U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 250
February 2013 – March 2013

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

[***Ed. Note*:** The following unpublished decision is not considered binding precedent[2]]

***Ceres Marine Terminals, Inc. v. Director, OWCP*, No. 12-11661 (11th Cir. 2013)(unpub.).**

The Eleventh Circuit held that: (1) the ALJ did not abuse his discretion in admitting a letter written by Ceres' own expert witness, Dr. Whitaker, into evidence post-trial; (2) Ceres' due process rights were not violated where it was not afforded opportunity to cross-examine the expert after the letter was admitted into the record; (3) substantial evidence supported the ALJ's finding under aggravation doctrine as to which employer was liable; and (4) Ceres waived the argument regarding ALJ's failure to apply § 20(a) presumption against claimant's later employer, Gulf Terminals Inc., and in any event that application would not have affected the responsible employer determination in this traumatic injury case.

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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[2] Eleventh Circuit Rule 36-2 states that unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion.

Claimant injured her knee while working for Ceres in 2007. Ceres argued, however, that claimant's most recent employer, Gulf, was the responsible employer. The ALJ found that Gulf showed that claimant's employment with Gulf did not aggravate her knee condition and that Ceres did not prove the contrary, as a preponderance of the evidence established that claimant's knee condition resulted from the natural progression of her 2007 work injury with Ceres. The court upheld this determination, finding that substantial evidence supported the ALJ's finding under aggravation doctrine as to which of the two employers was liable for claimant's injuries. The ALJ properly relied on claimant's testimony that she did not suffer any incident, accident, discomfort, pain or swelling; as well as his finding that neither Dr. Whitaker, nor claimant's treating physician opined that claimant's four hours of work for Gulf contributed to the need for knee surgery or worsened her condition. The court did not address the legal issues surrounding the application of § 20(a) presumption in the responsible employer analysis, as it found that Ceres waived this argument on appeal by failing to elaborate it. The court further stated that, in any event, the ALJ's determination of responsible employer was supported by substantial evidence, and therefore application of the presumption would not have affected the decision. The court further noted that "in a traumatic injury case (i.e., the instant case) the Ninth Circuit would employ the precise analysis applied by the ALJ and Board in this case." *Id*. at *4, n.5 (*citing Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 1302 (9th Cir. 2010)).

Particularly noteworthy is the court's discussion of Ceres' argument that the ALJ erred in admitting into evidence, post-trial, a letter prepared by Ceres' own expert witness, Dr. Whitaker, or, alternatively, that Ceres' due process rights were violated because it was not afforded an opportunity to cross-examine Dr. Whitaker after the ALJ admitted the letter into the record; and that the BRB erred in rejecting these arguments. The ALJ found that Ceres concealed Dr. Whitaker's letter, which contradicted Ceres' position that claimant's knee condition was aggravated during her employment with Gulf.

Because the record before it did not reflect the facts relating to the discovery process, the court declined (as did the BRB) to rely upon the reasoning of the ALJ — i.e., that Ceres had a duty to supplement the record with Dr. Whitaker's letter. It also declined to rely upon FRCP 26. However, the court observed that "it is clear that, pursuant to 33 U.S.C. § 923(a) and 20 C.F.R. § 702.338, the ALJ enjoys broad discretion with respect to the admission of evidence and with respect to reopening the hearing for the receipt of evidence." *Id.* at *2 (citation omitted). Here, the court found no abuse of discretion.

The court next rejected Ceres's assertion that the ALJ abused his discretion in admitting Dr. Whitaker's letter because the letter was privileged work product. Assuming *arguendo* that the letter was privileged, the ALJ properly found that Ceres waived the privilege by introducing previous opinions of that expert and by stating at trial that "no doctors disagreed" with the proposition that subsequent employment aggravated claimant's knee condition. *Id.* at *2 (citing *Cox v. Adm'r U.S. Steel & Carnegie,* 17 F.3d 1386, 1417 (11th Cir.), *modified on other grounds,* 30 F.3d 1347 (11th Cir. 1994)).

Further, the ALJ and the BRB properly rejected Ceres' contention that its due process rights were violated because the ALJ denied it permission to depose and cross-examine its expert after the expert's letter was admitted into evidence post-trial. The ALJ properly concluded that Ceres waived its due process rights, as the expert was its own witness and it had ample opportunity to question him before the hearing. The court found "no valid excuse" for Ceres' actions. It stated that

> "[w]e cannot conclude that the ALJ and Board erred in concluding that Ceres chose to conceal the May 20 letter rather than disclosing it and pursuing due process rights to depose Dr. Whitaker. We cannot conclude that the ALJ and Board erred in concluding that Ceres had ample opportunity to pursue full due process rights, and that it was only Ceres' own actions that caused a waiver of any additional process."

Id. at *4.

[Topic 23.2 EVIDENCE - ADMISSION OF EVIDENCE (*see also* Topic 27.1.1 POWERS OF ADMINISTRATIVE LAW JUDGES – ALJ Can Exclude Evidence); Topic 70.3 RESPONSIBLE EMPLOYER – SUCCESSIVE INJURIES AND THE AGGRAVATION RULE]

B. U.S. District Courts

***Service Employees Int'l, Inc. v. Director, OWCP*, Civil Action No. H–11–01065, 2013 WL 943840 (S.D.Tex. 2013).**[3]

The district court initially stated that it has appellate jurisdiction under 42 U.S.C. § 1653, as this appeal arose out of a Defense Base Act ("DBA") compensation order. The court next held that the BRB's decision in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon. en banc*, 43 BRBS 136 (2009),[4] impermissibly restricted the

[3] Only the Westlaw citation is currently available.

[4] *See* Recent Significant Decisions Digests Nos. 208 (Mar. 2009) and 214 (Sept. 2009).

discretion of the ALJ to determine claimant's Average Weekly Wage ("AWW") under § 10(c) of the LHWCA by requiring that the AWW be determined based solely on claimant's overseas earnings with employer. The court vacated all prior decisions in *Simons*, as well as prior decisions in a consolidated case,[5] and remanded the cases to the respective ALJs.

Simons had been a truck driver since the early 1990s. He then worked for employer, for two months, driving trucks from Kuwait to Iraq, until he injured his hand while strapping down a load. The ALJ initially calculated claimant's AWW based on a blend of his overseas and stateside wages. In vacating this finding, the BRB set forth the requirement that claimant's AWW be calculated based solely on his overseas earnings, without considering any earning rate prior to his employment in Iraq. On remand, the ALJ calculated claimant's AWW based on his earnings during his employment for 73 days in Iraq; and the BRB affirmed.

The court held that the BRB abused its discretion by requiring the ALJ to recalculate claimant's AWW based solely on claimant's overseas earnings. The BRB stated that its holding was mandated by *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), a case involving similar underlying circumstances of overseas employment, where the BRB affirmed the ALJ's reliance solely on the claimant's overseas earnings in calculating the AWW. The court stated that

> "[i]n so doing, the BRB ignored its holding in *Proffitt* that the ALJ may, but need not, examine wages from prior employment to arrive at a Section 10(c) AWW calculation, and the BRB essentially deprived the ALJ of the 'wide discretion' mandated by the statute. *Proffitt,* 40 [BRBS] at 42. The BRB's reversal of [the ALJ's] decision therefore went beyond the statutory requirement that '[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.' 33 U.S.C. § 921."

Id. at *3. The court further concluded that the ALJ's original AWW determination was, in fact, supported by substantial evidence. The court reasoned that § 10(c) "can best be summarized as a requirement that the ALJ consider three factors: "(1) past earnings of the employee in which he was working at the time of 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." *Id.* at *4. The ALJ considered these three factors in his calculation; the ALJ noted claimant's salary at the time of injury, the unique circumstances

[5] *Smith v. SEII*, BRB No. 09-0786 (Mar. 25, 2010)(unpub.) and No. 11-0326 (Aug. 23, 2011)(unpub.).

surrounding his employment,[6] and his past employment and salary. The ALJ also noted that while claimant may have intended to work in this position for a long period of time, his commitment was only for a year. The court observed that

> "[a]fter considering all of these factors, [the ALJ] determined that the best way to calculate Simons's wages was to utilize a blended approach accounting for Simons's higher wages in Iraq and Kuwait, while accounting for his past earnings in the United States. According to [the ALJ], this approach better reflects Simons's true wage earning capacity. This decision was well within the discretion of [the ALJ] and is supported by the record as a whole."

Id. at *4 (footnote and citations omitted).

The court rejected the BRB's determination that *Proffitt* was controlling in *Simons* because "[t]he [DBA] must be construed so that employees injured under the same circumstances receive equal treatment. To allow two employees who are working under the same contract and conditions, and injured at the same time, to receive different amounts of compensation because one [ALJ] relied on Iraq wages while another reduced claimant's rate by combining lower, stateside earnings, would be arbitrary." The court stated that the BRB provided no statutory, regulatory, or common-law support for this proposition. The court concluded that

> "[t]o require all cases with facts similar to those in *Proffitt* to have similar outcomes would relegate the ALJ to simply playing the role of calculator. It is within the ALJ's discretion to determine whether or not the facts of two cases are similar enough to merit similar outcomes, and [the ALJ] noted these differences in his May 18, 2010 decision and order on remand.[7] The BRB's order prevented [the ALJ] from considering these facts, and required that he calculate Simons's AWW solely based on his overseas wages. This decision stripped the ALJ of the

[6] These unique circumstances include overseas employment, seven-day work weeks, twelve-to-eighteen hour days, use of safety equipment, armed escorts, and the expectation of working more than a year overseas. *Id.* at *4, n.2.

[7] These differences included that Simons was employed in the same type of work as he was previously employed, was injured in manner that could have occurred stateside, and his work overseas did not provide him with new skills that might be used to increase his salary once he returned home. Proffitt was working in a different field than he had worked stateside, he had learned new skills that would increase his salary stateside, and was injured running from a mortar attack, an event that would not have occurred had he been working in the United States. *See id.* at *4, n.4.

'wide discretion' in determining AWW pursuant to Section 10(c) of the Act, as set forth in the express language of the statute."

Id. (citation to ALJ order omitted; substance of the footnote preserved).

Turning next to the *Smith* appeal, the court observed that Smith was employed by SEII as a truck driver in Kuwait and Iraq and sustained a back injury while riding across rough terrain in the dessert 47 days after his employment began. Smith did not appeal the ALJ's AWW determination based on a blend of his overseas and domestic earnings, but sought reconsideration based on a mistake in fact after the BRB issued its decision in *Simons.* The ALJ denied reconsideration, but, on appeal, the BRB ordered the ALJ to re-calculate the AWW based solely on Smith's earnings in Iraq, in light of *Simons*. The court vacated all previous decisions in *Smith* as they were controlled by *Simons*. The court did not address whether the ALJ correctly calculated Smith's AWW on remand.

[Topic 60.2.6 Appeals of Cases Determined Under DBA; Topic 60.2 DEFENSE BASE ACT; Topic 10.4.4 DETERMINATION OF PAY - AVERAGE WEEKLY WAGE IN GENERAL - Calculation of Annual Earning Capacity Under Section 10(c)]

C. Benefits Review Board

***Soliman v. Global Terminal and Container Service, Inc.*, __ BRBS __ (2013).**

The Board held that (1) in a case involving a scheduled injury, in order to establish that claimant's refusal to undergo a recommended medical procedure is objectively unreasonable under Section 7(d)(4) of the LHWCA, employer is not required to show that the procedure would aid the restoration of claimant's lost earning capacity; and (2) in cases involving work-related injury to one eye, the scheduled award is properly based on the extent of impairment to the injured eye, rather than on the extent of impairment to claimant's binocular vision.

Claimant sustained a work-related injury to his left eye; following two surgeries, he returned to his regular work for employer. The ALJ rejected employer's assertion that claimant had not reached maximum medical improvement ("MMI") because he refused to undergo YAG laser surgery. In so doing, the ALJ applied the analysis for determining whether a claimant's refusal to undergo surgery was unreasonable or unjustified under § 7(d)(4), which requires a dual inquiry. Initially, the burden of proof is on the employer to establish that claimant's refusal to undergo medical or surgical treatment is unreasonable (objective inquiry); if carried, the burden shifts to claimant to establish that circumstances justified the refusal (subjective

inquiry). In concluding that claimant's refusal was not unreasonable, the ALJ relied only on his finding that employer did not establish that the surgery was likely, as a matter of reasonable medical probability, to be of aid in restoring some measure of claimant's lost earning capacity. In vacating this conclusion, the BRB stated that:

> "the requirement set forth in *Hrycyk* [*v. Bath Iron works* Corp., 11 BRBS 238 (1979)] that the recommended medical procedure be shown to aid the restoration of lost earning capacity is not applicable to scheduled injury cases, in which loss of wage-earning capacity is not considered in calculating an employee's award under the Act. Rather, in a case involving a scheduled injury, the relevant reasonableness inquiry is whether the recommended procedure is likely, as a matter of reasonable medical probability, to lessen the extent of the claimant's medical impairment, or to relieve his symptoms and the physical effects of his injury, without undue risk to his health or well-being. As the [ALJ's] reasonableness analysis in this case focused only on whether the YAG procedure was likely to restore a measure of claimant's lost earning capacity, we must vacate the [ALJ's] conclusion that claimant's decision to forgo that procedure is not objectively unreasonable. We therefore remand the case for the [ALJ] to reconsider, in accordance with the standard applicable to scheduled injury cases, whether employer made the requisite showing that claimant's refusal to undergo the YAG capsulotomy is objectively unreasonable. On remand, the [ALJ] should fully discuss and weigh the relevant medical opinions regarding the probable benefits and the risks associated with the YAG surgical procedure. The [ALJ] then must determine what course an ordinary reasonable person in claimant's condition would pursue after weighing the risks and rewards of the procedure with the alternative of continued restriction."

Slip op. at 5 (citations and footnote omitted).

The BRB further held that, in determining the extent of claimant's visual impairment, "the [ALJ] committed legal error by relying on the extent of impairment to claimant's binocular vision rather than on the loss of vision in claimant's injured left eye. In a case, such as this one, in which the claimant's work-related injury resulted in damage to one eye, the scheduled award is properly based on the extent of impairment to the injured eye." *Id*. at 7 (citations and footnote omitted). Furthermore, under § 8(c)(16), compensation for loss of 80 percent or more of the vision of an eye is the same as for the total loss of an eye. As the credited physicians assessed the loss of visual acuity in claimant's left eye as greater than 80 percent, the measured loss of visual acuity represented the legal equivalent of the total

loss of that eye. Thus, if, on remand, the ALJ were to again find that claimant's condition has reached permanency, claimant would be entitled to the 160 weeks of compensation provided under the schedule for the total loss of an eye.

[Topic 8.1 NATURE OF DISABILITY (PERMANENT V. TEMPORARY); Topic 8.1.5 Generally Permanency Is Not Reached Where Surgery Is Anticipated; Topic 7.7 MEDICAL BENEFITS - UNREASONABLE REFUSAL TO SUBMIT TO TREATMENT; Topic 8.3.1 PERMANENT PARTIAL DISABILITY - Scheduled Awards -- Some General Concepts; Topic 8.3.20 PERMANENT PARTIAL DISABILITY - Binocular Vision or Per Centum of Vision]

***Stork v. Clark Seafood, Inc.*, __ BRBS __ (2013).**

The Board denied claimant's motion for reconsideration of the Board's decision in *Stork v. Clark Seafood, Inc.*, 46 BRBS 45 (2012),[8] affirming the ALJ's finding that claimant was excluded from coverage under Section 2(3)(E) of the LHWCA because he was employed by a commercial processor of fish – an aquaculture operation, irrespective of the nature of his duties with employer.

The Board rejected claimant's contention that it erred in considering only the nature of employer's business in ascertaining whether the § 2(3)(E) aquaculture exclusion applies. The BRB reiterated that the "aquaculture worker" exclusion rests on the nature of the employer's operation, and not the nature of a claimant's duties. Claimant asserted that because the Act does not specifically state that the exclusion applies to someone "employed by" an aquaculture operation, the BRB erred in relying on the definition in the regulation, 20 C.F.R. §701.301(a)(12)(iii)(E), averring that it is merely an agency interpretative rule which lacks the force of law. The BRB disagreed, reasoning that "as this regulation implemented Section 2(3)(E) of the Act, affected the rights and duties of the parties in cases under the Longshore Act, and was subject to the APA's notice and comment procedures, the regulation at issue herein is 'substantive,' and not 'merely interpretive,' and it has the force of law." Slip op. at 4 (citation and footnote omitted). The BRB rejected claimant's assertion that the regulation is inconsistent with the Act merely because the statute does not explicitly state that an aquaculture worker's status is dependent upon the nature of his employer's business. Rather, in light of the exclusions at § 2(3)(B), (C), (D), which determine a claimant's coverage based on the nature of his employer's business, Section 701.301(a)(12)(iii)(E) is a permissible and reasonable interpretation of § 2(3)(E). The Board further rejected claimant's contention that the legislative history supports his assertion that the

[8] *See* Recent Significant Decisions Monthly Digest # 248 (Nov. 2012).

"aquaculture worker" exclusion should be interpreted similar to the exclusion at Section 2(3)(A), which considers the nature of the worker's duties. The BRB found, by contrast, that the legislative history supports the regulatory definition. Finally, the BRB observed that this case arises in the Fifth Circuit, and stated that "[a]s the regulation defines an aquaculture worker in terms of his employment with an aquaculture operation, Fifth Circuit law requires that coverage be ascertained without addressing claimant's work duties." *Id.* at 6. The BRB acknowledged prior caselaw that addressed the nature of claimants' work activities despite their employment by aquaculture operations, but noted that these cases arose within the jurisdiction of the Ninth Circuit and predated the pertinent Fifth Circuit precedent.

[Topic 1.11.11 EXCLUSIONS TO COVERAGE - Aquaculture workers]

***Walker v. Todd Pacific Shipyards*, __ BRBS __ (2013).**

The Board granted employer's motion for reconsideration of its decision in *Walker v. Todd Pac. Shipyards,* 46 BRBS 57 (2012),[9] finding that the ALJ erred in granting claimant's motion for summary decision on the issue of claimant's entitlement to total disability benefits during his enrollment in a vocational rehabilitation program, because evidence offered by employer raised a genuine issue of material fact.

The Board stated that the ALJ should address relevant factors in determining whether claimant is entitled to total disability benefits while enrolled in a vocational rehabilitation program; no one factor is determinative. One such factor is whether completion of the program would benefit the claimant by increasing his wage-earning capacity; and the ALJ in this case found that it would. In its motion for reconsideration, employer asserted that it countered claimant's motion for summary decision with evidence that the vocational rehabilitation program would not increase claimant's earning capacity relative to the alternative employment it identified, a factor relevant to the unavailability of suitable alternate employment during the program; therefore, the ALJ should have inferred that the vocational rehabilitation program would not benefit claimant, as he must construe all inferences in the light most favorable to the non-moving party when ruling on a motion for summary decision.

The Board concluded that

> "[u]pon reconsideration, we agree with employer that this conflicting evidence on claimant's ultimate wage-earning capacity raised a genuine issue of material fact, and that the administrative law judge inappropriately resolved the issue by

[9] *See* Recent Significant Decisions Monthly Digest # 248 (Nov. 2012).

> weighing the evidence in claimant's favor. In addressing a motion for summary decision, the [ALJ] must determine if there is an absence of a genuine factual dispute and construe all inferences in favor of the non-moving party. Here, the [ALJ] weighed evidence regarding claimant's wage-earning capacity in claimant's favor, and thus, in conjunction with other factors, concluded that claimant is entitled to total disability benefits while he is enrolled in the program. If it is necessary to weigh evidence and/or to make credibility determinations, the [ALJ] cannot grant summary decision. As the evidence employer offered could support its position regarding claimant's ultimate wage-earning capacity, and as this factor is among those relevant to claimant's entitlement to benefits, we must vacate the [ALJ's] Order Granting Partial Summary Decision and the consequent award of benefits."

Slip op. at 2. The BRB remanded the case to the ALJ to set the case for an evidentiary hearing. Finally, the BRB granted claimant's counsel's request for attorney's fees for work performed before the BRB in successfully defending the vocational rehabilitation plan (not challenged by employer on reconsideration); but denied fees for work performed in the present appeal pertaining to the ALJ's award of disability benefits, noting that counsel may reapply for a fee if claimant is successful in obtaining disability benefits before the ALJ on remand.

[Topic 19.4.2 PROCEDURE - SUMMARY DECISION; Topic 27.1.4 POWERS OF ADMINISTRATIVE LAW JUDGES - Authority to Grant Summary Decision; Topic 8.2.3.2 EXTENT OF DISABILITY - Disability While Undergoing Vocational Rehabilitation; Topic 39.3 SECRETARY'S AUTHORITY TO DIRECT VOCATIONAL REHABILITATION]

***Cathey v. Service Employees International, Inc.*, __ BRBS __ (2013).**

The Board granted the OWCP Director's motion for reconsideration of the Board's decision in *Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012),[10] and it clarified the original decision to reflect that, upon acceptance by the Division of Federal Employees' Compensation ("DFEC") of an employer's application for reimbursement under the War Hazards Compensation Act ("WHCA"), the employer remains liable under the Defense Base Act and that the payment of benefits by the federal government is only for administrative purposes. The Board acknowledged that its original

[10] *See* Recent Significant Decisions Monthly Digest # 249 (Dec. 2012 – Jan. 2013).

decision made several references to employer being "relieved" of liability. The Board clarified that

> "[t]o the extent the Board's decision states that an employer is relieved of liability for benefits upon having its application for reimbursement under the WHCA accepted, it is overbroad. If an employer applies for reimbursement under the WHCA after having been held liable for a claimant's disability and/or medical benefits under the DBA, and [the DFEC] approves the employer's application, the DFEC may opt to reimburse the employer for future benefits as they are administered and paid out by the employer, or it may opt to administer the process itself and pay future benefits to the claimant directly. Either way, the employer remains a party to the case and remains primarily liable for the claimant's benefits under the DBA. If a dispute arises between the DFEC and the claimant regarding his entitlement or the employer's liability, the dispute is resolved under the DBA. At no time is the employer entirely 'relieved' of its liability; rather, until such time as, and if, the DFEC transfers the case back to the employer, the employer is relieved only of its current responsibility to administer and pay the claimant's benefits. 42 U.S.C. §§1704, 1711; 20 C.F.R. §§61.2, 61.100 *et seq*."

Slip op. at 2 (footnote omitted). The BRB also noted, agreeing with the Director, that in cases involving reimbursement requests from employers, as here, Section 101 of the WHCA, 42 U.S.C. §1701, and 20 C.F.R. §61.200(b) do not apply. The BRB affirmed its original decision in all other respects.

[Topic 60.5 WAR HAZARDS COMPENSATION ACT]

II. Black Lung Benefits Act

Benefits Review Board

In *Moser v. Director, OWCP*, 25 B.L.R. 1-__, BRB No. 12-0293 BLA (Feb. 26, 2013)(pub.), the Administrative Law Judge properly denied a subsequent survivor's claim under 20 C.F.R. § 725.309 because "the conditions of entitlement that claimant failed to demonstrate in her initial survivor's claim related solely to the miner's physical condition at the time of his death." In particular, the survivor did not present medical evidence sufficient to demonstrate the miner's death was due to coal workers' pneumoconiosis in her original claim. And, the Administrative Law Judge properly concluded the automatic entitlement provisions of the PPACA did not apply to the subsequent survivor's claim because the miner's lifetime claim had been denied.

[**death causation under 20 C.F.R. § 718.205; no automatic entitlement under PPACA where living miner's claim denied**]