**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 # 210 Mayl 2009*

*John M. Vittone*
*Chief Judge*

*Stephen L. Purcell*
*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. Circuit Courts of Appeals[1]

***Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044 (9th Cir. 2009).**

Reversing the Board's decision, the Ninth Circuit holds that a successful claimant was entitled to recover reasonable attorney fees under Section 28(a) of the LHWCA for work performed both before and after the workers' compensation insurer or employer declined to pay compensation; thus, a successful claimant was entitled to both pre- and post-controversion attorney fees.

The following four conditions must be satisfied in order to receive attorney fees under § 28(a) of the LHWCA: (1) the worker must file a claim with the District Director, (2) the employer must receive notice of the claim from the District Director, (3) the employer must decline to pay compensation or not respond within 30 days, and (4) the worker must thereafter utilize the services of an attorney to prosecute his claim

Applying various cannons of statutory construction, the Court concluded that § 28(a), which permits a successful claimant to recover attorney fees if he "thereafter" retains an attorney to represent him, requires only that the worker show that he employed an attorney after the employer declined to pay the claim. The Court reasoned that this is the

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

most natural reading of "thereafter," as used in § 28(a). While it is possible to read "thereafter" as also limiting the amount of fees to post-controversion services, this would be a somewhat strained reading. Additionally, § 28(a) provides for "reasonable" fees to be assessed against an employer, and the absence of an implied temporal limitation with respect to such fees is consistent with other fee-shifting statutory schemes and with the incorporation of an express limitation in § 28(b).

Furthermore, § 28(d) admonishes that an award of attorney fees shall not in any respect affect or diminish the compensation payable under the Act. Requiring the claimant to pay pre-controversion attorney fees diminishes his compensation. In interpreting the LHWCA, all doubts are to be construed in favor of the employee in accordance with the remedial purposes of the LHWCA.

In adopting § 28(a), Congress sought to provide an incentive for employers to pay valid claims rather than contest them. Creating a disincentive to pre-controversion legal representation would be detrimental to both employees and employers. In claims involving hearing loss or other injuries that are not apparent, assistance of an attorney may be critical to assemble enough information to allow the employer to make an informed decision. That the Secretary of Labor may provide some form of legal assistance to a claimant does not affect this analysis.

Furthermore, the Court's holding accords due weight to the OWCP Director's interpretation of § 28(a). The Court owes no deference to the Board's interpretation, which, moreover, has been inconsistent over the years.[2] Finally, the Court noted that the Fifth and Sixth Circuits, and possibly the Fourth Circuit, have interpreted § 28(a) as authorizing only post-controversion attorney's fees.[3]

**[Topic 28.1.3 Attorney's Fees – When Employer's Liability Accrues]**

***Coastal Prod. Servs., Inc. v. Hudson*, __ F.3d __, 2009 WL 1270457 (5th Cir. 2009)(en banc).**

---

[2] From 1979 to 1997, the Board interpreted § 28(a) as authorizing only post-controversion attorney's fees. In 1997, the Board adopted a contrary interpretation. *See Liggett v. Crescent City Marine Ways & Dry Dock Co.*, 31 BRBS 135 (1997). In 2002, the Board reverted to its previous interpretation. *See Childers v. Drummond Co.*, 2002 WL 32301637, BRB No. 01-0585 (2002).

[3] *Day v. James Marine, Inc.*, 518 F.3d 411, 419 (6th Cir. 2008); *Watkins v. Ingalls Shipbuilding, Inc.*, 12 F.3d 209, 1993 WL 530243, (5th Cir. 1993); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357 (5th Cir. 2002).

In a split decision, the Fifth Circuit denied a petition for rehearing and rehearing en banc of its earlier decision in *Coastal Prod. Servs. v. Hudson,* 555 F.3d 426, 441-52 (5th Cir. 2009),[4] which held that the requirements of situs and status under the LHWCA were satisfied where a platform operator was injured on a fixed production platform located in state waters. There, the Court had held that although the fixed platform also served the arguably non-maritime purpose of production, the platform was part of the "general area" used as part of the "overall loading process" adjoining navigable waters, and was therefore a maritime situs.

The two dissenting judges once again denounced the majority's holding as a "serious misapplication" of the LHWCA jurisprudence and a misinterpretation of *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). In the view of the dissent, *Herb's Welding* should be interpreted as holding that a fixed production platform is never the site of significant maritime activity, so it can never qualify as a maritime situs. Here, oil and gas production was the only activity that occurred upon the fixed production platform. Additionally, under *Herb's Welding*, fixed production platforms located in state waters "*are* islands," and "it has not been suggested that workers on islands are covered by the amended LHWCA." *Id.* at 422 n. 6 (emphasis in original). Furthermore, the Fifth Circuit has consistently held that oilfield workers injured on fixed production platforms in state waters were outside the scope of LHWCA coverage. The dissent warned that the effect of the majority's holding will be to give every oilfield worker injured on a fixed production platform in state waters a theory to claim LHWCA benefits in addition to state worker's compensation benefits.

**[Topic 1.62 Situs -- "Over land"]**

***Friede-Goldman Halter Inc. v. Escareno*, No. 08-60064, 2009 WL 1180896 (5th Cir. 2009)(Unreported).**

The Court affirmed the Board's award of benefits, attorney's fees and interest under the LHWCA against Texas Property Casualty Insurance Guaranty Association (TPCIGA). TPCIGA is a state-created association which pays claims for insolvent insurers. As in a prior decision involving TPCIGA,[5] having repeatedly referred to itself as the carrier and not contested that designation before the Board, TPCIGA was estopped from contesting that designation thereafter; the Department of Labor had jurisdiction under the

[4] This decision is summarized in Recent Significant Decisions # 206 (Jan. 2009).

[5] *Livingston Ship Bldg. Co. v. Pelaez,* Case No. 07-60616, 2009 WL 577736, at *2 (5th Cir. Mar. 6, 2009) (Unpublished)

LHWCA; and TPCIGA was liable under the LHWCA for penalties, attorney's fees, and interest. The Court declined to address TPCIGA's contention that it is not liable for attorney's fees having accepted the district director's recommendation, as TPCIGA had not properly appealed the ALJ's award of fees to the Board. Additionally, TPCIGA sought to overturn the ALJ's credibility determination concerning expert testimony. An ALJ is a fact-finder and is entitled to consider all credibility inferences; he can accept all or any part of an expert's testimony or he may reject it completely.

**[Topic 70.10 Insolvency of Last Responsible Employer or Carrier]**

## B. Benefits Review Board

### *R.H. v. Baton Rouge Marine Contractors Inc.*, __ BRBS __, BRB Nos. 08-0604, 08-0604A and 08-0604B (May 11, 2009).

The Board upheld an ALJ's award of permanent total disability benefits based on a finding that Claimant's retirement was due, at least in part, to his pulmonary condition caused by asbestos exposure. Claimant testified that he worked directly with asbestos from around 1965 to 1970; thereafter, from 1970 until 1977, he did not recall directly handling asbestos, but he did work in terminals where asbestos was handled. He stopped working as a longshoreman in 1977. Prior to his retirement in 2005, Claimant was diagnosed with pulmonary asbestosis with an impairment of lung function.

Claimant was not a voluntary retiree as his retirement was due, at least in part, to his pulmonary condition, as evidenced by Claimant's testimony and medical reports showing that his breathing impairment had progressed to a severe restriction prior to his retirement. *See* 33 U.S.C. §908(a), (b), (c), (e); *Harmon v. Seal-Land Serv., Inc.*, 31 BRBS 45 (1997). Although Claimant had applied for a regular rather than disability retirement, the type of retirement is not dispositive. Employer presented no evidence "rebutting" the evidence that Claimant suffered from a respiratory impairment that affected his ability to perform his usual work. Furthermore, as Employer did not submit any evidence of suitable alternate employment, Claimant was entitled to permanent total disability benefits.

The ALJ did not err in concluding that Claimant's last asbestos exposure occurred in 1977 and that, accordingly, the carrier on the risk at that time was the responsible carrier; in view of that carrier's insolvency, the Louisiana Insurance Guaranty Association ("LIGA") was liable in its stead. While Employer and LIGA posited that Claimant did not establish his actual exposure to asbestos through 1977, once, as here, claimant establishes a compensable claim, the burden is on the employer or carrier to establish

that it is not the responsible employer or carrier. Employer and LIGA did not present any evidence showing that asbestos eradication was undertaken prior to Claimant's departure from the Port in 1977, or that claimant was not exposed to asbestos after 1970. Claimant testified that between 1971 and 1977 he occasionally worked in the terminals which had formerly contained asbestos. Moreover, the ALJ did not err in relying on the opinion of a board-certified industrial hygienist and asbestos consultant in finding that Claimant continued to be exposed to asbestos after 1970 due to the lack of an asbestos removal program. Employer and LIGA offered no evidence negating the continued presence of asbestos in Employer's facility through 1977.

The Board rejected LIGA's contention that it was not liable for claimant's benefits because its implementing statute requires that all of the other insurance carriers' coverage must be exhausted, including claimant's personal medical insurance, before it can be held liable. As there is only one liable carrier under the LHWCA in cases involving long latency diseases, the Louisiana statute and precedent invoked by LIGA were inapplicable. Moreover, other policies could not be used to fill the gap of coverage for the insolvent carrier. Furthermore, while LIGA's implementing statute seeks to avoid double recovery, in cases arising under the LHWCA, there is no concern about a double recovery of medical benefits. Neither claimant, the health care provider, nor a private insurer can recover doubly under the Act.

Additionally, the Board rejected LIGA's contention that the other insurance carriers waived their insurance coverage defenses, noting that the carriers did not act in concert to defend Employer, but rather each defended the specific periods of time for which it covered Employer's risk under the Act; and each maintained separate counsel from Employer. The Board declined to address LIGA's objection to liability for attorney's fees and a § 14(f) assessment, as the former argument had not been raised before the ALJ and the latter had not been properly appealed. Finally, the Board did not address LIGA's assertion that it cannot be held liable for a § 14(e) assessment as no benefits were due Claimant for the period to which the assessment would apply.

**[Topic 8.2.4.7 Factors affecting/not affecting employer's burden; Topic 2.2.16 Occupational Diseases and the Responsible Employer/Carrier; Topic 70.10 Insolvency of Last Responsible Employer or Carrier]**

***G.M. v. P & O Ports Louisiana, Inc.*, __ BRBS __, BRB No. 08-0780 (May 21, 2009).**

The Board reversed an administrative law judge's ("ALJ") order to Employer to pay contractual short-term disability benefits to Claimant as "lost wages" pursuant to Section 49[6] of the LHWCA, holding that Claimant who is no longer medically qualified to return to his former employment is precluded by the plain terms of Section 49 from recovering for "loss of wages arising out of discrimination." 33 U.S.C. §948a; *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988).

The Board reasoned that under Section 49 and Section 702.271(d) of the regulations, the remedy for a claimant who is discriminated against is the reinstatement of his job and back wages, provided that he is qualified to perform this job. *See also* 20 C.F.R. §702.27l(a)(2). In accordance with Section 702.272(a), the question of whether an employee is "qualified" is one of medical restrictions, physical capabilities, and the requirements of the job. A claimant's ability to perform the duties of his job and be permanently reinstated is properly determined after he reaches maximum medical improvement ("MMI"). *See Monta v. Navy Exchange Serv. Command*, 39 BRBS 104, 111 (2005).[7]

The Board's holding obviated the need to address the parties' dispute as to whether the ALJ had the authority to order Employer to pay Claimant short-term disability benefits provided by his employment contract under any provision of the Act, or whether such benefits are a substitute for lost wages.

**[Topic 48a.2.4 Penalty for Violation of Section 48a]**

***N.T. v. Newport News Shipbuilding and Dry Dock Co.*, __ BRBS __, BRB No. 08-0773A (May 27, 2009).**

The Board held that treatment necessary for spinal manipulation to treat a diagnosed subluxation is compensable.

---

[6] The Board continues to refer to Section 48a as "Section 49" based on its designation prior to the 1984 amendments to the LHWCA.

[7] In *Monta*, the Board affirmed the ALJ's decision to reinstate claimant's employment status under Section 49 even though she remained temporarily totally disabled, while postponing a determination of her capability to perform the job duties until after she reached MMI.

Because Dr. Georgalas was a chiropractor who treated Claimant for a subluxation of the spine, she was a "physician" under Section 702.404, and employer was liable for reasonable treatment provided or prescribed by her as necessary for her spinal manipulations to treat Claimant's subluxation. Section 702.401(a), provides a broad definition of covered "medical care," and a variety of services and equipment have been held compensable under this section. The only difference where such care is prescribed by a chiropractor is that it must be related to the chiropractic manipulation to treat a demonstrated subluxation.

In holding Employer liable only for the actual spinal manipulations, the ALJ did not address whether her other treatment was necessary for the spinal manipulations to correct Claimant's subluxation and relied erroneously on *Bang v. Ingalls Shipbuilding*, 32 BRBS 183 (1998), as claimant in that case did not have a subluxation. Dr. Georgalas' uncontradicted testimony established that in order for a patient like Claimant with a subluxation of the spine to benefit from spinal manipulation, it is necessary to relax the patient's muscles, and that the totality of her services was reasonable and necessary for the manual manipulation of Claimants spine to treat a sublaxation.[8] Accordingly Employer was liable for such services.

**[Topic 7.3.4 Chiropractic Treatment]**

## II. Black Lung Benefits Act

### U.S. Circuit Court of Appeals

By unpublished decision in *Maynard v. Eastern Coal Co.*, Case No. 08-3909 (6th Cir. May 26, 2009)(unpub.), the court upheld a denial of benefits based on Claimant's failure to demonstrate the presence of complicated coal workers' pneumoconiosis, or that he was totally disabled due to simple coal workers' pneumoconiosis. With regard to the issue of complicated pneumoconiosis, the court stated:

> While all of the physicians who opined in this case agreed that Maynard's x-rays showed the presence of significant abnormalities in the lungs, some believed that this indicated simple CWP only, some believed it indicated complicated CWP, and some believed it was not CWP at all, but was the result of

[8] The Board noted with approval an ALJ's reasoning in *Voytovich v. C & C Marine Maint. Co.*, 39 BRBS 63(ALJ) (2005).

> scarring from a prior, healed granulomatous disease, such as tuberculosis, sarcoidosis, or histoplasmosis.

*Slip op.* at 3. Based on qualifications of the physicians, the opinions of two medical experts who diagnosed complicated coal workers' pneumoconiosis were outweighed by the contrary opinions that "recognized prior granulomatous disease as a possible explanation for (the miner's) abnormal x-rays."

With regard to weighing treating physicians' opinions, the court held that "[t]reating physicians are not entitled to automatic deference in black lung cases but may be given greater deference if their extended relationship with the patient makes their opinions more persuasive in the context of a given case." In affirming the administrative law judge's decision to discount the treating physicians' opinions, the court stated:

> Judge Levin noted that Dr. Nadorra, who diagnosed (Claimant) with complicated CWP in 2000, offered no basis for that diagnosis, presented no specialty credentials, and may have relied on an inaccurate smoking history. These are valid reasons for discounting Dr. Nadorra's opinion. Judge Levin's only explanation for discounting Dr. Younes's opinion was his reliance on an inaccurate smoking history. Although a history of smoking apparently has no direct relation to the diagnosis of CWP, a mistake as to such a basic historical fact by a physician treating a pulmonary ailment may cast doubt on the level of Dr. Younes's familiarity with (Claimant) and may be cause to undermine the reliability of his diagnosis.

*Slip op.* at 11.

[ **complicated pneumoconiosis; weighing treating physicians' opinions** ]