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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 242 April - May 2012

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

A. U.S. Supreme Court[1]

On May 21, 2012, the U.S. Supreme Court granted petitions for writ of certiorari in the cases of *Director, OWCP v. Boroski*, No. 11-926, *and Dyncorp International, et al. v.Boroski*, No. 11-936; vacated the judgment of the Eleventh Circuit in *Boroski v. Dyncorp Int'l, et al.*, __ F.3d __, 2011 WL 5555686 (11th Cir. 2011); and remanded the cases for further consideration in light of *Roberts v. Sea-Land Services, Inc.*, 566 U.S. __ (2012). The Eleventh Circuit's decision in *Boroski* is summarized in the Recent Significant Decisions Monthly Digests ## 237, 238 (October – November 2011). The Supreme Court decision in *Roberts* is summarized in the Recent Significant Decisions Monthly Digest # 241 (March 2012).

B. U.S. Circuit Courts of Appeals

[there are no decisions to report for April – May 2012]

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

C. Benefits Review Board

***Martin v. BPU Management, Inc./Sherwin Alumina Co.*, __ BRBS __ (2012).**

The Board affirmed the ALJ's finding that the Section 3(a) "situs" requirement was met where claimant was injured while shoveling raw bauxite onto an underground cross-tunnel conveyor belt at employer's Sherwin Alumina facility.

The primary purpose of employer's facility is to extract aluminum oxide (alumina) from bauxite ore. The raw bauxite is unloaded from vessels at a dock to the storage building by means of an overhead conveyor system. The conveyor carries the raw material over a street and fence separating the dock area from the alumina processing facility and dumps it into discrete piles according to grade in Building 15. Once a particular grade of raw bauxite is selected for the extraction process, it falls through the trap doors into an underground area referred to as the reclaim system. There, the raw bauxite passes through a screw feeder that sifts bauxite and then drops it onto the reclaim conveyor belt, which, in turn, transports and drops the material onto the cross-tunnel conveyor. The cross-tunnel conveyor belt, which is approximately 25-30 feet underground, transfers the pre-sifted, pre-blended bauxite to the rod mill. Often, some bauxite spills off the cross-tunnel conveyor onto the floor, requiring workers to intermittently shovel the bauxite back onto the conveyor belt. It is in the course of this activity underneath Building 15 that claimant sustained his injury.

The Board stated that, as claimant was not injured on navigable waters or on an enumerated site, in order to meet the situs requirement of § 3(a), his injury must have occurred in an "other adjoining area customarily used by an employer" in loading and unloading a vessel. "The inquiry in 'mixed-use cases,' *i.e.*, those involving a site with both a manufacturing and a maritime component, concerns whether the claimant's injury occurred in the area used for loading or unloading vessels, as that area has a functional relationship with navigable water." Slip op. at 4-5 (citations and footnotes omitted). Here, the issue was whether claimant was injured in an area that has a functional relationship to navigable waters, such that it is an "adjoining area."[2] The Board affirmed the ALJ's finding that the storage shed building in which claimant's injury occurred constituted an adjoining area under § 3(a). It reasoned that

[2] As claimant was injured on a facility located adjacent to Corpus Christi Bay, a geographic nexus with navigable waters was established.

> "[t]he building adjoins navigable waters, is connected to the docks by conveyor belts, and is used in furtherance of employer's unloading process; the building is not used for manufacturing. On these facts, the building has a functional relationship with navigable waters and the [ALJ] rationally found this case analogous to *Gavranovic* [*v. Mobil Mining & Minerals*, 33 BRBS 1 (1999)] and, hence, that claimant's injury occurred on a covered situs. Consequently, as claimant was injured in an area adjoining navigable waters customarily used for unloading barges, he was injured on a covered situs."

Slip op. at 8 (citations omitted). The Board rejected employer's contentions that the cross-tunnel area serves no functional role in the un/loading process as it is physically separated from the docks by several hundred yards, it is 25-30 feet underground, and is devoted solely to transferring bauxite from one phase of the manufacturing process to the next without regard to whether a vessel is at the dock.

The BRB further held that employer has not established error in the ALJ's rejection of the parties' stipulation that claimant suffered no permanent disability as a result of his injury. The parties' joint stipulations included the following statement: "9. Permanent disability: No Percentage: N/A." The ALJ reasoned that an impairment rating is not relevant to determining disability in this case involving an unscheduled back injury and that the stipulation is otherwise not supported by the record. The BRB stated that stipulations are binding upon the parties when they are received into evidence. 29 C.F.R. §18.51. An ALJ is not obligated to accept stipulations, but if he rejects them, he must provide the parties with prior notice that he will not accept them, his rationale for doing so, and an opportunity to submit evidence in support of their positions. Here, although the ALJ erred originally by not providing the parties with notice and an opportunity to present evidence in support of the rejected stipulation, the ALJ corrected that error in response to employer's motion for reconsideration. Moreover, the ALJ rejected the stipulation for the legally correct reason that the absence of a permanent impairment rating does not establish the absence of disability within the meaning of the Act. Furthermore, the ALJ rationally found that the stipulation was not supported by credited medical evidence showing that claimant was unable to perform his usual work until 5/6/10.

[Topic 1.6.2 JURISDICTION/COVERAGE – SITUS – "Over land;" Topic 19.3.6.1 19(c) ADJUDICATORY POWERS – Stipulations]

***Koepp v. Trinity Industries, Inc.*, __ BRBS __ (2012).**

The Board held that the ALJ properly applied the exclusion from coverage of Section 3(d) in finding that the area where claimant was working at the time of his injury was covered by the exemption certificate issued by the Department of Labor under § 3(d). Accordingly, the BRB affirmed the ALJ's denial of claimant's claim for benefits under the Act.

Contrary to claimant's assertion, the ALJ did not err in finding dispositive of the situs issue the geographic location of claimant's injury. Specifically, claimant argued that he spent some of his work time with employer in indisputably "covered employment" within the meaning of the Act, and that the ALJ's decision to focus solely on the location where claimant's injury occurred allows claimant to "walk in and out of coverage." The Board stated that claimant's contention conflated the issues of situs and status, and did not take into account the 1984 amendment to § 3 of the Act. In 1984, Congress amended Section 3 by adding the § 3(d), which provides in relevant part:

> "(d)(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary [of Labor], the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels. . . . ."

The Board reasoned that, contrary to claimant's argument that his satisfaction of the "status" requirement resulted in his claim being covered under the Act, both the "situs" and the "status" requirements must be met for the Act to apply. Although claimant correctly stated that the Act covers those who spend at least some of their time performing indisputably covered work, so as to avoid employees' "walking in and out of coverage," this principle refers only to the status prong of coverage. It is well established that the injury must occur on a site covered by § 3(a) and not otherwise exempted for the injury to be covered by the Act. In this regard, § 3(d), with exceptions not applicable here, specifically states that "no compensation is payable" if the site meets certain requirements and accordingly has a certificate of exemption. The ALJ, therefore, properly addressed the issue of coverage under § 3 by addressing whether the site of the injury is within the Act's coverage. As the facts concerning the location of claimant's injury and the existence of employer's small vessel exemption were not in dispute, the BRB affirmed the ALJ's finding that the location

where claimant was injured was exempt from coverage pursuant to § 3(d)(1) of the Act.

[Topic 3.3 § 3(d) SMALL VESSEL EXCLUSIONS]

***Jasmine v. CAN-AM Protection Group, Inc.*, __ BRBS __ (2012).**

In a Defense Base Act case, the Board held that the ALJ did not err in calculating claimant's average weekly wage ("AWW") based on a blend of his stateside earnings and his contract rate of pay with employer in the year prior to his injury, where claimant was injured while working for employer overseas pursuant to a six-month contract and his employment overseas was cyclical as he alternated periods of stateside and overseas employment.

Claimant commenced employment with employer in Afghanistan in December 2009, and he was injured on 2/1/10 by an improvised explosive device. Employer voluntarily paid temporary total disability benefits, and the only issue before the ALJ was claimant's AWW. Claimant challenged the ALJ's AWW calculation, contending that *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), mandated that his AWW be determined based solely on his overseas wages. Claimant argued that his employment overseas was neither intended to be, nor was in fact, short-term, as evidenced by his hearing testimony that he intended to continue working for employer beyond the term of his contract. The Board reasoned that

> "[c]ontrary to claimant's contention, *Simons* does not mandate the use of only overseas earnings to calculate a claimant's [AWW] in all DBA cases. Rather, the Board held that, in cases arising under the DBA, a claimant's overseas earnings must be used exclusively to calculate his [AWW] under Section 10(c) when he was enticed to work overseas in a dangerous environment in return for higher wages under a long-term contract. In this case, the [ALJ] discussed the Board's decisions in *Simons,* noted the Board's specific reference that its holding may not necessarily apply to situations where a claimant's contract of employment is for less than a one-year period, and determined that the Board's decision in *Simons* did not require the exclusive use of claimant's overseas earnings to calculate his [AWW] since claimant's contract of employment with employer was for a six-month period. Rather, the [ALJ] concluded that, in light of the short-term duration of claimant's employment contract with employer and claimant's employment history, which documented claimant's rotation between stateside and overseas employment, a calculation of claimant's [AWW] using both claimant's stateside and overseas earnings appropriately

> reflects claimant's actual earning capacity at the time of his injury."

Slip op. at 4-5.

The Board rejected claimant's assertion that the ALJ erred in failing to discuss claimant's prior overseas employment with another employer[3] as evidence of long-term employment in a dangerous environment. Claimant's overseas employment was, on two occasions, followed by his return to stateside employment in Louisiana. Prior to his work with employer, he was employed for over one year in the U.S. Claimant's employment overseas thus was not continuous and this factor was properly addressed by the ALJ. Moreover, the ALJ rationally found that *Simons* does not mandate the use of only claimant's overseas earnings. Unlike in *Simons*, claimant's overseas employment was not continuous, but rather cyclical. Consistent with § 10(c), the ALJ's calculation took into consideration claimant's history of interspersing domestic employment in Louisiana with overseas employment, as well as his earnings at the time of his injury. The ALJ, therefore, rationally found that claimant was employed by employer overseas pursuant to a short-term contract and that his employment history indicated the lack of a long-term commitment to overseas employment.

[Topic 10.4.5 DETERMINATION OF PAY - SECTION 10 (c) - Calculation of Average Weekly Wage Under Section 10(c); Topic 60.2 DEFENSE BASE ACT]

[3] Claimant's 2005 contract was for one year and his 2007 contract was for six months, which was renewed, after a two-month break during which time claimant returned to his former employment in Louisiana, for a subsequent four-month period.

II. Black Lung Benefits Act

Circuit Court of Appeals

In *Harman Mining Co. v. Director, OWCP (Looney)*, ___ F.3d ___, Case Nos. 05-1620, 11-1450 (4th Cir. May 15, 2012), the Administrative Law Judge's denial of Employer's petition for modification and the award of benefits in the miner's claim based on her finding of totally disabling legal pneumoconiosis were affirmed. Notably, the miner demonstrated 17 years of coal mine employment and a history of smoking cigarettes "for several decades."

In concluding that the miner's totally disabling chronic obstructive lung disease was due, in part, to his coal dust exposure, the Administrative Law Judge accorded greater weight to the opinions of Drs. Forehand and Robinette over contrary opinions of Drs. Fino, Hippensteel, and Sargent, who attributed the lung disease solely to smoking. The court concluded that, "despite its brevity", it was proper for the Administrative Law Judge to find that Dr. Forehand's report was "well-reasoned" as it was based on a physical examination of the miner as well as a "battery of tests", including a chest x-ray revealing "interstitial scarring", ventilatory testing yielding evidence of obstruction, and blood gas study evidence of hypoxemia at rest and after exercise. The court further found that it was proper for the Administrative Law Judge to find that Dr. Robinette's examination report and testing lent further support to Dr. Forehand's conclusions.

In according less weight to the opinions of Drs. Fino, Hippensteel, and Sargent, the court held that it was proper for the Administrative Law Judge to consider the preamble to the amended regulations as well as the plain language of the regulations. In particular, the court affirmed the following findings:

- Dr. Fino's opinion that smoking alone caused the miner's obstructive lung disease was less probative on grounds that it was premised on a view that legal pneumoconiosis "cannot" cause obstructive lung disease. The court noted, "The ALJ found this view hostile to the Act; she certainly did not err in doing so." The court further stated that "[c]ourts have long recognized what the 2000 regulations codified—that legal pneumoconiosis includes obstructive lung disease.

- The Administrative Law Judge properly determined that Dr. Sargent's opinion, "pneumoconiosis cannot cause disability in the absence of a positive x-ray" is contrary to the plain language of

the regulations at 20 C.F.R. § 718.202(b) ("No claim for benefits shall be denied solely on the basis of a negative chest x-ray").

- The Administrative Law Judge properly accorded less weight to the subsequent opinion of Dr. Fino that smoking was the sole cause of the miner's lung disease because "Dr. Fino relied heavily on general statistics rather than particularized facts about" the miner. Dr. Fino relied on the "average loss of FEV1 . . . in coal miners" and his view that the "amount of obstruction caused by coal dust inhalation is directly related to the amount of coal mine dust inhaled and retained within the lung tissue."

Because the x-ray, CT-scan, and pathological evidence "showed clinically insignificant coal dust retention . . ., Dr. Fino concluded that coal mine dust was not a clinically significant factor in [the miner's] obstruction." The court held that the Administrative Law Judge properly accorded less weight to Dr. Fino's opinion on grounds that it was premised on views contrary to the plain language of the regulations (distinguishing between clinical and legal pneumoconiosis at 20 C.F.R. § 718.201(a)(1)-(2)) and providing that "[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray" at 20 C.F.R. § 718.202(b)). Moreover, the court held it was proper to find Dr. Fino's opinion was premised on a view contrary to the preamble that "coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis" at 65 Fed. Reg. 79938-79940 (Dec. 20, 2000).

Employer challenged the Administrative Law Judge's use of the preamble in weighing the various medical opinions and the court stated the following:

Primarily, Harman objects to the ALJ's and the Board's invocation of the preamble in the 2000 regulations, spilling much ink in its briefs on why this reference violates the APA.

. . .

Harman contends that the ALJ violated the APA by finding Dr. Fino's opinion to be less credible because his views conflicted with the Department's position set forth in the preamble that legal pneumoconiosis in the form of obstructive pulmonary disease, can exist independently of clinical pneumoconiosis. We can find no support for this argument. Although the ALJ did not need to look to the preamble in assessing the credibility of Dr.

> Fino's views, we conclude that the ALJ was entitled to do so and the Board did not err in affirming her opinion.
>
> We note that the only other circuits to address the question have upheld the ALJ's invocation of the same preamble. *See Helen Mining Co. v. Dir., O.W.C.P.*, 650 F.3d 248 (3d Cir. 2011) (noting that 'the ALJ gave less weight' to the opinions of an employer's expert because it was 'inconsistent with 20 C.F.R. § 718.202(a)(1-4) and with the preamble to the regulations'); *Consolidation Coal Co. v. Dir., O.W.C.P.*, 521 F.3d 723, 726 (7th Cir. 2008) (describing as 'sensible' the ALJ's decision to give little weight to the opinion of employer's expert because, in part, it conflicted with the preamble's statements on the clinical significance of coal dust induced COPD).

Slip op. at 14-15.

The court dismissed Employer's arguments that use of the preamble in black lung adjudications violates the APA noting:

> The ALJ cited the preamble not to imbue it with the force of law or to transform it into a legislative rule, but simply as a source of explanation as to the Department's rationale in amending the regulations. *Cf. Wy. Outdoor Council v. U.S. Forest Srvc.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ('Although the preamble does not control the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent'). Because the ALJ found Dr. Fino's views conflicted with that rationale, it was well within her discretion to find his opinion less persuasive. So too the Board did not err in concluding that the ALJ 'permissibly referenced the preamble in making her credibility determination about Dr. Fino's opinion.'

Slip op. at 16. In so concluding, the court found that the preamble constitutes a "public law document" such that, contrary to Employer's assertion, it does not need to be "made part of the administrative record" in order for a fact-finder to rely on it.

Finally, the court rejected Employer's argument that the Administrative Law Judge did not sufficiently explain her rationale for awarding benefits. The court noted that "even Harman recognizes that the APA does not impose a 'duty of long-windedness' on the ALJ." To that end, the court stated that the Administrative Law Judge "conscientiously (and repeatedly) weighed the expert opinions and resolved the conflicts in favor of Looney." The court further stated, "Even if we might have weighed the evidence at issue differently than the ALJ, on review, we defer to her evaluation of the

appropriate weight to accord these conflicting medical opinions." *Slip op.* at 18.

[**use of the preamble to the amended regulations**]