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 # 264
June 2014

Stephen L. Purcell
Chief Judge

Stephen R. Henley
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

James P. Racine
Attorney-Advisor

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

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

[***Ed. Note:*** The following unpublished decision is included for informational purposes only].

***Global Management Enterprises, LLC v. Commerce & Industry Insurance Co.*, __ Fed.Appx. __, 2014 WL 2810005 (5th Cir. 2014)(unpub.)**

The Fifth Circuit held that the site of the claimant's injury was not customarily used for longshore work, and thus was not a covered "situs" under § 3(a) of the LHWCA; remote island beach on which claimant was injured when gathering oil spill-related debris had no structures, and while debris-containing bags were loaded onto truck for daily transport to vessel for removal, the beach and the vessel's dock were not interconnected parts of a larger area used in longshore activity, but were discrete parts of the island about half-mile apart.

Following the *Deepwater Horizon* oil spill, employer (Global) hired workers to assist with clean-up efforts in and around the Gulf of Mexico. Global employee Librado De La Cruz was allegedly injured while lifting a bag of oil-laden sand that would later be loaded onto a truck and transferred to a vessel for removal. It was undisputed that the employee spent up to two hours actively loading and unloading the vessel at the pier, and six or seven hours cleaning the beaches. At the time of the incident, he was working on a beach located a few feet from Gulf waters and around a half-mile from the pier at which the vessel was docked.

Global's workers' compensation carrier (Chartis) initially accepted De La Cruz's workers' compensation claim and began payment of benefits. De La Cruz also applied for benefits under the LHWCA, but ultimately withdrew his claim such that the question of coverage was never adjudicated by the Department of Labor. Nevertheless, Chartis ceased workers' compensation payments on the ground that the claim fell within the insurance

[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.

policy's exclusion for work subject to the LHWCA. Global brought action against Chartis for breach of contract, negligence, and bad faith, and the district court entered summary judgment in favor of Chartis. Global appealed.

The Fifth Circuit reversed the district court's summary judgment, based on its finding that the site of the injury was not covered by the LHWCA,[2] and thus the policy's exclusion for work subject to the LHWCA did not apply. Under § 3(a) of the LHWCA, benefits under the Act extend only to "injur[ies] occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." The court reasoned that, for a worksite to be reached by the LHWCA, it must (1) adjoin navigable waters; and (2) customarily be used by an employer to facilitate one of the maritime activities listed in § 3(a). Here, only the second element was in dispute.

The court concluded that the beach upon which the employee was allegedly injured is not a site customarily used for longshore work. There were no structures on the beach, which was located on a remote island, and there was no evidence that the beach had ever been used by longshoremen. Further, Global's crews did not work in any longshore capacity there; rather, they gathered spill-related debris into bags, which were then loaded onto truck for daily transport to vessel for removal.

Chartis argued, nevertheless, that the beach's customary use should be determined in light of the fact that, on a daily basis, the Global's crew would drive back to the pier and assist the sailors in loading the bags onto the vessel. The court, however, rejected Chartis' contention that the beach and the pier together serve as a single area customarily used for longshore activities. In concluding that the beach and dock are not interconnected parts of a larger area used to facilitate longshore activity, the court discussed the relevant case law and reasoned that:

> "[f]irst, the beach and dock did not compose a single contiguous entity. Undisputed testimony indicates that the pier and beach were around half a mile apart, and were rendered visually and functionally discrete by the island's geography. The workers used vehicles to travel from the pier to each day's worksite. So both interconnectedness and proximity are lacking. Moreover, to whatever extent we might conceive of the beach and the dock as a single locus, that broad area was not dedicated to longshore work. Instead, the overarching objective of the enterprise was the restoration of the island. The workmen would clean a different beachfront area each day. Any tangential relationship between the recovery effort and the transport vessel is insufficient to convert the entire island (or its discrete parts) into a single longshore facility of some kind. *See* [*Depot Services v. Worker's Compensation Programs,* 714 F.3d 384, 396 (5th Cir.2013) (en banc)](Clement, J., concurring) (explaining that endeavors tangentially related to traditional longshore work are not themselves longshore in nature). The beach, therefore, was not part of a larger contiguous area customarily used for longshore activity."

Id. at *3 (additional citations omitted).

[Topic 1.6.2 SITUS - "Over land"]

[2] As such, the court did not reach the issue of "employee" status under § 2(3).

B. Benefits Review Board

***Mitri v. Global Linguist Solutions*, __ BRBS __ (2014).**

Agreeing with the OWCP Director, the Board held that the ALJ erred in accepting the parties' stipulations that allowed employer to terminate or reduce compensation without seeking modification and obtaining a new compensation order, as such stipulations are contrary to Section 22 of the Act.

Employer initially controverted this claim, but while the claim was pending before the ALJ, rescinded its controversion and began paying compensation for temporary total disability (TTD).[3] The parties then requested the issuance of an order approving the parties' joint stipulations. The stipulations provided for the payment of ongoing TTD compensation and permitted the employer and carrier unilaterally to terminate or reduce compensation, without first obtaining an order under § 22, upon occurrence of the following "changes in condition:" claimant's reaching maximum medical improvement (MMI); claimant's return to work; the production of a labor market survey; or claimant's full medical release to return to work. The ALJ approved the stipulations over the OWCP Director's objection, stating that he was inclined to agree with the Director, but wished to facilitate a direct appeal to the Board. The Director appealed.

The Board held that the stipulations at issue are invalid as they are contrary to § 22, stating that:

> "stipulations 4 and 6 attempt to avoid Section 22 by permitting to (sic) employer to unilaterally decrease or terminate claimant's compensation upon changes in condition. These stipulations improperly give employer the authority to determine those changes in condition which warrant a reduction or termination in benefits. Rather, such authority is given by Section 22 of the Act only to an administrative law judge in contested cases.[4] The Director also correctly notes that as the stipulations are currently written, claimant would be unable to enforce the 'award' while he 'contested the validity' of employer's action in reducing its payments as no sum certain would be due. Accordingly, stipulations 4 and 6 are invalid because they are contrary to law."

Slip op. at 6-7 (citations and footnotes omitted). The BRB noted that, if employer unilaterally terminates or decreases compensation due under an award without pursuing § 22 modification, it takes the risk that it will be liable for a § 14(f) assessment in addition to past due benefits.

The Board also agreed with the Director's contention that the ALJ erred in not issuing a compensation order based on the parties' stipulations. The ALJ's order incorporated and "accepted" the parties' stipulations without providing for an "award" of benefits. Pursuant

---

[3] The BRB noted that the posture of the parties at that point in time is unclear. The Board instructed that, if employer had "rescinded" or withdrawn its controversion of the claim, and the parties were in agreement as to the disposition of the claim, the case should have been remanded to the district director, citing 20 C.F.R. §702.351.

[4] The BRB noted that, if the parties are in agreement as to the way in which an award should be modified, they can apply to the district director for such an order, see 20 C.F.R. §702.315.

to § 19(c) and its implementing regulation, 20 C.F.R. § 702.348, the Board has held that an ALJ's order must include an "order" directing the payment of benefits (or denying benefits). Here, the ALJ's order is not in accordance with law as it does not conclude with an order entering an award of benefits.

Finally, the Director asserted that the ALJ erred in adopting the parties' stipulation that claimant's disability commenced on 3/29/12, because the stipulation does not account for the period between the filing of the claim on 11/2/11 and 3/28/12, during which claimant did not work. The Board concluded that this contention is without merit, as the stipulation is not contrary to law. Stipulations of fact are offered in lieu of evidence. A stipulation is an express waiver conceding for the purposes of trial the truth of some alleged fact so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.

The ALJ's order was vacated and the case remanded.

[Topic 19.01 PRACTICE AND PROCEDURE – Generally; Topic 27.1.6 and 27.1.7 POWERS OF ADMINISTRATIVE LAW JUDGES - PROCEDURAL POWERS GENERALLY - Authority to Modify Existing Compensation Order; Authority to Enter Order in Contested Claim; Topic 22.1 MODIFICATION – Generally; Topic 22.3.4 MODIFICATION - Change in Condition Change in Physical Condition; Change in Economic Condition]

***Dill v. Service Employees Int'l, Inc.*, __ BRBS __ (2014).**[5]

The Board vacated the ALJ's award of death benefits in a case arising in the Ninth Circuit in light of an intervening decision in *Kealoha v. Director, OWCP*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), which rejected the Board's "irresistible impulse" test for determining compensability in cases involving suicide and adopted "chain of causation" test.

Decedent began working for employer in Iraq in 2004. He returned home on visits on three occasions in 2005 and again in June 2006. Claimant, his widow, testified that with each visit decedent was becoming more aggressive and angry. When he returned in June 2006, he learned, *inter alia*, about his wife's adultery and his daughter's drug problem. On July 16, 2006, decedent committed suicide. Claimant sought death benefits contending decedent's suicide was related to stressors associated with his employment.

The ALJ found that claimant invoked the § 20(a) presumption of causation, as she established a harm (suicide) and evidence of conditions in the zone of special danger that could have been a cause of decedent's suicide, including his separation from his family and exposure to wartime dangers. The ALJ further found that employer failed to rebut the § 20(a) presumption, and that the suicide was not a willful act, but was an impulsive one, making § 3(c) inapplicable. On first appeal, the BRB affirmed the ALJ's application of the § 20(a) presumption, as claimant demonstrated working conditions which could have contributed to decedent's death. However, the BRB found that the ALJ had incorrectly excluded from the record Dr. Whyman's report proffered by employer, and remanded the case for the ALJ to further address causation. The BRB also instructed the ALJ to address whether the events that occurred state-side in 2006 constituted an intervening cause of the suicide, and to reconsider the applicability of § 3(c) based on the totality of the evidence, including Dr. Whyman's opinion and decedent's suicide notes.

[5] In June 2014, the BRB granted a motion to publish this decision issued on 3/11/14.

On remand, the ALJ found that employer rebutted the § 20(a) presumption with Dr. Whyman's opinion that decedent's work in Iraq did not affect him psychologically, that any effect of the physical separation from his family was speculative, and that decedent's suicide was the result of his pre-existing personality defects. On weighing the evidence as a whole, the ALJ credited the opinion of claimant's expert, Dr. Seaman, supported by an Army study, that decedent's work-related separation from his family significantly intensified the dysfunction in his marriage. The ALJ found decedent's separation from his family, and any work-related stressors that occurred overseas, came within the zone of special danger. In a footnote, the ALJ stated that this case does not involve an intervening causal event, and he found that decedent's suicide was an irresistible impulse, and not an intentional act, based on Dr. Seaman's opinion and decedent's erratic behavior when he returned from Iraq.

Employer appealed the ALJ's award of benefits, arguing that decedent willfully intended to commit suicide, thereby barring benefits under § 3(c), and that the stateside events occurring after he returned home caused his death. The Board initially rejected employer's assertion that *Kealoha* (addressing the compensability of disability due to an attempted suicide) does not apply to this case because it was issued after the ALJ's decision, the court specifically declined to address the fact pattern in this case, and claimant did not file a cross-appeal. The Board observed that, until *Kealoha*, case precedent held that, in cases where an injured employee committed suicide, the central issue of compensability was whether the employee had the "willful intention" to commit suicide.[6] Where death was caused by an "irresistible suicidal impulse" resulting from an employment-related condition, § 3(c) did not bar compensation (collecting cases). *Kealoha* rejected this analysis in view of what it called a more recent understanding of mental illness. The court held that the appropriate issue is whether the claimant's work injury caused his suicide attempt rather than whether the suicide attempt was the result of an irresistible impulse. It stated that "suicide or injuries from a suicide attempt are compensable under the Longshore Act when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt." Slip op. at 6 (citing *Kealoha*, 713 F.3d at 524-525, 47 BRBS at 3(CRT)). Suicide is compensable "where the injury and its consequences directly result in the workman's loss of normal judgment and domination by a disturbance of the mind, causing the suicide." *Id.* at 7 (citing 713 F.3d at 524, 47 BRBS at 3(CRT)). Accordingly, the Board concluded that the Ninth Circuit's chain of causation rule, and not the irresistible impulse rule, applies to this case.

As the ALJ did not apply this standard, the Board vacated the ALJ's decision and remanded for the ALJ to weigh the evidence as a whole under the *Kealoha* standard. Claimant bears the burden of establishing the work-relatedness of the death. Slip op. at 8 (citing *Schwirse, supra*). The Board instructed that:

> "… on remand, the [ALJ] should address employer's evidence that the 'chain' was broken - effectively, that there was a non-work-related cause of decedent's death. Although the [ALJ] purported to address intervening cause in a footnote, his discussion does not take into consideration the full extent of the events that occurred in June and July 2006; therefore, we also vacate his 'intervening cause' findings."

[6] The BRB noted that it had previously stated that § 3(c) is an affirmative defense, and thus employer bears the burden of showing that 3(c) applies. However, in *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013), the Ninth Circuit held that as error and stated that, after the presumption is rebutted, the burden is on the claimant to prove by a preponderance of the evidence that the injury or death was not due to the employee's willful intent.

The BRB acknowledged that the ALJ, effectively, found that the behavior of claimant and her daughter was the natural or unavoidable result of decedent's having been away from home, the fighting and breakup were the natural next result, and the suicide was the natural final result. However, the BRB instructed the ALJ to "readdress this line of reasoning under the 'chain of causation'" test. Additionally, the ALJ erred in stating that an intervening cause must be the result of decedent's intent or carelessness. On remand, the [ALJ] must address whether claimant established an unbroken chain between decedent's work and his suicide; he must fully address all relevant evidence, including decedent's suicide notes.[7]

[Topic 3.2.2 COVERAGE – SECTION 3(c) OTHER EXCLUSIONS - Willful Intention; Topic 9.1.2 COMPENSATION FOR DEATH - Section 20(a) Presumption]

***Pensado v. L-3 Communications Corp.*, __ BRBS __ (2014).**[8]

The Board accepted claimant's appeal of the ALJ's interlocutory discovery order. It affirmed the ALJ's finding that San Diego, located approximately 30 miles from claimant's home, is an appropriate venue for employer's medical and vocational examinations. The ALJ, however, erred in requiring claimant to pay his own expenses for attending these evaluations, as employer must bear the cost of obtaining its evaluations.

Claimant injured his knee while working for employer in San Diego, and employer provided compensation and medical benefits. Presently, the parties dispute the extent of claimant's disability and this matter is pending before the ALJ. In the course of discovery, employer filed a motion to compel claimant to attend medical and vocational evaluations in San Diego. In granting the motion, the ALJ ordered that claimant must attend the defense examinations in San Diego at his own expense. Claimant appealed this order, asserting that he cannot afford to travel from his home in Rosarito, Mexico, to stay three days for evaluations in San Diego, as he does not have the money to pay for transportation, lodging, and meals; nor does he have a working vehicle. He further asserted that requiring him to pay such expenses violates "longstanding DOL policy."

The Board granted claimant's motion for reconsideration of its prior order dismissing his appeal as interlocutory, agreeing that its guidance was necessary to direct the course of the adjudicatory process in this case. It noted that the ALJ's discovery determinations will be upheld unless the challenging party establishes they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. The ALJ is not bound by technical or formal rules of procedure, 33 U.S.C. §923(a), and he has the authority, *inter alia*, to compel the production of documents, to compel appearances, and "to do all other things conformable to law which may be necessary to enable him effectively to discharge the duties of his office." 33 U.S.C. §927(a); 20 C.F.R. §702.331 *et seq.*; 29 C.F.R. §18.29(a). These powers include the authorization and direction of discovery.

Here, the ALJ rationally determined that San Diego is an appropriate venue for employer's examinations. The ALJ found that, as claimant had worked and been injured in

---

[7] The BRB noted that although Dr. Seaman's opinion supports the ALJ's finding that decedent's physical separation from his family aggravated their marital dysfunction, Dr. Seaman was unaware of, or did not discuss, all the events that transpired upon decedent's return. Thus, the ALJ should address whether this opinion is sufficient to meet claimant's burden of establishing an unbroken chain leading to decedent's death.

[8] In June 2014, the BRB granted a motion to publish this decision issued on 4/30/14.

San Diego, it was reasonable for him to attend evaluations in San Diego. Rosarito is approximately 30 miles south of San Diego, and the ALJ properly found, pursuant to § 702.337(a), that the formal hearing on a claim must be held within 75 miles of the claimant's residence. *See also* 20 C.F.R. §702.403 (generally, claimant's free choice physician should be within 25 miles of the place of injury or claimant's home, but other factors may be relevant).

The Board further held that the ALJ erred in ordering claimant to bear the costs of his attendance at employer's examinations in San Diego, and it reversed this aspect of the ALJ's order. Employer must bear the cost of obtaining its own evidence. As employer's motion did not request this, the ALJ's order was *sua sponte*. Moreover, these evaluations are not for the treatment of claimant's injuries pursuant to § 7(a), but are an aspect of discovery aimed at developing employer's evidence. Typically, each party pays its own discovery costs.

Additionally, "to the extent the [ALJ's] order that claimant pay his own expenses to attend employer's defense evaluations constitutes a sanction for claimant's non-attendance at prior appointments, the [ALJ] abused his discretion." Slip op. at 4. The BRB reasoned that the LHWCA provides specific procedures to sanction a party who disobeys any lawful order. Specifically, § 7(d)(4) provides that if a claimant "unreasonably refuses to submit . . . to an examination by a physician selected by the employer," the ALJ may "suspend the payment of further compensation during such time as such refusal continues[.]" In addition, pursuant to § 27(b), if the ALJ deems sanctions warranted for a party's failure to follow a lawful order, he must certify the facts to the appropriate district court and the court will order sanctions. Thus, the BRB held that "ordering claimant to pay the costs of attending medical and vocational evaluations arranged by employer for discovery purposes is not an appropriate sanction." *Id.*

The Board refused to address claimant's allegations of bias on the part of the ALJ and his request to have his case assigned to another ALJ, as these contentions must first be raised before the OALJ.

[Topic 27.2 POWERS OF ALJs – DISCOVERY; Topic 27.1 POWERS OF ALJs - PROCEDURAL POWERS GENERALLY; Topic 27.2 POWERS OF ALJs - FEDERAL DISTRICT COURT ENFORCEMENT; Authority to Determine Reasonableness Of Refusal to Undergo Medical Examination or Treatment; Topic 19.01 PRACTICE AND PROCEDURE – Generally; Topic 19.4 PROCEDURE - FORMAL HEARINGS COMPLY WITH APA]

II. Black Lung Benefits Act

[there are no decisions to report for this month]