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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 166
July – August 2003

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Associate Chief Judge for Longshore

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I. Longshore

A. Circuit Courts of Appeals

Onebeacon f/k/a Commercial Union York Insurance Co. v Knight, ___ F.3d ___ (No. 02-2073) (1st Cir. July 17, 2003).

The First Circuit upheld the timeliness of a widow's claim for benefits filed more than 3 years after her husband's death. The ALJ had found that she had not had any reason to believe or suspect that there was an interrelationship between the worker's death and work-related asbestos exposure until shortly before the claim was filed. The death certificate had listed as the cause of death "adenocarcinoma, primary unknown" of "3 mos." duration. The ALJ found that even had the widow known that her husband died of mesothelioma, she had no reason to link that disease to her husband's asbestos exposure in the workplace.

In upholding the ALJ, the First Circuit found that Section 13(b)(2) creates a "'discovery rule' of accrual," deferring the commencement of the statute of limitations until an employee or claimant has or should have an awareness "of the relationship between the employment, the disease, and the death or disability." The court noted that the scope of its review is to determine that the ALJ used the correct legal standard. "An ALJ's ultimate conclusion of when a claimant 'becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disability'...does not present a pure question of law amenable to de novo appellate review. Rather, this fact-intensive determination is one that a reviewing tribunal should disturb only if unsupported by 'substantial evidence.'" The First Circuit also concluded that Section 20(b) does create a presumption of timeliness under Section 13(b)(2), and that the burden is on the employer to demonstrate noncompliance with the requirements of Section 13(b)(2).

[Topics 2.2.13 Occupational Diseases: General Concepts; 13.1.2 Section 13(b) Occupational Disease; 13.3 Time For Filing Claims–Awareness Standard; 13.3.2 Time For Filing Claims–Occupational Diseases; 20.7 Section 20(b) Presumption That Notice of Claim Has Been Given]

Richardson v. Continental Grain Company, ___ F.3d ___ (No. 01-71860) (9th Cir. July 23, 2003).

The Ninth Circuit denied attorney fees under both Sections 28(a) and 28(b) for a back and knee injury. For the back injury, the claimant did not successfully prosecute his claim, and therefore fees were not due under Section 28(a). The employer had voluntarily paid more compensation than the claimant was ultimately entitled to. As to the knee injury, the claimant was awarded $932. However the employer had previously offered to pay $5000 to settle both the back and knee claims. (This was after the employer had already voluntarily paid more than the claimant was entitled to for the back injury.) Claimant has argued that the $932 recovery on his knee should not be compared with the total $5,000, but rather with the portion of the $5,000 that was tendered for the knee claim. However, the Circuit Court noted that the burden of proof is on the claimant to show he is entitled to an attorney fee and thus he has to demonstrate how much of the lump-sum offer was for each claim, "especially since he did not object to the nature of the lump-sum offer at the time." Since the claimant could not due this, the court compared the total amount awarded with the amount offered. The court concluded that he was not entitled to fees under this option because $932 (for his knee) plus $0 (for his back) is less than $5,000.

[Topics 28.1.2 Attorney Fees–Successful Prosecution; 28.2.2 Attorney Fees–Tender of Compensation]

New Haven Terminal Corp. v. Lake, ___ F.3d ___ (No. 01-4005) (2nd Cir. July 21, 2003).

The Second Circuit reversed an ALJ's termination of permanent partial disability benefits for a 1993 injury and remanded to determine whether a settlement for a 1997 injury overcompensated the worker in order to bypass the last employer rule. The court noted that it was concerned that a last employer, such as the one here, may offer an inflated award that overcompensates a claimant for the damages due proportionately to the last injury, so that the claimant will not take advantage of the last employer rule for the earlier injury and instead seek the rest of the compensation from an earlier employer. The court explained that "Because the aggravation rule must be defended against such manipulation an ALJ should inquire whether the claimant's explanation for the settlement is credible, and if not, should reject the claim against the earlier employer." Additionally, the court noted that on remand, the ALJ should address specifically whether, and estimate to what extend, the first injury contributed to the second. "When a claimant cannot recover from the last employer because of a settlement, we will permit recovery from an earlier employer where the claimant has acted in good faith and has not manipulated the aggravation rule." The court further noted that there is no statutory authority for a

previous employer to use the aggravation rule as a shield from liability. "Permitting the prior employer to use the aggravation rule as a defense to limit full recovery would frustrate the statute's goal of complete recovery for injuries."

[Topics 2.2.5 Multiple Injuries; 2.2.6 Aggravation/Combination; 2.2.16 Responsible Employer; 70.1 Responsible Employer–Generally]

[Ed. Note: While the following is not a LHWCA case, it is included because it is applicable to all administrative hearings.**]**

Bunnell v. Barnhart, ___ F.3d ___ (No. 01-36023)(9th Cir. July 28, 2003).

In this Social Security disability case, the Ninth Circuit found that the ALJ did not have to recuse himself from hearing a claimant's case due to the "appearance of impropriety" standard of 28 U.S.C. 455(a). The Ninth Circuit found that 28 U.S.C. 455(a) does not apply to an ALJ. The claimant had claimed that the alleged "appearance of impropriety" arose from a suit brought by her attorney against the Commissioner as well as three ALJs, including the ALJ assigned to her case.

[Topic 19.4 Procedure--Formal Hearings Comply With APA]

Scott v. Trump Indiana, Inc., ___ F.3d ___, (No. 01-2908) (7th Cir. July 28, 2003).

In this Admiralty Extension Act and LHWCA 905(b) case, the Seventh Circuit found that neither a land-based crane nor a life raft were "appurtenances" to a vessel. The circuit court further found that the director of safety training was not engaged in maritime employment" for purposes of the LHWCA. The director had been injured on a dock while observing a life raft being lowered onto the dock. His employer had contracted with Trump Indiana to design, install and maintain the lifesaving equipment required by the U.S. Coast Guard for the vessel "Trump Casino."

[Topics 1.4.3.1 Floating Dockside Casinos; 1.7.1 Status–"Maritime Worker;" 1.11.6 "Employee" exclusions; 5.2.1 Third Party Liability–Generally]

Vierling v. Celebrity Cruises. Inc. ___ F.3d ___ (No. 01-15975) (July 31, 2003).

While the focus of this case is primarily directed to contractual indemnity and warranty of workmanlike performance issues between a cruise line and a port authority, it

does address the issue as to when a port authority is a separate entity from a state, and therefore amenable to suit. Citing to *Hess v. Port Authority. Trans-Hudson Corp*., 513 U.S.30 (1994), the Eleventh Circuit found that Everglades Port Authority lacked immunity. The court noted that the port authority had an anticipated and actual history of financial and operational independence; that it was financially self-sufficient, generated its own revenues, and paid its own debts.

[Topic 2.8 Definitions–"State"]

Metropolitan Stevedore Co. v. Cresent Wharf and Warehouse Co., *[Price]*, ___ F.3d ___ (No. 01-71505)(9th Cir. August 13, 2003).

The Ninth Circuit found that under the "two-injury variant" of the "last responsible employer" rule, where the disability is a result of cumulative traumas, the responsible employer depends upon the cause of the worker's ultimate disability. If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury aggravating, accelerating or combining with a prior injury to create the ultimate disability, the employer of the worker at the time of the most resent injury is the responsible, liable party.

In the instant case, the Ninth Circuit turned its attention to just how minuscule the aggravation, acceleration or combination can be. Here the claimant worked as an industrial mechanic and fork lift driver for several companies for varying periods. After experiencing pain in his knees that increased significantly over time, he sought medical care and his doctor told him that x-rays revealed medial joint line "collapse" requiring total bilateral knee replacement surgery. His last employer before this visit to his doctor was Cresent city Marine Ways. In the months following, the claimant received injections and other prescribed pain medications to avoid or delay the need for surgery. X-rays showed degeneration of the knee condition with no cartilage remaining. His knees were described as "bone on bone." The claimant asked his doctor to schedule the knee replacement surgery. His last employer before this visit to his doctor was Cresent Wharf and Warehouse. On his last day of employment before the scheduled surgery, the claimant worked a forklift for Metropolitan Stevedore. Claimant testified that his condition "got progressively worse" over the course of the day. After surgery he filed a claim against Metropolitan Stevedore.

The ALJ determined that injuries suffered on that last day caused some minor but permanent increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. Since the claimant had still been able to do his job to some extent the day before the surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was gradual wearing away of the bone even on the last day before surgery, so his employment with

Metropolitan caused a marginal increase in the need for surgery. Thus the aggravation was a "disability," as defined by the LHWCA.

The Ninth Circuit found that the ALJ had correctly concluded that Metropolitan was the last responsible employer. In making its holding, the circuit court refused to use "diminished earning capacity" as the identifying feature of "disability" in two injury cases. In upholding the ALJ, the court agreed that in traumatic, two injury cases, disability is more appropriately defined as a physical harm. In explaining the difference in approach taken in this two traumatic injury case, as opposed to an occupational disease claim, the Ninth Circuit stated, "In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression on the disease with particular points in time or specific work experiences. However, cumulative traumatic injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times."

The Director, like Metropolitan Stevedore, had urged the court to use diminished earning capacity as a benchmark, and had also argued for a rule that assigned liability to the claimant's last employer before the need for surgery arose. The Ninth Circuit declined to make this departure from its prior approach finding that such a departure would introduce new uncertainty into the process of determining liability under the last employer rule.

[Topic 2.2.3 Injury; 2.2.5 Multiple Injuries; 2.2.6 Aggravation/Combination; 2.2.7 Natural Progression; 2.2.8 Intervening Event/Cause Vis-A-Vis Natural Progression; 2.2.15 Occupational Disease vs. Traumatic Injury; 2.2.16 Occupational Diseases and the Responsible Employer]

[Ed. Note: The following Social Security case is included since its holding may be applied in a Longshore context as well.**]**

Connett v. Jo Anne B. Barnhart, Commissioner, ___ F.3d ___ (No. 01-36102)(9th Cir. August 20, 2003).

At issue here was the ALJ's acceptance/rejection of medical evidence. The Ninth Circuit noted that the ALJ who holds a hearing in the commissioner's stead, is responsible for determining credibility and resolving conflicts in medical testimony, and that when rejecting a claimant's testimony, the ALJ must be specific. An ALJ may reject pain testimony, but must justify his/her decision with specific findings. In the instant case, the court noted that the ALJ's rejection of certain claims regarding the claimant's limitations was based on clear and convincing reasons supported by specific facts in the record that demonstrated an objective basis for his finding. "The ALJ stated which testimony he found not credible and what evidence suggested that the particular

testimony was not credible." Therefore, the decision was supported by substantial evidence.

As to other claims where the ALJ did not assert specific facts or reasons to reject the claimant's testimony, the matter was reversed. In addressing the treating physician's opinion, the Ninth Circuit noted that where a treating physician's opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. The ALJ can reject the opinion of a treating physician in favor of the conflicting opinion of another examining physician "if the ALJ makes 'findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" In the instant case the Ninth Circuit found that the treating physician's extensive conclusions were not supported by his own treatment notes.

The claimant also alleged that the "crediting as true" doctrine is mandatory in the Ninth Circuit. The "crediting as true" doctrine holds that an award of benefits is mandatory where the ALJ's reasons for rejecting the claimant's testimony are legally insufficient and it is clear from the record that the ALJ would be required to determine the claimant disabled if he had credited the claimant's testimony. However, the Ninth Circuit specifically stated that it is not convinced that the doctrine is mandatory in that circuit. In finding that there is no other way to reconcile the case law of the circuit, the court stated, "Instead of being a mandatory rule, we have some flexibility in applying the 'crediting as true' theory."

[Topic 19.3.5 Procedure–ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon; 23.5 Evidence–ALJ Can Accept or Reject Medical Evidence; 23.6 Evidence–ALJ Determines Credibility of Witnesses; 23.7 Evidence–ALJ May Draw Inferences Based On Evidence Presented]

Cheramie v. Superior Shipyard and Fabrication, Inc., ___ F. Supp 2 ___ (Civ. A 02-3099)(E.D. La. July 7, 2003).

Here the claimant was injured while working in a ship repair facility. He settled with the owner of the boat on which he was working and filed a 905 action against his employer. His employer filed a motion for summary judgment noting that the claimant had not sought the employer's written permission prior to entering into the settlement with the boat owner. The claimant alleges that he was entitled to file the 905 action because his employer failed to secure LHWCA insurance. In denying the motion for summary judgment, the federal district judge found that "Section 933(g) is inapplicable because [claimant] is suing [his employer] for damages, not compensation or benefits under the LHWCA." The judge went on to state, "[T]he Court does not consider whether Plaintiff's action is permissible under Section 905(a), or whether [the employer] has failed to secure payment of compensation because the record is devoid of any reference as to whether [the claimant] has either sought or received compensation from [the employer]."

[Topics 5.1.1 Exclusiveness of Remedy and Third Party Liability; 5.1.2 Right to Sue Employer If No Coverage; 5.2.1 Third Party Liability; 33.7 Ensuring Employer's Rights–Written Approval of Settlement]

Hertz v. Treasure Chest Casino, ___ F. Supp 2 ___ (No. Civ. A 03-73) (July 25, 2003).

Here the federal district court found that a river boat casino was no longer a vessel in navigation, but rather had become a work platform. The purpose of the vessel was for gambling and the state legislature had amended its gambling legislation to forbid the boat from sailing while gaming was in progress. The "captain" had been injured while removing carpeting from the deck of the vessel and sued under the Jones Act and the general maritime law. After finding that the boat was no longer a vessel, the court ruled out the possibility of a Jones Act recovery. As to the general maritime law, the court found that while he retained the title of captain, "he was a captain in name only. His vessel has been beached. He has no 'captain duties' while the Treasure Chest is being used as a gambling site, the purpose for which it was built and operated. What he was doing at the time of his injury-removing carpet-had no potentially disruptive impact on maritime commerce and has no substantial relationship to traditional maritime activity." While the captain satisfied the locus aspect of the maritime law test, the court found that he did not satisfy the nexus aspect of the test, and, consequently, the matter was not within the admiralty jurisdiction of the court.

[Topic 1.4.3 "Vessel."]

[Ed. Note: The following Black Lung Benefits Act case is included because it may be applicable to Longshore cases. For a thorough discussion, please see the Black Lung portion of this Digest.**]**

Eastover Mining Co. v. Williams, ___ F.3d ___ (No. 00-0362 BLA)(6th Cir. July 31, 2003).

In Black Lung cases, the Sixth Circuit has retreated from its earlier position that the treating physician's opinion is entitled to controlling weight. [The Longshore Bar has long called this concept of giving controlling weight to the treating physician, the "treating physician rule."] In its opinion, the Sixth Circuit notes the Supreme Court's position in *Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965 (2003)(Ginsburg, J.) wherein a unanimous Court criticizes the usefulness of automatically granting deference to the opinion of a treating physician.

[Topics 23.5 Evidence–ALJ Can Accept Or Reject Medical Testimony; 24.2 Expert Witness]

B. Benefits Review Board

[Ed. Note: The following June 2003 decision is included in this digest news letter because it was received in July.**]**

Gillus v. Newport News Shipbuilding & Dry Dock Company, ___ BRBS ___ (BRB No. 02-0637)(June 12, 2003).

The Board found that when a claimant in temporary partial disability status filed a motion for modification seeking de minimis benefits, it was not, per se, invalid as an "anticipatory" claim. Specifically, here the claimant filed the motion after her doctor noted her increasing difficulty in performing her job and that she had progressive arthritis and probably would need knee replacement surgery in the future. Thus the claim was not "anticipatory" according to the Board.

Further more, the Board found that simply because the claimant's injury was to her leg, a body part covered by the schedule, does not mean that the claimant cannot receive a de minimis award. The board noted that the claimant had not claimed or been compensated for any permanent disability to her leg, nor has her condition been termed "permanent" by her physician. Thus, her modification claim for de minimis benefits was appropriately viewed as based upon an award for temporary partial disability benefits pursuant to Section 8(e). A Section 8(e) award is not precluded to a claimant who sustains an injury to a member listed in the Schedule at Section 8(c), but whose injury has not yet been found permanent. A claimant is limited to the schedule only where the claimant is permanently partially disabled.

[Topics 8.3.1 Scheduled Awards–Some General Concepts; 8.2.2 Extent of Disability–De Minimis Awards; 22.3.1 Requesting Modification–Determining What Constitutes a Valid Request; 22.3.3 Modification–De Minimis Awards]

Vinson v. Resolve Marine Services, ___ BRBS ___ (BRB No. 02-0784) (July 11, 2003).

In this matter the employer appealed the ALJ's Decision wherein an expedited final hearing had been held, alleging that its procedural due process rights had been violated since the hearing was held on October 15, 2001, shortly after the carrier's offices in the New York World Trade Tower had been destroyed in the September 11, 2001 terrorist attach. Employer had alleged that all of its carrier's records, and in particular those relevant to the instant case, were destroyed in that disaster and that it would be "unduly prejudiced in attempting to recreate a file, conduct discovery and proceed to trial in this case in only a three week period." At the hearing, both parties submitted evidence,

presented witnesses and argued their respective cases, and the record was held open for a period of time thereafter for the submission of depositions and post-hearing briefs.

The ALJ had relied on 29 C.F.R. § 18.42(e) which deals with motions to expedite. Although the Board found that the Section 19(c) of LHWCA (10 days notice of hearing) and regulation 20 C.F.R. § 702.335 (notification of place and time of formal hearing must be not less than 30 days in advance) were more specific and therefore controlling, it nevertheless upheld the ALJ's decision. The Board found, "[T]he facts presented, allowing employer less than the time specified by Section 702.335 is insufficient to warrant a conclusion that employer's right to procedural due process has been abridged. First, the [ALJ's] decision complies with the time limit of Section 19(c) of the Act....Second, and more importantly, employer has not provided any substance to its allegation of prejudice, or any indication that the expedited hearing impeded its defense of this case."

[Topic 19.3 Adjudicatory Powers]

C. Other Jurisdictions

[ED. NOTE: The following California Workers' compensation case is included for informational purposes only.**]**

Le Parc Community Association v. Worker's Compensation Appeals Board, ___ Cal. App. 3d ___, (W.C.A.B. No. VNO041798) (July 25, 2003).

The California Court of Appeal held that a civil action for negligence by an injured employee against an illegally uninsured employer pursuant to the California Labor Code, as a matter of law, is not based on the same cause of action as an application for compensation filed with the compensation Board pursuant to the code and that the principles of res judicata and collateral estoppel do not bar the employee's pursuit of his workers' compensation remedy.

II. Black Lung

A. Circuit Courts of Appeals

In *Eastover Mining Co. v. Williams*, ___ F.3d ___, Case No. 00-0362 BLA (6th Cir., July 31, 2003), a case filed prior to promulgation of the December 2000 regulatory amendments, the court held that the opinion of a treating physician is not automatically entitled to greater weight simply because of the physician's status and, as a result, the court retreated from its holding in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993) that a physician's opinion should be accorded controlling weight. The court cited with approval the amended regulatory provisions at 20 C.F.R. § 718.204(d) (2001),

stating that "[a] simple principle is evident: in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." In this case, the court found that, while the treating physician had an "almost-certainly benevolent intent" towards the miner's family, the fact that he did not diagnose pneumoconiosis during 14 years of treatment, but only after the miner allegedly died from it, rendered the physician's conclusion "dubious."

[**treating physician's opinion**]

B. Benefits Review Board

In *Kenner v. Tennessee Consolidated Coal Co.*, 22 B.L.R. 1-___, BRB No. 02-0594 BLA (June 27, 2003), the ALJ concluded that the miner was entitled to reimbursement for costs associated with a lung transplant. The Board upheld the ALJ's ruling that statutory and regulatory provisions, which require that Employer furnish all medical treatment for conditions arising out of coal mine employment, are controlling over the Department of Labor's *Provider Manual* that excluded organ transplants from coverage. The Board concluded that the *Manual* does not "rise to the level of interpretive rules or formal policy." Rather, the *Manual* contains "informal, instructional guidelines" that do not have the "force and effect of law, and the fact-finder has discretion to determine based on the facts of each case, whether or not a lung transplant constitutes a covered procedure under the Act and the regulations."

However, the Board remanded the case holding that Employer was entitled to a hearing "on the contested issue of whether the miner's lung transplant was reasonable and necessary to treat the miner's pneumoconiosis pursuant to the standard enunciated in *Glen Coal Co. v. Seals*, 147 F.3d 502 (6th Cir. 1998) since the case arose in that circuit. Consequently, the case was remanded to the ALJ in order for a hearing to be held.

[**medical treatment dispute; lung transplant; entitlement to a hearing**]

In *Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-___, BRB No. 02-0643 BLA (June 17, 2003), Employer argued that the miner's duplicate claim was untimely under 20 C.F.R. § 725.308 because it was not filed within three years of a physician's opinion diagnosing the miner with totally disabling pneumoconiosis. The Board held, however, that Employer waived this argument because it withdrew its contest of the issue at the hearing before the ALJ *after* the Sixth Circuit issued *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). On the merits of the multiple claim, the Board held that the ALJ did not determine whether "the newly submitted evidence differs qualitatively from the previously submitted evidence" as required by *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) since the case arose in that circuit. As a result, the case was remanded to the ALJ for further consideration.

[**statute of limitations and multiple claims under § 725.309**]