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 # 201
August 2008

John M. Vittone
Chief Judge

Stephen L. Purcell
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

I. Longshore

A. U.S. Circuit Courts of Appeals

***C & C Marine Maintenance Co. v. Bellows*, ___ F.3d ___ , 2008 WL 3007994 (3rd Cir. Aug. 6, 2008).**

The Third Circuit upheld the Board's decision affirming an ALJ's grant of benefits under the LHWCA. Citing precedent from other Circuits, the Court interpreted section 13(a) of the Act, which tolls the deadline for filing a claim "until the employee … is aware, or by the exercise of reasonable diligence should have been aware of the relationship between the injury … and the employment," as tolling the statute of limitations "until the claimant is aware of the full character, extent and impact of the harm done to him." *Id.* at 2. Here, the claim was timely, as the statute of limitations began to run when the claimant's physician opined that his lime burns, suffered when he was moving lime from one barge to another, "may have irritated" his preexisting arthritic condition. It was at this time that the claimant became aware of the full extent of his injury and that it was, at least in part, caused by his employment. Additionally, pursuant to section 13(d), the statute of limitations was tolled during the pendency of the claimant's Jones Act claim. *Id.* at 2-3.

Substantial evidence supported the Board's finding that the claimant's lime burns aggravated his pre-existing arthritic condition. *Id.* at 3. The employer failed to present substantial evidence showing that the claimant's

disability did not result from this aggravation, as required to rebut the section 20(a) presumption. While the claimant's physician initially stated that he did not believe the claimant's arthritic disease was associated with the burn, he subsequently opined that the burn may have irritated the claimant's ankle and explicitly stated during his deposition that something happened with the burn that exacerbated the arthritic change. The employer failed to address the physician's change of opinion and instead relied on his earlier statement.

The Court further found that the employer failed to prove that the claimant's pre-existing disability was manifest to it, as required for employer to be eligible for special fund relief under section 8(f) of the Act. *Id.* at 4 (citing *Pa. Tidewater Dock Co. v. Dir., OWCP*, 202 F.3d 656, 658 (3rd Cir. 2000), *Dir., OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 295 (3rd Cir. 1998)). The employer failed to show it had constructive knowledge of the claimant's pre-existing arthritic condition, as the employer did not claim that the medical records were readily discoverable and did not produce any such records, but only offered speculation that such medical records existed. The employer's reliance on the Sixth Circuit's decision in *American Ship Building Co. v. Dir., OWCP*, 865 F.2d 727, 732 (6th Cir. 1989) was misplaced, as the Third Circuit precedent cited above rejected the Sixth Circuit's approach by requiring that the pre-existing condition be manifest to the employer.

[Topic 13.3.2 Time for filing claims, occupational disease; Topic 13.4 Tolling the statute of limitations; Topic 2.2.6 Aggravation/combination; Topic 20.5.1 Application of section 20(a), causal relationship of injury to employment; Topic 8.7.4 Section 8(f) Special Fund relief, pre-existing disability must be manifest to employer]

***Lake Charles Food Products, L.L.C. v. Broussard*, (Unreported) 2008 WL 3820861 (5th Cir. Aug. 15, 2008).**

The employer stopped making voluntary payments of benefits on the ground that an automobile accident involving the claimant, which caused an increase in his back pain, constituted a supervening cause of his disability. The Fifth Circuit denied the employer's petition for review of the Board's decision affirming an ALJ's award of benefits.

The Court acknowledged that "some tension" existed between the standards for supervening causation articulated by the Fifth Circuit in *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), and in *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, *modified on other grounds and reh'g denied*, 657 F.2d 665 (5th Cir. 1981) (citing *Bludworth*

Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983)). In *Voris*, a panel of the Court held that a supervening cause is an "influence [] originating entirely outside the employment" that "overpowered and nullified" the causal effect of the employment on the claimant's injury. In *Bosarge*, a subsequent panel stated that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." The Court observed that because under its rules only an *en banc* court can overrule a previous panel's holding, "*Voris* controls to the extent it conflicts with *Bosarge* on the facts of this case." The Court, however, saw no need to decide which standard is the operative one because the facts did not meet either standard for supervening cause – the claimant was totally disabled and in need of conservative treatment, both before and after the accident.

[Topic 20.5.1 Causal relationship of injury to employment]

***M & M Project Staffing v. Dir., Office of Workers' Comp. Programs,* (Unreported) 2008 WL 3876233 (5th Cir. Aug. 20, 2008).**

The Court reversed the Board's decision affirming an ALJ's grant of benefits, based on an error in the ALJ's computation of the claimant's average weekly wage ("AWW"). The parties agreed that the ALJ properly calculated the claimant's average annual earnings under section 10(c), which is to be applied when the claimant's work is "inherently discontinuous or intermittent" (quoting *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991)). However, the Court held that in calculating the claimant's AWW the ALJ violated section 10(d)(1), which states that an employee's AWW "shall be one fifty-second part of his average annual earnings." The ALJ erred in utilizing as a divisor the number of weeks the claimant worked during the year before his injury (33), in view of the evidence that the claimant had been employed only intermittently in the years preceding his injury and lack of substantial evidence indicating that he would have had the opportunity to work continuously in future years (citing *New Thoughts Co. v. Chilton*, 118 F.3d 1028, 1030-31 (5th Cir. 1997)). The Court observed that it may be appropriate to credit a claimant with the earning capacity of a full-time worker where year-round employment was available, but the claimant was unable to take this opportunity due to a non-recurrent event (e.g., a previous injury, a labor strike, a death in the family, or incarceration). While this is properly done by increasing the claimant's annual wage, the Court had affirmed as harmless error calculations that achieved the same result by increasing the weekly wage (citing *Staftex Staffing v. Dr., OWCP*, 237 F.3d 404, 407-08 (5th Cir. 2000)).

Finally, the Court observed that the propriety of excluding time spent on unemployment from the divisor depends on the circumstances of the case. If there is no evidence that the claimant had the opportunity to work continuously at the time of the injury, it is unfair to the employer to treat the claimant as a full-time worker (citing *New Thoughts*, 118 F.3d at 1031; *Strand v. Hansen Seaway Serv., Ltd*., 614 F.2d 572, 576-77 (7th Cir. 1980)).

[Topic 19.4.5 Average weekly wage, calculation under section 10(c)]

B. Benefits Review Board

***L.V. (Widow of J.V.) v. Pacific Operations Offshore, LLP*, (BRB No. 07-0965)(Aug. 12 2008).**

The Board affirmed an ALJ's grant of employer's motion for summary judgment based on the lack of situs under both the LHWCA and its extension, the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq*. ("OCSLA"). The worker in this case was employed as a roustabout at the employer's offshore oil platforms located on the Outer Continental Shelf. He also occasionally worked at the employer's crude oil flocculation facility in Ventura, California, where he sustained the fatal injury at issue. The worker had been dispatched to the rear yard of the plant to clean up some scrap metal debris and, after arriving in the area, was apparently attempting to harvest fruit hanging from a plantain tree within the plant facility. The fruit was beyond the reach of a person on the ground and the worker apparently climbed the forklift to pick the plantains. He was later found by his supervisor lying on his back next to the plantain tree with the forklift resting on his abdomen and chest. He was subsequently pronounced dead as a result of asphyxia by abdominal and chest compression.

Applying the LHWCA, the Board observed that the Ninth Circuit, in whose jurisdiction this case arose, has held that "adjoining areas" under section 3(a) of the Act must have a functional relationship with maritime commerce and a geographic nexus with navigable waters (citing *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978)). Here, the facility where the injury took place had no functional nexus with any maritime activities, as it was not customarily used in "loading, unloading, repairing, dismantling, or building a vessel," as required of an "adjoining area" under section 3(a). Rather, its proximity to navigable waters was not dictated by maritime concerns (citing *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Dir., OWCP*, 692 F.2d 87 (9th Cir. 1982); *Sisson v. Davis & Sons, Inc.*, 131 F.3d

555, 31 BRBS 199(CRT)(5th Cir. 1998), *Arjona v. Interport Maint. Co., Inc.*, 34 BRBS 15 (2000); *Charles v. Univ. Ogden Servs.*, 37 BRBS 37 (2003); *cf. Waugh v. Matt's Enters, Inc.*, 33 BRBS 9 (1999) (field where scrap metal is hauled from barges is covered situs)). The facility, which was located approximately 250 to 300 feet from the Pacific Ocean, served as a receiving station for a mixture of elements called "slurry" pumped from the offshore platforms where it was processed into oil, water, gas and solids. The facility was also used as a storage area for scrap metal, some of which came from the platforms and was delivered by a truck operated by a third-party contractor to the plant from a pier which was three miles away. The facility was not used as a staging area for employer's use of the pier for its employees or equipment, as such equipment was shipped directly to the pier.

The Board further found no situs under OCSLA, holding that the Act applies only to injuries that occur on the Outer Continental Shelf. The Board noted a split between the Fifth Circuit and the Third Circuit on this issue (citing *Mills v. Dir., OWCP*, 877 F.2d 356, 22 BRBS 97(CRT)(5th Cir. 1989)(*en banc*); *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 21 BRBS 61(CRT)(3rd Cir. 1988)). The Board sided with the 5th Circuit in holding that the situs-of-injury requirement is supported by the language of section §1333(a) and the legislative history of OCSLA, as well as by the Supreme Court's recognition of a geographic boundary to OCSLA coverage in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218-19 (1986). The Board quoted the Court's observation in *Tallentire* that "Congress determined that the general scope of OCSLA's coverage … would be determined principally by locale." The Board further observed that while the Ninth Circuit has not explicitly addressed the situs-of-injury requirement, it did state in *dicta* that "the situs requirement is a predicate for coverage under OCSLA." *A-Z Int'l v. Phillips*, 179 F.3d 1187, 1189 n.1, 33 BRBS 59(CRT), 61 n. 1(9th Cir. 1999).

[Topic 1.6.2 Situs, "over land;" Topic 60.3.2 OCSLA, coverage]

II. Black Lung Benefits Act

A. Benefits Review Board

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the Board issued a number of important holdings pertaining to the evidentiary limitations. First, with regard to the Department of Labor – sponsored pulmonary evaluation, the Board adopted the Director's position and reiterated its holding in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) (unpub.), to conclude that both Claimant and Employer may submit "rebuttal" to the Department-generated x-ray interpretation. Here, the Department's x-ray interpretation was positive and the Board held that it was proper for the administrative law judge to allow Claimant to submit a positive interpretation of the same study as "rebuttal." The Board determined that, with regard to the § 725.406 examination, a party is permitted "to respond to a particular item of evidence in order to rebut 'the case' presented by the opposing party." Had the Department-sponsored study yielded a negative interpretation, the Board noted, in *dicta*, that Employer would have been allowed to submit another negative interpretation as "rebuttal."

Turning to the affirmative x-ray evidence presented by Claimant and Employer, the Board reiterated earlier holdings that "each party may submit one rebuttal x-ray interpretation for each x-ray interpretation that the opposing party submits in support of its affirmative case, *even if the two affirmative-case interpretations are of the same x-ray*." (italics added).

The Board then reiterated earlier holdings that a failure to object to admission of evidence in excess of the limitations at 20 C.F.R. § 725.414 is irrelevant. Rather, medical evidence exceeded the limitations at § 725.414 must be excluded absent a finding of "good cause." In this case, the Board declined to find "good cause" for Claimant to submit a positive x-ray interpretation obtained by Employer. The Board reasoned that "good cause" was not established based on Claimant's argument that the "x-ray interpretation was generated by employer and the result was against employer's interest."

With regard to biopsy evidence generated in the course of a miner's hospitalization or treatment, the Board held that it does "not count against the claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. § 724.414(a)(2)(i) and (ii)." Additionally, Employer is not entitled to submit "rebuttal" of treatment or hospitalization records, including biopsies

generated as part of treatment or hospitalization. On the other hand, the Board noted that "a party can have its expert evaluate the biopsy tissue slides and submit the report as part of its affirmative evidence."

Finally, the Board adopted the Director's position and extended its holdings pertaining to autopsy evidence in *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc) to biopsy evidence. Specifically, the Board concluded that "a biopsy slide review can be in substantial compliance with 20 C.F.R. § 718.106 even if it does not include a gross macroscopic description of the tissue samples."

[**rebuttal of Department-sponsored x-ray interpretation; "good cause" standard; biopsy evidence**]

In *V.M. v. Clinchfield Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0822 BLA (July 29, 2008), the Board held that it was proper to apply collateral estoppel to establish coal workers' pneumoconiosis in the survivor's claim where there was an award of benefits in the miner's claim and no autopsy evidence was offered.

Notably, in this particular claim, the first administrative law judge to adjudicate the survivor's claim concluded that, despite the fact that there was no autopsy evidence offered in the survivor's claim, collateral estoppel could not be applied because the miner's claim was awarded prior to issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) (requiring that evidence submitted under § 718.202(a)(1)-(4) be weighed together prior to finding the presence of pneumoconiosis), whereas the survivor's claim was filed after issuance of *Compton*. The judge then denied benefits in the survivor's claim.

The survivor subsequently filed a petition for modification. A second administrative law judge reviewed the claim to assess whether a mistake in a determination of fact had been made. The judge concluded that collateral estoppel should have been applied in the survivor's claim pursuant to *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006) after also determining that application of the doctrine would not be unfair to Employer under the factors set forth in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) and *Polly v. D & K Coal Co.*, 23 B.L.R. 1-77 (2005). Upon consideration of evidence in the claim, benefits were awarded.

The Board adopted the Director's position and held that it was proper to find a mistake in a determination of fact in the original adjudication of benefits in the survivor's claim; namely, that coal workers' pneumoconiosis

should have been established via application of collateral estoppel. Moreover, because coal workers' pneumoconiosis was established in the survivor's claim, the Board held that it was proper for the judge to accord less weight to medical opinions of physicians who did not find the disease present.

[**application of collateral estoppel on modification**]

B. Administrative Review Board

In the Black Lung Part B claim of *R.L.H.*, ARB Case No. 08-075, 2007-BLA-5279 (ARB, July 30, 2008), the Administrative Review Board (Board) affirmed the administrative law judge's denial of an adult disabled child's claim for benefits. The Board stated, "To be eligible for survivor's benefits under Part B, claimant must establish that her SSA-adjudicated disability began before she was twenty-two" under 20 C.F.R. § 410.370. Claimant maintained that she was entitled to benefits as the surviving daughter of the deceased miner and his deceased wife because she is disabled and unmarried and "needs the benefits to sustain her livelihood." The Board rejected these arguments and noted that Claimant conceded that "she was not disabled before she was twenty-two but became disabled . . . at age forty-five." The Board further concluded that the adverse financial circumstances asserted by Claimant "do not change the regulatory requirement that she prove disability before she was twenty-two." As a result, the Board affirmed denial of the claim.

The Board did note that Part B proceedings are non-adversarial pursuant to 20 C.F.R. §§ 410.623(a), 410.625, and 410.632 (2007) such that it was error for the Director's counsel to enter an appearance in the claim before the administrative law judge. Nonetheless, the Board held that the Director's "mistake" was harmless in this case because Claimant did not allege any prejudice to her case as a result of the Director's entry of appearance and the Board found no prejudice.

Finally, the Board accepted jurisdiction of the appeal in this claim pursuant to the provisions of the Black Lung Consolidation and Administrative Responsibility Act of 2002, 116 Stat. 1925 (2002) and "Section 4(c)(44) of the Secretary's Order 1-2002, 67 Fed. Reg. 64,272

(Oct. 17, 2002)," which provides that the Board "has the authority to act for the Secretary of Labor when a statute enacted after September 24, 2002 states that the Secretary of Labor is the final decision maker on an appeal of a decision issued by an ALJ."

[**Black Lung Part B claim, disabled child; Black Lung Part B proceedings are non-adversarial; appellate review authority with the Administrative Review Board**]