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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 286
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I. Longshore and Harbor Workers' Compensation Act and Related Acts

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

***Moody v. Huntington Ingalls Inc.*, 879 F.3d 96 (4th Cir. 2018).**

Reversing the Board,[2] the Fourth Circuit held that claimant's voluntary retirement before the onset of a workplace injury's debilitating effects did not preclude the existence of a "disability" under § 2(10) of the LHWCA.

Claimant sustained a shoulder injury at work, but deferred surgery until after he retired. The decision to retire (after 45 years with employer) was made prior to the injury. He sought disability benefits for the two-month, post-surgery period during which he was not medically cleared for work. The Board reversed the ALJ's award of benefits on the ground that claimant voluntarily retired before the onset of his workplace injury's debilitating effects. It reasoned that voluntary retirement results in a total loss of ability to earn wages, such that no injury could cause any further loss of economic capacity.

The court stated that, for matters of statutory interpretation, it must first look to the statutory text, and absent a different definition, interpret statutory terms in accordance with their ordinary meaning. Under the LHWCA, "[d]isability' means incapacity because of injury

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[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, where citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *___).

[2] *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016).

to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Nothing in the statute expressly addresses retirement or its timing; the only reference to time requires the assessment of earning capacity at the time of injury, not the time of retirement. The Board's construction -- that an employee's retirement necessarily makes him incapable of earning any wages -- misconstrues the plain meaning of "incapacity" and the real-world significance of retirement. "Incapacity" means "inability," "incompetence," and "incapability." Retirement is not inherently debilitating. By focusing on the voluntary nature of retirement, the Board confuses being unwilling with being unable. In this case, apart from the two-month recovery period, claimant had the ability, competence, and capability of being a truck driver and earning wages on the days before and after his retirement.

The Board also erroneously equated loss of earning capacity with loss of actual earnings. Claimant's injury did not cause him to lose any income, but it did deprive him of the ability to work. Case law defines "economic harm" as lost capacity to earn wages, not actual economic loss. As the Supreme Court has held, "[c]apacity, and thus disability, is not necessarily reflected in actual wages earned after injury, and when it is not, the factfinder under the Act must make a determination of disability that is reasonable and in the interest of justice, and one that takes account of the disability's future effects." Slip op. at 6 (quoting *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 127-128 (1997)). The *Rambo* Court held that an employee may still be eligible to receive disability benefits under the LHWCA even if his post-injury wages are higher than his pre-injury wages, upon a determination that the employee's earning capacity is likely to fall below pre-injury levels in the future. Similarly, in this case, claimant's actual wage loss does not fully capture the loss of capacity caused by the injury. The ALJ followed *Rambo*'s instruction in deciding that the interests of justice and public policy weigh in favor of granting benefits. To decide otherwise would not only deprive claimant of his rightful benefits but would also confer a windfall on employer: claimant would have received disability benefits had he undergone surgery immediately, rather than discharging his duties in good faith, and employer would have had to pay for another driver. The fact that claimant did not look for work after retirement does not change the analysis, as it goes to actual economic loss but not incapacity. Because the LHWCA compensates workers for their inability to earn wages due to injury, workers are entitled to disability benefits when an injury is sufficient to preclude the possibility of working. Here, claimant could have changed his mind. "In sum, voluntary retirement is not a form of total incapacity. As the Board has determined in the past, retirement status, standing alone, is irrelevant to earning capacity and the determination of 'disability' under 33 U.S.C. § 902(10)." Slip op. at 7-8 (collecting BRB's earlier case holding that the only relevant inquiry is whether claimant's work injury precludes his return to his usual work).

The court also rejected employer's assertion that the original purpose of the LHWCA was to compensate workers for actual wage loss because the Act is modeled after the New York Workers' Compensation Act ("the NYWCA"). "Instead, the purpose of the LHWCA was not to emulate the NYWCA *per se* but to enact a 'humanitarian legislation' that afforded workers with 'protection' that was 'almost universally recognized as necessary in the interest of social justice between employer and employee.'" Slip op. at 8 (citations omitted). Indeed, "the LHWCA represents a compromise between the competing interests of disabled laborers and their employers." Slip op. at 8 (quoting *Potomac Elec. Power Co. v.*

Dir., OWCP, 449 U.S. 268, 281–82 (1980)). Employees give up the possibility of greater damages in tort litigation in return for the certainty of compensation payments. The court stated that "[w]e give effect to that compromise by applying the plain text of the statute and by adopting the interpretation that affords greater certainty of coverage if the text is ambiguous." Slip op. at 9 (citations omitted). Based on the plain text of the Act, earning capacity is distinct from actual wage. In sum, the court found no evidence that the LHWCA modeled its definition of "disability" after the NYWCA's. The legislative history of the LHWCA does not contradict the clear definition of "disability" and the plain meaning of "incapacity" under § 2(10).

The Board's decision was reversed and the case remanded for further proceedings.

[§ 2(10) DISABILITY; § 8 DISABILITY – WAGE-EARNING CAPACITY]

***Vortex Marine Constr. v. Grimm*, 878 F.3d 709 (9th Cir. 2017).**

In a published order, the Ninth Circuit held that *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2168 (2015), does not prevent an award of attorneys' fees for fee litigation under the Longshore Act.

On referral from the court, the Appellate Commissioner determined a fee award for work performed before the court and also recommended an award of fees to claimant's attorney for defending his fee application. The parties did not object to the recommendation. The court agreed with the recommendation, holding that *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2168 (2015), does not prevent an award of attorneys' fees for the fee litigation under the LHWCA. It stated that *Baker Botts* held that the text of § 330(a)(1) of the Bankruptcy Code does not shift the costs of adversarial litigation from one side to the other, and it does not displace the American Rule with respect to fee-defense litigation. The Ninth Circuit reasoned that § 28(a) of the LHWCA is a fee-shifting statute that departs from the American Rule and explicitly shifts to the employer or carrier the responsibility for payment of a reasonable fee for attorney services for the litigation if the claimant successfully prosecutes the claim. Under fee-shifting statutes like § 28(a), courts have uniformly declined to treat fee-application and fee-litigation work differently, and have consistently held that time spent establishing the entitlement to and amount of the fee is compensable.

[§ 28 ATTORNEY'S FEES]

***Manson Gulf, L.L.C. v. Modern Am. Recycling Serv.*, 878 F.3d 130 (5th Cir. 2017).**

In a tort action arising under § 5(b) of the LHWCA, the Fifth Circuit reversed the district court's summary judgment in favor of the defendant.

Longshoreman James "J.J." LaFleur fell 50 feet to his death after stepping through a hole in a decommissioned oil platform. The platform had been acquired by Manson Gulf, LLC ("Manson"), and sat atop a barge chartered by Manson. Manson ordered holes to be cut in the platform's grating, but left them uncovered and unmarked. Modern American Recycling Service ("MARS") agreed to purchase and scrap the platform, and Manson

delivered the structure to MARS's dock. On the day of the fall, J.J. was working for MARS. Manson did not cover the hole or warn J.J. of its existence. J.J.'s spouse alleged negligence on the part of Manson and sought damages. The district court granted summary judgment for Manson, finding no liability under any of the three *Scindia* duties—the duties a vessel owner owes to a longshoreman. On appeal, the Fifth Circuit concluded that a fact issue precluded summary judgment with respect to the duty to warn of hidden dangers.

<u>The *Scindia* Duties:</u>

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 164 (1981), the Supreme Court articulated three "narrow duties" owed by the vessel owner: (1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship under the active control of the vessel, and (3) a duty to intervene. The turnover duty encompasses two distinct-but-related obligations. First, the vessel owner owes a duty to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that an expert stevedore can carry on stevedoring operations with reasonable safety. Second, the vessel owner owes a duty to warn the stevedore of latent or hidden dangers which are known to the vessel owner or should have been known to it. However, a vessel owner need not warn of dangers which are either: (1) open and obvious or (2) dangers a reasonably competent stevedore should anticipate encountering. In this case, the Fifth Circuit agreed with the district court's finding that neither the active control duty nor the duty to intervene applied because all the ship's personnel departed the barge prior to the worker's fall. The evidence showing that Manson had not yet transferred legal ownership of the platform at the time of the fall was insufficient to establish active control.

<u>Standard of Review:</u>

A summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The decision-making process is tweaked slightly when the case is to be tried before the court and not a jury: "the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though [the] decision may depend on inferences to be drawn from what has been incontrovertibly proved." *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978). However, the court may exercise this inference-drawing function only when "the evidentiary facts are not disputed" and "there are no issues of witness credibility." *Id.*

<u>The Turnover Duty:</u>

The Fifth Circuit disagreed with the district court's decision to grant summary judgment with respect to Manson's turnover duty, specifically it's duty-to-warn component. It was undisputed that the hole was a "danger;" that Manson had actual knowledge of the hole, or is at least charged with knowledge; and that Manson did not warn MARS of the holes. The district court concluded the hole was both open and obvious and to be anticipated by a competent stevedore, and on that basis, granted summary judgment for Manson. However, the Fifth Circuit determined that the record contains evidence supporting the notion that the hole was a hidden hazard, one a stevedore would not anticipate. The district court did not acknowledge a conflict in the testimony on this issue. When an

evidentiary record contains a material factual dispute, fact-finding is required. While the district court correctly stated that the *Nunez* rule allows a judge to sometimes draw inferences in rendering summary judgment, neither *Nunez* nor any other case permits the court to do so when a factual dispute exists. And *Nunez* forbids credibility determinations on a cold summary-judgment record.

The *West* Caveat:

The Fifth Circuit also rejected Manson's alternative basis for affirmance of the summary judgment, one premised on a little-explored exception to vessel-owner liability. Manson argued that, pursuant to *West v. United States*, 361 U.S. 118, 119 (1959), recovery should be denied because J.J.'s role (vis-à-vis his stevedore) was to check the platform for hazards, including holes. In *West*, recovery was denied because, among other things, the defect was not hidden and the vessel owner was under no duty to protect the employee from risks that were inherent in the carrying out of the contract. The court found no authority for extending the *West* exception to situations beyond (1) an open and obvious defect that (2) an independent contractor is retained by the vessel owner to repair or inspect. And, moreover, this case involves a stevedore retained by the vessel owner to remove a structure for scrap, not to repair or inspect for particular known dangers. It is thus outside West's narrow liability bar.

[§ 5(b) THIRD PARTY LIABILITY; PROCEDURE – Summary Decision]

B. Benefits Review Board

Jarrett v. CP&O, LLC, ___ BRBS ___ (2017).

The Board reversed the ALJ's determination that the claim is barred under Section 3(c) of the LHWCA because claimant intended to injure himself.

Claimant alleged that he sustained injuries at work when the shuttle truck he was driving was involved in a collision with another shuttle truck. Employer asserted that the claim is barred under § 3(c), because claimant intended to injure himself by placing his shuttle truck in a position to be struck by another truck driven by Ms. Oliver. Section 3(c) of the Act provides in pertinent part:

> "No compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill himself or another."

33 U.S.C. § 903(c). Section 20(d) of the Act affords a claimant the benefit of a presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. § 920(d). To rebut the § 20(d) presumption, employer must produce substantial evidence that claimant's injury was due to his willful intent to injure himself. Upon production of evidence sufficient to support a finding of intentional, self-inflicted injury, the presumption falls out of the case and the case must be decided on the record as a whole.

In this case, the ALJ found claimant entitled to the § 20(d) presumption that he did not intend to injure himself, but that employer rebutted the presumption. The ALJ found, *inter alia*, that claimant knowingly broke the rules for operating a shuttle truck. The ALJ concluded that claimant failed to establish by a preponderance of the evidence that his alleged injuries were not occasioned by his willful intent to injure himself. Thus, he found the claim barred under § 3(c).

The Board disagreed, stating:

> "The [ALJ's] finding that employer rebutted the Section 20(d) presumption must be reversed as a matter of law. First, there is no direct evidence that claimant intended to injure himself. Second, the facts found by the ALJ may establish that claimant was negligent, but such conduct does not preclude recovery under the Act pursuant to Section 3(c). Indeed, pursuant to Section 4(b) of the Act, 'Compensation shall be payable irrespective of fault as a cause for the injury.' 33 U.S.C. § 904(b). Contributory negligence is not a defense to employer's liability. In *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940), the court observed that the Act 'is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, [or] illegality.' *Id.*, 112 F.2d at 17. Thus, claimant's knowledge of the rules for operating a shuttle truck, and negligent violation thereof, cannot establish he intended to injure himself."

Slip op. at 4 (additional citations omitted).

Moreover, the other evidence on which the ALJ relied to find "intent" cannot support the inferences he drew. The ALJ's finding that intent was demonstrated by claimant's years of prior operation of shuttle trucks without collision is belied by the evidence that claimant was terminated by employer due to his having a third vehicle accident within seven months. In addition, the police report cannot support a finding that claimant intended to injure himself. The police officer testified that Ms. Oliver's shuttle truck drifted forward prior to the accident, and he opined that both claimant and Ms. Oliver were at fault. Taken in isolation or as a whole, and in light of § 4(b) of the Act, the record evidence cannot support a conclusion that employer offered substantial evidence that claimant willfully intended to injure himself.

The case was remanded for the ALJ to resolve the remaining issues.

[COVERAGE – OTHER EXCLUSIONS – § 3(c) Willful Intention]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In an unpublished opinion, *Consolidation Coal Co. v. Thompson,* ___ Fed.Appx. ___, 2017 WL 6506328 (10th Cir. Dec. 20, 2017), the Tenth Circuit affirmed the decision awarding benefits and therefore denied the employer's petition for review.

In *W. Va. CWP Fund v. Director* [*Smith*], ___ F.3d ___, ___ BLR ___, No. 16-2453 (4th Cir Jan. 26, 2018), the claimant worked in coal mine employment for 23 years and his job involved heavy manual labor. The administrative law judge found the evidence sufficient to establish invocation of the 411(c)(4) presumption, finding that the claimant had more than 15 years of qualifying coal mine employment and that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(1). The administrative law judge found that rebuttal was not established and awarded benefits.

The finding of invocation of the presumption was generally challenged on appeal, and was affirmed by the Court.

The Court described Employer's main allegation of error, as an argument that since none of the physicians affirmatively diagnosed legal pneumoconiosis, legal pneumoconiosis is "proven absent," and therefore Employer has established rebuttal of the Section 411(c)(4) presumption."

The Court rejected this argument and stated that Employer's assertion "has the fifteen-year presumption exactly backwards," explaining that once the presumption is invoked, the existence of pneumoconiosis arising from coal mine employment is presumed, until and unless it is rebutted by the party opposing entitlement. As the Court stated, at this point in the analysis of entitlement, the question is whether the party opposing entitlement has come forward with affirmative proof that the claimant does *not* have legal pneumoconiosis.

The Court also addressed employer's challenge to a preliminary evidentiary ruling by the administrative law judge.

The administrative law judge had excluded from the record Dr. Rasmussen's 2009 report and associated testimony because the employer already had submitted the two medical reports allowed by regulation. *See* 20 C.F.R. § 725.414(a)(3)(i). The employer argued to the Court that the administrative law judge impermissibly departed from Board precedent by failing to render this ruling prior to issuing a Decision and Order. The employer maintained that the administrative law judge's failure to render an earlier determination on the evidentiary issue, *i.e.,* prior to the issuance of his Decision and Order, deprived it of the opportunity to argue for a good-cause exception to the two-report limit. The employer also argued to the Court that this omitted evidence, had it been admitted, would have been sufficient to rebut the presumption of legal pneumoconiosis.

The Court noted that the Board had rejected the employer's argument, stating that it is "preferable for an [ALJ] to rule on evidentiary objections before issuance" of his final decision. J.A. 85. But the Board found no prejudice, in the instant case, since the employer was on notice of the claimant's objection to inclusion of the 2009 report and nevertheless failed to argue for a good-cause exception in its closing argument letter to the administrative law judge.

The Court stated "We need not resolve this evidentiary issue," noting that *even if* this testimony was considered, the administrative law judge found that Dr. Rasmussen's

ultimate conclusion was insufficient to prove that Claimant's impairment was not significantly related to his coal mine employment. The Court concluded that "Because that alternative finding is supported by substantial record evidence and consistent with the burden-shifting regime established by the fifteen-year presumption, resolution of the evidentiary issue raised by the Fund would have no bearing on the outcome of this case."

For the foregoing reasons, the Court affirmed the administrative law judge's award of benefits.

[Rebuttal of the Section 411(c)(4) / 20 C.F.R. §718.305 presumption; Evidence rulings must be made *prior to* issuance of decision on the merits]

In Consolidation Coal Co. v. Latusek, No 16-1768 (4th Cir. Jan, 9, 2018)(unpub.), the Court addressed a living miner's claim. This claim was before the Circuit court for the third time.

The claimant applied for black lung benefits in 1994, and the parties agree that he was totally disabled due to interstitial pulmonary fibrosis (IPF), but disagreed as to whether his IPF was *caused* by his coal mine employment. In 1999, the Court vacated the award of benefits finding that the administrative law judge had failed to adequately explain his weighing of the evidence. On remand, the administrative law judge again awarded benefits, and the BRB affirmed that decision. In 2004, the Court held that the award of benefits was not supported by substantial evidence and denied benefits.

The claimant then requested modification, alleging a mistake in a determination of fact. New evidence was submitted, and in 2011 the administrative law judge issued a Decision and Order granting modification and awarding benefits. The BRB reviewed the Decision and Order, which it affirmed in part and vacated in part, and the case was remanded to the administrative law judge. The administrative law judge again awarded benefits, and the BRB affirmed the award on appeal.

Employer argued that granting modification was improper in view of the Court's 2004 decision that the evidence was insufficient to prove disability causation, asserting that the administrative law judge's finding in 2011 of a "mistake in a determination of fact" violates the law of the case and the mandate rule. The Court rejected this argument because in his 2011 Decision and Order, the administrative law judge considered the new evidence in conjunction with the previously submitted evidence, and the administrative law judge found that the newly submitted evidence corroborated the previously submitted evidence. Therefore, the Court held that the administrative law judge could properly rely on the previously submitted evidence, which was now corroborated.

The Court also rejected Employer's argument modification "annul[s] a final judgment" of the Court, and thereby violates the separation of powers doctrine. The Court stated that based on the record in 2004, the evidence was not sufficient to prove that the Claimant's IPF was caused by his coal mining, but that holding was not nullified by the administrative law judge's finding "that a different (albeit overlapping) body of evidence does so prove." The Court noted that Congress expressly included modification in the Black Lung Benefits Act as a statutory waiver of finality and *res judicata* that allows black lung claims to be reopened within one year of a benefits order. *See Jessee,* 5 F.3d at 725 (explaining that the modification provision "displaces *res judicata*" and the "principle of finality"), and held that invoking the modification process does not implicate separation of powers concerns.

In addition, the Court rejected Employer's argument that the claimant cannot show a "mistake because the original administrative law judge awarded benefits." The Court held

that this argument ignored the Court's ultimate holding, in 2004, that based on the record at that time, the claimant could not prove that his IPF was caused by his coal mining.

In other regards, the Court affirmed the administrative law judge's consideration and weighing of the medical evidence, found no abuse of discretion by the administrative law judge, and affirmed the award of benefits.

[Modification: mistake in a determination of fact]

B. Benefits Review Board

[no published decisions to report]