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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 231 April 2011

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

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

***Gold v. Dir., OWCP, et al.*, No. 10–60686, 2011 WL 1758767 (5th Cir. 2011)(unpub.)**

The Fifth Circuit upheld the Board's decision affirming the ALJ's determination that claimant, an offshore rigger, failed to establish a *prima facie* case by showing that he sustained an injury arising out of and in the course of employment, 33 U.S.C. § 920(a). According to claimant, he experienced back pain on 11/10/07 and promptly reported his injury to a supervisor. For several months thereafter, he continued to perform physically demanding work and never reported his alleged back pain to a physician. His employment was terminated on 1/17/08 because he reported to work with alcohol in his system. Claimant went to an emergency room on 3/11/08, reporting back and neck pain, and was noted to have sciatica and degenerative changes in his spine. He filed four LS-203 forms, stating different dates for his back injury.

In denying the claim, the ALJ found that claimant's credibility was suspect and thus insufficient to establish that an injury occurred, and that no medical evidence supported a finding that he suffered an injury under the

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

LHWCA. In the alternative, the ALJ found that even if claimant could show that he sustained an injury, there was insufficient evidence to establish that any work-related accident, exposure, event, or episode occurred that could have caused the injury. The ALJ based this finding on the many internal inconsistencies in claimant's statements, and on witnesses' testimony that contradicted claimant's account. On appeal, the Board stated that claimant's test results "arguably" established that he sustained a "harm." However, the Board stated that any such error by the ALJ was harmless, as ALJ properly found that claimant had not established the working conditions element of his *prima facie* case.

The Fifth Circuit fist rejected claimant's assertion that the ALJ and BRB erred as a matter of law under 33 U.S.C. § 907 and 20 C.F.R. § 702.403 by failing to order the authorization and payment for his choice of physicians. Contrary to claimant's assertion, claimant's right to a physician of his choosing did not vest when he provided notice of injury to his employer, but rather required proof that he was injured as defined by the statute, *i.e.*, that his injury was work-related. For the same reasons, the court rejected claimant's assertion that the decisions of the ALJ and BRB violated his Fifth Amendment due process right by not authorizing treatment by his chosen physician.

The court further rejected claimant's assertion that the ALJ and BRB incorrectly determined that the Section 20(a) presumption did not apply. The ALJ's determination that claimant's testimony on both prongs of the *prima facie* case was not credible, and that the credible evidence did not support his allegations, was supported by the evidence in the record. Further, contrary to claimant's position, the Supreme Court has held the LWHCA requires compensation not because of the "mere existence of a physical impairment," but only when the injury arises "out of" and "in the course of" employment. *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., OWCP,* 455 U.S. 608, 615 (1982). Further, contrary to claimant's assertion, the ALJ and the BRB did not require him to prove that an accident occurred at a particular time in order to establish the second prong of the *prima facie* case. Rather, they determined that, presuming he had shown he suffered a harm, he had not presented sufficient evidence linking that harm to his employment activities on the day he claimed he incurred the injury. The ALJ's determination that claimant failed to establish the second prong of the *prima facie* case was supported by sufficient evidence and the law.

[Topic 20.2.1 PRESUMPTIONS -- *Prima Facie* Case]

***Fred Wahl Marine Constr. v. Dir., OWCP, et al. [McCullough]*, Nos. 08–70511, 08–70582, 08–74899, 2011 WL 1338826 (9th Cir. 2011)(unpub.).**

The Ninth Circuit held that the Board erred in affirming the ALJ's finding that a job of a server/food preparer at Dairy Queen constituted suitable alternative employment ("SAE") for claimant, as claimant's physical limitations did not support this finding.

Following surgery for a work-related back injury, claimant was released to work with restrictions, but did not return to work. The ALJ found that only one of the nine jobs identified in employer's labor market survey – *i.e.*, the Dairy Queen job – was suitable for claimant; and that a single job was not legally sufficient to establish the availability of SAE. Accordingly, the ALJ awarded permanent total disability ("PTD") benefits.

The Fifth Circuit concluded that, after considering claimant's suspended driver's license, the lack of public transportation in the area, and the excessive cost of having his wife drive him to and from work, the ALJ properly limited the labor market to those jobs within walking distance. After considering claimant's physical, educational, and vocational limitations, the ALJ properly rejected several fast food, gas station attendant, restaurant, and customer service positions, as they exceeded claimant's abilities. However, the court further concluded that claimant's physical limitations rendered the Dairy Queen fast food job unsuitable. First, a vocational consultant opined that this job is "inappropriate" in that such jobs require virtually continuous standing as well as speed. Second, the record indicated that claimant could walk or stand only on a good day for up to six hours in an eight hour day, and that on a bad day, he would be limited to walking or standing for no more than four hours. Further, vocational rehabilitation counselor stated that claimant would need to lie down periodically to relieve back pain. Third, the record did not support a finding that respondent could compete for the position. As testimony from the respondent's wife indicates, despite the fact that she had no physical limitations, had prior restaurant experience (unlike her husband) and diligently sought work, she could not obtain a job in the fast food/restaurant industry, and never saw a job posting for Dairy Queen. The ALJ erred in disregarding this testimony when he merely stated that the job openings were advertised by "word of mouth," as opposed to "help wanted" signs. The court noted that, in the small town of Reedsport, it is likely that a qualified person seeking employment, such as claimant's wife, would have heard of the position if it were available. Finally, the record indicated that employees would be required to rotate positions, going from cashier or drive-through duties to cleaning tables and getting supplies that could

exceed claimant's lifting restrictions. As the record supported a finding that the Dairy Queen job was not SAE, the court did not address whether the finding of a single position satisfied the employer's burden. The Board's ultimate determination of PTD was affirmed.

[Topic 8.2.4 Suitable Alternate Employment; Topic 8.2.4.7 Suitable Alternate Employment -- Factors Affecting Employer's Burden; Topic 8.2.4.3 Suitable Alternate Employment – Location of Jobs]

B. U.S. District Courts

[there are no decisions to report for this month]

C. Benefits Review Board

***Raymond v. Blackwater Security Consulting*, __ BRBS __ (2011).**

In a Defense Base Act case, the Board held, agreeing with the Director, OWCP, that the ALJ's decision awarding claimant a two-tiered award for his back injury – *i.e.*, permanent partial disability ("PPD") benefits through the date of his planned departure from Afghanistan, followed by a nominal award premised on essentially equivalent pre- and post-injury stateside earnings -- did not comport with law.

Claimant injured his back while working for employer in Afghanistan. The ALJ awarded claimant PTD benefits through 1/6/08. The parties stipulated that claimant began post-injury alternate work on 1/7/08. The ALJ found that claimant's actual post-injury wages reasonably represented his post-injury wage-earning capacity ("WEC"), that his 2008 WEC was $798.83 per week, and that, as of 1/1/09, his WEC was $985.51 per week.[2] Based solely on claimant's testimony that he was going to leave his lucrative overseas job no later than August 2011, the ALJ agreed with employer that the amount of claimant's disability award must change at that time.[3] The

[2] These findings have not been challenged.

[3] The Board noted that the ALJ did not identify the legal principle on which this finding was based, but referenced employer's post-hearing brief, which in turn cited *Kubin v. Pro-Football, Inc.,* 29 BRBS 117 (1995) and *Murphy v. Pro-Football, Inc.,* 24 BRBS 187, *aff'd on recon.,* 25 BRBS 114 (1991), *rev'd mem. on other grounds,* No. 91-1601 (D.C. Cir. Dec. 18, 1992), wherein the ALJs awarded the claimants, former professional football players, benefits on a two-tiered system: the first, a higher award for the presumed duration of the football career cut short due to the work injury and the second, a lower award for the claimant's post-football career. The Board noted that "[i]n neither *Kubin* nor *Murphy* did any party appeal the changes to the compensation rates at the end of the projected football

ALJ also concluded that since claimant's pre-overseas and post-injury stateside wages were very similar, any loss of WEC after 9/1/11 was nominal.

The Board reasoned that, based on the plain language of Section 8(c)(21), claimant was entitled to PPD benefits based on his actual loss of WEC, "payable during the continuance of partial disability." Absent a successful request for modification under § 22, the statute does not authorize the ALJ to award claimant a lesser amount of benefits. The Board reasoned that

> "in this case, the date claimant planned to leave his overseas work is not a factor in awarding benefits under the Act. *See* 33 U.S.C. §908. In the first instance, the [ALJ's] two-tiered award is premised on the occurrence of a presumed future event that does not take the claimant's injured status into account. This type of calculation was rejected in *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004). Specifically, as the Director correctly argues, the Ninth Circuit, within whose jurisdiction this case arises, rejected a claimant's assertion that he was entitled to an upward adjustment of his compensation based on a promotion he anticipated he would have received had he not been injured. The Ninth Circuit distinguished tort law where a 'theoretical' wage may be relevant and held that the statutory formula under Section 8(c)(21) is straightforward: it contemplates wages at the time of the injury as the baseline for comparison with actual post-injury earning capacity. Therefore, rather than relying on speculative future factors, the Act provides set formulas for awarding disability compensation. Consequently, we hold that the [ALJ] erred in changing claimant's compensation rate based on his testimony regarding his planned departure from Afghanistan. As there is no legal support in the Act or case law for the [ALJ's] finding that he may limit the duration of claimant's award of [PPD] benefits, and as the plain language in Section 8(c)(21) provides that compensation is 'payable during the continuance of partial disability[,]' we reverse the [ALJ's] finding that claimant is entitled to only a nominal award as of September 1, 2011.

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careers. Accordingly, the Board's commentary in these cases about the two-tiered awards is *dicta*." Slip op. at 3, n.4.

Keenan, 392 F.3d 1041, 38 BRBS 90(CRT); *Harmon*, 31 BRBS 45.[4]"

Slip op. at 5-6 (footnotes and additional citations omitted).

The ALJ also erred in awarding nominal benefits based on essentially equivalent pre- and post-injury stateside earnings. It is well-settled that there is only one AWW per injury on which disability benefits will be based and post-injury events generally are not relevant to determining AWW. Here, "[b]y comparing the wages claimant earned in the United States prior to his overseas work to his post-injury stateside earnings, the [ALJ] effectively applied a second [AWW] in considering claimant's entitlement to benefits. . . . . Moreover, a finding that pre- and post-injury stateside wages are 'remarkably similar' does not meet the standard under *Rambo II* for awarding a nominal amount." Slip op. at 7 (citations omitted). The Board modified the decision to reflect continuing PPD benefits after 9/1/11.

[Topic 8.9.1 WAGE-EARNING CAPACITY – Generally; Topic 8.2.1 EXTENT OF DISABILITY – No Loss of Wage-Earning Capacity; Topic 8.2.2 *De Minimis* Awards; Topic 10.1 AVERAGE WEEKLY WAGE IN GENERAL]

[4] *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997), held that in a traumatic injury case, claimant only needs to establish a work-related disability to be entitled to benefits; as claimant's traumatic back injury totally disabled him prior to his retirement, the ALJ erred in terminating total disability benefits on the date of retirement. By contrast, in *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), claimant was not entitled to PTD benefits based on a deterioration of his knee condition, which occurred after he had retired for reasons unrelated to his injury and thus did not cause any loss of WEC (he was entitled to benefits under the schedule).

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Helen Mining Co. v. Director, OWCP [Obush]*, ___ F.3d ___, Case No. 09-3438 (3rd Cir. Apr. 12, 2011), the circuit court held that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a "misdiagnosis" and thus, cannot trigger the statute of limitations at 20 C.F.R. § 725.308 for filing a subsequent claim under 20 C.F.R. § 725.309. The court determined the definition of pneumoconiosis at 20 C.F.R. § 718.201 as a latent and progressive disease supports "reading the statute of limitations in an expansive manner to ensure that any miner who has been afflicted with the disease, including its progressive form, is given every opportunity to prove he is entitled to benefits."

The court also affirmed the Administrative Law Judge's weighing of the medical opinion evidence. Notably, the court found it proper to accord less weight to the opinion of Dr. Renn, who concluded that the miner did not suffer from legal pneumoconiosis, in part, because there was no x-ray evidence of the disease. The Administrative Law Judge found that Dr. Renn's opinion was inconsistent with the plain language of the regulations at § 718.202(a)(4), which allows for a finding of pneumoconiosis "notwithstanding a negative X-ray", and it was inconsistent with the Department's position in the preamble. The court noted that "[t]he ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."

Finally, Employer argued that, in a subsequent claim, the Administrative Law Judge is barred from "reconsidering facts (regarding the miner's smoking history) that were already determined" by another Administrative Law Judge in the prior claim. The court stated:

> ALJ Burke did state that Obush quit smoking in 1968, while ALJ Tierney stated that he quit in 1970. It was error for ALJ Burke to admit a different date into the record, but we regard it—and any potential impact it may have had on ALJ Burke's finding of 25 pack years—as harmless.

Id.

[**statute of limitations at § 725.308, applied in a subsequent claim; use of the preamble; findings of fact in the prior claim**]

B. Benefits Review Board

In *Fairman v. Helen Mining Co.*, 24 B.L.R. 1-__, BRB No. 10-0494 BLA (Apr. 29, 2011)(pub.), the Board reaffirmed its holdings in *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) and *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-__ (Dec. 22, 2010)(pub.), *appeal docketed* Case No. 11-1020 (4th Cir. Jan. 6, 2011) that the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA) are constitutional. The Board also reiterated that the date of filing of the survivor's claim, not the filing date of the miner's claim, controls applicability of Section 1556. The Board held that no hearing is required in these claims:

> Contrary to employer's argument, the administrative law judge was not required to provide employer with a second hearing[5] after the amendments to the Act were enacted on March 23, 2010. The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment pursuant to 20 C.F.R. § 725.452. (citation omitted). In this case, the Director moved for summary judgment, arguing that there was no genuine issue of material fact concerning claimant's entitlement to benefits under amended Section 932(l).

Slip op. at 5.

[**automatic entitlement under the PPACA**]

In *Harris v. Cannelton Industries, Inc.*, 24 B.L.R. 1-__, BRB No. 10-0420 BLA (Apr. 29, 2011)(pub.), counsel for the Director, OWCP joined Employer in arguing that the Administrative Law Judge "erred in finding that employer's stipulation (of coal mine employment) in the 1982 claim is binding in this (subsequent claim) pursuant to Section 725.309(d)(4) (2010)." In support of this position, the Director states that the language regarding stipulations at § 725.309(d)(4) first appeared in the December 20, 2000 amendments to the regulations such that it was error to apply the regulatory provision "retroactively to find that employer's 1986 stipulation is

[5] The claim was docketed in February 2009 and heard by the Administrative Law Judge in May 2009.

binding." Citing to the preamble at 65 Fed. Reg. 80054 (Dec. 20, 2000), the Board agreed and held:

> The provision of Section 725.309(d)(4) (2010), making a party's stipulations in a prior claim binding in a subsequent claim, in concert with 20 C.D.E. § 725.2, is not to be applied retroactively to stipulations made in claims filed on or before January 19, 2001.

Slip op. at 5.

[**stipulations**]

By unpublished decision in *Clark v. Westmoreland Coal Co.*, BRB No. 10-0407 BLA (Apr. 15, 2011)(unpub.), the Board affirmed the Administrative Law Judge's finding that a 3.4 centimeter mass observed on a CT-scan would yield an opacity of greater than one centimeter by chest x-ray. Employer argued that the Administrative Law Judge "substituted his 'untrained medical judgment' for that of the physician, . . . who failed to render this equivalency determination."

The Board disagreed and stated that the Fourth Circuit "has consistently held that *the administrative law judge* must render the requisite equivalency determination, which must be supported by substantial evidence." *Slip op.* at 5 (italics in original). The Administrative Law Judge determined that the x-ray evidence was insufficient to demonstrate complicated pneumoconiosis at 20 C.F.R. § 718.304(a), and there was no biopsy evidence such that § 718.304(b) was inapplicable. He also found that the digital x-rays and medical opinions were insufficient to demonstrate the condition under § 718.304(c). Therefore, the Board stated:

> After addressing all of the relevant evidence pursuant to Section 718.304(a)-(c), and noting that (the physician) concluded that the changes observed on the CT scan were 'typical of' and 'suggestive of' complicated pneumoconiosis, . . . the administrative law judge acted within his discretion in finding that the pulmonary mass measuring 3.4 centimeters that (the physician) observed would be equivalent to a 'greater than one centimeter opacity' if seen on x-ray, and that (the physician's) interpretation of the . . . CT scan was sufficient to establish complicated pneumoconiosis.

In further support of his equivalency finding, the Administrative Law Judge noted that some radiologists interpreting the chest x-rays diagnosed the presence of a size A mass "measuring up to 3 [centimeters]", even though other radiologists did not identify such a mass. As noted by the Board:

> . . . the administrative law judge was particularly persuaded by the comments of a dually qualified physician, . . . that the mass seen on x-ray was 'partially obscured by the clavicle;' the recommendations of several radiologists that a CT scan was necessary for further evaluation; and the observation of Dr. Hippensteel that 'when markings are obscured . . . a CT scan can provide 'extra information.'

Slip op. at 6. Consequently, the Board affirmed the Administrative Law Judge's finding of complicated pneumoconiosis based on the uncontradicted CT-scan interpretation that he concluded outweighed contrary evidence.

[**complicated pneumoconiosis; equivalency finding; CT-scans**]