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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 214 September 2009

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

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

***Jones v. Halliburton Co.*, __ F.3d __, 2009 WL 2940061 (4th Cir. 2009)**.[2]

The Fifth Circuit held, *inter alia*, that the arbitration agreement between Jones and Halliburton/KBR did not encompass her tort claims arising from Jones allegedly being gang-raped by her co-workers in her bedroom in employer-provided housing during her employment with Halliburton/KBR in Iraq.[3] The Court held that Jones' alleged rape fell outside the scope of her contract which provided for the arbitration of all claims "related to [her] employment" or "arising in the workplace" and of "any personal injury allegedly incurred in or about the workplace."

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

[2] Although this case did not involve a claim under the Defense Base Act, it provides some discussion of the "scope of employment" under the DBA.

[3] Namely, claims of assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision of the employees involved; and false imprisonment. Jones contended Halliburton/KBR was vicariously liable for the torts committed by its employees.

Having noted a disagreement in the case law, the Court took the view that even for broadly-construed arbitration clauses, in most circumstances, a sexual assault is independent of an employment relationship. The Court disagreed with the contrary holding in *Barker v. Halliburton Co.*, 541 F. Supp. 2d 879 (S.D. Tex. 2008), (relied upon by the dissent). In *Baker*, the district court commented on the unique nature of the work environment overseas and the absence of a bright line between work and leisure time, citing *O'Keeffe v. Pan American World Airways*, *Inc.*, 338 F.2d 319, 322 (5th Cir. 1964)(interpreting "scope of employment" under the Defense Base Act ("DBA")), and ruled that, for overseas employees stationed in remote locations, the "scope of the employment agreement and its arbitration clause" encompasses incidents that occur outside the work environment. Here, the Court observed that it may be (and Jones will have to so prove) that the alleged perpetrators' actions were related to *their* employment because, in assaulting Jones, they were violating company policies. But the *perpetrators'* conduct concerning company policies did not explain how *Jones* was acting in any way related to her employment by being the alleged victim of a sexual assault.

The Court acknowledged that overseas employment has led to a liberal interpretation in the case law of the "scope of employment" for purposes of workers' compensation under the Defense Base Act. Indeed, in order to receive workers' compensation for her injuries under the DBA, Jones acknowledged that they had been sustained in the course and scope of her employment. The Court concluded, however, that "the case law supports a conclusion that the liberal construction of "scope of employment" for purposes of workers' compensation ('zone of special danger') is not necessarily the same standard to be applied when construing an arbitration provision with similar language." The Court noted that in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506 (1951), the Supreme Court noted that "Workmen's compensation is not confined by common-law conceptions of scope of employment". The arbitration standard at issue requires, *inter alia*, a dispute "related to" a plaintiff's employment to have "a significant relationship to the contract" (citation omitted). Here, the Court concluded that "the provision's scope certainly stops at Jones' bedroom door." As such, it was not contradictory for Jones to receive workers' compensation under a standard that allows recovery solely because her employment created the "zone of special danger" which led to her injuries, yet claim, in the context of arbitration, that the allegations the district court deemed non-arbitrable did not have a "significant relationship" to her employment contract.

Jones' living in employer-provided barracks was unavailing to Halliburton/KBR's contention that the incident was "related to" her

employment for arbitration purposes. The Court noted that, even within the context of workers' compensation, simply living in employer-provided housing does not mean an injury occurring in that housing necessarily arises "out of and in the course of employment." A recent edition of Larsons' Treatise on Workers' Compensation states that injuries to employees required to live on the premises are generally compensable if the claimant was continuously on call, or if the source of injury was a risk distinctly associated with the conditions under which the claimant lived because of the requirement of remaining on the premises. Here, neither of these situations was present.

The Court stressed that a determination as to whether a claim falls within the scope of an arbitration agreement is fact-specific and noted the following alleged facts: (1) Jones was sexually assaulted by several Halliburton/KBR employees *in her bedroom*, *after-hours*, (2) while she was *off duty*, (3) following a social gathering outside of her barracks, (4) which was some distance from where she worked, (5) at which social gathering several co-workers had been drinking (which, notably, at the time was only allowed in "non-work" spaces). Although the record was unclear, it would also be significant if Jones was allowed to travel in the Green Zone and if non-Halliburton employees were allowed in Camp Hope. The Court refused to read the contract language as encompassing any claim related to Jones' *employer*, or any incident that happened *during her employment*.

[Topic 2.2.2 Arising Out of Employment; Topic 2.29 Course of Employment]

A. U.S. District Courts

***Tipton v. Northrop Grumman Corp.*, 2009 WL 2914365 (E.D.La. 2009).**

The district court dismissed several claims raised by the plaintiffs alleging violations of the LHWCA, stating that the plaintiffs did not represent that any of them filed a claim for benefits with the Department of Labor. With respect to plaintiffs' allegation that their employer violated the intent of the LHWCA by retraining workers to perform first-class work and paying them as trainees, the Court observed that such a claim does not fall within the scope of the LHWCA.

***Tipton v. Northrop Grumman Corp.*, 2009 WL 2969505 (E.D.La. 2009)(unpub.)**

The Court dismissed with prejudice all plaintiffs' cost claims filed against the U.S. Department of Labor ("DOL") by several employees of Northrop Grumman Ship Services, Inc. ("NGSS") who sustained work-related injuries and were assigned by NGSS to the Restricted Work Rehabilitation Program ("RWRP"). Plaintiffs, *pro se,* filed suit against several defendants, including the DOL, alleging claims for violations of the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the Longshore Act, and the Racketeering Influenced and Corrupt Organizations Act ("RICO"). As the basis for their LHWCA claim against the DOL, plaintiffs alleged that the DOL provided funding for the program but failed to investigate the alleged insurance fraud within the program. The Court concluded that none of these statutes include an explicit waiver of sovereign immunity permitting a non-employee to file suit against the United States or one of its agencies or departments.

***Hoffman v. Lyons*, 2009 WL 3029759 (D.N.J. 2009).**

This action arose out of alleged discrimination and tortious injuries Hoffman suffered while employed with a non-appropriated fund instrumentality. Throughout her employment, she was allegedly verbally abused and sexually harassed by other employees. Defendants moved to dismiss Counts One (Defamation), Four (Negligent Hiring, Training, Supervision and Retention), Eight (Misprison/Obstruction/Fraudulent Falsification), and Nine (Civil Conspiracy) of the complaint alleging that, as job-related injuries, those claims were pre-empted by the LHWCA. Having found that Hoffman's alleged injuries raised a "substantial question" of LHWCA coverage via the Nonappropriated Fund Instrumentality Act ("NFIA"), the Court denied the motion to dismiss and stayed the claim pending a determination of coverage by the Secretary of Labor.

The Court rejected Hoffman's assertion that she was not a covered "employee" under the LHWCA because she was not engaged in "longshoring operations" and because her employment in a "recreational operation" fit an exception in Section 2(3)(B). Rather, pursuant to the NFIA, employees of a non-appropriated fund instrumentality are employees within the LHWCA. The Court also rejected Hoffman's assertion that the NFIA did not apply because she did not suffer "death or disability." The Court noted that all four of the aforesaid Counts appeared to allege injuries arising out of employment, and that other courts have held that similar injuries potentially fall within the NFIA's coverage. *See Childers v. United States,* 12 F.3d 209

(table), 1993 WL 530245, at *1 (5th Cir.1993)(holding NAFI employee's claim for slander and libel against co-workers covered by LHWCA); *Wreath v. United States,* 897 F.Supp. 517, 520-21 (D.Kan.1995) (holding NAFI employee's outrage claim arising out of alleged sexual harassment by a supervisor stayed pending disposition of LHWCA benefits claim). In the related FECA context, a court has held that "emotional harms" raise a substantial question of coverage. *See O'Donnell v. United States,* Civ. No. 04-00101, 2006 WL 166531, at *5-6 (E.D.Pa. Jan.20, 2006) (collecting cases discussing emotional harms and substantial question). Finally, the Court rejected Hoffman's argument that her alleged injuries were outside of the LHWCA's coverage on the intentional tort exception, stating that to invoke this exception one must allege "specific intent to injure the employee," while Hoffman's complaint contained only a general allegation of intent to act versus intent to injure. The Court was not directed to any authority clearly holding that Hoffman's work-related injuries were definitively within or outside of the LHWCA's coverage.

[Topic 2.2.18 Representative Injuries/Diseases – Psychological Problems; Topic 60.4.2 NFIA – Employee Status]

***Martin v. Matt Canestrale Contracting, Inc.*, __ F.Supp.2d __, 2009 WL 3154417 (W.D.Pa. 2009).**

The District Court denied defendant's motion for a summary judgment on a Section 5(b) claim for vessel negligence filed by the widow of Blaine Martin. Plaintiff adduced sufficient evidence that Martin satisfied both the status and situs tests. His position as a "ticket collector" entailed two responsibilities: collecting tickets from truck drivers and loading into hoppers the coal that was spilled during dumping. Defendant did not argue that Martin's engagement in either one of these tasks was "so 'momentary or episodic' as to be insufficient to confer coverage." *Maher Terminals, Inc. v. Dir., OWCP*, 330 F.3d 162, 169-70 (3d Cir.2003) (quoting *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir.1980)). Martin physically handled cargo, and placing coal into a hopper was part of the overall loading process. Ticket collecting also qualifies as maritime employment. Like the checker's duties in *Maher Terminal*, Martin's duties involved handling paperwork for the in-coming cargo. Additionally, the Court found that there were genuine issues of material fact as to whether the dock barge on which Martin was found dead was a vessel.

[Topic 1.7 Status]

B. Benefits Review Board

***K.S. v. Serv. Employees Int'l, Inc.*, __ BRBS __, BRB No. 08-0583 (2009)(en banc).**

The Board, en banc, affirmed on reconsideration its decision in *K.S. v. Serv. Employees Int'l, Inc.*, 43 BRBS 18 (2009), which held that claimant's average weekly wage ("AWW") had to be calculated based solely on his overseas earnings in Kuwait and Iraq in order to reflect his earning capacity in the employment in which he was injured. The Board reiterated that where, as here, claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury.

The Board rejected Employer's contentions that the Board did not afford proper deference to the ALJ's broad discretion under Section 10(c) of the Act, and that requiring the ALJ to use only claimant's overseas earnings was inconsistent with the plain language of Section 10(c), which provides for the consideration of "other employment of such employee." Contrary to Employer's contention, the Board did not hold that in every DBA case the AWW must be derived solely from overseas earnings. Rather it held that the circumstances of this case required that claimant's AWW be based exclusively on his higher earnings in Iraq: "Specifically, employer paid claimant substantially higher wages to work overseas than he had earned stateside, claimant's employment entailed dangerous working conditions, and claimant was hired to work full-time under a one-year contract." Slip. op. at 2. *Compare Proffitt v. Serv. Employers Int'l*., 40 BRBS 41 (2006). The Board also agreed with the Director in concluding that the fact that claimant's injury here was not "peculiar to" overseas work did not negate the conditions which formed the basis for his remuneration. Accordingly, contrary to Employer's assertion, the Board properly concluded that *Proffitt* was not distinguishable. Although the ALJ is afforded broad discretion in determining the AWW under Section 10(c), that discretion is not unfettered and must be exercised within the "legal framework" provided by the Board. *See, e.g.*, *Empire United Stevedores v. Gaitlin*, 936 F.2d 819, 25 BRES 26 (CRT) (5th Cir. 1991). The Board noted that "[t]he Act must be construed so that employees injured under the same circumstances receive equal treatment. To allow two employees who are working under the same contract and conditions, and injured at the same time, to receive different amounts of compensation because one ALJ relied on Iraq wages while another reduced claimant's rate by combining lower, stateside earnings, would be arbitrary." Slip. op. at 3, n.1.

Moreover, Section 10(c) does not mandate the use of all of a claimant's wages in the year prior to injury. Rather, this subsection is written in the disjunctive, stating that the ALJ should have "regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury," or of other employment of the employee. The objective of Section 10(c) is "to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury." Thus, the ALJ is to "make a fair and accurate assessment" of the amount the employee would have the potential and opportunity of earning absent the injury. (Citations omitted). Based on the facts in this case, claimant's AWW must be based solely on his higher overseas wages as it best reflects his annual wage-earning capacity at the time of injury.

[Topic 60.2.1 Defense Base Act; Topic 10.4.4 Calculation of Annual Earning Capacity Under Section 10(c)]

***R.F. v. CSA, Ltd.*, __ BRBS __, BRB Nos. 09-0252 and 09-0252A (2009).**

Claimant, who had a history of psychological conditions and cosmetic dermatological procedures, alleged that a chemical peal he underwent during his employment with Employer in Kuwait caused a physical injury which in turn caused a psychological injury. The ALJ found that if claimant had sustained a skin injury from the chemical peel, the injury would be covered under the zone of special danger doctrine, stating that an injury as a result of a misapplication of a dermatological product prescribed by a physician in a foreign country is reasonably foreseeable. However, the ALJ further found that the claimant failed to prove any skin injury and, accordingly, did not establish that any psychological injury was work-related.

The Board reversed the ALJ's finding that claimant did not establish the "harm" element of his *prima facie* case, as uncontradicted evidence showed that he sustained some type of psychological injury during at least a portion of the claimed period of disability. The Board further held that claimant failed to show that working conditions existed that could have caused his perceived skin damage and, in turn, his psychological harm; and, thus, Section 20(a) presumption was not invoked. The Board held that "[a]s claimant's use of a chemical peel for cosmetic skin treatment is so thoroughly disconnected from his service to employer and did not have its genesis in his employment, we reverse the administrative law judges determination that the zone of special danger doctrine applies to connect claimant's perceived skin injury to his employment." Slip. op. at 8. Claimant contended that his psychological condition was aggravated by the

damage to his face, real or perceived; he asserted no other working conditions as a cause of his distress. The Board concluded that "claimant's use of the chemical peel in this case was personal in nature and did not have its genesis in his employment, making the zone of special danger doctrine inapplicable." Slip. op. at 8. Claimant had a long history of undergoing cosmetic skin treatments, and he has been diagnosed as being obsessed with his skin. He had multiple skin treatments in Kuwait. He testified that he was referred by a friend to a "well-known" clinic and underwent the chemical peel to even out his complexion. Thus, the "[u]se of chemical peel was not 'rooted in the conditions and obligations of his employment.'" Slip. op. at 8 (citation omitted).

[Topic 20.2.1 20(a) Claim Comes Within Provisions of the LHWCA – Prima Facie Case; Topic 20.2.2 Claim Comes Within Provisions of the LHWCA – Injury; Topic 20.2.3 Occurrence of Accident Or Existence of Working Conditions Which Could Have Caused the Accident; Topic 20.5 Application of Section 20(a) – Causal Relationship of Injury to Employment; Topic 20.5.2 Arising Out of and in the Course of Employment; 60.2.7 Defense Base Act – Course and Scope of Employment, "Zone of Special Danger"]

***B.H. v. Northrop Grumman Ship Sys., Inc.*, __ BRBS __, BRB Nos. 09-0198 and 09-0291 (2009).**

Claimant challenged the ALJ's findings with regard to five distinct periods of alleged disability. With respect to one of the periods at issue, the Board vacated the ALJ's finding that a job at Aerotek identified by Employer constituted suitable alternate employment ("SAE"). The ALJ rationally found that, even though claimant's car had been destroyed by Hurricane Katrina, she had access to alternative means of transportation. However, the ALJ did not address whether the extended commuting distance to this position, i.e., approximately 58 miles, one way, from claimant's residence, rendered that job unavailable to claimant, particularly in view of her lack of a car. The Board noted that the proper geographic area in which an employer must identify suitable jobs is based on the facts of each case.

The Board further vacated the ALJ's calculation of claimant's wage-earning capacity for this period as it was, in large part, based on the wages paid by the Aerotek position. The ALJ took the average of the hourly rates of only the lowest and highest paying SAE identified in the three labor market surveys. While an average of the salaries of the jobs identified as SAE is a reasonable method for determining a claimant's post-injury wage-earning capacity, the ALJ's wage-earning capacity finding for this period did not reflect a true average of the potential wages paid by all eight of the

positions he found to be SAE. Rather, it gave too much weight to the wages of the Aerotek position, which paid nearly twice as much as any of the other seven jobs.

With respect to a different period of disability, the Board rejected Claimant's assertion that the ALJ erred by using her LS-200 Report of Earnings in calculating her wage-earning capacity because the report contained mistakes and her W-2s contained more reliable evidence of her earnings. The ALJ acknowledged conflicting evidence and reasonably calculated the wage-earning capacity for the corresponding period by averaging the highest salary range indicated by the LS-200 form with the lowest range suggested by claimant's testimony.

The Board further vacated the ALJ's finding that claimant was only partially disabled during yet another period because she voluntarily withdrew from her job. The Board instructed the ALJ to determine, on remand, whether employer's letter on which claimant relied in leaving her job constituted an actual offer of employment on which it failed to follow through, and, if so, to consider whether employer otherwise established the availability of SAE. The ALJ further erred in finding that SAE was established for the period after claimant was laid off from a suitable job with employer, citing *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999)(holding that when employer makes a suitable job at its own facility unavailable, it bears a renewed burden of demonstrating the availability of other suitable alternate employment).

The Board additionally affirmed the ALJ's denial of a nominal award. A nominal award under Section 8(h) is appropriate when a worker's work-related injury has not diminished her current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. Here, claimant did not allege the likelihood that her physical condition would deteriorate, but rather averred that her light-duty position with employer was not permanent. The ALJ properly concluded that claimant failed to demonstrate a significant possibility of future economic harm: she was never told that her job would be discontinued; she was aware of other similar jobs which were permanent in nature; she conceded that her job was necessary and that she had been performing it successfully; and she informed a vocational counselor that her position had become a permanent assignment.

After summarizing the relevant case law, the Board further held that, contrary to claimant's assertion, there was no error *per se* in the reductions of the attorney fee made by the ALJ and the district director to account for the relative degree of success achieved. Where the adjudicator has

determined that the claimant has achieved only limited success, he may make an across-the-board reduction in claimant's counsel's fee.

Finally, the Board vacated the decisions by the ALJ and the district director denying travel expenses on the ground that claimant, who lives in Mississippi, retained an out-of-state counsel. The adjudicators in this case did not provide any factual support for their implicit conclusions that competent local counsel experienced with the LHWCA was available in claimant's community. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). Moreover, neither decision-maker took judicial notice of any information relevant to this issue. *See generally Story v. Navy Exch. Serv. Center*, 33 BRBS 111, 119-120 (1999) (ALJ could rely on Survey of Law Firm Economics regarding hourly rates). Nor did they make findings regarding the explicit geographic area constituting claimant's locality or cite any information regarding the number of attorneys within claimant's locality who represent longshore claimants, the extent of such attorneys' experience with the Act; or any other indicia of their competence to represent longshore claimants. (Citations omitted). As there was no evidence that claimant could have retained local counsel, her decision to retain counsel from Louisiana was not unreasonable and counsel was therefore entitled to reimbursement for her reasonable travel time and expenses, to be determined on remand.

[Topic 8.2.4.3 Suitable alternate employment: location of jobs; Topic 8.2.4.7 Factors affecting/not affecting employer's burden (Voluntary withdrawal from labor market; Subsequent lay-offs); Topic 8.2.4.8 Jobs in employer's facility; Topic 8.9.1 Wage-earning Capacity – Generally; Topic 8.2.2 *De Minimis* Awards; Topic 28.6.4 Factors Considered in Award – Losing on an Issue; Topic 28.6.7.4 Factors Considered in Award – Travel Expenses]

II. Black Lung Benefits Act

[No decisions to report for this month]