



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 263
May 2014**

Stephen L. Purcell
Chief Judge

Stephen R. Henley
Associate Chief Judge for Longshore

William S. Colwell
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**I. Longshore and Harbor Workers' Compensation Act
and Related Acts**

A. U.S. Circuit Courts of Appeals¹

[there are no decisions to report for this month]

B. Benefits Review Board

***DiCecca v. Battelle Memorial Institute*, ___ BRBS ___ (2014).**

The Board affirmed the ALJ's award of death benefits in this case arising under the Defense Base Act ("DBA"). Claimant's husband (decedent) worked for employer in a Department of Defense laboratory in Tbilisi, Georgia. Agreeing with the OWCP Director, the Board affirmed the ALJ's findings that decedent's fatal accident in an employer-provided taxi on his way to a grocery store was a foreseeable risk, incident to the obligations and conditions of his employment in Tbilisi, Georgia, and therefore was compensable under the "zone of special danger" doctrine.

In cases arising under the DBA, the Supreme Court has held that an employee may be within the course of employment, even if the injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" create a "zone of special danger" out of which the injury arises. Slip op. at 3 (quoting *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951))(additional citations omitted). Thus, an injury is covered by the statute where it results from "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen." *Id.* (quoting *O'Leary*,

¹ Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *___) pertain to the cases being summarized and refer to the Westlaw identifier.

340 U.S. at 507). However, an injury is not work-related when an employee is “thoroughly disconnected” from the service of employer. *Id.* (additional citations omitted).

Employer argued that the “zone of special danger” doctrine does not apply to this case because the types of injuries found to be employment-related under this doctrine have fallen into only the following two categories: (1) where the injury occurred during/following a reasonable recreational or social activity; and (2) where the injury occurred in a locale that presented living conditions giving rise to an increased risk of the injury sustained by the claimant. Employer further argued that because grocery shopping fits into neither category, this case is analogous to *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009), where the claimant’s injury due to the application of a cosmetic chemical peel was not within the “zone of special danger” as the activity was personal in nature.

The Board disagreed, reasoning that “[t]he injuries in the cases cited by employer were found to be employment-related not merely because they were recreational/social or due to local risks. Rather, the activities the employees engaged in were reasonable and foreseeable given the overseas conditions of their employment.” Slip op. at 4. Similarly, in *Fear*, the injury was found to be unrelated to employment not because it was personal, as opposed to recreational, but because it was not foreseeable in light of the conditions and obligations of the claimant’s employment in Kuwait. The Board has explained that the “‘zone of special danger’ [is] the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant.” Slip op. at 4 (collecting cases).

In this case, the Board reasoned that

“[the ALJ] addressed the proper inquiry under *O’Leary*, 340 U.S. at 507, focusing on the foreseeability of the injury given the conditions and obligations of employment in a dangerous locale. Decedent lived and worked in a dangerous locale as evidenced by employer’s payment of a hardship allowance/danger pay. Employer provided its employees taxi vouchers each month for use with a specific cab company that utilized Mercedes Benz automobiles. Employer permitted its employees to utilize the cab service for any reason within a certain radius. From this evidence, the [ALJ] rationally concluded that, ‘[t]he conditions [d]ecedent found himself in as a result of his employment . . . made grocery shopping a necessity’ and that ‘it was foreseeable that employees would use the [employer-paid taxi] service in order to travel to a grocery store.’ Indeed, it is entirely foreseeable that an employee will need to purchase groceries, and, given the taxi vouchers provided by employer, also entirely foreseeable that decedent would take a taxi to the grocery store. The fatal accident, thus, also was a foreseeable, ‘if not foreseen,’ consequence of riding in a taxi in a place where the dangers of automobile travel were anticipated by employer. Although employer attempted to mitigate the danger, employer has not cited any circumstances that could warrant a legal conclusion that decedent’s activity was not rooted in the conditions of his employment or was ‘thoroughly disconnected’ from the service of employer.”

Slip op. at ____ (citations and footnote omitted).

[Topic 60.2.7 LONGSHORE ACT EXTENSIONS – DEFENSE BASE ACT - Course and Scope of Employment, “Zone of Special Danger”]

***Richardson v. Huntington Ingalls, Inc.*, __ BRBS __ (2014).**

The Board affirmed the ALJ's approval of a settlement application over the objections of the OWCP Director, holding that the ALJ reasonably found the settlement to be adequate.

The employer initially paid the claimant temporary total disability benefits for a shoulder injury, which it later converted to partial disability benefits.² The parties eventually executed a settlement agreement, which was disapproved by the District Director on adequacy grounds. After the case was referred to the OALJ, the parties submitted an amended settlement which provided for \$140,500 in disability compensation (\$500 more than the original amount), \$10,000 in future medical costs, plus attorney's fees not to exceed \$10,000.

Both parties and the OWCP Director submitted briefs to the ALJ. Claimant urged approval of the settlement on the grounds that: (1) she was concerned that she might fail to reach her actuarial age and, if so, her heirs would lose the benefit of the remainder of any lump sum; (2) a lump sum payment would help her support her family and meet many current debts and obligations; (3) since she has returned to work, any increase in pay would decrease her future benefits; and (4) she was fully aware of the full value of her claim. The employer asserted that, if the case went to hearing, it would be able to substantiate a reduction in benefits. The OWCP Director urged the ALJ to reject the settlement because the parties had failed to establish its adequacy. The claimant's post-injury wage (\$7.25/hour) was consistent with the employer's vocational evidence. Applying that earning capacity and using the claimant's actuarial life expectancy and an 8% discount rate, the Director calculated a minimum adequate amount of \$306,000. The Director further asserted that the claimant did not provide sufficiently specific information pertaining to her personal circumstances to justify the discounted settlement amount; if such information was of a "sensitive nature," she could communicate it by telephone to the District Director and shield it from unnecessary disclosure.

The ALJ was not persuaded by the Director's contentions and he approved the settlement. He stated that "[t]he ultimate issue here involves the statutory role of the Department of Labor (DOL) in administering claims under the Act and the tension between the paternalistic role taken by the DOL and the normal assumption that counsel advising claimants are competent and ethical." Order at 4. The ALJ rejected the Director's position that, as a statutory second guesser, the Department must substitute its judgment for that of the claimant and her attorney, and he concluded that "even in its paternalistic context, the Act does afford a presumption of effective assistance of counsel." *Id.* at 6. He reasoned that, by providing for automatic approval of any settlement application by a represented claimant, if no action is taken within 30 days, Section 8(i)(1) "clearly indicates that applications submitted by counsel are entitled to some level of deference not due those submitted by *pro se* claimants." *Id.* at 5. The ALJ further observed that second-guessing decisions claimant makes on the advice of counsel implies that counsel is incompetent or unethical. In discussing the standard of review to be applied by the U.S. Department of Labor in reviewing settlements, the ALJ contrasted an abuse of discretion standard with *de novo* review that would allow the DOL to exercise veto power over the choices made by a claimant on the advice of counsel. The ALJ noted several concerns associated with the latter approach. In particular, the DOL normally does not have the same information as the claimant and his or her attorney. While the general reasons given by the claimant in this case could be offered in support of virtually every settlement, revealing more specific

² *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 107(ALJ), 2013-LHC-01317 (June 24, 2013 "Order Approving Settlement").

information may cause an employer to take money off the table. The ALJ added that shielding such information from employer with *ex parte* communications is not an option for an ALJ. He further observed that assessment of the litigation risk and expected value is extremely subjective, and that “[t]he individuals with the best assessment of litigation risk are Claimant and her counsel and, as with the life expectancy and future earnings issue, I do not believe Claimant or her counsel are obliged to explain to the Department the detailed specifics of the assessment of why she thinks she might lose her case.” *Id.* at 6. The ALJ concluded that the settlement application was submitted by claimant on the advice of counsel after consideration of the risks of litigation and her personal circumstances, and he approved it as adequate and not procured by duress. The Director appealed.

Noting that the ALJ’s approval of a settlement is reviewed under an abuse of discretion standard, the Board affirmed the ALJ’s order. The Board addressed and rejected the arguments advanced by the Director in support of his position that the settlement is inadequate; in so doing, it rejected the Director’s interpretation of *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), controlling precedent in this case arising in the Fifth Circuit. The Board initially rejected the Director’s contention that the ALJ erred in deferring to claimant’s counsel as he was required to independently assess adequacy, regardless of claimant’s representation by counsel. It also rejected the Director’s related contention that the ALJ could not properly distinguish between represented and unrepresented claimants in determining the amount of specific information necessary to demonstrate adequacy. The Board concluded that the ALJ reasonably determined that the provision in the statute, 33 U.S.C.S. § 908(i)(1), and regulation, 20 C.F.R. § 702.243(b), which deems a counsel-negotiated settlement “approved” effectively includes a presumption that counsel is competent and ethical. Consistent with this provision, the ALJ held that a represented claimant is not required to substantiate the reasons stated for the compromise with the same specificity as might be required of an unrepresented claimant; general assertions may be sufficient if the claimant is represented by counsel who is presumed to be competent and ethical. The Board also noted the ALJ’s assessment that claimant and her counsel were in the best position to assess her risks of litigation. The Director has not shown that the ALJ’s interpretation is unreasonable or inconsistent with *Nordahl*. The Board concluded that

“[a]s claimant is represented by counsel who explained the pros and cons of her choices, and as the Act contains an automatic approval provision for settlements when claimants have legal representation, absent a specific disapproval of the settlement, it was reasonable for the [ALJ] to conclude that claimant is entitled to rely on the advice of her attorney. Thus, the [ALJ] did not abuse his discretion in giving weight to the opinions of claimant and her counsel when ascertaining the settlement’s adequacy.”

Richardson, ___ BRBS ___, slip op. at 9 (citation omitted).³

Next, the Board rejected the Director’s “primary” contention that the ALJ was required to perform an actuarial analysis to arrive at a starting point for assessing adequacy. While the court in *Nordahl* noted that determination of adequacy largely depends on actuarial tables, the regulations and case law it cited do not support this statement; e.g.,

³ The BRB contrasted this holding with *Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010) (ALJ summarily approved settlement without discussing whether amount for future medical benefits was adequate; BRB vacated and remanded). The BRB noted that when medical benefits are involved, adequacy in § 702.243(f) specifically requires ascertaining the cost and necessity of future medical benefits. *Id.*, slip op. at 9-10, n.11. Here, the Director did not challenge the settlement provisions pertaining to medical benefits and attorney’s fee.

only § 702.243(g) mentions actuarial tables and, then, only under certain circumstances not applicable in this case. Further, the court's statements "requiring" an actuarial analysis were non-binding *dicta* and were not applied in addressing adequacy.

Finally, the Board rejected the Director's assertion that the parties did not provide sufficient evidence for determining adequacy. The Director asserted that claimant's concerns regarding early demise and possible increase in earnings were unsupported by facts; and that claimant's reason for wanting a lump sum to help her pay debts might indicate that she agreed to the settlement amount under financial duress, especially because the type and amount of those debts were not specified. The Board observed that the settlement agreement addressed the regulatory factors for determining adequacy set forth in § 702.243(f), including probability of success if the case were litigated. The ALJ properly determined that there was risk to claimant in proceeding with litigation; he discussed employer's evidence indicating claimant's physical evaluation efforts were sub-maximal, as well as employer's assertions that it would have developed evidence showing that claimant could return to her usual work or had fewer restrictions, or that additional employment opportunities were available. The Board concluded that

"[i]n light of employer's litigation strategy, claimant's acknowledgements thereof, and the fact that the [ALJ] found them credible, it is unreasonable for the Director to make judgments on the evidence as it stands to presume that claimant's success is assured and that the risk to claimant of litigating her claim is slight. The [ALJ] also noted claimant's concerns about not living until the expected age, having debts to pay, and earning increased wages in the future that would decrease her entitlement to benefits, and he rejected the Director's assertions that claimant's statements cannot be accepted without further 'specific substantiation' or some 'confidential concession.' He found that claimant and her attorney are in the best position to assess her litigation risks, her life expectancy, and her future earnings, and that neither is 'obligated to explain to the Department the detailed specifics of the assessment of why she thinks she might lose her case.' The [ALJ's] conclusion is rational.

As employer and claimant argue, the Director fails to recognize that the settlement here is a compromise between the parties that acknowledged their disputed issues – it is not employer's agreement to pay claimant a discounted portion of what claimant could obtain were she to succeed on every aspect of her claim and live to or beyond expectations. Claimant and her attorney have assessed the situation and arrived at a mutually acceptable solution, the parties' settlement addressed the factors required by the regulation, and the [ALJ] accepted claimant's generalized reasons for her decision, considering the risk of litigation."

Slip op. at 13-14 (citations to record omitted).

The Board thus concluded that the ALJ reasonably found the settlement to be adequate and not procured by duress, and affirmed the ALJ's approval of the settlement.

[Topic 8.10.1 SECTION 8(i) SETTLEMENTS - Generally; Topic 8.10.3 SECTION 8(i) SETTLEMENTS - Structure of Settlement; Topic 8.10.5 SECTION 8(i) SETTLEMENTS - Approval]

II. Black Lung Benefits Act

[there are no decisions to report for this month]