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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 237 October 2011

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

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

***Boroski v. Dyncorp Int'l, et al.*, __ F.3d __, 2011 WL 5082185 (11th Cir. 2011).**

The Eleventh Circuit held that Section 6 maximum compensation rate for a claimant receiving "newly awarded compensation" for permanent total disability ("PTD") benefits pursuant to the LHWCA was governed by reference to the national average weekly rate in effect on the date when he received his award, not the date his disability commenced. The court noted a circuit split on this issue, and the fact that the Supreme Court has recently granted certiorari in a Ninth Circuit case involving this issue. *Roberts v. Director, OWCP*, 625 F.3d 1204 (9th Cir.2010), *cert. granted sub nom. Roberts v. Sea–Land Services, Inc.*, 80 U.S.L.W. 3017, 2011 WL 1831577, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (Sept. 27, 2011) (No. 10–1399).

Claimant ceased working for employer in 2002 due to a severe vision impairment caused by his work-related exposure to chemicals, and was awarded PTD by the ALJ in 2008. The ALJ awarded compensation at the maximum rate, but did not specify the applicable rate. Employer began payments based on the maximum rate in effect in 2002, and claimant

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

sought a supplemental order of default from the district director. The district director rejected claimant's assertion that the applicable maximum rate had to be determined based on the date of the ALJ's award, and the Board and the district court affirmed. The Eleventh Circuit disagreed.

The court stated that in any case of statutory construction, analysis begins with the language of the statute, and where the statutory language provides a clear answer, it ends there as well. Here, the court reasoned that under the LHWCA compensation is generally based on a worker's AWW at the onset of disability, with annual adjustments, unless otherwise provided by the Act. *See* 33 U.S.C. § 910. The court concluded that Sections 8 and 6(b) "otherwise provide" in this instance. The court held that

> "[a] plain reading of subsections 906(b) and (c) compels our holding that a person, such as Boroski, who has never received compensation for a covered disability that commenced in 2002, and who is 'newly awarded compensation' in 2008, is entitled to have his maximum compensation rate determined by reference to the national average weekly rate applicable to the date on which he received his award."

Slip op. at *17.

The court acknowledged that prior decisions by the Ninth Circuit and the Board had held that the date on which disability occurred determines the maximum weekly rate of compensation for a permanently totally disabled employee who is "newly awarded compensation." The court also stated that this interpretation was advocated in this case by the Director, OWCP, and was, therefore, entitled to *Skidmore* deference; yet, the court was not persuaded. The court rejected the Ninth Circuit's conclusion in *Roberts* that "[c]onsistent with the meaning of the term 'awarded' in sections 8 and 10, 'newly awarded compensation' in section 6 means 'newly entitled to compensation,'" stating that this interpretation of §6 overlooks its plain meaning and was adopted "perhaps because [the 9th Circuit] applies *Chevron* deference to the Director's litigating positions." Slip op. at *14, *citing Roberts*, 625 F.3d at 1207. The court agreed instead with the Fifth Circuit's holding in *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997).

The court further reasoned that the Director's interpretation was also incompatible with the use of "award" in Sections 28(c), 13 and 14; contradicted by the Act's legislative history; and contrary to *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379

(1992)(holding that "entitled to compensation" in §33 cannot be read to mean "awarded or receiving compensation"). Further,

> "application of the clear meaning of the statutory terms in this case will not have any harsher effect than construing it as the Ninth Circuit did in *Roberts*; it will simply favor the disabled employee over the employer, rather than the employer over the employee, in the event of significant delay. . . . . The fact that Congress has chosen to encourage employers to pay promptly by imposing penalties for non-payment of claims that result in awards unless a claim is timely controverted does not make the disabled employee whole, since controversion is totally within the control and discretion of the employer."

Slip op. at 15. Finally, the court rejected the Director's argument that claimant cannot obtain additional compensation even if "award" refers to an administrative order because the term "during such period" in §6(c) can be read to mean "for such period" and claimant was awarded compensation "for" 2002–2008. The Board stated that "[t]his argument fails because 'during' is best understood to have a meaning more consistent with 'in' than 'for.'" *Id.*

[Topic 6.2.3 COMMENCEMENT OF COMPENSATION – Maximum Compensation for Disability and Death Benefits]

B. Benefits Review Board

***Ramos v. Container Maintenance of Florida*, __ BRBS__ (2011).**

In this case arising in the Eleventh Circuit, the Board affirmed the ALJ's finding of status, but reversed his finding that the injury occurred on an "adjoining area" and thus met the situs requirement of §3(a).[2]

Claimant was injured while working at employer's Alta Drive facility ("The Depot") in Jacksonville, Florida as a dual mechanic, repairing and maintaining containers and chassis brought to employer's facility by shipping companies. As to the status requirement, the Board held that "[a]s claimant's regular work involved keeping the containers in good repair for use in maritime commerce, as well as overland transportation, his regular

[2] The Board noted that the ALJ erred in applying §20(a) to the coverage issues as the facts were not disputed and §20(a) does not apply to the legal issues involved with coverage.

work as a container and chassis mechanic satisfies the status requirement."[3] Slip op. at 3.

As to situs, the Board stated that, in the Eleventh Circuit, in order to constitute "adjoining area," the area must have a functional nexus with maritime activities and a geographical nexus with the same body of navigable waters. As Alta Drive facility is not adjacent to any water, the inquiry concerns whether it is within the "vicinity" of navigable water, or in a neighboring area, and customarily used for maritime activities. In particular, it must have a geographic nexus with the Blount Island terminal on the St. Johns River. The ALJ found, applying the *Winchester* and *Herron* factors, that: 1) the Alta Drive facility is over three miles from the Blount Island facility; 2) the surrounding property is mixed-use and none is used for maritime purposes; 3) the Depot is as close as feasible to navigable water and to the Blount Island terminal (considering price, suitability, financial constraints, and employer's site demands); and 4) the Depot's work on containers and chassis from the Jacksonville area was functionally related to the maritime work at the Jacksonville ports.

The Board concluded that, in finding geographic nexus, the ALJ improperly gave conclusive weight to finding no. 3, as "[a] property that is 'as close as feasible' still must lie within the general geographic parameters of sites involved in maritime commerce." Slip op. at 8. The ALJ erred in not giving any weight to his findings that: no constructing, repairing, unloading, or loading of vessels occurs at Alta Drive; no railway or conveyor belt connects it with Blount Island or any deep-water port; and the Depot is not located in an area of maritime commerce as it is surrounded by heavy-industrial and mixed-use properties, as well as residences. With the exception of the ALJ's inference that employer was motivated by proximity to local ports, the reasons for selecting the site were general business-related reasons. Under the relevant precedent, where a property was chosen for economic reasons, was not surrounded by maritime pursuits, was located inland from the waterway, and was found to have not been particularly suitable for maritime commerce, the Board has affirmed the finding that it was not an adjoining area under §3(a). Here, the Board concluded that

[3] The ALJ credited testimony that the containers at the Alta Drive facility come from both distant and local ports by trucks, and he determined that work on the "local" containers constitutes maritime work whereas work on the containers from Savannah and Charleston did not. The Board noted that the ALJ provide not discussion as to why he made this legal distinction, but concluded that any error was harmless.

"[a]s in *Cunningham* [*v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004)], the site of injury in this case is several miles from the port, separated by bridges, highways, residences and businesses, it is inland, and it is surrounded by mixed-use/non-maritime businesses and properties. Even taking into account the motive for the purchase rationally inferred by the [ALJ], the Alta Drive property was purchased for general business reasons in an area not devoted to maritime pursuits, and other parcels of land closer to Blount Island were rejected. As the facts do not support the [ALJ's conclusion that the Alta Drive facility is in an area neighboring the Blount Island facility or the St. Johns River, and because there is 'a substantial expanse of unrelated land uses' between the two properties, we reverse his decision and hold that the Depot is not in the same geographic area as Blount Island. To hold that it is adjoining would be to extend unreasonably the perimeter of the 'common geographical area' several miles inland.

Consequently, we hold that the Alta Drive facility does not have a geographic nexus with the Blount Island terminal on the St. Johns River: it is not adjacent to or in the vicinity of navigable water; its location was chosen based on general business factors; the Blount Island facility is three miles away; properties closer to Blount Island were rejected as unsuitable for employer's purposes; and the businesses surrounding the Depot are not maritime. The words of the *Cunningham* court are applicable to the instant case: '[N]o matter how much maritime activity takes place at [the Alta Drive facility], . . . the substantial expanse of unrelated land uses between the [Blount Island facility] and [the Alta Drive facility] forecloses a finding that the one 'adjoins' the other.' The Alta Drive facility is, therefore, not within the vicinity or a neighboring area of Blount Island and is not in an area customarily used for maritime commerce."

Slip op. at 11-12 (internal citations omitted).

[Topic 1.7.1 JURISDICTION/COVERAGE– STATUS – "Maritime Worker" ("Maritime Employment"); Topic 1.6.2 JURISDICTION/COVERAGE - SITUS - "Over land"]

II. Black Lung Benefits Act

Benefits Review Board

In *Owens v. Mingo Logan Coal Co.*, 24 B.L.R. 1-__, BRB No. 11-0154 BLA (Oct. 28, 2011), the Board addressed Employer's challenges regarding application of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010) to a miner's claim. Specifically, Employer argued:

> . . . that the presumption of total disability due to pneumoconiosis at Section 411(c)(4) is not applicable to this case because the rebuttal provisions apply to the Secretary of Labor, and not to responsible operators.

The Board further noted that Employer:

> . . . also contends that Section 1556 of the PPACA is unconstitutional because its retroactive application denies employer the right to due process and constitutes a taking of private property.

Slip op. at 2.

The Board adopted the positions of the Claimant and Director, OWCP finding that Section 411(c)(4), which is implemented through 20 C.F.R. § 718.305, applies to responsible operators:

> We reject employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. As claimant and the Director have indicated, the courts have consistently ruled that Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference to "the Secretary." (citations omitted) Therefore, we reject employer's assertion that Section 411(c)(4) does not apply to a responsible operator.

The Board also rejected Employer's argument that Section 1556 of the PPACA is unconstitutional because "its retroactive application denies employer the right to due process and constitutes a taking of private property." Here, the Board cited its prior decisions in *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620

(4th Cir. June 13, 2011) and *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

[**Section 1556 of PPACA held constitutional; 15-year presumption may apply in claim involving responsible operator**]

In *Dotson v. McCoy Elkhorn Coal Corp.*, 24 B.L.R. 1-__, BRB No. 10-0706 BLA (Nov. 16, 2011) (en banc)[4], a claim involving application of the PPACA's automatic entitlement provisions in a survivor's claim, the miner was receiving federal black lung benefits at the time of his death on August 28, 1998. The survivor filed her claim for benefits on January 30, 2006 and it was pending at the time of enactment of the PPACA. Citing its prior decisions in *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011) and *Fairman v. Helen Mining Co.*, 24 B.L.R. 1-225 (2011), *appeal docketed*, No. 11-2445 (3rd Cir. May 31, 2011), the Board rejected Employer's arguments that the automatic entitlement provisions at Section 1556 of the PPACA are unconstitutional.

Turning to the date of onset of survivor's benefits under the automatic entitlement provisions, the Board noted the following:

> Employer argues that to allow entitlement to derivative benefits dating back to the miner's death in 1998 is tantamount to finding that the miner's death was due to pneumoconiosis during the period from 1981 through January 1, 2005, even though the PPACA was not applicable during that period. Employer asserts that such a 'harsh, retroactive application of the law' provides claimant with a 'windfall,' since claimant did not file her claim until eight years after the miner's death.
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> . . .
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> Rather, employer argues, the date of filing of the survivor's claim should be utilized as the commencement date for benefits, consistent with the default date for the commencement of miner's benefits under Section 725.503(b), in those cases where the evidence does not establish the month of onset of total disability due to pneumoconiosis. Because Congress limited the automatic continuation of benefits provision to claims filed after January 1, 2005, that are pending on or after March 23, 2010, and expressed no intent to utilize the miner's date of death as

[4] This case summary is included in the October 2011 digest because of its importance.

> the commencement date for benefits, as set out in Section 725.503(c), employer asserts that 'fairness' dictates that benefits, if awarded, should commence from one of the following dates: (1) March 23, 2010, the date of enactment of the amendments; (2) January 30, 2006, the date claimant filed her claim; or (3) at the earliest, January 1, 2005, the date Congress selected as the date after which claims must be filed for consideration under amended Section 932(l).

On the other hand, the Board noted the Director's arguments to the contrary:

> The Director contends that, while the Act does not specifically address the date from which benefits to a survivor should commence, the Director promulgated the regulation at 725.503 over thirty years ago, through express statutory authority. This regulation provides, in pertinent part, that '[b]enefits are payable to a survivor who is entitled beginning with the month of the miner's death, or January 1, 1974, whichever is later.' (citations omitted) The Director asserts that Section 725.503(a) is applicable to claims filed pursuant to amended Section 932(l), arguing that when the PPACA was passed, Congress did not change the Director's long-standing position that survivor's benefits commence the month of the miner's death.
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> . . .
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> The Director contends, therefore, that benefits should commence from August 1998, the month in which the miner died. (citation omitted).

Slip op. at 5.

The Board noted that the PPACA is silent with regard to the onset date of survivor's benefits under its automatic entitlement provisions. In awarding benefits to the survivor as of August 1998, the month of the miner's death, the Board noted that "Congress is presumed to know the law when it passes legislation, and it gave no indication from the language of Section 1556 that it intended to change the established rule entitling survivors to receive benefits from the date of the miner's death." The Board

also noted that it was not persuaded by Employer's argument that the survivor will receive a "windfall" of benefits because "the Act contains no time limit for the filing of a claim by a survivor of a miner."

[**automatic entitlement under the PPACA; onset of benefits as of month during which the miner died**]