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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 209 April 2009

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

A. U.S. Circuit Courts of Appeals

***Carey v. Hercules Ocean Corp*., ___ F.3d ___, 2009 WL 1011031 (5th Cir. 2009)(Unpub.)**

In *Carey v. Hercules Ocean Corp*., the U.S. Court of Appeals for the Fifth Circuit upheld the District Court's apportionment of fault under Section 5(b) of the Act with respect to a claimant who was injured while working as a member of a longshoremen's crew securing the mooring lines of a ship. Section 5(b) of the Act provides that when an individual covered by the Act is injured by the negligence of a vessel, then the individual may bring a negligence action against the vessel as a third party under Section 33 of the Act. 33. U.S.C. § 905(b).

The appellate court described the injured worker's theory of negligence as follows: "His crew, standing on a platform extending from the shore, had just stopped pulling on their end of a mooring line. A few seconds after Carey's crew created some slack in the line, and only as a result of the crew on the ship releasing their end, the portion of the line between the two crews fell into the water. The forces generated by the falling line hitting the water jerked Carey towards the ship and into a handrail, severely injuring his back." Hercules, in contrast, argued that the cause of Carey being pulled into the rail was his crew slacking off the line, not the ship's crew releasing their end of the line.

Both the District Court and Court of Appeals considered the rule that "proximate cause may not be established by speculation or conjecture, but instead must be based on evidence that provides some probative force." However, the Court of Appeals noted that proximate cause can be based on inferences arising from the factual circumstances presented, and it concluded that the testimony of Carey's crew provided evidence of causation sufficient to sustain the District Court's findings of negligence and apportionment of fault.

[Topic 5.2 – Exclusivity of Remedy and Third Party Liability]

B. Benefits Review Board

***H.S. v. Dep't of Army/Navy*, __ BRBS __, BRB Nos. 08-0533 and 08-0596 (Apr. 10, 2009).**

In *H.S. v. Dep't of Army/Navy*, the Board vacated attorney fee awards by a district director and an ALJ in light of the Ninth Circuit's opinions in *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049 (9th Cir. 2009) and *Van Skike v. Dir., OWCP*, 557 F.3d 1041 (9th Cir. 2009).[1]

In support of his requested hourly rate of $375, Claimant's counsel submitted his resume, a copy of the Morones Survey, and an affidavit and deposition of William B. Crow, an attorney and expert on attorney fees. The district director found that the Board and the OALJ have consistently rejected use of the Laffey Matrix[2] and the Morones Survey[3] as evidence of the market rate under the Longshore Act. Noting that the work performed before her lacked complexity, the district director determined the appropriate hourly rate to be $235. The ALJ also rejected the Morones Survey as insufficient to establish a proxy rate for Longshore work. The ALJ concluded that it is a survey of hourly rates of "an elite sub-group of commercial litigators" and is limited to 16 law firms specializing in

[1] These cases involved the same counsel.

[2] The matrix is a chart derived from hourly rates allowed by the district court in *Laffey v. Northwest Airlines, Inc*., 572 F.Supp. 354 (D.D.C. 1983). The matrix is prepared annually by the Civil Division of the United States Attorney's Office for the District of Columbia for use in "fee-shifting" statutes where the prevailing party is entitled to a "reasonable" attorney's fee. www.usdoi.gov/usao/dc/divisions/Civil_Division/ laffey_matrix_6.html.

[3] The Morones Survey is a 2004 survey of commercial litigation fees in the Portland, Oregon, area taken by Serena Morones, a CPA. Claimant's counsel indicated that the Survey covers 281 attorneys in 16 firms.

commercial litigation.[4] He also rejected Mr. Crow's opinion as evidence of proxy Longshore rates because he had "significant doubts regarding Mr. Crow's familiarity with Longshore litigation." Accordingly, the ALJ found that counsel failed to establish a normal billing rate or a suitable proxy rate, and he relied on his own experience and knowledge of rates in Longshore cases to arrive at a rate of $275 per hour, declining to modify the hourly rate because of the lack of complexity or quality of representation. Absent any evidence supporting an hourly rate of $120 for the legal assistant's fee, the ALJ awarded an hourly rate of $110. On appeal, Claimant's counsel contended that the district director and the ALJ improperly rejected the Morones survey and Mr. Crow's affidavit, as evidence of counsel's appropriate market-based hourly rate; and that the district director erred in awarding a rate different form the ALJ's rate.

The Board summarized the Ninth Circuit's holdings and underlying reasoning in *Christensen* and *Van Skike*. In *Christensen*, the court held that the Board erred in limiting the relevant community rates to those awarded in Longshore cases in a geographic region rather than independently examining an actual market. *Christensen*, 557 F.3d at 1054. The Court instructed that the Board "must define the relevant community more broadly than simply [as] fee awards under the [Act.]." *Id.* at 1055. Additionally, the Ninth Circuit stated that the burden for producing relevant market evidence is on the fee applicant, and where he fails his burden, the Board may look to other Board and administrative law judge cases to determine a reasonable fee. *Id.*

In *Van Skike*, the ALJ rejected the Morones survey proffered in support of the requested rate, stating there was an absence of "meaningful" proof of what counsel can receive from paying clients. *Van Skike*, 557 F.3d at 1044-1045. The Ninth Circuit observed that the ALJ and the district director provided detailed analyses of the evidence proffered by counsel to establish a prevailing market rate. However, because the ALJ and district director exclusively relied on contemporaneous Longshore cases to set the rate, the court vacated the awards and remanded for further consideration consistent with *Christensen*. *Id.* at 1047. The court further held that adjustments for the lack of complexity of a case should be made in considering the number of compensable hours worked and not in the hourly rate awarded. *Id.* at 1048.

[4] Although the ALJ rejected its probative value, he found that the Morones Survey reported a 2004 average hourly rate of $344 for commercial litigators with 30 or more years of experience, and Mr. Crow opined that an attorney in the Portland, Oregon, area with counsel's experience, abilities, and reputation, should be earning between $350 and $400 per hour.

The Board vacated the awards at issue for the reasons set forth in *Christensen* and *Van Skike* and remanded the case for determinations of a reasonable hourly rate consistent with these decisions. *See also Welch v Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007).

[Topic 28 Attorney's Fees – Generally; Topic 28.6 Factors Considered in Award; Topic 28.6.1 Hourly Rate]

***K.L. v. Blue Marine Security, LLC*, __ BRBS __, BRB No. 08-0789 (Apr. 16, 2009).**

In *K.L. v. Blue Marine Security*, the Board affirmed the administrative law judge's decision and order on summary judgment finding Claimant covered by the Act, and it remanded the case to the ALJ for further findings regarding whether there were any remaining disputed issues and for entry of a compensation order awarding or denying benefits.

Pursuant to regulations issued by the Department of Homeland Security, guards are required at all times on certain vessels anchored in the Mississippi River to ensure compliance with requirements imposed by the U.S. Customs Service, the INS, and the Coast Guard. Claimant was working as such a guard aboard a vessel on the Mississippi River when his exposure to a harmful substance caused a seizure and loss of consciousness. The ALJ found that he was not excluded from coverage under Section 2(3)(A) of the Act because his work was not performed in an office but was instead performed aboard a vessel on navigable waters. Employer appealed, alleging that Claimant was expressly excluded from coverage under Section 2(3)(A) of the Act. It further argued that Claimant acted as a "government employee" and was thus excluded from coverage under Section 3(b) of the statute, inasmuch as his duties were delegated to him by the Coast Guard.

The Board first rejected Employer's contention that Claimant was a government employee under Section 3(b) of the Act since it had offered no factual or legal basis in support of its argument.

With respect to Employer's contention that Claimant was excluded from coverage under Section 2(3)(A) of the Act, the Board acknowledged that claimants bear the burden of establishing that: their injuries occurred upon a site covered by Section 3(a) of the Act; they were engaged in maritime employment pursuant to Section 2(3) of the statute; and there is no specific statutory exclusion which applies to their employment. It further acknowledged that Section 2(3)(A) of the statute expressly excludes from coverage "individuals employed exclusively to perform office clerical,

secretarial, security, or data processing work" but stated that the term "exclusively" in that section modifies all four classifications. Noting that it had previously found the term "office" modified "clerical" and "data processing" work in Section 2(3)(A), the Board similarly held in this case that Claimant was not excluded from the Act's coverage because he was not exclusively performing "office" security work. The Board determined that there was substantial evidence to support the ALJ's finding that Claimant was not working in an office or administrative space, but was instead working on a vessel subject to various marine hazards. It further determined that the exclusions in Section 2(3)(A) were intended by Congress to be interpreted narrowly, and noted that Claimant "was not confined, physically and by function, to an office or other administrative area on land." It thus found that Claimant "is not the type of security officer intended to be excluded pursuant to Section 2(3)(A) as he was exposed to traditional maritime hazards."

[Topic 1.7.1 Jurisdiction/Coverage – Maritime Worker; Topic 2.3 Definitions – Employee; Topic 3.1 Coverage – Government Employees;

***A.S. v. Advanced American Diving*, __ BRBS __, BRB No. 08-0574 (Apr. 27, 2009).**

In *A.S. v. Advanced American Diving*, the Board affirmed in a split decision the administrative law judge's determination that a widowed claimant who was receiving death benefits had not remarried. It thus upheld the ALJ's determination that Employer's petition for modification to discontinue death benefits should be denied.

Claimant and decedent were married in September 1998, decedent died during the course of his Longshore employment in March 1999, and Employer thereafter began paying death benefits pursuant to Section 9 of the Act. In September 1999, Claimant vacationed in Cabo San Lucas, Mexico where she began dating A.F., and they subsequently began living together in Mexico in 2001. On November 2, 2002, Claimant and A.F. "celebrated their relationship in a 'commitment ceremony' presided over by a minister and witnessed by 50 friends and family members . . . , [they] said vows, exchanged rings, and had a party, which included catered food, a photographer, and a band." In November 2003, Claimant applied to, and was granted permission by, an Oregon court to change her last name to that of her companion. The couple subsequently had two children, one born in March 2004 and the other in March 2006. At the time Employer filed its petition for modification, the couple owned property together in Mexico and

Oregon, and generally referred to themselves as "husband and wife" in public. They had not, however, filed joint tax returns with the U.S. Internal Revenue Service.

Both parties presented expert evidence to the ALJ on the subjects of Mexican and family law. Claimant testified at the hearing that she did not consider the "commitment ceremony" to be a marriage ceremony and did not consider herself married to A.F. A.F. provided similar corroborating testimony, and based on the evidence submitted, the ALJ concluded that Employer had failed to meet its burden to show Claimant had remarried. the ALJ thus denied Employer's petition for modification.

Recognizing that a widow is entitled to death benefits under Section 9(b) of the Act only while she is a widow, and that the statute does not define "marriage," the Board concluded that state law controls when deciding whether a marriage has been created. The Board noted that Oregon did not recognize common-law marriage, but recognized common-law marriages legally established in other jurisdictions, and it thus found that the issue here was whether Claimant and A.F. formed a marriage under the Civil Code of the State of Baja California Sur that Oregon would recognize as a valid marriage.

According to Employer's expert, Mexican law does not recognize common-law marriage but provides an alternative type of legal union between a man and a woman known as "concubinage." According to the expert, this union exists when the man and woman cohabit continuously with the tacit purpose of forming a family. This relationship, the expert further testified, may be terminated by "mutual agreement, abandonment, death, or by seeking a statement in *ex parte* proceedings." Claimant's expert testified that he believed there was also a "lesser" union under Mexican law into which a man and woman could enter called a "free union." According to the expert, "free union" was not regulated by Mexican law.

With respect to Oregon law, Employer's expert stated that Oregon will recognize a marriage, including common-law marriage, deemed valid in the jurisdiction in which it was formed. He opined that "if concubinage were the equivalent of marriage, Oregon would recognize it, as it is the public policy of Oregon to protect the marriage state and there is a presumption that people holding themselves out as married are married." While he did not form an opinion on whether "concubinage" was the equivalent of a marriage, he concluded that Claimant's "domestic situation would probably satisfy the elements of a common-law marriage in a state that recognizes such marriage." Claimant's expert, in contrast, concluded that Claimant's domestic situation did not establish a relationship for Oregon to recognize

inasmuch as a relationship had to "be a marriage" rather than simply "equivalent to marriage."

The Board determined that, inasmuch as it was "uncontested that claimant and A.F. did not marry formally in either Oregon or [Baja California Sur], and cannot create a common-law marriage in Oregon or [Baja California Sur], the administrative law judge properly concluded that they are married under Oregon law only if they formed a concubinage relationship under [Baja California Sur] law that would be recognized as a marriage in Oregon." Since Mexican law did not treat concubinage and marriage the same, and either party could terminate the concubinage relationship without the consent of the other, the Board affirmed the ALJ's determination that Claimant had not "remarried" under the provisions of Section 9(b) of the statute. The Board found support for its determination in decisions by California and Texas courts which held that concubinage was not marriage. It also noted that the testimony of the parties' experts on Oregon law established that ceremonial and common-law marriages require that the parties intend to be married, whereas the ALJ here found credible the testimony of Claimant and her partner that they did not intend to marry. Since the Board is bound to respect the ALJ's determination regarding the credibility of testimony, it affirmed as rational and supported by substantial evidence the ALJ's decision denying modification.

In a dissenting opinion, one Board member concluded that the ALJ's analysis of the term "remarriage" in Section 9(b) was "devoid of its context in the statute" and thus fatally flawed. According to the dissenting member, the Supreme Court has held that "practical considerations trump a claimant's technical legal status in determining her right to death benefits" and "[a]nalysis of the record [here] in light of the relevant law leads to the inescapable conclusion that claimant's relationship with A.F. is a 'remarriage' within the meaning of [Section 9 of the Act]." Some of the facts established by the record cited by the dissenting judge in support of her conclusion were, *inter alia*: Claimant had been advised by her attorney that if she remarried she would lose entitlement to ongoing payment of death benefits under the Act; she conducted an investigation of relevant marriage laws and determined that neither Oregon nor Mexico recognizes common law marriage; the specific purpose of her research was to avoid having a legal marriage to A.F. which would cause her to lose her death benefits; she and A.F. represented themselves to the world as husband and wife; they jointly

owned their bank accounts and real estate, including a home worth approximately $800,000; and they both obtained life insurance policies in which they described themselves as married and identified the policy beneficiaries as husband and wife.

[Topic 8.5 Disability – Death Benefits for Survivors; Topic 9.3.3 Compensation for Death – Death or Remarriage of Surviving Spouse; Topic 2.16 Definitions – Widow or Widower]

II. Black Lung Benefits Act

U.S. Circuit Court of Appeals

In *Hill v. Director, OWCP*, ___ F.3d ___, Case No. 06-4868 (3rd Cir. Mar. 24, 2009), the court reversed an Administrative Law Judge's denial of benefits in a widow's claim.

Under the facts of the case, the miner's treating physician concluded that, although pancreatic cancer was the immediate cause of the miner's death, the presence of chronic obstructive pulmonary disease hastened his demise because it compromised his respiratory system. The Administrative Law Judge concluded that this constituted insufficient evidence upon which to award survivor's benefits because the physician did not attribute development of the miner's COPD to his history of coal dust exposure.

The circuit court noted that, because the miner had been awarded benefits during his lifetime, the parties stipulated to the presence of coal workers' pneumoconiosis in the widow's claim. From this, the sole remaining entitlement issue in the widow's claim, according to the court, *should have been* death causation, and not whether the miner's COPD stemmed from coal dust exposure:

> Rather than seizing upon a semantic technicality to reject Dr. Carey's explanation of the causes of Hill's death, the ALJ should have recognized that 'pneumoconiosis,' as defined under the Black Lung Benefits Act, was a cause of, and a hastening factor in, his death.

Moreover, citing to *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3rd Cir. 1989), the court reiterated that it was "irrelevant" that pancreatic cancer was the immediate cause of the miner's death; rather, the court determined that benefits should have been awarded in the survivor's claim if evidence demonstrated that "pneumoconiosis contributed to the miner's death, *albeit briefly*." (italics in original).

Upon review of the record, the treating physician's opinion that COPD compromised the miner's respiratory system and hastened his death was sufficient to award survivor's benefits under the Act. The court stated:

> [W]e are at a loss to understand why the ALJ was so troubled by Dr. Carey's testimony about the effect of a compromised respiratory system on the human body. One need not be board certified in pulmonology nor have an advanced degree in

> anatomy to appreciate the impact that low oxygen levels in the blood can have on the human body. Common sense suggests that if the heart and lungs do not have a sufficient supply of oxygen to function properly, the result could surely include organ failure as well as other complications.

The Third Circuit noted, "Every physician who examined Hill within a month of his death, and every medical examination and finding, confirmed his pulmonary disease, decreased breath sounds, and respiratory difficulties." The court added that "pneumoconiosis need only have some identifiable effect on the miner's ability to live" in order for the widow to be entitled to benefits. From this, it concluded:

> The law simply does not require a miner with a respiratory system that has been ravaged by mine-related pneumoconiosis to hang on until a physician can document his last moment of life so that the survivor will be able to document that his impaired respiratory system hastened his death.

The court then stated, "Given the medical evidence on this record, we believe that Mrs. Hill has established her entitlement to survivor's benefits as a matter of law, and there is nothing left to do but award the benefits she is clearly entitled to."

[**death causation in a survivor's claim**]