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NWLAA Case Law Review Norman Cole, Editor

Attorney Fees – Entitlement

20% penalty assessed for delay in payment of award was compensation. Attorney fee awarded for establishing entitlement. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 38 BRBS 37 (4th Cir. 2004).

Employer paid an award eighteen days after it was ordered. Claimant requested a 20% penalty, and employer objected, contending that claimant had intentionally evaded delivery. The OWCP awarded the penalty and a \$2,068.80 fee. Employer appealed, contending that her attorney was not entitled to a fee because the penalty was not compensation.

The court held that the 20% payment was compensation because it was money allowance payable to the employee and because it was not like other penalties or fines paid to the Special Fund. Furthermore, denying counsel a fee for collecting the §14(f) payment would discourage other claimants from seeking the benefit of full and timely compensation for an injury.

Attorney Fees – Mitigation/Tender

Tender must be unconditional. *Jackson v. Newport News Shipbuilding & Dry Dock*, 38 BRBS 39 (BRB 2004); *accord, Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (BRB 2004).

Employer sent claimant's counsel a letter offering 5% PPD for the left arm but also asked claimant to agree that there were no other outstanding issues as of the date of the execution of a stipulation awarding this compensation. Claimant refused to agree to this language. At hearing, the parties stipulated that claimant was entitled to 5% PPD, a §14(e) penalty for failing to controvert timely, and interest. The ALJ awarded a \$3,000 fee. The Board affirmed. The tender was not unconditional per §28(b).

Average Weekly Wage – §10(a)

§10(a) still mandatory if employed more than 75% of year. *SSA v. Homeport Insurance Co. v. Price*, 38 BRBS 25 (9th Cir 2004) (John Dudrey and Russell Metz for employers, Charles Robinowitz for claimant).

In the year before a 1998 injury claimant worked as a longshoreman 197 days, or 75.77% of the 260 days available to a five day per week worker. The ALJ found that employment was not intermittent or casual, though because he was dispatched through a union he did not always work the same number of days every week. This did not equate to fixed, determinable periods of inactivity that would prevent §10(a) from being reasonably and fairly applied. Therefore, the ALJ

properly applied §10(a) to calculate his average weekly wage, as required by *Matulic v. Director, OWCP*.

Causation – §20 presumption

No presumption of situs. *Cunningham v. Director, OWCP*, 38 BRBS 42 (1st Cir.2004).

Claimant argued that per §20, which establishes a presumption that a claim comes with the provisions of the Act, the ALJ should view the case with a bias in favor of finding the location of injury a covered situs. The Court rejected this view, holding that §20 does not govern general interpretation of the situs requirement.

Concurrent Awards – Average Weekly Wage Adjustment

Concurrent awards allowed when earning capacity did not change after first award. *SSA v. Homeport Insurance Co. v. Price*, 38 BRBS 25 (9th Cir 2004) (John Dudrey and Russell Metz for employers, Charles Robinowitz for claimant).

When injured in 1998 Claimant was receiving \$196.01 PPD for a 3/27/79 injury based on an average weekly wage of \$627.88 and residual earning capacity of \$333.87. His average weekly wage for his 1998 injury, calculated per §10(a), was \$1,525.90. Claimant was awarded PTD for this injury, and employer requested a credit for the prior PPD award, contending that §8(a) prohibited payment in excess of 66-2/3% of average weekly wage. The court held that a double dipping problem occurs only if there has been a change in condition since the first injury that mitigated or eliminated the prior injury's negative economic effect on the employee's ability to earn wages. If an increase in wages was not caused by a change in wage earning capacity, an award for the second injury would not constitute double dipping, and neither award should be adjusted.

Here, the ALJ found that claimant's increase in earnings was not due to an increase in wage earning capacity. Thus, claimant was not over-compensated, and the Board erred in reducing the 1998 award by the amount of the 1979 award.

Estoppel – Election of Remedies

Collateral estoppel bars LHWCA claim. *Jones v. Tidewater Marine Service, Inc.*, 378 BRBS 330 (ALJ 2004).

In 1999 claimant filed a state compensation claim for a 1978 or 1979 injury when employed as a deckhand on the Northtide. This claim was dismissed based on a finding that he was a Jones Act seaman and excluded from coverage. He then filed a LHWCA claim, but the ALJ held that claimant was barred from asserting the claim because of collateral estoppel. The prior proceeding involved an identical issue, was actually litigated, and Jones Act status was a critical and necessary part of the judgment in the earlier action. The ALJ also alternatively held that claimant actually was a Jones Act seaman and exempt from coverage under the LHWCA.

Claimant asserted alternative claims for hearing loss. Judicial estoppel not applied when claimant settled with one employer prior to hearing. No credit either. *Johnson v. Metropolitan Stevedore Co.*, 38 BRBS 258 (ALJ Dorsey, 2004).

Metropolitan was found responsible for claimant's hearing loss under the last employer rule and then filed a petition for reconsideration asserting that claimant should be judicially estopped from obtaining compensation from Metropolitan, or Metropolitan should be entitled to a credit for a prior settlement with Pasha. Claimant had asserted an alternative claim against Pasha but settled this claim for approximately \$40,000. Metropolitan contended that claimant should be judicially

estopped from taking inconsistent legal positions. The ALJ held that claimant had not made an inconsistent claim about how well he hears and had assumed the risk that Metropolitan might be exonerated. There was no abusive manipulation of the administrative or judicial process. Also, in *Alexander v. Director*, the 9th Circuit held that settlements, as here, are not subject to a credit by Metropolitan.

Exclusions – Jones Act

Employment on dredge subject to Jones Act, not LHWCA. *Daniels v. The M Operating Company, Inc.*, 38 BRBS 236 (ALJ 2004).

Claimant was a land based employee who performed maritime activities on a dredge that had no means of self-propulsion, was essentially a work platform engaged in a form of construction, and any movement of the dredge was purely incidental to its primary function of construction (*i.e.*, dredging). The dredge was moved using tugs or was moved several feet every few hours through use of anchors dropped overboard and winched in to allow the dredge to crawl sideways in the river. Any movement of the dredge was incidental to its primary function of removing sediment from the river bed.

The ALJ held that the dredge was a special purpose vessel. It was not built to assist in the construction or repair of ships or piers, nor was it intended to contribute to the loading or unloading of cargo. Claimant was excluded from coverage as a member of a crew of a vessel.

Insurance – Coverage

ALJ had jurisdiction to resolve insurer reimbursement dispute. *Kirkpatrick v. BBI Inc.*, 38 BRBS 27 (BRB 2004).

Claimant worked as a “material expeditor” for BBI. BBI had a contract to provide general labor for Bay, who had a contract to construct a fixed platform on the Outer Continental Shelf (OCF) for Conoco. The platform was 170 miles southwest of New Orleans in the Gulf of Mexico. Claimant was working in an office on the fixed platform when he leaned across his desk to answer a phone and injured his lumbar spine. At the time of injury BBI had coverage from Houston General with a OCSLA endorsement covering work on the OCS off the coast of Texas in the Gulf of Mexico. INA also provided coverage with an OCSLA endorsement covering all oil lease work off the coast of Louisiana in the Gulf of Mexico. The ALJ found that the claim was subject to the OCSLA and INA’s policy covered the injury. By then Houston had voluntarily paid more than \$650,000 in compensation and sought reimbursement from INA. The ALJ declined to resolve the reimbursement issue.

HELD, an ALJ has authority to decide all issues integral to resolving the claimant’s claim for compensation, including insurance disputes necessary to resolve claimant’s claims under the Act. The ALJ has authority to resolve related reimbursement claims. Here. There was on established responsible employer, BBI. It had two insurers with OCSLA endorsements. These insurers did not have a contractual relationship with each other. There was no contract dispute to resolve invoking some law other than the LHWCA. The issue here was which of the two carriers was responsible, an issue the ALJ had authority to resolve. The Board remanded the claim to resolve the reimbursement dispute.

Maximum & Minimum Compensation

Limit on maximum compensation applies to a single claim, not value of award from multiple claims. *SSA v. Homeport Insurance Co. v. Price*, 38 BRBS 25 (9th Cir 2004) (John Dudrey and Russell Metz for employers, Charles Robinowitz for claimant).

When injured in 1998 Claimant was receiving \$196.01 PPD for a 3/27/79 injury based on an average weekly wage of \$627.88 and residual earning capacity of \$333.87. His average weekly wage for his 1998 injury, calculated per §10(a), was \$1,525.90. Claimant was awarded PTD for this injury. Employer contended that the combined awards could not exceed the maximum compensation allowed by §6(b)(1) (200% of the NAWW). The court held that the limitation provided in §6(b) applied to each claim rather than the total awards from multiple claims. The court reached this conclusion based on its interpretation of the plain meaning of the statute and its view that a contrary conclusion would contravene the purpose of the 1972 amendments. If employers never had to pay more than 200% of the NAWW, it would have no incentive to ensure the safety of a formerly injured employee who returned to work while receiving maximum compensation.

Medical Services – Other

24 hour care required. Family members entitled to be paid. *Carroll v. M. Cutter Company, Inc.*, 37 BRBS 134 (BRB 2003), *on reconsideration en banc*, 38 BRBS 53 (2004) (John Dudrey for employer/carrier; Meagan Flynn for claimant).

Claimant sustained a serious head injury which resulted in cognitive impairment and PTD. His treating physician and independent medical examiners agreed he needed 24 hour supervision. The ALJ deferred to employer's expert, a certified life-care planner with an nursing background, who concluded that claimant did not need a paid attendant 24 hours per day. His "supervisor" could be his spouse or family member. The ALJ ordered employer to pay for an average of 14.5 hours of paid care 5 days per week and 48 hours of paid care one weekend per month and two full weeks per year of paid care for vacation. The Board reversed, relying on claimant's expert, and concluding that the ALJ must defer to claimant's treating physician, who concluded without contradiction from other medical experts, that claimant required 24 hour care. As family members provided the same type of services as the licensed attendant it was improper for the ALJ to commandeer their services for free regardless of their willingness to serve. To the extent they were willing to perform the services employer was obliged to provide claimant's family members were entitled to payment, albeit at a reduced rate.

Modification – Change in Condition

Modification allowed. New skills increased earning capacity. *Kuehl v. Lockheed Shipbuilding Co.*, 38 BRBS 253 (ALJ Mapes, 2004) (Russell Metz for employer; claimant appeared without attorney).

When injured on 3/1/85 claimant's AWW was \$474.36. He eventually received a PPD award based on a residual earning capacity of \$254.36, yielding PPD of \$169.37 per week. Employer was granted relief per 8(i). In 1987 claimant earned an Associate of Arts degree and from 12/87 to 7/01 was employed by two companies in their quality control departments. In 1998, 1999, and 2000 claimant earned in excess of \$100,000 per year. He left his job in 7/01 to move to Seattle to be closer with his mother who had recently suffered a heart attack and stroke, survived on sale of his stock options (>\$261,000), and did not find another job until 6/10/02. Earnings from this employment averaged \$43,000 to \$44,000 per year. Employer petitioned for modification.

The ALJ observed that a mere increase in earnings was insufficient to meet employer's burden of showing a change of condition. There had to be evidence that as a result of acquisition of new skills or some factor other than transitory changes in the general economy, the claimant became capable of obtaining suitable alternative employment that enabled him to earn more, after adjusting for inflation, than the residual earning capacity determined in the prior compensation order. The ALJ concluded that claimant had acquired new skills which improved his earning capacity. Employer could have justifiably asked to terminate all PPD but instead asserted that

claimant's residual earning capacity was \$13.00 per week, yielding entitlement to \$8.67 per week. The ALJ therefore reduced claimant's PPD award to \$8.67 per week as of 1/1/98.

Modification – Other

Ineffective modification petition when no objective findings of increased disability. *Lassiter v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 273 (ALJ 2004).

Claimant was awarded compensation for carpal tunnel syndrome in a compensation order dated 8/20/99. On 7/20/00 claimant's attorney wrote the District Director stating that "claimant has noted a worsening of his condition which is now interfering with his working. He requests compensation for additional permanent partial disability and for temporary total disability which will be due to the additional time he will now need to be out of work to undergo additional treatment." Claimant did not seek medical treatment for approximately a year and a half after the compensation order, and until then there were no objective findings of increased disability. The ALJ held that the filing was anticipatory, per *Meekins v. Newport News Shipbuilding and Dry Dock Co.*, 34 BRBS 5 (2000), and therefore was not sufficient to constitute a petition for modification.

Permanent Disability – De minimis award

De minimis award denied when claimant entitled to PTD for subsequent injury. *SSA v. Homeport Insurance Co. v. Price*, 38 BRBS 34 (9th Cir 2004) (John Dudrey and Russell Metz for employers, Charles Robinowitz for claimant).

Claimant was awarded \$196.01 PPD for a 3/27/79 injury, based on an average weekly wage of \$627.88 and residual earning capacity of \$333.87. In 1991 he sustained another injury but returned to work after a period of TTD from 10/3/91 to 11/23/92. In 1998 claimant sustained a third injury (aggravation of his condition due to work activity), when his average weekly wage was \$1,525.90. Claimant was awarded PTD for the 1998 injury but sought an additional PPD award for the 1991 injury. The ALJ did not award PPD for the 1991 injury. The Court affirmed because such an award would not serve the purpose for which nominal awards are given. By 1998 claimant had already suffered a loss in wage earning capacity due to his post 1992 work, so the nominal award could not serve the purpose of permitting claimant to file a claim if and when his earning capacity diminishes because it already had diminished.

Permanent Disability – Motivation

No PPD due to claimant's failure to engage in diligent job search. *Harrell v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 239 (ALJ 2004).

Employer presented evidence of suitable and available employment notwithstanding claimant's scheduled injury. Claimant provided testimony regarding the employers he had contacted in an attempt to find work, but the ALJ concluded that the search was not diligent or sufficient to overcome employer's evidence that suitable work was available. Claimant contacted employers only because he was motivated to receive unemployment compensation. He knew that the majority of the businesses he contacted did not have any positions he could perform. He did not keep a record of the person he contacted or list any job positions that were available or the salary/wage per hour. He contacted some businesses identified by employer's vocational expert and said that nothing was available even though employer's expert said jobs were available. He completed a very limited number of actual applications and failed to submit an application to some employers who actually had positions available. Several employers tried to contact claimant, but letters to him were returned as not deliverable, leading the ALJ to doubt if claimant actually contacted these businesses or if he contacted them how diligent he was in seeking employment from them.

Because claimant did not engage in a diligent search, the ALJ denied his claim for PTSD.

Situs – Adjoining Area

Pipe manufacturing facility four miles from main shipyard not an adjoining area. *Cunningham v. Director, OWCP*, 38 BRBS 42 (1st Cir. 2004).

In 1990 Bath Iron Works (BIW) moved its East Brunswick Manufacturing Facility (EBMF) several miles from its main shipyard because it needed more space to manufacture pipe units needed in ships under construction. The area between the main shipyard and EBMF was not predominantly maritime. It contained restaurants, motels, convenience stores, gas stations, residences, and other non-maritime uses. EBMF was 1,400 feet from the navigable New Meadows River and it was crossed by Thompson Brook, a waterway that was not used for commercial purposes or reasonably capable of future commercial use. The ALJ and Board found that EBMF was not a covered situs.

Noting that the 1st Circuit had not adopted the 9th Circuit's functional relationship methodology for defining adjoining area (*Brady Hamilton v. Herron*) or the 4th Circuit's literal reading of the statute, requiring that an adjoining area be contiguous with or otherwise touch navigable waters (*Sidwell*), it concluded, without deciding, that the *Herron* functional test was dispositive in this claim. There were two clearly separate locations. EBMF was part of a second campus for the shipyard's maritime activities, separated by a large area of mostly unrelated business and residential properties. Workers at EBMF had status, but status and situs are different concepts. There was no sense of a largely continuous neighborhood of maritime uses, some shape of a perimeter, perhaps broken in spots or irregular in form, that extended out from the water's edge. No functional relationship existed between EBMF and the New Meadows River.

Situs – Pier, Wharf

Fixed oil platform not a covered situs. *Thibodeaux v. Grasso Production Management, Inc.*, 38 BRBS 13 (5th Cir. 2004).

Claimant was a pumper/gauger on a fixed oil and gas production platform. He reached the wells by using a 17 foot skiff and also piloted a 24 foot vessel, the M/V Elizabeth, which was used to transport employees from Venice, Louisiana, to the platform with their personal supplies and on occasion equipment used for production. The platform on which he spent most of his working hours rested on wooden pilings, extended over marsh and water, but was accessible only by vessel. He was injured when a wood platform gave way, causing him to plunge into the marsh below where a nail pierced his hand.

The Court identified the issue as whether a fixed oil production platform built on pilings over a marsh and water inaccessible from land constitutes a pier or other adjoining area. It concluded that it was neither.

The court rejected the 9th Circuit's *Hurston* decision which held that if it looks like a pier, is built like a pier, and adjoins navigable waters, it is a pier. Instead, the court held that a pier must serve a maritime purpose even if it is not "customarily used" for loading, unloading, building, or repairing vessels. The court did not think Congress would define pier in such a way as to include structures having no connection to maritime activity when the term is in a statute enacted pursuant to Congress's maritime jurisdiction and for the benefit of maritime employees and is placed in a list of structures with obvious maritime connotations.

Here, the purpose of the platform on which claimant was injured was to further drilling for oil and gas, which was not a maritime purpose. The injury was not on an adjoining area because it was not normally a site of significant maritime activity.

Status – Integral Employment

Union president duties not integral or essential to loading, unloading, building, or repairing. Lacks status. *Sidwell v. Virginia International Terminals, Inc.*, 38 BRBS 19 (4th Cir. 2004).

When claimant became president of his local longshoreman's union (Local 1970) he spent about one hour per week at locations where longshoring activities took place to resolve specific issues or grievances and spent the remainder of his work week representing the local on committees of the Hampton Roads Pot Authority away from the waterfront terminals. During this employment he learned that he had a work related hearing loss. Prior to employment as a union president he spent most of his time as a container repair mechanic for VIT. VIT successfully argued before the ALJ and BRB that Local 1970 should be responsible for the hearing loss.

The Court reversed. Claimant was removed from the unloading and unloading process. He did not have authority to interrupt longshoring operations. He may have assisted the smooth workings of the waterfront but his job was not integral to loading, unloading, building or repairing a vessel. His absence or failure to discharge his duties would lead to work stoppage. He had at best an indirect and incidental role in loading and unloading and therefore lacks status.

Third Party – Notice/Consent

§33 bar when claimant did not secure approval of settlement from carrier & employer. *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (BRB 2004).

Claimant filed a Jones Act and general maritime suit against employer and other defendants. Claimant agreed to a \$100,000 settlement with one of the defendants. Employer was granted summary judgment on the civil suit, but by then claimant had filed a claim for compensation under the LHWCA. Employer's carrier repeatedly told claimant that it would not approve the civil settlement unless it resolved all disputes, including the LHWCA claim.

Claimant argued that employers active participation in the third party settlement negotiations made prior written approval of the agreement unnecessary, resulting in a waiver of employer's §33 defense. The Board held that §33(g)(1) specifically requires written approval of both the employer and its carrier. Because claimant did not obtain prior written approval of the carrier, the claim is barred. Furthermore, the LHWCA carrier did not provide Jones Act coverage, so employer's approval cannot be imputed to the carrier. Claimant knew that employer had a separate LHWCA carrier, was aware of §33(g)(1), but settled the claim nevertheless.

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