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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 156
November 2001 - January 2002

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Associate Chief Judge for Longshore

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I. Longshore

A. Circuit Courts of Appeals

[ED. NOTE: While this attorney fee case is not a LHWCA case, it is included for informational use.]

Fogle v. William Chevrolet/Geo, Inc., ___ F.3d ___, (No. 01-1427)(7th Cir. 2001)(Dec. 26, 2001).

The circuit court, in an opinion written by Judge Posner, reduced both the number of hours as well as the hourly rate (from $310 to $185) in determining an adequate attorney fee in a fee shifting situation. The court noted that there is no single, market-wide fee for a given case, and thus, a judge must consider the quality of the particular lawyer as well as the amount of time that he devoted to the case. "The best evidence of the lawyer's quality is the fee he commands in the market,...but such evidence may not be available if the lawyer is usually compensated by a-court-awarded fee,... ." The court noted that, "Given the well-known informational problems in the legal-services market, a lawyer's ability to persuade the very occasional client to pay a very high hourly rate is poor evidence of the lawyer's market value." Finally, the court noted that in the absence of a reliable market test of the attorney in questions own services, he had to show that lawyers of comparable ability commanded the rate he was asking the judge to assess. The lawyer in the instant case submitted the affidavit of a lawyer which failed to impress the circuit court and referred to as a "self-serving evaluation" which was "worthless and inadmissible under *Daubert*... ." "There are almost a million lawyers in the United States, and if [the] affidavit counts as evidence there will never be a case in which a lawyer can't produce the paid affidavit of another lawyer that his market value is whatever he says it is."

[Topic 28.6 Attorney Fees–Factors Considered in Award]

Rodriquez v. Bowhead Transportation Co., ___ F.3d ___, (9th Cir. 2001)(No. 00-35280)(Oct. 26, 2001).

At issue here was who was responsible for liability in a borrowed employee setting when there is a "time charter." Barrett Business Services (Barrett), a temporary labor supplier provided longshoring services (including employee/claimant Mr. Rodriquez) to Northland Services, Inc.(Northland), a stevedoring company. The stevedoring company was loading a barge owned by Foss Maritime Company(Foss) when Claimant was injured. Bowhead Transportation Company (Bowhead), a common carrier, had arranged for transportation of cargo via a Standard Terminal Services Agreement with Northland.

Bowhead did not own or operate the loading dock and Bowhead was not involved in the loading of cargo on the barge. Under the agreement Bowhead was to provide the barge and Northland was to provide use of its loading terminal and load Bowhead's cargo on the barge. Bowhead did not own or operate any of the vessels used to transport cargo. Instead, it contracted with Foss in 1995 to provide and operate the necessary vessels each year in a "time charter."

Bowhead had limited involvement in loading the barge. Bowhead gave Northland a load plan, identifying which cargo was to be delivered at which port. Claimant asserts that his injury occurred when Northland employees loaded some cargo in an incorrect order and had to rearrange if on the barge deck while other workers were continuing to load the rest of the cargo. No Bowhead representative was supervising the loading when Claimant was injured.

Claimant brought an action against Northland and Foss. The district court held that Claimant was a borrowed employee of Northland and that his sole remedy was workers' compensation under the LHWCA. The District Court granted Northland's Motion for Summary Judgment. Claimant then brought an action against Bowhead. Bowhead argued that it could not be sued for negligence under the LHWCA and that even if it could be sued, there was no evidence it breached any duty owed to Claimant. The district court granted Bowhead's summary judgment motion and dismissed.

The Ninth Circuit held that under Section 905(b), a "time charterer" can be sued as a "vessel."
"Our cases make no distinction between charters and shipowners as far as who is a "vessel" under the LHWCA." Therefore, the "claimant" can bring a 905(b) negligence action against the company.

[ED. NOTE: The Ninth circuit also dealt with the issue of whether Bowhead breached a duty under the LHWCA, but that issue is not germain to this Digest.**]**

[Topics 4.1.1 Employer Liability–Contractor/Subcontractor Liability; 5.2.1 Third-Party Liability]

Alexander v. Director, OWCP, ___ F.3d ___, (9th Cir. 2001)(No. 00-70762)(December 19, 2001).

Under Section 3(e), in a last responsible employer case, settlements with prior employers for

long term exposure injury are not to be credited against the amount owed by the last responsible employer. The Ninth Circuit found that as Section 3(e) refers only to payments made under "other workers' compensation laws," the statute provides no credit for settlements made under the statute itself. The Ninth Circuit also found that the last responsible employer's argument that Section 14(j) should be read in light of Section 2(22) to authorize credit, is mistaken. "The plain language of Section 14(j) authorizes credit for compensation advances made only by "the employer," not "the employer(s)." Further, Section 33(f) can not be used to secure credit here since it "is limited to the situation in which the third party is potentially responsible to both the employee and the covered employer." Finally, the circuit court found that the last responsible employer could not argue that it was entitled to credit by way of the credit doctrine. The credit doctrine, created by the Board does not refer to settlements of the kind at issue here. The settlements that the claimant here received were alternative to an entire award against any one of the three settling employers, who might have been liable for an entire award if found to be the claimant's last responsible employer. "The credit doctrine, an equitable creation, cannot here trump the plain words of § 903(e).

[Topic 3.4 Credit For Prior Awards]

Newport News Shipbuilding and Dry Dock Co. v. Wiggins, (Unpublished)(No. 00-2532)(December 14, 2001).

Here, the Fourth Circuit affirmed the ALJ's award of total disability benefits to the claimant. Employer had argued that Claimant's part-time job as a newspaper carrier constituted "suitable alternate employment." In upholding the award, the Fourth Circuit agreed that the newspaper route did not establish a continuing ability to earn wages. The evidence showed that Claimant experienced problems with her hands, wrists and knee, and that it swelled and gave way if she walked too much or too quickly. It further showed that she sometimes received help from her children in carrying out her duties. Furthermore, her doctor noted that the carrier job was causing her "a lot of pain in her knee" and he prescribed medication and a knee brace to ease the pain and stabilize her knee.

[Topic 8.2.4 Partial Disability/Suitable Alternate Employment]

Pool Co., v. Cooper, ___ F.3d ___ (Nos. 99-60615, 00-60093)(Nov. 20, 2001).

The Fifth Circuit held: (1) a claim for additional benefits filed by a claimant could not be deemed an impermissible protective filing against speculative future injuries; (2) the regulation permitting an LHWCA claimant to withdraw his claim applies only when a claimant seeks to withdraw the entirety of his claim for benefits, rather than to modify it with respect to dates or categories of disability; (3) the Board erred in awarding attorney fees to the claimant under the statute authorizing such an award when the employer has paid compensation without an award and the claimant subsequently obtains a compensation award in excess of what employer was willing to pay; and (4) the claimant was entitled to an attorney fee award under another section of the LHWCA.

Here there was no protective filing since the claim arose from a specific injury which was identified on the claim form and since the claimant had not attained MMI. The court distinguished the instant case from *Ingalls Shipbuilding, Inc. v.Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994), noting that in *Ingalls*, the claimants had endured exposure to asbestos but "as yet suffered neither physical nor economic disability." In the instant case, there existed substantial evidence from which the ALJ could infer that at the time the claim was filed, he was undergoing continuing treatment for his original injury in the hope of improving his condition, and he and his physicians reasonably believed that he had not attained maximum medical improvement after all.

In a matter of first impression, the Fifth Circuit held that the withdrawal regulation, 20 CFR §702.225(a), applies only to the withdrawal of a claim, not to the situation where a claimant seeks to modify a claim with respect to dates or categories of disability.

Under Section 28(b), the Fifth Circuit found that an attorney fee could not be awarded where no informal conference with OWCP had taken place. Significantly, the court stated, "However, as the parties concur, no informal conference with the [DOL] ever took place. Under the law of our Circuit, that fact poses an absolute bar to an award of attorney's fees under § 28(b). *See FMC Corp. v. Perez*, 128 F.3d 908, 910 (5th Cir. 1997); *accord Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 409 (5th Cir. 2000), *modified on rehearing*, 237 F.3d 409 (5th Cir.2000); *James J. Flanagan Stevedores v. Director, OWCP*, 219 F.3d 426, 434-35 (5th Cir. 2000)." The court would not entertain the claimant's arguments on this issue: "We see no need to entertain these arguments, not only because of our obligation to follow the established law of our Circuit, ... ,but because we find that an award of attorney's fees is proper under § 28(a)."

[Topics 8.11 Withdrawal of Claim; 19.1 Protective Filing; 28.2 Attorney Fees--Employer's Liability; Attorney Fees--28.2.3 District Director's Recommendation]

Owens v. Seariver Maritime, Inc., ___ F.3d ___, (No. 00-60048)((November 26, 2001).

[ED. NOTE: This non-LHWCA seaman case is included for informational purposes only.]

At issue in this FLSA claim is whether or not a claimant performed a substantial amount of non-seaman's work, thus preventing him from properly being considered a seaman for purposes of the maximum hour provisions of the FLSA. Workers employed as seaman under 29 U.S.C. § 213(b)(6) are exempt from FLSA coverage as to maximum hour and overtime provisions. The FLSA does not define "seaman." Although barge tenders are seamen under the FLSA, industrial workers on dredge barges are not. The definition of "seaman" under the FLSA is narrower than that used in the Jones Act and the definitions under the two acts are separate and independent of each other. Under the FLSA, when a worker performs both seaman's work and non-seaman's work, he is a seaman unless his non-seaman's work is substantial in amount. DOL h, for FLSA purposes, has defined "substantial" as work that "occupies more than 20 percent of the time worked by the employee during the workweek."

B. Federal District Court

Olsen v. Ms. Alexis Herman, et al, (No. 00-3165 MMC)(N. Dist.of CA)(Oct. 31, 2001).

[ED. NOTE: This matter is presently unpublished.]

In this matter, the employer filed a Section 22 Modification Request challenging the claimant's entitlement to benefits. The claimant resisted the employer's move to affect his benefits. During the course of considering the modification request, the claimant sued members of the Department of Labor, OWCP, OALJ, and members of the Board. The Federal District Court ruled that a claimant cannot sue the above noted persons for rulings made in the course of considering the challenge to the claimant's benefits. **"ALJs and judges serving on the BRB are entitled to absolute immunity for performing judicial acts."**

The federal district court went on to state that "As the Court previously ruled in its Order filed December 21, 2000, the LHWCA provides the exclusive procedures for the determination of benefits available under the LHWCA. Courts have repeatedly held that the comprehensive nature of the LHWCA's administrative review scheme, its limited provision for district court jurisdiction, and its legislative history, purpose, and design preclude subject matter jurisdiction in district courts over claims for injunctive relief arising out of compensation proceedings under the LHWCA." The court found that it lacked jurisdiction over the plaintiff's claims against the federal defendants for injunctive relief and dismissed these claims.

Besides noting the federal defendants ' immunity, the court specifically rejected the plaintiff's claims for 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 damages, finding that these claims fall for a variety of reasons.

[Topic 19.3 Adjudicatory Powers]

C. Benefits Review Board

Sistrunk v. Ingalls Shipbuilding, Inc., ___ BRBS ___, (BRB No. 01-298)(Nov. 26, 2001).

A prima facie case (lung cancer plus asbestos at the shipyard) does not result in recovery once the Section 20(a) presumption falls out and the medical evidence shows that there is no asbestosis. Here, the Board noted that in denying the claimant's claim for death benefits based on the record in its entirety, the ALJ found that the decedent's death was not caused, contributed to, or aggravated by his exposure to asbestos at the employer's facility, but was caused by carcinoma, cancer, related to his history of cigarette smoking. Of particular importance was a medical opinion stating that in the absence of asbestosis, lung cancer cannot be attributable to exposure to asbestos and that there was no lung parenchyma available for the evaluation of the presence or absence of asbestosis.

[ED. NOTE: The term "lung cancer" should not be construed as including mesothelioma, a cancer

of the lining of the lung. One can have mesothelioma without also having asbestosis.**]**

[Topic 20.3.2 Presumptions–Successful Rebuttal; 20.4 Presumptions–If Successful, Presumption No Longer Affects Outcome; 20.5 Presumptions–Application of Section 20(a)]

Jensen v. Weeks Marine, Inc., ___ BRBS ___, (BRB No. 01-0532)(Nov. 30, 2001).

At issue in this matter, on its third ALJ and second Decision and Order on Remand, whether an employer is entitled to a modification of an existing disability award. Specifically, the ALJ found that the employer did not present sufficient evidence of suitable alternate employment to warrant modification of the award of total disability. Additionally the ALJ had declined to address whether the claimant's physical condition had changed/improved as employer conceded that the claimant could not return to his previous work, and there is insufficient evidence of suitable alternate employment to alter the claimant's totally disabling condition.

The Board remanded this matter once again, for several reasons. Pertinent here, the Board, distinguished *Lombardi v. Universal Maritime Service Corp*., 32 BRBS 83 (1998)(When an employer presents no evidence of extenuating circumstances that prevented it from doing so, or of a change in the claimant's economic position, the employer is not entitled to a modification based on evidence of the current availability of jobs. Under these circumstances, the new submission reflects nothing more than a change in litigation strategy for which modification is not available.) The Board noted that the instant employer presented evidence of suitable alternate employment at the initial hearing, and, on modification, put forth evidence of a change in the claimant's economic position, i.e., evidence of the claimant's subsequent cooperation and of an improvement in the local labor market.

Further, the Board found that, on remand, the ALJ must also fully consider the effect of the claimant's subsequent cooperation with the employer's vocational experts, and may, if necessary, elect to reopen the record for submission of additional relevant evidence, previously excluded on this issue.

[Topic 22.3. Requesting Modification]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Freeman United Coal Mining Co. v. Summers*, ___ F.3d ___, Case No. 01-1430 (7th Cir. 2001), the court held that the ALJ properly invoked the 15 year presumption at 30 U.S.C. § 921(c)(4) having found that the miner's work at the surface of the mine was under "conditions substantially similar to those in an underground coal mine." The ALJ found "similarity" based on the miner's unrefuted testimony about his employment conditions. The miner worked as an electrician in the mines during some of his coal mine employment but most of his work "occurred when he worked inside the offices and shops that were built above ground on the coal company's property." The court found that the miner described, in detail, the dusty conditions in his work areas and it noted the following:

> Summers intermittently labored underground or in buildings located atop subterranean coal mines, performing tasks inexorably intertwined with coal production. Therefore, he is a miner, according to the regulations, and we will not require him to prove similarity in a different manner merely because he did not wield a pickaxe and a shovel while he worked.

Id.

Applying the pre-amendment regulations at 20 C.F.R. § 725.101(a)(32), the court utilized the 125-day rule to determine the miner's length of coal mine employment. In satisfying this requirement, the court stated the following:

> Summers was not required to establish that he worked underground for more than 125 days per annum. *See Landes v. Director, OWCP*, 997 F.2d 1192, 1198 (7th Cir. 1993) (quoting *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989)). Nor did he have to prove that he was around surface coal dust for a full eight hours a day on any given day for that day to count towards the 125-day total. (citation omitted). All that Summers had to show was that he worked 'in or around a coal mine' for any part of 125 days in a calendar year, for a total of 15 years. This he unquestionably did, by demonstrating that he was exposed to worked-related dust five or six days each week from May 1948 to April 1965 and from April 1975 to October 1980. On this record, we conclude that the ALJ properly invoked the 15-year presumption.

Id. The court further upheld the ALJ's weighing of the medical opinion evidence concluding that the ALJ properly accorded greater weight to the opinion of Dr. Cohen "particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research."

The court also found that the ALJ properly gave less weight to the opinions of Dr. Fino

"based on a finding that they were not supported by adequate data or sound analysis." Of importance, the court made reference to the comments to the amended regulations and stated the following:

> Dr. Fino stated in his written report of August 30, 1998 that 'there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.' (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature."

Slip op. at n. 7.

[**15-year presumption; weighing medical opinions; amended regulations**]

By unpublished decision in *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001), the court upheld the ALJ's use of the American Medical Association's Guides to the Evaluation of Permanent Impairment to conclude that a miner's "single breath diffusing capacity (DLCO) study was abnormal." A conflict arose in the interpretation of the test:

> Dr. Rasmussen questioned the lower predicted value used by Dr. Bercher's laboratory in the 1991 test, stating that he believed that the claimant's diffusing capacity on that test would be abnormal if a higher predicted value was used. Thus, a controversy arose as to whether the claimant's actual performance on the 1991 test was within normal or abnormal range, *i.e.*, whether the lower predicted value was in fact the appropriate or correct value against which to measure the claimant's test result.

Id. The ALJ properly notified the parties that the AMA guidelines would be used to determine the proper predicted value for the test. Employer objected to the use of the AMA guides because "inter-laboratory differences" would render the AMA guidelines unreliable. The court disagreed, however, and held that the guide already takes such differences into account. Consequently, the court concluded that "the employer had adequate notice yet offered no specific evidence to show that the use of the AMA guide was unfair or inaccurate when applied to the case at hand."

Turning to medical opinion evidence, the court noted that "[i]n his practice of pulmonary medicine, Dr. Rasmussen had examined some 24,000 to 25,000 miners, and the employer conceded on the record that he is an expert in his field." Dr. Rasmussen found that the miner suffered from obstructive and restrictive impairments arising from coal dust exposure and smoking. The court determined that his opinion was supported by the objective medical data of record. On the other hand, the court agreed that Dr. Fino's opinion was entitled to less weight. Dr. Fino concluded that the miner did not suffer from a restrictive or interstitial disease because his diffusing capacity values were normal which "rules out the presence of clinically significant pulmonary fibrosis, and

pneumoconiosis is an example of a pulmonary fibrosis." However, the ALJ properly found that the diffusing capacity values were abnormal according to the AMA guidelines and, therefore, Dr. Fino's conclusions were accorded less weight.

[**use of the AMA guidelines; weighing medical opinion evidence**]

B. Benefits Review Board

In *Cornett v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-___, BRB No. 01-0276 BLA (Nov. 28, 2001), a case arising in the Sixth Circuit, the Board upheld retroactive application of the amended medical treatment dispute regulations at 20 C.F.R. § 725.101(e) to determine whether the miner's medical bills were related to his respiratory impairment arising from coal dust exposure. Employer argued that the regulations adopted the Fourth Circuit's presumption set forth in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492 (4th Cir. 1991) which was specifically rejected by the Sixth Circuit in *Seals v. Glen Coal Co.*, 147 F.3d 502 (6th Cir. 1998). Citing to the district court's ruling in *United Mining Ass'n. v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001), the Board upheld the validity of the revised regulation which provides that any pulmonary disorder for which treatment is required is presumed to be caused or aggravated by the miner's condition. The Board further noted that Employer's burden to defend against the "compensability of the disputed expenses" has not been altered. Turning to the merits of the case, the Board upheld the ALJ's finding that the miner's hospitalization was related to his coal dust induced lung disease notwithstanding the fact that the records did not specifically "reflect treatment for pneumoconiosis." The ALJ noted that the miner's chronic obstructive pulmonary disease and chronic bronchitis had been found to be related to coal dust exposure and, therefore, because his hospitalization records reflected treatment for such a disease, the costs were compensable. Moreover, it was proper to give little weight to Dr. Branscomb's opinion that the medical expenses were not compensable because his opinion was premised on a finding that the miner did not suffer from legal pneumoconiosis.

[**medical treatment disputes**]

By unpublished decision in *Howard v. Valley Camp Coal Co.*, BRB No. 00-1034 BLA (Aug. 22, 2001) (unpub.), a case arising in the Fourth Circuit, the Board held that a survivor was not entitled to application of collateral estoppel to preclude re-litigation of the existence of pneumoconiosis. Under the facts of the case, Employer did not contest the existence of pneumoconiosis in the miner's claim and benefits were ultimately awarded. Citing to *Island Creek Coal Co. v. Compton*, 211, F.3d 203 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3d Cir. 1997), the Board noted that, subsequent to adjudication of the miner's claim, the Fourth Circuit changed the standard for establishing the presence of pneumoconiosis and required that all relevant evidence under 20 C.F.R. § 718.202(a) be weighed together in making such a determination. As a result, the issue to be litigated in the survivor's claim was not "identical to the one previously litigated" and, therefore, collateral estoppel was inapplicable.

[**collateral estoppel in a survivor's claim**]