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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 247 October 2012

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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 International*, __ F.3d __, 2012 WL 5305797 (11th Cir. 2012).**

The Eleventh Circuit held that a permanently and totally disabled ("PTD") employee was "currently receiving compensation," for purposes of determining which fiscal year's national average weekly wage ("NAWW") to apply in calculating annual increase in benefits under § 6 of the LHWCA, when he was "entitled to compensation," not when he actually received benefits. In so holding, the court agreed with the Director, OWCP, and upheld decisions by the BRB and the district court.

Claimant ceased working for employer in 2002 due to a work-related vision impairment, and was awarded PTD benefits by the ALJ in 2008 at the maximum compensation rate. Under § 6(b), the maximum rate of compensation is determined in reference to the NAWW; § 6(b)(3) provides that the NAWW is determined by the DOL annually. Further, § 6(c) provides that determinations of the NAWW "... shall apply to employees or survivors currently receiving compensation for permanent total disability or death

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations ("*id.* at *__") pertain to the cases summarized in this digest and refer to the Westlaw identifier.

benefits during such period, as well as those newly awarded compensation during such period." On appeal, claimant made two arguments regarding the proper interpretation of § 6(c). First, he contended that the phrase "newly awarded compensation" means the actual entry of a compensation award, and thus the 2008 NAWW determined his PTD benefits from 2002 to 2008. Second, claimant argued that "currently receiving compensation" means the time the compensation is *actually* received; as claimant did not receive any payments until 2008, he argued that the 2008 NAWW should determine the size of his benefit payments under either clause. In *Boroski v. DynCorp Int'l*, 662 F.3d 1197 (11th Cir. 2011) ("*Boroski I*"), the court agreed with claimant's first argument and thus did not reach his second contention.[2] However, in *Roberts v. Sea–Land Services, Inc.*, __ U.S. __, 132 S.Ct. 1350, 182 L.Ed.2d 341 (2012), the Supreme Court held that "newly awarded compensation" in § 6(c) means newly entitled to compensation.[3] Thereafter, in *Director, OWCP v. Boroski*, __ U.S. __, 132 S.Ct. 2449, 182 L.Ed.2d 1059 (2012), the Court vacated *Boroski I* and remanded for further consideration in light of *Roberts.*

On remand, the Eleventh Circuit held, in accordance with *Roberts*, that "newly awarded compensation" in § 6(c) means "newly entitled to compensation." It observed, however, that neither *Boroski I* nor *Roberts* addressed claimant's second argument based on the "currently receiving compensation" clause. The court stated that "[e]ven assuming that Boroski's benefits for 2002 are governed by the 'newly awarded clause,' the amount of Boroski's benefit payments for each year after he became disabled (2003–2007) must be determined under the 'currently receiving' clause." *Id.* at *4. Because claimant was being compensated at the maximum rate, his annual benefit increases (for as long as his compensation rate exceeds the maximum rate) were the result of § 6(c)'s 'currently receiving' clause rather than § 10(f).

Agreeing with the Director, OWCP, the court held that "'currently receiving compensation' in § 906(c) means 'currently entitled to compensation.'" *Id.* at *5. The court reasoned that, in isolation, this phrase could support either interpretation. However, in the context of the overall statutory scheme, the Director's interpretation is appropriate. First, the Director's position harmonizes the "currently receiving" and "newly awarded" clauses of § 6(c). In this regard, the court rejected claimant's contention that the former clause expressly limits itself to PTD individuals and focuses on a claimant's actual receipt of benefits; while the latter clause applies to those who are not PTD and focuses on a claimant's entitlement to benefits. The court concluded that the "newly awarded" clause does not exclude PTD

[2] *See* Recent Significant Decisions Monthly Digests ## 237, 238 (Oct. – Nov. 2011).

[3] *See* Recent Significant Decisions Monthly Digest # 241 (Mar. 2012).

persons from its reach, and therefore, under claimant's interpretation, "for the year 2002, the two clauses would direct two different and irreconcilable weekly benefit payment amounts." *Id.* at *6. Conversely, the Director's interpretation will result in only one benefit payment amount for a claimant's first year of disability. Second, the court concluded that the Director's interpretation is more consistent with § 10(f), which similarly provides for a *gradual* increase in PTD benefit based on yearly increases in the NAWW. The result is also consistent with the Act's goal of compensating disability based on wages at the time of injury, as a claimant's PTD benefits are based on his wages at the time he became disabled, with cost-of-living increases each year thereafter. By contrast, claimant's interpretation would effectively give the injured employee a raise to the NAWW for the year in which the first payment is made, and would make it retroactive to the date of his disability. The court rejected claimant's contention that Congress adopted his interpretation to encourage prompt payment of benefits, stating that a claimant is clearly entitled to interest on each past due benefit payment, which adequately compensates him for any delay in payment. Third and finally, the court reasoned that the Director's position avoids disparate treatment of similarly situated claimants, which was one of the considerations underlying the holding in *Roberts*.

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

***Schwirse v. Director, OWCP*, __ WL __, No. 11-73172 (9th Cir. 2012)(unpub.)**

The Ninth Circuit upheld the Board's decision in *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011),[4] which affirmed the ALJ's finding on remand that employer established by a preponderance of the evidence that claimant's injury was occasioned solely by his intoxication and that claimant's compensation was barred pursuant to § 3(c). Section 3(c) provides that "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee."

The court found no error in the BRB's interpretation of the term "injury" to mean the cause of the accident rather than the mechanism of the injury, stating that "[i]ncluding the mechanism of the injury as a cause in addition to intoxication would render the intoxication exception 'insignificant, if not wholly superfluous.'" Slip op. at 2, *citing TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Accordingly, the court rejected claimant's contention that his injury was not caused by his intoxication, but by the concrete and metal slab upon which he fell.

[4] *See* Recent Significant Decisions Monthly Digest # 236 (Sept. 2011).

Pursuant to § 20(c), once an injury is established, a presumption arises that it was not occasioned solely by intoxication; employer must then present "substantial evidence" to rebut that presumption. Here, substantial evidence supported the ALJ's conclusion that claimant's employer rebutted the presumption that intoxication was not the sole cause of claimant's injury. The court found no error in the BRB's conclusion that claimant's employer does not have to 'rule out' all other possible causes of injury in order to rebut the presumption under § 20(c). The BRB correctly concluded that employer need not negate every hypothetical cause. The court observed that to require an employer to 'rule out' all other possible causes would conflict with the statutory language and applicable standard of review. The ALJ properly denied disability benefits, because no other factor was supported by substantial evidence except that claimant's intoxication was responsible for his injury.

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

B. U.S. District Courts

***Vance v. CHF International, et. al.*, Civil Case No. RWT 11–3210, 2012 WL 5200049 (D.Md. 2012)(unpub.)**

Plaintiffs, the personal representative of the estate of Stephen D. Vance and his wrongful death beneficiaries, filed a six-count complaint against Defendant CHF International ("CHF") and Defendant Unity Resources Group ("URG"), asserting various tort claims based on the tragic murder of Mr. Vance while he was performing aid work in Pakistan. Plaintiffs alleged that in 2008, one of CHF's projects was to implement a job creation and workforce development program in Pakistan's Federally Administered Tribal Area ("FATA"). The project was funded, in whole or in part, by the United States Agency for International Development ('USAID') via a Cooperative Agreement. The Cooperative Agreement required CHF to provide Defense Base Act ("DBA") insurance coverage to its employees working on the Program, and Mr. Vance's beneficiaries received DBA death benefits.

The district court had previously granted defendants' respective motions to dismiss, finding that it cannot exercise personal jurisdiction over URG; and that it lacks subject matter jurisdiction over plaintiffs' claims against CHF because DBA insurance is the exclusive civil remedy against CHF for Mr. Vance's death, *see* 42 U.S.C. § 1651(c).[5] Thereafter, plaintiffs filed a motion pursuant to Fed. R. Civ. P. 59 to vacate the order dismissing

[5] *See* Recent Significant Decisions Monthly Digest #243 (June 2012).

the case against CHF citing newly discovered evidence that the DBA does not apply.

The court denied plaintiffs' motion to vacate, and did not reach their argument that the Cooperative Agreement is not a "contract" as that term is used in the DBA. The court reasoned that the evidence in question was not newly discovered, because the USAID policy guidance was available to plaintiffs via the Internet well in advance of the court's order of dismissal, and reasonable diligence would have uncovered this information. The court also rejected plaintiffs' assertion that its order was marred by a clear error of law because the court declined plaintiffs' request for jurisdictional discovery. The court observed that it never directly confronted the legal issue of whether the Cooperative Agreement is a "contract." The parties presented arguments that assumed that the Cooperative Agreement is a contract, and plaintiffs did not request jurisdictional discovery to uncover whether the Cooperative Agreement is a contract. Finally, the court found no manifest injustice because plaintiffs are receiving their full remedies under the law: the parties agreed that Mr. Vance's death was covered by the DBA, and the DOL approved payment of DBA compensation.

[Topic 60.2 DEFENSE BASE ACT; Topic 60.2.2 DEFENSE BASE ACT – Claim Must Stem From a "Contract" for "Public Work" Overseas; Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy]

C. Benefits Review Board

There were no published Board decisions under the LHWCA in October 2012.

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

No cases to report for this month.

B. Benefits Review Board

By published decision in *Rose v. Trojan Mining & Processing*, 25 B.L.R. 1-__, BRB No. 12-0001 BLA (Oct. 24, 2012), the Administrative Law Judge properly awarded benefits in a subsequent survivor's claim under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). The Board reiterated its holding in *Richards v. Union Carbide Corp.*, 25 B.L.R. 1-31 (2012) (en banc) (J. McGranery, concurring and dissenting; J. Boggs, dissenting), *appeal docketed,* No. 12-1294 (4th Cir. Mar. 8, 2012) to hold that the automatic entitlement provisions apply to subsequent survivors' claims:

> The principles of res judicata addressed in Section 725.309, requiring that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of the PPACA, because entitlement under amended Section 932(l) is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis.

Slip op. at 4.

[**automatic entitlement under the PPACA, subsequent survivor's claim**]