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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 200 July 2008

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I. Longshore

A. U.S. Circuit Courts of Appeals

***Kirksey v. Tonghai Marine*, 2008 WL 2735870 (5th Cir. July 15, 2008).**

A longshoreman, who was injured when a steel coil fell on him during the unloading of a vessel that had encountered high winds at sea, sued the vessel's owner, operator, and charterer under § 905(b) of the LHWCA. The district court entered judgment in favor of the longshoreman, finding the shipowner violated its turnover duty by failing to exercise ordinary care to turn over the ship in a safe condition so as to allow the stevedore to safely perform its work and failing to warn the stevedore that the vessel had encountered rough seas during the voyage creating a risk of unstable cargo stow. *Id*., at *3.

The sole issue before the Fifth Circuit was whether the district court erred in concluding the shipowner breached the turnover duty. *Id*. The Court reviewed the Supreme Court's decision in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92 (1994) and concluded that while *Howlett* confirmed the availability of the open and obvious defense to the turnover duty to warn, it did not definitely decide whether the defense was applicable to the turnover duty to provide a reasonably safe vessel. *Id*., at *4. However, the Fifth Circuit concluded:

> most of the same considerations *Howlett* gives for permitting the shipowner to assert an open and obvious defense to a failure to warn claim strongly support making the same defense available to the shipowner defending against a claim based on the general failure to provide a safe ship based on defects in the stow.

Id., at *5. The Court further reasoned:

> Given the *Howlett* Court's clear language strictly limiting the vessel's turnover duty to warn to *latent* defects and dangers, it makes no sense to say that the vessel is nevertheless liable to the longshoremen for breach of the duty to turnover a safe ship based on an *obvious* defect against which it had no duty to warn.

Id., at *6 (citing Samuel A Keesal, Jr. et al., *Shipowners' Liability for Longshoremen Personal Injuries: The Supreme Court Blocks the "Importation" of Unseaworthiness*, 7 U.S.F. Mar. L.J. 67, 106-108 (1994)).

The Fifth Circuit reversed the district court and held:

> Because the defect in the cargo stow found by the district court was open and obvious to the stevedore, the vessel had no turnover duty to warn against the defect or correct the unsafe condition. Consequently, the vessel had no liability for breach of either the turnover duty to warn or to furnish a reasonably safe ship.

Id., at *8.

***Board of Commissioners of the Orleans Levee District v. M/V Bell of Orleans,* 2008 WL 2853878 (11th Cir. July 25, 2008).**

The issue in the instant case is whether the Belle of Orleans is a vessel for purposes of establishing admiralty jurisdiction. The district court denied admiralty jurisdiction based on its determination that the Belle of Orleans was not a vessel. The Circuit Court based its determination of whether the Belle of Orleans is a vessel on the Supreme Court's decision in *Stewart v. Dutra Const. Co*. 543 U.S. 481 (2005) and the Fifth Circuit's decision in *Pleason v. Gulfport Shipbuilding Corp*. 221 F.2d 621 (5th Cir. 1955). The Court held that although the Belle of Orleans was moored to the dock with steel cables, received utility lines from land, and engaged in a business that could have physically been conducted on shore, she was also capable of being used as a means of transportation without the assistance of tow,

operated with a captain and a crew aboard, and had maintained her engines, generators, and equipment in working order at all times prior to Hurricane Katrina. The Court directed its focus to whether a watercraft is practically capable of serving as a means of transportation upon water rather than her owner's intended use or her actual mobility at the time in question. All the crew had to do was unmoor her cables and start her engine and the Belle of Orleans would have been able to sail. The Court therefore held that the Belle of Orleans is a vessel for purposes of admiralty jurisdiction.

B. Benefits Review Board

R.V. v. J. D'Annunzio and Sons, (BRB No. 07-0982)(Jul. 17, 2008)

The claimant in this case worked for four weeks as a laborer on a beautification project involving the development of a park along the Hudson River in New York. He was assigned by employer to repair a bulkhead and, on the day of his injury, had worked approximately one hour assisting in the removal of landscape lumber approximately 85 or 90 feet away from the bulkhead work area. While guiding a payloader carrying a sling of lumber, his knee became pinned between the lumber and a contractor's construction trailer, and he thereafter filed claims for benefits under both the New York workers' compensation statute and the LHWCA.

After the claim was referred to the Office of Administrative Law Judges for hearing, Employer sought summary judgment on the ground that Claimant did not satisfy the Act's situs requirement under Section 3(a). Claimant filed a cross motion for summary judgment arguing that he was covered as a "harbor worker" because he was working on a bulkhead. The ALJ granted employer's motion and denied claimant's motion finding that claimant that the area of injury was not an enumerated area, had no nexus to maritime activity, and was not a covered situs under Section 3(a). He also found that claimant did not meet the status requirement of Section 2(3) of the Act inasmuch as claimant had no history of maritime work, worked only one day on the bulkhead itself, and his work on the bulkhead had nothing to do with loading, unloading, mooring, building, or repairing vessels.

The Board affirmed the ALJ's order granting summary decision, noting that a claimant must separately satisfy both the "situs" and "status" requirements of the Act in order to demonstrate that coverage exists. It rejected claimant's reliance on *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28 (CRT) (2nd Cir. 1998), *cert. denied*, 525 U.S. 981 (1998) for the proposition that the entire area around the bulkhead was a covered

situs noting that the bulkhead at issue in that case was analogous to a pier, i.e., an enumerated site, whereas the bulkhead in this case was not. Since the injury did not occur on an enumerated site, claimant had the burden of showing that the injury occurred in an "adjoining area," i.e., in the vicinity of navigable waters or a neighboring area which is customarily used for maritime activity. In finding that claimant did not meet this burden, the Board wrote:

> While the overall site was bounded by and thus adjacent to the Hudson River, the administrative law judge concluded, based on undisputed facts, that no loading, unloading, building, repairing, or dismantling of vessels occurred at the site where claimant was working for employer. Absent customary maritime activity, an area cannot be a covered "adjoining area" within the meaning of Section 3(a).

The Board thus affirmed the ALJ's finding that the site, which was to be used as a park, was not "customarily used for maritime activity."

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

By unpublished decision in *Island Creek Coal Co. v. Henline*, Case No. 07-1850 (4th Cir. July 9, 2008) (unpub.), the court affirmed the administrative law judge's finding that Employer failed to present evidence sufficient to rebut the presumption that Claimant timely filed his claim for benefits under 20 C.F.R. § 725.308 (2007). The judge concluded that no physician provided Claimant with a "reasoned opinion" of total disability due to pneumoconiosis more than three years prior to the filing of his claim. Additionally, the judge discredited Claimant's testimony that a physician informed him that he was totally disabled due to the disease more than three years prior to the filing of his claim on grounds that Claimant "admitted that a stroke had left him with a poor memory" as well as the fact that the miner's testimony "was inconsistent and composed primarily of 'yes' answers."

In concluding that the miner's claim was timely filed, the court declined to rule on whether a "reasoned opinion" is required to trigger the limitations period. Rather, the court held that the judge "discredited the only testimony that (the miner) received any medical opinion—reasoned or unreasoned—that would have triggered the limitations clock more than three years prior to the claim . . .."

Turning to the merits of the claim, the court concluded that the judge properly found the opinions of Employer's experts to be less probative regarding whether the miner was totally disabled due to pneumoconiosis. In particular, the court stated:

> . . . the ALJ reasonably determined that none of Island Creek's doctors satisfactorily explained why (Claimant's) total disability was not due to a coal-dust induced disease . . .. In employing this analysis, the ALJ did not improperly 'shift[] the burden of proof from the claimant to the employer,' as Island Creek claims he did. (citation omitted). Rather, he merely concluded their analysis was

> incomplete, and therefore that their opinions were not well-reasoned.

Slip op. at 2. Consequently, the court affirmed the award of benefits on appeal.

[**statute of limitations at 20 C.F.R. § 725.308; weighing medical opinions**]

By unpublished decision in *Itmann Coal Co. v. Scalf*, Civil Action No. 5:07-cv-00940 (S.D. W.Va. July 10, 2008) (unpub.), the district court dismissed Employer's motion for default judgment in an action "seeking enforcement of an order by the District Director for the Office of Workers' Compensation awarding (Employer) recoupment of an overpayment of black lung benefits to (Claimant)." In support of this opinion, the district court determined that it lacked subject matter jurisdiction over the action.

Citing to 33 U.S.C. § 921(d), which is incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932(a), the court noted that these statutory provisions allow beneficiaries of compensation awards to enforce the awards in federal district court. These provisions do not, on the other hand, "authorize employers to bring an action in federal district court to recover alleged overpayment of benefits."

The court did note that it would have jurisdiction to enforce an order directing recovery of an overpayment under 33 U.S.C. § 927(b), which requires that the administrative law judge certify the facts to the district court:

> For a court to retain jurisdiction under (§ 927(b)), a person must first 'disobey[] or resist[] any lawful order or process' of the ALJ, and the ALJ must certify the facts to the district court regarding the alleged violation of the order. § 927(b). Although (Employer) here seeks to enforce a lawful order of the ALJ that was allegedly breached by (Claimant), . . . nowhere in the Complaint or any other filings does (Employer) present a certification of facts from the ALJ. Without a certification of facts from

> the ALJ, the requirements of § 927(b) are not met and the Court may not retain jurisdiction.

Slip op. at 2.

[**certification of facts under 33 U.S.C. § 927(b) for enforcement of overpayment recovery order**]

B. Benefits Review Board

In *L.P. v. Amherst Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0183 BLA (July 23, 2008) (on recon. en banc), the Board adopted the Director's position and held that a party has the right to cross-examine a physician whose report is admissible under 20 C.F.R. § 718.104(d). In so holding, the Board stated that Employer's cross-examination of the miner's treating physician was necessary "to ensure the integrity and fundamental fairness of the adjudication of the survivor's claim *and* for a full and true disclosure of the facts." However, the Board circumscribed its decision as follows:

> In rendering this holding, we have recognized only a right to cross-examine a physician whose report is admissible under Section 725.414(a)(4), if the physician's report is material and cross-examination is necessary to ensure the integrity and fundamental fairness of the adjudication of the claim and for a full and true disclosure of the facts. We decline to address the question of whether there is a general right to rebut the evidence admitted under Section 725.414(a)(4) because the circumstances of this case do not squarely present the issue.

Slip op. at 7-8.

The Board further noted that "adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency." From this, the Board concluded:

> Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude that consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties

> should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

Slip op. at 8.

[**cross-examination of treating physician; issuing evidentiary rulings prior to issuing decision**]

By unpublished decision in *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board upheld the administrative law judge's finding that Employer was properly designated as the responsible operator although Claimant subsequently worked for another operator (Double B Mining Company) for six months and then received workers' compensation from the Double B for nine years due to a back injury.

The Board noted that "claimant did not receive any pay from Double B after 1985 and did not engage in coal mine employment after he 'was retired' on January 26, 1986 as a consequence of his back injury." From this, the Board held that "the administrative law judge acted within her discretion as fact-finder in determining that because claimant was not 'on an approved absence, such as vacation or sick leave,' employer, rather than Double B, was the operator for whom claimant had most recently worked for at least one year" under 20 C.F.R. § 725.101(a)(32).

Next, given that Claimant was a Florida resident, the Board held that Employer was not entitled to have him examined in Virginia despite Employer's argument that Claimant "travels regularly to Virginia and was examined by physicians in Virginia in connection with all three of his claims . . .." The Board held, to the contrary, the provisions at 20 C.F.R. § 725.414(a)(3)(i) mandate that an employer "may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation" under 20 C.F.R. § 725.406. Here, Claimant was a resident of Florida and his pulmonary evaluation under § 725.406 was conducted within 100 miles of his residence.

In assessing the medical opinion evidence regarding the existence of legal pneumoconiosis, the Board upheld the judge's decision to accord the opinion of Employer's expert little weight on grounds that the expert "did not

explain his conclusion that claimant's pulmonary condition is entirely attributable to smoking."

After affirming the award of benefits, the Board turned to the award of attorneys' fees. As an initial matter, the Board affirmed the judge's approval of use of quarter-hour increments in billing.

In reviewing the hourly rates requested by counsel, the Board noted that "risk of loss" is a "constant factor in black lung litigation and, therefore, is deemed incorporated into the hourly rate and is not evaluated separately." On the other hand, the Board concluded that enhancement of the hourly rate to reflect "delay in payment" of the fee is an appropriate factor to consider.

With regard to the number of hours claim, the Board held that it is the burden of the proponent of the fee petition to establish the reasonableness of the fee requested in light of the factors set forth at 20 C.F.R. § 725.366(b). As a result, the Board concluded that the judge erred in assessing the number of hours awarded based on whether Employer demonstrated that the services were unnecessary or duplicative. The Board concluded that "the administrative law judge (improperly) shifted the burden of proof to employer . . .." As a result, the fee award was vacated and the judge was instructed to reconsider the reasonableness of the number of hours claimed on remand.

[**responsible operator designation; Employer-sponsored medical evaluations; weighing medical opinions; attorneys' fees**]