U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 241 March 2012

Stephen L. Purcell
Chief Judge

Paul C. Johnson, Jr.
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

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

A. U.S. Supreme Court[1]

***Roberts v. Sea-Land Services, Inc., et al.*, 566 U.S. __, __ S. Ct. __, 2012 WL 912953 (2012).**

Interpreting Section 6(c) of the LHWCA, the Supreme Court held that "an employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf." *Id.* at *5. The Court affirmed the Ninth Circuit, which had upheld the BRB and the ALJ's decision holding the same; this decision abrogates *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997)(time of order), and *Boroski v. DynCorp Int'l*, 662 F.3d 1197 (11th Cir. 2011)(same).

The LHWCA caps benefits for most types of disability at twice the national average weekly wage ("NAWW") for the fiscal year in which an injured employee is "newly awarded compensation." 33 U.S.C. § 906(c). Claimant sustained an injury in 2002, and employer voluntarily paid benefits (interrupted in 2003) until fiscal year 2005. When employer discontinued voluntary payments, claimant filed an LHWCA claim, and employer controverted. In fiscal year 2007, the ALJ awarded claimant benefits at the fiscal year 2002 statutory maximum rate. Claimant appealed, arguing that "awarded compensation" means "awarded compensation in a formal order,"

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

and thus the higher statutory maximum rate for fiscal year 2007 applied. The Court rejected this position, agreeing instead with the interpretation of § 6(c) advocated by employer and the Director, OWCP.[2]

The Court initially concluded that the text of § 6(c), standing alone, admits of either interpretation. At first blush, claimant's interpretation of "award" is appealing as it is more in line with its ordinary usage. However, "award" can also mean "grant," or "confer or bestow upon"; "[t]he LHWCA 'grants' benefits to disabled employees, and so can be said to 'award' compensation by force of its entitlement-creating provisions." *Id.* at *5. Based on "contextual and structural considerations," the Court further concluded that "[o]nly the interpretation advanced by Sea–Land and the Director makes § 906 a working part of the statutory scheme; supplies an administrable rule that results in equal treatment of similarly situated beneficiaries; and avoids gamesmanship in the claims process." *Id.* at *5. "In the context of the LHWCA's comprehensive, reticulated regime for worker benefits--in which § 906 plays a pivotal role—'awarded compensation' is much more sensibly interpreted to mean 'statutorily entitled to compensation because of disability.'" *Id.* at *6. The Court reasoned that

> "[t]he LHWCA requires employers to pay benefits voluntarily, and in the vast majority of cases, that is just what occurs. Under Roberts' interpretation of § 906(c), no employee receiving voluntary payments has been 'awarded compensation,' so none is subject to an identifiable maximum rate of compensation. That result is incompatible with the Act's design."

Id. Three provisions of Section 6 work together to cap disability benefits, namely §§ 6(b)(1), 6(b)(3) and 6(c). Further,

> "[b]y its terms, and subject to one express exception, § 906(b)(1) specifies that the cap applies globally, to all disability claims. But all three provisions interlock, so the cap functions as Congress intended only if § 906(c) also applies globally, to all such cases. If Roberts' interpretation were correct, § 906(c) would have no application at all in the many cases in which no formal orders issue, because employers make voluntary payments or the parties reach informal settlements. We will not construe § 906(c) in a manner that renders it 'entirely superfluous in all but the most unusual circumstances.'"

[2] The Court noted that, "[b]ecause 'newly awarded compensation,' read in context, is unambiguous, we do not reach respondents' argument that the Director's interpretation of § 906(c) is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)." *Id.* at *11, n.12.

Id. at *6 (citations omitted). The Court characterized claimant's proposed solution – *i.e.*, that orders issue in every case – as a "solution in search of a problem," as it "would set needless administrative machinery in motion and would disrupt the congressionally preferred system of voluntary compensation and informal dispute resolution." *Id.* at *7.

Using the NAWW for the fiscal year in which an employee becomes disabled coheres with the LHWCA's administrative structure. An employer must be able to calculate the cap in order to pay benefits within 14 days of notice of an employee's disability pursuant to § 14(b), and in order to certify to the Department of Labor whether the maximum rate is being paid. Further, an OWCP claims examiner must verify the rate of compensation in light of the applicable cap. It is difficult to see how an employer or claims examiner can use a NAWW other than the one in effect at the time an employee becomes disabled.

Moreover, applying the NAWW for the fiscal year in which an employee becomes disabled advances the LHWCA's purpose to compensate disability, defined in § 2(10) as incapacity because of injury to earn the wages which the employee was receiving at the time of injury. Just as § 10 bases computation of compensation rate on employee's AWW at the time of injury, it is logical to apply the NAWW for the same point in time. The Court noted that in some cases, the time of injury and the time of onset of disability differ; since the LHWCA compensates disability resulting from an injury rather than the injury alone, "when dates of injury and onset of disability diverge, the latter is the relevant date for determining the applicable [NAWW]." Slip op. at *7, n.7.[3]

Applying the NAWW at the time of onset of disability avoids disparate treatment of similarly situated employees. Under claimant's reading, two employees who earn the same salary and suffer the same injury on the same day could be entitled to different rates of compensation based on the happenstance of their obtaining orders in different fiscal years. Finally, using the NAWW for the fiscal year in which disability commences discourages gamesmanship in the claims process. If the fiscal year in which an order issues were to determine the cap, the fact that the NAWW typically rises every year with inflation, would become unduly significant. Claimant's rule would reward employees with windfalls for initiating unnecessary administrative proceedings, while simultaneously punishing employers who have complied fully with their statutory obligations.

[3] Likewise, in a small group of cases—those in which disability lasts more than 3 but less than 15 days—the time of onset of disability and the time of entitlement will differ. In these cases, the relevant date is that on which disability and entitlement coincide: the fourth day after the onset of disability. *Id.*

The Court rejected claimant's counterarguments as unconvincing. First, although the LHWCA sometimes uses "award" to mean "award in a formal order," the presumption that identical words used in different parts of the same act are intended to have the same meaning readily yields whenever, as here, the variation in how the words are used reasonably warrants the contrary conclusion. Here, the presumption is overcome because several provisions of the Act would make no sense if "award" were read as claimant proposes; these provisions, in context, use 'award' to denote a statutory entitlement to compensation because of disability. Slip op. at *9 (discussing, e.g., §§8(c)(20); 8(d)(1)).

Second, claimant argued that, because this Court had refused to read the statutory phrase "person entitled to compensation" in § 933(g) to mean "person awarded compensation," *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S.Ct. 2589, 120 L.Ed.2d 379, the converse must also be true: "awarded compensation" in § 906(c) cannot mean "entitled to compensation." But *Cowart*'s reasoning does not work in reverse. *Cowart* did not construe § 6(c) or "award," and it did not hold that the groups of "employees entitled to compensation" and "employees awarded compensation" were mutually exclusive.

Finally, claimant contended that his interpretation furthers the LHWCA's purpose of providing employees with prompt compensation by encouraging employers to avoid delay and expedite administrative proceedings. But his remedy would also punish employers who voluntarily pay benefits at the proper rate from the time of their employees' injuries, because they would owe benefits under the higher cap applicable in any future fiscal year when their employees chose to file claims. The more measured deterrent to employer tardiness is interest that accrues from the date a benefit came due, rather than from the date of the ALJ's award.

In a separate opinion, concurring in part and dissenting in part, Justice Ginsburg agreed with the majority's rejection of claimant's interpretation of § 6(c), and further stated that

> "[u]nlike the Court, however, I do not regard as reasonable respondent Sea–Land Services' view that an employee is 'newly awarded compensation' in the year she becomes 'statutorily entitled to compensation.' Applying the common meaning of the verb 'award' and recognizing the Act's distinction between benefits paid voluntarily, and those paid pursuant to a compensation order, . . . I would hold that an injured worker is 'newly awarded compensation' when (1) the employer voluntarily undertakes to pay benefits to the employee, or (2) an administrative law judge (ALJ), the Benefits Review Board (BRB), or a reviewing court orders the employer to pay such benefits."

Slip op. at *11. Justice Ginsburg observed that "[u]nder the Court's view, the employee was 'newly awarded compensation' in 2002, even though the employee did not receive a penny—and the employer was not obligated to pay a penny—until 2007. Only the most strained interpretation of 'newly awarded' could demand that result." *Id.* at *13. Further, the legislative history of § 6(c) supports giving it its "commonsense meaning." *Id.* at *13. Finally, the suggested interpretation "is consistent with the Act's goal of encouraging employers to pay legitimate claims promptly." *Id.* at *13 (citations omitted). The majority opinion addressed Justice Ginsburg's interpretation of § 6(c), stating that it is "farther from the ordinary meaning of 'award' than the Court's approach"; that her reliance on a single sentence of legislative history is not persuasive; and that her suggested approach is "either easily circumvented or unworkable." *Id.* at *6, n.5; *7, n.6.

[Topic 6.2.3 COMMENCEMENT OF COMPENSATION – Maximum Compensation for Disability and Death Benefits]

[*Ed. Note.*: although the following case did not arise under the LHWCA, the issue presented is potentially relevant to the adjudication of claims arising under the LHWCA**]**

***Lozman v. City of Riviera Beach, Fla.*, 132 S.Ct. 1543, 80 BNA USLW 3338, 80 BNA USLW 3465, 80 BNA USLW 3475 (U.S. Feb 21, 2012) (NO. 11-626).**

The Supreme Court of the United States granted certiorari in the case of *City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet In Length*, 649 F.3d 1259 (11th Cir. 2011). The question presented is: Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.

B. U.S. Circuit Courts of Appeals

***Eberly-Sherman v. Dep't of Army/NAF, et al.*, No. 10–73713, 2012 WL 722229 (9th Cir. 2012)(unpub.)**

The Ninth Circuit upheld the BRB decision affirming an award of attorney's fees to claimant's attorney, Charles Robinowitz, including an hourly rate of $309 for Attorney Robinowitz and a $110 hourly rate for his legal assistant.

The ALJ properly found that claimant's counsel failed to meet his burden of producing satisfactory evidence that his requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. The BRB did not err in affirming the ALJ's decision to consider the hourly rates of workers' compensation attorneys in setting counsel's rate. A major consideration in determining an appropriate fee award under the LHWCA is the market rate of attorneys employing legal skills similar to those required by LHC practice. Here, the ALJ considered rates charged by workers' compensation attorneys in calculating counsel's hourly rate because the ALJ determined that workers' compensation practice requires legal skills similar to those required by LHC practice. Substantial evidence supports this finding. This is especially true because LHC practice is a form of workers' compensation practice. *See* 33 U.S.C. § 902(2).

Further, substantial evidence supported the ALJ's refusal to place claimant's counsel in the top ten percent of his peers. The ALJ had an opportunity to observe counsel's filings in the fee proceeding and had access to the record for the case. The record included an order by a different ALJ, which explained that counsel had made "sophomoric," "careless," and "egregious" errors in his representation of claimant. While the BRB modified that order, it did not set aside the ALJ's findings regarding the quality of counsel's work. The ALJ's consideration of the quality of counsel's representation in the case does not violate *Perdue v. Kenny A. ex rel. Winn,* __ U.S. __, 130 S.Ct. 1662 (2010), because unlike the district court in *Perdue*, the ALJ in this case considered representation quality only once when determining the reasonable hourly rate. *See id.* at 1674–76 (holding that the district court erred by enhancing a lodestar award by 75%, based on performance, because the lodestar method incorporates hourly rates based upon attorney market value).

The BRB also did not err in affirming the ALJ's consideration of Oregon market rates instead of Portland market rates. An attorney's fee is "calculated according to the prevailing market rates in the relevant community." *Christensen,* 557 F.3d at 1053 (quoting *Blum,* 465 U.S. at 895). "The relevant community is generally defined as the forum in which the district court sits." *Van Skike,* 557 F.3d at 1046 (internal quotation marks and citation omitted). In this case, the district court is located in Portland, Oregon, but its jurisdiction includes the entire state of Oregon. In light of counsel's failure to provide satisfactory evidence establishing that the hourly rate for attorneys providing similar services to LHWCA work is higher in Portland than it is in the rest of Oregon, substantial evidence supports the ALJ's reliance on Oregon fee rates.

Finally, because claimant's counsel failed to carry his burden to produce satisfactory evidence supporting the requested legal assistant rate, the BRB did not err by affirming the awarded legal assistant rate. *See Christensen,* 557 F.3d at 1055.

[Topic 28.6.1 Hourly Rate]

C. Benefits Review Board

There have been no published Board decisions under the LHWCA in March 2012.

II. Black Lung Benefits Act

[There are no decisions to report for the month.]