sponsored exam, diagnosed total disability due to pneumoconiosis. The ALJ found that Dr. Rasmussen's report was not credible and relied upon the other evidence in the record to deny benefits on September 27, 2007. On April 3, 2008, the miner filed a request for modification. He was again examined by Dr. Rasmussen, who diagnosed total disability due to coal dust exposure. The miner withdrew his modification request on November 5, 2008.

The miner's third and current claim was filed on May 21, 2012. The district director awarded benefits and employer requested a formal hearing. The Director failed to provide the parties with the file from the 2005 claim. The employer argued that the 2005 claim was withdrawn or was a legal nullity due to the Director's failure to provide the file and, as such, the current claim was untimely based upon the report of Dr. Rasmussen. The ALJ disagreed. He found that the 2005 claim could not have been withdrawn as it had been fully adjudicated. As such, the employer's argument that Dr. Rasmussen's report rendered the claim untimely was incorrect since it had not been found credible by the previous ALJ. The ALJ also rejected the employer's argument that the 2005 claim should not be considered since the Director had not provided the file. He went on to find that the miner was entitled to benefits.

The employer appealed to the Board, who remanded the claim due to the missing 2005 file. It took the Director almost six months to provide the complete file. The ALJ once again rejected the employer's timeliness argument and awarded benefits. He also rejected the employer's argument that the Director's delay in providing the file constituted "procedural outrage." The Board affirmed his decision. The employer appealed.

The Court agreed that the current claim was timely filed. It also rejected the employer's argument that it had been deprived due process by the Director's failure to provide the 2005 claim file. The Court held that although the Director was "dilatory and sloppy" in providing a complete record to the OALJ, the procedural issues did not deprive the employer of notice or the opportunity to be heard. It went on to point out that the correct line of inquiry in such a circumstance is whether the Director's oversight prejudiced the adjudication. The Court stated that this did not occur in the current claim since the employer's counsel previously defended the 2005 claim and was privy to the file at that time. Moreover, the employer eventually received all of the missing 2005 documents from the Director while defending the current claim.

[Timeliness/Due Process; Incomplete OWCP File]

Island Creek Coal Company v. Belt, No. 19-4098 (6th Cir. Nov. 2020) (unpub.): Miner filed this claim on March 12, 2012. It was his third claim. The Director awarded benefits in the PDO. Employer requested a formal hearing, and the ALJ awarded benefits. In so doing, the ALJ found that Employer had not rebutted the 15 year presumption. Employer appealed to the Board. It vacated the award and remanded the claim back to the ALJ for specific findings on the exertional requirements of Miner's usual coal mine employment. On remand, the ALJ utilized the *Dictionary of Occupational Titles* (DOT) to find that Miner performed medium to

heavy work. Employer again appealed to the Board, who affirmed the ALJ's award of benefits. It further appealed to the Sixth Circuit Court of Appeals.

The Court rejected Employer's arguments regarding the ALJ's use of the DOT. Employer argued that the ALJ did not provide adequate notice that he would be relying upon DOT. However, since Employer did not raise this issue before the Board, the Court found that it had been forfeited. The Court further found that even if the issue had not been forfeited, the Employer was given "adequate opportunity" to contest the ALJ's use of the DOT since he indicated that he had taken notice of his reliance upon the DOT in his opinion. However, it noted that 29 CFR § 18.84 does not expressly state that notice can be provided in a decision and that it might not be the best practice to do so. Moreover, the Court held that the ALJ's reference to 20 CFR § 404.1567 was not a legal error. Instead, the ALJ made specific factual findings regarding Miner's work and matched it to the DOT's definition of medium and heavy work. He then made specific factual findings regarding Miner's physical abilities based on the medical opinions versus medium and heavy labor. As such, he did not use any judicially-noticed facts, *i.e.* 20 CFR § 404.1567, in making his finding of total disability.

The Court went on to reject the Employer's argument that the finding of total disability was not based on substantial evidence. Specifically, it held that the ALJ did not err in crediting the report of Dr. Baker, who found Miner totally disabled despite non-qualifying PFT results. In so finding, the Court pointed out that 20 CFR § 718.204(b)(2)(iv) allows an ALJ to find total disability despite non-qualifying test results. It also rejected Employer's argument that Miner did not do medium to heavy work as that would require a re-weighing of the evidence.

The Employer then argued that Miner's smoking history was unresolved by the ALJ, which was a violation of the APA. The ALJ made a finding of "at least 35 years" of smoking. The Court adopted the holding in *Greyson Coal & Stone Co., Inc. v. Teague*, 688 F. App'x 331, 335 (6th Cir. 2017), that there is no case law requiring the ALJ to make a specific finding of the number of years that a claimant smoked. Further, the Court found that the ALJ, within a permissible exercise of his discretion, reasonably rejected the Employer's expert testimony because it failed to explain the additive effects of smoking and coal mining.

Finally, the Court rejected Employer's argument that the onset date of benefits should have been that date of the first qualifying PFT rather than the date of filing. The Court stated that there was other earlier evidence of total disability in the record, specifically pointing to the statement of Employer's expert that Miner could not perform heavy work. Further, it stated that Employer could not rely on non-qualifying tests results to prove a lack of total disability. As such, it held that the ALJ's finding that the record did not establish the month of onset of total disability was supported by substantial evidence.

[Use of DOT; Smoking History; Onset Date]

B. Benefits Review Board

Clepper v. A & S Coal Company, BRB No. 19-0476 BLA (Oct. 21, 2020) (unpub.): The employer argued that the ALJ erred in applying the Section 411(c)(4) presumption to the miner's claim. Specifically, the employer contested the ALJ's determination that the miner's employment was substantially similar to that of an underground coal miner. The miner worked as a rock truck driver. He testified that his job duties also included operating a grader, cleaning coal, and loading shot holes. He stated that he was covered in coal dust when he got off work the same as an underground coal miner. The ALJ found that he was regularly exposed to coal dust during his twenty years of surface mine employment based upon this testimony. The Board, noting that the employer did not allege a specific error, upheld the ALJ's finding that the miner's coal dust exposure was substantially similar to that of an underground miner per 20 C.F.R. §718.305(b)(1)(i) and that he was entitled to the 15 year presumption.

[Qualifying Coal Mine Employment]

Lusk v. Jude Energy, Inc., BRB No. 19-0505 BLA (Oct. 21, 2020) (unpub.): The employer appealed the ALJ's use of Exhibit 610 in finding that the miner had of 21.12 years of coal mine employment. In the Fourth Circuit, the ALJ must first determine whether the miner had a year of employment before she can rely upon the industry average of 125 days found in Exhibit 610. Here, the Board found that the ALJ satisfied this requirement since she first found that the miner had "periods of largely uninterrupted coal mine employment" from 1971-1993 based on his application, employment history form, answers to interrogatories, and testimony. She then compared his earnings on the Social Security Earning Records with Exhibit 610 to find 125 days of employment in 1972-1983, 1986-1987, and 1991-1995 and credited the miner with a year of employment for each of these years. For the years in which the miner had less than 125 days of employment, the ALJ credited him with fractional years based on the ratio of number of days worked to 125. The Board stated that since she first determined that miner had established several full calendar years of coal mine employment through his application, answers to interrogatories, and hearing testimony, it was permissible for the ALJ to find that the miner had a year of employment when he worked 125 days within those years.

[Calculating Length of CME]

Galiczynski v. Tanoma Mining Co., Inc., BRB Nos. 20-0003 BLA and 20-0028 BLA (Oct. 21, 2020) (unpub.): The employer appealed the ALJ's award of benefits arguing that the presumptions in Sections 411(c)(4) and Section 422(1) are unconstitutional. The employer also argued that the supplemental report of the DOL examiner was inadmissible. In arguing that Sections 411(c)(4) and Section 422(1) are unconstitutional, the employer relied upon *Texas v. United States*, 340 F.Supp. 3d 579 (ND Tex, 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (ND Tex. 2018). The Board rejected this argument. It pointed out that although the United States Court of Appeals for the Fifth Circuit found that the individual requirement to maintain health insurance was unconstitutional, it rejected the lower court's decision that the remainder of the ACA was inseverable from that portion. In addition, it pointed out that the United States Supreme Court upheld the constitutionality of the ACA in *Nat' Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

The Board also rejected the employer's argument regarding the DOL physician's supplemental report. The claims examiner asked the physician who performed the DOL-sponsored exam for clarification of his report regarding total disability, disability causation, and existence of legal pneumoconiosis. The employer argued that the supplemental report was inadmissible and that clarification of the DOL-sponsored examination is prohibited. The Board disagreed. It found that the since the DOL examiner's initial report did not comply with the requirements of 20 CFR §725.406(a), the ALJ did not err in admitting the supplemental report as the Act requires that the claimant be given "complete pulmonary evaluation."

[Constitutionality of ACA; Pilot Program; Admissibility of Supplemental Reports from DOL Examiner]

Bailey v. Bailey Mining Co., BRB No. 19-0543 BLA (Oct. 21, 2020) (unpub.): The ALJ relied upon the opinions of Dr. Forehand and Dr. Baker in awarding benefits. Dr. Forehand found that the miner had COPD due to smoking and coal dust exposure. He further stated that it was impossible to determine how much of the miner's impairment was due to smoking versus coal dust. Dr. Baker also diagnosed COPD and stated that, although smoking may have been the primary cause of the miner's condition, coal dust exposure significantly contributed to and substantially aggravated his condition. The employer argued that the ALJ erred in relying on the preamble to award benefits. Specifically, it argued that it had been deprived of due process because it was unable to conduct any discovery on the preamble. The Board

found that the employer forfeited this argument as it was not raised in its first appeal to the Board.

The employer then argued that the ALJ added evidence to the record by relying upon the preamble. The Board rejected this argument, stating that the Sixth Circuit, within whose jurisdiction this case arose, has held that evaluating an expert's opinion in conjunction with the preamble is a valid function of the ALJ's deliberative process. Finally, the employer argued that the ALJ erred in not requiring Drs. Forehand and Baker to "rule in" coal dust exposure as a cause of miner's disease and disability. The Board found that the ALJ correctly required the miner to establish that his pulmonary disease and impairment was significantly related to/substantially aggravated by coal dust exposure and that he did not apply a presumption of causation.

[ALJ's Use of the Preamble]

Gray v. Powell Construction Company, BRB No. 19-0433 BLA (Oct. 29, 2020) (unpub.): The Board vacated the original ALJ's award of benefits because she did not adequately explain her findings regarding the miner's inability to perform his usual coal mine employment. On remand, the case was reassigned due to the previous ALJ's retirement. Based on the miner's testimony, the new ALJ found that the Miner did not have to perform any physical work other than climbing a ladder. The ALJ determined that this was light manual labor based on the *Dictionary of Occupational Titles (DOT).* Then, the ALJ reviewed the medical evidence in the case and found that the miner was not totally disabled since the only medical expert in the record, Dr. Rasmussen, diagnosed total disability based upon an incorrect understanding that the miner performed heavy manual labor.

The miner appealed to the Board. He argued that the ALJ erred in relying on the DOT to evaluate his usual coal mine employment. The Board rejected this assertion and stated that this was a permissible exercise of the ALJ's discretion per *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989). The Board went on to find that the ALJ's rejection of Dr. Rasmussen's opinion regarding total disability was a permissible exercise of discretion since the medical opinion was based upon an incorrect assumption of heavy manual labor.

[Reliance on DOT]

Adams v. Benham Coal, Inc., BRB No. 19-0555 BLA (Oct. 29, 2020) (unpub.): The employer argued that the ALJ erred in assigning more weight to the x-ray evidence versus the CT scan evidence. The ALJ found that complicated CWP was established by the x-ray evidence. There were also 3 CT scan interpretations in evidence, but none of them were read as positive for simple or complicated CWP. The ALJ found that these reports did not undermine the x-ray diagnoses of complicated CWP because there was no indication that the interpreters had any knowledge of the miner's coal mining history. He also noted that there was no indication of the credentials of the physicians who interpreted the CT scans in the record.

The employer appealed to the Board. It argued that the ALJ ignored the CT scan evidence, but the Board rejected this argument since the ALJ's opinion included his analysis of this evidence. The Board also rejected the employer's argument that the ALJ had ignored the medical opinion evidence. Further, the Board rejected the employer's argument that the ALJ did not weigh all of the evidence. Instead, the Board stated that the ALJ weighed all of the evidence together and permissibly found that the x-ray readings diagnosing complicated CWP were entitled to greater weight and that they were not undermined by the CT scan evidence.

[Weighing Evidence: Complicated CWP]

Lester v. Vaco Resources Incorporated, BRB Nos. 19-0556 BLA and 19-0556 BLA-A (Nov. 5, 2020) (unpub.): The miner filed his first claim on July 24, 2006, which was denied on July 24, 2009. He filed for modification on March 4, 2010. The modification was denied on February 13, 2013. He filed this subsequent claim on May 12, 2014. The ALJ found that the PPACA applied to the modification claim and was considered by the previous ALJ, it could not be invoked to establish a change in condition in this claim. Further, he adopted the previous ALJ's finding regarding the miner's length of coal mine employment.

The Board found that the ALJ erred in finding that the Section 411(c)(4) presumption did not apply. It stated that the presumption applies to all claims filed after January 1, 2005 and pending on or after March 23, 2010. Further, it found that a collateral estoppel does not preclude an ALJ from revisiting the issue of length of coal mine employment.

[Availability of Section 411(c)(4) presumption; Collateral estoppel; Length of CME]

Jewell v. Arch on the North Fork, Inc., BRB No. 20-0069 BLA (Nov. 13, 2020)(unpub.): The ALJ found that the miner had 15.52 years of surface coal mine employment and that the employment was substantially similar to underground employment. On appeal, Employer first argued that the ALJ erred in calculating the miner's employment. The ALJ found that the miner worked from May 8, 1974 to March 12, 1989 plus an additional two week period in September 1989. Employer argued that May 8, 1974 to March 12, 1989 was two months shy of 15 years and that the 2 weeks the miner worked in September 1989 did not equal 2 months. In this case, which arises within the jurisdiction of the US Court of Appeals for the Sixth Circuit, the Board affirmed the ALJ's finding of 15 years as, under the *Shepherd* decision, the evidence established 125 days of employment in 1974 and the Employer did not contest that the miner worked full years of employment from 1975-1988.

The Employer then argued that the miner's employment was not substantially similar to underground mining. The Board found no error in the ALJ's determination that the miner's work as an equipment operator in an enclosed cab was substantially similar to underground coal mine employment. The Board reiterated that claimants are not required to prove that dust conditions aboveground are identical to those underground. Nor are they required to show that the miner was exposed to coal dust for a full eight hours.

[Length of CME; Substantial similarity]

Hall v. S & J Mining Company, BRB 19-0517 BLA (Nov. 18, 2020)(unpub.): The ALJ found that the miner had 15 years of coal mine employment based upon the Director's finding and the miner's statement on the application for benefits. The Board vacated this decision since the ALJ did not provide his analysis or basis for finding that 15 years had been established. In a footnote, the Board stated that it is improper to adopt the Director's finding as administrative law judges are required to review the record de novo and perform an independent weighing of the evidence in order to reach his or her own findings on issues of fact and law.

[Calculating Length of CME]

Coleman v. Jim Walter Resources, Inc., BRB No. 20-0070 BLA (Nov. 24, 2020): The claimant appealed the ALJ's finding that total disability had not been established. The pulmonary function testing revealed a totally disabling impairment. However, the ALJ weighed the PFTs against non-qualifying ABGs and medical opinion evidence and found that the claimant was not totally disabled by a preponderance of the evidence. The Board pointed out that the qualifying PFTs could only have been outweighed by contrary probative evidence.

Since ABGs measure different types of impairment than PFTs, non-qualifying ABGs cannot be contrary evidence to PFTs. Although medical opinion evidence can be contrary probative evidence to PFTs, this was not the case here since the medical opinion evidence of no total disability was either based on ABG findings or did not include a review of qualifying PFTs. The Board instructed the ALJ to fully explain his findings and reasoning to comply with the APA.

[Weighing Evidence of Total Disability]