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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 192
November 2007 [corrected December 19, 2007]

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I. Longshore

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Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Elston], (Unreported)(No. 07-1360)(**4th Cir.** Nov. 13, 2007).

Circuit court upheld ALJ and Board's previous denial of Section 8(f) relief where Claimant had pre-existing COPD. The ALJ had found that Employer failed to establish that the decedent's disability and death were not due solely to his asbestos-related condition. The Board noted that there was no evidence that the pathological findings demonstrated the contribution of COPD to the death. The autopsy report was insufficient as a matter of law, to establish contribution. The Board had found that the ALJ rationally found that the pathologist did not adequately explain the basis for his opinion.

[Topic 8.7.5 Special Fund Relief--The Disability Must Not Be Due Solely to the New Injury]

C. Federal District Courts and Bankruptcy Courts

Romero v. Cajun Stabilizing Boats, Inc., ___ F. Supp. 2 ___ (Civ. Action No. 06-263)(W.D. La. Nov. 21, 2007).

Here a fitter/welder employed upon a jack-up rig was granted reconsideration of a Summary Judgment Order wherein his claim had been dismissed. He alleges a cause of action under the general maritime law. In order to consider whether Claimant can bring such an action, the court first needed to address whether he was covered by the LHWCA. LHWCA coverage would exclude general maritime law as a cause of action. After analyzing the facts, the court found that Claimant had both situs and status under the LHWCA, and therefore was not entitled to the general maritime cause of action and dismissed his claim.

[Topic 1.4.2 Jurisdiction/Coverage—LHWCA v. Jones Act]

Phelps v. Bulk III Inc., ___ F. Supp. 2 ___ (Civ. Action No. 06-0833 c/w 05-2148)(E.D. La. Nov. 1, 2007).

Court refused to grant summary judgment as to lack of seaman status where worker had only a five day tenure with company since seaman test should be evaluated in terms of worker's intended relationship as if he had continued employment uninjured. Additionally court found that simply because worker was doing "traditional land based longshore work" did not preclude seaman status since the seaman inquiry is a "status-based standard." It is not the employee's particular job that is determinative, but the employee's connection to a vessel.

[Topic 1.4.2 Jurisdiction/Coverage—Master/member of the Crew (seaman)]

Lee v. Great Lakes Dredge & Dock Co., ___ F.Supp. 2 ___ (06 Civ. 14251 (SAS))(S.D. NY Nov. 15, 2007).

Motion for summary judgment was denied where injured worker employed in a beach nourishment and restoration project at Fire Island filed Jones Act claim. The purpose of the project was to repair and reconstruct beach areas that had been eroded by storms, weather, and waves. Worker's duties included operating and maintaining something called "the CRAB,"(Coastal Research Amphibious Buggy). The CRAB was a three-wheeled, amphibious vehicle with an operator's platform perched upon three tall legs. An inflatable rubber tire is attached to the bottom of each leg. The CRAB is powered by a diesel engine that drives a hydraulic pump on the operator's platform that in turn drives a hydraulic motor attached to each rubber tire. The CRAB moves by the rotation of its rubber tires on the sea bottom or on land. The worker was injured after the CRAB got stuck approximately 100 feet offshore. The worker had to abandon the CRAB

and jump into the rough waters, and he was pulled ashore while holding on to a retrieval line.

Employer argued that there is a difference between transporting people and materials "above water" as opposed to "on water." However, the court found that Employer "gives a crabbed reading to the phrase 'on water'" and noted many different types of watercraft from airboats to submarines.

[Topic 1.4.3 Jurisdiction/Coverage--Vessel]

D. Benefits Review Board

T.S. v. Northrop Grumman-Avondale Industries, (Unpublished)(BRB No. 07-0213(Nov. 23, 2007).

Where a doctor states that he was unable to determine whether a fight at work aggravated Claimant's psychotic disorder, but did state that it "could have tipped her over the edge," the Section 20(a) presumption is not rebutted.

[Topic 20.3 Presumptions--Employer Has Burden Of Rebuttal With Substantial Evidence]

A.W. v. Newport News Shipbuilding & Dry Dock Co., (Unpublished)(BRB No. 07-0532)(Nov. 21, 2007).

Although the ALJ found that nine years was an excessive amount of time to wait to file an attorney fee petition, the Board would not affirm the denial as it was based on what the Board referred to as the erroneous finding that a deadline had been set for submission of an attorney's fee petition. In view of the lack of specified time period for filing in a prior order, the Board vacated the ALJ's denial and remanded for further consideration.

[Topic 28.4.2 Attorney Fees—Time Requirements]

R.S. v. Marine Industries Northwest, Inc., (Unpublished)(BRB No. 07-0419)(Nov. 26, 2007).

When Claimant's counsel did not receive his fee within 10 days of an order he filed for a default order under Section 14(f). OWCP denied the default order stating that there was no provision of the LHWCA requiring payment of an awarded attorney fee within 10 days. Following the denial, Claimant's counsel filed a supplemental fee petition for time spent seeking the default order. Employer did not submit any objections to the fee petition and thus, the district director summarily awarded the requested fee.

Employer then filed a motion for reconsideration, objecting to the fee petition on the grounds that counsel was not entitled to a fee because his motion for a default order was unsuccessful. The district director denied Employer's motion on the ground that Employer failed to object to the fee petition in a timely manner. The Board reversed the district director since claimant's counsel had been wholly unsuccessful in obtaining a default order, the services for which counsel sought an attorney fee.

[Topics 28.1.4 Attorney Fees—Decline to Pay; 14.4 Payment of Compensation--Compensation Paid Under Award]

E. ALJ Opinions

F. Other Jurisdictions

Calcaterra v. City of New York, 845 N.Y.S.2d 22 (Supreme Court, App. Div. Nov. 1, 2007).

In state court, the appellate court upheld the trial court's finding of Jones Act status although the worker had previously resolved a LHWCA claim with DOL. "Plaintiff was not precluded from bringing a Jones Act claim by reason of the fact that he had commenced this action after resolution of his LHWCA claim against defendant." *See* Topic 1.4.6 Jurisdiction/Coverage--Jurisdictional Estoppel in the Longshore Benchbook.

[Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act; 1.4.6 Jurisdiction/Coverage—Jurisdictional Estoppel]

II. Black Lung Benefits Act

Circuit Courts of Appeals

In *The Pittsburgh & Midway Coal Mining Co. v. Director, OWCP*, ___ F.3d ___, Case No. 06-15141 (11th Cir. Nov. 28, 2007), the court affirmed an administrative law judges' award of benefits to the survivor of a miner pursuant to the irrebuttable presumption at 20 C.F.R. § 718.304 (complicated pneumoconiosis). The prosector identified massive lesions and "[m]ultiple scattered fibroanthracotic nodules measuring up to 1.2 cm" and stated that the "microscopic features are consistent with a complicated pneumoconiosis, as defined by the Black Lung Program Guidelines . . .." The prosector then testified that "pathologists are best able to make a diagnosis of complicated pneumoconiosis when they perform both a gross and microscopic examination because 'the things you see grossly are not . . . necessarily in toto represented on the slides . . .." Employer submitted a contrary report wherein a reviewing pathologist concluded that the largest nodule he could find on the autopsy slides measured 0.9 centimeters, which did not qualify for a diagnosis of complicated pneumoconiosis.

On appeal, Employer argued that, because the miner died due to congestive heart failure, the provisions at § 718.205(c)(4) (that a survivor is not entitled to benefits where the principal cause of death is unrelated to pneumoconiosis) mandated denial of the survivor's claim. The court disagreed and held that the provisions at § 718.304 are mandatory and provide that there "*shall* be an *irrebuttable* presumption" of the cause of death where it is established that the miner suffered from complicated pneumoconiosis.

Turning to the medical evidence, the court noted that Claimant did not produce chest x-ray evidence sufficient to invoke the irrebuttable presumption at § 718.304. With regard to the autopsy evidence, one of Employer's experts maintained that "'massive lesions' refers to lesions the size of a chicken egg or one-third of one lung, significantly larger than the 1.2 centimeter lesion found by" the prosector. The Director disagreed and stated that the "chicken-egg standard has no medical basis, and that '[t]he term massive lesions is merely one of several ways of describing the condition known as complicated pneumoconiosis.'"

The court noted that neither the Act nor the implementing regulations define the term "massive lesions." Upon review of legislative intent, case law, and regulatory history, the court concluded that the Director's position was correct. In sum, the court stated:

> We are satisfied that the term 'massive lesions' means lesions revealed on autopsy or biopsy that support a diagnosis of complicated pneumoconiosis. Because 'massive lesions' is simply shorthand for complicated pneumoconiosis, we agree with the BRB's conclusion that a physician need not employ the magic words 'massive lesions' in order to satisfy the requirements found in § 718.304(b). It is sufficient if the claimant can establish by a preponderance of the evidence that the miner's

> autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards. (citations omitted).

Here, the court concluded that the prosector's identification of multiple nodules, including a nodule measuring 1.2 centimeters, was sufficient to support a finding of complicated pneumoconiosis. In this vein, the court declined to follow *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242 (4th Cir. 1999) wherein the Fourth Circuit required a claimant to demonstrate that the lesion on autopsy would show as an opacity greater than one centimeter in diameter on x-ray. The Eleventh Circuit held that the regulations do not require such an "equivalency determination." In a footnote, the court further stated that, "because [the prosector] found at least one lesion as large as 1.2 centimeters in diameter, . . . we are satisfied that 1.2 centimeters is sufficiently greater than 1 centimeter to qualify as 'massive'" in support of a finding of complicated pneumoconiosis.

[**complicated pneumoconiosis**]