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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 204 November 2008

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I. Longshore

A. U.S. Circuit Courts of Appeals

***B & D Contracting v. Pearley*, __ F.3d __, 2008 WL 4811102 (5th Cir. 2008).**

The Fifth Circuit held that "wages" under the Longshore and Harbor Workers' Compensation Act ("LHWCA") are not limited to taxable compensation. The Court reasoned that the plain text of § 2(13) defines wages as the "money rate at which the employee is compensated" plus any taxable advantages, and the money clause does not require taxability. *See, e.g.*, *Custom Ship Interiors v. Roberts*, 300 F.3d 510 (4th Cir. 2002); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 431 (5th Cir. 2000); *see also Colbert v. CDI Aircraft Maint.*, BRB No. 97-1120 (1998). Rather, taxability is one of several indicia of a wage.

The Court observed that the definition of "wages" under § 2(13) does not include "fringe benefits" and noted that this term "refers only to a class of fringe benefits whose value is too speculative to be readily converted into a cash equivalent" (quoting *Gallagher*, 219 F.3d at 432).

Here, the ALJ and the BRB properly classified employer's per diem payments to Claimant as "wages" for purposes of calculating benefits under the LHWCA. Although the per diem payments were not subject to tax withholding, they played the role of money wages, in that they were

calculated based on the number of hours worked; they were paid in the same paycheck as Claimant's normal wages; the per diem was an unrestricted payment, unrelated to actual costs of meals, lodging, or travel; the same per diem was paid to all employees regardless of where they lived; and the per diem constituted almost half of claimant's gross pay.

[Topic 2.13 Wages]

B. Benefits Review Board

***Z.S. v. Science Applications Int'l Corp.*, __ BRBS __, BRB No. 08-0223 (Nov. 26, 2008).**

The Board affirmed an ALJ's finding of no coverage under the Defense Base Act ("DBA") with respect to Claimant's claim for benefits for post-traumatic stress disorder ("PTSD") attributed to an incident which occurred during her employment in the Green Zone of Baghdad, Iraq.

Claimant initially contended that the ALJ erred in failing to hold Employer estopped from denying her coverage under the DBA since Employer paid its insurance carrier premiums for such coverage and represented to claimant that she would be covered under the DBA during her employment in Iraq. The Board declined to address the issue of estoppel, as it had not been raised before the ALJ. *See, e.g., Turk v. E. Shore R.R. Inc.,* 34 BRBS 27 (2000). The Board noted that there is an exception to the general rule under which it will consider an issue raised for the first time on appeal if it involves a pure question of law and failure to address the issue would result in a miscarriage of justice. *See Bernuth Marine Shipping, Inc. v. Mendez*, 638 F.2d 1232 (5 th Cir. 1981). However, the Board concluded here that whether estoppel applies is not a pure question of law, as it requires determinations of fact by an ALJ. The Board thus rejected Claimant's contention that she was entitled to raise this theory on the basis that it was not a new "claim" but rather an additional argument supporting her original claim. The Board reasoned that the parties may not raise "new *issues* on appeal, and estoppel is not merely an ancillary argument supporting coverage but a new theory requiring additional findings of fact" (emphasis in original). *See Goldsmith v. Dir., OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988)(doctrine of laches first raised on appeal); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989)(coverage issues first raised on appeal).

The Board next addressed Claimant's contention that her employment in Iraq was covered under sections 1(a)(1) and 1(a)(4) of the DBA.[1] Claimant averred that, for purposes of section 1(a)(1), the Green Zone was "acquired" by conquest and was a "base" as United States military personnel were stationed there. The Board noted that the question of what constitutes a "military base" under section 1(a)(1) was one of first impression. The Board reasoned that definitions found in the U.S. Code and U.S. Army, Navy and Air Force regulations indicated that a military installation is one governed or controlled by the U.S. government. Because the DBA describes a "base" as being either "military, air, or naval," an area must be under the control of the United States military in order to be considered a base within the meaning of section 1(a)(1).

The Board affirmed the ALJ's conclusion that the Green Zone is not a military base for purposes of coverage under section 1(a)(1) of the DBA. The ALJ found that there was no definitive evidence of the Green Zone's official military status and that, while it was partly protected by the military, it was not controlled or owned by the military. The ALJ also concluded that the Green Zone is not a territory or possession sufficient to confer coverage under section 1(a)(2) of the DBA.

The Board agreed that the evidence credited by the ALJ, including testimony of Employer's supervisors, established that control of the Green Zone did not rest with the United States military. Although the Green Zone has fixed boundaries, contains military enclaves within those boundaries, and is protected by military forces and private security contractors, substantial evidence supported the ALJ's findings that the United States military did not control the entire Green Zone. The evidence credited by the ALJ established that individuals within the Green Zone were not required to follow the United States military's rules or standards of procedure. The stationing of military personnel in the Green Zone alone is insufficient to establish that the United States military governed the area such that the entire Green Zone could be considered a "military base." The Board noted that, in light of its holding, there was no need to address whether the Coalition Provisional Authority was an entity of the United States government.

The Board further affirmed the ALJ's determination that Claimant's work in Iraq was not covered by section 1(a)(4) of the DBA as it was not performed "under a contract" with the United States. The Board noted that the ALJ identified three alternative ways in which Claimant could establish

[1] Addressing Claimant's assertion that the § 20(a) presumption applied to the issue of coverage under the DBA, the Board stated that, assuming § 20(a) applied, it was rebutted by Employer (fn. 5).

that she performed work under a government contract: (1) if the employee acted in furtherance of a government contract, *see Airey v. Birdair, Div. of Bird & Sons,* 12 BRBS 405 (1980); (2) if the employee was involved in the performance of a government contract, *see Rosenthal v. Statistica*, 31 BRBS 215 (1998); or (3) if the employee was doing work which was related to the employer's contract with the United States. *See Casey v. Chapman College-Pace Program*, 23 BRBS 7 (1989).

Employer in this case was a corporation consisting of many separate "groups" which individually hired employees and contracted with customers, and which could compete for business and subcontract work to each other. Claimant was employed by Employer's Young Group. The Board affirmed the ALJ's determination that Claimant was sent to Iraq to develop business opportunities for the Young Group, which at the time of her employment in Iraq had no contracts there. In particular, she unsuccessfully attempted to secure subcontracts under a contract between Employer's Dube Group and the U.S. Department of Defense, which was to be performed, *inter alia*, in the Green Zone. Based upon the testimony of Employer's supervisors, Claimant's own deposition testimony, her e-mail correspondence, her lack of the requisite security clearance to work on a government contract, and her timesheets which charged her work to the Young Group and Employer's corporate accounts and not to a government contract, *see Rosenthal v. Statistica*, 31 BRBS 215 (1998), the ALJ properly concluded that there was no evidence that Claimant worked on a government contract while in Iraq. While Employer issued Claimant a contractor's badge indicating that she was working on a contract between Employer and the Iraqi Media Network ("IMN"), Claimant testified that she performed no work for IMN and that the badge was issued merely to enable her to stay in the Green Zone. Although Claimant testified that she sat in the office space designated for employees working on the IMN contract and occasionally answered their telephones, the ALJ found that she was not working under the IMN contract and that email correspondence indicated that she had to leave Employer's IMN workspace. Furthermore, while Claimant designed proposals for the Iraqi Reconstruction Development Committee, the Young Group never received a contract as a result of this work.

[Topic 60.2 Longshore Act extensions -- Defense Base Act; Topic 60.2.2 Defense Base Act, claim must stem from a "contract" for "public work" overseas; Topic 21.2.2 New issues raised on appeal]

II. Black Lung Benefits Act

[no cases to report for this month]