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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 255 August 2013

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

***Insurance Co. of the State of Pa. et al. v. Director, OWCP et al.* [Vickers], 713 F.3d 779 (5th Cir. 2013).[2]**

The Fifth Circuit reversed the Board's/district court's affirmance of the ALJ's award of benefits for claimant's chronic inflammatory demyelinating polyneuropathy ("CIDP"). Citing *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., OWCP*, 455 U.S. 608, 615, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1982), and *Amerada Hess Corp. v. Dir., OWCP*, 543 F.3d 755 (5th Cir.2008), the court held that the Section 20(a) presumption does not apply to claimant's claim for benefits for his CIDP, because CIDP was not included in his "claim" for compensation.

Claimant sustained an arm injury and gastritis while working for employer in Iraq; he later developed neurological symptoms and was diagnosed with CIDP. Claimant subsequently filed a claim seeking benefits for his arm injury and for "other related problems associated with [this] injury and working conditions in Iraq." Claimant alleged that his CIDP resulted from an autoimmune response due to some combination of his gastritis and arm surgeries.

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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[2] This decision was designated as unpublished when originally issued on 2/15/13; on employer/carrier's motion, it was issued as a published opinion on 5/15/13.

The court stated that the LHWCA's presumption of compensability cannot apply to a claim that has never been made. Rather, a *prima facie* claim must at least allege an injury that arose in the course of employment as well as out of employment; it must contain a statement of the time, place, nature, and cause of the injury. Here, claimant did not assert a primary claim for gastritis or CIDP. The catch-all clause included in his claim is vague and insufficient to convert a secondary condition into a primary claim subject to the § 20(a) presumption.[3]

Pursuant to *Amerada Hess*, not all "secondary" injuries are covered simply because the claimant demonstrates a subsequent harm that could have stemmed from the covered injury. Rather, to receive benefits for a subsequent injury, the claimant must present substantial evidence that the secondary condition (CIDP) "naturally or unavoidably" resulted from the first covered injury (arm injury), as is required by Section 2(2). *Id.* at 786. The court concluded that, in this case, "[claimant's] CIDP is properly understood as a secondary injury because it allegedly arose from an autoimmune response to the surgeries related to his work-related arm injury referenced in the claim and the gastritis he allegedly contracted due to working conditions in Iraq." *Id.* Thus, the court remanded the case for the ALJ to reconsider the issue under the proper standard.

In a concurring opinion, Circuit Judge Graves agreed that *Amerada Hess* mandated reversal, but noted his disagreement with its holding that the § 20(a) presumption is inapplicable to a "secondary" injury or an injury not expressly listed on the original claim form. *Id.* at 786-87, citing A*merada Hess Corp.*, 543 F.3d at 764–66 (Reavley, J., concurring)(noting that, for purposes of the § 20(a) presumption, because worker's injury listed on original claim form arose out of his employment, "any injury resulting from treatment for that injury should also be presumed to have arisen out of the employment and the primary injury.").

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[3] The court noted that the BRB distinguished *Amerada Hess* on the ground that this case included the "sequelae of the arm injury;" it summarized the BRB's analysis as follows:

> "first, the BRB made the legal determination that employers are liable for sequelae resulting from the original injury alleged in the claim filed; second, it found that Vickers made a claim for sequelae, including his CIDP, by claiming injuries to 'other parts of [his] body, [and] other related problems associated with [his] injury and working conditions in Iraq'; and third, it determined that the ALJ properly applied the presumption to conditions 'that were part of the claim filed,' including Vickers's CIDP, in light of Dr. Vaughan's testimony that Vickers's 'disabling CIDP could have been precipitated by his initial arm injury or the subsequent surgeries therefore.'"

Id. at 782.

[Topic 20.2.1 PRESUMPTIONS -- 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA -- *Prima Facie* Case; Topic 20.5 APPLICATION OF SECTION 20(a); Topic 20.6 SECTION 20(a) DOES NOT APPLY]

B. Benefits Review Board

***McGarey v. Electric Boat Corp.*, __ BRBS __ (2013); *Russell v. Electric Boat Corp.*, __ BRBS __ (2013).**

The Board vacated the ALJ's order denying Section 14(e) assessment in each of these two cases, consolidated on appeal. In both cases (involving the same employer), claimants underwent audiograms at employer's facility, and subsequently filed claims for benefits based on the hearing loss revealed by the audiograms; employer paid the benefits. Each claimant then sought § 14(e) assessment based on employer's failure to pay benefits within 28 days of his audiogram. In each case, relying on *Mowl v. Ingalls Shipbuilding, Inc.,* 32 BRBS 51 (1998), the ALJ denied claims for § 14(e) assessment based on a finding that employer did not have full knowledge of claimants' injuries for the purpose of § 14(e) until the claim for compensation for work-related hearing loss was filed by claimant. The ALJs relied on *Mowl* for the proposition that in a hearing loss case in which the claimant continues to work and to be exposed to injurious noise after undergoing an audiogram demonstrating a loss of hearing, the employer does not have knowledge for § 14(e) purposes of the injury for which compensation is to be paid until a claim is filed for cumulative work-related hearing loss.

Agreeing with the OWCP Director, the Board concluded that *Mowl* is distinguishable and that the ALJs' reading of *Mowl* is overbroad. In *Mowl,* the claimant received a 1988 audiogram which revealed a hearing loss; she continued to work and to be exposed to injurious noise and did not file a notice of injury or claim for compensation until after a 1994 audiogram revealed an increased hearing loss. The BRB reversed the ALJ's award of a § 14(e) assessment on that portion of the hearing impairment revealed by the 1988 audiogram, holding that the 1988 audiogram did not give the employer knowledge of the subsequent cumulative hearing loss. Here, the Board reasoned that:

> "[c]ontrary to the [ALJs'] broad reading, . . . *Mowl* does not stand for the proposition that in a hearing loss case in which claimant continues to work for employer and to be exposed to noise after undergoing an audiogram, employer cannot be found to have knowledge for purposes of Section 14(e) until the claim is filed. Such a holding would be contrary to the plain language of Section 14(b) and (d), that employer must pay or controvert

> upon knowledge or notice of an *injury*. Rather, *Mowl* holds only that in a case in which the compensable injury is a cumulative hearing loss injury, the employer does not have knowledge for Section 14(e) purposes until it has knowledge of the full extent of the hearing loss injury on which the claim is based. In these cases, claimants were seeking a Section 14(e) assessment based on the hearing loss injuries demonstrated on the audiograms that formed the basis for the claims, not on prior audiograms."

Slip op. at 8 (footnote and citations omitted; emphasis in original).[4] Accordingly, the BRB vacated the ALJs' orders and remanded for the ALJs to determine whether employer had knowledge of the claimants' respective injuries when it conducted the in-house audiograms that revealed the full extent of the hearing loss for which compensation was claimed and paid.[5]

[Topic 14.3.1 14(e) ESTABLISHING LIABILITY -- Employer Knowledge]

[4] The BRB further distinguished the line of cases holding that, when the parties in good faith decide to wait a reasonable time after the claimant returns to work following an injury in order to determine the permanency or extent of disability, the employer need not file a notice of controversion until a controversy arises. The limited records presented to the BRB in *McGarey* and *Russell* contained no indication that there were good faith agreements between the parties to defer a determination of the extent of claimants' respective hearing impairments.

[5] The BRB instructed that, in *McGarey*, the ALJ should also address on remand employer's alternative argument that it should be excused from timely paying compensation pursuant to § 14(e) "owing to conditions over which [it] had no control."

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

In *Marmon Coal Co. v. Director, OWCP [Eckman]*, ___ F.3d ___, Case No. 12-3388 (3rd Cir. Aug. 8, 2013), the court affirmed application of the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act to a subsequent survivor's claim filed after January 1, 2005 and pending on or after March 23, 2010.

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

B. Benefits Review Board

In *Kern v. Walcoal, Inc.*, ___ B.L.R. ___, BRB No. 12-0561 BLA (July 30, 2013), the Board adopted the positions of Claimant and the Director, OWCP to hold Employer was not automatically entitled to have the miner examined and tested in conjunction with its petition for modification. The plain language of 20 C.F.R. § 725.203(d) addresses the duration and cessation of entitlement and provides the following:

> Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, *if an issue arises pertaining to the validity of the original award.*

20 C.F.R. § 725.203(d) (italics added). The Board rejected Employer's argument that this regulation is in conflict with 20 C.F.R. § 725.310(b), which provides each party "shall be entitled to submit" certain medical testing and reports on modification. Employer maintained 20 C.F.R. § 725.310(b) should be controlling where a petition for modification is filed.

In support of its decision, the Board cited to language in the preamble; *to wit*, "The Department emphasizes that the responsible operator does not have an absolute right to compel the claimant to submit to a medical examination for purposes of the modification petition." 65 Fed. Reg. 79,920, 79,962 (Dec. 20, 2000). The Board indicated an employer would be entitled to have the miner tested or examined where the "claimant filed a request for modification and obtained a new examination." However, the Board noted, "The present case is distinguishable in that employer filed a request for

modification and claimant has not submitted any newly developed medical evidence."

In addressing the standard to be applied by the Administrative Law Judge, the Board stated:

> In cases in which the issue has been squarely raised, the Board has held that an administrative law judge must determine, on a case-by-case basis, whether employer has raised a credible issue pertaining to the validity of the original adjudication, such that an order compelling claimant to submit to examinations or tests would be in the interests of justice. *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37, 1-40-42 (2000)(en banc); *Selak* [*v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173, 1-177-79 (1999)(en banc)].

As a result, the claim was remanded, and the Board directed:

> On remand, the administrative law judge must determine whether employer raised a credible issue pertaining to the validity of the original adjudication. . . so that an order compelling claimant to submit to examinations or tests would be in the interest of justice.
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> . . .
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> In addition, when the administrative law judge reaches the merits of employer's request for modification, he must be mindful that modification does not automatically flow from a finding that there has been a change in conditions or a mistake in a determination of fact. Modifying an award or denial must additionally render justice under the Act.

Slip op. at p. 11.

[**employer not automatically entitled to examination and testing of miner on modification**]