**U.S. Department of Labor**

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***RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 265***
***July – August 2014***

*Stephen L. Purcell*
*Chief Judge*

*Stephen R. Henley*
*Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*
*Senior Attorney*

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

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

[there are no decisions to report for July and August]

### B. Benefits Review Board

***Simmons v. Huntington Ingalls, Inc.*, __ BRBS __ (2014).**

The Board affirmed the ALJ's denial of claimant's counsel's request to hold employer personally liable for payment of counsel's liens for attorney's fees awarded to him pursuant to Section 28(c).

Following an award of benefits to claimant, claimant's counsel sought fees from the district director and ALJ, respectively. The district director concluded that counsel was not entitled to an employer-paid fee under §§28(a) or (b), but could seek fees under §28(c). Claimant agreed to pay his counsel, and the district director issued an order awarding fees under §28(c). By contrast, the ALJ awarded employer-paid fees under §28(a). On appeal, the Board held that the requirements of §§28(a) and (b) were not met and, thus, the Board affirmed the district director's denial of an employer-paid fee and reversed the ALJ's award of an employer-paid fee. On further appeal, the Fifth Circuit affirmed the Board's determination. Claimant died during the pendency of this appeal.

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *__) pertain to the cases being summarized and refer to the Westlaw identifier.

Following the issuance of the Fifth Circuit's decision, claimant's counsel sought to have employer held personally liable for the fees previously awarded by the district director and the ALJ under §28(c). Counsel asserted that employer continued to pay claimant the full amount of the disability benefits awarded without consideration of the liens for the awarded attorney's fees and, because of claimant's death, counsel was unable to collect his previously awarded fees as a lien against claimant's future benefits. Claimant's counsel argued that employer's failure to protect his liens rendered employer personally liable for the payment of the fees awarded to him. The ALJ denied counsel's request, and the Board agreed.

The Board observed that §28(c) provides, in pertinent part, that:

> "[a]n approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the [district director], Board, or court shall fix in the award approving the fee, such lien and manner of payment."

Consistent with the express terms of §28(c), a fee award entered under that subsection must "fix" both the lien upon the compensation due claimant and the "manner of payment" of such lien. Here, both the district director and the ALJ awarded claimant's counsel fees under §28(c), pursuant to claimant's agreement to pay such fees (both awards were entered in response to claimant's counsel's submission of proposed orders), without specifying the "manner of payment" of the fees. The Board concluded that

> "[i]t was the responsibility of claimant's counsel to have the district director and the [ALJ] 'fix in the award approving the fee, such lien and manner of payment,' in accordance with the requirements of Section 28(c). *See generally Richardson v. Continental Grain Co.,* 336 F.3d 1103, 37 BRBS 80(CRT) (9 th Cir. 2003) (claimant bears burden of showing entitlement to an attorney's fee). Here, claimant's attorney failed to ensure that the fee orders of the district director and the [ALJ] specified the 'manner of payment' of the attorney's fee lien against claimant's compensation award. Without orders from the district director and the [ALJ] specifically setting out the manner of payment, employer cannot be viewed as having failed to secure counsel's liens."

Slip op. at 3-4.

**[Topic 28.3 ATTORNEY'S FEES -- 28(c) CLAIMANT'S LIABILITY]**

***Losacano v. Electric Boat Corp.*, __ BRBS __ (2014).**

The Board held that an ALJ is not authorized to make any changes to a settlement agreement, and thus the ALJ's order was not in accordance with law as it altered the terms of the parties' settlement agreement by: (1) modifying claimant's attorney's hourly rate; (2) making approval of the settlement under the Act contingent upon approval of the state settlement; and (3) holding an insurance carrier that was not a party to the claim liable for paying the settlement proceeds and discharging it's liability under the Act.

Claimant sustained an injury to his lungs (asbestosis) and a hearing loss in the course of his employment with employer. Employer controverted the claim for the lung injury but paid all benefits for the hearing loss. The parties then reached a settlement

agreement under §8(i),[2] which was submitted to the ALJ. They also submitted a duplicate settlement to the Connecticut Workers' Compensation Commission (CWCC) under the state act. Claimant died shortly after signing the agreements. Thereafter, employer withdrew its consent to the settlement submitted to the CWCC,[3] and the CWCC dismissed and denied the state claim on this basis (claimant appealed this decision).

The ALJ issued an order approving the settlement agreement, concluding that the settlement was adequate and was not procured by duress. The ALJ, however, expressly altered the terms of the agreement because the parties' stipulated attorney's fee resulted in a billing rate of $395 per hour, which is greater than the ALJ's previously determined maximum hourly rate for the Connecticut marketplace.[4] The ALJ modified the attorney's fee amount and stated that the difference ($2,940) was payable to claimant. Further, in summarizing the approved settlement, the ALJ stated that approval of the settlement was contingent upon the CWCC's approving the companion settlement; and further stated that employer and/or Ace American Insurance Co. was liable for the benefits and would be discharged of liability upon payment. Claimant's estate appealed, asserting that the ALJ erred in modifying the settlement agreement. Employer moved to dismiss the appeal on the ground that the issue is not ripe for adjudication as the settlement is not final until the CWCC acts. Alternatively, employer urged the Board to affirm the ALJ's order as he properly interpreted the language of the agreement.

The Board initially determined that the issue raised by claimant – *i.e.*, whether the ALJ may modify the parties' settlement agreement – was ripe for adjudication. Determining whether an issue is ripe addresses two considerations: 1) the fitness of the issue for review and 2) the hardship on the parties if review is withheld. The "fitness" prong involves ascertaining whether the issue is purely legal with sufficiently developed facts while the "hardship" prong involves showing that withholding review would result in immediate hardship with more than just financial loss. Here, both prongs were satisfied. The issue raised by claimant is solely a legal issue and, therefore, fit for review. Further, because the ALJ conditioned the finality of his order on the approval of the settlement by the state agency, and the state agency has not approved the settlement because of employer's withdrawal, claimant's claim under the Act has been left unresolved. If the Board declined to address claimant's appeal, his claim would remain in limbo as the state settlement agreement may never be approved.

Next, the Board held that Section 8(i) of the Act and its implementing regulations do not give an ALJ the authority to alter a complete §8(i) settlement submitted by the parties. Rather, when a settlement agreement is submitted to the ALJ, he can take only one of four actions within 30 days of his receipt of a settlement application: 1) issue a deficiency notice if the application is incomplete, 20 C.F.R. §§702.242, 702.243(b); 2) approve the

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[2] The parties agreed to settle both claims as follows: $90,999, as compensation for the lung condition (including an attorney's fee of $18,200 and $265.87 for legal expenses); $1 as consideration for the hearing loss, which had been compensated; and employer would remain liable for medical expenses for both conditions.

[3] Once a settlement agreement is submitted under the LHWCA, an employer may not withdraw from it unless the parties contractually agreed that such a withdrawal is permissible.

[4] In January 2011, the ALJ had set $325 as the maximum hourly rate for the Connecticut marketplace, *Davis v. Electric Boat Corp.*, 2009-LHC-01268 (Jan. 3, 2011).

settlement if it is adequate and not procured by duress, 33 U.S.C. §908(i)(1); 20 C.F.R. §702.243(b); 3) disapprove the settlement if it is inadequate or was procured under duress, 33 U.S.C. §908(i)(1)-(2); 20 C.F.R. §702.243(b), (c); or 4) do nothing, in which case, if the parties are represented by counsel, the settlement will be deemed approved after 30 days, 33 U.S.C. §908(i)(1); 20 C.F.R. §702.243(b). If the ALJ disapproves any portion of a settlement, the entire settlement is disapproved unless the parties specifically stated in the agreement that the portion could be severed and settled independently. 20 C.F.R. §702.243(e).

In this case, the ALJ's order altered the settlement terms in three ways. First, the ALJ improperly amended the agreement by incorporating a contingency. The plain words of the agreement[5] comported with claimant's interpretation that the parties' intent was to avoid double recovery (see §3(e)), as the agreement neither stated nor implied that the parties intended approval or finality of their settlement under the Act to be contingent upon the state agency's approval of the companion agreement. The ALJ's action has made the finality of his order approving the settlement reliant upon the actions of an outside entity. This is problematic because, as the state settlement has been withdrawn and may never be reinstated for approval, the ALJ's own order approving the §8(i) settlement will never become final and effective. The Board concluded that "[a]s the [ALJ's] Order misinterpreted the parties' settlement terms, and as the [ALJ] is not authorized to alter the terms to which the parties agreed, the [ALJ's] Order cannot be affirmed." *Id.* at 8.

Next, the ALJ modified the parties' agreement, perhaps inadvertently, by holding an insurance carrier liable for the settlement proceeds and then releasing the carrier from liability. The settlement agreement reflected that no insurance carrier is a party to the settlement agreement; only claimant and the self-insured employer agreed to the terms.

Finally, the ALJ modified the settlement agreement by reducing the attorney's fee to claimant's counsel that had been negotiated by the parties.[6] The ALJ determined that the agreed-upon fee resulted in counsel's receipt of an excessive hourly rate. After calculating the new amount payable to counsel at the ALJ's previously-set hourly rate, the ALJ stated that the difference was payable to claimant. Thus, effectively, the ALJ disapproved the attorney's fee aspect of the settlement. Relying on §§702.132(c) and (e), the Board concluded that "[a]s the parties control the severability of the provisions of a settlement, and as a settlement may also include the fee to be paid to the claimant's counsel, it follows that, absent a contractual provision permitting a fee to be approved independently, the fee agreement cannot be severed from rest of the settlement agreement and addressed separately." *Id.* at 9. The Board noted that, in this case, there was no question as to

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[5] The settlement agreement stated in relevant part:

> "The parties have entered into a collateral agreement to settle these claims as to the self-insured employer under the provisions of the State of Connecticut Workers' Compensation Act. It is the parties' agreement that any consideration paid will act to satisfy the self-insured's liability and promises under both Acts and agreements, so that the total consideration to be paid by the self-insured employer to satisfy the promises within both agreements is $91,000.00."

[6] Although counsel specifically waived this issue on appeal, the Board stated that the ALJ's action was improper and could not be affirmed.

whether the amount of the attorney's fee improperly diminished the payment to claimant so as to make the amount claimant is to receive inadequate. *See generally Jankowski v. United Terminals, Inc.*, 13 BRBS 727 (1981).

The Board modified the ALJ's order to comport with the law.

**[Topic 80 Ripeness; Topic 27.1.5 POWERS OF ADMINISTRATIVE LAW JUDGES -- Power to Approve Agreed Settlements; Topic 8.10.1 SECTION 8(i) SETTLEMENTS – Generally; Topic 8.10.7 SECTION 8(i) SETTLEMENTS – Attorney Fees; Topic 8.10.5 SECTION 8(i) SETTLEMENTS – Approval]**

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

In *Arch on the Green, Inc. v. Groves*, __ F.3d __, Case No. 13-3959 (6th Cir. July 31, 2014), the court affirmed an Administrative Law Judge's finding of legal pneumoconiosis but vacated his finding that pneumoconiosis contributed to Claimant's total disability.

The ALJ found that legal pneumoconiosis was established partly by Dr. Rasmussen's opinion that coal dust inhalation "is more than a *de minim[i]s* factor in Claimant's condition." Specifically, Dr. Rasmussen asserted that "[i]t seems quite intuitive that most of [Claimant's] impairment is secondary to cigarette smoking and that coal mine dust contributes to a minor degree." The Board upheld the ALJ's finding, explaining that the applicable standard is satisfied if Claimant's coal mine employment contributed "at least in part" to his pneumoconiosis.

In finding that Claimant's pneumoconiosis contributed to his total disability, the ALJ again credited the opinion of Dr. Rasmussen. Dr. Rasmussen opined that coal dust exposure "contributes minimally to [Claimant's] disabling chronic lung disease." Although the ALJ stated that he must "address whether Dr. Rasmussen's opinion, viewed in its entirety, established that pneumoconiosis is a substantially contributing cause of claimant's total disability," he also explained that this standard is satisfied when the total disability is "'due at least in part' to pneumoconiosis." The ALJ concluded that Dr. Rasmussen's opinion was better reasoned and was sufficient "to satisfy the *de minim[i]s* standard." The Board affirmed the ALJ's finding, and cited to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), "for the proposition that disability causation is established when 'pneumoconiosis [is] a contributing cause of some discernible consequence to claimant's totally disabling respiratory impairment.'"

The Fourth Circuit held that the Board and the ALJ applied the correct standard for concluding that Claimant's COPD arose out of coal mine employment. The court explained that a claimant is not required to establish what portion of his disease is due to non-mine exposure, and what portion is due to mine exposure; it is enough that the mine exposure is an exposure that contributed to the disease at least in part. In this case, Claimant has presented substantial evidence of legal pneumoconiosis because

> [w]hile Dr. Rasmussen said that smoking was the more important cause, "[i]t is sufficient that ... exposure to coal mine employment contributed 'at least in part' to [a claimant's] pneumoconiosis." *Cornett,* 227 F.3d at 576. Dr. Rasmussen's opinion clearly stated that Groves' coal mine employment contributed to Groves' disease.

Therefore, the court found that the ALJ and Board did not err in concluding that Claimant established that he suffered from legal pneumoconiosis.

However, the court held that the ALJ and Board erred in determining that total disability was due to pneumoconiosis because they did not use the "substantially contributing cause" standard. According to the court

> although the ALJ did initially cite 20 C.F.R. § 718.204(c) and the correct standard, he never again referenced the "substantially contributing cause" language. Instead, the ALJ appears to have applied a less rigorous standard in which "a claimant must affirmatively establish only that his totally disabling respiratory impairment ... was due-at least in part-to his pneumoconiosis." The ALJ repeatedly referenced this less demanding standard when performing

> his analysis of the doctors' evaluations. For example, when summarizing his assessment, the ALJ stated that "Drs. Majmudar and Baker both opined that Claimant's coal mine employment contributed, *at least in part,* to his total disability." (emphasis added).
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> The ALJ never found that Calloway's coal mine employment or his pneumoconiosis was a "substantially contributing cause" of his total disability. Rather, the ALJ very clearly stated that "I find that Claimant has established by a preponderance of the evidence that his total disability was due in part to his pneumoconiosis." This conclusion clearly fails to use the correct standard in which the claimant's pneumoconiosis must be a *substantially* contributing cause of his or her total disability.

Accordingly, the court remanded the case with instructions to the ALJ to apply the regulatory provision with respect to whether a miner's pneumoconiosis is a substantially contributing cause of the miner's disability.

In addition, the court held that the ALJ did not err when he referred to the preamble to the regulations to test whether the theories of Employer's doctors were consistent with medical literature. The court noted that there is no indication that the ALJ treated the preamble as binding. Moreover, although the ALJ used the phrase "regulatory intent," there is no indication that he was invoking a presumption in favor of granting benefits. Rather, "[i]n context, it seems far more likely that the ALJ was using regulatory intent to refer to the language that the decision quoted from the preamble, which was not in error."

Finally, the court declined to address the fifteen-year presumption, which the ALJ held was not applicable because Claimant failed to show that his aboveground mining work was equivalent to underground work. The court noted that Claimant raised the argument on appeal "only tangentially in the facts section of his brief, presumably as an alternative basis for upholding the Board's decision." Because Claimant raised the issue in "only a cursory fashion" the court declined to review it.

**[Existence of pneumoconiosis] [Etiology of total disability] [The preamble to the amended regulations] [Fifteen-year presumption at 20 C.F.R. § 718.305]**

### B. Benefits Review Board

In *Wyatt v. Ranger Fuel Corporation*, BRB No. 13-0565 (July 30, 2014) (unpub.), the Board held that the administrative law judge permissibly assigned less weight to Dr. Wheeler's readings, that claimant does not have complicated pneumoconiosis, because the doctor read the x-rays as not showing simple pneumoconiosis, contrary to the ALJ's own finding and contrary to all of the other physicians, who found at least simple pneumoconiosis.

**[Presumption at 20 C.F.R. § 718.304, complicated pneumoconiosis and Dr. Wheeler]**

In *Brock v. Cloverlick Coal Co.*, BRB No. 14-0021 (July 30, 2014) (unpub.), the Board vacated the Administrative Law Judge's finding that the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a). The Board agreed with the Director that the ALJ failed to rationally explain why Dr. Wheeler's negative readings of three x-rays are credible. The Board noted that Dr. Wheeler based his opinion that claimant does not have complicated pneumoconiosis, in part, on his belief that claimant does not have underlying simple, clinical pneumoconiosis; however, contrary to Dr. Wheeler's opinion, the ALJ specifically determined that claimant has simple, clinical

pneumoconiosis. Accordingly, the Board vacated the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a) and instructed the ALJ to determine the weight to assign Dr. Wheeler's x-ray readings, taking into consideration his rationale and the fact that claimant has established the existence of simple, clinical pneumoconiosis.

**[Presumption at 20 C.F.R. § 718.304, complicated pneumoconiosis and Dr. Wheeler]**