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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 232 May 2011

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

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

[there are no decisions to report for this month]

B. U.S. District Courts

***Jones v. Halliburton Co.,* 2011 WL 2066621 (S.D. Texas).[2]**

The district court held that plaintiff was not barred by the Defense Base Act ("DBA") from bringing common law claims against employer (Halliburton d/b/a KBR) for injuries sustained when she was allegedly raped in employer-provided housing while stationed in Iraq.

The court first determined that the injuries did not arise out of the "zone of special danger" created by obligations or conditions of plaintiff's employment, and therefore were not covered by the DBA; KBR's contrary arguments were spurious. The court explained that it is the "particular condition or obligation of employment overseas (such as environmentally

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

[2] Only the Westlaw citation is currently available. An earlier Fifth Circuit decision in this case was summarized in the September 2009 issue of the Recent Significant Decisions Monthly Digest.

harsh working conditions or restriction to the company cafeteria and dental services), not merely the fact of overseas employment" which create the zone of special danger. Slip op. at 8. Therefore, defendants could not rely on the undisputed fact that Iraq is a dangerous place to prove that any injury occurred within the zone of special danger. Further, the special danger must give rise to the particular type of injury suffered by the employee. The court held that defendants provided no evidence that plaintiff's work overseas in itself created a zone of special danger for being sexually assaulted by her coworkers. Notably, the Employment Agreement signed by plaintiff established standards of personal conduct for KBR employees which prohibited sexual harassment. This further supported the assertion that plaintiff's work in Iraq under the Employment Agreement did not place her in the zone of special danger to be sexually harassed.

The Court also rejected the claim that the requirement that plaintiff live in the employer-provided housing created the zone of special danger out of which the assault arose. With regard to workers' compensation for resident-employees, the law in the Fifth Circuit requires one of the following two features be present for employees to be compensated for injuries sustained while being required to live on the premises: 1) the claimant is continuously on call, or 2) the source of the injury is a risk distinctly associated with the conditions under which the claimant lived because of the requirement of remaining on the premises. Slip op. at 9-10, citing a Fifth Circuit order in this case (quoting 2 Larson & Lex. K. Larson, Larson's Worker's Compensation Law § 24.01, 24-02 (2009). Here, the plaintiff was not continuously on call, and the court has held that sexual assault is not a risk distinctly associated with living in employer-provided housing overseas.

Also, plaintiff's limited opportunities for social and recreational activities during her employment did not create a zone of special danger for this situation. Here, the incident occurred while she was in the barracks and not while engaged in social or recreational activities. Even if it occurred directly before or after she was engaged in recreational activities, only injuries reasonably and foreseeably resulting from recreational activities are compensable under the LHWCA. *Kalama Svcs., Inc. v. Dir., OWCP*, 354 F.3d 1085 (9th Cir. 2004). The sexual assault of the plaintiff fell outside of the zone of special danger because she was not engaging in any activity that would make her injury reasonable or foreseeable. Also, her assault was not a voluntary recreational activity in which she chose to engage, which makes this case distinguishable from *Kalama*, where "the presence of social clubs serving alcohol to employees who experience lengthy periods of isolation on atoll create[d] a foreseeable risk that horseplay might take place from time to time." 345 F.3d at 1092.

With respect to Jones' intentional tort claims, KBR contended that they should be barred because only proof of employer's specific intent to injure will allow a plaintiff to circumvent the DBA's exclusivity provision. Because the court held that Jones' injuries did not arise out of or in the course of her employment, the court did not analyze defendants' claims that her intentional tort claims are not supported by defendants' specific intent to inflict an injury on her. The court held that the exclusivity provisions of the DBA did not apply to any of plaintiff's common law claims, including the intentional tort claims.

Defendants also argued that plaintiff's injuries fell within the scope of the DBA because they were "caused by the willful act of a third person directed against and employee because of her employment." 33 U.S.C. § 902(2). The court reiterated that the injury must have been inflicted upon the plaintiff because of her employment, whether or not it was caused by a willful act of a third person. Since defendants cited no case law or evidence on this point, the injuries did not fall within the DBA.

Also, plaintiff's receipt of compensation under the DBA did not bar her from proceeding on her common law claims against defendants. In prior administrative proceedings, plaintiff had stated that the LHWCA applied to her claim, and had received DBA compensation for this injury. The court first held that the issue of whether Jones' injuries arose out of or in the course of her employment decided before the OWCP did not have preclusive effect and did not prevent her from litigating the same issue before the district court. This is because it was unclear from the record whether or not the issue was actually litigated, which is necessary for collateral estoppels to apply, as the issue was resolved by parties' stipulations rather than judicial resolution. *Ariz. V. Cal.,* 530 U.S. 393, 415 (2000). Further, the fact that plaintiff received compensation under the DBA does not bar her from proceeding on her common law claims. Even though the DBA provides her with her only remedy if her injuries are covered by the DBA, the court did not defer to the OWCP's decision of whether or not the injuries are covered. The court independently decided that Jones' injuries did not arise out of or in the scope of her employment, and therefore her DBA compensation did not bar her from compensation for her common law claims.

[Topic 2.2.2 INJURY - Arising Out of Employment; Topic 2.29 INJURY - Course of Employment; Topic 2.2.12 INJURY - Zone of Special Danger; Topic 2.2.10 INJURY - Employee's Intentional Conduct/ Willful Act of 3rd Person]

C. Benefits Review Board

***Hough v. Vimas Painting Co., Inc., et al.*, __ BRBS __ (2011).**

The Board affirmed the ALJ's finding that claimant's injury was not covered under the LHWCA. The Board initially upheld the ALJ's finding that claimant contracted histoplasmosis while working on a bridge rather than on a barge. The Board further held that claimant did not meet the status requirement because his duties as a bridge vacuumer did not constitute "maritime employment" under Section 2(3); specifically claimant's loading the barge with materials from a transport boat and while vacuuming debris from the bridge did not constitute "loading" for purposes of § 2(3).

Claimant's duties involved vacuuming debris which fell into a containment area as a result of the bridge cleaning process. The vacuum for this particular job was attached by hose to a recycler on a barge that was spudded below the bridge on the Ohio River. Bags of debris were stored on an adjacent barge in a dumpster and were to be disposed of at the end of the project. For three days, when claimant's vacuum machine was shut down for repairs, claimant worked on the barge, helping load materials needed to repair the vacuum machine onto the barge and assisting with cleaning the barge and moving debris bags from the recycler into the dumpster.

The Board initially affirmed the ALJ's finding that claimant contracted histoplasmosis -- caused by his exposure to debris containing bird droppings -- while working on a bridge and not on the barge. The Board noted that, under *Dir., OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), a worker injured on actual navigable waters while in the course of his employment on those waters is a maritime employee under § 2(3), regardless of the nature of the work being performed (unless expressly excluded from coverage). With regard to bridge workers, the Board stated that

> "[s]ince the 1972 Amendments were enacted, it has generally been held that employees engaged in bridge construction are covered by the Act only if they establish that their duties include working aboard, or loading or unloading materials from, vessels on navigable waters or that a particular bridge construction project will aid navigation. Where the employee is working from a fixed structure, such as the bridge itself, the Board has generally held such employees are not covered because bridge projects aid overland commerce and do not involve inherently maritime work."

Slip op. at 5 (citations omitted). Here, it was undisputed that claimant contracted acute histoplasmosis from his employment with employer. As claimant worked on the bridge and also spent some time on the barge, historically an uncovered situs and covered situs, respectively, it was appropriate for the ALJ to assess whether the injury occurred on a covered situs.[3] The Board reasoned that "[a]lthough Section 20(a) does not apply to the legal issues of coverage, courts have held that it may apply to the factual issues related to the coverage provisions. . . . Assuming, *arguendo,* the applicability of Section 20(a), it is employer's burden to rebut the Section 20(a) presumption with substantial evidence that claimant was not exposed to injurious stimuli on a covered situs." Slip op. at 6 (citations and footnote omitted). Claimant contended that his injury was covered under *Perini* because it was more probable that he contracted his disease while working on the barge without protective gear than on the bridge with protective gear. The Board, however, concluded that lay and medical evidence credited by the ALJ constituted substantial evidence that the injury occurred on the bridge and not the barge and, thus, was sufficient to rebut the § 20(a) presumption; thus, claimant was not covered by the Act pursuant to *Perini*.[4]

As claimant was not injured on navigable waters, he had to satisfy both the status and situs requirements in order to be covered by the Act. The Board rejected claimant's argument that he satisfied the § 2(3) status requirement because he loaded the barge with materials from the transport boat and also loaded the barge with debris that were sucked by the vacuum from the bridge and sent, through hoses, to the barge.[5] The Board stated that while Congress did not define "maritime employment," the Supreme Court has determined that the Act "cover[s] all those on the situs involved in the essential or integral elements of the loading or unloading process." *Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40, 46, 23 BRBS 96, 98(CRT) (1989); *Stowers v. Consolidated Rail Corp.,* 985 F,2d 292, 26 BRBS 155(CRT)(6th Cir.), *cert. denied,* 510 U.S. 813 (1993). The Board further reasoned that

> "[h]owever, not all 'loading' conveys coverage. In *Herb 's*

[3] The Board noted that this aspect of the case was analogous to cases involving "multi-purpose facilities" or manufacturing sites which required consideration of whether the exposure or injury occurred on covered or non-covered areas.

[4] As the BRB affirmed the ALJ's determination that claimant was not injured on the bridge, it did not address the ALJ's finding that, even if claimant contracted the disease on the barge, his presence on the barge was too insubstantial and fortuitous to convey coverage.

[5] The Board noted that the ALJ simply rejected this argument as "tenuous at best."

> *Welding, Inc. v, Gray,* 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Supreme Court addressed whether a welder who built and replaced pipelines on an offshore fixed platform was involved in maritime employment merely because he loaded and unloaded his tools and supplies from a boat. The Court acknowledged that 'maritime employment' is not limited to the occupations enumerated in Section 2(3) but stated that the term cannot be read to eliminate the requirement that there be a connection with the loading or construction of ships. That is, the Supreme Court declined to extend the definition 'beyond those actually involved in moving cargo between ship and land transportation.' Thus, the Court held that the claimant was not covered because, despite having to unload his tools, his job as a welder on a fixed platform included no tasks that were 'inherently maritime.'"

Slip op. at 11 (internal citations omitted). The Board also cited, *inter alia*, the Fifth Circuit's statement in *Munguia v. Chevron USA., Inc.*, that not all "loading" confers coverage, but rather, if (un)loading and construction are "undertaken to enable a ship to engage in maritime commerce, then the activities become 'maritime employment.'" 999 F.2d 808, 27 BRBS 103(CRT) *reh'g en banc denied,* 8 F.3d 24 (5th Cir. 1993) (claimant not covered where (un)loading supplies and tools from a boat and repairing the boat were incidental to his job as an oilfield worker), *cert. denied,* 511 U.S. 1086 (1994).

In this case, the Board concluded that claimant was not engaged in maritime employment.[6] The Board reasoned that

> "[t]he purpose of claimant's work in this case was to dispose of the debris that accumulated from the cleaning of the bridge. As with work on a fixed platform, work on a bridge is not inherently maritime. That the vacuum deposited the debris into a machine on a barge in this case was unique, as Mr. Frangopolous testified that this was the first time his company had ever used a barge to hold the bridge-cleaning equipment. Significantly. the debris was merely collected and stored on the barge until the end of the bridge cleaning project; the vacuumed debris did not 'enable' the barge to 'engage in maritime commerce.' Neither the vacuumed debris nor claimant's role in vacuuming the debris was integral to any maritime purpose. *Compare with Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT). Because claimant's work was

[6] As the BRB concluded that claimant did not meet the status requirement, it did not address whether the §3(a) situs requirement was met.

> neither maritime in nature nor integral to maritime commerce, we conclude that claimant's vacuuming of debris from the bridge does not constitute 'loading' as that term relates to coverage under the Act. *See Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 17 BRBS 78(CRT); *Munguia,* 999 F.2d at 813, 27 BRBS at 107(CRT); *Stowers,* 985 F.2d at 294, 26 BRBS at 159(CRT); *Bazemore v. Hardaway Constructors, Inc.,* 20 BRBS 23 (1987) (the claimant's duties cleaning up a storage yard, where materials used by the employer in a variety of maritime and non-maritime construction projects were stored, did not further maritime commerce in any way)."

Slip op. at 12 (footnote and additional citations omitted).

[Topic 1.3 NO SECTION 20(a) PRESUMPTION OF COVERAGE; Topic 1.6.1 SITUS — "Over Water;" Topic 1.6.2 SITUS — "Over land;" Topic 1.7.1 STATUS - "Maritime Worker" ("Maritime Employment"); 1.7.3 STATUS – Bridge Building]

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

In *Crowe v. Zeigler Coal Co.*, ___ F.3d ___, Case No. 10-2174 (7th Cir. June 1, 2011)(pub.), the court addressed handling of a defunct employer's petition for modification. This particular legal issue resulted in a "majority" opinion, concurring opinion, and dissenting opinion by the three-member panel.

Of relevance here, in 2001, an Administrative Law Judge issued an award of benefits and no appeal was taken. Within one year of the award of benefits, Zeigler Coal filed a petition for modification. In 2004, while the modification proceeding was pending before the Board, Zeigler's counsel withdrew from the case citing to the fact that Horizon Natural Resources, a successor-in-interest to Zeigler, was liquidated in bankruptcy. The Board ultimately remanded the claim to the Administrative Law Judge for further proceedings and, in February 2005, the Solicitor's office notified the Administrative Law Judge, Aetna Casualty and Surety Company, and Horizon that Aetna was the surety that could be held liable for the payment of benefits. In the letter, the Solicitor further notified Aetna that it could seek to intervene in the modification proceeding as a party in interest. Aetna did not intervene.

In 2005, the Administrative Law Judge denied benefits on remand based on the defunct Zeigler's petition for modification. Further appeals and remands ensued until the denied claim, again, was appealed to the Seventh Circuit.

The majority held that the modification proceeding should have been dismissed when Zeigler was liquidated in bankruptcy and no other party intervened as a proponent of the modification petition. The court determined that, while the regulations at 20 C.F.R. 725.360(a) and (d) do not set forth time frames for a party to intervene, the surety was on notice of its potential liability through the Solicitor's February 2005 letter:

> It is apparent to the Court that Travelers did not seek timely intervention in the modification proceeding at issue in this case. As noted, no later than February 2005, when DOL invited Aetna, the predecessor in interest of Travelers, to intervene in the proceeding, Travelers was on notice that, by virtue of the surety bond issued to Zeigler covering Mr. Crowe's claim, Travelers had an interest that might be impaired by the proceeding, were

> Travelers, as Zeigler's surety, required to pay Mr. Crowe's claim against Zeigler.

In determining whether an intervention is timely, the court noted that, "mere lapse of time" is insufficient; rather, a tribunal "must weigh the lapse of time in light of all the circumstances of the case." In particular, it must determine whether the delay prejudices the "existing parties to the case." Under these criteria, the court held that Aetna's failure to intervene in Mr. Crowe's claim did prejudice the claimant:

> For approximately three years, while the modification proceeding was artificially, and improperly, kept alive by the ALJs assigned to the matter, Mr. Crowe was obliged to defend his award of benefits against a phantom litigant.

The court concluded that it was error for the Board "to refuse to dismiss the modification proceeding" in 2004 when it was notified of Employer's liquidation. The court also held that it was error to permit Travelers, as successor surety to Aetna, to intervene in the proceeding on grounds that the intervention was untimely. As a result, the claim was remanded for reinstatement of the 2001 award of benefits.

In a concurring opinion, Circuit Judge Hamilton joined in District Judge Murphy's opinion, but wrote separately "to address a second basis for reversal that is at least as powerful as that explained by Judge Murphy." Circuit Judge Hamilton concluded that, after the 2001 award of benefits by the Administrative Law Judge was not appealed, it became a final order. When Zeigler Coal refused to pay benefits pursuant to the final order, Circuit Judge Hamilton concluded that the modification petition filed by the company does not render "justice under the Act" and should have been dismissed. He asserted that it was a mistake for the Administrative Law Judge and Board allow the modification proceeding to go forward under such circumstances:

> The mistake led the ALJ and the BRB to create incentives to encourage employers to refuse to comply with final payment orders, as required by law. Those incentives will undermine rather than 'render justice under the Act.'

Id.

Finally, Circuit Judge Ripple wrote a dissenting opinion stating that "the ALJ and the Board acted within their discretion in denying Mr. Crowe's

motion to dismiss and in permitting delayed intervention by Travelers." He stated:

> [G]iven the Act's strong preference for accuracy in benefits determinations, the ALJ did not abuse his discretion in determining that justice under the Act was served by the modification.

Circuit Judge Ripple acknowledged that the Black Lung Benefits Act and its implementing regulations "create a complicated process for adjudicating benefits claims . . .." However, he noted that, in creating the statute, "Congress deliberately prized accuracy over finality" and "[t]he statute accomplishes this task by allowing agency reexamination of claims to a degree far exceeding the norm in our judicial system."

[**consideration of a petition for modification filed by a bankrupt employer; intervention by a surety**]

B. Benefits Review Board

By published decision in *Harris v. Cannelton Industries, Inc.*, 24 B.L.R. 1-__, BRB No. 10-0420 BLA (Apr. 29, 2011), the Board held that stipulations in a claim filed prior to January 19, 2001 are not binding in a subsequent claim filed after January 19, 2001. Of importance, when the regulatory amendments were promulgated on December 20, 2000, the following language was added to the subsequent claim provision at 20 C.F.R. § 725.309(d)(4):

> [A]ny stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. § 725.309(d)(4). Counsel for the Director, OWCP and Employer's counsel maintained that, because the provision was newly added to the regulations in December 2000, it is impermissible, in a post-amendment subsequent claim, to bind a party to its stipulation in a pre-amendment claim. Here, the Board adopted the Director's and Employer's position 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.F.R. § 725.2, is not to be applied retroactively to stipulations in claims filed on or before January 19, 2001. 20 C.F.R. §§ 725.2, 725.309(d)(4)(2010).

Slip op. at 5.

[**stipulations**]