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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 229 February 2011

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

A. U.S. Supreme Court[1]

***Valladolid v. Pacific Operations Offshore, LL*P, U.S., 604 F.3d 1126 (9th Cir. 2010), *cert. granted*, __ S.Ct. __, 2011 WL 588844, 79 USLW 3254, 79 USLW 3465, 79 USLW 3475 (U.S. Feb 22, 2011) (NO. 10-507).**

The U.S. Supreme Court has agreed to address a Circuit split on the issue of coverage under the Outer Continental Shelf Lands Act. Granting employer's petition for certiorari, the Court has agreed to review whether the widow of an offshore oil worker who suffered a fatal work-related injury in his employer's onshore facility may pursue workers' compensation benefits under the OCSLA.

[Topic 60.3.2 OCSLA – Coverage (Situs, Status, "But for" Test) – Circuit Courts]

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

B. Circuit Courts of Appeals

***Wheeler v. Newport News Shipbuilding and Dry Dock Co., et al.*, __ F.3d __, No. 10-1164, 2011 WL 541805 (4th Cir. 2011), *aff'g* 43 BRBS 179 (2010).**

In this case of first impression, the Fourth Circuit held, agreeing with the Board, that employer's voluntary payment of medical benefits to a claimant's medical providers did not constitute the payment of "compensation" for purposes of tolling the statute of limitations for filing a request for modification under Section 22 of the LHWCA; the contrary position of the Director, OWCP was not entitled to deference.

Claimant sustained a bilateral knee injury in 1992, and employer paid her scheduled permanent partial disability ("PPD") compensation and a period of temporary total disability ("TTD") compensation. Her subsequent claim for permanent total disability ("PTD") compensation was denied by an ALJ in 2002, and the Board affirmed the denial in 2003. By that time, employer had completed the scheduled PPD payments. Employer continued to pay for the medical treatment, including surgeries in 2006 and 2008. Claimant then sought to modify the denial of her claim for PPD in 2007, less than one year after employer's most recent payment of medical benefits for her.

As the one-year period for requesting modification under § 22 commenced in 2003, when the Board's decision affirming the ALJ's denial of the PTD claim became final, the Fourth Circuit upheld the Board's and the ALJ's conclusion that claimant's 2007 modification request was untimely filed. Agreeing with the Board, the court rejected claimant's contention that employer's continuing voluntary payment of medical benefits to claimant's health care providers constituted the payment of "compensation" for purposes of tolling the § 22 statute of limitations.

The court initially determined that the meaning of "compensation" in § 22 is ambiguous. The court noted that the definition of "compensation" in § 2(12) does not expressly state whether the term should be interpreted to include medical benefits. After reviewing the relevant caselaw, the court concluded that the meaning of "compensation" varies among the different sections within the Act, and thus *Marshall v. Pletz*, 317 U.S. 383 (1943), was

not controlling, albeit instructive.[2] The court next concluded that the legislative history of § 22 supports the conclusion that "compensation" in § 22 does not include payment of medical benefits: the contrary holding would allow the statute of limitations to be extended indefinitely, which Congress had explicitly rejected when § 22 was amended in 1934. Additionally, the Director's reading of "compensation" to include medical benefits in § 22 renders that provision potentially inconsistent with both § 7 and the Supreme Court's interpretation of § 13 in *Pletz*. The court noted that, because it concluded that compensation in § 22 does not include medical benefits, it did not reach employer's argument that even if the term compensation includes "medical benefits," it would only include medical benefits paid directly to the employee and not benefits paid directly to healthcare providers.[3]

The court acknowledged the Director's contention that the court's reading of § 22 will mean that a claimant whose previous workplace injuries worsen to the point of requiring additional medical care will not be entitled to seek disability benefits if it has been more than one year since she last received disability benefits (or since such benefits were denied). The court stated, however, that it is the nature of limitations periods to sometimes work seemingly harsh results. The court concluded that the Director's reading strips the limitation period of nearly all meaning and is not consistent with Congressional intent;[4] it might also discourage employers from promptly paying for medical expenses. The Director's position was not entitled to *Skidmore* deference, where the Director had never before taken a formal position on the issue, did not point to any regulations, rulings, or administrative practice to support his viewpoint, and the Director's reasoning was found to be flawed.

[Topic 22.3.2 Modification -- Filing a Timely Request; Topic 2(12) Definitions -- Compensation]

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[2] The court noted that the ALJ and the Board relied heavily on *Pletz*, which held that the § 13 requirement that an employee file a claim for "compensation for disability" within one year of the injury does not include medical payments.

[3] The court noted that employer relied for this argument on the definition of "compensation" in § 2(12) and on *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297 (5th Cir. 1992), which drew this distinction under § 18(a); *see also Pletz*, *supra*, at 391.

[4] The court noted that in *Lisa Lee Mines v. Dir., OWCP*, 86 F.3d 1358 (4th Cir.1996)(en banc), it recognized that a claimant who wanted to "be a perpetual litigator" could simply file repeated requests for "modification" the day before a year runs from the prior denial. The court was not persuaded by the Director's reliance on *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997)("Rambo II"), which held that "nominal awards" are allowed under the Act; instead, the court highlighted the *Rambo II* requirement that something be timely done by the claimant in order to keep open the possibility of future disability payments in the event of a worsening medical condition.

C. U.S. District Courts

***Baker v. Hercules Offshore, Inc.*, No. H-10-0898, 2011 WL 338812 (S.D.Tex. 2011).[5]**

Plaintiff, a welder whose employer was under contract to Hercules Offshore, was allegedly injured while working on board Hercules's mobile offshore jack-up drilling rig, which at that time was attached to the seabed on the Outer Continental Shelf ("OCS"), for the purpose of developing minerals. He brought claims under general maritime law and, in the alternative, under § 5(b) of the LHWCA, and further sought damages under Texas tort law. Hercules removed this action to the district court based on federal question jurisdiction under the OCSLA. Plaintiff then filed a motion to remand to the state court premised on his assertion that the tort at issue occurred on a "vessel" located on navigable water on the OCS, and therefore maritime law, not OCSLA, applied to this action against third parties.

In denying plaintiff's motion, the court initially provided a thorough overview of the history of OCSLA, jurisdiction and choice of applicable law under OCSLA, and an overlap between OCSLA and general maritime law. The court rejected plaintiff's assertion that the jack up rig is a vessel, stating that a jack up drilling rig affixed to the seabed of the OCS is considered to be a "device" for "the purpose of drilling oil," providing federal jurisdiction under OCSLA, and not a vessel subject to maritime jurisdiction. For maritime law to apply to a tort action, precluding its removal, there must be both a maritime situs and a connection to traditional maritime activity. The accident here did not occur on a maritime situs, but on an OCSLA situs. Nor did plaintiff's claim arise from a traditional maritime activity related to navigation or commerce, but out of activities for developing oil and gas on the OCS. Thus there was no admiralty jurisdiction, and removal was not precluded by overlapping jurisdiction. Further, the court found that it has federal question subject matter jurisdiction over this action under OCSLA, as plaintiff's injury occurred on the OCS in furtherance of mineral development and would not have occurred but for his employment.

[Topic 60.3.2 OCSLA – Coverage (Situs, Status, "But for" Test) – Circuit Courts]

[5] Only the Westlaw citation is currently available.

D. Benefits Review Board

***Wilson v. Service Employees Int'l, Inc.*, __ BRBS __ (2011), *aff'g on recon.* 44 BRBS 81 (2010).**

The Board denied reconsideration of its earlier decision in this case, in which the Board reversed the ALJ's denial of attorney's fees under § 28(b) and held that, where employer paid claimant permanent total disability ("PTD") benefits in accordance with the district director's written recommendation but did not pay him mandatory cost-of-living adjustment pursuant to Section 10(f), employer thereby failed to comply with the district director's recommendation, thus establishing an element prerequisite to employer's liability for attorney's fees under § 28(b).[6]

On reconsideration, employer argued that the Board's decision was contrary to *FMC Corp. v. Perez,* 128 F.3d 908, 31 BRBS 162(CRT)(5th Cir. 1997), which employer asserted establishes that there is no distinction between permanent total and temporary total disability benefits when determining fee liability under § 28(b). In *Perez,* employer voluntarily paid TTD compensation and continued to make such payments after claimant reached MMI until the parties reached a settlement. After the district director approved the parties' settlement under § 8(i), the district director awarded claimant's counsel an attorney's fee. The Fifth Circuit held that a fee award under § 28(b) was inappropriate on the basis that employer paid total disability benefits at all times and the case settled without an informal conference. The Board distinguished the present case on the ground that, unlike in *Perez*, this case required an informal conference before the district director.

The Board also rejected employer's assertion that the ALJ's decision was supported by the following facts: (1) there is no evidence that an informal conference was held; (2) that pursuant to *Thompson v. Northrop Grumman Shipbuilding, Inc.,* 44 BRBS 71 (2010), the lack of a specified compensation rate in the written recommendation precludes its liability for an attorney's fee under § 28(b); and (3) there was no dispute over the amount of benefits, and thus no controversy, until after the formal hearing. Contrary to employer's assertion, an informal conference was held by correspondence among the parties, and it culminated in the district director's issuance of a written recommendation. Although the Fifth Circuit has not addressed this issue, 20 C.F.R. §702.311 allows correspondence between the parties and the district director to serve as the functional equivalent of

[6] *See* Recent Significant Decisions Monthly Digest #226 (October 2010).

an informal conference. Slip. op. at *3-4 (also citing decisions by the Fourth Circuit and the Board). Further, unlike in *Thompson*, employer could not argue in this case that it was unable to discern its liability for PTD benefits such that it was unable to accept or reject the written recommendation; here, average weekly wage did not arise as an issue until after the case was referred for a formal hearing (by contrast, in *Thompson*, the recommendation for TPD benefits required knowledge of claimant's wage-earning capacity with other employers, and the district director stated that a compensation rate could not be calculated). Finally, contrary to employer's position, a controversy arose at the time that it rejected the district director's written recommendation via its actions, in not paying the § 10(f) adjustment which became due as of 10/1/08, and in arguing before the ALJ that claimant was partially rather than totally disabled.

The Board also awarded claimant's counsel fees for work performed before the Board in this case, which were not challenged by employer.

[Topic 28.2.3 ATTORNEY'S FEES – 28(b) EMPLOYER'S LIABILITY - District Director's Recommendation]

II. Black Lung Benefits Act

Benefits Review Board

By unpublished decision in *Reed v. Markfork Coal Co.*, BRB No. 10-0170 BLA (Feb. 22, 2011)(unpub.), the Board affirmed the award of benefits on grounds that Claimant suffered from complicated coal workers' pneumoconiosis. On appeal, Employer challenged the judge's designation of certain ILO x-ray interpretations, which were generated at a black lung clinic, as "treatment" records. The Board upheld the judge's characterization of the ILO interpretations as "treatment" records and stated:

> Because the regulations do not specifically define what evidence may constitute a treatment record, such a determination is a matter of discretion for the administrative law judge, based on his review of the facts and evidence in a particular case. (citation omitted). As an initial matter, we hold that the administrative law judge acted within his discretion in rejecting employer's general contention that the classification of an x-ray under the ILO system establishes, *per se*, that the x-ray reading is not a treatment record under 20 C.F.R. § 725.414(a)(4). The administrative law judge rationally determined that employer did not provide any evidence establishing that ILO classified x-rays are obtained, or used, solely for the purpose of litigation. (citations omitted).

Slip op. at 7.

Moreover, the Administrative Law Judge applied the proper legal standard for considering the miner's petition for modification of the denial of a subsequent claim. Citing to *Hess v. Director, OWCP*, 21 B.L.R. 1-141 (1998), the Board stated that "the (threshold) issue properly before the administrative law judge was whether the new evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement." Here, because the original claim was denied for failure to demonstrate a totally disabling respiratory impairment, the Board held that the judge properly found this threshold issue met on grounds that newly submitted evidence established the presence of complicated pneumoconiosis.

In finding that complicated pneumoconiosis was established via a preponderance of the chest x-ray evidence, the Board upheld the judge's decision to accord little weight to the "multiple negative readings" of Dr.

Wheeler as well as the readings by Dr. Scatarige. The Administrative Law Judge determined that the miner's treatment records "did not support the alternative etiologies advanced by either Dr. Wheelor or Dr. Scatarige for claimant's radiographic changes." These "alternative etiologies" included tuberculosis, histoplasmosis, or another granulomatous disease. The Board noted that the Administrative Law Judge's consideration of interpretations by Drs. Wheeler and Scatarige did not fun afoul of its holding in *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999)(en banc on recon.):

> The present case is distinguishable as, in contrast to the readings at issue in *Cranor*, Drs. Wheeler and Scatarige did not classify the x-rays as containing a large opacity consistent with an ILO classification of complicated pneumoconiosis, which they then explained was not consistent with complicated coal workers' pneumoconiosis. (citation omitted). Rather, Drs. Wheeler and Scatarige suggested that what they observed on claimant's x-rays was not properly classified as a large opacity under the ILO system. Because their comments were relevant to whether they accurately determined that the films contained no large opacities consistent with pneumoconiosis, we discern no error . . ..

Slip op. at 13-14.

The Administrative Law Judge also addressed non-qualifying blood gas and pulmonary function testing in light of his finding of complicated pneumoconiosis and the Board stated:

> The administrative law judge acknowledged that, although it may be unusual for a miner to have complicated pneumoconiosis and no respiratory impairment, . . . he was not persuaded that the mere absence of an impairment precluded a finding of complicated pneumoconiosis, as defined in the Act and regulations, noting that even Dr. Castle admitted that there are times when a miner may have a Category A opacity on x-ray and no disability demonstrated on his pulmonary function testing.

Slip op. at 12.

[**ILO x-ray interpretations as "treatment" records; standard of review of petition for modification of denial of a subsequent claim; weighing x-ray evidence of complicated pneumoconiosis**]

By unpublished decision in *Crabtree v. Queen Anne Coal Co.*, BRB No. 10-0301 BLA (Jan. 31, 2011)(unpub.), the Board upheld the Administrative Law Judge's order dismissing Employer's petition for modification of an attorney fee award. On appeal, Employer maintained that the Administrative Law Judge was obliged to determine whether the fee award contained a "mistake in a determination of fact" regarding Claimant's counsel's hourly rate. The Board disagreed. Citing to *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 B.R.B.S. 41 (1997), the Board stated that an attorney fee award "does not concern 'compensation' or 'the terms of an award or denial of benefits' as required under Section 22 of the Longshore and Harbor Workers' Compensation Act", such that the award is not subject to modification.

[**modification under 20 C.F.R. § 725.310 of an attorney fee award, not permitted**]