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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 194
January 2008

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Chief Judge

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Berry Brothers General Contractors, Inc. v. Director, OWCP, (Unpublished)(No. 07-60370)(5th Cir. Jan. 3, 2008).

The ALJ's findings of fact on the issue of natural progression vs. aggravation of a work-related injury were supported by substantial evidence. The ALJ found that the claimant's knee injury was a natural progression and thus, the first employer was liable. The first employer appealed, noting that one doctor had testified that "repeated deep knee bends can accelerate the degenerative process. In other words, make it worse." The doctor added that such activities "can be expected to aggravate…arthritic change." However that doctor also agreed that the claimant's condition was a normal progression of an arthritic condition that became painful as a result of the catwalk accident. The first employer further noted that the other doctor testified that the activities of a welder would probably exacerbate a knee condition like the claimant's: "[I]f you have an injury and you continue to abuse the joint with severe wear and tear problems then you're going to cause further damage." The second doctor added that "an injury predisposes or causes degeneration in many cases…."

In upholding the ALJ's findings of fact, the Fifth circuit stated: "There is no indication in the record that [claimant] suffered from increased pain, a flare-up of pain, or a worsening of his condition caused by his work for a subsequent employer. While [the doctors] opined that strenuous activity consistent with welding work would likely aggravate an injury like [claimant's], nothing indicates that it actually did. The record indicates that [claimant's] condition remained the same after his injury, but the symptoms

were reduced while he was taking Vioxx [The second doctor's] testimony that Vioxx would reduce [claimant's] pain is consistent with the ALJ's finding that [claimant's] pain was a natural progression of the original injury."

[Topics 2.2.6 Definitions—Injury—Aggravation/Combination; 2.2.7 Definitions—Injury—Natural Progression]

C. Federal District Courts and Bankruptcy Courts

D. Benefits Review Board

J.H. v. Oceanic Stevedoring Co., ___ BRBS ___ (BRB No. 07-0430) (Jan. 31, 2008).

The Board vacated a Section 8(i) settlement agreement wherein the parties agreed that the settlement provided for a credit to Eller-ITO Stevedoring Company, Ltd. Or any other specified members of Signal Mutual Indemnity Association (Signal Mutual) for permanent disability benefits if claimant returned to longshore work and suffered further injury. The specific, pertinent wording of the agreement was as follows:

> "…if the Claimant returns to work as a longshoreman after his Settlement Agreement is approved, and suffers a re-injury or permanent aggravation of the alleged injury which is the subject matter of this settlement or a new injury which independently or in combination with any prior injury to cause (sic) a loss of wage earning capacity, then the parties agree that the subsequent Employer will be entitled to a credit toward any future claim for permanent partial disability benefits or permanent total disability benefits for the monies paid as a result of this 8(i) settlement. The parties agree and stipulate that this credit toward permanent partial disability benefits and/or future permanent total disability benefits will only be enforceable if the subsequent Employer is Eller-ITO Stevedoring Company, Ltd., or any other Signal Mutual Indemnity Association, Ltd. Member including [other named employers]. The other members of Signal Mutual Indemnity." Association are included in this Agreement because Signal is a self-insured group mutual where all members share collective responsibility and liability for each other's losses.

In agreeing with the director's challenge to the settlement agreement, the Board found that: 1) the agreement runs afoul of the regulation at Section 702.241(g) as it is not "limited to the rights of the parties and to claims the in existence;" 2) any credit granted to a subsequent employer member by virtue of the agreement would affect claimant's right of full recovery in a potential future claim; as it affects claims and rights which are not yet in existence, the provision limiting claimant's recovery for a potential future injury via an employer credit is invalid under Section 702.241(g); 3) the settlement's credit provision is not encompassed in any existing statutory credit scheme and, therefore is contrary to law; 4) the credit provision attempts to include other Signal Mutual members as parties to the settlement by providing them with a credit upon the

stated contingencies; as those employers are not parties to the current claim, they cannot be parties to the settlement. *See* § 8(i)(1); 20 C.F.R. §702.241(g) (stating that parties to the claim can settle the claim).

[Topics 8.10.1 Section 8(i) Settlements—Generally; 8.10.2 Section 8(i) Settlements—Persons Authorized; 8.10.11 Section 8(i) Settlements--Settlements—Agreements and Clauses Restricting Employment]

R.S. v. Electric Boat Corp., (Unpublished)(BRB No. 07-0647)(Jan. 31, 2008).

ALJ found that although the claimant was not officially demoted, the claimant's perception that he had been demoted was reasonable. While claimant's psychological disability can not legally be caused by the demotion, it could be caused by the teasing and harassment that the claimant suffered from his co-workers. The Board upheld the ALJ's finding that the claimant suffered a work related injury.

[Topics 2.2.2 Definitions—Injury—Arising Out of Employment; 2.2.3 Definitions—Injury—Injury (fact of)]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

Benefits Review Board

In *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 27, 2007)(unpub.), a case involving complicated pneumoconiosis, the Board held that the irrebuttable presumption at 20 C.F.R. § 718.304 cannot be invoked under subsection (c) using medical opinions that are based solely on chest x-ray interpretations. Specifically, the Board noted that § 718.304(c) permits invocation of the presumption "*by means other than*" interpretations of chest x-rays at § 718.304(a) of the regulations. Therefore, while medical opinions may be considered under § 718.304(c) to invoke the irrebuttable presumption, such opinions cannot be based solely on x-ray interpretations.

[**complicated pneumoconiosis, invocation of presumption at § 718.304**]

In *J.V. v. Edd Potter Co.*, BRB No. 07-0292 BLA (Jan. 25, 2008) (unpub.), the Board upheld the administrative law judge's award of $250.00 per hour for counsel's services in the successful prosecution of a claim for benefits. The Board rejected Employer's proclaimed "uncontradicted evidence" that the "market rate for black lung attorneys in the geographic region of claimant's practice areas is no more than $140.00 per hour." Rather, the Board held that the "administrative law judge properly determined that Section 725.366(b) is controlling." In applying the factors set forth in the regulation, the administrative law judge noted that he had observed claimant's counsel's "handling of this case" and found that "that quality of representation was very good." Further, the Board upheld the administrative law judge's approval of 47.25 hours of legal services, including the judge's determination "that time counsel spent conferring with his client and explaining decisions issued in this case was reasonable and compensable." *See Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980).

[**representative's fees**]