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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 274
September 2016

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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 published decisions to report]

B. Benefits Review Board

***Ahmed v. Western Ports Transportation, Inc.*, __ BRBS __ (2016).**

The Board affirmed the ALJ's finding that claimant, who injured his elbow at employer's Union Pacific Intermodal Facility during the course of his work as a commercial truck driver with employer, did not meet the status and situs requirements for coverage under the LHWCA.

Employer operates a trucking company, headquartered five miles from the Port of Seattle, which contracts with independent truck owner/operators to transport containers between rail yards, retail outlets, warehouses, and piers. Employer's operations consist of three groups: 1) international, which moves merchandise from the port and warehouses to retail outlets; 2) domestic, which moves containers between warehouses; and 3) rail, which moves containers between the port terminals and rail yards. Claimant was usually assigned to the rail group.

The ALJ denied the claim for benefits on three separate bases: (1) claimant was an independent contractor, rather than employer's employee; and he did not satisfy either the (2) situs or (3) status tests.

[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 Lexis identifier.

For a claim to be covered by the Act, a claimant must establish that his injury occurred on a covered situs under § 3(a), and that his work is maritime in nature and is not specifically excluded by the Act.

Situs

The Board affirmed the ALJ's finding that claimant's injuries did not occur on a covered situs. As claimant was not injured while he was working upon navigable waters or on a § 3(a) enumerated site, the ALJ correctly found that the issue is whether the injury occurred on an "other adjoining area." 33 U.S.C. §903(a). An area can be considered an "adjoining area" if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. The Ninth Circuit, within whose jurisdiction this case arose, concluded that an "adjoining area" must have both a functional and a geographical relationship with navigable waters that need not depend on physical contiguity with those waters. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141, 7 BRBS 409, 411 (9th Cir. 1978). In *Herron*, the court stated that consideration should be given to the following factors, among others, in determining if a site is an "adjoining area:"

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

568 F.2d at 141, 7 BRBS at 411.

Here, the ALJ did not err in concluding that that the Union Pacific Intermodal Facility functions, fundamentally, as "a railroad facility located, for economic reasons, near the port." The ALJ stated that, generally, once containers leave the port for inland destinations, maritime activity ceases, and that more specifically, as in this case, once the containers are taken to the near rail facility, the functional nexus is with the landward transportation of cargo, not the un/loading of vessels. Substantial evidence supported the ALJ's findings that employer's facility is not located in, and does not function as, an area of maritime commerce, as it is surrounded by mixed-use properties, it is located several miles from the Port of Seattle, and it is not customarily used in the un/loading of any vessels. Thus, the ALJ rationally found that claimant did not establish that the facility was customarily being used for the maritime purposes of the Act, *i.e.*, the loading, unloading, repairing, dismantling, or building of a vessel.

Status

The Board also affirmed the ALJ's finding that claimant was not engaged in maritime employment for purposes of § 2(3).

Claimant contended his work satisfied the status element because it involved the intermediate step of moving cargo between ships at the Port of Seattle's terminals to the nearby intermodal rail yards. Claimant thus asserted that the ALJ's finding, under the "point of rest" theory, that maritime transport ended, and landward transport began, at the port terminals rather than at the Union Pacific Intermodal Facility, is contrary to law. The Board disagreed.

The Board stated that while Congress did not define the term "maritime employment," the Supreme Court addressed it on several occasions. In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), the Court explained that coverage under the Act is limited to those whose work facilitates the loading, unloading,

repair or construction of vessels. The Court stated that persons who are on the situs but are not engaged in the overall process of un/loading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Nevertheless, the Court rejected the "point of rest theory," which advocated coverage of only those employees who moved cargo from the vessel to its initial point of rest on the pier or in the terminal area and vice versa. Thereafter, in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), the Court recognized that coverage under the Act extends to land-based workers who, although not actually unloading vessels, are involved in intermediate steps of moving cargo between ship and land transportation. Claimant Ford was working as a warehouseman when he was injured on a public dock, while securing military vehicles, unloaded several days earlier, to railroad cars. Claimant Bryant, in a consolidated case, was working as a cotton header when he was injured while unloading a bale of cotton from a dray wagon into a pier warehouse where it was stored until loaded on a vessel. The Court held that both claimants were covered because they were engaged in intermediate steps in moving cargo between ship and land transportation. Claimant Ford was performing the last step before the vehicles left on their landward journey. Similarly, claimant Bryant was performing the first step in removing cargo from a vehicle so that it could be readied for loading onto ships. The Court reasoned that if the goods had been taken directly from the ship to the train, or from the truck directly to the ship, claimant's activities would have been performed by longshoremen and that the only ground to distinguish claimants from those who do such "direct" loading would be the "point of rest" theory rejected in *Caputo.*

Next, the Board summarized the case law involving truck drivers. In *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987), *aff'g Dorris v. California Cartage*, 17 BRBS 218 (1985), a truck driver whose regular duties consisted of transporting containerized cargo away from the terminal to a consignee, fastening containers to a chassis, and trucking the containers between different harbors was not engaged in longshoring operations, but in land transportation. Similarly, truck drivers whose responsibility is to pick up and/or deliver cargo unloaded from or destined for marine transportation are not covered under the Act. See, e.g., *McKenzie v. Crowley America Transport, Inc.*, 36 BRBS 41 (2002). Conversely, coverage under the Act has been found in instances where the claimant's work as a truck driver was confined to the port area. *See*, *e.g.*, *W.B. [Booker] v. Sea-Logix, L.L.C.,* 41 BRBS 89 (2007), *aff'd mem*., 378 F.App'x 691 (9th Cir. 2010). In several of those cases, the claimant transported maritime cargo within the port area from dockside to storage facilities, and was therefore involved in an intermediate step in the loading process. The Board noted that whether containers are transported within or outside the port is the key distinction between *McKenzie* and *Booker*.

In this case, the ALJ rationally found that claimant's work was more like that of the truck driver in *McKenzie* than the driver in *Booker*, as he was not involved in intermediate cargo-moving steps within the Port of Seattle. Claimant's deliveries between maritime facilities and facilities outside the port thus make him a non-covered truck driver "whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation." Slip op. at 7-8, citing *Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61 (additional citations omitted). The Board also noted that claimant did not board ships, un/load cargo (the trucks were loaded and unloaded by others), or transport cargo within the port.

As the Board affirmed the ALJ's finding of no coverage, it did not address the ALJ's finding that claimant was an independent contractor, rather than employer's employee, at the time of injury.

[Topic 1.6.2 COVERAGE – SITUS – "Over land;" Topic 1.7.1 STATUS – "Maritime Employment"]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

[There are no published or unpublished Circuit Court decisions to report.]

B. Benefits Review Board

In *Parks v. U.S. Steel Mining Co., LLC*, BRB No. 15-0524 (Sept. 28, 2016) (unpub.), a case arising out of the Fourth Circuit, the Benefits Review Board ("Board") addressed Employer's appeal of an ALJ's award of benefits.

Below, the ALJ found that Claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304; therefore, the ALJ found Claimant further established the irrebuttable presumption that he is totally disabled due to the disease. In reaching this finding, the ALJ considered nine interpretations of four x-rays taken in December 2011, April 2012, May 2012, and April 2014. The ALJ found that the May 2012 x-ray was positive for complicated pneumoconiosis, the December 2011 x-ray supported "the existence of opacities consistent with complicated pneumoconiosis," and the April 2012 and April 2014 x-rays neither supported nor refuted the existence of complicated pneumoconiosis. The ALJ also considered a digital x-ray, treatment records, two CT scans, and three medical opinions at Section 718.304(c). Finally, the ALJ found that Claimant's complicated pneumoconiosis arose out of his coal mine employment ("CME"), and thus awarded benefits.

On appeal, Employer challenged the ALJ's finding, which rested on analog x-ray and other evidence, that Claimant established the existence of complicated pneumoconiosis. The Board first rejected Employer's argument that the ALJ inappropriately conducted a head count of the x-ray readings in considering the analog x-ray evidence, concluding instead that the ALJ "properly considered both the quantity of the positive and negative readings *and* the comparative credentials of the interpreting physicians." In addressing this argument, the Board focused on the ALJ's consideration of the December 2011 x-ray[2] and the similarities those readings shared with readings of an x-ray at issue in *Sea "B" Mining Co. v. Addison*, ___ F.3d ___, 2016 WL 4056396 (4th Cir. July 29, 2016).[3] Despite the

[2] Dr. Forehand, a B reader, and Dr. Alexander, a dually qualified B reader and Board-certified radiologist, read the December 2011 x-ray as positive for simple and complicated pneumoconiosis, category A. Dr. Meyer, a dually qualified radiologist, read the x-ray as being negative for the disease. The ALJ determined that, "although the two most qualified readers [Drs. Alexander and Meyer] disagreed" as to whether the x-ray was positive for complicated pneumoconiosis, the x-ray "supports the existence of opacities consistent with complicated pneumoconiosis," as two of the three B readers read the x-ray as positive.

[3] Of specific concern in *Addison* was an ALJ's assessment of the readings of a May 2011 x-ray. Dr. Forehand and Dr. Miller, who is dually qualified, interpreted the x-ray as being positive for pneumoconiosis, while Dr. Scott, who is also dually qualified, read the x-ray as negative for the disease. The ALJ found the x-ray to be positive for pneumoconiosis, noting that x-ray was positive for clinical pneumoconiosis because "Dr. Miller's opinion . . . is supported by Dr. Forehand's opinion." On appeal, the Fourth Circuit concluded that it was unable to "decipher from the ALJ's sparse explanation how, or if, he weighed the x-ray readings in light of the readers' qualifications." According to the court, "[w]ithout a more specific record of the ALJ's rationale for reaching his decision as to the [May 2011] x-ray, we are unable to adequately perform our judicial review function to assure that the ALJ's

similarities between the readings of these x-rays, the Board distinguished the facts of the present case from those of *Addison*:

> Unlike in *Addison*, however, it is clear from the administrative law judge's decision in this case that she took into consideration the comparative credentials of the interpreting physicians. After setting forth a detailed description of the x-ray readings, the administrative law judge accurately recognized that "the two most qualified readers," Drs. Alexander and Meyer, disagreed on the existence of complicated pneumoconiosis. Nevertheless, the administrative law judge declined to find that these conflicting interpretations rendered the x-ray inconclusive, and instead permissibly found that the x-ray "supports" a finding of opacities consistent with complicated pneumoconiosis because a preponderance of the readings by the three physicians, all of whom are B readers, found it to be positive for the disease.

Slip op. at 5-6 (internal citations and footnote omitted). In further distinguishing *Addison* from the present case, the Board noted that the ALJ in this case (1) did not improperly exclude evidence from her consideration, and (2) took into consideration the x-ray readers' and physicians' qualifications. The Board also noted the ALJ's finding of complicated pneumoconiosis at Section 718.304(a) was based on more than simply the December 2011 x-ray, but was also supported by the May 2012 x-ray. Accordingly, the Board affirmed the ALJ's finding that that the existence of complicated pneumoconiosis was established pursuant to Section 718.304(a).

The Board next addressed the ALJ's consideration at Section 718.304(c) of other evidence, including a digital x-ray,[4] treatment records, two CT scans, and three medical opinions. The ALJ found that the digital x-ray, treatment records, and CT scans neither supported nor refuted the presence of complicated pneumoconiosis. In rejecting Employer contention that the ALJ improperly ignored the probative value of the treatment records, the Board concluded that the ALJ acted within her discretion in finding the treatment record evidence failed to establish or refute the existence of complicated pneumoconiosis. The Board also affirmed the ALJ's finding that the medical opinion evidence supported a finding

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decision is based on a 'reasoned explanation.'" Therefore, the Fourth Circuit directed the ALJ on remand to "provide an explanation for his decision concerning the [May 2011] x-ray by explaining how he weighed the evidence 'in light of the readers' qualifications' and whether his conclusion was based on a numerical headcount of experts."

[4] The Board gave the following explanation concerning the recent digital x-ray regulations:

> Effective May 19, 2014, the Department of Labor revised the regulations governing the admission and weighing of chest x-rays to include digital x-ray readings. *In claims, such as this one, that are filed before May 19, 2014, the revised regulations apply to digital x-ray readings performed on or after May 19, 2014. See* Black Lung Benefits Act Bulletin Nos. 14-08, 14-11. Thus, because the November 7, 2012 digital x-ray was read by Dr. Meyer on September 25, 2014, and by Dr. DePonte on October 1, 2014, this x-ray should have been considered pursuant to 20 C.F.R. §718.304(a). Employer's Exhibit 8; Claimant's Exhibit 4.

Slip op. at 7, n.8 (emphasis added). The Board concluded that this error was harmless, however, as the ALJ found that the readings of Drs. Meyer and DePonte were in equipoise, and therefore the x-ray neither supported nor refuted the existence of complicated pneumoconiosis.

of complicated pneumoconiosis, as she permissibly credited the opinion of Dr. Forehand and discredited, as inconsistent with the regulations, the opinions of Drs. Zaldivar and Castle that Claimant does not have pneumoconiosis.

Finally, the Board affirmed the ALJ's finding that, based on a weighing of all of the relevant evidence of record, Claimant established the presence of complicated pneumoconiosis. The Board also affirmed, as unchallenged on appeal, the ALJ's finding that the disease arose out of Claimant's CME. Accordingly, the Board affirmed the award.

In a concurrence, while noting his agreement with the majority's affirmance of the award, Judge Gilligan expressed his belief that the ALJ's weighing of the December 2011 x-ray readings was "plainly contrary to Fourth Circuit precedent." Judge Gilligan cited to *Addison* in concluding that the ALJ, after acknowledging that the two dually qualified physicians' readings were in equipoise, "failed to explain why a lesser qualified physician's interpretation of the x-ray was entitled to any weight." However, Judge Gilligan decided that this error was harmless because the ALJ acted within her discretion in finding the May 2012 x-ray to be positive; accordingly, the ALJ's finding that the evidence at Section 718.304(a) established the presence of complicated pneumoconiosis did not rest simply on the December 2011 x-ray.

[Chest x-rays: Mechanical application, held improper; Digital x-rays, weighed under 20 C.F.R. §718.202(a)(1) or 20 C.F.R. § 718.304(a).]

In *Barker v. Arch of West Virginia*, BRB No. 15-0399 BLA (Sept. 30, 2016) (unpub.), a case arising out of the Fourth Circuit, the Board addressed Claimant's appeal of a Decision on Remand in which the ALJ denied benefits in a survivor's claim filed on April 1, 2011. On remand, as the miner had worked for sixteen years in underground CME and suffered from a totally disabling respiratory or pulmonary impairment at the time of his death, the ALJ found Claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). On rebuttal, the ALJ found that Employer disproved the existence of legal pneumoconiosis but failed to disprove the existence of clinical pneumoconiosis. The ALJ further found Employer established that no part of the miner's death was due to pneumoconiosis and therefore denied benefits.

Claimant appealed the Decision and Order on Remand, alleging that the ALJ erred in finding that Employer rebutted the presumption of death due to pneumoconiosis.

On appeal, the Board first summarized the ALJ's finding at prong one of rebuttal: that Employer disproved the existence of legal pneumoconiosis. In accordance with the Board's remand instruction, the ALJ reweighed the opinions of Employer's physicians, Drs. Farney and Oesterling, on the issue of the etiology of the miner's bullous emphysema. The ALJ found Dr. Farney's opinion not well-reasoned on this issue and gave it no weight, as he found Dr. Farney did not adequately explain how he determined that the miner's emphysema resulted solely from his smoking, "beyond his belief that coal dust is not associated with the disease." However, the ALJ found Dr. Oesterling "adequately explained how he concluded that this specific miner's bullous, panlobular, and centrilobular emphysema were [sic] not due to coal dust, while repeatedly acknowledging that coal dust *can* cause the disease." The Board noted that Dr. Oesterling "opined that coal dust exposure did not play a role in the miner's emphysema because the histologic [pathology] slides that evidence the emphysema revealed no 'significant concentration of coal [dust], and thus coal dust would not appear to be the primary etiologic agent in producing this [emphysema] process.'" Dr. Oesterling instead attributed the miner's emphysema to his smoking history. In light of Dr. Oesterling's opinion, the ALJ found Employer disproved the existence of legal pneumoconiosis.

On appeal, Claimant argued that the ALJ erred in crediting Dr. Oesterling's opinion on the issue of legal pneumoconiosis. The Board disagreed, concluding that the ALJ permissibly found the reasoning employed by, and the conclusions of, Dr. Oesterling did not conflict with the preamble. The Board further concluded that the ALJ "permissibly credited Dr. Oesterling's opinion as being 'well-documented and reasoned,' because Dr. Oesterling "adequately explained how he concluded that this specific miner's bullous, panlobular, and centrilobular emphysema were [sic] not due to coal dust." Of note, the Board stated that the ALJ acted within his discretion in finding that Dr. Oesterling's opinion did not conflict with the definition of legal pneumoconiosis or the terms of Section 718.202(a)(4) "because he did not base his opinion solely on a negative x-ray, 'but on *pathology* clearly demonstrating minimal dust retention.'"[5] The Board affirmed the ALJ's finding that Employer established the miner's emphysema was not significantly related to, or substantially aggravated by, coal mine dust exposure and therefore disproved the existence of legal pneumoconiosis.

Next, the Board addressed the ALJ's finding that Employer rebutted the presumption at the second prong of rebuttal by establishing the miner's clinical pneumoconiosis played no part in his death. Below, the ALJ considered the medical opinions of Drs. Dennis,[6] Caffrey, Oesterling, and Farney.[7] Dr. Caffrey opined that neither clinical pneumoconiosis nor coal dust played a role or hastened the miner's death because "of the paucity of lesions of simple coal workers' pneumoconiosis." Instead, he posited that the miner likely suffered a cardiac death. Dr. Oesterling concluded that the miner's clinical pneumoconiosis "was [not] sufficient to have been a terminal factor in the miner's demise." While he testified that the miner "probably" died due to cardiac arrest, "emphysema 'may have . . . contributed' because the miner 'had so much passive congestion, so much pneumonia.'" Finally, Dr. Farney, who reviewed the pathology evidence and other record evidence, opined that the miner "died as a result of inadequate oxygen delivery due to circulation failure[,] but not due to ventilatory failure and inability to oxygenate the blood." Dr. Farney "specifically stated that the clinical study evidence 'is not consistent with respiratory failure due to emphysema[.]" Distinguishing the present case from *Collins*, *t*he ALJ found as most credible Dr. Farney's opinion, noting that the physician's opinion (1) "thoroughly explained" the basis for a conclusion that "the clinical evidence . . . rules out respiratory failure as a cause of death," (2) was "based upon the most comprehensive review of the medical and

[5] The Board also stated that the ALJ correctly noted that the Department has "cited, with approval, studies finding that the extent of emphysema is related to the amount of dust in the lungs, and used them as support for including obstructive pulmonary diseases in the definition of legal pneumoconiosis."

[6] Dr. Dennis opined that the miner's death was attributable to coal workers' pneumoconiosis. The ALJ gave his opinion "little, if any weight, . . . because of its rambling, sometimes less than understandable presentation, his lack of information concerning the miner's health, and for the reasons behind the suspension of his medical license." Because the ALJ's weighing of Dr. Dennis's opinion was unchallenged on appeal, the Board affirmed this finding.

[7] In its prior Decision and Order remanding the case for further consideration, the Board directed the ALJ to weigh the opinions of Drs. Farney, Oesterling, and Caffrey at prong two of rebuttal in light of the Fourth Circuit's decision in *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014). The Board explained that the Fourth Circuit cautioned in that decision "that a medical opinion that the miner's 'death is purely cardiac in nature' must be carefully evaluated as 'the relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole.'"

pathology evidence," and (3) was "supported by Dr. Oesterling's well-reasoned pathology review and by Dr. Caffrey's opinion."

The Board concluded that the ALJ "acted within his discretion in crediting Dr. Farney's opinion, as supported by the opinions of Drs. Caffrey and Oesterling, because '[r]egardless of the emphysema's etiology, [Dr. Farney] thoroughly explained how he concluded that the [the miner's] death was caused by congestive heart failure as opposed to respiratory failure.'" Accordingly, the Board affirmed, as supported by substantial evidence, his finding that Employer established that no part of the miner's death was caused by pneumoconiosis.

In light of the above, the Board affirmed the ALJ's Decision and Order on Remand denying benefits.

[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]