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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 224 August 2010

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

Notice of proposed regulation:

On August 17, 2010, the Department of Labor, Office of Workers' Compensation Programs ("OWCP") published proposed regulations to implement amendments to the Longshore & Harbor Workers' Compensation Act ("LHWCA") contained in the American Recovery and Reinvestment Act of 2009. *See* Federal Register, Vol. 75, pages 50718 - 50730. The 2009 amendment expanded the LHWCA's exclusion from coverage of individuals employed to repair recreational vessels or to dismantle those vessels for repair. 33 U.S.C. § 902(3)(F). The proposed regulations implement the amendment by clarifying the definition of "recreational vessel," specifying when the amendment applies, and codifying current case law holding that the LHWCA covers an employee throughout his or her employment if he or she regularly performs at least some duties that come within the ambit of the statute. For more information, please visit:
http://www.dol.gov/owcp/dlhwc/lsnewreg.htm

[Topic 2(3) Definitions – Employee]

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

Jowers v. Lincoln Electric Co., __ F.3d __, 2010 WL 3341651 (5th Cir. 2010).

Robert Jowers worked as a shipfitter and, later, as a supervisor and foreman for Ingalls, a U.S. Navy shipbuilding contractor. One of his primary tasks was mild-steel welding, which involved the use of welding rods that emit fumes containing manganese. After Jowers was diagnosed with manganese-induced Parkinsonism, his employer, Ingalls, paid LHWCA benefits. Jowers and his wife also brought an action under the Mississippi Products Liability Act (MPLA) against welding rod manufacturers, alleging failure to warn, loss of consortium, and seeking punitive damages. The jury found in favor of Jowers on his failure-to-warn claim and awarded both compensatory and punitive damages. The jury apportioned 40% of the fault to Jowers, with a corresponding reduction of the compensatory award. The manufacturers appealed on several grounds; pertinent to this review, they argued that the district court erred by not permitting the jury to apportion fault to Ingalls based on its LHWCA immunity.

The Court held that in failure-to-warn case under the MPLA, fault could be allocated to employer that was immune under LHWCA even if employer was not sufficiently "sophisticated" to absolve manufacturers of duty to warn, since the jury could have found that Ingalls bore some responsibility for Jowers's injury by allowing welding fume exposure levels to exceed regulatory limits and by failing to inform welders about individual chemicals contained in welding fumes. Consequently, the Court vacated both the compensatory and punitive damages awards and remanded the case for a new trial on damages that includes a jury instruction permitting allocation of fault to Ingalls.

[Topic 5.1.1 Exclusivity of Remedy – Exclusive Remedy; Topic 5.2.1 Third Party Liability – Generally]

Louisiana Ins. Guar. Assoc. v. Dir., OWCP [Harvey], __ F.3d __, 2010 WL 3125810 (5th Cir. 2010).

Louisiana Insurance Guaranty Association ("LIGA") petitioned for review of an order of the Benefits Review Board ("the Board") affirming an ALJ's award of compensation under the LHWCA for injuries flowing from claimant's asbestosis. The Fifth Circuit held that:

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

(1) substantial evidence supported the ALJ's finding that claimant's "last injurious exposure" occurred in 1977, while insolvent insurer provided coverage to claimant's employer; although claimant stopped working directly with asbestos prior to that year, evidence showed that he worked in warehouses where latent asbestos fibers subjected him to toxic background exposure for the duration of his employment with employer;

(2) substantial evidence supported the ALJ's finding that claimant's retirement was "involuntary;" claimant's own testimony, as well as the testimony of doctors that claimant suffered from "significant impairment" due to his asbestosis, supported the ALJ's finding that claimant's illness contributed to claimant's decision to retire;

(3) substantial evidence supported the ALJ's finding that claimant who had been diagnosed with asbestosis suffered from a total disability; claimant's doctors opined that he was 60% disabled and 51% disabled, respectively, and the medical testimony, which spanned an eight-year period, explicitly stated that claimant had declined from moderate to severe impairment by the time of his retirement;

(4) LIGA was correctly held liable as a "carrier" under the LHWCA's "last responsible employer" rule, despite its special status as a state-created guarantee association; under Louisiana law, LIGA stepped into insurer's shoes when the insurer became insolvent, including its liability under the "last responsible employer" rule; and

(5) LIGA failed to prove that it was entitled to a credit against the ALJ's award because claimant was covered by health insurance through his retirement plan; nothing in the record indicated whether claimant's health insurance policy would or could cover his work-related asbestosis injuries, and nothing in the record supported a conclusion that any other carrier paid or was obligated to pay any amount for which LIGA could receive a credit.

[Topic 2.2.16 Occupational Diseases and the Responsible Employer/Carrier – Responsible Employer; Topic 2.2.18 Representative Injuries/Diseases – Asbestosis; Topic 8.2.3 Extent of Disability – Total Disability Defined; Employee's *Prima Facie* Case; Topic 10.5.2 Occupational Disease – Section 10(d)(2) and 8(c)(23); 1984 Retiree Provisions; Topic 70.10 Insolvency of Last Responsible Employer or Carrier]

Eysselinck v. Dir., OWCP, No. 09-20847, 2010 WL 3257778 (5th Cir. 2010)(unpub.)

The Fifth Circuit affirmed the denial of death benefits to Claimant whose husband committed suicide while home on leave of absence from his civilian job as a Task Leader for de-mining operations in Iraq. This claim was denied by the ALJ and the Board, and the district court also denied relief.

The decedent was responsible for the overall administration and training of certain personnel who would perform de-mining operations in Iraq. This included defusing or rendering inoperable unexploded ordinance. In support of her claim for death benefits, Claimant asserted that the work-related stress and dangerous nature of the decedent's work caused him to suffer Post Traumatic Stress Disorder ("PTSD") leading to an irresistible impulse to commit suicide.[2]

Section 3(c) of the LHWCA provides that "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." To prove an irresistible impulse, the claimant must produce expert opinion that the decedent suffered from a mental disease or impairment that created the impulse leading to the suicide.

In this case, two competing medical experts were making a retrospective diagnosis of whether the decedent suffered from PTSD. Claimant's expert opined that the decedent must have suffered from work-related PTSD because he could find no other cause. The other expert opined that the evidence failed to establish PTSD, and that the decedent's act was due to a combination of non-work related stressors, including alcohol consumption. The court concluded that the ALJ's determination that the latter expert was more persuasive was supported by substantial evidence and consistent with the law. Extensive testimony was offered about the decedent's work and activities before his death. The ALJ found that the decedent had not been exposed to life threatening situations in Iraq. A court may not reweigh or re-evaluate the evidence considered by the ALJ. "That the facts may permit diverse inferences is immaterial. The [ALJ] alone is charged with the duty of selecting the inference which seems most reasonable and his choice, if supported by the evidence, may not be

[2] The court stated that although Claimant averred that the decedent suffered from depression, the issue before the ALJ was whether PTSD could render his suicide involuntary and Claimant did not argue that depression caused the suicide.

disturbed." *Presley v. Tinsley Maint. Serv., 529 F.2d 433, 436 (5th Cir.1976)* (citation omitted).

The court also rejected Claimant's assertion that she was not granted the statutory presumption that the decedent's death was not willful. The court observed that such a presumption applies only "in the absence of substantial evidence to the contrary...." 33 U.S.C. § 920(d). The court quoted a 1935 Supreme Court decision, stating that this presumption's "only office is to control the result where there is an entire lack of competent evidence." *Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935). Here, the ALJ thoroughly reviewed voluminous evidence presented, and the presumption did not control.

[Topic 3.2.2 Coverage – Other Exclusions – Willful Intention; Topic 20.9 Section 20(d) Presumption that Employee Did Not Intentionally Injure Self or Other]

***Cooper v. Int'l Offshore Servs.*, LLC, No. 10-30046, 2010 WL 3034497 (5th Cir. 2010)(unpub.)**

Affirming the district court's grant of a summary judgment, the Fifth Circuit held that the district court did not have jurisdiction over the injured worker's challenge to the District Director's final order approving a Section 8(i) settlement, and that *res judicata* precluded the worker from relitigating the District Director's finding of fact in the final compensation order that International was released from liability from "any and all claims of whatsoever nature" arising out of the accident.

Charles Cooper was injured while loading supplies onto a vessel when a wake from an unidentified passing ship caused the gang plank he was standing on to shift. He settled his compensation claims with his employer ("International") through the LHWCA administrative processes. In consideration for a lump sum payment to Cooper, the parties agreed that, "[a]pproval and payment of this agreed settlement shall discharge the liability of [International] for the payment of any further compensation and/or medical benefits as a result of the injury." The District Director, OWCP approved the settlement and entered a compensation order, which included the following finding of fact:

> "5. [International] ... shall be forever released and relieved from all past, present, and future medical expenses, rehabilitative expenses, workers' compensation benefits, and any and all claims of whatsoever nature and kind arising heretofore or which

> may hereafter arise, growing out of any accident or injury or out of any medical treatment provided as a result of any accident or injury occurring prior to the date of this agreement."

The compensation order was not appealed to the Board and thus became final thirty days later. 33 U.S.C. § 921(a). Cooper subsequently filed a complaint in a district court asserting negligence claims arising out of the accident, and seeking damages, maintenance, and cure from International and the unidentified vessel that created the wake. Cooper argued that, having settled his compensation claim, he could still recover damages under Section 5(b) of the LHWCA, which permits a qualifying injured employee to sue a vessel owner for negligence.

The Fifth Circuit initially observed that Section 8(i) of the LHWCA gives wide latitude to employers and workers to settle qualifying compensation claims. Slip. op. at *2 (citing 1A Benedict on Admiralty § 75 (rev. 7th ed.2009)). An agreed settlement must be approved by an administrative adjudicator to ensure it is adequate and was not induced under duress. *Id.*

Here, the district court correctly held that it lacked jurisdiction over any challenge to the factual findings contained in the compensation order that was not appealed and thus became final. On appeal, Cooper argued that he was seeking a judicial interpretation of the order due to it being ambiguous in addressing release from liability. The appellate court declined to consider this argument, as it was not presented to the district court. Rather, before the district court, Cooper argued that the District Director made an erroneous finding of fact in formulating the extent of the release, as he did not intend such a broad release in settling the case. The Fifth Circuit noted that "[t]here may well be a serious question about whether the District Director went further than the parties intended." Slip. op. at *3. However, the district court properly concluded that it lacked jurisdiction over such a challenge. *Id.* § 921(c), (d). If Cooper believed the District Director's order did not reflect the parties' settlement agreement, he could have sought reconsideration by the Director or appealed the order to the Board. *Id.* § 921(a).

Cooper further argued that regardless of whether he has settled all workers' compensation claims, he could still bring claims for negligence against the vessel's owner. 33 U.S.C. § 905(b). International argued that despite this general principle, Cooper's separate negligence claims were barred by *res judicata* arising from his broad settlement agreement. The appellate court observed that once a final judgment on the merits of a prior action is entered, the parties and those in privity with them may not relitigate issues that either were or could have been brought in the action.

Res judicata applies when an administrative agency was the venue of the first action, provided the agency acted in a judicial capacity, gave the parties sufficient opportunity to present their case, and resolved any disputed fact questions properly brought before it. Four elements must be met for a claim to be barred by *res judicata*. Here, only one element was in dispute, *i.e.*, that the same claim or cause of action was involved in both cases. Cooper argues that his claim in the administrative proceedings was for compensation and his claim in the district court was for damages. The Fifth Circuit observed, however, that the District Director's finding of fact in the final compensation order was that International was released from liability from "workers' compensation benefits, and any and all claims of whatsoever nature" arising out of the accident. This language was unambiguous. While the language may have been errant, that was an issue to resolve on appeal from the Director. Thus, International has no further liability connected with the accident, and *res judicata* precluded Cooper from relitigating this issue.

[Topic 8.10.1 Section 8(i) Settlements – Generally; 5.2.1 Third Party Liability – Generally; Topic 85 *Res Judicata*, Collateral Estoppel, Full Faith & Credit, Election of Remedies]

B. Benefits Review Board

***Holiday v. Newport News Shipbuilding and Dry Dock Co.*, __ BRBS __ (2010).**

On remand from the Fourth Circuit, the Board addressed the appropriate hourly rate for claimant's counsel, a Washington, D.C.-based attorney who only represented claimant on appeal before the Board. In vacating the Board's fee award, the Fourth Circuit held that the Board erred in summarily stating that $250 was the prevailing rate in the geographic area, and instructed the Board on remand to address relevant lodestar factors based on specific findings. *Newport News Shipbuilding & Dry Dock Co. v. Holiday,* 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

The Board held that, since counsel participated in this case only at the appellate level and thus did not have any contacts with the local area where claimant resides and the hearing was held, Washington, D.C. was the appropriate geographic market for setting counsel's hourly rate, as it is the community in which the Board sits. The Board observed that this holding is supported by the Fourth Circuit case law identifying the test for determining if extrajurisdictional counsel is entitled to his home market rates. The fact that Employer does not do business in Washington, D.C. is not a relevant factor.

The Board further determined that counsel adequately justified his requested rate of $420, as he provided sufficient evidence of a "market rate" that he receives in view of his expertise and experience in those very limited cases in which he represents paying clients, and the *Laffey* Matrix supported the requested hourly rate. The Board noted that the Fourth Circuit rejected counsel's contention that the Board is constrained to consider the *Laffey* Matrix when determining the reasonable hourly rate in the geographic market of Washington, D.C. At the same time, the Board rejected Employer's assertion that the *Laffey* Matrix should not be applied because it is applicable only to limited types of complex litigation. The Board noted that the Supreme Court has stated that a "reasonable attorney's fee" is calculated in the same manner in all federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557, 561 (1992). Thus, the Board "[found] appropriate counsel's reference to the *Laffey* Matrix as support for his hourly rate request, as the Matrix applies to fee-shifting statutes, such as the Longshore Act, where the prevailing party may recover a reasonable attorney's fee." Slip. op. at 4 (citations omitted). Contrary to employer's contention, the fact that certain fee-shifting statutes set attorney's fees in a different manner does not render the Matrix inapplicable. The Board further stated that "[e]mployer's citation to the outdated 2002 Altman Weil survey fail[ed] to address with specificity the Washington, D.C. market or counsel's assertion that he is entitled to his requested rate based on his expertise." *Id.*

[Topic 28.6 Attorney's Fees - Factors Considered in Award; Topic 28.6.1 Attorney's Fees – Hourly Rate]

***Rice v. Service Employees Int'l, Inc.*, __ BRBS __ (2010).**[3]

The Board reversed the ALJ's determination that claimant failed to establish that her inability to return to her pre-injury employment in Iraq was unrelated to a work-related psychological condition she suffered while working for employer in Iraq. The Board held that claimant established a *prima facie* case of total disability, as both psychologists who had evaluated her believed that a return to work in the war zone is contraindicated due to the likely recurrence of work-related symptoms of claimant's underlying psychological condition. Claimant's job was unavailable without a medical release, which the psychologists refused to provide.

The ALJ found that claimant suffered from a work-related psychological injury that resulted in short-term symptoms, which resolved after she

[3] This decision was issued by the Board on June 25, 2010.

returned to the United States, and that her subsequent inability to work in the war zone was related to her pre-existing psychological impairments. Thus, the ALJ only awarded temporary total disability benefits. The Board initially held that the ALJ rationally credited the opinion of Dr. Klein over that of Dr. Ashworth. The ALJ found that in concluding that claimant suffered from work-related PTSD and depressive disorder, Dr. Ashworth did not have an accurate description of claimant's background and psychological history, did not explain the significance of claimant's persistent distortions, and relied in part on the occurrence of a sexual assault in 2004, which the ALJ did not believe had occurred. Instead, the ALJ credited Dr. Klein's opinion that claimant suffered from pre-existing psychiatric conditions which were temporarily aggravated by her work overseas, and that she should not return to work in Iraq because she may endanger others if she were to panic under conditions of war.

The Board concluded that Dr. Klein's opinion is legally insufficient to support a finding that claimant is not disabled from her work injury. The ALJ found that exposure to stimuli in claimant's employment made her psychiatric condition symptomatic. Thus, the fact that claimant's work-related symptoms abated upon her return to the United States does not establish that she is not disabled by her symptoms. Rather, claimant sustains a work-related injury when the conditions of employment cause her to become symptomatic, regardless of whether the underlying condition is altered or permanently aggravated. Moreover, an employee may be disabled if her employment is medically contraindicated, even if she is not currently in pain or symptomatic, due to her work-related condition. The fact that Dr. Klein based his opinion that claimant should not return to work in Iraq on a concern for claimant's co-workers is immaterial; the premise for his concern is that claimant's work would cause her to become symptomatic.

The Board, accordingly, modified the ALJ's decision to award claimant benefits for a period of permanent total disability followed by ongoing permanent partial disability, based on the ALJ's alternative findings, not challenged on appeal, as to the existence of suitable alternate employment and employer's entitlement to Section 8(f) relief.

[Topic 2.2.6 Injury – Aggravation/Combination; Topic 2.2.18 Representative Injuries/Diseases – Psychological Problems; Topic 8.2.3 Extent of Disability – Total Disability Defined; Employee's *Prima Facie* Case]

II. Black Lung Benefits Act

Benefits Review Board

By unpublished decision in *Wilson v. Peabody Coal Co.*, BRB No. 09-0770 BLA (Aug. 11, 2010)(unpub.), a case arising in the Sixth Circuit, the Board affirmed the Administrative Law Judge's denial of Employer's petition for modification on grounds that reopening the claim would not "render justice under the Act." In particular, the miner was awarded benefits by an original deciding Administrative Law Judge and the award was affirmed by the Board on appeal.

On modification, Employer asserted that the original deciding judge made a mistake in a determination of fact in weighing the chest x-ray evidence. In the original claim, Employer did not provide the *curriculum vitae* of two of its physicians documenting that they were board-certified radiologists and NIOSH-certified B-readers in the original claim, but it sought to do so in conjunction with the modification proceeding. In denying Employer's modification petition, the Board affirmed the Administrative Law Judge's conclusion that Employer "showed a lack of diligence from the beginning of this claim when it disregarded—either through ignorance or indifference—the well established rule that a party must prove the credentials of its experts." The Administrative Law Judge noted that Employer had multiple opportunities to cure this deficiency, including while the original claim was pending before the District Director and Administrative Law Judge.

Citing to *Kinlaw v. Stevens Shipping and Terminal Co.,* 33 B.R.B.S. 68 (1999), Employer argued that its modification petition cannot be denied solely because evidence was available at an earlier stage in the proceeding. The Board recognized, however, that "the interest in arriving at the 'correct' result does not always override the interest in finality." As a result, in *Wilson,* the Board concluded that Employer's modification petition was properly denied:

> The facts here – where the employer failed to submit critical evidence, then attempted to use modification to correct the oversight – are similar to those in *Kinlaw*, where the Board upheld the administrative law judge's finding that reopening the claim would not render justice under the Act, because the employer there was attempting to correct its own misstate in failing to develop its expert's testimony in the initial litigation. *Kinlaw*, 33 BRBS at 73-75. Detecting no abuse of discretion, we affirm the administrative law judge's finding that employer

> exhibited a lack of diligence in establishing the radiological qualifications of its experts.

Slip op. at 10. The Board agreed that Employer's motive in requesting modification was improper as it sought to "remedy its own failure to timely submit the radiological qualifications of its experts, *i.e.* its own litigation mistake."

Turning to the issue of whether the miner's ventilatory testing values were qualifying under the regulations, the Board cited to *K.L.M. [Meade] v. Clinchfield Coal Co.,* 24 B.L.R. 1-40 (2008) and held that "[g]iven claimant's advanced age, the administrative law judge permissibly utilized the qualifying values for a 71 year old miner."

[**modification not "render justice under the Act"; qualifying ventilatory testing values for a miner over 71 years of age**]