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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 185
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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Crescent Towing & Salvage Co. v. Collins, (Unpublished)(No. 06-60687)(Summary Calendar)(**5th Cir.** April 20, 2007).

Here the claimant suffered an undisputed back injury at work. The claimant contended that a later episode of atrial filbrillation was triggered by an epidural steroid injection administered to treat his back injury. The circuit court found that the opinion of the board-certified cardiologist qualified as substantial evidence to support the ALJ's finding that the Section 20(a) presumption was triggered. The cardiologist had stated that it was much more likely than not that the claimant's initial episode of atrial filbrillation was triggered by the epidural injection. The employer had offered the testimony of another cardiologist who had opined that the claimant sustained a lone episode of atrial fibration, i.e., a spontaneous condition. The circuit court found that the ALJ was entitled to weigh the evidence, assess the credibility of the witnesses, and draw inferences and conclusions from the evidence.

[Topic 20.2.4 Presumptions--ALJ's Proper Invocation of Section 20(a)]

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*Newport News Shipbuilding & Dry Dock Co. v. Bentley***,** (Unpublished, per curiam)(No. 06-1697)(**4th Cir.** April 13, 2007).

The court affirmed an underlying denial of a Section 8(f) claim without oral arguments. Previously, the Board had upheld the ALJ's finding that the medical opinions submitted by the employer either failed to adequately quantify the level of impairment resulting from the claimant's work-related injury alone or to explain how the work-related component compared to the overall respiratory impairment.

[Topic 8.7.5 Special Fund Relief--The Disability Must Not Be Due Solely to the New Injury]

[Ed. Note: Although the following case is not a longshore matter, it potentially may impact some future longshore issues. This potential link to longshore jurisprudence was first noted by Tom Langan in his May 1st, 2007 Maritime Newsletter.**]**

Lombardi v. Whitman, ___ F. 3d ___ (No. 06-1077)(**2nd Cir.** April 19, 2007).

This matter involved workers who performed search, rescue, and clean-up at the World Trade Center site after 9/11. The workers alleged that federal officials knowingly made false statements as to air quality and its safety and that this violated their right to substantive due process. The court found that the allegations do not shock the conscience (the standard needed to violate due process) even if the defendants acted with deliberate indifference. Only an intent to cause harm arbitrarily can shock the conscience.

C. Federal District Courts and Bankruptcy Courts

McLaurin v. Noble Drilling Inc., (Unpublished) (1:05CV463)(S. D. MS)(April 5, 2007).

In this 905(b) matter, the federal district court granted a motion for summary judgment because the claimant's injury occurred on land rather than on or in navigable waters.

[Topic 5.2.1 Third Party Liability--Generally]

D. Benefits Review Board

Richards v. Stevedoring Services of America, (Unpublished)(BRB No. 05-0581)(April 26, 2007).

The claimant argued that the district director and ALJ lacked jurisdiction to issue Orders awarding attorney fees on remand while the matter was still pending before the

Board. In finding jurisdiction the Board stated, "Although it would have been preferable for the district director and the [ALJ] to defer issuing attorney fee awards on remand until after the Board addressed claimant's timely filed motion for reconsideration of the Board's decision in BRB Nos. 05-0581, 05-0582/A, any error on the part of the district director and the [ALJ] in issuing decisions on remand while claimant's motion for reconsideration was pending before the Board is harmless in view of our review herein of both claimant's motion for reconsideration and his new appeals."

[Topic 28.7.1 Attorney Fees—Authority To Award Fees]

McAllister v. Lockheed Shipbuilding, ___ BRBS ___ (BRB No. 06-0646)(April 26, 2007).

This matter involved the application of the Section 20(a) presumption and the last maritime employer rule. Here there were three employers made party to the proceeding. The Director argued that the ALJ conflated the issues of "compensability" and "liability," making the Section 20(a) presumption "virtually determinative of the last employer issue." Holding that the ALJ did not properly address the responsible employer issue, the Board noted that the responsible employer determination is to be made without reference to the Section 20(a) presumption. The invocation of and failure to rebut the Section 20(a) presumption does not mandate the assessment of liability against any particular employer. "Rather, once compensability of the claim is established, the [ALJ] must weigh the relevant evidence to determine which employer is liable for the claimant's benefits."

The Board held that the standard espoused in *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997) is to be used in both traumatic injury cases and in occupational disease cases: Each employer must persuade the fact-finder that the employee's disability is due to his injury with another employer. "This burden is not sequential; it is simultaneous."

[Topics 2.2.1 Definitions—Section 2(2) Vis-à-vis Section 20(a) Presumption; 2.2.16 Definition—Occupational Diseases and the Responsible Employer/Carrier; 20.2.4 Presumptions—ALJ's Proper Invocation of Section 28(a)]

Irby v. Blackwater Security Consulting, LLC, ___ BRBS ___ (BRB Nos. 06-0655) (April 25 2007).

At immediate issue in this Defense Base Act claim was a Motion to Withdraw Claim filed by the claimants. Here the employer had paid the claimants benefits for a substantial period of time and sought a compensation order so that it could seek reimbursement under the War Hazards Act. The claimants, who had file parallel tort litigation in state court, opposed the issuance of a compensation order. The District Director refused to issue an order, stating that the parties were not in agreement.

Employer, noting that it had withdrawn its opposition to the claim and was accepting liability, argued that it was entitled to such an order.

At the ALJ level, the judge ordered the employer to file a motion for summary judgment. The claimants did not respond to this order and instead filed a motion to withdraw. Referencing 20 C.F.R. §702.351, the employer argued that it was entitled to the entry of orders awarding the claimants compensation. The Board however, noted that 20 C.F.R. §702.351 references a disposition pursuant to 20 C.F.R. §702.315 and this presupposes the agreement of the parties. The opposition of a claimant to the entry of a compensation order is sufficient to preclude application of 20 C.F.R. §702.351.

The Board next rejected the ALJ's finding that the withdrawal was not for a "proper purpose." The Board stated: "[C]laimants have the right to choose the forum in which they first litigate their cases in order to avoid application of doctrines such as election of remedies and/or issue preclusion." That the exclusivity provision of the DBA is at issue does not preclude the claimants from first pursuing remedies in another forum. See Section 13(d) of the LHWCA.

Next, the Board addressed whether or not the withdrawal was in the "best interest of the claimants," another requirement under the withdrawal regulation. 20 C.F.R. § 702.225. It noted that the ALJ had stated a scenario wherein, the claimants might not recover under state law and arguably would not be able to re-file their claims under the LHWCA because Section 13(d) does not apply when the case at law is denied on the merits. Additionally, the ALJ noted that the claimants did not provide any meaningful evidence of their likely net recovery in the state forum, as they alleged only that such would be many times greater than a workers' compensation recovery. The ALJ noted that without better evidence, he could not find that withdrawal was in the claimants' best interest. Rather, he stated that the claimants would be relinquishing their rights to a sum certain in exchange for a speculative recovery.

Agreeing with the ALJ's conservative approach, the Board affirmed the ALJ's finding that the claimants had failed to establish that the withdrawal of their claims would be in their best interest.

The Board rejected the employer's contention that the claims could not be withdrawn because the United States Constitution gives federal tribunals exclusive jurisdiction over military matters and state courts therefore cannot impose tort liability on contractors employed in a foreign battle zone. This argument was rejected by the district court in denying removal jurisdiction. *Nordan v. Blackwater Security Consulting, LLC*, 382 F. Supp.2d 801 (E.D. N.C. 205) at 813-814.

[Topics 8.11 Withdrawal of Claim; 60.2.1 Longshore Extension Acts—Defense Base Act—Applicability of the LHWCA]

J.T. v. American Logistics Services, ___ BRBS ___ (BRB No. 07-0135)(April 30, 2007).

The threshold issue here was whether the employer, as an entity, and its officers, as potentially liable officers of the corporation (there were allegations of no insurance coverage.), were properly notified of the formal proceedings before the ALJ. While the parties and potential parties had notice of the claimant's claim, the district director sent the notice of referral to the wrong Mideastern city. The ALJ, in turn, sent the notice of hearing and first show cause order to the wrong city.

The employer alleged that the notice of hearing was deficient in that it was not addressed properly and was sent by regular mail. Additionally, the claimant's attempt to join officers of the employee's corporation to the claim (as allowed by Section 38 if there is no proper insurance) occurred only six days prior to the formal hearing and was sent to the wrong city address. The second show cause order was the first communication sent by the ALJ to the proper address and by a trackable delivery system.

The Board held that the failure to notify the employer and the individuals of the hearing 10 days prior thereto at the correct address violated Section 19(c) of the LHWCA and thereby vacated the Decision and Order. Additionally the Board held that service by UPS is sufficiently equivalent to certified mail, as there is a tracking system for the items. **[Ed. Note:** The U.S. Post Office web site indicates that sending certified and registered mail is possible only in the United States.**]**

The Board specifically rejected the claimant's contention that the corporate officers did not require separate notice of hearings. "They are 'interested parties' pursuant to Section 19(c), even if section 38(a) operates as a matter of law because they are entitled to the opportunity to argue that Section 38(a) is not applicable."

[Topic 19.1 Procedure--Generally]

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*Neff v. Foss Maritime Company***,** ___ BRBS ___ (BRB No. 06-0641)(April 30, 2007).

The instant matter involves suitable alternate employment and wage earning capacity issues when a worker voluntarily works less than fulltime. The claimant worked less than half of the year preceding his injury, choosing to work part-time in order to avoid the heat of summer, to work on his home and to travel. It was undisputed that the claimant could not return to his usual work as a boilermaker. The ALJ found that as the claimant had worked part-time prior to his injury, the full-time positions identified by the employer were insufficient to establish the availability of suitable alternate employment. Opining that the employer cannot be permitted to benefit by forcing the claimant to work more hours post-injury in order to reduce his loss in wage-earning capacity, the ALJ found the claimant to be totally and permanently disabled.

However, the Board found that the extension of the wage-earning capacity analysis to the suitable alternate employer issue cannot be affirmed, "as the purpose of the latter analysis is to determine whether the claimant retains *any* wage-earning capacity, whereas the former concerns the degree of that wage-earning capacity."

The Board explained. "It is uncontested that claimant is capable of full-time work which is within his medical restrictions. That he chose to work part-time prior to his injury does not affect the analysis of the suitability of the positions identified by employer, as retirement considerations unrelated to injury generally are not relevant in traumatic injury cases. The suitability inquiry encompasses factors such as claimant's age, education, technical or verbal skills, vocational history and physical restrictions. Thus, the fact that one security guard and one bench assembler position are full-time does not negate a finding that they are otherwise suitable, given the relevant factors."

Thus the Board found that there was suitable alternate employment and that the claimant has some retained wage-earning capacity and is at most partially disabled. Only now does the inquiry turn to determining the extent of the claimant's disability, and at this juncture the ALJ can properly consider the claimant's pre-injury part-time status. The Board noted that the claimant's post-injury wage-earning capacity may not be reflected by the full time wages by the two suitable positions. "On remand, the [ALJ] may calculate claimant's wage-earning capacity based on part-time wages extrapolated from the suitable jobs, or on any other relevant evidence of record."

[Topic 8.2.4.2 Extent of Disability--Suitable alternate employment—Factors affecting/not affecting employer's burden 8.9.1 Wage-Earning Capacity]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

Circuit Courts of Appeals

In *Kessler v. Island Creek Coal Co.*,23 B.L.R. 1-__ (Mar. 28, 2007), a case arising in the Fourth Circuit, the administrative law judge dismissed the miner's claim as untimely under 20 C.F.R. § 725.308, which provides a rebuttable presumption that a claim is filed within three years of a medical determination of total disability due to pneumoconiosis. Specifically, the judge cited to the miner's hearing testimony, wherein the miner stated that a physician advised that he was totally disabled due to pneumoconiosis in 1988, more than three years before he filed his 2003 claim for federal black lung benefits. The judge further found that the miner received "written notice" in 1994 that he prevailed on a state workers' compensation claim for black lung and "the documentation indicates that [c]laimant received a medical determination of total disability due to pneumoconiosis." Considering the state workers' compensation award

in conjunction with the miner's testimony, the judge concluded that the miner's "understanding was that he was totally disabled due to pneumoconiosis" in 1994, more than three years prior to the filing of his federal claim for black lung benefits.

Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), the Board disagreed that the presumption at 20 C.F.R. § 725.308 had been successfully rebutted. First, the Board noted that, "under the language set forth in *Kirk*, a claimant's mere statement that he was told by a physician that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations." Interestingly, the Board cited to the Fourth Circuit's holding in *Island Creek Coal Co. v. Henline*, 456 F.3d 421 (4th Cir. 2007), wherein the court held that the presumption at § 725.308 may be rebutted by a miner's testimony. Said differently, the court found that § 725.308 does not contain the written notice requirement adopted by the Board in *Adkins v. Donaldson Mine Co.*, 19 B.L.R. 1-36 (1993). Thus, the Board held, in this case, that "claimant's sole statement, as to what he believed a doctor told him in 1988, may be insufficient to trigger the running of the statute, unless the administrative law judge also finds that claimant received a 'reasoned' diagnosis of total disability due to pneumoconiosis."

Second, the Board noted that a disability award under a state workers' compensation program "does not *per se* establish that claimant is totally disabled due to pneumoconiosis for purposes of the (Black Lung Benefits) Act." Rather, the Board concluded the following:

> An award by a state workers' compensation board may be supportive of a finding of total disability, if the administrative law judge determines that the degree of impairment determined by the board prevents a miner from performing the requirements of his usual coal mine work in accordance with the regulatory criteria. (citations omitted). Moreover, in assessing the weight to accord the findings of the state board, the administrative law judge should consider how that agency reached its finding of disability. (citations omitted). In this case, because the December 20, 1994 report fails to explain either the medical or legal criteria relied upon by the (West Virginia Occupational Pneumoconiosis) Board in reaching its determination of respiratory disability, the administrative law judge must assess the probative value of the report in light of the employer's burden of proof at Section 725.308.

The Board noted that x-ray and ventilatory testing was referenced in the state workers' compensation award, but the results of the tests were not disclosed.

In sum, the judge's dismissal of the claim was vacated and the case was remanded for further consideration regarding whether the presumption at § 725.308 had been successfully rebutted.

[**rebuttal of presumption of timely filed claim at § 725.308**]