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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 287
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I. Longshore and Harbor Workers' Compensation Act and Related Acts

On April 19, 2018, the Federal Register published a final rule containing regulations implementing the Longshore Act's provisions on the maximum and minimum compensation rates: 83 Fed. Reg. 17287-17293 (Apr. 19, 2018). The rule also implements the Longshore Act's annual compensation-adjustment mechanism for permanent total disability compensation and death benefits. This rule will go into effect on May 21, 2018.

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

***Sickle v. Torres Advanced Enterprise Solutions, LLC*, 884 F.3d 338 (D.C. Cir. 2018).**

Matthew Elliott and David Sickle worked as subcontractors for Torres Advanced Enterprise Solutions ("Torres"), a military defense contractor, in Iraq. Torres terminated Elliott's and Sickle's contracts, without advance notice, after Elliott sought workers' compensation benefits under the Defense Base Act ("DBA"), and Sickle, a base medic, medically documented Elliott's claim. Elliott and Sickle jointly sued Torres in a federal district court for retaliatory discharge,[2] breach of contract, and common-law torts (*i.e.*, retaliatory discharge, conspiracy, and "prima facie tort"). Torres argued that the DBA preempts the plaintiffs' common-law tort and contract claims. The district court agreed and dismissed all claims.

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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 citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *__).

[2] In an earlier decision, the court affirmed the district court's dismissal of Elliott's and Sickle's claims of discrimination and retaliatory discharge in violation of Section 48a of the LHWCA, based on failure to exhaust the necessary administrative remedies.

As a preliminary matter, the DC Circuit determined that preemption under the DBA and LHWCA is not jurisdictional and, thus, does not determine the power of the court to act. Rather, preemption forecloses a plaintiff from stating a legally cognizable claim for recovery. It is, ordinarily, an affirmative defense forfeitable by the party entitled to its benefit.

Turning to the merits of Torres' preemption arguments, the court initially determined that the exclusivity provisions of the DBA, 42 U.S.C. § 1651(c), and LHWCA, 33 U.S.C. § 905(a), do not expressly foreclose the tort and contract claims at issue in this case. Next, the court addressed whether the concept of implied preemption forecloses the claims. This court previously held that the LHWCA's and DBA's exclusivity provisions impliedly preclude common-law tort remedies against employers for work-related injuries, because these statutes embody a compromise in which employees surrender tort claims arising out of workplace injuries in exchange for an expeditious statutory remedy. It also held that the DBA's preemptive bar clearly encompasses intentional torts. In this case, because Elliott's tort claims relate to and arise directly out of his entitlement to and recovery of statutory workers' compensation benefits, they are impliedly preempted. His retaliatory discharge, conspiracy, and prima facie tort claims all address the same conduct: Torres's allegedly unlawful discharge of him in retaliation for filing a DBA claim.

However, the concept of implied preemption does not preclude claims that arise independently of a statutory entitlement to benefits. Unlike Elliott, Sickle's tort claims arise independently of an entitlement to benefits under the DBA. Neither does the DBA's retaliation provision apply to Sickle. The Act only speaks to retaliation against an employee "because he has testified or is about to testify in a proceeding under this chapter." 33 U.S.C. § 948a. Sickle was not involved in or asked to testify in any matter, let alone in a "proceeding under this chapter." Instead, he was terminated simply because, according to his complaint, he truthfully documented Elliott's medical injuries. The court rejected Torres' argument that Sickle's filing of a medical report amounts to testimony "in a proceeding" for purposes of Section 48a, stating that it wrenches the language of Section 948a out of context and strains its ordinary meaning.

Finally, the DBA does not preempt either Elliott's or Sickle's contract claims. Claims of contractual liability that exist independently of a claim for worker's compensation benefits are not foreclosed. Here, the only issue raised by the contract claims is whether Torres provided a notice of termination required under Elliott's and Sickle's employment contracts, which has no bearing on either Elliott's or Sickle's entitlement to or recovery of workers' compensation benefits under the DBA.

In sum,

> "The touchstone for implied preemption under the Base Act is a claim's nexus to the statutory benefits scheme. Because Elliott sought and obtained workers' compensation under the Base Act, his tort claims arising from that benefits process are preempted, but his independent claim of contractual injury is not. Sickle, for his part, never set foot into the Base Act's regulatory arena, so both his tort and contract claims can proceed."

Id. at 350.

[Defense Base Act (exclusivity of remedy); § 5(a) Exclusivity of Remedy; § 48a – Discrimination Against Employees Who Bring Proceedings]

B. Benefits Review Board

***Walton v. SSA Containers, Inc.*, __ BRBS __ (2018)(en banc).**

On reconsideration en banc, the Board held that the ALJ did not have jurisdiction to address a dispute between potentially responsible employers regarding liability for claimant's past medical treatment provided by his private health care provider, where the employers had agreed to hold claimant harmless for such expenses in a prior Section 8(i) settlement and the medical provider never filed a claim for reimbursement under Section 7(d)(3).[3]

Claimant sustained injuries to her knees and back while working for SSA Containers ("SSA") in February 2011, for which she filed a claim under the Act. She returned to work but had to stop in October 2011 due to pain. As claimant was employed by Ports America ("Ports") on her last day of work, she filed a claim against Ports for cumulative trauma injuries to her back and knees. In 2013, the ALJ approved a Section 8(i) settlement wherein SSA and Ports agreed to pay claimant a lump sum in exchange for a discharge of all liability for disability compensation arising from her injuries. Ports agreed to be responsible for future medical treatment for claimant's left knee condition related to her 2011 injuries. The parties did not resolve liability for claimant's past medical treatment (stating that both employers denied liability), except that SSA and Ports did agree to "hold claimant harmless with respect to same." However, prior to executing the settlement, SSA and Ports entered into an indemnity agreement in which Ports agreed to defend, indemnify, and hold SSA harmless in relation to claimant's Longshore claim for the February 2011 injury, in exchange for SSA paying Ports $10,000.

Claimant later filed a state workers' compensation claim for her February 2011 injuries at SSA, as well as for additional injuries she sustained in 2014. After this claim was settled, claimant's private health care provider, the Motion Picture Industry Health Plan ("MPIHP"), filed a lien against SSA in state court for medical benefits it had paid that were related to claimant's February 2011 injury. The lien dispute has not been resolved. Ports refused to defend SSA in the state proceedings.

SSA requested an informal conference with the district director and, later, a hearing with an ALJ on the issue of reimbursement for the past medical benefits paid by MPIHP. SSA then filed a motion for summary decision, asking the ALJ to order Ports, as the last employer, to reimburse MPIHP the nearly $80,000 it paid for claimant's treatment. The ALJ denied the motion and dismissed the claim, stating he lacked jurisdiction to resolve the reimbursement dispute, because there was no claim for medical reimbursement under Section 7(d)(3), the Section 8(i) settlement disposed of claimant's interest in this case and

[3] Section 7(d)(3) states: "The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee."

did not authorize him to assign liability to Ports, and enforcement of an indemnity agreement between employers is not a question "in respect of" a Longshore claim.

In its original decision, the Board agreed that the ALJ lacked jurisdiction to address the indemnity dispute and to order either employer to reimburse MPIHP, but it reversed the ALJ's finding that he lacked jurisdiction to determine which employer is liable under the Act for the benefits MPIHP paid. *Walton v. SSA Containers, Inc., et al.*, BRB No. 16-0549 (May 30, 2017) (Buzzard, J., dissenting). The Board reasoned that liability for medical benefits is an issue "in respect of" claimant's claim that was specifically preserved in the parties' Section 8(i) settlement agreement; therefore, the settlement of claimant's interests did not divest the ALJ of jurisdiction to resolve the responsible employer issue (citing *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997)). Ports sought reconsideration en banc, arguing that the question regarding which employer is liable for reimbursing MPIHP is theoretical and unripe for adjudication because no claim for reimbursement has been filed under the Act. SSA argued that the Board could not address the ripeness issue because it was not raised before the ALJ,[4] and further argued, in the alternative, that this issue is ripe for adjudication. The Director responded, agreeing with Ports and asserting that the Board erred in focusing on whether a "question in respect of" claimant's claim was left unresolved rather than whether a "claim" had been presented for adjudication at all.

The Board granted Ports' motion. Upon reconsideration en banc, a majority of the Board agreed with the OWCP Director's position and held that the ALJ lacks jurisdiction to resolve the responsible employer dispute. Pursuant to Section 19(a), an ALJ has "full power and authority to hear and determine all questions in respect of" a claim made under the Act. The Board has previously held that in the absence of a justiciable claim asserting a right arising out of or under the Act, the ALJ does not have jurisdiction to resolve any disputes. In this case, the Board held that "on the facts of this case, we agree there is no claim arising out of or under the Act to be addressed and, therefore, the responsible employer question presented is theoretical, and the [ALJ] is without authority to resolve it." Slip op. at 6. It reasoned that:

> "To begin, the only claim that has been filed under the Act in this case is claimant's original claim for compensation, which was settled in 2013. …. Only liability for past medical treatment was left unresolved …. By settling with claimant, the parties eliminated any controversy with claimant.[5] Thus, claimant does not have an extant claim or interest in the dispute over liability for past medical benefits.

[4] The Board rejected this argument, stating that the alleged lack of subject-matter jurisdiction may be raised at any time.

[5] The BRB noted that existence of a settlement, alone, is insufficient to preclude the ALJ's authority to address disputes arising out of or under the Act that persist post settlement. In this case, however, claimant did not pay for any past medical treatment and is not entitled to personally recover the costs of any of that treatment. By also holding claimant harmless for medical care, the parties eliminated any future reimbursement interest claimant might have.

> Although SSA and Ports explicitly denied liability for claimant's past medical care in the settlement agreement, and reserved, for later resolution, their dispute regarding which employer must pay for that treatment, neither employer paid for those medical services such that it may seek reimbursement from the other. Consequently, neither SSA nor Ports has filed a claim for reimbursement so as to bring this claim before the [ALJ].
>
> Indeed, the only benefits at issue in this case are those that were paid by MPIHP, giving only MPIHP a derivative right to reimbursement under the Act. Only MPIHP has standing to pursue that right, and only a claim by MPIHP could give rise to the responsible employer's liability to reimburse it. At this juncture, MPIHP has not filed a claim for reimbursement *under the Act*. Absent such, no rights arising under or out of the Act are currently at issue, neither employer faces liability under the Act, and the dispute regarding which employer must reimburse MPIHP is theoretical and not justiciable under the Act."

Slip op. at 6-7 (citations and footnotes omitted; emphasis in original). The Board concluded that *Kirkpatrick* and *Schaubert* are distinguishable, because the responsible employer disputes in those cases were raised within the context of justiciable reimbursement claims under the Act. By contrast, here, MPIHP did not claim a derivative right to reimbursement under the Act pursuant to Section 7(d)(3); MPIHP filed its lien for medical benefits in state court. Thus, in the federal forum, SSA seeks to resolve a factual dispute between itself and Ports, which arises in a state forum, by asserting the rights of MPIHP for use in the state forum. However, SSA does not have standing to pursue MPIHP's "claim" under the Act, and is inappropriately seeking declaratory relief in an effort to defend against liability in state court.

As the purported responsible employer dispute presented in this case does not affect the disposition of the parties' rights and liabilities regarding any extant claim under the Act, the ALJ lacks jurisdiction to resolve the dispute. Accordingly, the Board vacated its prior decision and affirmed the ALJ's denial of SSA's claim.

In a dissenting opinion, Administrative Appeals Judge Gilligan opined that:

> "For the reasons stated in the Board's original decision, I would hold that SSA raised a justiciable issue in asking the [ALJ] to determine which employer is liable for past medical benefits under the Act, as that issue was specifically preserved in the parties' settlement agreement. As claimant's meritorious claim in this case included the past medical benefits that were paid by MPIHP, I disagree with my colleagues' holding that the responsible employer issue in this case is theoretical and unripe for adjudication."

Id. at 10.

[§ 19(a) – The Claim; Adjudicatory Powers; Ripeness; Responsible Employer; MEDICAL BENEFITS - § 7(d)(3); § 8(i) SETTLEMENTS]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

Spring Creek Coal Co. v. McLean, F.3d , BLR , No. 17-9515 (10th Cir. Feb. 5, 2018).

In this living miner's claim, all of Claimant's coal mine employment took place above ground in open pit coal mines. In addition to his coal mine dust exposure, Claimant smoked approximately 1.5 packs of cigarettes per day from age 20 to 64.

The administrative law judge awarded benefits. The administrative law judge found that Claimant worked in dust conditions "substantially similar to those found in underground mining." The administrative law judge commented that although Claimant worked "inside a cab with an attached dust collector, he was regularly exposed to coal dust when he worked for Spring Creek." Employer's witness reported that about 23 dust samples were taken "at the driller position over a twenty-year period" and he stated that they showed dust levels that were lower than the maximum limits established by MSHA. (*see* n.2) The administrative law judge found that this evidence was not sufficient to show that Claimant was not regularly exposed to coal dust. Because the parties stipulated that Claimant had a totally disabling respiratory or pulmonary impairment, the administrative law judge invoked the Section 411(c) presumption of total disability due to pneumoconiosis. The administrative law judge found that employer did not rebut this presumption since it did not establish that Claimant did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of or in connection with his coal mine employment. The BRB rejected employer's arguments, and thus affirmed the administrative law judge's award of benefits.

On appeal to the Tenth Circuit, employer argued that the language in 20 C.F.R. §718.305(b)(2), that "The condition in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there," fails to satisfy the statutory language in 30 U.S.C. §921(c)(4) that "conditions of a miner's employment in a coal mine other than an underground mine were *substantially similar* to conditions in an underground mine." Specifically, employer asserted that Claimant's work at an above ground mine is not "substantially similar" to work at an underground mine solely because Claimant, a miner at the above ground mine, is "regularly exposed" to coal mine dust.

The Court rejected employer's challenge to this standard, relying on its earlier decision in *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014), and the decision of the United States Court of Appeals for the Seventh Circuit in *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). In *Antelope*, the Tenth Circuit noted that Section 718.305(b)(2) addressed "when a surface miner's working conditions are substantially similar to underground mining working conditions," and held that Section 718.305(b)(2) "codifies that interpretation [of the Seventh Circuit] by making regular exposure to coal mine dust the standard to determine substantial similarity of surface working conditions to those in underground mines." Further, the Court stated "Importantly, the DOL expressly relied on the Seventh Circuit's decision in *Midland Coal* when it revised and adopted the current and reinstated version of §718.305(b)(2) in 2013." The Court noted that it is not bound to the DOL's determination that the regulation is consistent with the Act, but acknowledged that it should be awarded deference pursuant to *Chevron*. The Court found that the DOL's explanation "reasonably and persuasively indicates why the standard adopted in §718.305(b)(2) is consistent with

§921(c)(4)'s 'substantial similarity' standard." For the foregoing reasons, the Court rejected employer's challenge to the legitimacy of Section 718.305(b)(2).

Turning to the administrative law judge's findings on the merits, the Court rejected employer's assertion that the administrative law judge erred by using the Preamble to the regulations in his weighing of the medical evidence, noting that an administrative law judge's use of the Preamble to evaluate medical evidence has repeatedly been allowed by the courts. The Court held that the administrative law judge permissibly evaluated the opinions of Drs. Farney and Tuteur when he concluded that they were not consistent with the scientific evidence accepted by the DOL, found that they failed to explain why coal mine dust could not have been a contributing or aggravating factor, and found that they did not adequately explain their opinions that coal mine dust exposure did not contribute to claimant's disability with science underlying the Preamble.

The Court affirmed the administrative law judge's weighing of the medical evidence, and his finding that employer failed to establish rebuttal. Therefore, the award of benefits was affirmed.

[Bench Book Chapter 11: IV. D. 5. b. "'Substantially similar' conditions at a surface mine, deference to Administrative Law Judge"]
[Bench Book Chapter 3: VI. J. 6 "The preamble to the amended regulations: Tenth Circuit"]

Island Creek Coal Co. v. Director, OWCP [Conley], ___ F.3d ___, No. 16-1453 (4th Cir. Feb. 12, 2018)(unpub.).

Conley involves a living miner's claim. The administrative law judge found that the evidence established invocation of the Section 411(c) presumption of total disability due to pneumoconiosis, and that employer failed to rebut this presumption. Accordingly, benefits were awarded. The Board affirmed the administrative law judge's award of benefits.

On appeal to the Fourth Circuit, employer challenged the administrative law judge's reliance on the Preamble to the amended regulations to discredit the opinions of its physicians, Dr. Rosenberg and Dr. Castle. The Court noted that it had held this appeal in abeyance pending its decision in *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663 (4th Cir. 2017).

The Court stated that in *Stallard*, the Fourth Circuit reaffirmed its prior holdings that an administrative law judge may "look to the Preamble" in considering and weighing medical opinions and addressing the cause of a claimant's lung disease. Specifically, the Court stated that in *Stallard* it endorsed the administrative law judge's finding that "Dr. Rosenberg's hypothesis regarding FEV1/FVC ratios runs directly contrary to the agency's own conclusion in this regard." *Stallard*, 876 F.3d at 671. The Court noted that the Preamble cites several studies indicating that coal dust exposure does result in decreased FEV1/FVC ratios, and that the Preamble is consistent with the regulations that allow entitlement based on a reduced FEV1/FVC ratio. *Stallard*, 876F.3d at 671-72. In addition, the Court stated that *Stallard* determined that the "more recent studies" relied upon by Dr. Rosenberg do not address black lung disease and therefore did not support employer's argument that the administrative law judge erred in disregarding Dr. Rosenberg's opinion. *Stallard*, 876 F.3d at 672.

Based on its analysis in *Stallard*, the Court concluded that in the instant case, the administrative law judge did not err in discounting the opinions of Drs. Rosenberg and Castle as their opinions were based on the theory that the cause of a miner's COPD can be determined from the FEV1/FVC ratio patterns.

The Court affirmed the award of benefits.

[Bench Book Chapter 3, VI. J. 3 "The preamble to the amended regulations: Fourth Circuit"]

B. Benefits Review Board

[no published decisions to report]