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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 150
October 2000 - November 2000

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

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Associate Chief Judge for Black Lung

I. Longshore

A. Court of Appeals

Stafftex Staffing v. Director, OWCP, ___ F.3d. ___, (5th Cir. 2000)(Case No. 99-60587)(issued Nov. 1, 2000) [previously issued on July 18, 2000 and revised July 25, 2000, then withdrawn.]

On reconsideration, a panel of the Fifth Circuit now holds that the ALJ correctly granted attorney fees. (Originally the appellant court had denied the fee request because an informal conference had not been held on an AWW issue, though on other issues. *See* this newsletter's previous treatment of this case at Recent Significant Decisions, August 2000-September 2000.)

Now the Fifth Circuit holds that when there is an informal conference and recommendation, and the rate of compensation is to 'continue' as an essential part of the recommendation, and the recommendation specifically referenced both the AWW and comp rate, then, if the employer raises the rate of the AWW at the time of the formal hearing, a successful claimant's attorney will be entitled to a fee award.

[Since *Stafftex* on reconsideration turned on the particular facts in evidence, the prior, now withdrawn, version of *Stafftex* may leave the longshore bar wondering how the court will hold when again faced with the situation where there has not been an informal conference.]

[Topic 28.1.2 Successful Prosecution; 28.2 Employer's Liability; 28.2.1 Controversy; 28.2.6 Avoidance of Attorney's Fees Under Section 28(b)]

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Dillard), ___ F.3d ___, (4th Cir. 2000)(Case No. 97-2099) (Oct. 12, 2000).

The issue in this case was whether an employer can add a late-asserted ground for Section 8(f) relief. Employer asserted, and the Director did not dispute, that Employer was unaware of the critical information concerning the late-asserted ground. Therefore the ALJ allowed the late assertion. The Board found that the ALJ, in effect, must have found that the Employer could not have reasonably anticipated the late-asserted grounds. However, the court found that the ALJ had not determined whether or not the Employer reasonably anticipated the ground.

Furthermore, the court noted that:

> "Whatever its powers on review, the Board cannot supply in lieu of what the ALJ did not find, what he intended to find, or what he "in effect" found, rather it must deal with stated findings or the absence thereof.....Only an ALJ has the power to make the factual findings, assess the credibility of the relevant witnesses, and resolve any inconsistencies in the evidence necessary to determine if [Employer] demonstrated that it could not have reasonably anticipated the late-asserted ground for §8(f) relief at the time the company initially filed its application with the district director."

[Topic 8.7.9.2 Timeliness of Employer's Claim for Relief; 19.3 Adjudicatory Powers; Review of Compensation Order–Grant of Authority; 21.2.9 Scope of Review]

Admiralty Coatings Corp. v. Emery, ___ F.3d ___ (4th Cir. 2000)(4th Cir. No. 97-2639)(September 21, 2000).

In this matter, Employer unsuccessfully challenged the ALJ's authority to award temporary partial benefits beyond the date of the evidentiary hearing. Employer had argued that the ALJ's holding violated the APA 's mandate that all findings and conclusions be supported by the evidence of record.

[Topic 8.6.1 Temporary Partial Disability]

Norfolk Shipbuilding & Drydock Corp. v. Faulk, ___ F.3d ___ (4th Cir. 2000)(4th Circuit No. 99-1755)(September 25, 2000).

Petition for Cert. has been filed in this matter before the Supreme Court at S.Ct. No. 00-576. [Currently the case is at the briefing process.]

On September 25, 2000, the Fourth Circuit amended its July 11, 2000 opinion herein to be classified as a published decision. The issue here is whether liability for an occupational disease claim (asbestos caused mesothelioma) under the LHWCA is properly assigned to the last employer to expose Claimant to substances that have the potential to cause the disease. The Fourth Circuit held that Employer was liable because it failed to establish that the asbestos to which Claimant was

exposed while working for petitioner did not have the potential to cause Claimant's asbestos-related disease. The court stated that it has never required proof of a certain level of exposure to injurious stimuli in order to warrant the attachment of liability under the LHWCA. It explained that the reason for this stems directly from the humanitarian nature of the LHWCA. "It is from this purpose that the last employer rule originates, as well as a concern for administrative ease of claims handling and an elimination of the inherent difficulty in attempting to apportion liability among employers.

[Topic 2.2.16 Occupational Diseases and the Responsible Employer/Carrier]

In Re: In the Matter of the Complaint of ADM/GROWMARK RIVER SYSTEM, Inc., As Owner Pro Hac Vice of the Barge Rebecca, ___ F.3d ___ (5th Cir. 2000)(5th Cir. No. 99-30535) (November 30, 2000).

In a case of interest primarily to outside practitioners, the Fifth Circuit found that Congress did not intend its prohibition of liability allocation agreements to protect dual capacity employers beyond the extent of their immunity from tort liability as employers under Section 905(a). Specifically, the court held that a dual capacity employer sued for negligence in its capacity as vessel owner may terminate its rights to contribution from another vessel by agreeing to contractually indemnify that vessel.

[Topic 5.1.1 Exclusive Remedy]

B. Benefits Review Board

Jensen v. Weeks Marine, Inc., ___ BRBS ___ (2000)(BRB Nos. 00-0203 and 00-0203A)(October 24, 2000).

This matter involves both a remand on a Section 22 Modification Request as well as a cross appeal. Of importance here is the discussion as to when a Section 22 Request is proper. The Board first noted that where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in Claimant's condition. This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, the ALJ must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in Claimant's physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding.

The Board distinguished the instant case from those in which petitioners present no suitable

alternate employment at the initial proceeding and on modification, no evidence of extenuating circumstances that prevented it from doing so, or of a change in Claimant's economic position. In those cases the employer is not entitled to a modification. In the instant case, employer had presented evidence of suitable alternate employment at the original hearing although the ALJ found it lacked the specificity for him to determine if the jobs were suitable. Here, on modification, one of Employer's vocational experts testified that the job market had improved since the initial labor market survey. Thus, the Board found that Employer had offered evidence of a change in general economic conditions. More importantly, the Board found that Claimant cooperated with Employer's vocational experts subsequent to the initial adjudication, which Employer alleges has allowed it to obtain better evidence of alternate employment suitable for claimant. The Board found that these factors bring the claim within the scope of Section 22. Significantly, the Board stated that "Contrary to the [ALJ's] statement in his decision on remand, claimant's cooperation with employer's vocational efforts is not a 'further, independent ground' for modification. This factor is a central component of employer's assertion that there has been a change in claimant's economic condition."

[Topic 22.3.1 Modification–Determining What Constitutes a Valid Request; 22.3.4 Change in Condition]

Milam v. Mason Technologies, ___ BRBS ___ (2000)(BRBS No. 00-270)(Nov. 22, 2000).

In this case, the meaning of the word "person" is in question, specifically, whether the term includes the United States, i.e., whether the United States government can be a "third person" as that term is used in Section 33 of the LHWCA. Here Claimant filed a claim under the Defense Base Act. He worked as a facilities manager for Employer, a contractor with the U.S. Navy in Puerto Rico. While being paid benefits under the LHWCA, Claimant filed a civil action against the United States under the Federal Tort Claims Act and eventually entered into a settlement with the government. The ALJ found that Claimant had not obtained the prior written approval of the settlement from Employer as required by Section 33(g).

On appeal the Board found that the Section 2(1) definition of "person" ("The term 'person' means individual, partnership, corporation, or association.") does not include the United States. The Board held that " Neither the United States nor any of its entities is included in the plain language of Section 2(1); consequently, neither the United States nor any of its governmental entities is expressly included in the term "third person" as that term is used in Section 33(g).

[Topic 2.1 Person; 2.8 State]

Berezin v. Cascade General, Inc., ___ BRBS ___ (2000)(BRBS Nos. 00-0250 and 00-0257)(Nov.

14, 2000).

In this suitable alternate employment case, after re-examining the Ninth Circuit's holding in *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), the Board upheld an ALJ who found that the employer had identified only one actual assemble position that was both suitable for and realistically available to the claimant where the employer also demonstrated the general availability of similar assembler positions during the questionable period.

The Board is, in effect, aligning the Ninth Circuit law with the position of the Fifth Circuit:

> The Ninth Circuit's rejection of the employer's offer of evidence [in *Bumble Bee*] that claimant could perform sedentary work, therefore, is just as susceptible to the interpretation that the employer cannot meet its burden of showing merely that the claimant possesses the physical capacity to engage in certain activities. Such a showing is plainly insufficient to satisfy employer's burden of establishing suitable alternate employment. [cites omitted.] The Ninth Circuit emphasized the word "specific," not the word "jobs" and its explanation of its rejection of employer's evidence seems to indicate that an employer must identify the availability of jobs that are within claimant's physical, educational and vocational capabilities, which, in fact, is the test also utilized by the Fifth Circuit.

[Topic 8.2.4 Partial Disability/Suitable Alternate Employment; 8.2.4.2 Suitable Alternate Employment: Employer must show nature, terms, and availability; Suitable Alternate Employment: number of available jobs required to meet burden; 8.2.4.5 Suitable Alternate Employment: vocational evidence]

Ruffin v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (2000)(BRB No. 00-0248)(October 25, 2000).

In this "status" issue case, the Board held that as a matter of law, one can not conclude that a worker who is engaged in general cleaning duties is not covered under the LHWCA because her duties do not have a sufficiently strong nexus with either loading/unloading or shipbuilding. The Board found that "employees who perform general cleaning duties may well be covered by the Act if those duties are integral to the overall ship construction process." According to the Board, one should not focus on the description of a claimant's duties as a janitor, but rather should focus on whether the duties themselves were integral to the shipbuilding process. The Board remanded the matter for the ALJ to consider whether claimant's work sweeping and disposing of debris and waste from machinery, as well as the stocking of safety supplies, all of which was ongoing while the machinery was in use, was essential to the building and repairing of ships.

[Topic 1.7.1 Status–"Maritime Worker"]

Angelle v. Steen Production Service, Inc., ___ BRBS ___ (2000)(BRBS No. 00-0235)(November

8, 2000).

Whether a claimant is a "widow" under Section 9(b) of the LHWCA or a "dependent" under Section 9(d) of the LHWCA is at issue here. As to the Section 9(b) issue, the Board found that the ALJ properly rejected Claimant's allegation that she was the decedent worker's widow. It noted that the ALJ properly chose to apply Louisiana domestic relations law to determine her status and that his application of the state law was correct.

As to the Section 9(d) issue, the LHWCA provides that if there be no surviving spouse or child, death benefits may be granted to a "dependent" of decedent at the time of death, who is not otherwise eligible under Section 9, as that term is defined by Section 152 of Title 26 of the Tax Code. See 33 U.S.C. §909(d); 26 U.S.C.A. § 152 (West 2000). In remanding this matter for the ALJ to revisit the Section 152 requirements, the Board made several holdings. First, it held that a decedent's taxable year for purposes of a dependency determination under Section 9(d) is the period from January 1st until the date of his death that year. Second, the Board held that a claimant's testimony regarding the decedent's level of financial support constitutes record evidence of the decedent's support and there is no requirement under the LHWCA nor Section 152 of the Tax Code that the claimant further substantiate her testimony with documentation (so long as the testimony does not lack credibility). Third, the Board interpreted Section 152(a)(9) to not require that the decedent's "household" include everyone living under one roof. Here, Claimant and decedent rented a separated room and bath from Claimant's mother, in the home of Claimant's mother; they had their own phone and cable television service. The Board likened this as tantamount to a couple living in a third person's house as boarders. Fourth, the Board found that it did not matter that the decedent never actually claimed Claimant as a dependent in his tax returns since Section 152 speaks in terms of whether the decedent was *entitled* to claim Claimant, not whether he actually did so.

[Topics 2.16 Widow or Widower; 9.3.1 Survivors; 9.3.6 Payments to Other Dependents; 23.2 Admission of Evidence]

Walker v. PCL Hardaway/Interbeton, ___ BRBS ___ (2000)(BRB No. 00-289)(November 28, 2000).

In deciding this coverage issue case, the Board noted, "It is not the designation of claimant as a 'bridge worker' or his work on a bridge itself which conveys coverage." In upholding the ALJ's determination that Claimant was covered under the LHWCA, the Board specifically looks to the factual findings in this matter. Claimant, a form carpenter on the Chesapeake Bay Bridge tunnel, was injured while setting the steamboat jacks against the pilings. This was part of the process of securing the work platform to the bridge after it was lifted by crane from the work barge to the side of the bridge.

Thus, The ALJ determined that not all of the steps to insure the security of the platform to the pilings had been completed, i.e., the crew had not yet tightened the tension rods to secure the

platform to the pilings. determined. Thus, at the time of Claimant's injury the platform remained suspended from the crane which is attached to the barge which was sitting on jack-up legs. Since the barge with jack-up legs is a vessel, the ALJ reasoned that Claimant's injury occurred over navigable waters. Thus, according to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983), Claimant satisfied both the situs and status requirements and was covered under the LHWCA as he was injured on actual navigable waters while in the course of his employment on those waters, and was not specifically excluded from coverage by another statutory provision.

The Board further noted that Claimant also performed some of his work aboard the work barge, which the ALJ determined was a vessel. Additionally, the record established that part of Claimant's job required him to unload the supply barge and at certain times help load the work barge. Moreover, Claimant assisted when the work barge was moved from spot to spot. As these duties support a finding that Claimant performed some work aboard a vessel on navigable waters, Claimant cannot be said to have been "transiently or fortuitously" on navigable waters.

Topic 1.4.3 Vessel; 1.6. Situs; 1.7.3 Bridge Building]

II. Black Lung Benefits Act

Benefits Review Board

In *Caudill v. Arch of Kentucky, Inc.*, ___ B.L.R. ___, BRB No. 98-1502 BLA (Sept. 29, 2000) (en banc on recon.), the Board held that a "material change in conditions" cannot be established based upon an element of entitlement which was not specifically adjudicated against the claimant in prior litigation. Specifically, the original administrative law judge in *Caudill* concluded that the miner did not suffer from coal workers' pneumoconiosis, but he did not conclude whether the miner had a totally disabling respiratory or pulmonary impairment. As a result, the Board concluded that the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions . . .." In so holding, it adopted the arguments of the Director and Employer to state that the "material change" standard "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." The Board further stated that, unless an element has been previously adjudicated against the claimant, "new evidence cannot establish that the miner's condition has changed with respect to that element."

[**"material change in conditions"**]