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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 272
June 2016

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

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

No decisions to report.

B. Benefits Review Board

Pittman v. New Century Fabricators, Inc., __ BRBS __ (2016).

Agreeing with the OWCP Director, the Board held that, in determining whether § 33(g)(1) bars the claim, the gross amount of the third-party settlements, rather than its net amount, should be compared to the amount of claimant's lifetime compensation entitlement under the Act.

Claimant sustained injuries in a work-related accident while being transferred from a jack-up vessel to the supply vessel. He filed a claim for benefits under the LHWCA, which employer controverted. He also filed a third-party tort suit in federal court against the owner of the jack-up vessel, which was settled for the gross amount of $650,000. Claimant's net recovery was $375,000, and the remaining $275,000 went to attorney's fees and expenses. Employer was aware of the third-party lawsuit and settlement negotiations but did not give written approval of the settlement.

The ALJ granted employer's motion for summary decision and dismissed the LHWCA claim. The ALJ reasoned that, because claimant's net recovery is less than claimant's proposed valuation of his lifetime compensation entitlement, $524,960.38, and he failed to obtain written approval of the third-party settlement from employer and carrier, his claim is barred by § 33(g).

Pursuant to § 33(a), a claimant may proceed in tort against a third party if he determines that the third party may be liable for damages for his work-related injuries. In order to protect an employer's right to offset any third-party recovery against its liability for

[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 Lexis identifier.

compensation under the Act under § 33(f), a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in his favor, or he must obtain his employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g). The Supreme Court has held that § 33(g)(2) requires a "person entitled to compensation" (PETC) to provide notice of the termination of the third-party proceedings to his employer in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 26 BRBS 49, 53(CRT) (1992). Thus, the prior written approval requirement of § 33(g)(1) is inapplicable in those two instances. Pursuant to § 33(g)(1), prior written approval is necessary only when the PETC enters into a settlement with a third party for less than the compensation to which the claimant is entitled under the Act.

In this case, the Board held that, in determining whether § 33(g)(1) bars the claim, the ALJ erred in comparing the net amount of the third-party settlement to the amount of claimant's compensation entitlement under the Act. The Fifth Circuit, in whose jurisdiction this case arose, has not directly ruled on this issue. However, the only two circuit courts to have explicitly considered the issue have held that in making the requisite comparison under § 33(g)(1), the gross, rather than the net, amount of the settlement should be used. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). In *Bundens*, the Third Circuit reasoned that Congress demonstrated its ability to specify "net amount" in § 33(f), but chose not to do so in § 33(g). In *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5, 16 (1996), *aff'g and modifying on recon. en banc* 28 BRBS 254 (1994) (Brown and McGranery, JJ., concurring and dissenting), the Board agreed with the reasoning in *Bundens*, and it has consistently held thereafter that the gross amount is the relevant figure for purposes of the § 33(g) comparison.

The Board rejected employer's assertion that, in view of its underlying facts, *Cowart* stands for the proposition that § 33(g)(1) bars an award under the Act to any claimant who settles with a third party for a net amount less than his entitlement to compensation under the Act even if the gross settlement amount is greater than the compensation entitlement. In *Cowart*, as in this case, claimant settled his third-party action for a gross amount more than, and a net amount less than, his claimed compensation entitlement. However, in the absence of a holding in *Cowart* on this specific issue, the Board refused to conclude that *Cowart* supports employer's position. Further, the Board's *en banc* decision in *Harris* is binding precedent for the Board. Thus, the Board rejected employer's invitation to overturn longstanding precedent.

The Board further rejected employer's contention that, even if the claim is not barred by § 33(g)(1), § 33(f) operates to "extinguish" its liability for benefits in light of *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989). The Board reasoned that factual situations may arise where all benefits are not offset by § 33(f) (e.g., an employee may outlive his life expectancy), and, thus, § 33(f) does not necessarily extinguish an employer's total liability for benefits in every case, although this may be the practical effect in many cases. Rather, § 33(f) provides the employer with an offset in the amount of the claimant's net third-party recovery against its liability for compensation and medical benefits, and compensation and medical benefits are suspended until the net recovery is exhausted. Neither *Villaneuva*, nor *Cowart* substantiate employer's position.

In a case involving a continuing award, the ALJ may use any reasonable method to calculate the amount of compensation under the Act to which the claimant would be entitled over his lifetime. The ALJ should make findings regarding the extent of claimant's disability,

the applicable compensation rate and claimant's life expectancy, and he may consider medical evidence, actuarial tables and any other probative evidence. If the gross amount of claimant's third-party settlement is less than the amount of claimant's lifetime entitlement to compensation under the Act, exclusive of medical benefits, claimant's failure to obtain the employer's and carrier's prior written approval of the settlement bars his claim for disability and medical benefits, pursuant to § 33(g)(1). If, however, the gross settlement amount is greater than claimant's compensation entitlement, the ALJ must determine, based on all the relevant facts, whether claimant complied with the notice provision of § 33(g)(2). In the latter case, employer is entitled to an offset under § 33(f) for the net amount of the third-party settlement, but its liability for compensation would resume after the net proceeds are offset.

The ALJ's decision granting employer's motion for summary decision was vacated, and the case is remanded for further consideration.

[Topic 33.7 Section 33(g) - ENSURING EMPLOYER'S RIGHTS; Topic 33.6 Section 33(f) - EMPLOYER CREDIT FOR NET RECOVERY BY "PERSON ENTITLED TO COMPENSATION;" 19.4.2 PROCEDURE - Summary Decision]

[**Ed. Note:** The Board decision in *Clisso v. Elro Coal Co.*, __ BRBS __ (2016), a Black Lung case, addressed Section 28 of the Longshore Act, and is therefore relevant to the adjudication of attorney fee disputes in Longshore cases.]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Chevron Mining, Inc. v. Director, OWCP [Cherry]*, ___ Fed. Appx. ___, 2016 WL 3402524 (11th Cir. June 21, 2016) (unpub.), which concerned Employer's challenge to an ALJ's award of benefits in a subsequent claim, the issued presented to the court was "whether substantial evidence supports the ALJ's determination that [Employer] failed to rebut the [15-year] presumption."

Below, after finding that Claimant had established a totally disabling respiratory or pulmonary impairment and more than 15 years of qualifying coal mine employment (CME), the ALJ was required to address whether Employer rebutted the presumption by disproving the existence of clinical and legal pneumoconiosis, or by establishing that no part of Claimant's totally disabling respiratory or pulmonary impairment arose out of his CME. While the ALJ determined that Claimant did not suffer from clinical pneumoconiosis, she also found that Employer was unable to disprove the existence of legal pneumoconiosis. The ALJ did not, however, separately address the evidence at prong two of rebuttal concerning whether Employer established that no part of Claimant's totally disabling respiratory or pulmonary impairment arose out of his CME.

The court rejected Employer's challenge to the ALJ's finding that legal pneumoconiosis was established. According to the court:

> [S]ubstantial evidence supports the ALJ's determination that Chevron failed to satisfy its burden of rebutting the 15-year presumption. Chevron has identified no "affirmative proof" that Claimant's respiratory condition does not qualify as a chronic lung disease arising out of his coal mine employment: that is, legal pneumoconiosis. That Claimant has never been diagnosed formally with pneumoconiosis, in and of itself, is insufficient rebuttal evidence.

The court therefore concluded that the ALJ reasonably found deficiencies in each of the opinions offered by Employer's physicians, deficiencies which were applicable to the issues of both the existence of pneumoconiosis and whether no part of Claimant's disabling impairment was due to his pneumoconiosis. Therefore, the court denied Employer's petition for review.

[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]

B. Benefits Review Board

In *Clisso v. Elro Coal Co.*, BLR , BRB No. 15-0010 BLA (June 17, 2016) (Order on Recon.) (en banc), the Board addressed Employer's contention that the U.S. Supreme Court decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S. Ct. 2158 (2015), precluded its being held liable for the claimant's counsel's fee for defending his fee petition. In *Baker Botts*, the Court held that, as Section 330(a)(1) of the Bankruptcy Code "does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation." 135 S. Ct. at 2169. As the Court noted, the American Rule provides that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Id.* at 2164 (internal quotation marks and citation omitted).

In *Clisso*, the Board noted that "*Baker Botts* clearly distinguishes Section 330(a)(1) of the Bankruptcy Code from statutes that explicitly provide for fee-shifting, such as the Longshore Act." Slip op. at 4, citing *Baker Botts*, 135 S.Ct. at 2165.[2] The Board also referred to numerous instances in which courts have rejected the application of *Baker Botts* to fee-shifting statutes. *See Clisso*, slip op. 4, n.6. Accordingly, the Board held "that *Baker Botts* is not applicable to Section 28(a) of the Longshore Act because it is a fee-shifting provision that abrogates the American Rule to the extent that the statutory requirements are satisfied, as in this case." Slip op. at 4. As Employer did not challenge the reasonableness of the fee award, the Board affirmed its prior order awarding the claimant's counsel a fee for services rendered in defense of his fee petition.

[Preparation of the fee application; litigation of the fee petition]

[2] Section 28(a) of the Longshore Act, 33 U.S.C. §928(a), which governs the award of attorney's fees following the successful prosecution of a claim, is incorporated into the Black Lung Benefits Act by way of 33 U.S.C. §932(a).