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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 254 July 2013

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

Schwirse v. Director, OWCP, __ F.3 __ (9th Cir. 2013).[2]

The Ninth Circuit upheld the ALJ/BRB's determination that claimant was precluded from receiving compensation under Section 3(c) of the LHWCA, because his intoxication was the sole cause of his injury.

Claimant consumed alcohol throughout his work day; then, while relieving himself near a bull rail of employer's dock, claimant fell over the bull rail onto a concrete and steel ledge approximately six feet below, and sustained an injury. Under § 3(c), "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee." The court stated that the phrase "occasioned solely by" requires the adjudicator to determine whether intoxication was the "legal cause" of the injury (a "but for" analysis). The court looked for guidance to admiralty cases determining proximate cause, and concluded that this analysis entails (1) looking at the act that caused the accident, and (2) determining whether there were any superseding or intervening causes that contributed to the injury. The court observed that this interpretation is consistent with the BRB's application of a two-part test for determining whether the employer met its burden in establishing that intoxication was the sole cause of the accident: first, the employer must establish that the employee was drunk at the time of the

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[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.

[2] The court initially denied claimant's petition for review of the BRB's decision by an unpublished opinion. *See* Recent Significant Decisions Monthly Digest #247 (Oct. 2012).

accident, and, second, the employer must establish that the employee fell owing to his drunkenness and was injured. Accordingly, the court held that

> ". . . an injury 'occasioned solely by' intoxication means that the legal cause of the injury was intoxication, regardless of the surface material of the landing on which the intoxicated person fell. In other words, as aptly stated by the BRB, '[i]f intoxication was the sole cause of the claimant's fall, then intoxication also was the sole cause of the claimant's injury.'"

Id. at *3. The court rejected claimant's argument that by using the term "injury" (instead of "accident") Congress intended to incorporate the "harmful physical consequences of that event." Under this interpretation, claimant's "accident" may have been caused by intoxication, but the injury was caused by hitting the concrete and metal slab. The court reasoned that this broad definition of the term "injury" would preclude the application of § 3(c). Rather, the most logical way to interpret § 3(c) and § 20(c) is to limit the analysis to the sole causal factor of the injury.

In this case, there was no dispute that claimant was injured at work, and thus a presumption arose under § 20(c) that his injury was not occasioned solely by intoxication. Further, the ALJ/BRB did not err in concluding that employer rebutted the presumption with substantial evidence, which included two medical opinions, testimony of employer's marine manager that the bull rail was free of tripping or slipping hazards, and photographs of the accident site. There was no evidence of any superseding or intervening cause of the injury. Further, there is no question that a foreseeable consequence of falling is that one may hit the pre-existing surface material. The court stated that "absent evidence of the surface material being unforeseeably defective, the 'legal cause' is limited to the reason for his fall and the foreseeable consequences of that fall." *Id.* at *4. Thus, the ALJ properly concluded that the only known cause for claimant's injury was the fall off the bull rail attributable solely to his drunkenness. Additionally, the BRB did not err in concluding that employer does not have to "rule out" all other possible causes of injury in order to rebut the § 20(c) presumption.

The court noted, however, that the Board erred to the extent that it placed the ultimate burden on employer to establish by preponderance of the evidence that the employee's injury was caused solely by intoxication. *Albina Engine & Machine v. Dir., OWCP,* 627 F.3d 1293, 1298 (9th Cir.2010), clearly establishes that after the employer rebuts the presumption by substantial evidence, the burden shifts to the claimant to prove entitlement to benefits by a preponderance of the evidence. Thus, having rebutted the § 20(c) presumption under the substantial evidence standard, the employer

does not further bear the burden of proving that the injury was caused solely by intoxication under the preponderance of the evidence standard. Nevertheless, the court concluded that the only alleged cause of claimant's injury that was supported by substantial evidence was his intoxication, and the ALJ properly weighted the evidence as a whole to determine whether claimant established the necessary causal link between the injury and employment.

[Topic 3.2.1 Solely Due to Intoxication; Topic 20.8 Presumption That Employee Was Not Intoxicated]

***Bunn v. Oldendorff Carriers GMBH & Co. KG*, __ F.3d __ (4th Cir. 2013).**

A longshoreman brought negligence action under Section 5(b) of the LHWCA against a shipowner after the longshoreman slipped and fell on a patch of untreated ice when loading the vessel. The district court entered a judgment for the longshoreman on jury verdict and denied shipowner's motion for a judgment as a matter of law.

On appeal, the Fourth Circuit held that: (1) a patch of untreated ice on a vessel was not an open and obvious hazard after chief officer of the vessel promised to remedy the unsafe condition; (2) the shipowner did not preserve a challenge to jury instruction on appeal; (3) a shipowner may be liable for injury resulting directly from an unsafe condition on the ship of which it was aware and which it voluntarily agreed and undertook to remedy, but failed to do so; and (4) the shipowner's proposed open and obvious jury instruction was incomplete. Circuit Judge Motz dissented.

Of note is the court's discussion of the turnover duty and its relationship to other duties recognized under Section 5(b). In particular, the majority reasoned that "our affirmance of the judgment is based not on the *duty to warn* but on the more general turnover *duty of safe condition*." *Id at* *7 (emphasis in original). The dissenting opinion, in turn, faulted the majority for extending the logic and precedent pertaining to active operations duty to the turnover duty context. In response, the majority noted that it could discern no good reason to limit liability arising from a shipowner's breach of a promise to correct a dangerous condition, even one that is otherwise "open and obvious," to the "active involvement" rubric.

[Topic 5.2.1 SECTION 5(b) THIRD PARTY LIABILITY – Generally.]

A. Benefits Review Board

There have been no published Board decisions under the LHWCA in July 2013.

II. Black Lung Benefits Act

In *Eastern Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, ___ F.3d ___, Case Nos. 11-2038 and 11-2380 (4th Cir. July 31, 2013), the circuit court addressed whether certain awards of attorneys' fees "properly reflected market-based evidence of counsel's hourly rate," and whether "the practice of quarter-hour billing by claimant's counsel resulted in an excessive number of hours billed in this case."

With regard to determining whether counsel's hourly rate was "market-based," the court noted:

> Of central importance to this appeal, claimant's counsel also submitted for the ALJ's consideration a list of twenty-one prior fee awards issued in black lung cases handled by claimant's counsel. These awards had been made by seven different ALJs, all within several years of the present fee awards.
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> Claimant's counsel also submitted to the ALJ the Altman Weil Survey of Law Firm Economics (2006) . . ., which showed hourly rates for attorneys with varying degrees of experience in the 'South Atlantic' and 'Middle Atlantic' regions. Claimant's counsel additionally attached an itemized billing statement describing work done for the claimant in proceedings before the ALJ between February 2007 and March 2010.

Employer argued hourly rates of $300.00 for Mr. Wolfe and $175.00 for Mr. Gilligan were not market-based. As noted by the court:

> [A]ccording to Eastern, the agency adjudicators should have considered what 'fee-paying clients actually pay for this type of work in Norton, Virginia,' a small community in Virginia where claimant's counsel has an office. Eastern further suggested at oral argument that regional hourly rates of attorneys in social security cases, criminal cases, or civil disputes could provide the necessary market-based evidence.

The court disagreed.

First, Employer challenged the reliability of prior fee awards as support for establishing market-based rates, but the court held, "[O]ur precedent plainly permits consideration of such documentation." While such fee awards "do not themselves actually set the market rate," the court held these prior awards "provide 'inferential evidence' of the prevailing market rate." The court elaborated as follows:

> In cases such as the present one, in which there is no lawful billing rate, the prevailing market rate should be determined with reference to 'the next best evidence,' which includes, among other things, 'evidence of fee awards the attorney has received in similar cases.'

The court agreed with the Administrative Law Judge's determination that "multiple and consistent awards by diverse judges' shown in the submission by claimant's counsel constituted specific evidence of the prevailing market rates for those counsel." Thus, the court upheld the Administrative Law Judge's hourly rate determination as it was supported by "multiple prior fee awards and was consistent with the rates cited in the Altman Weil Survey for attorneys in the region with the same amount of experience."

However, even though evidence of the legal assistants' training, education, and experience was submitted with the fee petition, the court reduced the hourly rate awarded the legal assistants from $100.00 to $50.00 based on counsel's failure to "submit any evidence to support a prevailing market rate for the work of those legal assistants." Notably, no information was provided regarding hourly rates awarded the legal assistants in the list of prior fee awards used to support the prevailing rates for counsel. Employer "submitted evidence . . . of numerous prior fee awards in black lung cases in which legal assistants employed by claimant's counsel were awarded fees based on an hourly rate of $50," and, based on this data, the court reduced the hourly rate for the legal assistants from $100.00 to $50.00.

Turning to counsel's use of quarter-hour billing, Employer argued Claimant's counsel should be required to prove "it took fifteen minutes to perform each and every task alleged." The court rejected this position stating it "would impose undue burdens not required by law." In upholding the quarter-hour billing method, the court found the Administrative Law Judge properly reviewed the fee petition to determine whether the hours requested were reasonable and necessary. Here, the court noted:

> In conducting this review, the ALJ eliminated over forty charges by Wolfe, Gilligan, and certain legal assistants that were not compensable because the tasks at issue were clerical in nature. Moreover, the ALJ disallowed a significant number of charges on the basis they were duplicative or unnecessary, including seven hours billed by Gilligan related to a deposition and a hearing when his co-counsel Wolfe also had charged for the same services.

The court determined "the ALJ's award was manifestly the result of careful and thoughtful consideration of the fee petition and of Eastern's 'extensive' objections."

[**market-based rates, establishment of; quarter-hour billing**]

In *Mingo Logan Coal Co. v. Director, OWCP [Owens]*, ___ F.3d ___, Case No. 11-2418 (4th Cir. July 31, 2013), Employer argued the Administrative Law Judge erred in limiting rebuttal to either the existence of pneumoconiosis, or disability causation, once the 15-year presumption was invoked. In support of this argument, Employer cited the plain language of the statute at 30 U.S.C. § 921(c)(4) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35 (1976) which, according to Employer, limits the Secretary of Labor's rebuttal, not Employer's rebuttal. The court noted Claimant and the Director "argue that even though the statute does not, by its terms, limit employers to the two specified methods of rebuttal, logic does, and therefore the ALJ and the Board articulated the correct legal standard."[3]

Skirting this issue, the court found the Administrative Law Judge, in fact, did not apply the rebuttal limitations to Employer and the award of benefits was affirmed. Notably, the Administrative Law Judge weighed the conflicting medical evidence as if Claimant carried the burden of demonstrating a totally disabling respiratory impairment due to coal workers' pneumoconiosis under 20 C.F.R. §§ 718.202-718.204.

When weighing opinions by the medical experts, the court found the Administrative Law Judge properly found the opinions of Employer's experts insufficiently reasoned, stating:

> (The Administrative Law Judge) found (the experts) both 'dismissed in a cursory [fashion] the medical literature that associated coal dust exposure with interstitial fibrosis;' that they both 'maintained that idiopathic interstitial fibrosis exists in the general population, but neither adequately addressed the fact that [Owens] is not a member of the general population' based on his extensive coal-dust exposure; and that they '[b]oth acknowledged that the diagnosis of idiopathic interstitial fibrosis depended on ruling out all suspected factor[s], but neither doctor gave an adequate explanation for why coal dust

[3] In a concurring opinion, Circuit Judge Niemeyer disagreed with the position offered by the Director, OWCP and Claimant; *to wit*, Employer is limited to two methods of rebuttal. Rather, Circuit Judge Niemeyer stated the plain language of the statute limits the *Secretary of Labor* to two methods of rebuttal under 20 C.F.R. § 718.305 and, as a result, an employer should not be subjected to this limitation.

> inhalation could not have caused at least some of [Owens'] impairment.'

The Administrative Law Judge further noted the experts relied on negative chest x-ray and CT-scan interpretations, and did not address a treating pulmonologist's "findings of a mixed obstructive and restrictive defect." The court upheld the Administrative Law Judge's conclusion that the experts did not adequately explain why the miner's "interstitial fibrosis—which they identified as the cause of his total disability—did not constitute legal pneumoconiosis."

[**interstitial fibrosis, weighing medical opinions**]

In *Richards v. Union Carbide Corp.*, ___ F.3d ___, Case No. 12-1294 (4th Cir. July 5, 2013), *aff'g.* 25 B.L.R. 1-31 (2012) (en banc) (J. McGranery, concurring and dissenting; J. Boggs, dissenting), the Fourth Circuit upheld application of the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act to a subsequent survivor's claim. The court further upheld the Board's ruling regarding the date of onset; benefits are paid beginning with the month of the miner's death, except "no benefits may be paid for any period prior to the date upon which the order denying the prior [survivor's] claim became final."

[**automatic entitlement; applicable to subsequent survivor's claim**]