



RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 300
August - October 2019

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

William S. Colwell
Associate Chief Judge for Black Lung

Yelena Zaslavskaya
Senior Counsel for Longshore

Austin J. Egan
Attorney-Advisor

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

A. U.S. Circuit Courts of Appeals¹

[Mays v. Director, OWCP, ___ F.3d ___, 2019 WL 4283622 \(5th Cir. 2019\).](#)

The Fifth Circuit affirmed the ALJ/BRB's determination that a worker who injured claimant by kicking him in the head was not a borrowed servant of claimant's employer, and therefore claimant's settlement of his tort suit against the third-party tortfeasor triggered the application of § 33 of the LHWCA.

Claimant worked as a welder for Huntington Ingalls, Inc. ("Avondale") at its shipyard. Avondale contracted with International Marine & Industrial Applicators, Inc. ("IMIA") for cleaning and sandblasting services on a Naval vessel. John Gliott was one of the IMIA employees placed on temporary work duty at Avondale's shipyard. In 1991, Gliott kicked claimant in the head, fracturing his cheekbone and injuring his eye, and further resulting in a psychological condition.

After Avondale ceased voluntary payment of benefits, claimant filed a claim under the LHWCA and was awarded medical benefits, but no wage indemnity. Claimant also filed a suit against Gliott and IMIA in a state court, and in 2000, accepted a settlement of \$60,000 from Gliott and IMIA without Avondale's approval. Thereafter, Avondale sought relief under § 33(g), which provides that all rights to compensation and medical benefits under the LHWCA shall be terminated if an employee fails to obtain employer's approval before accepting a third-party tort settlement for less than the value of his workers'

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, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *___).

compensation benefits. At the same time, claimant filed a request for modification of the ALJ's award, providing new documentation showing that his injuries were more extensive than previously recognized. The ALJ found that § 33(g)'s forfeiture provision did not apply because the settlement amount exceeded the value of the benefits claimant had received up to that point. However, the ALJ granted Avondale relief under § 33(f), which entitles an employer to credit the net settlement amount against its liability. Finally, the ALJ denied claimant's request for modification as untimely. The Board affirmed the ALJ's grant of § 33(f) relief but found that claimant's modification action was not time-barred. Claimant, however, withdrew his request for modification.

Years later, claimant reinstated his modification request, this time alleging a mistake of fact in the earlier proceeding. Specifically, claimant asserted that he had never entered into a third-party settlement because Gliott was a borrowed servant of Avondale, not a third-party employee of IMIA. In 2016, the ALJ found that claimant was entitled to additional disability compensation of more than three hundred thousand dollars. However, the ALJ further found that because that additional award would far exceed claimant's unapproved settlement with Gliott and IMIA, § 33(g) would mandate forfeiture of the additional award, resulting in no change for claimant. Accordingly, the ALJ denied the modification. The Board affirmed. Both parties appealed: claimant challenged the ALJ/BRB's findings on Gliott's employment status, while Avondale challenged the denial of § 33(g) relief.

The Fifth Circuit affirmed the Board's finding that Gliott was an independent contractor employed by IMIA rather than a borrowed servant of Avondale, although it disagreed with some elements in the Board's analysis. The court applies the nine *Ruiz* factors² to determine whether an employee is a borrowed servant: (1) who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation, (2) whose work is being performed, (3) was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer, (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate his relationship with the employee; (6) who furnished tools and place for performance, (7) was the new employment over a considerable length of time, (8) who had the right to discharge the employee, and (9) who had the obligation to pay the employee. Although no single one of these factors is decisive, the first is the most critical.

The court agreed with the ALJ and the Board that IMIA retained control over Gliott and his work. IMIA's on-site foremen were in charge of all tasks performed by IMIA employees. Co-operation, as distinguished from subordination, is not enough to create an employment relationship. Avondale's quality checks and general site management were readily distinguished from the conduct of a borrowing employer, who gives direct orders to its borrowed servant.

The court disagreed with the ALJ's and Board's conclusion that the second *Ruiz* factor—whose work is being performed—was neutral. Instead, it weighed in favor of borrowed servant status, as the tasks IMIA completed at Avondale's shipyard were crucial to Avondale's ship-expansion contract with the Navy.

² *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969).

The court agreed with the ALJ's finding that the third *Ruiz* factor was neutral, and it disagreed with the Board's finding that there was no agreement between the two employers that Gliott would become Avondale's servant. Given the age of the document and the many corporate transitions in the years since it was executed, the court declined claimant's request to draw an adverse inference against Avondale for failing to produce the agreement.

The fourth *Ruiz* factor considers whether the employee acquiesced in his new work situation. In concluding that Gliott did not acquiesce to becoming Avondale's borrowed servant, the ALJ and the Board applied an incorrect legal standard. The question is not whether he agreed to become Avondale's employee but whether he was aware of his work conditions and chose to continue working in them. It is clear that Gliott did so here.

However, the fifth factor—whether the original employer terminated his relationship with the employee—clearly supported independent contractor status. Here, IMIA retained control over all the most important aspects of Gliott's employment: his pay, his performance, his supplies, and his insurance.

The sixth factor—who furnished the tools and place of performance—likewise indicates that Gliott was an independent contractor. The ALJ found that IMIA provided the scaffolding and tools of work, while employer provided the ship and shipyard on which he worked. Contrary to the Board's conclusion, however, this bifurcation of duties between IMIA and Avondale did not render the sixth factor neutral. The tools provided by IMIA were essential to Gliott's task, while the location of the work was merely incidental.

Noting that the case law provides little guidance, the court held that substantial evidence supported the ALJ's and BRB's conclusion that Gliott's 90-day employment term should lead to a neutral finding on the seventh *Ruiz* factor.

The eighth factor asks which company—the nominal employer or the purported borrowing employer—had the right to discharge the employee. While Avondale could not terminate Gliott's employment, it did have the right to remove him from its property for inappropriate conduct. The ALJ concluded that this factor favored independent contractor status, but the Board found the opposite. The court agreed with the Board, stating that the proper focus is whether the purported borrower had the right to terminate the worker's services with itself, not his employment with the lending employer.

Finally, the ALJ and the Board correctly determined that the ninth factor—who had the obligation to pay the employee—weighed in favor of independent contractor status. Typically, the distinguishing factor is the basis on which the purported borrower makes its payments. Here, the amount IMIA received from Avondale was not connected to the hours worked by IMIA employee.

Next, the court rejected claimant's contention that Avondale was estopped from denying that Gliott was its borrowed servant because prior statements by Avondale's agents constituted judicial admissions of his borrowed servant status. A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them. A statement made during the course of a lawsuit—even a

statement made in a pleading filed with the court—should be considered a judicial admission only if it was made intentionally as a waiver, releasing the opponent from proof of fact. An evidentiary admission, by contrast, is merely a statement of assertion or concession made for some independent purpose, and it may be controverted or explained by the party who made it. Here, the statements at issue were of the latter variety.

Turning next to Avondale’s cross-appeal, the court rejected its argument that the Board misconstrued the ALJ’s decision as an award of § 33(f) relief, as opposed to § 33(g) relief. Avondale misunderstood the ALJ’s decision: it did not modify claimant’s benefits and then apply a § 33(g) forfeiture to the modified amount. Rather, the ALJ determined that modification was not required, because any upwards modification would trigger, and be cancelled out by, a § 33(g) forfeiture. Thus, the unmodified compensation award and the § 33(f) relief remained in effect.

[Employer-Employee Relationship - Borrowed Employee; Section 33 - THIRD-PARTY CLAIMS – Third Party; Section 22 - MODIFICATION]

B. Benefits Review Board

[Powell v. Service Employees Int’l, Inc., BRBS \(2019\).](#)

The Board held that claimant forfeited her Appointments Clause challenge by not raising it before the ALJ. It further upheld the ALJ’s analysis of the medical opinions on the issue of causation, but remanded for consideration of additional medical opinions not discussed by the ALJ.

Claimant filed a claim for benefits under the Defense Base Act, asserting that a mandatory flu vaccine she received while working for employer in Iraq caused her to develop an inflammation in the spinal cord, or transverse myelitis, and neuromyelitis optica. The ALJ and the Board generally used the term neuromyelitis optica (“NMO”) to refer to all of claimant’s conditions. The parties agreed that claimant suffers from NMO. After discussing the medical opinions of record, and the underlying scientific studies, the ALJ gave more weight to the opinion of employer’s medical expert that it was very unlikely that the flu vaccine caused claimant’s NMO. Accordingly, the ALJ denied the claim. Claimant appealed.

Initially, the Board rejected claimant’s motion to vacate the ALJ’s decision and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. Sec. & Exch. Comm’n*, 585 U.S. ___, 138 S. Ct. 2044 (2018). Claimant asserted that she timely raised the *Lucia* issue because it was raised in her first brief to the Board and was a purely legal issue based upon a new Supreme Court decision. Agreeing with the OWCP Director, the Board held that claimant’s *Lucia* challenge was forfeited because she did not raise it before the ALJ, citing *Kiyuna v. Matson Terminals, Inc.*, ___ BRBS ___, BRB No. 19-0103 (June 25, 2019). It is well established that Appointments Clause issues are “non-jurisdictional” and, as such, are subject to the doctrines of waiver and forfeiture. *Lucia* was decided two months before the ALJ issued her decision, but claimant failed to raise her arguments while the claim was pending before the ALJ. Had she done so, the ALJ could have referred the case for assignment to a different, properly appointed ALJ to hold a new

hearing. Instead, claimant waited to raise the issue until after the ALJ issued an adverse decision. Because the issue can be waived or forfeited, the Board rejected claimant's contention that her Appointments Clause argument is one of "pure law" that had to be addressed on appeal regardless of whether it was timely raised below. In applying the doctrines of waiver and forfeiture, courts should proceed on a case-by-case basis to determine whether the circumstances of a particular case warrant excusing the failure to timely raise an issue. In this case, the Board declined to excuse claimant's forfeiture of the issue, as she did not raise any basis for doing so, citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the "obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware").

Turning to the merits, the Board rejected claimant's contention that employer's physician's opinion was insufficient to rebut the § 20(a) presumption because the doctor did not examine claimant personally, admitted she is not a specialist in neurology, and did not express an opinion as to whether it was possible that another aspect of claimant's working conditions in Iraq could have aggravated her condition.³ While the doctor did not physically examine claimant, the ALJ was not required to discount her opinion on this basis. The ALJ noted the doctor's experience in toxicology. Further, claimant did not allege that her general working conditions in Iraq played a role in her injury or submit evidence on this point, and an employer is not required to rebut a claim that was not made.

Claimant also challenged the ALJ's weighing of the evidence as a whole, arguing that the ALJ drew her own medical conclusions in reviewing the scientific studies and improperly substituted her opinion for that of claimant's doctor. The Board was unpersuaded. The ALJ did not misreport the conclusions of the scientific studies of record. Rather, the ALJ restated the studies' ultimate conclusions or noted why the cited study was irrelevant to the claim. She noted that a few of the studies suggested a possible connection between autoimmune diseases and vaccines, but none found cases of NMO related to the flu vaccine. Nor did the ALJ substitute her own opinion for that of claimant's physician; the ALJ noted that the study he relied on did not support his conclusion, and further found his summary of the development of claimant's symptoms inconsistent with the medical records. The ALJ did not err in giving more weight to employer's doctor's opinion, which she found was supported by the scientific studies and claimant's treatment history.

Nevertheless, the Board vacate the ALJ's conclusion on the record as a whole, as the ALJ did not consider all the medical opinions of record. Specifically, she did not discuss the opinions of two of claimant's treating physicians who stated that there is a causal relationship between claimant's vaccination and her NMO. The ALJ mentioned one of these opinions but neither accepted nor rejected it. The ALJ did not address the second physician's opinion, nor did she address the opinion of a Nurse Practitioner who similarly

³ Noting that this case arose in the Eleventh Circuit, the Board observed that other circuits have rejected the "ruling out" standard of *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). The Board reiterated its prior holding that, pursuant to *Brown*, the opinion of a physician, given to a reasonable degree of medical certainty that no relationship exists between an injury and claimant's work, is sufficient to rebut the presumption. See *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

opined that a causal connection existed. The case was remanded for the ALJ to consider all relevant evidence on the issue of causation.

[PROCEDURE – *Lucia v. SEC*; Application of Section 20(a) - Rebutting the Presumption, Evaluating the Evidence]

[Wilson v. Creamer-Sanzari Joint Venture, BRBS \(2019\).](#)

The Board upheld the ALJ's finding that the portion of the Passaic River on which claimant was injured was not navigable and thus claimant did not meet the situs requirement under the LHWCA.

Claimant worked as a dockbuilder on employer's Route 3 bridge project that consisted of building a new bridge to replace an existing bridge over the Passaic River between Clifton and Rutherford, New Jersey. Claimant worked on float stages, *i.e.*, wood planks bolted together and attached to the cofferdam but not fixed to the riverbed. He filed a claim seeking benefits under the LHWCA for hearing loss.

The ALJ dismissed the claim based on claimant's failure to establish coverage. She reasoned that because claimant was injured while afloat on the water, he would satisfy the situs and status requirements for coverage under the Act provided the Passaic River was "navigable waters of the United States." 33 U.S.C. §903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). The ALJ relied on the Supreme Court's definition of "navigable waters" as those which are "navigable in fact," that is, "when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel of water." *The Daniel Ball*, 77 U.S. 557, 563 (1871). She concluded that claimant did not establish that river mile (RM) 11.8 of the Passaic River, where he was injured, was capable of sustaining commercial use and, consequently, that portion of the river is not navigable water for purposes of the Act.

The Board affirmed the ALJ's analysis. The test for navigability is whether a body of water is "navigable in fact" for admiralty purposes. For admiralty purposes, "navigability" generally means a present capability of waters to sustain commercial shipping, or contemporary navigability in fact. The admiralty definition of navigability depends on the water's capability of commercial use and not on the mode or extent of that use. A threshold requirement of navigability is the presence of an "interstate nexus" which allows the body of water to function as a continuous highway for commerce between ports. A natural or artificial waterway not susceptible of being used as an interstate artery of commerce because of natural or manmade conditions (such as a dam) is not navigable for purposes of admiralty law.

Initially, the Board addressed claimant's contention that the ALJ erred in not applying the § 20(a) presumption to the issue of situs. Assuming, *arguendo*, that § 20(a) applies to the issue of the navigability, any such error was harmless as employer presented substantial evidence to rebut a presumption. Thus, claimant bore the burden of establishing that his injury occurred on navigable waters.

Further, the ALJ properly concluded that the evidence did not clearly establish that the Passaic River at RM 11.8 is capable of sustaining commerce. A 2008 Army Corps of Engineers Report ("ACE Report"), proffered by employer, stated that the section of the river where claimant worked was 10-feet deep, limiting its navigability and preventing navigation by any commonly-used large commercial ships without further dredging. Additionally, two employees testified that they did not see any barges or tugboats during the Route 3 bridge project. The Board rejected claimant's assertion that the ACE Report's description of the stretch of the Passaic River as part of the "authorized federal navigation channel" constitutes a tacit admission that the river is navigable. It is the ALJ's prerogative to weigh the evidence and draw inferences therefrom. The ALJ permissibly concluded that with respect to RM 11.8 the ACE Report establishes limitations to commercial navigability, no use by commonly-used large ships, and does not address or identify use by smaller vessels. A showing of present commercial use or susceptibility for future commercial use is necessary to find a waterway navigable.

Nor did the ALJ err in addressing claimant's evidence. Claimant cited 33 C.F.R. § 117, a provision pertaining to drawbridges across navigable waters, which mentions the bridge at RM 11.7 of the Passaic River, and a number of court cases describing the river as navigable. The ALJ did not give weight to the regulations because it is unclear whether they are concerned with commercial navigation or simply recreational boat traffic. She also did not accept as probative evidence the cases claimant cited because they did not address whether the Passaic River was navigable in fact and were decided more than 50 years ago. The ALJ found that the only affirmative evidence of navigability in fact is claimant's testimony that almost a decade prior he used barges and tugboats when he worked on the bridge north of the Route 3 Bridge and more recently saw barges and tugboats used south of the bridge project. She concluded that this testimony is not specific enough to establish contemporary commercial use of the river at RM 11.8. Thus, substantial evidence supported the ALJ's finding that claimant did not meet his burden to prove that he was injured on "navigable waters."

[Section 3(a) SITUS - Navigable Waters]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

[Island Creek Coal Co. v. Bryan, 937 F.3d 738, Nos. 18-3680/3909/4022, 2019 U.S. App. LEXIS 27366, 2019 WL 4282871 \(6th Cir. Sept. 11, 2019\).](#) **Holding:** Parties may not raise *Lucia* issues for the first time in a reconsideration motion after a final merits decision by the BRB.

Procedural History: This decision consists of two different claims by miners Bryan and Cunningham, both independently against Island Creek Coal Company that the Sixth Circuit consolidated for review. Common to both cases is an affirmance of the ALJ decisions (i.e. final decision on the merits) from the BRB in June 2018, the month that *Lucia v. SEC*, 138 S. Ct. 2044, was decided. Then, the losing parties filed motions for reconsideration, making *Lucia* challenges to the proper appointment of the ALJs for the first time. The BRB denied the motion on the grounds that the moving parties waived the issues by never raising them before a final determination on the merits. Director conceded before the Sixth Circuit that the ALJs in these cases were not properly appointed under *Lucia*. The Sixth Circuit affirmed.

Analysis: The Sixth Circuit found that the Black Lung Benefits Act, through its implementing regulations, requires exhaustion of issues before appealing them to applicable circuit court. The Court explains that raising a new constitutional issue in a reconsideration motion does not satisfy the exhaustion requirement under the DOL's claim processing rules. The Court recognized that there are exceptions to the exhaustion requirement but found that none apply here. Having affirmed the BRB's decision on the *Lucia* issues, the Court then moved to the properly appealed "substantial evidence" review of the ALJ fact finding; the Court found substantial evidence in both cases.

B. Benefits Review Board

No published decision to report.