



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 244
July 2012**

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

A. U.S. Circuit Courts of Appeals¹

***Pacific Ship Repair and Fabrication Inc. v. Director, OWCP, et al.*, ___
F.3d ___, 2012 WL 3004717 (9th Cir. 2012).**

Affirming the Board, the Ninth Circuit held, on an issue of first impression in that circuit, that a prior finding of partial permanent disability ("PPD") does not preclude a later finding of temporary disability for the same underlying injury during a period of recovery following surgery.

Claimant was initially awarded PPD benefits for her back and neck injury; her employer was awarded § 8(f) relief and thus "special fund" took over disability payments. Her condition subsequently deteriorated and surgery was performed. The ALJ determined that claimant was temporarily totally disabled during the nine-month period immediately following her surgery until her condition reached "stationary status," at which point her disability became both total and permanent. As a result, employer rather than the "special fund," was liable for the benefits during the period at issue, as the fund does not pay temporary disability benefits. The BRB affirmed, holding that even if a disability is declared permanent, it may be later re-characterized as temporary when the underlying condition worsens and re-stabilizes following a surgical procedure.

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

The Ninth Circuit held that an employee who has a PPD may be reclassified as temporarily totally disabled (“TTD”) during a recovery period following surgery, even though permanency of the underlying partial disability was never expected to change. The court reasoned that the term permanent is not defined in the LHWCA, but it takes on meaning in the context of the statutory framework. Although “re-characterization of a once-permanent disability may seem absurd,” it may be necessary due to changed circumstances, as reflected in the § 22 modification provision. *Id.* at *3. The court accorded deference to the OWCP Director’s view that a permanent disability may become temporary during a period of exacerbation and healing, regardless of whether complete cure is expected. The court stated that

“[p]ut another way, initiation of a healing period serves as a ‘reset’ button for a disability previously-determined to be permanent.

. . . . Periods of healing related to a flareup, relapse, surgery, or other major treatment could all lead to a new and unknown maximum medical improvement [“MMI”] point based on the vicissitudes of the individual’s responsiveness to medical treatment. Of course, the temporary nature of the disability will again transform to permanent status when normal and natural healing is no longer likely.”

Id. at *4 (footnote and citations omitted).

Employer asserted that the Director’s position was unreasonable in that case because surgery was not expected to improve claimant’s condition and thus the permanency of her underlying partial disability was never expected to change. The court disagreed, stating that “taking into account the ‘considerable weight’ we accord the Director’s interpretation, we conclude that the Director’s position—that an award for [TTD] trumps, or subsumes, an award for any underlying [PPD]-is reasonable.” *Id.* at *5. As the court’s holding is consistent with the BRB’s long-standing interpretation, the court rejected employer’s claim that it would create unacceptable uncertainty for employers. As for employer’s claim that this holding will dissuade potential employers from hiring individuals with disabilities, the court observed that policy arguments are best made elsewhere and that employers are expected to respect legal constraints prohibiting discrimination against the disabled.

[Topic 8.1.1 NATURE OF DISABILTY – PERMANENT V. TEMPORARY - Generally; Topic 8.1.4 NATURE OF DISABILTY – PERMANENT V. TEMPORARY - Permanency Not Reached Where a Condition Is Improving]

New Orleans Depot Services, Inc. v. Director, OWCP, et al. [Zepeda], ___ F.3d ___, 2012 WL 3023799 (5th Cir. 2012).

Affirming the BRB, the Fifth Circuit held that substantial evidence supported the ALJ's finding that claimant satisfied both the situs and status prerequisites to coverage under the LHWCA. The court initially observed that determination of situs by the ALJ is one of fact; status determinations are also findings of fact, unless made under an erroneous legal standard. The court further observed that the Act should be liberally construed in favor of injured workers, and there is a presumption of coverage.

Situs

In deciding whether a location constitutes "other adjoining area" for purposes of § 3(a), the Fifth Circuit considers its geographic proximity to the water's edge and its functional relationship to maritime activity. It is not required that the area be used primarily for maritime purposes. This court has previously held that if a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in un/loading a vessel or physically connected to the point of un/loading.

In upholding the ALJ's situs determination, the court observed that

"the ALJ determined that the functional nexus requirement was satisfied because Evergreen's marine containers, which were used for marine transportation or had previously been used in marine transportation, were stored and repaired at the Chef Yard. In addition to the evidence explicitly relied upon by the ALJ as the basis for his decision, our independent review of the record has identified other evidence supportive of the maritime situs determination, notably the testimony of Brooks, a claims adjuster, acknowledging the presence of marine facilities in the area surrounding the Chef yard. Applying the deferential standard of review required by *Winchester*^[2], it is clear that the ALJ's situs determination is supported by substantial evidence in the record as a whole."

New Orleans Dept Servs., Inc., 2012 WL 3023799 at *4 (footnote omitted). The court rejected employer's reliance on Ninth Circuit case law, stating that the Fifth Circuit does not rely on a "formulaic factor test" in addressing situs, and, furthermore, one of the sited decisions involved an ALJ's denial of benefits affirmed by the BRB.

² *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 515 (5th Cir.1980) (en banc).

Status

As a matter of first impression, the Fifth Circuit held that substantial evidence supported the ALJ's determination that claimant was a maritime employee while he worked for employer as a container repair mechanic. The court noted the Supreme Court's statement in *Schwalb*³ that employees who are injured while maintaining or repairing equipment essential to the un/loading are covered by the Act. The court also noted its own prior holdings that maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of "maritime employment" as that term is used in the Act; and that nonmaritime skills applied to a maritime project are maritime for purposes of status analysis. The court also cited Eleventh Circuit's holding that an employer was liable for a claimant's injury incurred while working on chassis and containers owned by a shipping company.

The court concluded that there was sufficient evidence in the record to support the ALJ's factual finding that claimant was a maritime employee. Specifically,

"the ALJ determined that [claimant] engaged in maritime employment because, as an [International Longshoremen's Association] employee, he worked on Evergreen marine shipping containers. Testimony revealed that the containers came into the Port of New Orleans aboard ships, and were sent to local contractors for repair. [Claimant] worked a portion of his employment with NODSI solely on Evergreen containers and, therefore, repaired marine shipping containers at least some of the time. The ALJ considered marine container repair an essential function of the loading and unloading process.

The ALJ's reasoning in this case is consistent with our case law. Accordingly, the ALJ's factual determination with respect to maritime status is entitled to deferential review for substantial evidence in the record."

New Orleans Depot Servs., Inc., 2012 WL 3023799 at *6.

In a lengthy dissenting opinion, Circuit Judge Clemens opined that neither situs nor status requirement was met in this case, stating that

"[t]he majority's reasoning sweeps so broadly that it threatens to swallow every employer with even a tangential relation to the maritime industry. If a worker whose sole responsibility is to

³ *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989)

repair containers is covered by the LHWCA, why not a factory worker who manufactures those same containers? And if container manufacturing has a sufficient connection to loading, so also will the manufacture of countless other products that have some potential use in maritime activities. For example, a machinist working on an assembly line making cranes, some of which will eventually be used in shiploading by the manufacturer's stevedore customers, has just as close a connection to loading and unloading operations as did [claimant] during his employment with NODSI, assuming only that the crane factory is located in an industrial district in the general vicinity of a port or harbor. But it does not end there. On the majority's reasoning, it is not at all clear why a cobbler's apprentice who repairs shoes for stevedores would not be covered by the LHWCA. The repaired shoes are, unlike repaired containers, 'items used as part of the loading process,' and the cobbler's shop is therefore a better candidate for maritime situs than is the Chef Yard."

Id. at *11.

[Topic 1.6.2 SITUS – “Over land;” Topic 1.7.1 STATUS - “Maritime Worker” (“Maritime Employment”)]

B. Benefits Review Board

***Lamon v. A-Z Corporation*, ___ BRBS ___ (2012).**

The Board granted employer's motion for reconsideration of the BRB's prior decision in *Lamon v. A-Z Corp.*, 45 BRBS 73 (2011).

Claimant, who last worked in covered employment as a welder for employer, filed a claim alleging that his severe, disabling chronic obstructive pulmonary disease (“COPD”), though directly caused by smoking and obesity, was aggravated by his occupational exposure to irritants such as welding fumes. In its initial decision, the BRB affirmed the ALJ's finding that claimant was temporarily totally disabled due to the work-related aggravation of his symptoms. The BRB affirmed the ALJ's finding that opinions of Drs. Tudor and Gerardi, who both stated that claimant should not return to work for employer because exposure to welding fumes would increase the risk of aggravating his symptoms, demonstrate claimant's inability to return to his usual work due to his work injury. Employer sought reconsideration, asserting that claimant's continued exacerbations after he voluntarily left covered employment demonstrate that his condition after leaving employer was due to the natural progression of his underlying disease. Employer further contended that since claimant voluntarily stopped

working for reasons unrelated to his occupational exposures, the contraindication of employment was due to the underlying disease.

In granting reconsideration, the Board stated that

“[w]hile substantial evidence supports the [ALJ’s] finding that claimant sustained a work-related injury, i.e., the opinions of Drs. Tudor and Gerardi establish that claimant had temporary exacerbations of his COPD caused by occupational exposure to deleterious substances, upon further reflection we find that the [ALJ] did not adequately address the cause of claimant’s present total disability in terms of the relevant evidence of record. Employer is correct to note that in the cases cited in support of the [ALJ’s] award of total disability benefits, each claimant’s departure from the work place had temporal nexus to the work exacerbations, i.e., the claimant experienced symptoms and stopped working because of the symptoms. Thereafter, physicians stated that each claimant should not go back to work because the symptoms would likely recur.”

Slip op. at 2 (footnote and citations omitted). The Board elaborated that “the [ALJ] did not address: that claimant last worked in non-covered employment; his earlier finding that claimant had voluntarily removed himself from the workplace in September 2007; or the medical evidence as to the cause of claimant’s COPD at the time he became totally disabled.” *Id.* at 3. The BRB further concluded that *Rice v. Service Employees Int’l, Inc.*, 44 BRBS 63 (2010)⁴ “does not compel the finding that claimant’s disability is compensable even in the absence of evidence that the work-related injury altered or permanently aggravated claimant’s underlying COPD.” *Id.* at 4. *Rice* did not involve the issue presented by this case, i.e., whether claimant is disabled by an aggravating work injury or solely by his underlying disease; and furthermore, employer in *Rice* withdrew the usual work from claimant.

The BRB, therefore, vacated its prior affirmance of the ALJ’s award of total disability benefits, and remanded the case for the ALJ to determine the cause of claimant’s total disability. The BRB instructed that “the [ALJ] should determine whether the doctors gave any opinion as to the cause of claimant[’s] disability, i.e., is claimant’s total disability due, even in part, to the work exacerbations or is it due solely to the natural progression of his non-work-related COPD.” *Id.* at 4.

⁴ In *Rice*, the BRB held that claimant established her prima facie case of total disability, as employer sent her home, both doctors stated that claimant should not return to work in a war zone as she could suffer exacerbations, and there was no evidence that employer offered claimant her job back.

[Topic 8.2.3 TOTAL DISABILITY Defined; Employee's *Prima Facie* Case]

***Macklin v. Huntington Ingalls Inc.*, __ BRBS __ (2012).**

Claimant sustained a work-related knee injury on 11/7/08, which precluded his return to his usual work as a rigger for employer. In January 2009, after recovering from knee surgery, claimant returned to light-duty work in employer's tool room. In May 2009, claimant was diagnosed with prostate cancer. He stopped work in order to undergo cancer treatment. In December 2009, claimant's left knee symptoms flared up and he sought TTD benefits. On 12/18/09, claimant's orthopedist released him to work with restrictions associated with his knee injury. However, claimant remained out of work due to his cancer; he was released to work by his urologist on 2/24/10. He returned to light duty in March 2010. The ALJ awarded claimant TTD benefits for the period 12/4/09 to 12/18/09, when claimant was totally disabled due to his knee injury. The ALJ denied disability benefits for the period from 12/18/09 to 2/24/10, during which time claimant had been released to work with restrictions related to his knee but had been taken off work by his oncologist.

The Board discussed the legal standard for intervening cause analysis. Any disability attributable to an intervening cause, such as a non-work-related medical condition that claimant develops subsequent to his work injury, is not compensable. Employer is absolved of all continuing liability only if the intervening event is the sole cause of claimant's disability. It is claimant's burden to establish he is disabled as a result of a work-related injury. Restrictions from pre-existing conditions are to be considered in addressing claimant's ability to perform alternate employment; however, restrictions related to a condition that is the result of an intervening cause are not considered in assessing suitable alternate employment ("SAE").

In this case,

"[c]laimant's cancer, which was diagnosed in May 2009, represents an unrelated medical condition that occurred subsequent to the November 2008 work injury, and thus, restrictions associated with this condition cannot be considered in addressing the extent of claimant's disability. Contrary to employer's arguments on appeal, the mere occurrence of claimant's subsequently diagnosed non-work-related cancer does not dictate that claimant's disability is due solely to that condition. Rather, employer remains liable for any natural progression of claimant's work-related knee injury notwithstanding the occurrence of an intervening event. Employer, however, is not liable for compensation for any

additional disability caused by the intervening event. Thus, in this case, a finding of disability must be based solely on the flare-up of claimant's work-related knee injury without regard to the disabling effects of his prostate cancer."

Slip op. at 5. Accordingly, the BRB affirmed the ALJ's finding that claimant was entitled to TTD benefits from 12/4/09 to 12/18/09, based on claimant's work-related knee injury; the fact that during this period claimant was also totally disabled by his non-work-related cancer "is of no legal consequence." *Id.* at 5-6. The ALJ, however, erred in denying claimant's claim for TTD benefits for the period from 12/18/09 to 2/24/10 on the basis that during this period claimant was medically restricted from working due to his cancer. The BRB stated that "[t]he fact that claimant was totally disabled by his cancer does not foreclose his entitlement to disability benefits during the relevant period if his knee-related work restrictions, considered alone, rendered him totally or partially disabled." *Id.* at 6. Thus, on remand, the ALJ must address claimant's entitlement to disability benefits during this period.

[Topic 2.2.8 INJURY - Intervening Event/Cause Vis-à-vis Natural Progression; Topic 8.2 DISABILITY – EXTENT OF DISABILITY; Topic 8.2.3 DISABILITY - EXTENT OF DISABILITY - TOTAL DISABILITY Defined; Employee's *Prima Facie* Case; Topic 8.2.4.1 DISABILITY - EXTENT OF DISABILITY - Burdens of Proof]

II. Black Lung Benefits Act

Benefits Review Board

In *Copley v. Buffalo Mining Co.*, 25 B.L.R. ____, BRB No. 11-0713 BLA (July 31, 2012), the Administrative Law Judge applied the 15 year presumption to award benefits in a survivor's claim. Upon finding that the PPACA's revival of the 15-year presumption is constitutional, the Board affirmed the Administrative Law Judge's invocation of the presumption based on findings of 28 years of underground coal mine employment and a totally disabling respiratory impairment under 20 C.F.R. § 718.204. Turning to rebuttal, the Administrative Law Judge "did not specifically summarize the x-ray and CT scan readings", but concluded that Employer failed to rebut the existence of pneumoconiosis as the pathologists agreed that the disease was present on autopsy. The Board determined that it was "harmless error" to not summarize the x-ray and CT scan evidence as "the administrative law judge permissibly credited the autopsy evidence, since it is 'highly reliable' for diagnosing the presence or absence of pneumoconiosis."

The Administrative Law Judge then concluded that Employer failed to rebut disability causation and benefits were awarded. Counsel for the Director, OWCP argued that this constitutes error in a survivor's claim. As noted by the Board:

The Director contends that 'invocation of amended Section 411(c)(4) by a survivor results *only* in a presumption of death due to pneumoconiosis' and '[c]onsequently, the presumption is rebutted by proving that the miner did not suffer from pneumoconiosis or that the miner's death was wholly unrelated to his coal mine employment.'

Slip op. at 6 (emphasis in original). The Board reviewed statutory history and held the following:

[W]e conclude that invocation of the amended Section 411(c)(4) presumption, in a survivor's claim filed after January 1, 2005, gives rise to a presumption that the miner's death was due to pneumoconiosis. In order to rebut this presumption, therefore, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment.

Slip op. at 8. The Board further stated that its holding is consistent with the standard set forth by the Department in proposed 20 C.F.R. § 718.305, implementing amended Section 411(c)(4), which provides the following:

§ 718.305 Presumption of pneumoconiosis

(d) Rebuttal . . .

(2) Survivor's Claim. In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by establishing that

- (i) the miner did not have pneumoconiosis, as defined in section 718.201; or
- (ii) the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment.

77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. § 718.305).

[rebuttal of invocation at § 718.305 in survivor's claim]