U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 184
March 2007

Stephen L. Purcell
Associate Chief Judge for Longshore

Kerry Anzalone
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

I. Longshore

Announcements

A. United States Supreme Court

Bellamy v. Director, OWCP, ___ U.S. ___ (S.Ct. Docket No. 06-8603)(*Cert. denied* March 5, 2007).

This matter involved the denial of a modification request for being time-barred.

[Topic 22.3.2 Modification--Filing a timely Request]

B. Federal Circuit Courts

McKenzie v. Universal Maritime Services, (Unpublished) (No. 05-2309)(**4th Cir.** March 7, 2007).

In this Section 20(a) issue claim, the court found that the ALJ did not properly analyze the testimony and vacated the denial of compensation and benefits. It remanded the case to the Board for further proceedings and directed that the Board reassign the case to a different ALJ on remand. "This direction does not suggest that the ALJ acted improperly. However, the remand will require a review of additional facts in the record and a reassessment of expert testimony about which the ALJ has already formed an opinion."

[Ed. Note: Query—doesn't the trier of fact form an opinion in every case? In fact, Section 554(d) of the APA, 5 U.S.C. § 554(d), provides that the post-hearing decision shall be made by the judge who received the evidence and presided at the hearing, unless that officer is unavailable. Adverse rulings, alone, are insufficient to show bias. *Olsen v. Triple A Mach. Shops*, 25 BRBS 40, 45-46 (1991).**]**

[Topics 19.3 Procedure—Adjudicatory Powers; 19.4 Procedure—Formal Hearings comply With APA]

[Ed. Note: The following entry was previously noted in the last digest when it should have been held for the March Digest. It is repeated here solely for consistency.**]**

Goldman v. Halliburton Energy Services, (Unpublished)(No. 06-60431 Summary Calendar) (**5th Cir.** March 12, 2007).

Here the claimant sustained injuries while working aboard an oil rig in the Gulf of Mexico and filed an LHWCA claim. The ALJ granted summary judgment to Halliburton because the worker was excluded from coverage under the LHWCA as a member of a vessel's crew. The claimant argued that the employer was judicially estopped from claiming that he was a member of the crew. The Board upheld the ALJ's grant of summary judgment. The circuit court noted that judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. "For a party to be judicially estopped from arguing a position, the position must be clearly inconsistent with the party's previous one, and the party must have clearly convinced the court to accept that previous position." The court found that the claimant failed to show that Halliburton convinced a court in any judicial proceeding to accept the position that he was not a member of a crew, so Halliburton was not judicially estopped from claiming that the claimant was a member of a crew.

[Topics 1.4.1 Jurisdiction/coverage—LHWCA v. Jones Act; 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies—Introduction and General Concepts]

C. Federal District Courts and Bankruptcy Courts

Drake v. Danos and Curole Marine Contractors, ___ Fed. Supp 2 ___ (Civ. Act. No. 04-3522 c/w 05-6657 Sec "N" (4))(March 13, 2007).

In this summary judgment matter wherein Jones Act coverage was at issue, the claimant filed a Motion to Show Cause asking the federal district court to require a defendant to show cause why it should not be ordered to provide him with medical treatment and compensation under either the Jones Act or the LHWCA. Since the court granted the defendant's summary judgment motion concluding that the plaintiff was not a seaman for purposes of the Jones Act, it was precluded from issuing an order under the Jones Act statute. The court further wrote: "With regard to Plaintiff's LHWCA claim, which is pending before the Department of Labor, Plaintiff has not established that this Court is empowered, at present, to provide any relief relative to that claim."

[Topic 21.5 Review of Compensation Order--compliance]

D. Benefits Review Board

W.G. v. Marine Terminals Corp., ___ BRBS ___ (BRB No. 06-0501)(March 22, 2007).

The Board held that pursuant to the plain language of Section 28(a), since the employer did not pay benefits to the claimant within 30 days of its receipt of the claim from the district director, its liability for an attorney's fee for work involving all benefits due on the claim must be determined pursuant to Section 28(a).

After initially controverting the claim, the employer paid the claimant temporary total disability benefits and also paid the fee for work regarding these benefits. The claimant subsequently reached maximum medical improvement, and he ultimately was successful in obtaining permanent partial disability benefits. "Claimant's pursuit of these benefits, however, did not involve a new claim but rather the permanent disability aspect of the previously filed claim. Under these circumstances Section 28(a) must be applied to the entire claim." The Board found that the conclusion that the pursuit of additional benefits after an initial payment is not a new "claim" is supported by jurisprudence. The term "filing a claim," refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks additional benefits on a prior claim. "In this case, [the] claimant's pursuit of permanent partial disability benefits … is part of [the] claimant's initial claim for benefits. Contrary to the district director's analysis, it is not a new claim separate from the initial disability claim. As [the] employer did not timely pay benefits after receipt of the claim, fee liability on the entire claim is governed by Section 28(a) rather than Section 28(b)."

[Topics 28.1.2 Attorney Fees—Successful Prosecution; 28.2 Attorney Fees—Employer's Liability]

T.H. v. Maersk Container Services, (Unpublished)(BRB No. 06-0932)(March 27, 2007).

In this Section 7 case the Director filed a motion to vacate and remand, "conceding" that the district director had erred in issuing a compensation order in the case because issues of fact were involved and issues of fact must be decided by an ALJ. In granting the requested relief, the Board stated that "Although the authority vested by Section 7(b) to supervise medical care rests with the delegate of the Secretary, the district director, … the [ALJ] retains the role as factfinder when disputed issues of fact concerning medical benefits arise." In this particular case the Board further stated: "Moreover, as questions of fact were raised by employer, including, *inter alia*, which body parts were injured in the accident and whether medical care is necessary for the treatment of claimant's injuries, the [ALJ], and not the district director, must resolve the issues in accordance with the [LHWCA]'s formal adjudication procedures."

[Topic 7.4.1 Medical Benefits Authorization by Secretary]

R.B. v. Kinder Morgan Bulk Terminals, (Unpublished)(BRB No. 06-0742)(March 28, 2007).

Here the claimant directly appealed an attorney fee award of the district director to the Board. The Board noted that, "[a]lthough it is preferable that the district director not issue a decision on remand until the Board physically remands the case upon the expiration of the time for filing a motion for reconsideration, the district director was not prohibited from issuing a new fee order pursuant to the Board's remand instructions while the motion for reconsideration was pending before the Board."

[Topic 21.2.11 Review Of Compensation Order—Remand By Board]

Banks v. Service Employers International, Inc., (Unpublished)(BRB No. 06-0486)(March 14, 2007).

In this Defense Base Act claim dealing with a Section 20(a) issue, the Board found that the ALJ erred in finding that the presumption was rebutted by the mere existence of medical records of a prior back condition. "The mere existence of a prior back injury condition does not establish that the current condition is due to that injury or that the pre-existing condition was not aggravated by the work accident."

[Topic 20.2.5 Presumptions--Failure to Properly Apply Section 20(a); Presumptions—Employer Has Burden of Rebutal With Substantial Evidence]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

Circuit Courts of Appeals

In *The Daniels Co. v. Director, OWCP [Mitchell]*, ___ F.3d ___, Case No. 06-1137 (4th Cir. Nov. 29, 2006), the court issued important holdings in calculating the length of coal mine employment and determining whether complicated pneumoconiosis arose from coal dust exposure.

"Law of the case" doctrine and modification.

The court held that findings of a previous administrative law judge regarding the length of a miner's employment and responsible operator designation do not constitute "law of the case" on modification under 20 C.F.R. § 725.310.

Length of coal mine employment (125 day rule) for purposes of operator designation.

In order for an operator to be held responsible for the payment of benefits, (1) it must have employed the miner for at least one calendar year, and (2) during the calendar year the miner must have actually spent a minimum of 125 working days at the mine site. The Benefits Review Board and Director, OWCP asserted that "regular employment" with an operator for a period of one year may be demonstrated if a miner demonstrates 125 working days at the mine site over the entire course of his employment with the operator. The court disagreed:

> Under the view of the Board and director, 'regular employment' under § 725.493(b) is established if an employee works a total of 125 days over the course of his entire period of employment, even if that employment lasts a decade or more. So long as the employee worked a total of at least 125 days in or around a coal mine or tipple at *any* time during his employment, he will be deemed to have been 'regularly employed in or around a coal mine.' (citations omitted). We have not interpreted § 725.493 in such a manner nor, as we noted in *Armco*[1], do the intervening amendments to the regulations support such an interpretation . . ..

The court concluded that, in naming an operator responsible for the payment of benefits, it is the Director's burden to demonstrate that the miner worked for the company for one calendar year *during which* the miner spent a minimum of 125 working days at the mine site.

Application of 20 C.F.R. § 725.101(a)(32)(iii) (2005) to a pre- January 19, 2001 claim.

The court held that the amended provisions at § 725.101(a)(32)(iii) are not applicable to a claim arising prior to January 19, 2001 and, under the facts of the present

[1] *Armco, Inc. v. Martin*, 277 F.3d 468, 473 (4th Cir. 2002).

case, they could not be used as a "guide." In support of its holding, the court reasoned as follows:

> By its terms, the (amended) regulation may be used in situations where the miner's employment lasted less than one year or 'the beginning and ending dates of the miner's coal mine employment' cannot be established. (citation omitted). Here, the record contains documentary evidence of Mitchell's employment by Mesa, including 'payroll registers listing the specific dates on which the miner was dispatched to the coal mine tipples, his hours, and his pay.' (citation omitted). The formula's calculation is also to be based upon BLS average daily earnings for the coal mine industry and any calculation thereunder 'shall' be accompanied by a copy of the BLS table. Here, the ALJ did not attach the table and did not explain her calculation. Nor does it appear that she took into account the undisputed evidence that Mitchell, by virtue of the character of his work for Mesa, was paid tipple wages at inflated overtime rates. In short, § 725.101(a)(32)(iii) is not applicable to the responsible operator inquiry in this case, nor would we affirm its use as a 'guide' given the multiple deficiencies present in its application; its use as a 'guide' in this case could not help but yield an unreliable and unfair result.

Slip op. at 20.

The court determined that there was insufficient evidence to designate Daniels as the responsible operator. Indeed, the court noted that evidence established that the miner was employed by Daniels from September 1974 to February 1988, "but not as a miner." Rather, Daniels operated a "fabrication shop" that "engaged in the business of building material handling systems for various coal processing plants . . .." Daniels did not, however, operate a coal mine or coal tipple, nor did it "provide services or perform work at or near any such facility." From this, the court concluded that "Daniels could not be designated a responsible operator under the Act because it is not engaged in coal mine or coal tipple work, nor did (Claimant) technically perform any such work or receive wages for it from Daniels."

The court noted that, on occasion from 1979 to 1986, the miner performed sporadic, part-time work at the tipples for Daniels' sister company, Mesa. However, it determined that, if Claimant was viewed as an employee of Mesa, then the "first step of the 'responsible operator' inquiry would not be met; namely, the evidence did not demonstrate that Claimant worked for Mesa for a period of one year or partial periods totaling one year. The court then noted that, if Claimant was viewed as an employee of Daniels, then the "first step" of the inquiry would be satisfied, *i.e.* evidence establishes that the miner worked for Daniels for a period of one year, or partial periods totaling one year from 1974 to 1988. However, the "second step" of the inquiry would remain unsatisfied; *to wit*, the evidence does not support a finding that Claimant spent an actual 125 working days at the mine site *during* a calendar year of his employment with Daniels.

Complicated pneumoconiosis and the presumption at § 718.203.

In assessing whether a miner suffers from complicated coal workers' pneumoconiosis, the court held that the fact-finder has a two step process: (1) whether there are radiographic or other findings consistent with complicated pneumoconiosis under the provisions at 20 C.F.R. § 718.304(a)-(c); and, if so (2) whether the pneumoconiosis arose at least in part out of coal mine employment at 20 C.F.R. § 718.203(a). The court emphasized that the causation element is not "subsumed" in a finding that the miner suffers from complicated pneumoconiosis. Rather, a miner with ten years or more of coal mine employment is entitled to a rebuttable presumption that his complicated pneumoconiosis arose out of coal dust exposure, whereas a miner with fewer than ten years of employment must present medical evidence to establish causation.

[**length of coal mine employment; 125 day rule; cause of complicated pneumoconiosis**]