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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 205 December 2008

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

A. U.S. Circuit Courts of Appeals

***Bay, Ltd. v. Dir., OWCP [Stiles]*, No. 07-60991, 2008 WL 4933752 (5th Cir. Nov. 19, 2008)(Unreported).**

The Fifth Circuit noted that § 10(c) of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act") allows an ALJ to calculate average annual earnings based upon three factors: (1) past earnings of the employee in the employment in which he was working at the time of the injury; (2) the earning history of employees of the same or most similar class working in the same or most similar employment; and (3) the employment history of the injured employee.

The Court held that the ALJ did not err in concluding that the second factor reasonably represented Claimant's annual earning capacity. With respect to the first factor, the Court held that the award under Section 10(c) is not limited by the employee's past earnings with employer, as he might have more opportunity to earn wages at the time of his injury than he had prior to his injury. *See Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). With respect to the third factor, this Court previously held that the ALJ must take into account the employee's earnings over several years, but it did not find that this was the critical factor. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). The ALJ is

required to consider all of the relevant factors, but need not rely upon a factor if it does not reasonably represent the employee's annual earning capacity.

Here, Claimant had been working for Employer for about two weeks at the time of his injury, earning a total of $1,636 at a rate of $18 per hour. Claimant's annual earning capacity over the previous five years ranged from $11,872 to $66,496. Applying § 10(c), the ALJ properly determined that Claimant's annual earning capacity, at the time of the injury, may be more than his average earnings over the previous one to five years. The ALJ properly identified a similarly situated employee who was working in a similar job at the same hourly wage, and concluded that Claimant would have had the same opportunities to acquire overtime had he not been injured. Thus, the ALJ properly awarded benefits based on this employee's average weekly income of $1,329.63, including overtime. The Court noted that the ALJ correctly determined that § 10(b) did not apply, as there was no evidence of Claimant's average daily wage; nor was it possible to calculate the similarly situated employee's average daily wage, as there was no evidence of the number of hours he worked each day.

[Topic 10.4.4 Calculation of annual earning capacity under Section 10(c)]

***Superior Boat Works, Inc. v. Cremeen*, No. 07-60993, 2008 WL 5231840 (5th Cir. Dec. 16, 2008)(Unreported).**

In August of 1998, Claimant fell at work, injuring his shin. He had previously injured his back in an automobile accident in June of 1997. He first reported back pain allegedly related to the work injury in September 1998, when he had exhausted the pain medication prescribed in connection with the car accident. An MRI performed after the work accident showed that the bulging discs in his back were unchanged from an MRI performed after the car accident. In 2004, Claimant's treating physician opined for the first time that his pain was caused by a sacroiliac (SI) joint disease, rather than his back injury. Claimant filed a claim for benefits under the Act in 2004.

The ALJ concluded that the § 20(a) presumption under the LHWCA had been invoked and rebutted. The ALJ found Claimant's testimony that the work accident caused increased back pain to be self-serving and unreliable, particularly as he was already taking pain medication and thus lacked any frame of reference to determine whether his back pain from the June 1997 injury increased after he sustained a second injury in August 1998 while

working for Employer. The ALJ further found no medical opinion relating Claimant's SI joint disease to the work accident. The Board reversed and remanded, stating that the ALJ had not explicitly determined whether Employer had produced substantial evidence that the work accident did not aggravate Claimant's pre-existing condition. The Board noted that the ALJ improperly considered the MRI evidence "in light of the evidence that the work injury involves a different condition [SI joint disease]."

On remand, the ALJ concluded that Employer failed to rebut the § 20(a) presumption because it presented "no evidence" that the work accident did not aggravate Claimant's SI joint disease and failed to present substantial evidence that Claimant's pre-existing back condition and pain were not aggravated by the fall at work. On appeal, the Board held that Employer offered only "circumstantial and lay evidence" insufficient to rebut the § 20(a) presumption. In particular, comparable MRIs were not determinative of aggravation, nor did they address whether the accident caused Claimant's back condition to become symptomatic. Claimant's failure to complain was not substantial evidence, as he was on pain medication until one month after the fall.

Having reviewed the Fifth Circuit precedent on the application of the § 20(a) presumption, the Court held that the presumption had been invoked and rebutted. *See, e.g., Conoco, Inc. v. Dir.,* OWCP, 194 F.3d 684, 687 (5th Cir. 1999); *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003). The Court held that "[Employer's] production of comparable MRIs and medical records exhibiting constant back pain and use of pain medication since the automobile accident is substantial evidence to rebut the presumption that the work-related injury aggravated [Claimant's] previous back injury." The Court concluded that the Board erred in determining that the use of comparable MRIs was not proper "in light of the different diagnoses," because the ALJ had concluded that there was no link between the second diagnosis, SI joint disease, and the work injury. The Court then denied benefits based on the Board's statement that it would affirm the ALJ's denial if Employer rebutted the § 20(a) presumption.

[Topic 20.5.1 Application of Section 20(a), Causal relationship of injury to employment]

***Pontoriero v. Dir., OWCP*, No. 08-1147, 2008 WL 5265752 (3rd Cir. Dec. 19, 2008)(Unreported).**

In 2001, Claimant requested a modification of a 1999 award of benefits pursuant to § 22 of the LHWCA, alleging a worsening of his condition and seeking permanent total disability benefits. The Third Circuit upheld the Board's decision affirming an ALJ's denial of the request.

On appeal to the Third Circuit, Claimant argued, *inter alia*, that even if parts of his claim were "slightly exaggerated," he did suffer serious injuries while working. The Court observed that the ALJ acknowledged a change in Claimant's physical condition sufficient to bring the claim within the scope of § 22. The ALJ therefore turned to the law regarding total disability, and found that Claimant did not establish he was disabled from his pre-injury employment. The Court noted that the ALJ's decision turned on Claimant's credibility. The ALJ discredited Claimant's subjective complaints and the opinion of his treating physician based on those complaints, instead giving credence to the opinion of Employer's doctor that Claimant could return to work in his pre-injury position without restrictions. The ALJ factored into his analysis a November 2005 surveillance video showing Claimant engaged in activities inconsistent with his assertion of disability.

[Topic 22.3.4 Change in physical condition]

***Tucker v. Thames Valley Steel*, No. 07-3575-AG, 2008 WL 5381273 (2nd Cir. Dec. 24, 2008) (Unreported).**

Claimant filed claims for compensation under the LHWCA for occupational diseases allegedly caused by exposure to hazardous substances in the course of work for Employer. An ALJ noted that x-rays from 1985 showed "a poor inspiratory effort with pleural thickening and tenting at the cardiac apex." The ALJ also noted, however, that it was not until 1993 that Claimant was given a full examination which revealed that he had "indisputable evidence of asbestos-related pleural disease" as a result of his exposure to asbestos at work. The ALJ nevertheless ordered Employer to pay total disability compensation benefits retroactive to 1985 because he concluded that Claimant had stopped work at that time "at least in part, [due] to his occupational disease," and was thus an involuntary retiree. [1]

[1] Non-essential procedural history is omitted.

Employer appealed the ALJ's decision to the Board and, around the same time, filed a motion for reconsideration with the ALJ, which was denied. Thereafter, Employer filed a second notice of appeal with the Board along with a cover letter asking the Board to consolidate it with the appeal field earlier. The Board dismissed Employer's original appeal as premature and construed the second notice of appeal as an appeal of all the underlying decisions. The Board then reversed the ALJ's decision that Claimant was an involuntary retiree, on the ground that "there is no evidence that [Claimant] left his employment in 1985 due to his lung disease." On remand, the ALJ awarded permanent partial disability compensation from 1993, when a medical report first linked Claimant's illness to his past employment; and denied reconsideration of this decision. The Board affirmed.

The Second Circuit rendered the following holdings. First, the Court held that the Board acted in accordance with its procedural regulations in concluding that Employer's second notice of appeal, in conjunction with the cover letter, sought review of all previous ALJ decisions. Second, the Court concluded that although Claimant experienced health problems in 1985, the Board properly concluded that the record did not support the existence of a permanent respiratory impairment at that time. Finally, the Court held that, on remand, the ALJ correctly determined that he was precluded by the Board's prior decision from finding that Claimant's disability arose is 1985. The Board had found no evidence that Claimant's lung condition affected his ability to perform his job in 1985 and further noted that mere diagnosis of an illness and evidence of pleural thickening were insufficient to support a finding of disability. In the circumstances of this case, the Board's determination that Claimant was not disabled by a work-related condition in 1985 necessarily implied that there was also insufficient evidence that he suffered any impairment from a work-related condition at that time. The ALJ, therefore, did not err in finding that the onset of Claimant's impairment was in 1993.

[Topic 2.2.13 Occupational diseases: general concepts; Topic 2.2.14 Occupational disease & disability; Topic 8.2.4.7 Voluntary withdrawal from labor market]

B. Benefits Review Board

***K.M. v. Lockheed Shipbuilding*, __ BRBS __, BRB No. 08-0403 (Dec. 30, 2008).**

The Board affirmed an ALJ's identification of a responsible employer in a claim filed by decedent's widow against three employers potentially liable for decedent's death due to asbestos exposure.

The Board upheld its interpretation of the Ninth Circuit's case law on responsible employer in *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28, 33 (2007)(*McAllister II*). The Board set forth the applicable law as follows (citations omitted): Where a death is work-related, it is for the employers to establish which of them is liable. In cases involving claims against multiple employers, the burden is placed on each employer to exculpate itself from liability. In an occupational disease case, the responsible employer is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. To defeat liability, the employers bear the burden of establishing either that the employee was not exposed to injurious stimuli in sufficient quantities while working for them or that the employee was exposed to injurious stimuli while working for a subsequent covered employer, if any. (The Board noted, however, Fifth and Fourth Circuit precedent applying no minimal exposure rule.) The responsible employer determination is to be made without reference to the Section 20(a) presumption. If there is uncertainty as to which employer was last chronologically, then the Ninth Circuit and the Board assign liability to the employer claimed against. If no employer presents persuasive exculpatory evidence, then liability is assigned to the later employer.

Each employer must persuade the fact-finder, simultaneously not sequentially, of its position by a preponderance of the evidence. *See McAllister II*. The Ninth Circuit does not require the later employer to bear any initial burden (citations omitted). An ALJ need not look at the evidence chronologically. Placing the burden on all employers and not just the last employer does not eliminate the requirement of a "rational connection" between exposure and causation. Rather, it emphasizes this requirement by allowing the ALJ to weight all the evidence simultaneously to determine when exposure last occurred. Here, the ALJ did not err in concluding that, more likely than not, decedent was not exposed to asbestos at the last employer's facility.

[Topic 2.2.16 Occupational diseases and the responsible Employer/Carrier]

***G.S. v. Marine Terminals Corp.*, __ BRBS __, BRB No. 08-0611 (Dec. 19 2008).**

The Board held that an ALJ erred in awarding benefits to Claimant who, after consuming alcohol at work, was injured when he fell over the bull rail onto a ledge while urinating. Claimant's violation of Employer's rule against drinking did not remove him from the course of employment. Under the Act, an injury occurs in the course of employment if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. The Section 20(a) presumption applies to this question, and thus, the burden was on Employer to produce substantial evidence that Claimant's injury did not occur in the course of employment.

The injury occurred within the time and space boundaries of Claimant's employment as it occurred on Employer's premises during the work day (citation omitted). Claimant had been drinking during the work day and, after finishing his work, continued to drink in Employer's van used to transport employees. Generally, employees who, within the time and space limits of their employment, act to accommodate personal comforts do not thereby leave the course of employment. Thus, the fact that Claimant was urinating did not take the injury outside the course of his employment.

Claimant's violation of the alcohol rule did not, *per se*, remove him from the course of his employment. Pursuant to Section 4(b), compensation under the Act is payable "irrespective of fault." The Board cited with approval the "work rule" cases decided under state workers' compensation laws, which hold that an employee who violates a rule prescribing the manner in which he should perform his duties acts within the course of employment, while an employee who violates a rule that limits the scope of work which he is authorized to do is thereby removed from the course of employment.

Nevertheless, entitlement to compensation was barred under Section 3(c), which expressly bars recovery if "the injury was occasioned solely by the intoxication of the employee …." This provision must be applied in conjunction with Section 20(c), which states that, in the absence of substantial evidence to the contrary, it is presumed that the injury was not occasioned solely by the employee's intoxication. If employer produces substantial evidence rebutting this presumption, then the claimant bears the burden of persuading the ALJ that his intoxication was not the sole cause of his injury.

Here, the ALJ erred in finding that Employer failed to rebut the Section 20(c) presumption, where two qualified physicians testified that intoxication was the sole cause of the injury, Claimant testified that he was inebriated to the point of being unable to recall the incident, and Employer's manager testified as to the absence of hazards in the area. The ALJ inappropriately speculated that the fall may have been due to Claimant's being distracted, careless, or in a hurry, without a basis in the record and without considering that such factors may have been directly related to his alcohol consumption.

[Topic 3.2.1 Coverage – Other exclusions – Solely due to intoxication]

***J.R. v. Bollinger Shipyard, Inc.*, __ BRBS __, BRB No. 08-0508 (Dec. 19, 2008).**

The Board affirmed an ALJ's award of temporary total disability and medical benefits. The ALJ did not err in concluding that Claimant was incapable of performing any work by according the greatest weight to Claimant's description of his back pain and his treating physician's opinion, supported by Claimant's use of pain treatment and objective evidence (MRI).

The ALJ's finding that Claimant was medically unable to perform any work rendered Employer's vocational evidence moot. Nonetheless, the Board noted that a claimant's refusal to cooperate with Employer's vocational expert is a factor which should be considered in evaluating the expert's testimony. Here, the ALJ acknowledged evidence of Claimant's refusal to cooperate, and found that Employer's vocational expert was able to render a vocational assessment based on Claimants' medical reports and vocational background.

The Board further held that Claimant's status as an illegal alien did not preclude him from receiving benefits under the Act, as the Act does not differentiate between compensation paid to illegal aliens and that paid to legal residents and/or citizens of the United States. The Board noted that the ALJ found, based on *Hernandez v. M/V Rajaan*, 848 F.2d 498 (5th Cir. 1988), that Employer presented no evidence that Claimant "was about to be deported or would surely be deported" in order to establish that he has no legal wage-earning capacity. Indeed, Claimant had been working for Employer and earning wages. Additionally, the ALJ appropriately concluded that "the issue of illegal alienage" does not affect compensation entitlement under the Act, citing *Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51(CRT)(D.C. Cir. 1991), *aff'g* 24 BRBS 78 (1990)(claimant's status as an

illegal alien not a proper factor in determining the availability of suitable alternate employment). In light of *Rivera*, Employer's assertion that it could not show suitable alternate employment due to Claimant's status was without merit.

Moreover, Employer cited no authority for its position. The definition of "employee" in Section 2(3) (including specific exceptions) does not differentiate between individuals based on their citizenship status. Furthermore, Section 9(g), and its implementing regulation, 20 C.F.R. §702.142, provide for payment of compensation to non-resident aliens "in the same amount as provided for residents" (with certain stated exceptions).

[Topic 8.2.4.7 Partial disability/suitable alternate employment – Factors affecting/not affecting employer's burden – Status as an illegal alien – Employee's non-cooperativeness with employer's vocational exert]

II. Black Lung Benefits Act

[no cases to report for this month]