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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 160
July - August 2002

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

Lorimer v. Great Lakes Dredge & Dock Co., (Unpublished) (No. 01-70849) (June 3, 2002) (9th Cir. 2002).

At issue here was whether the claimant was excluded from coverage under the LHWCA because he was a "seaman." The Board and the Ninth Circuit found that, although the claimant worked 12 hour shifts, came ashore to sleep, and had no seaman papers, he was nevertheless a seaman. The court noted that the claimant's duties as a deckhand included tying up barges alongside the dredge where he was stationed, taking depth readings, greasing the dredge's clamshell bucket, painting, cleaning, and other general maintenance, all of which contributed to the accomplishment of the vessel's mission of dredging in Los Angeles and Long Beach Harbors.

[Topics 1.4.1 LHWCA v. Jones Act; 1.4.2 Master/member of the Crew (seaman)]

Stevedoring Services of America v. Director, OWCP, ___ F.3d ___, (No. 01-70354) (July 30, 2002) (9th Cir. 2002).

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate *reliable* audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The Ninth Circuit, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The Ninth Circuit explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the 'last employer doctrine' is a rule of convenience and involves a certain amount of

arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public policy principles. n hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted–something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury–the first employer can simply point to the later audiogram as 'determinative' and hand off the burden of primary liability."

[Topics 2.2.16 Definitions–Occupational Diseases and the Responsible Employer/Carrier; 8.13.11 Multiple Hearing Loss Claims and Date of Injury; 13.2 Defining a Claim]

Riley v. F A Richard & Associates Inc; Ingalls Shipbuilding; and Hyland, (Unreported) (No. 01-60337) (August 1, 2002) (5th Cir. 2002).

At issue here was whether a claim filed against an employer, a self-insured administrator, and an individual of that administrator, was properly removed from state court to federal court and then ultimately dismissed by the federal district court. The longshore claimant (Riley) asserted that Hyland, a nurse employee/agent of F A Richard, posed as Riley's medical case manager and that Hyland, while purporting to assist Riley in obtaining appropriate medical care, engaged in ex parte communications with Riley's doctor. According to Riley, these communications caused the doctor to reverse his opinion regarding the nature and causation of Riley's back condition. After contact with Hyland, the doctor concluded that a natural progression of Riley's congenital spondylolisthesis caused Riley's back pain rather than the work-related accident. In a suit filed in Mississippi state court, Riley alleged that Ingalls and FA Richard established a close working relationship with the Orthopaedic Group, where numerous injured Ingalls employees are sent for treatment.

According to Riley, this close relationship allowed Ingalls and F A Richard to exert inappropriate influence over the Orthopaedic Group's physicians so as to interfere with the medical treatment of injured Ingalls employees. Specifically, Riley asserted the following nine state law claims: (1) intentional interference with contract, (2) breach of fiduciary duty, (3) intentional interference with prospective advantage, (4) medical malpractice by Hyland, as nurse, (5) fraud and misrepresentation, (6) negligence, (7) intentional infliction of emotional distress, (8) intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege, and (9) intentional interference with medical care by ex parte communication.

The Fifth Circuit found that Riley did not fraudulently join Ingalls in order to avoid federal diversity and found that Riley's claim against Ingalls was not for wages, compensation benefits or bad faith refusal to pay benefits; but rather was "for damages that are completely independent of the employer/employee relationship."

The court concluded that the federal district court lacked both federal question jurisdiction and diversity jurisdiction over this matter. The court noted that the LHWCA is nothing more than a 'statutory defense' to a state-court cause of action and that the LHWCA does not create federal subject matter jurisdiction supporting removal.

[Topic 5.1 Exclusiveness of Remedy and Third Party Liability]

Newport News Shipbuilding & Dry Dock Co. v. Williams, (Unpublished) (No. 01-2072) (2002 WL 1579570) (July 11, 2002) (4th Cir.2002).

In this matter the ALJ found that the claimant's filing a claim four years after an injury was not timely. The Board reversed, finding that the claimant had no reason to be aware of a likely impairment of his earning power until almost four years after the injury when he underwent a nerve block. The employer appealed contending that the Board had substituted its own finding of fact for that of the ALJ. The Fourth Circuit upheld the Board, noting that *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991) was controlling. The court held that the question of whether the claim was timely filed related to when the claimant knew, or had reason to know, that his injury was likely to impair his earning capacity and that seeking ongoing treatment, experiencing pain, or knowing of a possible future need for surgery, are legally insufficient to trigger the running of the one-year limitations period.

[Topics 13.3 Time for Filing of Claims–Awareness Standard; 13.3.1 Effect of Diagnosis/Report]

Custom Ship Interiors v. Roberts, ___ F.3d ___ (4th Cir. No. 01-1880) (Aug. 15, 2002)(4th Cir. 2002).

Regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were includable as "wages" under the LHWCA.

The claimant was injured while remodeling a Carnival Cruise Line Ship for Custom Ship Interiors. Custom Ship's employment contract entitled the claimant to per diem payments without any restrictions. Carnival provided free room and board to its remodelers and Custom Ship knew this. Custom Ship argued that the per diem was a non-taxable advantage.

The court noted Custom Ship's argument that payments must be subject to withholding to be viewed as wages, but did not accept it: "However Custom Ship misconstrues the Act's definition of a 'wage.' Whether or not a payment is subject to withholding is not the exclusive test of a 'wage." Monetary compensation paid pursuant to an employment contract is most often subject to tax withholding, but the LHWCA does not make tax withholding an absolute prerequiste of wage

treatment.

The court explained that because the payments were included as wages under the first clause of § 2(13), Custom Ship's invocation of the second clause of § 2(13) is unavailing. "This second clause enlarges the definition of 'wages' to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the case payments in this case fall." Finally, the two member pleurality summed up, "The so-called per diem in this case was nothing more than a disguised wage."

The Dissent noted that the definition of "wages" found at Section 2(13) requires that a wage be compensation for "service," not a reimbursement for expenses. *See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 (4th Cir. 1998).

[Topic 2.13 Wages; 10.1.3 Definition of Wages]

Diamond Offshore Co. v. A & B Builders, Inc., ___ F.3d ___ (5th Cir. 2002)(No. 01-403666) (Aug. 30, 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

[Topics 5.2 Third Party Liability; 5.2.2 Indemnification; 5.3 Indemnification in OCSLA Claims; 60.3.1 OCSLA--Applicability of the LHWCA; 60.3.2 OCSLA–Coverage]

B. United States District Court

Mayberry v. Daybrook Fisheries, Inc., ___F.Supp. ___ (2002 WL 1798771) (E.D. La. Aug 5, 2002).

A "905(b) action" is not available where it was dock-side, land-based equipment that caused an injury. For there to be a 905(b) action against the vessel owner, there must be vessel negligence. Therefore, the vessel owner is not liable for breaching the "turnover duty" (failing to warn a stevedore when turning over the ship hidden defects of which the owner should know) since the faulty equipment was not part of the vessel.

[Topic 5.2.1 Third Party Liability–Generally]

C. Benefits Review Board

Boatwright v. Logisitec of Connecticut, Inc., (Unpublished) (BRB No. 01-0804) (July 12, 2002).

In this attorney fee issue case which arose within the jurisdiction of the Second Circuit, the Board rejected the employer's contention that Section 28(b) is not applicable as no informal conference was held in this matter. The Board noted that the Second Circuit has not addressed the issue of whether the absence of an informal conference is an absolute bar to the imposition of fee liability under Section 28(b). Thus, the Board has not seen fit to apply the Fifth Circuit holding beyond that circuit. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that informal conference is prerequisite to fee liability under Section 28(b)). *See also*, *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105 (CRT) (5th Cir. 2000), *modifying on reh'g* 237 F.3d 407, 34 BRBS 44 (CRT) (5th Cir. 2000).

[Topic 28.2 Attorney Fees–Employer's Liability]

Dodd v. Crown Central Petroleum Corp., ___ BRBS ___ (BRB Nos. 00-578 and 01-840) (July 29, 2002).

This remand involved both a traumatic as well as psychological injury. Although finding the claimant to be entitled to total disability benefits, the ALJ ordered the benefits suspended pursuant to Section 7(d)(4), on the ground the the claimant unreasonably refused to submit to medical treatment, i.e., an examination which the ALJ ordered and the employer scheduled. The Board noted that Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that the claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to the claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant.

Here the Board supported the ALJ's finding that the claimant's refusal to undergo an evaluation was unreasonable and unjustified, citing the pro se claimant's erroneous belief that he has the right to determine the alleged independence and choice of any physician the employer chooses to conduct its examination or can refuse to undergo the examination because the employer did not present him with a list of doctors in a timely manner, and the claimant's abuse of the ALJ by yelling and insulting the integrity of other parties. (The Board described the telephone conference the ALJ had with the parties as "contentious.") The Board held that the ALJ did not abuse his discretion by finding that the claimant's refusal to undergo the employer's scheduled examination was unreasonable and unjustified given the circumstances of this case. However, the Board noted that compensation cannot be suspended retroactively and thus the ALJ was ordered to make a finding as to when the claimant refused to undergo the examination.

The Board further upheld the ALJ's denial of the claimant's request for reimbursement for expenses related to his treatment for pain management. The ALJ rejected the claimant's evidence in support of his request for reimbursement for pain management treatment pursuant to 29 C.F.R. § 18.6(d). That section provides that where a party fails to comply with an order of the ALJ, the ALJ, "for the purpose of permitting resolution of the relevant issues may take such action thereto as is just,"
including,

> (iii) Rule that the non-complying party may not introduce into evidence...documents or other evidence...in support of... any claim....
>
> (v) Rule...that a decision of the proceeding be rendered against the non-complying party.

In a footnote, the Board noted that medical benefits cannot be denied under Section 7(d)(4) for any other reason than to undergo an examination. However, the Board went on to note, "The Act also provides for imposition of sanctions for failure to comply with an order. Under Section 27(b), the [ALJ] may certify the facts to a district court if a person resists any lawful order. 33 U.S.C. § 927(b). As these provisions are not inconsistent with the regulation at 29 C.F.R. §18.6(d)(2), the [ALJ] did not err in applying it in this case."

[Topics 7.7 Unreasonable Refusal to Submit to Treatment; 27.1.1 Powers of the ALJ–ALJ Can Exclude Evidence Offered in Violation of Order]

Hennessey v. Bath Iron Works Corp., (Unpublished) (BRB No. 01-0872) (Aug. 7, 2002)

Here the worker filed claims under both the LHWCA and the Maine Workers' Compensation Act. The Board affirmed the ALJ's determination that the doctrine of collateral estoppel does not bar his reaching the merits of the case since the state board's decision regarding the extent of disability was not final at the time the ALJ issued his decision. (The state board decision had been appealed and thus was not a final decision.)

[Topic 85.2 Effect of Prior State Proceeding on a Subsequent Federal Claim]

Thomas v. Raytheon Range Systems, (Unpublished) (BRB No. 01-0891) (August 13, 2002).

The claimant herein, without aide of counsel, now challenges a Section 8(i) settlement on the grounds that: (1) she signed the agreement because she would otherwise have to wait to have her claim adjudicated and (2) she did not know that by signing the agreement she would not get to testify about her post injury employment and termination. In upholding the settlement, the Board stated that waiting for a hearing is not duress and reflects no more than a choice faced by any claimant in deciding whether to proceed with, or settle, a pending case. "Moreover, the fact that claimant did not get to testify before the [ALJ] concerning her post-injury employment and termination does not establish grounds for negating or modifying the settlement."

[Topics 8.10.6 Settlements–Withdrawal of Claim/Settlement Agreement; 8.10.8.2 Settlements–Setting Aside Settlements]

D. ALJ Decisions and Orders

Nival v. Electric Boat Corp., (Case Nos. 2002-LHC-362; 2002-LHC-1720) (July 25, 2002)

This is a Section 8(f) hearing loss claim. At issue is who receives the credit (Employer or Special Fund) for a previously paid compensation award. Previously the claimant was awarded benefits for a 53.75 percent hearing loss. As the employee demonstrated a pre-existing hearing loss of 42.50 percent, the employer was awarded the limiting provision of Section 8(f) and was only responsible for 11.25 percent of the hearing loss. The claimant was retained in employment and continued to be exposed to loud noises. In the present case, the parties stipulated that the claimant presently suffers from a 68.92 percent binaural hearing loss. The ALJ found that the employer was responsible to the claimant for his 68.92 percent hearing loss to the extent of 15.17 (68.92 - 53.75). As noted, the sole remaining issue was whether the Employer or the Special Fund is entitled to take a credit for all or a portion of the money that the claimant had already received as a result of the prior compensation award. Section 8(c)(13)(B).

The jurisprudence notes both an "Employer-First" rule, *Krotis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506 (2d Cir. 1990), and a "Fund-First" rule, *Blanchette v. OWCP, United States Dept. of Labor*, 998 F. 2d 109, 27 BRBS (CRT) (2d Cir. 1993). Under both rules the credit offsets the compensation due to the claimant for the second injury so that a double recovery does not occur. These cases, and others, note varying fact situations (i.e. voluntary payments; no pre-existing, pre-employment hearing loss).

While noting that *Krotis* applied an "Employer-First" rule, the ALJ judged it inequitable to apply *Krotis* since the employer herein "clearly has caused most of Claimant's current hearing loss during his maritime employment" and "would escape any liability herein." Agreeing with the District Director, the ALJ found *Blanchette* (Congress intended the employer to compensate the disabled employee for the entire second (work-related) injury.) to be controlling. Thus, the ALJ concluded that the "Special Fund-First" rule applied and the Special Fund was entitled to take a credit for the money paid to the claimant as a result of his first hearing loss claim.

[Topics 8.13.5 Hearing Loss–Sections 8(c)(13) and 8(f)(1); 8.13.6 Hearing Loss–Duplicative Claims and Section 8(f)]

E. State Courts

Soloman v. Blue Chip Casino, Inc., ___ N.E.2d ___, (2002 WL 1763935) (Ind. App. July 31, 2002).

This is a consolidation of casino boat cases where the court of appeals court upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870); *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247,(3d Cir. 1994(A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the

commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition under admiralty jurisdiction or the Jones Act.

[Topics 1.4.1 LHWCA v. Jones Act; 1.4.3.1 Floating Dockside Casinos; 1.5.2 Navigable Waters]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Wolf Creek Collieries v. Director, OWCP [Stephens]*, ___ F.3d ___, Case No. 98-1154 BLA (6th Cir. Aug. 2, 2002)[1], the court held that the ALJ properly accorded greater weight to the opinion of the miner's treating physician, who examined the miner on numerous occasions from 1981 through 1989, as opposed to the opinions of employer's physicians who never examined the miner or who only examined the miner once in 1981. Citing to *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993), the court stated that the opinions of treating physicians are not "presumed" to be entitled to greater weight, but they must be "properly weighed and credited." Further, although the court found that the amended regulatory provisions at 20 C.F.R. § 718.104(d) were not directly applicable because the evidence was developed prior to January 19, 2001, it did state that these provisions were "instructive." In particular, the amended regulations provide that:

> In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall be on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

Slip op. at 10.

[**treating physician's opinion**]

In *Jericol Mining, Inc. v. Director, OWCP [Napier]*, ___ F.3d ___, Case No. 01-3156 (6th Cir. Aug. 30, 3003), the court cited to its decision in *Stephens*, which is summarized above, to hold

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[1] It is noted that the employer, in *Peabody Coal Co. v. Director, OWCP [Groves]*, Case No. 02-249, filed a writ of certiorari to the United States Supreme Court arguing that the "treating physician rule," as set forth in the Sixth Circuit case law and at 20 C.F.R. § 718.104(d) (2001), is improper. In its petition, employer further states at footnote 1 that "[n]o petition for a writ of certiorari will be filed" with regard to the D.C. Circuit Court's decision in *National Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

that the factors set forth at 20 C.F.R. § 718.104(d)(5) (2001) "are relevant for determining the appropriate weight that should be assigned to the opinions of treating physicians." However, the court concluded that the ALJ did not properly discuss each of the factors before according the treating physician's opinions greater weight, *i.e.* nature and duration of relationship and frequency and extent of treatment. The court then determined that "the same factors that justify placing greater weight on the opinions of a treating physician are appropriate considerations in determining the weight to be given an examining physician's views." In this vein, the court concluded that the ALJ did not provide sufficient reasoning to accord greater weight to the opinion of Dr. Baker, who examined the miner four times over a four year period of time, as opposed to the opinion of Dr. Dahhan, who examined the miner twice over the same time period. The court noted that the "problem with the ALJ's analysis is that he did not specifically consider whether the four annual examinations by Dr. Baker were materially different from the two examinations that Dr. Dahhan performed during the same time frame." The court reasoned that this would render claimants unable to "'stack the deck' by frequently visiting a physician who provided a favorable diagnosis, and then arguing that the opinion of that examining physician should automatically be accorded greater weight."

[**treating physician's opinion**]

In *Livermore v. Amax Coal Co.*, ___ F.3d ___, Case No. 01-3986 (7th Cir. July 25, 2002), the Seventh Circuit upheld the ALJ's finding that coal workers' pneumoconiosis did not hasten the miner's death because "the ALJ reviewed all the opinions, qualifications of the experts, and resolved the conflicting reports in a thorough and logical manner."

[**weighing autopsy evidence**]

B. Benefits Review Board

In *Childers v. Drummond Co.*, ___ B.L.R. ___, BRB No. 01-0585 BLA (June 20, 2002)(en banc) (Judges McGranery and Hall, dissenting), the miner's and survivor's claims were filed prior to January 19, 2001 and, as a result, the Board denied an award of pre-controversion attorney's fees. In so holding, the Board noted that "imposition of pre-controversion attorney fees on employers may be made only where the district director has initially denied benefits, as an adversarial relationship arises at that point . . .."[2] The Board further stated that, in a case where the district director initially awards benefits, a claimant cannot receive pre-controversion attorney's fees. The Board reasoned that "no adversarial relationship arises unless and until employer controverts the award and, therefore, claimant has no reason to seek professional assistance in pursuing the claim." Moreover, the Board determined that an employer's

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[2] The Board noted that the amended provisions at 20 C.F.R. § 725.367(a) (2001) did not apply to claims filed prior to January 19, 2001.

controversion of a miner's claim is "separate and distinct" from its controversion in a survivor's claim and the controversions "do not merge." Claimants are liable for fees incurred prior to the employer's receipt of the formal notice of claim, notice of its potential liability, and subsequent refusal to pay compensation . . .."

[**pre-controversion attorney's fees**]

By unpublished decision in *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpublished), the Board noted that a physician concluded, on autopsy, that no coal workers' pneumoconiosis was present and, yet he also stated that there was "minimal anthracosis in the mediastinal lymph nodes." As a result, the Board remanded the case to the ALJ to determine whether the legal definition of pneumoconiosis at 20 C.F.R. § 201, which includes anthracosis, was satisfied. The Board held that "anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis."

[**anthracosis**]