



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 238
November 2011**

Stephen L. Purcell
Chief Judge

Paul C. Johnson, Jr.
Associate Chief Judge for Longshore

William S. Colwell
Associate Chief Judge for Black Lung

Yelena Zaslavskaya
Senior Attorney

Seena Foster
Senior Attorney

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

A. U.S. Circuit Courts of Appeals¹

***Boroski v. Dyncorp Int'l, et al.*, ___ F.3d ___, 2011 WL 5555686 (11th Cir. 2011).**

On 11/16/11, the Eleventh Circuit republished its prior decision in this case. The decision as initially published was summarized in the October 2011 Recent Significant Decisions Monthly Digest, and the republished decision contains no substantive changes.

***Caleb Brett, LLC v. Director, OWCP, et al.*, 2011 WL 5555823 (5th Cir.) (unpub.)**

In 1996, claimant was awarded medical expenses for his work-related injury. Thereafter, a dispute arose regarding compensability of massage therapy prescribed by claimant's chiropractor, and an ALJ denied such benefits. By order issued on 4/16/09, the Board held that the massage therapy was compensable.² Employer failed to appeal this order within the

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

² *R.C. v. Caleb Brett, L.L.C.*, ___ BRBS ___, BRB No. 08-0741 (Apr. 16, 2009) (holding that massage therapy prescribed by a chiropractor, chosen by claimant as his treating physician, and performed by a massage therapist was compensable under the Act and the applicable

60-day period prescribed under §21(c) of the LHWCA. When carrier refused to reimburse corresponding medical expenses, claimant petitioned the OWCP district director for a supplemental order declaring default. Carrier objected, arguing that the Board's 4/16/09 order was not an "Order requiring payment of benefits" since it did not include express findings as to the amount of the award. In response to claimant's motion for clarification, the Board issued a second order on 8/18/10, clarifying that a reversal of the ALJ's denial of medical benefits constitutes an award of medical benefits, particularly in this case, as the amount was not in dispute. Thereafter, an order of default was issued by the district director, and a district court directed the entry of judgment.

Employer/carrier timely appealed the Board's second order, but the Fifth Circuit denied review for lack of jurisdiction. Petitioners argued that neither the first nor the second BRB order constituted an appealable "final order" within the meaning of *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 1303 (5th Cir.1992); and urged the court either to (1) dismiss for lack of jurisdiction on the basis that the second Board order is not a final award and is therefore unappealable under the LHWCA, or (2) disregard the long-elapsed time bar and reverse the first Board order on the underlying substantive question concerning the reimbursability of the adjunct therapies. The court noted that petitioners evidently hoped that either outcome would thwart claimant's efforts to have the BRB's orders enforced. The Director of the OWCP, moved for dismissal of the appeal, arguing that the court lacks jurisdiction because the Board lacked jurisdiction to issue its second order in the absence of a timely request for reconsideration of its first order. Claimant, for his part, argued that the BRB had inherent authority to issue the second order clarifying its earlier order, but that the court could only review the BRB's conclusion that its first order was final and enforceable.

The court concluded that it lacked jurisdiction to consider the merits of the issue for which employer/carrier sought review, *i.e.*, the reimbursability of the adjunct therapies. The court reasoned that

"[i]mportantly, Petitioners' only prayer for relief requests vacatur of the *First* Board Order and reinstatement of the ALJ Decision. Moreover, their limited request for relief is not a simple oversight, as the vast majority of their brief attacks the merits of the First Board Order's substantive determination that the adjunct therapies were reimbursable. Thus, Petitioners are

regulations where such therapy was reasonable and necessary for the treatment of a subluxation of the spine); this decision is summarized in the June 2009 Recent Significant Decisions Monthly Digest.

seeking review only of the First Board Order, but they fail to advance any argument as to how we could properly consider the merits of the First Board Order. Either (1) the First Board Order was, as Carter and the Director argue, a final order within the meaning of *Lazarus*, in which case it became unreviewable sixty days after it was issued, or (2) neither the First nor the Second Board Order was a final order, as Petitioners argue, in which case Petitioners have nothing to appeal. Petitioners' only attempt to navigate this dilemma is their frivolous request that the court disregard the jurisdictional question and consider the 'primary substantive issue,' meaning the question of whether the adjunct therapies are properly reimbursable."

[Topic 21.3.3 REVIEW OF COMPENSATION ORDER – Jurisdiction; Topic 21.3.2 Process of Appeal; Topic 21.3.5 Finality/Interlocutory Appeal]

A. U.S. District Courts

[there are no decisions to report for this month]

C. Benefits Review Board

There have been no published Board decisions under the LHWCA in November 2011.

II. Black Lung Benefits Act

Benefits Review Board

In *Dotson v. McCoy Elkhorn Coal Corp.*, 24 B.L.R. 1-___, BRB No. 10-0706 BLA (Nov. 16, 2011) (en banc)³, 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.

...

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 the commencement date for benefits, as set out in Section 725.503(c), employer asserts that 'fairness' dictates that

³ This case summary is included in the October 2011 digest because of its importance.

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.

. . .

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**]