U.S. Department of Labor

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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 199 June 2008

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I. Longshore

Benefits Review Board

In *E.B. v. Atlantico, Inc.*, ___ B.R.B.S. ___, BRB Nos. 07-0906 and 07-0906A (June 20, 2008), the Board affirmed the administrative law judge's finding that W.F. Magann Corporation was not a "borrowing employer" liable for the payment of benefits to Claimant under the Act based on criteria set forth in *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000). Specifically, the judge found that Atlantico was properly designated as the employer responsible for the payment of benefits because (1) Atlantico's superintendent supervised Claimant's activities, (2) Claimant's work was solely the work of Atlantico and was performed pursuant to a contract between Atlantico and the Navy, (3) Claimant's place of employment was owned by the Navy, (4) Claimant was not paid by Magann, (5) Magann did not make the decision to hire Claimant and Magann did not have authority to fire Claimant, and (6) disputes arising between Atlantico and Magann were resolved by the Navy.

On the other hand, the Board held that, in his final decision in the claim, it was error for the judge to dismiss four individuals identified by the Director as Atlantico's corporate officers since the judge did not notify the parties that "he would not be bound by his prior orders (in the claim) denying the motions to dismiss the officers." Citing to 20 C.F.R. § 702.336(b), the Board held that the judge was obligated to afford the parties "not less than ten days notice of the hearing on such new issue." The Board noted that the judge had

previously denied motions to dismiss the officers in two prior orders and "the parties were entitled to reasonable notice that he intended to reconsider the individuals' status as proper parties to this claim."

As a result, the Board remanded the claim for the judge to determine whether the four individuals at issue were officers of Atlantico and, if so, whether each of the individuals is "personally liable, jointly with the corporation, for claimant's benefits pursuant to Section 38 of the Act."

[**"borrowing employer"; liability of corporate officers, providing adequate notice of issue to be decided**]

In *B.E. v. Electric Boat Corp.*, ___ B.R.B.S. ___, Case No. 07-1011 (June 20, 2008), the administrative law judge's dismissal of a claim on summary decision was affirmed where Claimant, who worked as a janitor for Employer and suffered an injury after slipping and falling on ice at work, was not a "covered employee" under the Act.

Initially, Claimant argued that Employer was equitably estopped from "from asserting lack of coverage as a defense" on grounds that it had made benefits payments to her under the Act. The judge disagreed to state that Claimant had not satisfied the criteria for invoking equitable estoppel. The Board affirmed the judge's ruling noting that Claimant failed to sustain her burden of producing evidence that she "detrimentally relied on employer's payments under the Act" because Claimant (1) filed an initial claim for this injury under the state law, and (2) she did not "submit any evidence that she would be precluded from pursuing the state claim in the event she is not entitled to benefits under the Act."

The judge also correctly held that, as a matter of law, Claimant was not a "covered employee" because her janitorial duties were not essential to the shipbuilding process. Citing to the definition of "employee" under Section 2(3) of the Act, the Board noted that Claimant's job duties were to clean the Employer's offices, cafeteria, and bathrooms. The Board concluded:

> Although claimant cleans facilities used by production workers, the evidence establishes that she does not clean or maintain any shipbuilding equipment or the production areas around the equipment.

Because a failure to perform Claimant's janitorial job would not "disrupt the shipbuilding process," her job was not integral to Employer's shipbuilding operation and she was not a "covered employee" under the Act.

[**"covered employee," defined**]

In *A.M. v. Electric Boat Corp.*, ___ B.R.B.S. ___, BRB No. 07-0791 (June 18, 2008), the Board reversed the district director's denial of attorney's fees on grounds that, pursuant to 33 U.S.C. § 928(a), Employer became liable for the attorney's fees when it did not pay compensation to Claimant within 30 days of its receipt of the claim from the district director's office. The Board noted:

> . . . claimant filed his claim for benefits on January 22, 2002, employer received written notification of the claim from the district director on February 6, 2002, and filed its notice of controversion on February 7, 2002. Employer ultimately paid scheduled awards of permanent partial disability benefits on October 13, 2007, and a related fee as well as temporary total disability and medical benefits in 2007. Under these circumstances, Section 28(a) must be applied to the entire claim. (citations omitted).

Slip op. at 7.

Consequently, the Board found Employer liable for the payment of attorney's fees. Even though Employer did not deny Claimant medical treatment at any time in the claim, it did file the 2002 controversion of Claimant's entitlement to disability compensation, which was sufficient to trigger Section 28(a) of the Act.

[**liability for attorney's fees, controverting disability benefits**]

In *V.M. v. Cascade General, Inc.*, ___ B.R.B.S. ___, BRB Nos. 07-0798 and 07-0798A (June 26, 2008), the Board affirmed the administrative law judge's denial of a claim for death benefits as time-barred under 33 U.S.C. § 913(a). The judge determined that Claimant "was aware of the alleged relationship between decedent's knee injury and his death as of April 10, 2002, when she learned of his fatal alcohol-related car crash earlier that day." Specifically, the judge relied on Claimant's deposition testimony and affidavit and found the

evidence "reflected claimant's personal opinion, as of the time of decedent's death, that there was a relationship between decedent's knee injury that caused his loss of employment, his subsequent drinking problem, and his alcohol-related fatal car accident."

Since Claimant filed a claim more than one year after the accident, the Board agreed with the judge that it was time-barred under Section 13(a) unless circumstances established a case for statutory or equitable tolling. Here, the judge concluded that Claimant was not mentally incompetent such that Section 13(c) would not be invoked to toll the limitations period and he did not find a basis for applying equitable tolling. In this vein, the Board rejected Claimant's argument "that she could not be found to have possessed the requisite awareness until she consulted her current attorney and was advised of the potential compensability of decedent's death under the Act." The Board emphasized that Section 13(a) requires only awareness of a causal link between death and employment; it does not require that Claimant also "recognize that this relationship supports a potential claim for death benefits under the Act."

[**Section 13(a), time-barred death claim**]

In *N.R. v. Halliburton Services,* ___ B.R.B.S. ___, BRB No. 07-0810 (June 30, 2008) (J. McGranery, dissenting), a case arising under the Defense Base Act extension at 42 U.S.C. § 1561 (DBA), the Board reversed the administrative law judge's finding that Claimant's injuries were not compensable because they fell outside the "zone of special danger" created by his employment. Here, the judge determined that, because Claimant's injuries were sustained as the result of an altercation he started while working for Employer in Afghanistan, then Claimant could not avail himself of benefits under the DBA. In particular, the judge found that Claimant willfully and deliberately refused to comply with lawful instructions of the Military Police (MPs) and he improperly hindered their efforts to clothe him in protective body armour for off-base travel. Having found Claimant at fault, the judge denied his claim.

The Board agreed with the judge that Claimant was at fault in starting the altercation with MPs that led to his injuries, but held "those considerations are not relevant under the Act." It cited to 33 U.S.C. § 904(b), which provides that "compensation shall be payable irrespective of fault as a cause for the injury."

The judge also held that injuries sustained by Claimant were not work-related; rather, he emphasized that Claimant was injured by MPs and not Employer. The Board held that this was irrelevant and stated:

> The specific purpose of the zone of special danger doctrine is to extend coverage in overseas employment such that considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment.

Slip op. at 8. As a result, the Board concluded that "an employer's direct involvement in the injury-causing accident is not necessary for any injury to fall within the zone of special danger." The Board concluded that, because "the dispute leading to claimant's injuries had its genesis in his employment, we hold, as a matter of law, that claimant's injuries fall within the zone of special danger."

[**"zone of special danger" under the Defense Base Act**]

In *L.D. v. Northrop Grummon Ship Systems, Inc.*, ___ B.R.B.S. ___, BRB No. 07-0963 (June 20, 2008) (on recon.), the Board reiterated its holding that, after the district director refers a claim to the Office of Administrative Law Judges (OALJ), then s/he does not have authority to issue an order suspending Claimant's compensation. Here, after referral of the claim to the OALJ, the district director issued an order suspending Claimant's compensation on grounds that Claimant refused to attend a scheduled medical examination. In vacating the district director's order, the Board stated that "only the entity before whom the case is pending may issue an order suspending compensation."

[**authority of district director to suspend benefits**]

In M.M. v. Universal Maritime APM Terminals, ___ B.R.B.S. ___, BRB Nos. 08-0213 and 08-0213A (June 27, 2008), the Board rejected Employer’s motion to dismiss the appeal of an injured worker who died prior to filing of the appeal. The widow petitioned the Board to allow her to be substituted as the “claimant” on behalf of the decedent’s estate.

Citing to Section 19(f) of the Act, the Board concluded that "claims under the Act may continue following the death of an injured employee and are not abated." Moreover, the Board cited to Rule 43(a)(2) of the Federal Rules of Appellate Procedure to note that, while it was "undisputed that decedent's counsel filed a timely appeal with the Board" after his client died, under Rule 43(a)(2) "this is a permissible action" to preserve the estate's rights. Consequently, the Board allowed for substitution of the widow to pursue the appeal on behalf of the decedent's estate.

[**filing appeal after death of injured worker held proper**]

II. Black Lung Benefits Act

Benefits Review Board

In *K.J.M. v. Clinchfield Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0655 BLA (June 30, 2008), the Board adopted the Director's position and held that, for miners over 71 years of age, the table values of Appendix B for a 71 year old miner should be used to determine whether the study is qualifying. The Board reasoned, "[i]n the absence of a revision to Appendix B to account for older miners, we are persuaded that the Director has presented a reasonable method for resolving the problem of the table values ending at age 71." However, the Board also held that the opposing party must be allowed to submit evidence to challenge whether the test establishes total disability under the circumstances.

Thus, while the Board remanded the claim and instructed the judge to utilize the values for a 71 year old miner at Appendix B to determine whether the 75 year old Claimant's study was qualifying, the Board also instructed the judge to "reopen the record to allow employer to submit evidence . . . indicating that the ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling respiratory impairment."

In this case, Employer proposed on appeal that the "Knudson formula" be used for this miner's testing. According to Employer, the formula provides that the predicted normal FEV_1 is 0.1321 x height (in inches) – 0.0270 x age (in years) – 4.203." The threshold FEV_1 is then calculated by multiplying the predicted normal value by 0.60. The Board noted that the tables at Appendix B were derived using a

formula contained in the published study by R.J. Knudson and others entitled, "The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age," 113 Am. Rev. Resp. Dis. 587-660 (May 1976).

Thus, the Board directed that the record be reopened by the judge on remand to address this evidence from Employer. Moreover, although this claim was not governed by the amended regulations at 20 C.F.R. § 725.414 (2008), even if the amendments applied, the Board noted that Employer's proffered evidence would be admissible under the "rebuttal" provisions at 20 C.F.R. § 725.414(a)(2)(ii) and (a)(3)(ii) (2008).

[**pulmonary function study values for miners over 71 years of age**]

In *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-___, BRB Nos. 07-0649 BLA and 07-0649 BLA-A (Apr. 30, 2008)[1], the Board held that a petition for modification may be withdrawn under 20 C.F.R. § 725.306 at any time before a decision becomes "effective." Here, the miner filed a petition for modification in 2001, after the Board affirmed the denial of benefits in his first claim on October 18, 2000. Subsequently, the miner sought withdrawal of the petition. Adopting the Director's position, the Board held that the petition could be withdrawn as there was no effective decision on the petition:

> Although the Director agrees that the August 2001 application constituted a modification request, the Director also asserts that the modification request was properly withdrawn by claimant. The Director contends that a withdrawn modification request is treated in a manner similar to a withdrawn claim, insofar as it must be considered never to have been filed. *See* 20 C.F.R. § 725.306(b).

Citing to *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002) (holding a claim may be withdrawn before a denial becomes effective), the Board held that, since the district director in this case had not issued a decision regarding the 2001 modification petition prior to receiving a letter from Claimant seeking its withdrawal, it was

[1] The decision was not received by this Office, or available on the Board's website, until this month.

proper to allow withdrawal of the petition for modification. The Board concluded that the 2001 petition would be "treated as if it were never filed."

With regard to evidence submitted in conjunction with the 2001 petition, Employer argued that such evidence should automatically be part of the record for consideration in any subsequent proceeding. The Board disagreed and held that "evidence developed in conjunction with the August 2001 application must be treated as if it had never been filed, and is not part of the record unless the parties choose to specifically designate that evidence under Section 725.414."

The Board then turned to the miner's 2003 application for benefits. Because the petition for modification was withdrawn, the 2003 claim was filed more than one year after the Board's October 2000 decision denying the miner's first claim such that it was governed by the provisions at 20 C.F.R. § 725.309 (2008).

Employer challenged whether the 2003 claim was timely filed under 20 C.F.R. § 725.308 and *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). The Board noted that, under *Kirk*, the limitations period is triggered by "the reasoned opinion of a medical professional." The Board then upheld the administrative law judge's finding that Dr. Baker's 1994 opinion was "unreasoned" due to inconsistent disability findings and Dr. Baker's failure to explain the basis for his opinion. As a result, the opinion was insufficiently reasoned to trigger running of the limitations period such that the miner's claim was timely filed.

[**withdrawal of petition for modification; timeliness of subsequent claim**]

In *D.S. v. Ramey Coal Co.*, 24 B.L.R. 1-___, BRB No. 07-0789 BLA (June 25, 2008), the Board held that it was error for the administrative law judge to decline to consider Employer's petition for modification on grounds that Employer failed to establish "good cause" for its untimely challenge to the district director's finding of entitlement. Citing to 20 C.F.R. § 725.412(b) (2008), the Board stated to the contrary that, if an Employer does not submit a statement *accepting* Claimant's entitlement to benefits within 30 days of the district director's award, then Employer is deemed to have *contested* the award of benefits.

As Employer did not submit a statement accepting Claimant's entitlement in this case, then the Board concluded:

> Employer is entitled to *de novo* consideration of its modification request by the administrative law judge, and new evidence may be admitted into the record, subject to evidentiary limitations (citations omitted). The Director correctly notes that as the proponent of an order terminating an award of benefits, Employer now bears the burden of disproving at least one element of entitlement.

Slip op. at 4 (emphasis added). However, in light of *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007), the Board also directed the judge to consider Employer's diligence and motive as well as the need for accuracy in determining whether to entertain Employer's modification petition.

[**Employer's petition for modification, consideration of**]