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# *RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 222 June 2010*

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

### A. U.S. Circuit Courts of Appeals[1]

**_Hawaii Stevedores, Inc. v. Ogawa_, __ F.3d __, 2010 WL 2489588 (9th Cir. 2010).**

The Ninth Circuit held that: (1) employer was not prejudiced by employee's late notice of injury; (2) the ALJ was entitled to credit an internist's opinion, even though he testified that he altered the language in his report after learning from claimant's attorney about how medical reports were used in litigation; (3) any error in decertifying physician as an expert in cardiology was harmless; (4) in determining causation, the ALJ's error in weighing credibility at second-stage of burden-shifting framework was harmless; (5) substantial evidence supported the ALJ's determination that claimant was restricted to employment that allowed for frequent breaks; but (6) decision setting claimant's maximum medical improvement ("MMI") date at about two and a half years after claimant's stroke was not supported by substantial evidence; and (7) error in setting MMI date was not harmless.

The Ninth Circuit granted in part petitions for review of a BRB decision affirming an ALJ's award of disability benefits. Ogawa worked at employer's marine terminal from 1977 until 2002 as the storeroom maintenance clerk. He performed responsibilities related to employer's provision of maintenance

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

services to shipping lines, including ordering and delivering equipment parts, monitoring inventory, scheduling equipment maintenance, providing design assistance, and reviewing employees' time cards. Although Ogawa enjoyed his work, he also found it stressful. He worked up to fifteen unpaid hours per week from home and also experienced stress from friction with his co-workers. Ogawa was diagnosed with hypertension in 1987 and he regularly reported job stress to his doctor. In 2002, he suffered a slow-developing left parietal stroke that left him with mild expressive aphasia and limited fine motor skills in his right hand and arm. When Ogawa returned to Hawaii Stevedores six months later, it was as an assistant to the new storeroom clerk, and was unable to work at his pre-stroke pace. During the course of downsizing, employer told Ogawa to choose between medical retirement and termination. The same week, Ogawa filed an accident report which gave notice to employer that Ogawa believed his stroke to be work-related. Ogawa elected medical retirement. He sought compensation under the Act on the ground that job stress caused or contributed to his high blood pressure and stroke.

The court upheld the ALJ's finding that the late notice of injury was excused because employer did not show that it was prejudiced by the late notice, 33 U.S.C. § 912(d)(2): employer made no allegation that it lacked evidence of Ogawa's medical condition following the stroke, as it had access to all of Ogawa's medical records, his doctors, and Ogawa himself for two depositions and five independent medical examinations over nearly four years.

Second, the court held that the ALJ was entitled to credit a physician who testified that he altered the language in his report after learning from claimant's attorney about how medical reports are used in litigation. The ALJ reasonably found Dr. Keller credible and accepted his testimony that he changed the language to reflect more accurately his opinion but did not change the substance of his opinion (*i.e.* , that Ogawa's stroke began at work and was caused in part by job stress). The court stated that "[t]he mere fact that an expert witness has talked with a party's lawyer and then altered his or her opinion language, though it might be considered relevant, does not require a factfinder to find that expert witness is other than credible." Slip. op. at *4.

Third, employer asserted that the ALJ erred in decertifying physician as an expert in cardiology based on Ogawa's post-trial motion, without giving employer a chance to respond. The court held that any such error was harmless, as the decertification decision came only after the ALJ discredited this physician's opinion for several other reasons.

Fourth, in determining whether Ogawa's stroke arose in the course of his employment, the ALJ's error in weighing credibility at the second-stage of the burden-shifting framework was harmless.[2] Although the burden of persuasion remains on the claimant throughout the administrative process, *see Dir., OWCP v. Greenwich Collieri*es, 512 U.S. 267, 280-81 (1994), the burden of production shifts in the course of determining whether his injury is work-related. If the claimant invokes the Section 20(a) presumption of causation at the first step, the employer may rebut the presumption at the second step by presenting substantial evidence that is "specific and comprehensive enough to sever the potential connection between the disability and the work environment." Slip. op. at *5 (citation omitted). At the second step, the ALJ's task is to decide, as a matter of law, whether employer submitted evidence that could satisfy a reasonable factfinder that the injury was not work-related. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 54-55 (1st Cir. 2010). Weighing of credibility has no proper place in determining whether employer met its burden of production at step two. *Id.* at 55 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). If employer carries its evidentiary burden at step two, the presumption "falls out of the case" and the ALJ moves to the third and final step of weighing the evidence as a whole "to determine whether the claimant has established the necessary causal link between the injury and employment." *Id.* at 53. This final determination is a question of fact. *Id.* at 54-55. Here, the evidence marshaled by employer to rebut the presumption that Ogawa's stroke was work-related included Ogawa's delay in reporting the stroke as work-related, the absence of a reference to right-arm weakness in Ogawa's emergency room records, Dr. Scaff's testimony that records created immediately after an injury are the most reliable, Ogawa's supervisor's testimony that the storeroom maintenance clerk position is not stressful, the fact that Ogawa enjoyed his job, and the possibility that Ogawa's stress may have come from stock and mutual fund losses instead of from work. Although mislabeled by the ALJ as step-two analysis, the ALJ essentially carried out step-three analysis by considering all of the evidence bearing on whether Ogawa's stroke occurred at work, whether the storeroom maintenance clerk position is stressful, and whether workplace stress can accelerate a stroke.

Fifth, substantial evidence supported the ALJ's determination that claimant was restricted to employment that allowed for frequent breaks. Employer asserted that the ALJ erred in crediting Dr. Palozzi's opinion on this issue on the ground that Dr. Palozzi is a clinical psychologist who did not purport to offer an opinion about Ogawa's ability to work. The court

[2] The court expressly confirmed that harmless error analysis applies to petitions for review brought under the Longshore Act. 5 U.S.C. § 706.

reasoned that the ALJ is expected to consider the record as a whole, and noted that Dr. Palozzi's opinion was labeled a "recommendation" that would help Ogawa avert more pronounced cognitive difficulties.

Finally, the court accepted both parties' contention that the ALJ's determination of the date of Ogawa's MMI was not supported by substantial evidence. Despite Dr. Keller's testimony and Dr. Kimata's report, both of which indicated that Ogawa likely reached a stationary, permanent condition within about a year after the stroke, the ALJ set the MMI at about two and a half years after the stroke. Although the ALJ expressed concern that the MMI testimony and opinions were speculative and unexplained, the ALJ did not take additional evidence on this point. Instead, the ALJ reasoned that "Dr. Keller would have more of a basis for his MMI date after examining the Claimant" and selected the date when Dr. Keller first examined Ogawa as the MMI date. However, no doctor expressed a view that normal and natural stroke recovery continues more than two years after a stroke, and Dr. Keller opined that Ogawa reached MMI before his examination. This error was not harmless, as the date of MMI may affect employer's liability pursuant to § 8(f) and claimant's entitlement to annual adjustments of benefits under Section § 10(f).

**[Topic 12.4.3 SECTION 12(d) DEFENSES -- Employer Not Prejudiced; Topic 23.5 EVIDENCE – ALJ Can Accept or Reject Medical Testimony; Topic 23.6 EVIDENCE -- ALJ Determines Credibility of Witnesses; Topic 21.2.9 REVIEW OF COMPENSATION ORDER – Scope of Review; Topic 20.2.5 Section 20(a) PRESUMPTIONS -- Failure to Properly Apply Section 20(a); Topic 20.3 PRESUMPTIONS -- EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE; Topic 8.1.3 DISABILITY – Permanency of Disability is a Medical Determination]**

### B. U.S. District Courts

[ there are no decisions to report for this month ]

### C. Benefits Review Board

***Bogden v. Consolidated Coal Co.*, __ BRBS__ (2010).**

The Board held that claimant is entitled to the resumption of his scheduled permanent partial disability ("PPD") award for his work-related hearing loss as of the date on which his permanent total disability ("PTD") award for his back injury converted to a PPD award for that injury;

thereafter, the scheduled and unscheduled PPD awards are to be paid concurrently, with the number of weeks for the scheduled award extended so that claimant would not receive benefits greater than those for PTD.

Claimant ceased working on May 8, 2002 as a result of a work-related back injury. He also sought benefits under the Act for a 30.938 percent binaural hearing loss, based on a May 3, 2002 audiogram.[3] Agreeing with claimant and the Director, OWCP the Board held that the ALJ erred in holding that claimant's entitlement to a scheduled award for his hearing loss was subsumed in, and permanently terminated by, his award of total disability benefits for a different injury, stating that this holding was based on a misinterpretation of *B.S. [Stinson] v. Bath Iron Works Corp.,* 41 BRBS 97, 98 (2007)(holding that a claimant cannot receive PPD benefits for hearing loss concurrently with total disability benefits for a different injury, but recognizing that if a claimant's total disability award lapses, scheduled award can be paid in full). The Board did not reach claimant's alternative argument that *Stinson* was incorrectly decided in that the subsequent onset of total disability due to a different injury should have no effect on his entitlement to ongoing PPD benefits for his hearing loss, and that both awards may be paid concurrently.

The Board noted that the "the only relevant precedent" on calculating concurrent scheduled and unscheduled PPD awards is the Fourth Circuit's decision in *I.T.O. Corp. of Baltimore* v. *Green,* 185 F.3d 239, 33 BRBS 139(CRT)(4th Cir. 1999). In *Green*, the Fourth Circuit held that compensation for the combination of claimant's disabilities could not exceed the rate for PTD (*i.e.*, 2/3 of the AWW),[4] *see* 33 U.S.C. §908(a); nor can a claimant be deprived of full compensation for each PPD. Applying *Green*, the Board modified the ALJ's award to reflect claimant's entitlement to receive ongoing PPD benefits for his back injury for the duration of such disability; as well as scheduled benefits for his hearing loss commencing on the date his total disability due to back injury lapsed, for the difference between his unscheduled PPD and the total disability rate, payable weekly until the

[3] The ALJ awarded benefits for the hearing loss for the period between the date of the audiogram and the onset of total disability due to the back injury, and employer did not appeal this award.

[4] The Board noted that this figure represents the maximum benefit for total disability and not the maximum compensation rate under Section 6(b)(1). However, Section 6(b)(1) applies in determining the maximum amount of each of the two awards individually, not the total amount of the two awards combined. Slip. op. at __, citing *Stevedoring Servs. of Am. v. Price,* 382 F.3d 878, 889-892, 38 BRBS 51, 57-59(CRT)(9th Cir. 2004), *cert. denied,* 544 U.S. 960 (2005).

scheduled award is paid in full.[5]

Additionally, the Board rejected Claimant's assertion that the ALJ erred in applying the statutory maximum rate in effect at the time his disability commenced in 2002 rather than the one in effect at the time compensation was first awarded in 2009, holding that the ALJ's finding is consistent with the Board's construction of Section 6(b), (c) of the Act, *see Reposky v. Int 'l Transp. Servs.,* 40 BRBS 65 (2006); *see also J. T. [Tracy] v. Global Int'l Offshore, Ltd.,* 43 BRBS 92, 99-100 (2009); *C.H. [Heavin] v. Chevron USA., inc.,* 43 BRBS 9, 15-17 (2009).

The Board further rejected claimant's contention that the ALJ abused his discretion in denying claimant's motion for leave to file a response to employer's post-hearing brief on the issue of concurrent benefits. Claimant was not prejudiced by the ALJ's adherence to the simultaneous post-hearing briefing schedule, as his counsel was aware of this issue and addressed it in his post-hearing brief. *See generally Touro v. Brown & Root Marine Operators,* 43 BRBS 148 (2009).

**[Topic 8.4.2 CONFLICTS BETWEEN APPLICABLE SECTIONS – Permanent Partial v. Permanent Total; Topic 6.2.1 Maximum Compensation for Disability and Death Benefits; Topic 19.02 DUE PROCESS]**

[5] Employer was entitled to a credit for the scheduled benefits paid prior to the onset of claimant's PTD.

## II. Black Lung Benefits Act

[There are no cases to report for this month.]