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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 186
May 2007

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I. Longshore

Announcements

A. United States Supreme Court

B. Federal Circuit Courts

Barscz v. Electric Boat Corp., ___ F.3d ___ (Docket No. 05-6420-ag)(**2nd Cir.** May 18, 2007).

Only the portion of a settlement related to state law death benefit claims may be credited against the death benefits awarded under the LHWCA. The entire amount of a state law settlement covering both disability and death benefits may not be credited against an award of death benefits under the LHWCA. Here, the worker and his wife settled state claims; the worker filed for and was awarded LHWCA benefits and after his death, the widow filed a widow's claim under the LHWCA.

Section 3(e) limits credit to amounts paid for the same injury, death, or disability currently being claimed under the LHWCA. In this case of statutory construction, the court found that the words "are claimed" are critical and that the use of the present tense "unambiguously indicates that only those injuries currently being claimed can be considered in applying the Section 3(e) credit." The court found that Section 3(e) was specifically enacted to overrule a decision that had allowed a claimant to recover twice for the same injury. "The reading of Section 3(e) we adopt is consistent with Congress's purpose of limiting double recoveries for the same injury by the same claimant; the

reading adopted by the Board would go beyond Congress's limited purpose of preventing double recovery by the same claimant and would decrease awards based on amounts previously received by other claimants." Thus, the court rejected the Board's view which had rejected any distinction between the death benefits being claimed by the widow and the disability benefits that had previously been claimed by the now deceased worker.

Thus, the court held that under Section 3(e) only the portion of the settlement that covered the widow's state law death claims may be credited against her LHWCA death benefits. In remanding the matter, the court went on to hold that in applying Section 3(e), the burden of proof lies on the party that seeks to apply the credit. Thus, the employer here bore the burden of proof as to allocation of the settlement.

[Topic 3.4 Coverage--Credit For Prior Awards]

Mai v. Knight & Carver Marine, (Unpublished)(No. 04-76279)(**9th Cir.** May 29, 2007).

Here the Board affirmed the ALJ's determination that the claimant's job duties were not related to the construction or repair of boats, and therefore, he was not a maritime employee covered under the LHWCA. The claimant argued on appeal that the ALJ should have drawn an adverse inference against the employer regarding his job duties because the employer failed to introduce his time cards into evidence. The court found that the fact-finder has discretion in deciding whether to draw an adverse inference, so long as the decision is based upon a sound rationale. The court further found that since the ALJ found that the claimant had not established a prima facie case under the LHWCA based solely on his own testimony, the ALJ acted within his discretion when he refused to apply the adverse inference rule in the claimant's favor.

[Topic 23.7 Evidence—ALJ May Draw Inferences Based On Evidence Presented]

Eldridge Construction Inc. v. Director, OWCP, (Unpublished) (No. 06-60423)(**5th Cir.** May 3, 2007).

The court upheld the Board's and ALJ's determination that the employer and carrier failed to establish the existence of suitable alternative employment for the claimant**.** The ALJ had found that some of the suggested jobs did not meet physical limitations of the claimant. Additionally the ALJ found that the claimant had obtained only an elementary school education in Vietnam and could not read, write or speak English. Because of his lack of education, the ALJ found that the claimant could not perform other suggested suitable alternative jobs.

On appeal to the Board, the Employer argued that the claimant should have improved his English ability after he became unable to work due to his injury, and that the ALJ erred by not considering this lack as evidence that the claimant did not diligently seek alternate employment. The ALJ had found that the claimant is not required to learn

English to rebut a finding of suitable alternate employment inasmuch as an employer must take workers as it finds them, and in this case, the employer was willing to hire the claimant notwithstanding his inability to speak English. The Board upheld the ALJ's finding that the claimant does not need to show that he attempted to improve his communication skills in order to establish he diligently sought alternate work.

[Topics 8.2.4.7 Extent of Disability--Factors affecting/not affecting employer's burden; 8.2.4.9 Extent of Disability--Diligent search and willingness to work]

C. Federal District Courts and Bankruptcy Courts

Sheppard v. Northrop Grumman Systems Corp., ___ F.Supp 2 ___ (Civ. Act. No. 07-2208 Sec. J)(E.D. La. May 24, 2007).

At issue here is whether a longshore related claim was properly removed to federal district court. The plaintiff had filed his suit against Northrop and several defendants in Civil District Court for the Parish of Orleans asserting that he contracted asbestos-related lung cancer while employed as a laborer and rigger by Avondale Shipyard. Northrop and one of its executive officers removed this action to federal court based on federal officer immunity and the LHWCA. The day before the defendants removed the matter, the plaintiff moved to amend his petition to delete certain paragraphs in regard to strict liability claims. The plaintiff then moved to have the matter remanded to state court. Amongst his arguments for sending the matter back to state court, plaintiff argued that the LHWCA does not provide a colorable federal defense. The federal district court agreed that the LHWCA does not preempt, but rather supplements, state remedies available to an injured worker. "Thus, a person injured while shipbuilding may maintain an action under either the Louisiana state compensation scheme or the LHWCA. A review of plaintiff's petition reveals that it was plaintiff's intent to sue defendants in state court for state law claims." The court remanded the matter to state court.

[Topic 1.1 Jurisdiction/Coverage--Generally]

D. Benefits Review Board

Wheaton v. Golden Gate Bridge, Highway & Transportation District, ___ BRBS ___ (BRB No. 06-0672)(May 24, 2007).

The claimant, injured while working as a vessel repairman and ferryboat mechanic, filed a claim for LHWCA benefits, which was challenged by employer under Section 3(b)(exemption from liability as a subdivision of a governmental entity.). The claimant initially argued that Section 3(b) does not apply because local federal courts had held that the employer was not an arm or agency of the State of California, but rather, was an independent corporate body such that it does not have immunity, under either the

Eleventh Amendment of the U.S. Constitution or the inherent sovereign immunity of the state, from admiralty-law tort claims.

The Board upheld the ALJ who found that the employer was exempt under Section 3(b). The ALJ had opined that he was doubtful that sovereign immunity analysis has a role in the outcome of this matter, as treating the exemption in Section 3(b) as co-extensive with the Eleventh Amendment sovereign immunity needlessly injects a constitutional issue into an ordinary question of statutory construction. The Board found that the case turned on a specific determination as to whether the employer, by virtue of its structure and operation, is a "subdivision" of a state pursuant to Section 3(b). Noting that Section 3(b) does not define or identify what is encompassed by the term "subdivision," the Board looked to case law for guidance. The Board specifically found that *Tyndzik v. University of Guam*, 53 F.3d 1050 (**9th Cir.** 1995) and *Keating v. City of Titusville*, 31 BRBS 187 (1997), provide a test as to whether an entity is excluded. The Board noted that in *Keating*, like the employer in the instant case, the employer had the right to take property by eminent domain, and to enact ordinances, including traffic regulations for travel on its facilities, and rules of conduct enforceable through criminal prosecution in the state courts. While the employer did not have the taxing power possessed by its counter part in *Keating*, it nevertheless had sufficient financial underpinnings akin to those held by a governmental subdivision, i.e., the power to issue bonds and a legislatively derived reliance on local municipalities for some of its financing. Moreover, the Board noted that the ALJ had reasoned that the employer's authority to fix and collect tolls for public use of the Golden Gate Bridge was further indication that the employer was a political subdivision.

[Topic 3.1 Coverage—Government Employees]

Pearley v. B & D Contracting, (Unpublished)(BRB No. 06-0685)(May 15, 2007).

The Board upheld the ALJ's determination that the per diem paid to the claimant here should be included in his average weekly wage as it was "monetary compensation" and not an untaxed "advantage." Claimant was paid a wage plus an hourly per diem. An officer of D & B testified that the claimant's pay was divided in this manner to give him more take-home pay and to benefit the employer under IRS guidelines. He further testified that the per diem was meant for travel and lodging and was provided to all employees regardless of where they lived or what their actual expenses were and depended on the number of hours they worked. Both items appeared on the same pay check. On appeal, the employer argued that the per diem should not be included in "wages."

In upholding the ALJ, the Board noted that, pursuant to **Fifth Circuit** law, "wages," equals monetary compensation plus taxable advantages. "The amounts labeled per diem here were part of the monetary hourly rate paid to claimant without regard to claimant's actual meals or lodging."

[Topic 2.13 Definitions--Wages]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

Benefits Review Board

In *Presley v. Clinchfield Coal Co.*, BRB No. 06-0761 BLA (Apr. 30, 2007) (unpub.), the Board adopted the Director's position and held that a letter from the miner's treating physician, Dr. Robinette, constituted a medical report as defined at 20 C.F.R. § 725.414(a)(1) as opposed to a treatment record. The Director maintained that Dr. Robinette's letter was provided to the miner's counsel in anticipation of litigation and it contained a "written assessment of claimant's respiratory condition based on a review of his treatment records and test results" such that it was subject to the evidentiary limitations at § 725.414(a)(2)(i) of the regulations. In agreeing that the letter was a "medical report" under the regulations, the Board found:

> In his January 10, 2005 letter to claimant's attorney, Dr. Robinette stated that he had been claimant's treating physician for several years, and reported claimant's symptoms, the medications he was taking, and the results from a chest x-ray and CAT scan. (citation omitted). Dr. Robinette concluded that the claimant is disabled from his usual coal mine employment, and has complicated coal workers' pneumoconiosis based on his chest x-ray abnormalities and CAT scan findings.

The Board concluded that the tenor and structure of Dr. Robinette's letter resulted in its classification as a "medical report" subject to the evidentiary limitations as opposed to a treatment note, the admission of which is not limited under the amended regulations.

[**medical report versus treatment record, defined**]

By unpublished decision in *Jude v. Wolf Creek Collieries*, BRB No. 06-0659 BLA (May 23, 2007), the Board affirmed the administrative law judge's handling of procedural matters related to a defunct employer. Of relevance here, while the case was pending before the OALJ, Employer's counsel withdrew citing that the employer's parent company, Horizon Natural Resources Incorporated, had been liquidated in bankruptcy.

Upon request of the Director, the OALJ held the claim in abeyance pending the Director's investigation that a surety bond issued by St. Paul Fire and Marine Insurance Company (St. Paul) would secure Employer's liability for benefits. Moreover, pursuant to a Joint Liquidation Plan approved by the bankruptcy court, Horizon Liquidating Trust (Horizon) was also liable for the payment of any benefits owed by Employer. The Director provided St. Paul and Horizon with "a copy of his pleading in order to notify them of their right to request that they be permitted to intervene in the case pursuant to 20 C.F.R. § 725.360(d)." St. Paul's counsel filed a motion to be dismissed from the claim, which was denied by the administrative law judge. Although counsel for St. Paul was present at the hearing, he advised that "St. Paul would not intervene as a party to the case" and asked that its name be removed from the caption. Counsel also requested that the record be held open for 60 days "in the event that there was some interested party that wished to submit evidence to defend against the claim."

The administrative law judge granted St. Paul's motion that it be removed from the caption of the claim, but denied its request that the record be left open for 60 days. Moreover, the judge did not dismiss St. Paul from the claim. The administrative law judge then awarded benefits and held Employer liable for payment of the benefits. The Board held that the administrative law judge "properly deemed employer capable of assuming liability for benefits based on the assurances of the Director that there has been a surety bond posted on behalf of Horizon and its subsidiaries." The Board also noted that assessing liability against Employer was consistent with the terms of the liquidation trust of the bankruptcy court.

Further, the Board held that the administrative law judge properly declined to dismiss St. Paul "as such an action would preclude the Department of Labor from exercising its enforcement remedies in district court." The Board reasoned that, "[w]hile the Black Lung Disability Trust Fund may ultimately be required to pay benefits, the Director must have an award of benefits issued against employer in order to enforce liability on the surety bond."

Finally, the Board declined to entertain St. Paul's arguments on appeal that it did not have adequate notice or opportunity to be heard on the claim. The Board noted that, "because St. Paul refused to exercise its right to intervene as a party to the case while the case was before the administrative law judge, . . . and St. Paul has not filed a motion to intervene as a party before the Board, . . .St. Paul does not have standing in this appeal to challenge the administrative law judge's award of benefits or his determination that employer is liable for benefits."

[**surety, intervention and liability of**]
