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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 259 January 2014

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I. Longshore and related Acts

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

Ed. Note: The Fourth Circuit's decision in ***Fox v. Elk Run Coal Co.,*** **___ F.3d ___, 2014 WL 26556 (4th Cir. 2014)**, arising under the Black Lung Act and summarized in the corresponding portion of this Digest, is potentially relevant to the adjudication of Longshore claims.

B. U.S. District Courts

***Sickle v. Torres Advanced Enterprise Solutions, LLC*, __ F.Supp.2d __, 2013 WL 7231238 (D.D.C. 2013).**[2]

The district court granted defendants' motion to dismiss the claims brought by two former military subcontractors, David Sickle and Matthew Elliot, allegedly discharged in retaliation for seeking benefits under the Defense Base Act (DBA) and verifying accident report, respectively. The court held that the employees could not pursue a retaliation claim under Section 48a of the LHWCA, 33 U.S.C. § 948a, in the district court without first exhausting administrative remedies with respect to this claim. It further held that the employees' related tort and breach of contract claims under state common law are preempted by the DBA.

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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 refer to the Westlaw identifier.

[2] This decision was issued on 12/24/13.

The court initially rejected the employees' contention that an original action under § 48a may be brought in district court without exhausting the LHWCA's administrative remedies. It reasoned that neither the DBA nor the federal jurisprudence interpreting the DBA/LHWCA supports this position. Rather, the DBA/LHWCA and pertinent regulations establish a comprehensive administrative procedure for DBA/LHWCA discrimination and retaliation claims that enables the agency to exercise its expertise and discretion, while also allowing for eventual federal court review. There is no reason to allow plaintiffs to sidestep this process, particularly where the regulations empower the DOL to require reinstatement, back pay, and other restitution sought by plaintiffs.

The court next concluded that the DBA/LHWCA preempts plaintiffs' state common law claims arising out of their workers' compensation injuries, pursuant to each of the three doctrines of preemption: express preemption (*i.e.*, Congress states in express terms that state law is preempted); field preemption (*i.e.*, Congress authorizes a scheme of regulation so pervasive that intent to preempt can be inferred); and conflict preemption (*i.e.*, compliance with both federal and state laws is either impossible or would undermine the Congressional objectives behind the federal law). First, express preemption applies because, as other courts have found, the DBA's broad exclusivity provision clearly expresses Congress's intent that the DBA preempt any and all claims that fall within the ambit of that statute. Here, plaintiffs' common law claims alleging retaliation fall squarely within the scope of § 48a of the DBA, and thus are preempted under the DBA's exclusivity provision. The court rejected the plaintiffs' contention that this provision should be narrowly construed (since it uses language pertaining to "this chapter") and that the DBA contains no retaliation provision, reasoning that the LHWCA's § 48a undoubtedly applies to DBA employers. The court rejected as either inapposite or unpersuasive other courts' decisions that allowed state law claims to proceed despite defendants' assertion of preemption under the DBA/LHWCA. Second, the doctrine of field preemption bars plaintiffs' state common law claims, as the LHWCA creates a comprehensive scheme for compensating employees who are injured or killed in the course of employment, giving rise to a reasonable inference that Congress intended to preclude States from supplementing it. Third, the doctrine of conflict preemption also bars these claims, as the DC Circuit has long held that Congress's purpose in enacting the LHWCA/DBA was to provide employers with general immunity from employee tort suits for covered injuries and to provide employees with a specific remedy for covered claims. Moreover, there is a risk of contradictory rulings by the DOL and the court.

In sum, the court concluded that: "[t]he bottom line is that, as federal courts across the country have found, the DBA expressly and impliedly preempts other remedies state law affords to similarly-situated plaintiffs.

Those courts that have allowed an employee to proceed with common law claims have done so only after finding that the particular injury is outside the DBA/LHWCA's scope, and thus the DBA/LHWCA provides no remedy." *Id.* at *11 (citations omitted).

The court observed that Sickle, who was allegedly fired for completing an accident report verifying Elliot's injury on the job, asserted that § 48a does not cover his particular retaliation claim. The court concluded that this assertion contradicts both the fact that Elliot sought to recover under § 48a as part of his complaint, and the text of the statute, which should be construed broadly to cover those who assist others in making a workers' compensation claim. In the absence of any authority from the DOL, the court declined to limit the reach of § 48a to those who provide actual testimony in LHWCA/DBA proceedings, as argued by Sickle. Rather, the injury alleged by plaintiffs arises from their allegedly retaliatory discharge, which falls squarely within the scope of the DBA.

[Topic 48a.2.3 Procedure and Burden of Proof; Topic 5.1.1 EXCLUSIVITY OF REMEDY -- Exclusive Remedy; Topic 85.3 FEDERAL/STATE CONFLICTS (preemption); Topic 60.2 DEFENSE BASE ACT; Topic 60.2.1 DEFENSE BASE ACT – Applicability of the LHWCA]

C. Benefits Review Board

***Luis E. DeJesus v. Viking Yacht Co., Inc.*, __ BRBS __ (2014).**

In a case of first impression, the Board interpreted the amended version of Section 2(3)(F) of the LHWCA, 33 U.S.C. §902(3)(F) (amended 2009) (Supp. 2011), and its implementing regulation, 20 C.F.R. §701.501, holding that yachts that were used by employer for promotional sea trials were "recreational" vessels under 20 C.F.R. §701.501, and thus claimant's work in repairing such vessels was excluded from coverage under Section 2(3)(F) of the LHWCA.

As amended in 2009, Section 2(3)(F) excludes from coverage "individuals employed to repair any recreational vessel." The Department of Labor promulgated regulations to implement §2(3)(F). 20 C.F.R. §701.501(a) defines "recreational vessel" as a vessel

> "(1) Being manufactured or operated primarily for pleasure; or
> (2) Leased, rented, or chartered to another for the latter's pleasure."

20 C.F.R. §701.501(a); *see also* 46 U.S.C. §2101(25). Section 701.501(b) details how this definition should be applied to vessels that are being repaired, stating that

> "A vessel being repaired . . . is not a recreational vessel if the vessel had been operating, around the time of its repair . . ., in one or more of the following categories on more than an infrequent basis –
>
> . . .
>
> (D) Vessel routinely engaged in 'commercial service' as defined by 46 U.S.C. §2101(5); . . . ."

Subsection (b)(2)(A)-(E) lists several types of usage that would render a vessel non-recreational, referencing vessel categories designated by the Coast Guard. Here, the "commercial service" exclusion was the only potentially relevant exclusion, as the rest of the categories involve carrying at least one paying passenger.

In the present case, Claimant, who performed repair/maintenance of yachts for employer, sought benefits under the LHWCA for his work-related injury. Employer controverted the claim on the grounds that the amended version of §2(3)(F) excludes claimant from coverage under the LHWCA because employer repaired only recreational vessels. In awarding benefits under the Act, the ALJ found that claimant was not excluded from coverage under §2(3)(F), because some of the vessels he repaired were used by employer for boat shows and sea trials ("stock boats"). The ALJ determined that such vessels were "commercial" within the definition of §702.501(b)(2)(D), and not "recreational," as they were used to transport customers with a "commercial" purpose of promoting sales. Employer appealed these findings; Claimant and the OWCP Director urged affirmance. The Board reversed the ALJ's award of benefits.

On appeal, the Director argued that §701.501(a) provides an overarching definition of a "recreational vessel," which must be met before looking to the §701.501(b) exclusions; and that this list of exclusions is merely illustrative and not intended to limit the scope of the overarching definition. Thus, the Director argued that the stock boats, although manufactured to be recreational vessels, are not "recreational" vessels operated primarily for pleasure because they are used for the commercial purpose of promoting sale and generating income.

The Board stated that the Director's interpretation of the agency's own regulations is controlling unless it is plainly erroneous or inconsistent with the statute or the regulations. The Board concluded that, in this case, the Director's interpretation of §701.501 conflicts with the plain language of the regulation and thus is neither rational nor persuasive. Subsection 701.501(a) provides that the definition of recreational vessels includes those vessels that are operated primarily for pleasure. "Pleasure" is not defined; however §701.501(b)(2) lists specific categories of uses that would render

vessels "non-recreational." The Board concluded that the list of categories in subsection (b)(2) is exclusive and, thus, "the only way an apparently recreational vessel becomes 'non-recreational' is if its use falls within one or more of the categories listed in subsection (b)(2)." Slip op. at 8. As reflected in the preamble to the regulation, the concern about the tension between paragraph (a) and paragraph (b)(2) of the regulation was resolved in the final rule by providing that a vessel remains recreational unless it falls within the designated Coast Guard vessel categories on more than infrequent basis during the time the vessel is in operation. The Director's interpretation ignores a portion of the regulation and would require adding words to the regulation.

In the present case, the Board reversed the ALJ's findings that the stock vessels engaged in commercial service and that the vessels were non-recreational. It stated that, in promulgating §701.501, the Department observed that the Coast Guard deems to be recreational any unchartered passenger vessel used for pleasure and carrying no passengers-for-hire (*i.e.*, paying passengers). The stock vessels meet these elements; arguably, they are operated for the passengers' pleasure, as it is they who must be pleased in order to generate the sale. Thus, although the stock vessels are used for the business of generating sales, they may reasonably be said to be operated "primarily for pleasure" pursuant to §701.501(a).

The Board further observed that §701.501(b)(2)(D) incorporates Section 2101(5) of the Shipping Code, which provides: "'commercial service' includes any type of trade or business involving the transportation of goods or individuals, except service performed by a combatant vessel." Here, the ALJ erred in finding that taking customers on test runs to entice them to purchase vessels satisfies the "transportation" element. The Board reasoned that "[t]ransportation" is the act or process of moving or conveying goods or people from one place to another, citing *Lozman v.City of Riviera Beach, Florida*, 133 S.Ct. 735, 741 (2013)(citing dictionary definitions). Here, potential customers return to their starting point when the test run is finished, and thus the stock vessels are not "transporting" people.

Accordingly, as claimant repaired only recreational vessels, and as he is covered by a state workers' compensation law, he is excluded from coverage pursuant to Section 2(3)(F).

[Topic 2.3 DEFINITIONS -- EMPLOYEE (Section 2(3)(F)); Topic 21.2 BOARD APPELLATE PROCEDURE]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Consolidation Coal Co. v. Maynes*, 739 F.3d 323 (6th Cir. 2014), the court affirmed application of the automatic entitlement provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA), to a subsequent survivor's claim meeting the filing date requirements (*i.e.* filed after January 1, 2005 and pending on or after March 23, 2010) where the miner was finally awarded benefits in his lifetime claim. In denying application of *res judicata* to bar the subsequent survivor's claim, the court stated, "A comparison of the determinative factual elements underlying each claim demonstrates that Mrs. Maynes's original claim and her subsequent claim were not the same cause of action." The court explained:

> In her original claim, Mrs. Maynes could recover only by proving that her husband's death was due to pneumoconiosis. In her subsequent claim, the cause of Mr. Maynes's death was not at issue. Rather, Mrs. Maynes's eligibility simply hinged upon whether Mr. Maynes had received benefits during his lifetime, an administrative fact.

Slip op. at p. 6.

[**automatic entitlement in subsequent survivor's claim**]

In *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309 (6th Cir. 2014), re-litigation of designation of the responsible operator in a subsequent claim was at issue. As noted by the court:

> The claimant originally brought suit in 1992 and an administrative law judge determined that he was not medically qualified for benefits. In the same decision, the administrative law judge indicated that Arkansas Coals was not the 'responsible operator' required to pay benefits. Approximately seventeen years later, the claimant filed a second claim alleging a change in his medical condition and requesting relief. After finding that his medical condition had worsened and that the claimant was now disabled, an administrative law judge awarded benefits and determined that Arkansas Coals was the responsible operator.

Slip op. at p. 2. The court held designation of the responsible operator issue could be re-litigated in the second claim because (1) the miner was entitled to bring the claim under 20 C.F.R. § 725.309(d)(4), and (2) designation of

the responsible operator was not a "necessary" finding in the originally-denied claim. The court concluded the Director, OWCP's failure to participate at the hearing in the first claim, or to appeal the decision in that claim, did not preclude its participation in the second claim with regard to re-litigation of the responsible operator issue.

[**re-litigation of responsible operator designation in subsequent claim**]

In the subsequent claim of *Fox v. Elk Run Coal Co.,* 739 F.3d 131 (4th Cir. 2014), the Administrative Law Judge concluded Employer committed "fraud on the court" in conjunction with adjudication of the miner's prior claim by failing to disclose the existence of two pathology reports diagnosing the miner with pneumoconiosis to its experts and to Claimant. From this, the Administrative Law Judge awarded benefits in the miner's second claim, and concluded benefits would commence from January 1997, the date of initial x-ray evidence in the miner's first claim identifying a large mass in his right lung.

On appeal, the Fourth Circuit vacated the Administrative Law Judge's finding that Employer committed "fraud on the court" in the miner's first claim pursuant to Federal Rule of Civil Procedure (FRCP) Rule 60(d)(3) such that a denial of benefits in the miner's prior claim would not be set aside. As noted by the court:

> Fox asks this court to set aside the ALJ's 2001 judgment (in the miner's first claim), which would have the effect of moving the onset of her entitlement to benefits under the BLBA (in the subsequent claim) from June 2006 to January 1997. She claims the judgment was fraudulently procured because, although Elk Run knew that the Naeye and Caffrey (pathology) reports diagnosed her husband with pneumoconiosis, it intentionally failed to disclose those reports to its own experts and later relied on the conclusions of those experts to controvert Fox's 1999 claim that he had pneumoconiosis. While Elk Run's conduct over the course of this litigation warrants nothing approaching judicial approbation, we are unable to say that it rose to the level of fraud on the court.

Slip op. at pp. 8-9.

In declining to affirm the Administrative Law Judge's finding of "fraud on the court," the Fourth Circuit held the standard under FRCP 60(b)(3)

must be "construed very narrowly," and it presents "a very high bar for any litigant." The court provided examples as follows:

> [T]he doctrine is limited to situations such as 'bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged.'

Slip op. at pp. 11-12. From this, the court found the facts in *Fox* did not rise to the level of "fraud on the court":

> Fox does not allege that Elk Run bribed or otherwise improperly influenced any officials involved in the benefits process, nor does she claim that Elk Run encouraged or conspired with its witnesses to suborn perjury.

Slip op. at p. 13. Thus, the court concluded Employer's nondisclosure amounted to no more than fraud on a single litigant, which constitutes an insufficient basis upon which to invoke relief under FRCP 60(b)(3).

On the other hand, as noted by the court, Employer maintained its conduct was proper and "it did not have any intent to defraud the court by declining to disclose the reports of Dr. Naeye and Dr. Caffrey because, as non-testifying consulting experts, their reports were protected by the work product privilege—a protection that would have been lost if the reports had been provided to Elk Run's testifying experts." *Slip op.* at p. 20. The court declined to address Employer's assertion stating the following:

> We see no reason to address these matters when a plain, narrow disposition is available. We bestow no blessing and place no imprimatur on the company's conduct, other than to hold that it did not, under a clear chain of precedent, amount to a fraud upon the court.

Slip op. at p. 20.

[**fraud on the court under FRCP 60(b)(3)**]

B. Benefits Review Board

In *Sword v. G&E Coal Co.*, __ B.L.R. 1-__, BRB No. 13-0235 BLA (Jan. 27, 2014) (J. Hall, dissenting), the Administrative Law Judge's award of benefits through invocation of the 15-year presumption was reversed by the Board, which held that the finding of a totally disabling respiratory impairment may not be made based on lay testimony where medical

evidence addressing whether the miner suffered from a totally disabling respiratory impairment was in the record. Notably, the provisions at 20 C.F.R. § 718.305(b)(4), formerly 20 C.F.R. § 718.305(b), states the following:

> [I]n the case of a deceased miner, affidavits . . . from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits . . . if the claim were approved.

20 C.F.R. § 718.305(b)(4).

Here, the Administrative Law Judge considered pulmonary function studies, blood gas studies, and medical opinions addressing the existence of a totally disabling respiratory impairment, but accorded this medical data little to no probative value for various reasons, *i.e.* inconsistency, age of the data, and the like. He then relied on lay testimony of the miner's survivor along with notations in the miner's treatment and hospitalization records to conclude a totally disabling respiratory impairment was demonstrated such that criteria for invocation of the 15-year presumption were met.

A majority of the three-member panel disagreed. Citing to *Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987), the Board stated the following:

> In *Coleman*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the presence in the record of 'medical evidence on the issue of disability due to a respiratory or pulmonary impairment' precludes the use of lay testimony to invoke the presumption of death due to pneumoconiosis. (citation omitted). As employer asserts, and as set forth above, the record in this case contains multiple pulmonary function studies, medical opinions, and treatment notes which address the miner's pulmonary or respiratory condition prior to his death. Thus, pursuant to *Coleman*, claimant is precluded from relying on lay testimony to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.
>
> Furthermore, while the administrative law judge stated that claimant's testimony is 'consistent with extensive treatment and

> hospitalization notes which detail the [m]iner's persistent shortness of breath,' . . . the treatment notes cannot establish the presence of a totally disabling respiratory or pulmonary impairment. The administrative law judge discounted the results of all of the pulmonary function studies and blood gas studies contained in the treatment notes, and the physicians' narrative comments do not address the degree of the miner's impairment, if any, or whether the miner retained the respiratory capacity to perform his usual coal mine work.

Slip op. at pp. 5-6. As a result, the award of benefits was reversed.

In the dissenting opinion, Appeals Judge Hall stated the Administrative Law Judge's award of benefits should be affirmed. Initially, Judge Hall cited to the following language at 20 C.F.R. § 718.305(b)(4):

> In the case of a deceased miner, affidavits . . . from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other *relevant* evidence exists which addresses the miner's pulmonary or respiratory condition.

20 C.F.R. § 718.305(b)(4) (italics in original). Judge Hall explained that "the administrative law judge evaluated the medical evidence in detail, and permissibly concluded that <u>it was not relevant</u> to the issue of total disability." *Slip op.* at p. 7 (emphasis added). From this, Judge Hall determined that lay evidence could be used to demonstrate a totally disabling respiratory impairment under 20 C.F.R. § 718.305(b)(4) for purposes of invoking the 15-year presumption.

[**the 15-year presumption; using lay evidence to demonstrate a totally disabling respiratory impairment**]