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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 226 October 2010

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

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

[there are no decisions to report for this month]

B. U.S. District Courts

***Slightom v. Nat'l Maint. & Repair, Inc.*, No. 09-cv-683-JPG, 2010 WL 4053377 (S.D.Ill. 2010)(unpub.).**

Relevant to this review, the district court granted defendant a summary judgment with respect to a worker's state court claim of retaliatory discharge,[2] holding that "[t]he Longshore Act provides a unique and necessary means of addressing retaliation claims related thereto, and Slightom has not sufficiently argued or demonstrated why he should be exempt from its reach." Slip. op. at *5. Following his discharge in 2008 for absenteeism, Slightom filed various claims against his former employer, including the claim at issue alleging that he was terminated because of his 1994 injury claim under the LHWCA. The court stated that Section 948a of

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

[2] Employer removed the matter to the federal court claiming federal question jurisdiction based on Slightom's claim of violation of the Americans with Disabilities Act.

the LHWCA and related regulations prescribe the administrative process one must follow when filing a retaliation claim that involves the Longshore Act. 20 C.F.R. §§ 702.271(b)-(d); 702.272 (2010). Further, Section 21(e) of the Act prescribes a specific appeals process. When one fails to follow these necessary administrative and appellate channels, he has not exhausted his administrative remedies. *Maxon Marine, Inc. v. Dir., OWCP,* 39 F.3d 144, 147 (7th Cir.1994). Here, Slightom has clearly failed to exhaust his administrative remedies under the LHWCA. While he filed his original worker's compensation claim under the LHWCA, he did not bring his retaliation claim before any district director. And, even if Slightom had followed the proper administrative channels, this case would be subject to review by the Seventh Circuit Court of Appeals, not this court.

[Topic 48a.1 DISCRIMINATION AGAINST EMPLOYEES WHO BRING PROCEEDINGS -- Generally]

***Allen v. M/G Transport Servs.*, Inc., 2010 WL 3894241 (M.D.La. 2010)(unpub.).**

Plaintiff brought a claim against M/G under Section 5(b) of the LHWCA for injuries sustained while performing stevedoring operations on behalf of his employer, Cooper/T. Smith Stevedoring ("Cooper"), aboard M/G's barge. In this summary judgment ruling, the court rejected M/G's argument that plaintiff's suit was barred by the statute of limitations. The court rejected M/G's assertion that the § 5(b) claim is subject to the three-year statute of limitations set out in the Uniform Statute of Limitations Act for Maritime Torts ("USLAMT"), 46 U.S.C.App. § 763(a). The court reasoned that, by its terms, the USLAMT's uniform statute of limitations applies "[u]nless otherwise specified by law …." The court stated that the LHWCA specifically provides for a different prescriptive period in Section 13(a), which the court deemed applicable to § 5(b) claims. Section 13(a) permits a plaintiff to file suit within one year from the time a party making voluntary benefit payments under the Act ceases making payments. Here, the court concluded that the § 5(b) claim was timely as it was filed within one year of the last voluntary payment of LHWCA benefits made by plaintiff's employer. However, the court granted M/G's motion for summary judgment on the issue of its liability under § 5(b).

[Topic 5.2 THIRD PARTY LIABILITY - Generally]

[***Ed. Note*:** The following decision does not involve the LHWCA and is included for informational purposes only]

***Brown v. Cassens Transport Co.*, __ F.Supp.2d __, 2010 WL 3842373 (E.D.Mich. 2010).[3]**

Multiple plaintiffs alleged that through various acts of mail and wire fraud, and in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), defendants perpetrated a scheme to deny them benefits to which they were entitled under the Michigan Workers' Disability Compensation Act ("WDCA"). The essence of the alleged scheme is that plaintiffs' self-insured employer and a company that served as employer's claims adjuster deliberately selected unqualified doctors to give erroneous medical opinions that would support fraudulent denials of workers' compensation benefits. Plaintiffs each claimed monetary damages as a result of the wrongful denial of their statutory workers' compensation benefits, "measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs provided by law."

The Court concluded that plaintiffs' exclusive remedy for their claim that they were fraudulently denied benefits under the WDCA lies within the exclusive administrative scheme set forth in the WDCA, which forecloses their RICO claim. The Court further concluded that even assuming such a claim could be raised outside of the WDCA's exclusive administrative framework, plaintiffs have failed to allege an "injury to business or property" as that term is defined under RICO and their claims thus fail for this additional reason. Finally, even assuming that plaintiffs' complaint stated a cognizable claim under RICO, the court would abstain from deciding their claims and would stay proceedings pending a final WDCA administrative determination of plaintiffs' entitlements to workers compensation benefits.

C. Benefits Review Board

***Wilson v. Service Employees Int'l, Inc.*, __ BRBS __ (2010).**

Reversing the ALJ's determination, the Board held that where employer paid claimant permanent total disability ("PTD") benefits in accordance with the district director's written recommendation but did not pay him mandatory cost-of-living adjustment pursuant to Section 10(f), employer thereby failed to comply with the district director's recommendation, thus establishing an element prerequisite to employer's liability for attorney's fees under Section 28(b).

[3] This decision was issued on September 27, 2010.

In his written recommendation, the district director determined that claimant is entitled to ongoing PTD benefits starting on 3/31/08. Claimant then requested a formal hearing seeking PTD benefits along with a § 10(f) annual adjustment. Employer paid PTD benefits until claimant requested referral to the OALJ, and argued before the ALJ that claimant is only partially disabled. The ALJ determined that claimant is entitled to temporary total disability benefits through 3/30/08, and PTD benefits thereafter subject to § 10(f) adjustments. The ALJ further found that employer was not liable for attorney's fees under § 28(b) as it had complied with the district director's recommendation.

The Board concluded that claimant was entitled to attorney's fees under § 28(b) based on a four-part test articulated in *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT)(5th Cir. 2009). It held that "[a]lthough the district director did not specifically mention Section 10(f), we conclude that a recommendation for permanent total disability benefits necessarily incorporates Section 10(f) adjustments." Slip. op. at 3. Further, employer's actions constituted a rejection of the district director's written recommendation because "[e]mployer did not pay the Section 10(f) adjustment to which claimant became entitled on October 1, 2008, and opposed claimant's entitlement to permanent total disability benefits, with the corresponding cost-of-living adjustments under Section 10(f), as a finding that claimant was permanently partially disabled prior to October 1, 2008, would foreclose any entitlement to such adjustments." Slip. op. at 5. Finally, the Board determined that claimant obtained greater compensation than that paid by employer following its rejection of the recommendation, as "claimant's entitlement to cost-of-living adjustments pursuant to Section 10(f) constitutes additional compensation within the meaning of Section 28(b)." *Id.*

[Topic 28.2.3 ATTORNEY'S FEES – 28(b) EMPLOYER'S LIABILITY - District Director's Recommendation]

[***Ed. Note***: the following unpublished decisions of the Benefits' Review Board are included for informational purposes]

***Bomback v. Marine Terminals Corp.*, BRB No. 10-0129 (Oct. 19, 2010)(unpub.).**

While working for employer, claimant sustained work-related injuries to his knee and neck while employer was insured by Majestic, and he sustained additional injuries to his knee and neck while Signal was the insurer on the risk. The ALJ approved claimant's settlement agreements with each carrier; only the Signal settlement was at issue on appeal. The

Signal settlement was only for future medical benefits ($15,000); Signal separately entered into stipulations with claimant on the disability claims, and the ALJ granted Signal's application for Section 8(f) relief.[4] The Director, OWCP, appealed the ALJ's approval of the Section 8(i) settlement of $15,000 for future medical benefits, as well as the ALJ's compensation order awarding permanent partial disability ("PPD") benefits predicated on the parties' stipulations.

The Board first vacated the ALJ's approval of the medical benefits settlement on the ground that the ALJ "summarily found the settlement adequate without considering claimant's need for future medical treatment or 'the probability of success if the case were formally litigated.'" Slip. op. at 6. A settlement application must include a statement explaining how the settlement amount is considered adequate, 20 C.F.R. 702.242(b)(6). Further, where the settlement application covers medical benefits, it must include estimates as to the claimant's need for future medical treatment and the costs associated with such treatment. 20 C.F.R. §702.242(b)(7). The parties should have included such information to enable the ALJ to explicitly determine whether the $15,000 is adequate. Moreover, as employer challenged the work-relatedness of claimant's injuries, §702.243(f) directs that, in determining adequacy, the adjudicator should also consider "the probability of success if the case were formally litigated." In so holding, the Board

> "reject[ed] employer's contention that the $15,000 settlement explicitly accounted for the facts that claimant has collateral medical insurance through the ILWU-PMA Welfare Plan and that claimant received $6,000 for future medical care in the settlement agreement with employer/Majestic. First, the parties must indicate that claimant's additional medical insurance will pay for a work-related condition. *See* 20 C.F.R. §702.242(b)(8) (the parties need to identify 'any collateral source available for the payment of medical expenses"). Second, although the contention concerning the Majestic settlement is relevant, it is not contained in the parties' settlement application which must be a self-sufficient document. 20 C.F.R. §702.242(a)."

Slip. op. at 7 (footnote omitted). In a footnote, the Board also addressed employer's argument that, in addressing adequacy, consideration had to be

[4] As the Board noted, pursuant to § 8(i)(4), employer is prohibited from receiving § 8(f) relief after a disability claim has been settled pursuant to § 8(i). *See Cochran v. Matson Terminals, Inc.,* 33 BRBS 187 (1999).

given to its agreement (evidently included in the settlement) to obtain Medicare's approval of a Medicare set-aside:

> "Employer's contention that its agreement to obtain Medicare's approval of a set-aside trust in the settlement application, which it alleges may ultimately result in claimant receiving an amount greater than the $15,000 provided by the settlement, is not relevant to the current settlement application, as Medicare and Medicaid are not acceptable collateral sources of medical care. Medicare requires pre-approval of workers' compensation settlements if either one of the following is true: 1) Any settlement, regardless of amount, if the claimant is currently entitled to Medicare; or 2) Any settlement greater than $250,000, AND the claimant may reasonably expect to become eligible for Medicare within 30 months of the settlement date. Claimant, whose date of birth is February 2, 1949, is not yet 65 years old and, thus, does not appear to be currently entitled to Medicare. Moreover, even if Medicare is applicable, there is no requirement that the adjudicatory officer require the parties to obtain Medicare pre-approval nor can she deny the settlement as inadequate for failure to obtain such approval. *See* http://www.dol.gov/owcp/dlhwc/lspm/lspm3-501.htm."

Slip. op. at 7, n.7.

Agreeing with the Director, the Board further vacated several findings set forth in the ALJ's agreed compensation order based on stipulations. The Board summarized the relevant standard for approval of stipulations affecting employer's entitlement to Section 8(f) relief as follows:

> "It is well-established that stipulations between an employer and claimant affecting the liability of the Special Fund are not binding on the Special Fund, absent the participation of the Director. In this regard, an administrative law judge may find stipulations binding as between claimant and employer, but reject them with regard to the claim for Section 8(f) relief, which is essentially a separate case involving employer and the Special Fund. In addition, stipulations between the private parties are not binding when they evince an incorrect application of law. Furthermore, stipulations are offered in lieu of factual evidence, but they must accord with law."

Slip. op. at 7-8 (internal citations omitted).

Here, the Board vacated the ALJ's scheduled award for claimant's knee injury which was based on the parties' stipulation as to the degree of impairment attributable to the injury for which Signal is liable (7% according to Dr. London), as this finding was not supported by substantial evidence or in accordance with law. Specifically, "[a]s the administrative law judge did not address the parties' stipulations in terms of the aggravation rule, the [*Nash*] credit doctrine, or whether suitable alternate employment ["SAE"] is established, the stipulations evince an incorrect application of law." Slip. op. at 10. Thus, the Board rejected employer's contention that the parties can "compromise" the degree of impairment. Slip. op. at 10, n.11, *see generally Ramos v. Global Terminal & Container Servs, Inc.*, 34 BRBS 83 (1999). In particular, the stipulation failed to account for the aggravation rule which renders Signal liable for the totality of claimant's knee condition. Moreover, under the *Nash* credit doctrine, an employer is allowed a credit for prior payments under the schedule, 33 U.S.C. §905(c)(1)-(19), where claimant sustains an aggravating injury resulting in an increased schedule award. While on appeal employer asserted that it is entitled to a *Nash* credit for the $6,000 allocated in the Majestic settlement for claimant's knee injury, this position was not reflected in the parties' stipulations and was not addressed by the ALJ. Furthermore, "claimant is limited to a scheduled award only if he is partially disabled, which can be ascertained only if he returns to his usual work or to suitable alternate employment. The parties did not stipulate to the existence of suitable alternate employment nor did employer submit evidence of such, and thus, the predicate for the partial disability award is legally absent." Slip. op. at 9. The Board instructed the ALJ on remand to fully consider the extent of claimant's disability due to his knee impairment and employer's entitlement to credit.[5]

Finally, the Board affirmed the ALJ's findings that claimant is entitled to disability benefits for his cervical injury and that employer has established its entitlement to Section 8(f) relief, but vacated the ALJ's finding as to the date upon which the Special Fund shall assume liability and the amount of such benefits. The parties' stipulations related to these issues could not stand, insofar as they affect the liability of the Special Fund, in light of the absence of specific findings regarding the date claimant's disability changed from total to partial, the date of maximum medical improvement ("MMI"), and his post-injury wage-earning capacity. The parties stipulated that claimant reached MMI on 9/30/06 (based on Dr. London's opinion), and that his disability became partial on the same day. However, partial disability commences on the date SAE is identified, and the record contained no

[5] The Board also noted the Director's contention that, on remand, the ALJ should address whether the stipulated compensation rate is correct in terms of the applicable maximum rate under Section 6.

evidence of SAE. Further, the ALJ did not discuss conflicting medical evidence as to the date of MMI. Finally, neither the stipulations nor the ALJ's order explained how the parties arrived at the stipulated compensation rate; in particular, no stipulation or supporting evidence was provided regarding claimant's post-injury WEC. The Board instructed the ALJ on remand to make specific findings as to whether the parties' stipulations are supported by substantial evidence and to consider the issues directly affecting the liability of the Special Fund.[6]

[Topic 8.10.5 SECTION 8(i) SETTLEMENTS - Approval; Topic 8.10.5 SECTION 8(i) SETTLEMENTS - Approval; Topic 8.7.9.6 SECTION 8(f) SPECIAL FUND RELIEF – Effect of Settlements and Stipulations]

***Eberly-Sherman v. Dep't of Army/NAF*, BRB No. 10-0387 (Oct. 5, 2010)(unpub.).**

The Board affirmed the ALJ's award of fees at an hourly rate of $309 to claimant's attorney Charles Robinowitz of Portland, Oregon for work performed in this case in 2007.
Counsel submitted as evidence to support the requested hourly rate of $400 his resume and estimation of the value of his services in non-longshore cases, the 2008 Morones Survey of commercial litigation rates in the Portland area, three attorney affidavits (Crow, Goldsmith and Markowitz), and a 2008 district court fee award based on a rate of $325/hour. The ALJ found that the Morones Survey represents the hourly rates of an elite sub-group of commercial litigators and is, therefore, insufficient to establish a proxy rate for a fee award under the Act. The ALJ further found that Mr. Crow, a commercial litigator, is unqualified to gauge the market rate for claimant's counsel's services because he is unfamiliar with the basics of longshore litigation; and that Mr. Goldsmith and Mr. Markowitz did not provide any examples of an hourly rate approaching $350 to $400 charged by an attorney engaged in work similar to that of claimant's counsel. The ALJ found unpersuasive the prior fee award, as he did not credit counsel's subjective assertion that his trial skills are comparable to the attorney in that case, and it was unclear that the skills employed in that case were comparable. Finally, in the absence of any corroborating evidence, the ALJ found that counsel's assertion that he has averaged $325 to $400 per hour in non-longshore cases cannot serve to establish the reasonableness of the requested rate.

[6] The Board noted that if, on remand, the new scheduled award is to be paid weekly as opposed to a lump sum, the ALJ must determine that the scheduled and unscheduled awards do not exceed the LHWCA's maximum compensation rate.

The ALJ found that he must estimate the value of counsel's services in the Portland, Oregon market, since counsel did not establish a normal billing rate or suitable proxy therefor. The ALJ stated that he would rely on data from the 2007 edition of *The Survey of Law Firm Economics*, which measures skills similar to those used in longshore claims, and factors specific to this claim, such as counsel's years of experience, geographic location, and overall ability. The ALJ averaged the hourly rates provided in the survey for attorneys who practice in the areas of employment, maritime, personal injury, and workers' compensation law, and the hourly rate charged by lawyers, like counsel, who have more than thirty-one years of experience. Based on this survey data, the ALJ found that the average proxy market rate is $266.60. The ALJ then adjusted the hourly rate to the upper quartile rate of $309 to account for counsel's expertise, which, he stated, is well above average. The ALJ rejected claimant's counsel's contention that the hourly rate should be enhanced to reflect that his practice is in the Portland area, rather than using statewide rates.

On appeal, the Board rejected counsel's assertion that the ALJ erred by using statewide survey data, rather than using a method that focuses solely on the average rates in Portland, Oregon, where counsel practices. In *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009), the Ninth Circuit stated that the relevant community is generally the forum where the district court sits. Considering that the relevant district court is located in Portland and its jurisdiction includes the entire state of Oregon, and further considering that counsel's office is located in the city of Portland, the Board concluded that "[t]hus, the appropriate community in this case could reasonably be found to be the state of Oregon, the greater Portland metropolitan area, or the city of Portland." Slip. op. at 4-5, citing *Christensen v. Stevedoring Servs. of Am.,* , 43 BRBS 145, 146 (2009), *modified in part on recon.*, 44 BRBS 39 (2010). In the absence of counsel's production of satisfactory evidence to establish a reasonable hourly rate, the ALJ acted within his discretion in relying on the statewide survey. The ALJ rationally found that the survey best establishes a proxy rate for counsel's services since it measured the hourly rates charged by lawyers employing legal skills most comparable to those required in longshore practice.

The Board further rejected counsel's assertion that the ALJ erred by including the average rates charged by workers' compensation attorneys in calculating the proxy market rate. Counsel relied on a statement in the 2009 Small Law Firm Economic Survey that workers' compensation attorneys report lower hourly rates. The statement cited gave no reason for that fact, and the ALJ could rationally find that workers' compensation rates should be included because this category of work requires skills similar to

those employed in longshore claims. The Board noted that the ALJ "is afforded considerable discretion in determining factors relevant to a market rate in a given case, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday, 591* F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining Inc. v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), and is not bound by the Board's determinations in other cases. *See Christensen*, 44 BRBS at 4041." Slip. op. at 5.

The Board also rejected counsel's assertion that the ALJ erred by adjusting his proxy hourly market rate only to that applicable to attorneys in the "upper quartile;" counsel argued that the proffered attorney affidavits establish that he is entitled to the proxy rate for attorneys whose abilities are rated as within the top five percent of all lawyers. The Board stated that the ALJ rationally rejected the affidavits because the attorneys providing them were unfamiliar with the hourly rates charged by attorneys performing work similar to counsel's actual practice. *See B&G Mining, supra.* "Moreover, the administrative law judge's reliance on his own evaluation of counsel's expertise in this case to find that counsel is entitled to a rate received by attorneys in the upper quartile is reasonable, is within his discretion, and in accordance with law. *See Christensen, 557* F.3d at 1053, 43 BRBS at 8(CRT)." Slip. op. at 6.

Nor did the ALJ err in rejecting Mr. Goldsmith's deposition testimony and the unsigned affidavit of Serena Morones offered in support of the requested legal assistant hourly rate of $150. The ALJ rationally found that the evidence offered by claimant's counsel does not establish that a rate of $150 is reasonably commensurate with the services provided in this case. Based on the factors in 20 C.F.R. §702.132(a) and his knowledge of longshore practice, the ALJ found an hourly rate of $110 for legal assistant services to be appropriate in this case. The Board affirmed this determination as the ALJ addressed the relevant factors and counsel has not shown that the ALJ abused his discretion.

Finally, the Board affirmed the ALJ's finding that the delay in payment in this case was not so egregious or extraordinary as to require a delay enhancement.

[Topic 28.6.1 ATTORNEY'S FEES - Hourly Rate]

II. Black Lung Benefits Act

Benefits Review Board

[There are no cases to report for this month.]