



RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 243
June 2012

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

A. U.S. Circuit Courts of Appeals¹

***Ceres Gulf, Inc. v. Director, OWCP, et al.*, ___ F.3d ___, 2012 WL 1977908 (5th Cir. 2012).**

The Fifth Circuit reversed the Board and reinstated the ALJ's decision finding that employer rebutted claimant's Section 20(a) presumption and that the record as a whole did not establish the work-relatedness of claimant's hearing loss. The court held that the Board erred by declaring portions of employer's expert's testimony inadmissible, and by improperly raising the employer's burden of rebutting the §20(a) presumption.

Claimant was a longshoreman since the 1950s and he worked for employer from 1982 until his retirement in 1988. After his retirement, claimant was diagnosed with both conductive and sensorineural hearing loss, and he filed a claim against employer in 2006. The ALJ's initial finding of no work-related hearing loss was reversed by the BRB and remanded for further consideration. The BRB concluded that some of the evidence relied on by the ALJ to satisfy the "substantial evidence" standard could not, as a matter of law, contribute to rebutting the §20(a) presumption of causation. On remand, the ALJ awarded claimant benefits for an 8.4% binaural hearing loss. On second appeal, the BRB affirmed the ALJ's finding of compensable

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

injury, but held employer liable for claimant's total 80.9% hearing loss under the aggravation rule.²

The Fifth Circuit held that, in its first decision, the Board erred in excluding two of the bases for employer's expert's opinion: sound level surveys and generalized population studies. In so doing, "the Board impermissibly placed a thumb on the evidentiary scale by arbitrarily declaring portions of Dr. Seidemann's testimony inadmissible. Under the statute, the ALJ, not the BRB, was entitled to assess the relevance and credibility of testimony, including expert testimony." 2012 WL 1977908 at *4. Specifically, the BRB found that the noise surveys from other longshore facilities were irrelevant to rebut the presumption formed by evidence from claimant's own work environment. Yet, those surveys were relevant to the question whether potentially harmful working conditions existed that could have caused claimant's harm. *Id.* at *4, *7. The BRB's reliance on *Everson v. Stevedoring Servs. of Am.*, 33 BRBS 149 (1999), was misplaced, as in that case the noise surveys were not deemed legally irrelevant; rather, they were deemed insufficient to rebut the presumption as they were produced under materially different working conditions. Further, "[t]hat the BRB has itself considered noise level surveys in the past demonstrates their relevance. Their use by Dr. Seidemann goes to the weight, not the admissibility, of the surveys, and the weighing was exclusively under the ALJ's control." *Id.* at *4-5. The second basis for Dr. Siedemann's expert testimony erroneously excluded by the BRB was the generalized population studies which showed that claimant had better hearing than the average person of his age. The BRB's conclusion that these studies had no logical relationship to the case was in error because they were offered as evidence that claimant's hearing loss may have been caused by the natural process of aging.

The court further found that

"[t]he Board was required to consider all of this evidence for an additional reason. The Board evidently raised the employer's burden of rebutting the Section 20(a) presumption from that of

² It was undisputed that a significant portion of claimant's hearing loss was caused by non-work-related otosclerosis. On remand, the ALJ found that, because claimant had not shown that his non-work-related hearing loss predated his work with employer, that condition could not have been "aggravated" during employment. On second appeal, the BRB held that the ALJ erred in holding that claimant must prove that his conductive hearing loss pre-existed his work-related hearing loss. The BRB placed the burden on the employer to provide substantial evidence that it did not. It held that in view of the §20(a) presumption, the entire hearing impairment was work-related, and the employer failed to produce substantial evidence that some portion of the disability was due to an intervening cause post-dating the work injury. Employer was thus held liable for claimant's total 80.9% hearing loss. Employer challenged this finding on appeal, but the Fifth Circuit did not reach the aggravation rule issue.

simply adducing 'substantial evidence' [that the hearing loss was not work-related] to the more onerous task of disproving the Claimant's prima facie case. Thus, the Board states that the employer must 'demonstrate' the absence of causation or a work-related injury. [Claimant's] brief is even more emphatic that the presumption must be rebutted with specific and comprehensive medical evidence 'proving the absence' or 'severing the connection' between the harm and the employment. This court has explicitly held, however, that the BRB may not adopt standards requiring employers' rebuttal evidence to 'rule out,' 'unequivocally state,' or 'affirmatively state' their positions to the exclusion of the plaintiff's case. In *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 287 (5th Cir.2003), the court stated the reason for this holding: 'We have repeatedly held that this evidentiary standard [substantial evidence] is less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence.' The Board's 'demonstrate' requirement heightens the substantial evidence standard by making the employer prove the deficiency in the Claimant's prima facie case, when all it must do is advance evidence to throw factual doubt on the prima facie case. Having produced substantial evidence, the employer then casts the duty on the ALJ to weigh all the record evidence."

Id. at *5 (additional citations and footnote omitted). In this regard, the Board erred to the extent it relied on this court's characterization, in *Ibos*, of the employer's burden to rebut the presumption with "proof" that "exposure to injurious stimuli did not cause the employee's occupational disease." *Id.* at *6, citing *New Orleans Stevedores v. Ibos*, 317 F.3d, 480, 485 (5th Cir. 2003). This is because: (1) *Ibos* was an asbestos case in which the work-related nature of the injury was not contested, and thus the court's statement on causation was dictum; (2) the major issue in *Ibos* was the last-employer rule, which was not at issue here; and (3) *Ibos* involved an occupational disease, and in that context a higher burden on employer to rebut claimant's *prima facie* case would not be surprising, although it facially appears incongruous with the statute.

Having reversed the BRB's erroneous findings, the Fifth Circuit concluded that the ALJ's weighing of the evidence was reasonable. Claimant's expert testimony did not carry much weight and the neutral expert testimony was too neutral to support compensability. Employer's expert opinion, on the other hand, was "thoroughly grounded in the facts of the case, was comprehensive, direct and unequivocal." *Id.* at *6. He relied on his own studies and those conducted by OSHA, and also noted the earplug effect of claimant's otosclerosis. He substantiated his conclusion that claimant's sensorineural hearing is better than 80-year-old peers who

were not exposed to noise. Further, his opinion was supported by claimant's continued hearing loss after retirement.

[Topic 8.13.13 HEARING LOSS -- Rebutting the Section 20(A) Presumption; Topic 20.3.2 EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE -- Successful Rebuttal; Topic 20.4.1 IF SUCCESSFUL, PRESUMPTION NO LONGER AFFECTS OUTCOMES -- Evidence Based on Record as a Whole]

M-I, LLC, v. Director, OWCP, No. 11-60694, 2012 WL 2138254 (5th Cir. 2012).

In an unpublished opinion, the Fifth Circuit upheld the decision of the BRB affirming the ALJ's finding that claimant was entitled to compensation for the death of her husband. The ALJ properly found that claimant successfully put forth a *prima facie* case through witness testimony to the effect that the decedent had been exposed to lime dust and diesel fuel while at work and that such exposure caused or could have caused damage to his pulmonary artery and thereby led to his death. Employer rebutted this presumption through opinions of doctors who denied an association between inhalation injuries and pulmonary blood clots. Further, substantial evidence supported the ALJ's determination that the work conditions caused the death. Dr. Emil Laga provided expert testimony that the exposure to lime dust and diesel fumes caused damage to the decedent's pulmonary artery, resulting in Systematic Inflammatory Response Syndrome ("SIRS") and creating the blood clot that led to his death. Dr. Laga's testimony was found to be credible because of his extensive background and because his findings were consistent with the medical records. The ALJ reasonably concluded that Dr. Laga's testimony was more credible than the statements by other doctors denying the connection between blood clots and chemical exposure, as Dr. Laga's findings were more persuasive and consistent with the records and the requirements of SIRS.

[Topic 2.2.18 INJURY -- Representative Injuries/Diseases -- Pulmonary Conditions]

B. U.S. District Courts

Vance v. CHF Int'l, et al., Civil Case No. RWT 11-3210, 2012 WL 2367075 (D.Md. 2012)(unpub.)

Relevant to this review, the district court granted CHF's motion to dismiss a six-count complaint brought by personal representatives of the estate of Stephen D. Vance and his wrongful death beneficiaries. The complaint asserted claims for wrongful death; survivorship; loss of consortium; negligent hiring, supervision, training; and intentional infliction

of emotional distress based on the murder of Mr. Vance while he was performing aid work in Pakistan.

Decedent worked for CHF in Pakistan under its contract with USAID. The contract provided for the implementation of a program directed at: job and workforce development, revitalizing community infrastructure and services, and business development. The court concluded that the Defense Base Act (“DBA”) applied pursuant to § 1651(a)(5) and § 1651(a)(4) and, thus, the DBA provided the exclusive remedy for plaintiffs’ tort claims. The court initially determined that the DBA applies pursuant to §1651(a)(5) because funding was provided under the FAA and CHF maintained the required DBA insurance. The parties disagreed as to the interpretation of this subsection, which provides in relevant part that the DBA applies to the injury of death of an employee engaged in employment: “under a contract approved and financed by the United States or any executive department ... where such contract is to be performed outside the continental United States, under the [Foreign Assistance Act], as amended” The court rejected plaintiffs’ assertion that for the contract to be covered under this subsection, there had to be a statutory grant of authority under the FAA for the work to be performed under the contract. The court held that it was sufficient that the contract with USAID was financed in the manner required by the DBA. The court found that the plaintiffs’ argument that the terms ‘performed under’ and ‘funded by’ are not synonymous lacks support in case law and is an incorrect interpretation of the statute. The court stated that §1651(a)(5) has two relevant clauses. First, the contract must be “approved and financed by the United States or executive department, independent establishment, or agency thereof.” Here, the contract is financed by USAID. Second, the contract must be “performed under the [FAA].” Here, USAID awarded the sum for the project pursuant to the FAA. The agreement between CHF and USAID stated that the contract was based on the authority of the FAA, which implicated this statutory provision.

The court further found, in the alternative, that the DBA applied pursuant to §1651(a)(4) because CHF's program constituted “public work.” The work appeared to be performed under a service contract connected with a government-related construction project and national defense effort. The program was undertaken to counter extremist influences in Pakistan, which is a goal of the United States’ war on terror. The program also included construction projects such as rebuilding agricultural infrastructure in the FATA.

The court next determined that plaintiffs’ intentional infliction of emotional distress claim was subject to dismissal. It noted that the issue of whether DBA exclusivity bars an intentional tort claim appeared to be one of first impression for the Fourth Circuit. The court agreed with the Fifth Circuit’s holding that the DBA bars plaintiffs from bringing claims of

intentional torts against employers unless the claim involves injuries caused by an employer's intentional assault of an employee with the specific desire to injure the employee. The court dismissed the plaintiffs' claim for lack of subject matter jurisdiction, as it could only be viewed as a negligence claim for which the DBA provides the exclusive remedy. As additional ground for dismissal of this claim, the court found that plaintiffs failed to state a claim upon which relief could be granted.

[Topic 60.2 DEFENSE BASE ACT; Topic 60.2.2 DEFENSE BASE ACT – Claim Must Stem From a “Contract” for “Public Work” Overseas; Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy]

C. Benefits Review Board

***Omar et al. v. Al Masar Transportation Co. et al.*, __ BRBS __ (2012).**

The Board affirmed the ALJ's denial of death benefits under the Defense Base Act to Shahira Omar, one of deceased employee's two putative widows. Decedent Mohammed Omar, a foreign national, was killed when a truck ran over him during his employment with employer in Jordan. Employer voluntarily paid death benefits under §9(b) to decedent's "widow," Shahira Omar, who held dual citizenship in Jordan and Palestine and was the mother of decedent's four adult children. Employer also discovered a second "widow," Lily Carrasco Bonilla, who was a citizen of Honduras and the mother of decedent's two minor children. Employer divided the death benefits among the two women and the two minor children.

Shahira's "widow" status: The ALJ found that Shahira was not entitled to benefits under §9 of the Act. However, he determined that Lily was entitled to benefits under §9(b) based on her status as, at least, a putative wife under the laws of California, where she and decedent were "married," and that her minor children were entitled to benefits as decedent was their father.³ Therefore, the ALJ awarded Lily and her children benefits pursuant to §9(b), and he determined that employer was entitled to a credit for any voluntary benefits paid to them. The ALJ denied employer a credit for any

³ The ALJ found that the marriage between Lily and decedent may or may not have been lawful, depending on the legal status of Shahira's marriage. Even if Lily's marriage was void legally, the ALJ found that she met the requirements for a putative spouse under California law and that she was living with decedent at the time of his death. Therefore, the ALJ found that Lily was entitled to benefits as decedent's widow. This award was unchallenged. The BRB noted, however, that where there is a legal impediment to a marriage, and common-law marriage is not permitted, as in California, the putative spouse doctrine provides that the party claiming entitlement must have an objective good faith belief that a valid marriage exists and this belief must continue throughout the marriage. The BRB stated that the ALJ rationally found that Lily had a good faith belief that her marriage was valid and, thus, awarded her benefits.

benefits voluntarily paid to Shahira. On appeal, employer asserted that because decedent and Shahira were legally married, she was decedent's widow entitled to death benefits.

In deciding whether Shahira is a "widow" for purposes of §9(b), the Board summarized the relevant law as follows. Section 9(b) provides for death benefits payable to a deceased employee's "widow or widower." Pursuant to §2(16), "the terms 'widow or widower' includes [sic] only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time." Whether a claimant is a "widow" is determined by applying the law of the forum of the "marriage" to determine the marital status of the couple. A claimant must establish her status as a "wife" and at least one of the §2(16) criteria in order to be entitled to death benefits as a "widow." If the married couple is not living together and the spouse is not dependent on the employee for support, the Supreme Court has stated that the essential requirement for demonstrating "widow" or "widower" status under the Act is the establishment of a "conjugal nexus" between the decedent and the claimant. *Thompson v. Lawson*, 347 U.S. 334 (1954). A "conjugal nexus" depends on the "behavior" of the claimant and not necessarily that of the decedent. The BRB has held that before reaching the issue of whether a conjugal nexus existed, the claimant must establish that she and the decedent were living apart for a justifiable cause or by reason of desertion. Where justifiable cause exists for the initial separation from the employee, subsequent conduct of the claimant may sever the conjugal nexus, and, thus, the claimant will not be considered the widow/widower under the Act.

In this case, decedent married Shahira in Jordan according to Islamic law, and he later married Lily under the laws of California. Presuming Shahira and decedent were once legally married, and as decedent reaffirmed the marriage in Palestine in 2005 prior to a final divorce (pursuant to the laws of Islam), then, under the law of the foreign forums, Shahira was legally married to decedent at the time of his death. The Board stated, however, that, contrary to employer's assertion, a "legal" marriage alone is not enough to establish entitlement to death benefits under the Act. In this case, there was no evidence that decedent was living with Shahira. There also was no evidence that decedent was supporting Shahira financially, despite the Islamic law stating that multiple wives must be equally supported. The BRB further reasoned that

"[a]s Shahira and decedent were living apart, in order for her to obtain benefits under the Act there must have been a desertion or some other justifiable reason for living apart. The ALJ summarily found there was none. As the ALJ correctly stated, there is no evidence of record establishing any basis for their

living apart.^[4] Although decedent moved to the United States and married other women, the record is devoid of any evidence regarding whether Shahira continued to live as 'the deserted spouse' of, and to hold herself out as, decedent's 'wife.' See *Thompson*, 347 U.S. 334. This is required for Shahira to have maintained the conjugal nexus with decedent. As the proper focus is on Shahira and there is no evidence that she continued to live as the deserted spouse of decedent, the ALJ rationally found that no conjugal nexus existed between Shahira and decedent despite any desertion that occurred. In any event, decedent's 2005 reaffirmation of his marriage to Shahira, acknowledging her as his wife, arguably counters any prior 'desertion.' Thus, in the absence of any evidence satisfying any of the criteria of Section 2(16), despite her arguable status as decedent's 'legal' wife, the ALJ did not err in finding that Shahira did not establish her right to death benefits under the Act."

Slip op. at 7-8 (additional citations and footnotes omitted). As employer did not establish that the ALJ's findings were erroneous, the BRB affirmed the denial of death benefits to Shahira.⁵

Commutation of Benefits: The ALJ further found that, as Lily's children are citizens of the U.S., and §9(g) applies only to alien non-residents, commutation of benefits under §9(g) was not available to employer as long as the children were entitled to benefits because there could be no satisfaction of the entire benefit with a single payment of one-half the commuted amount of future benefits. Agreeing with employer, the Board vacated the ALJ's determination that commutation of benefits was unavailable. The Board agreed with employer that the authority for approving commutation applications rests only with the district director. 20 C.F.R. §702.142. The ALJ's reliance on 29 C.F.R. §18.29(a)(7) was misplaced, as that section refers to general powers related to conducting a formal hearing. Where the Rules of the Office of ALJs, which are rules of general application, are inconsistent with a rule of special application, as

⁴ The BRB noted that "justifiable cause" for living apart is a factual question of whether one spouse's departure from the home is defensible under the circumstances. For example, if the employee is abusive, an alcoholic, not providing financial support, or has a mental instability, etc., the spouse may have justification for living apart.

⁵ Accordingly, the BRB did not reach employer's argument that accepting two wives for the purpose of paying death benefits does not violate public policy. The BRB also affirmed the ALJ's denial of a §14(j) credit to employer for benefits it voluntarily paid to Shahira against its liability to Lily and her children. The BRB reasoned that, because Shahira is not entitled to compensation, benefits voluntarily paid to her were not part of the one death benefit payable under the Act.

here, they do not apply. 29 C.F.R. §18.1(a). Further, pursuant to the 1972 Amendments, the BRB has held that statutory references to the authority of the deputy commissioners should be considered references to ALJs if judicial functions are involved. In contrast, statutory references to the Secretary of Labor, as in §9(g), have been held to refer to the deputy commissioners (district directors) to whom the Secretary's discretionary authority has been delegated. Thus, the authority to address an application for the commutation of benefits rests only with the Director, and her designees, the district directors, as §9(g) references the discretionary authority of the Secretary of Labor. In this case, moreover, there was no actual application for the commutation of Lily's benefits pending. Employer had only applied for commutation of Shahira's benefits, and that application was denied. Accordingly, as there was no application pending, and as the ALJs do not have the authority to address an application for the commutation of benefits, it was improper for the ALJ to address the issue. Nevertheless, the BRB affirmed one finding of the ALJ pertaining to commutation, *i.e.*, his finding that any benefits due Lily's children could not be commuted as they are citizens of the U.S. The BRB added that employer may file an application for commutation with the district director who would then decide whether commutation is appropriate.

[Topic 2.16 WIDOW OR WIDOWER; Topic 9.3.8 Compensation to Aliens]

II. Black Lung Benefits Act

Benefits Review Board

In *Surratt v. U.S. Steel Mining Co.*, 25 B.L.R. 1-___, BRB No. 11-0627 BLA (June 18, 2012), an award of benefits in a subsequent survivor's claim on modification, based on the automatic entitlement provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010), was upheld. Here, the survivor's subsequent claim initially was denied by the District Director on September 24, 2009 on the medical merits. After passage of the PPACA, the survivor filed a petition for modification of the denial on April 15, 2010, which was granted. The Board held that the survivor's claim met the requirements for application of the PPACA. Specifically, it was filed after January 1, 2005 and, by virtue of the modification petition, the claim remained pending after March 30, 2010. The Board modified the onset date to reflect that benefits would be awarded as of "the month after the month in which the order denying claimant's prior claim became final."

[**automatic entitlement; subsequent survivor's claim on modification**]