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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 162
November - December 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

Bianco v. Georgia Pacific Corp., ___ F.3d ___ (No. 01-14656) (September 3,2002) (11th Cir. 2002).

The Eleventh Circuit found that a worker in a sheetrock production plant did not have situs under the LHWCA. "Even if GPC's sheet-rock production plant "adjoins" navigable waters, it is not an 'area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel.' " The area was used soley to manufacture sheetrock. Simply because maritime activity occurred in other areas of the GPC facility (namely where raw gypsum was unloaded from vessels), the entire GPC facility did not become an "area customarily used.... " The court reasoned: "Indeed, were we to conclude that GPC's entire facility (irrespective of what GPC does at different areas therein) is an 'adjoining area' simply because certain areas of the GPC facility engage in maritime activity, we would effectively be writing out of the statue the requirement that the adjoining area 'be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

[Topic 1.6.2 Situs–Over land]

Boomtown Belle Casino v. Bazor, ___ F.3d ___ (No. 01-60705)(December 6, 2002)(5th Cir. 2002).

In denying status to the claimant, the Fifth Circuit held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage 'individuals employed by a club,

camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The Fifth Circuit further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

[Topics 1.4.3.1 Floating Dockside Casinos; 1.6.2 Situs–Over land; 1.7 Status; 1.11.8 Exclusions–Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet]

Newport News Shipbuilding & Dry Dock v. Director, OWCP, (Brickhouse), ___ F.3d ___ (No. 01-2401)(December 27, 2002)(4th Cir. 2002).

Here the Fourth Circuit adopted the Fifth Circuit's rationale in *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122 (5th Cir. 1994), that suitable alternate employment is reasonably unavailable due to the claimant's participation in an approved rehabilitation program even though the employer's offer of alternate employment would have resulted in an immediate increase in wage earning capacity. In the instant case, after OWCP approved a vocational rehab program for the claimant, and placed a two year completion timetable on it, Newport News sought to hire the claimant in a newly created desk position. At the time of the offer, the claimant lacked completing the program by two classes and it was doubtful as to whether he could enroll in night school to timely complete the program. Additionally, the job offer from Newport News came with the condition that the claimant could be "terminated with or without notice, at any time at the option of the Company or yourself."

[Topic 8.2.3.2 Disability While Undergoing Vocational Rehabilitation]

B. United States District Courts

[Ed.. Note: The following federal district court cases are included for informational purposes only.**]**

Ayers v. C&D General Contractors, 2002 WL 31761235, ___ F.Supp. ___(Civil Act. No. 3:01-CV-48-H) (W.D. Ky. Dec. 6, 2002)

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "watercraft exclusion" excluded this claim since the worker had been working underneath a barge. The court concluded that the claim should not be excluded since

the barge was not used for transportation but merely aided the work under the dock.

In Re: Kirby Inland Marine, 2002 WL 31746725, ___ F.Supp. ___ (No. CIV. A G-02-383)(S.D. Tex. Dec. 2, 2002).

This matter involves a third party action commenced after a longshoreman was injured when he fell from the deck of a vessel onto the hopper. After the longshoreman filed his 905(b) Action in state court, the vessel owner filed under the Limitation of Vessel Owners Liability Act, 46 U.S.C. 181 et seq. to stay the state court action pending the Limitation proceeding. The longshoreman stipulated that the federal court had exclusive jurisdiction over the limitation action and that he would not try to enforce a 905(b) judgment in excess of the declared value of the vessel until the Limitation action had been determined. However, since the 905(b) Action included claims by other corporate entities for indemnification and contribution, the federal district court would not lift the stay since there was no assurance by these "other plaintiffs" that they would not seek enforcement prior to the determination of the Limitation action.

C. Benefits Review Board

Terrell v. Washington Metropolitan Area Transit Authority, ___ BRBS ___ (BRB No. 99-0509)(Dec. 6, 2002).

This is a Reconsideration of the Board's previous holding in this matter found at 36 BRBS 69 (2002). That Order held that the employer could not be held liable for the claimant's attorney's fee for the work counsel performed and that the claimant was liable for a reduced fee that was made a lien on his total disability compensation award. In a plurality decision on reconsideration, counsel successfully sought to hold the claimant liable for the entire fee he had requested.

This matters stems from a modification request brought by the director. Previously the claimant contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. The Board rejected those contentions. In the appeal on the merits, the claimant opposed the Director's contention that the employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the ALJ's decision excluding the employer from the proceedings. Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Board then held that counsel for the claimant was not entitled to a fee for the work performed on research, motions or briefs, as the claimant was unsuccessful in maintaining the status quo.

Now the Board holds that *Hensley* does not apply since *Hensley* is only applicable to fee shifting statutes such as Sections 28(a) and (b) and not to Section 28(c) where attorney's fee entitlement is determined by the necessary work performed in securing an award. Citing 20 C.F.R. 802,203(e), the Board found the work counsel performed to be "necessary" in that he advocated a position protective of

his client's interest. Noting that, on remand, the claimant had been awarded ongoing permanent total disability benefits and the entitlement to cost-of-living adjustments, the Board found that the claimant was financially able to pay the $4,100.00 attorney fee.

In a concurring opinion, Judge McGranery agreed that the claimant should be responsible for the attorney fee under Section 28(c), but took issue with the plurality's interpretation of *Hensley* (that fee shifting does not apply to the instant case because fee liability had not shifted to the employer.). "I think that the *Hensley* analysis provides guidance whenever a judicial tribunal is responsible for directing an attorney's fee award." She went on to note; "The flaw in the majority's analysis is that it fails to distinguish between substantive and procedural issues. Although claimant was unsuccessful in opposing employer's participation in the modification proceeding, this was purely a procedural issue. The prohibition against compensating attorneys for work on unsuccessful issues concerns substantive issues, i.e., claims."

[Topics 28.1.2 Attorney Fees–Sucessful Prosecution; 28.3 Attorney's Fees--Claimant's Liability]

McCracken v. Spearin, Preston and Burrows, Inc., ___ BRBS ___ (BRB No. 02-0256)(Dec. 12, 2002).

This matter involves a bankrupt carrier wherein the ALJ allowed the Carrier/Employer's attorney to withdraw and found that the Employer's motion for a stay of proceedings had been withdrawn since no one was present to argue the motion to withdraw. Employer's motion for a continuance was also denied and Employer was declared in default. The ALJ issued a default judgment against the Employer, ordering it to pay Claimant permanent total disability benefits, medical benefits and an attorney's fee. Employer, now represented, moves for reconsideration.

The Board noted that the ALJ had based his declaration of default and his award of permanent total disability benefits solely on Employer's absence from the proceedings. In vacating the award, the Board stated that "Without any evidence, it is impossible to determine whether claimant is entitled to permanent total disability benefits."

Noting the similarities between 29 C.F.R. 18.39(b) and Rule 55(c) of the Federal Rules of Civil Procedure (FRCP), the Board agreed with the Employer that the failure to send a company representative to the hearing on the facts presented was insufficient to warrant a declaration of default against Employer and was "a overly harsh sanction" in light of the circumstances presented. The Board noted that 29 C.F.R. 18.39(b) has a "good cause" standard similar to FRCP 55(c) and applied the good faith standard articulated in *Enron Oil Corp. v. Diakuhara* 10 F.3d 90 (2d Cir. 1993).

[Topic 19.3 Adjudicatory Powers; 19.10 Bankruptcy]

Alexander v. Avondale Industries, Inc., ___ BRBS ___ (BRB No. 02-0292) (Dec. 23, 2002).

At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the Employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

[Topics 22.1 Modification–Generally; 22.3.2 Filing a Timely Request; 7.1 Medical Treatment Never Time Barred]

D. State Court Decisions

[ED. Note: The following is provided for informational value only.**]**

St. Bernard Parish Police Jury and Travelers Property Casualty Corp. v. Duplessis, ___ La. Sup. Ct. Rept. ___, (La. Docket No.2002-C-0632) (La. Supreme Ct. Dec. 4, 2002).

The Louisiana State Supreme Court held that a claimant's wilful misrepresentation of mileage reimbursement subjected him to the forfeiture of his workers' compensation benefits, pursuant to LSA-R.S. 23:1208. The statute, in pertinent parts, states that it is unlawful for any person, for the purpose of obtaining or defeating any workers' compensation benefit or payment, to willfully make a false statement or representation. "Any employee violating this Section shall, upon determination by workers' compensation judge, forfeit any right to compensation benefits under this Chapter." Claimant had submitted a request for reimbursement for 4,354 miles when he was only entitled to 1,114.2 miles for doctors' visits.

Although noting that the claimant was "not a workers' compensation neophyte," the hearing officer, found that the forfeiture of all benefits was "too harsh" and ordered the forfeiture of the requested mileage and referral of the matter to the Fraud Section. On appeal the court affirmed the ruling. Noting the intent of the state legislature, the Louisiana State Supreme Court has now overturned the prior rulings and denied all future benefits.

II. Black Lung

A. Circuit Courts of Appeals

In *Zeigler Coal Co. v. Director, OWCP [Villain]*, ___ F.3d ___, Case No. 01-3961 (7th Cir. Dec. 6, 2002), the court held that an employer is collaterally estopped from re-litigating the existence of coal workers' pneumoconiosis in a survivor's claim where the miner was awarded benefits based on a lifetime claim and no autopsy evidence is presented in the survivor's claim. In this vein, the court noted the following:

> Not all kinds of black lung are progressive; the milder forms of the condition do not get worse over time unless the miner inhales more dust. Yet unless pneumoconiosis sometimes goes into remission, there is no reason to hold a new hearing on the question whether a person who had that condition during life also had it at death. Zeigler does not offer us (and did not introduce before the agency) any medical evidence suggesting that black lung can be cured.
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> . . .
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> Radiologists frequently disagree about the interpretation of x-ray films; only for the most serious forms of the disease are the opacities indicative of pneumoconiosis easy to distinguish from opacities with other causes. Death offers a considerably better source of evidence: analysis of the lung tissue removed in an autopsy. The Benefits Review Board therefore has created an autopsy exception to the rule of issue preclusion. Both a mine operator and a survivor are allowed to introduce autopsy evidence in an effort to show that the determination made during the miner's life was incorrect.

As a result, the court held that, because no autopsy evidence was submitted in the survivor's claim, Employer was collaterally estopped from re-litigating the issue of whether the miner suffered from coal workers' pneumoconiosis.

Employer further challenged whether coal workers' pneumoconiosis hastened the miner's death from colon cancer. The court cited, with approval, to the amended regulations at 20 C.F.R. § 718.205(c)(5) and the D.C. Circuit Court's ruling that the regulation was valid in *National Mining Ass'n. v. Department of Labor*, 292 F.3d 849, 871 (D.C. Cir. 2002). The court noted that "the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support." (emphasis in original). In this vein, the court cited to the regulatory history to the amended regulation at 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000). In determining whether pneumoconiosis hastened the miner's death, the court accorded greatest weight to the opinion of the

miner's treating physician over the opinion of Dr. Tuteur, who merely concluded, without reasoning, that the miner's pulmonary impairment did not accelerate his death. Consequently, the court upheld the award of survivor's benefits.

[**collateral estoppel in a survivor's claim; hastening death**]

In *Amax Coal Co. v. Director, OWCP [Chubb]*, ___ F.3d ___, Case No. 01-4226 (7th Cir. Dec. 6, 2002), the court concluded that a 16 year delay in the adjudication of the miner's claim–from the time of the 1978 filing to the 1994 order by the Board to "start afresh"–did not constitute a violation of Employer's due process rights. As a result, Employer's request to transfer liability to the Black Lung Disability Trust Fund was denied. Citing to *C&K Coal Co. v. Taylor*, 165 F.3d 254 (3d Cir. 1999), the court noted that Employer received timely notification of the claim and had been able to develop its evidence, even though the delayed processing of the claim was "inexcusable." The court distinguished the holdings in *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1995) and *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799 (4th Cir. 1998), where the Fourth Circuit transferred liability to the Black Lung Disability Trust Fund because of the Department's inordinate delay in notifying the employers of the viability of a claim and their potential liability for the payment of benefits. The court noted that, in *Borda* and *Lane Hollow*, the due process rights of the employers were denied "when the defendants had not received 'timely notice of the proceeding'" and that, under the facts in *Chubb*, "Amax received notice of, and participated in, all of the proceedings dealing with Mr. Chubb's claim since 1978."

The court then held that the date of onset for the payment of benefits was not the date on which the miner retired from working in the coal mines. Rather, the court cited to 20 C.F.R. § 725.503 which requires that, if the date of onset cannot be determined from the medical evidence, then it is the date on which the miner filed his claim which, in this case, is August 1978. The court then noted that the miner returned to coal mine work in September 1981 for a period of one year. Pursuant to 20 C.F.R. § 725.504 (formerly 20 C.F.R. § 725.503A), the court determined that the payment of benefits would be suspended for that period of time. Employer argued that the regulatory provisions regarding onset were invalid because they were in conflict with Section 7(c) of the Administrative Procedure Act (APA). To the contrary, the court held that the regulation was valid and, under the express language of the Black Lung Benefits Act, the APA "does not trump the regulation."

Finally, the court approved of an attorney's fee for Sandra Fogel based on an hourly rate of $200.00. In support of its holding, the court noted that Ms. Fogel filed affidavits by various black lung attorneys nationwide who stated that $200 per hour was reasonable in light of Ms. Fogel's expertise, a letter from the vice president of the local bar association stating that the fee was reasonable in the area, and the fact that Ms. Fogel was awarded that hourly rate in 22 out of 27 fee applications she filed with various ALJs and the Benefits Review Board.

[**due process; onset date for the payment of benefits; attorney's fees**]

In *Consolidation Coal Co. v. Director, OWCP [Held]*, ___ F.3d ___, Case No. 99-2507 (4th Cir. Dec. 20, 2002), the court held that it was improper to accord "great weight" to the opinion of a physician merely because he treated Claimant and examined him each year over the past ten years. The court stated the following:

> The ALJ's treatment of Dr. Tsai (Claimant's treating physician) was inconsistent with the law. In *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093 (4th Cir. 1993), we clearly stated that '[n]either this circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians. (citations omitted). That statement is still true today. Thus, while Dr. Tsai's opinion may have been entitled to special consideration, it was not entitled to the great weight accorded it by the ALJ.

Moreover, the court held that the ALJ did not follow the requirement of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) that all evidence under 20 C.F.R. § 718.202(a) be weighed together to determine whether the miner suffers from pneumoconiosis. As a result, the court remanded the case and directed that the ALJ weigh the chest x-ray evidence along with the medical opinions.[1]

[**treating physicians; weighing all evidence together under § 718.202(a)**]

B. Benefits Review Board

By unpublished decision in *Andrews v. Director, OWCP*, BRB No. 02-0228 BLA (Dec. 23, 2002), a case involving a survivor's claim, the Board held that it was error for the ALJ to exclude a medical report submitted by Claimant to establish a mistake in a determination of fact under 20 C.F.R. § 725.310, where the medical report was available (and could have been submitted) at the time of the original hearing. The Board agreed with Claimant and the Director who argued that the ALJ "should not have excluded Dr. Simelaro's report from the record on the sole ground that this evidence should have been submitted in earlier proceedings."

This appears contrary to the Board's holding in *Shertzer v. McNally Pittsburgh Manufacturing Co.*, BRB No. 97-1121 (June 26, 1998)(unpub.), wherein the Board held that the ALJ erred in admitting evidence on modification as part of the Director's exhibits where the evidence was in existence at the time

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[1] No autopsy or biopsy evidence was in the record.

the ALJ issued his original decision. The Board stated that 20 C.F.R. § 725.456(d) and *Wilkes v. F&R Coal Co.*, 12 B.L.R. 1-1 (1988) "mandates exclusion of withheld evidence in the absence of extraordinary circumstances."

[**admission of evidence on modification**]