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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 219 March 2010

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

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

***Bath Iron Works Corp. v. Fields*, __ F.3d __, 2010 WL 986915 (1st Cir. 2010).**

In this case, it was undisputed that claimant has been totally and permanently disabled since 2002, as the result of a lower back condition that causes intense pain. At the onset of his disability, he was sixty years old and weighed approximately 400 pounds. Employer conceded that claimant made out a *prima facie* claim for relief, triggering the presumption under Section 20(a) that his disability was work-related. On appeal, employer asserted that it produced "substantial evidence" to rebut the § 20(a) presumption and, alternatively, that the Board exceeded the scope of its authority by substituting its own factual findings and credibility determinations for the ALJ's in vacating the ALJ's determination that employer had rebutted the presumption of causation.

The First Circuit upheld the Benefit Review Board's ("BRB" or "Board") determination that employer did not produce substantial evidence to rebut the 20(a) presumption that claimant's injury was work-related, since employer's evidence did not address whether working conditions rendered claimant's pain symptomatic; although a physician testified that claimant's

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

osteoarthritis was wholly attributable to weight and age, he said nothing to suggest that claimant's disabling pain was unrelated to his employment.

Contrary to employer's assertion, the Board did not exceed its authority under the LHWCA in vacating the ALJ's determination that employer had rebutted the 20(a) presumption of causation, since the Board was entitled to independently examine the record and to exercise its own judgment as to whether the substantial evidence standard was met; in doing so, the Board concluded that employer's evidence was legally insufficient to meet the substantial evidence standard because it simply did not address the cause of the relevant "injury" within the meaning of the LHWCA – i.e., claimant's disabling pain. Courts have implemented the § 20(a) presumption through a burden-shifting framework similar to that used in employment discrimination cases. The ultimate burden of proof always lies with the claimant. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). The Board is statutorily bound to uphold the ALJ's findings of fact if they are supported by substantial evidence.[2] The question of what caused claimant's disabling back pain is, of course, a question of fact. If the Board had set aside the ALJ's ultimate finding at step three of the burden-shifting framework that claimant had not proved by a preponderance of the evidence that his pain was work-related, there might be some force to employer's argument. Instead, the Board found fault with the ALJ's determination at step two of the burden-shifting framework that employer had produced sufficient evidence to rebut the § 20(a) presumption. That determination by the ALJ was a legal judgment, subject to plenary review by the Board.

The court elaborated that, in effect, the requirement that employer come forward with "substantial evidence" of non-causation at step two to rebut the presumption of causation sets up an "objective test," which requires employer to produce "not the degree of evidence which satisfies the [ALJ] that the requisite fact [(non-causation)] exists, but merely the degree which could satisfy a reasonable factfinder." Slip. op. at *6, citing *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 377, 118 S.Ct. 818, 139

[2] The court noted that

> "… the LHWCA 'uses the same standard-'substantial evidence'-for two entirely different purposes.' 2 Richard J. Pierce, Jr., Administrative Law Treatise § 11.2 (5th ed.2010). Here, we are talking about the Benefits Review Board's standard of review. As noted, the Act also requires the employer to produce "substantial evidence" of non-causation to rebut the section 20(a) presumption. The two issues are not identical. A commentator has observed, for example, that 'it is quite possible that the employer [could] present[ ] 'substantial evidence' to rebut the presumption [at step two of the burden-shifting framework], but that the ALJ could still make a finding [at step three of the burden-shifting framework], supported by 'substantial evidence,' that the employee suffered a job-related injury.' *Id*."

Slip. op. at *8, n.2.

L.Ed.2d 797 (1998)(additional citations omitted.) The determination that employer has or has not produced sufficient evidence to rebut the presumption of causation under the LHWCA is not dependent on credibility. The Board was entitled to independently examine the record and to exercise its own judgment as to whether the substantial evidence standard was met. *Cf. Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 718 & n. 2 (1st Cir.1999). The Board held that employer's evidence was legally insufficient to meet that standard because it simply did not address the cause of the relevant "injury" within the meaning of the LHWCA – i.e., claimant's disabling pain. Indeed, one physician admitted that "almost any activity, in theory, could initiate symptoms if there's a disc herniation," but offered no opinion about the likelihood of such a connection in claimant's case.

The court concluded that the Board's focus on the distinction between claimant's osteoarthritis and his pain was sound, and further summarized the pertinent precedent as follows:

> "A claim for LHWCA benefits can be based on a work-related activation or aggravation of the employee's symptoms, even if the disease itself is not work-related. As we explained in *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir.1981), '[w]hether circumstances of [the claimant's] employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition." *See also Marinette Marine Corp. v. OWCP*, 431 F.3d 1032, 1035 (7th Cir.2005) (The LHWCA "does not require that a later injury fundamentally alter a prior condition. It is enough that it produces or contributes to a worsening of symptoms.'); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir.1998) (holding that the ALJ 'erroneously focused on the origins of [the claimant's] underlying heart condition, rather than on the ultimate heart attack')."

Slip. op. at *6. Here, a "reasonable mind" could not conclude from the evidence that claimant's pain was unrelated to his working conditions. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 606-07 (1st Cir.2004)(a psychiatrist's opinion regarding the cause of employee's psychological symptoms was insufficient to rebut the 20(a) presumption as it did not address the alleged connection between the employee's work and his physical symptoms); *Bath Iron Works Corp. v. Dir., OWCP ("Shorette")*, 109 F.3d 53, 56 (1st Cir.1997)(holding that evidence that the employee had developed asbestosis prior to his maritime employment was insufficient to

rebut the 20(a) presumption because it did not address the employee's theory that subsequent exposure to asbestos had aggravated his conditions).

Contrary to employer's assertion, the Board did not require it to "rule out" any possible causal relationship between claimant's employment and his condition. The Board focused on whether employer's evidence was material to claimant's claim that his working conditions had caused his disabling pain, not on the degree of certainty expressed by the physicians.

[Topic 20.3 EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE; Topic 20.3.1 Failure to Rebut]

***Rhine v. Stevedoring Servs. of America*, __ F.3d __, 2010 WL 744277 (9th Cir. 2010).**

The Ninth Circuit upheld the BRB's affirmance of the ALJ's determination of claimant's average weekly wage ("AWW") under subsection 10(c), holding that (1) the ALJ was entitled to use the average wage of all B-registered longshoremen[3] for the year in which claimant was injured in the course of his employment as a B-registered longshoreman to calculate claimant's AWW, even though the average data for all longshoremen did not match up with claimant's injury date and lacked hours data for the individual workers; and (2) reducing claimant's AWW by the amount he could have earned in alternative non-longshore employment was warranted.[4]

Claimant contended that the ALJ's use of the 1997 PMA "B" Average was error and underestimated his earnings because: (1) it was based on average earnings for all "B" workers as of December 31, 1997 including some who had few hours as longshore workers; (2) it included Rhine's total earnings for the year even though he was injured the majority of time that he was a "B" worker; (3) it did not include holiday and vacation pay for some workers; (4) it excluded pay guarantee income for all workers; and (5) it did not adjust the "B" earnings for a mid-year contract wage increase. The court concluded that claimant misconstrued the cases he cited for the proposition that the omitted components must be included in an ALJ's AWW calculation under § 10(c), stating that

[3] This date is referred to as the "Pacific Maritime Association Average" or "PMA Average."

[4] The court initially concluded that it had jurisdiction despite claimant's failure to name the Director of the OWCP as a respondent as required by the Federal Rules of Appellate Procedure, where claimant provided notice to the OWCP, and it subsequently appeared as a respondent.

> "[i]n *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir.1980), we held that earning capacity after the date of injury may, not must, be considered in the ALJ's determination of an employee's wages. *See also Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1293 (9th Cir.1979) (refusing to hold as a matter of law that an ALJ must assume that an employee's earlier, lower wages would have continued when the employee started higher paying work shortly before being injured). And in *Sproull v. Director, OWCP*, 86 F.3d 895, 899 (9th Cir.1996), we upheld an ALJ determination that incorporated vacation pay into a compensation award, but we did not require that vacation pay be included. Similarly, in *Fireman's Fund Insurance Co. v. Van Steene*, 120 F.2d 548, 550 (9th Cir.1941), we upheld an ALJ award that determined a worker's average weekly wage based in part on the wages of other employees, but set forth no principle that an ALJ could not consider time off due to temporary injuries when performing a wage calculation. Finally, in *McMennamy v. Young & Co.*, 21 BRBS 351, 353-54 (D.O.L.Ben.Rev.Bd.1988), the BRB interpreted the meaning of "wages" under 33 U.S.C. § 902(13) but did not consider what compensation must factor into an ALJ's calculation under section 910(c)."

Slip. op. at *1.

Under subsection 10(c), the ALJ has more flexibility in determining an employee's reasonable annual earning capacity than when applying §§ 10(a) and 10(b). Under § 10(c), the average annual earnings "shall be such sum as ... shall reasonably represent the annual earning capacity of the injured employee." The language of § 10(c) reflects that analysis under it is not meant to be strictly mathematical. It merely requires that the ALJ give regard to evidence of the employee's annual earning capacity. If the ALJ's AWW determination under § 10(c) is supported by substantial evidence in the record, then it must be affirmed; the court's task is not to reweigh the evidence. The substantial evidence test for upholding factual findings is extremely deferential to the factfinder; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Here, the ALJ found Rhine's own testimony unreliable and self-serving and noted that other testimony in support of Rhine contradicted the earnings data. Although the ALJ stated that the PMA Average data was "far from perfect," upon consideration of all available evidence, the ALJ reasonably concluded that it represented the best estimate of Rhine's average wages.

Claimant further asserted that the ALJ committed legal error by reducing his compensation by the amount he could have earned in alternate

non-longshore employment because taking such work could have jeopardized his status as a longshoreman by possibly causing him to loose his longshore registration.[5] The court disagreed. The claimant cited no case or rule which holds that claimant's possible loss of his longshoreman status rendered the substitute employment inadequate. The availability of alternative employment is determined by reference to two criteria: claimant's physical abilities and the economic availability of particular jobs in the market. Furthermore, Section 8(c)(21) provides that the rate of compensation is determined based on the difference between the employee's AWW and his post-injury wage-earning capacity "in the same employment *or otherwise*" (emphasis added). Under the statute and this Circuit's case law, claimant's preferences, or the possible employment consequences of taking an available job, are not relevant. Further, in *Berezin v. Cascade Gen., Inc.*, 2000 WL 35364100 (D.O.L.Ben.Rev.Bd. Nov. 14, 2000), the BRB rejected a claimant's similar argument that, because he wished to return to longshore work, he need not diligently seek alternative employment.

[Topic 10.4.3 Actual Earnings Immediately Preceding the Injury Are Not Controlling; Topic 10.4.4 Calculation of Annual Earning Capacity Under Section 10(c); Topic 10.4.2 Judicial Deference Regarding Application of §10(c); Topic 8.2.4.2 Suitable alternate employment: Employer must show nature, terms, and availability]

***Traschsel v. Rogers Terminal & Shipping Corp.*, __ F.3d __, 2010 WL 775654 (9th Cir. 2010).[6]**

On denial of petition for rehearing en banc, agreeing with the ALJ and the Board, the Ninth Circuit held that in calculating claimant's average annual earnings under Section 10(a) of the LHWCA, unworked paid holidays should be included in the number of days claimant was employed in the year preceding his injury.

In applying Section 10(a), an ALJ must first determine the total income earned by the claimant in the 52 weeks before the injury, then divide that number by the number of "days when so employed." The result

[5] The court rejected employer's assertion that Rhine has not preserved this argument for appellate review because the BRB only considered this issue during prior appeal in the same case. The court reasoned that under the LHWCA and the Administrative Procedure Act, previous non-final orders of the BRB are properly before the Court of Appeals only when the final Board order is appealed.

[6] This decision amended and superseded the Ninth Circuit's decision in *Trachsel v. Rogers Terminal & Shipping Corp.*, 590 F.3d 967 (9th Cir. Dec. 30, 2009), which was summarized in Recent Significant Decisions Monthly Digest # 217, December 2009.

is then multiplied by either 300 or 260, depending on whether the worker is a six-or five-day worker, to determine his average yearly wage. *Id.* To find the average weekly wage, the average annual wage is divided by 52. 33 U.S.C. § 910(d)(1).

The court agreed with the Fifth Circuit's reasoning in *Ingalls Shipbuilding, Inc. v. Wooley,* 204 F.3d 616, 618 (5th Cir. 2000), which considered whether vacation days constitute days employed under § 10(a). In *Wooley*, the Fifth Circuit concluded that the ALJ should be charged with making findings as to whether particular vacation payments constitute a "day worked" or an "additional compensation to be added to [the worker's] annual wage." *Id.* Where compensation represents a day worked, it constitutes a "day so employed" under § 10(a). Additional compensation and benefits not tied to a particular date, however, are not counted as a day employed. As stated in *Wooley,* this distinction serves Section 10(a)'s goal of a "theoretical approximation of what a claimant could ideally have been expected to earn in the year prior to his injury." Slip. op. at *3, citing *Wooley*, 204 F.3d at 618 (internal quotation marks and citation omitted). That approximation includes what the claimant would have earned had he worked every available work day in the year. Vacation days taken as a lump sum payment do not replace any actual work days and thus should not be included under 10(a); by contrast, vacation days used to receive pay on a particular day that the employee chose not to work should be included under 10(a). Citing *Wooley*, the Ninth Circuit concluded that,

> "Similarly, when an employee does not work and is paid for a particular holiday, the holiday must be included to approximate what Trachsel could theoretically have been expected to earn.
>
> Following *Wooley,* we conclude that a day should be included as a `day [ ] ... so employed' under section 910(a) if the employee is paid for that day as if he actually worked it. …. Additionally, for those days where Trachsel received vacation pay and also worked, the ALJ correctly counted them only once."

Slip. op. at *3 (internal citations omitted).

Claimant contended that "days when so employed" does not include days for which an employee is paid but does not work, relying on *Matulic v. Dir., OWCP,* 154 F.3d 1052, 1057 (9th Cir. 1998) ("[W]e conclude, as a matter of law, that a worker's receipt in future years of disability benefits computed on the basis of 18% more days (including vacation, holiday, and sick days) than he actually worked in the measuring year is not sufficient basis to find the § 910(a) presumption rebutted.") Rejecting this reasoning,

the court stated that *Matulic* addressed when § 10(a) should be applied as opposed to § 10(c), not what days constitute "days when so employed." Thus, *Matulic's* reference, in passing, to the days the claimant "actually worked" had little relevance. Further, claimant's proposed method of calculation would be inappropriate in this case because it would be inconsistent with how his post-injury wage earning capacity was determined -- on reconsideration, the ALJ included non-worked holidays in the divisor when calculating his wage earning capacity.

[Topic 10.2.5 Calculation of Average Weekly Wage Under § 10(a)]

***Hyatt v. Dir., OWCP*, No. 09-60476, 2010 WL 935309 (5th Cir. 2010)(unpub.)**

The court denied for lack of jurisdiction claimant's untimely petition for review of the BRB's affirmance of an ALJ's attorney's fee award, without addressing the merits of claimant's assertion that the fee awarded based on her partially successful claim was too low. The ALJ awarded Hyatt benefits for a closed period of temporarily total disability, but denied her permanent partial disability claim. The ALJ then awarded claimant $7,017.25 in attorney's fees and costs, down from $16,531.03 requested in the fee petition; and the BRB affirmed the award on February 12, 2009. Hyatt purported to seek the BRB's en banc review of the fee award pursuant to § 21(b)(5) of the LHWCA. Section 802.407(b) of the BRB's rules of practice and procedure provides that every petition for rehearing en banc "must accompany a motion for reconsideration directed to the panel which rendered the decision." Hyatt did not file a motion for reconsideration addressed to the BRB panel and offered no reason for rehearing en banc; and the BRB denied her petition on this basis on April 21, 2009.

The court opined, *sua sponte*, that it lacked jurisdiction to review the merits determination by the BRB. The court's jurisdiction to review an order of the BRB is limited by § 21(c) of the LHWCA, which required Hyatt to file her petition with this court "within sixty days following the issuance of" the BRB's order. Hyatt filed her petition exactly sixty days after the BRB denied her "petition for review" for rehearing en banc -- but well in excess of that time limit as to the BRB's February 12, 2009 order on the merits. The BRB's rules of practice provide that an order is final after sixty days "unless a timely request for reconsideration by the Board has been filed as provided under § 802.407," in which case "the 60-day period for filing such petition for review will run from the issuance of the [BRB]'s decision on reconsideration." 20 C.F.R. § 802.406. Section 802.407 requires that a motion for reconsideration en banc must be accompanied by a motion for

reconsideration directed to the panel. Thus, Hyatt's filing did not comply with this exception.

[Topic 21.4.2 Appeal to Court of Appeals]

B. U.S. District Courts

***Dinh v. Stalker, et. al.*, Civil Action No. 09-3019, 2010 WL 925292 (E.D. La. 2010)(unpub.)**

In a lawsuit filed by an injured worker seeking to enforce an ALJ's compensation order, the district court held that the ALJ's order could not be enforced against individual alleged to be employer's corporate officer as he did not receive notice of the claim for compensation or notice of the administrative hearing required under subsections 18(b) and (c) of the LHWCA, and, accordingly, dismissed the claim against said individual.

Sau Dinh was injured while working aboard a barge for KYE, Inc. He filed several lawsuits and also sought LHWCA benefits. In a 2006 decision, the ALJ found KYE, which was no longer in business, to be liable for Mr. Dinh's medical and disability benefits as his borrowing employer.[7] Thereafter, Mr. Dinh filed his present suit against KYE, also naming as defendants KYE's alleged president, Raymundo Groot, and KYE's alleged director and Chief Financial Officer. Mr. Groot filed a motion to dismiss.

Pursuant to Section 38(a), the president, secretary, and treasurer of a corporation that is an employer under the LHWCA and that fails to secure the payment of LHWCA compensation "shall be severally personally liable, jointly with the corporation, for any compensation or other benefit which may accrue ... in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required...." Additionally, when an employer or his officers or agents fails to comply with a final compensation order awarding benefits under the LHWCA, the beneficiary of that compensation order may apply in a district court of proper venue, to enforce the compensation order. 33 U.S.C. § 921(d). "If the court determines that the order was made and served in accordance with the law, and that such employer or his offices or agents

[7] Mr. Dinh was a payroll employee of Structure Services, Inc., which entered into an Out-Source Agreement with KYE under which Structure provided KYE with a labor pool and further agreed to indemnify KYE for any claim due to injuries to their employees. The compensation carrier for Structure, urged before the ALJ that it was not liable for the benefits because it did not insure the compensation obligations of KYE, the responsible employer under the LHWCA. The ALJ concluded that he lacked subject matter jurisdiction to interpret the indemnity agreement. Thereafter, the district court held that the insurance certificate did not provide coverage for KYE's compensation liability, and the Fifth Circuit affirmed.

have failed to comply therewith, the court shall enforce obedience to the order...." *Id.*

The court also discussed the notice requirements under the Act. Thus, Section 19(b) provides that within ten days after a claim for benefits is filed, the deputy commissioner shall notify the employer and any other person, whom the deputy commissioner considers an interested party, that a claim has been filed. Further, Section 19(c) provides that if a hearing on the claim is ordered "the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail...." "The administrative law judge must give notice of the hearing, pursuant to Section 19(c), to all potentially liable entities, both corporate and individual, as well as to claimant and the Director, at their proper addresses by a trackable mailing system." *J.T. v. American Logistics Services,* BRB No. 07-0135, p. 8. (April 30, 2007). The failure to comply with the notice mandate of § 19(c) with respect to an individual sought to be held responsible for LHWCA benefits is fatal to an attempt to bind that individual by an award of benefits. *Id.* at p. 7. Failure to afford notice to an interested party violates the most rudimentary demands of due process of law.

Here, the ALJ's order and the DOL's service sheet attached thereto made it clear that Mr. Groot did not receive the notice required under 33 U.S.C. 918(b) and (c) to enforce the compensation order against him; and plaintiff has offered no contrary evidence. This conclusion was also confirmed by the ALJ's order denying a request for reconsideration filed by the Director, OWCP, which sought to reopen the case in order to, *inter alia*, name KYE's president, secretary, and treasurer as parties to the proceedings, provide them with notice and an opportunity to be heard, and rule on the issue of their personal liability for claimant's compensation. In denying the Director's motion, the ALJ concluded that the issue of the corporate officers' liability was not before him and was mentioned in his order merely to acknowledge an argument urged by employer and was at best dicta. The court further denied the plaintiff's request to conduct additional discovery as it did not appear to be reasonably calculated to lead to the discovery of information regarding the dispositive issue, i.e., whether Mr. Groot received the required notice under § 19(c).

[Topic 19.-01 Procedure – Generally (liability of corporate officers, providing notice of hearing); Topic 19.2 District Director Must Notify Employer; 19.4 Formal Hearings Comply With APA (Due Process); Topic 21.5 Review of Compensation Orders - Compliance]

[**Editor's Note**: *The following case is included for informational purposes only*]

Moore v. Capitol *Finishes, Inc*., __ F.Supp.2d __ (E.D.Va. 2010).

The district court held that plaintiff who, as a result of a work-related injury, had sought and obtained benefits under both the LHWCA and Virginia's workers' compensation statute, was not precluded by the exclusivity provision of Virginia's statute from brining a federal maritime tort claim against a third-party subcontracted by plaintiff's employer to perform the work that allegedly caused his injury.

Capital Finishes sought a summary judgment based on the exclusivity provision of the Virginia Act. Plaintiff objected, contending that it made no difference whether he sought or recovered benefits under the Virginia Act, the LHWCA, or both, because the Supremacy Clause of the U.S. Constitution precludes the Virginia Act's exclusivity provision from operating to deprive plaintiff of his federal maritime claim.

The court observed that the courts have applied different tests in resolving conflicts between state law and admiralty. The Virginia Supreme Court has applied a test that involves balancing of state and federal interests, derived from the Eleventh Circuit's jurisprudence. By contrast, decisions by the Fourth Circuit and this district court appeared to apply a Supremacy Clause-based approach, and the Fifth Circuit has similarly rejected the balancing test. Rejecting the balancing test, the court held that it "cannot allow the Virginia Act to preclude plaintiff's federal maritime tort claim, and defendant's motion for summary judgment must therefore be denied." Slip. op. at *9. The court noted that if it were to apply the balancing test, it might well have concluded that plaintiff's conduct in this case justified preclusion of his federal maritime claim in that plaintiff's opportunistic efforts to 'have it both ways' -- i.e., seeking to avail himself of supplemental state workers' compensation benefits under the Virginia Act while also filing a claim expressly prohibited by the exclusivity provision of the same statute -- ran afoul of Virginia's strong state interest in the application of its own workers' compensation laws. The court discussed additional considerations, noting, *inter alia*, that while an injured worker's claims against his or her employer would implicate the state's interest in enforcing the bargain struck by its workers' compensation laws, plaintiff's claim was directed against a third-party. The court denied defendant's motion for a summary judgment, and concluded that an interlocutory appeal of this opinion to the Fourth Circuit was appropriate, as the legal question raised by defendant's motion is the subject of a Circuit split, with regard to which the Fourth Circuit has not yet explicitly taken a position.

C. Benefits Review Board

***Honaker v. Mar Com, Inc.*, __ BRBS __ (2010).**

Affirming the ALJ's grant of a summary decision to claimant, the Board held that although claimant did not give notice when he instituted third-party tort actions or when such claims were dismissed, there is nothing in the LHWCA or regulations stating that a claim for benefits under the LHWCA is barred by such a failure and therefore claimant's right to benefits was not affected. Although claimant's failure to provide notice to employer and the district director violated the notice requirement of 20 C.F.R. § 702.281(a), neither this regulation nor the LHWCA impose a penalty for such failure.

Claimant suffered a serious head injury while working with a hydraulic cylinder. He filed third-party tort actions against companies that manufactured and maintained the equipment. These claims were ultimately dismissed, and there were no settlements or judgments resolving the civil cases in claimant's favor. Claimant also brought a claim under the LHWCA, and was awarded temporary total disability and medical benefits in 2003. However, in 2007, employer unilaterally ceased paying benefits, contending claimant failed to notify it of, or obtain prior written approval for, third-party settlements. Both parties filed motions for a summary decision.

The Board affirmed the ALJ's finding that claimant did fail to comply with Section 702.281(a), which provides that a claimant must give notice to his employer and the district director when he makes a claim that someone other than the employer is liable for his injuries, when he institutes legal action against that party, and when there has been a settlement, compromise, or adjudication that resolves that claim. Employer argued that claimant's non-compliance with § 702.281(a) warranted the forfeiture of benefits pursuant to Section 33(g)(2) of the LHWCA. Claimant countered that § 702.281(a) is invalid to the extent it conflicts with the statute. The Board observed that, by its plain language, Section 33(g)(1), (2) did not apply here as claimant did not obtain a settlement or judgment against a third party; nor did § 702.281(b) apply as it reiterates the statutory language of § 33 (g)(1). The Board determined that Section 702.281(a) does not conflict with Section 33(g) of the LHWCA, but rather adds a notice requirement and -- unlike Section 33(g) and Section 702.281(b) -- Section 702.281(a) states no penalty for violation of its notice requirements. There is nothing in the statute or regulations stating that a claim is barred by failure to comply with the notice requirement of § 702.281(a). The Board stated that:

> "Neither Section 33(g) nor Section 702.281(a) contains a penalty or forfeiture provision for failing to give notice of the institution of a claim or the termination of a claim by dismissal against the claimant without settlement. Therefore, we affirm the administrative law judge's conclusion that claimant's non-compliance is without consequence. Absent a settlement or judgment against a third party, the forfeiture provision of Section 33(g) is not applicable."

Slip. op. at 6-7. (Internal citations and footnote omitted.) In a footnote, the Board noted that "[a]s Section 33(g) and Section 702.281(b) are punitive, it is in a claimant's best interest not to proceed in third-party litigation in secret. Given that the notice provisions of Section 702.281(a) existed prior to the imposition of any notice requirement in the Act […], it is reasonable to interpret Section 702.281 as providing for the earliest possible notice while penalizing only the conduct which violates the Act." *Id.* at 7, n.6

The Board further held that the ALJ did not err in refusing to modify the 2003 award of benefits. The employer did not file a motion for modification of the 2003 decision. Moreover, as the forfeiture provisions of § 33(g) were inapplicable, there was no basis for a modification. Thus the 2003 decision remained in effect, and the ALJ did not err in concluding that employer's improper unilateral termination of benefits subjected it to a § 14(f) assessment.

[Topic 33.7 ENSURING EMPLOYER'S RIGHTS--WRITTEN APPROVAL OF SETTLEMENT]

II. Black Lung Benefits Act

[There are no published decisions for March 2010 to report.]