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NWLAA Case Law Review

Norman Cole, Editor

Attorney Fees – Amount

Court disapproves reduction of fee. *Barbera v. Director, OWCP*, 35 BRBS 27 (3d Cir. 2001).

ALJ Barnett awarded medical benefits but denied the request for PPD and then awarded $71,247.89 in fees and costs, plus $1,060.00 in additional fees and costs for defending objections to the fee application. The Board remanded for further consideration of fees due to the limited results obtained.

On remand, ALJ Chapman held that a reasonable rate was @ $200.00 and $170.00 per hour (partner/associate) instead of $300.00 and $250.00/hr requested because claimant provided no proof that the rate requested was a prevailing rate in the area, and research revealed no awards in the amount requested. Using the new rates, he calculated a lodestar figure of $46,242.50, plus costs. Inasmuch as claimant was only partially successful, and claims were interrelated and involved a common core of facts, the ALJ awarded counsel one-third of the amount requested, or $15,414.16, plus all costs ($3,750.39), since costs could not be parsed among the different claims.

On reconsideration, the ALJ made no change in his opinion but indicated that $300.00 and $250.00 per hour was not reasonable in this case. The ALJ thought a fee this high should be reserved for attorneys who are expert and require little time to recognize issues and research the law. Here, the petition reflected the equivalent of 19.8 full 8-hour days of "expert" attorney work, suggesting that neither attorney was an "expert" in this particular practice area. The Board affirmed the reduction in fees.

On appeal to the 3d Circuit claimant was awarded a nominal (*de minimis)* PPD award. Additionally the court held that ALJ Barnett's full fee, with no limited success reduction, was supported by substantial evidence and was in accordance with *Hensley v. Eckerhart*. Petitioner prevailed against employer's strong contestation of jurisdiction, extent of disability, and entitlement to future medical expenses. He gained substantial benefit. In a footnote the court stated: "Penalizing a litigant for unsuccessful claims by reducing fees earned on successful claims could have a chilling effect on the willingness of counsel to advocate even meritorious positions in unsettled areas of the law. If the reduction in the present case were to stand, it might well be seen by the bar as a warning that counsel should not insist on rights secured under the law as interpreted by the Courts, when the Board has announced a contrary interpretation."

Attorney Fees – Entitlement

Spouse denied a "representative's fee". *Galle v. Director, OWCP*, 35 BRBS 17 (5th Cir. 2001).

After worker died and his counsel withdrew, the worker's surviving spouse continued seeking compensation before the ALJ as the worker's "representative." The ALJ determined she was not entitled to a representative's fee in addition to her stake in the outcome of the case. The Court agreed because a non-attorney proceeding *pro se* cannot receive attorney's fees under the LHWCA.

Fee allowed because employer did not accept recommendation of DOL. *Staftex Staffing v. Director, OWCP*, 34 BRBS 44 (5th Cir. 2000), *on rehearing*, 35 BRBS 26 (5th Cir. 2000).

After an informal conference the claims examiner recommended PTD effective 7/5/95 based on an AWW of $490.24. Shortly before hearing employer agreed claimant was PTD but contended for the first time that claimant's AWW was $108.02. The ALJ concluded that the AWW was $504.32 and awarded a $7,239.28 attorney fee. Initially, at 34 BRBS 44, the court assumed there had not been an informal conference, so claimant could not receive a fee. On reconsideration, the Court held claimant was entitled to a fee because the employer did not accept the OWCP's recommendation and claimant secured a larger award of compensation.

Employer/Employee – Borrowed Servant

Employee of subdivision was borrowed servant of covered employer. *Fitzgerald v. SSA*, 34 BRBS 202 (BRB 2001).

Claimant worked for the Georgia Ports Authority (GPA) for 10 years operating various equipment at the Garden City Terminal located on the Savannah River. GPA owned the terminal and the equipment needed to load and unload vessels, and is exempt from the LHWCA per §3(b). GPA leased equipment and operators to stevedoring companies, such as SSA. Claimant spent 70-80% of his time in 1992 assisting vessel operators for stevedores and the remaining time taking orders from a GPA clerk. He was injured when assigned to SSA to load containers on trucks, and he sought compensation from SSA under the LHWCA. The ALJ concluded that SSA was claimant's borrowing employer and was liable. SSA argued that since claimant was an employee of GPA, a subdivision of Georgia, he should be excluded from coverage under the LHWCA.

HELD, §3(b), which concerns immunity of governmental entities, does not prevent a nominal state employee from becoming the borrowed employee of a statutory employer under the Act. The 5th Circuit uses a nine-part test to determine the responsible employer in a borrowed employee situation. *Ruiz v. Shell Oil Co.*, 413 F2d 310 (5th Cir., 1969); *Gaudet v. Exxon Corp.*, 562 F2d 351 (5th Cir. 1977), *cert. den.*, 436 US 913 (1978). (Who has control over the work? Whose work was being performed? Was there an agreement between the employers? Did the employee acquiesce in the work situation? Did the original employer terminate the relationship with the employee? Who furnished tools and place for performance? Was the new employment over a considerable length of time? Who had the right to discharge? Who had the obligation to pay the employee?) The Board affirmed the ALJ's determination that the claimant was a borrowed employee per application of the *Ruiz-Gaudet* factors.

Exclusions – Other

Injury barred when caused by willful intent to injure another. *Swanigan v. Maersk Pacific Ltd.*, 35 BRBS 23 (ALJ 2000).

Claimant and employer presented contradictory testimony regarding events leading to claimant's injury. The ALJ found claimant not credible and held she had initiated a confrontation and physically assaulted another person. That person defensively pushed her, causing cervical and lumbar injuries. §3(c) precludes from coverage injuries occasioned by the "willful intention of the employee to injure … another." As claimant solely brought about the confrontation by taking it upon herself to call out names being called for work assignment and aggravate the apparent tension between the marine clerks and the traditional stevedores, initially resulting in a heated exchange of words and then culminating in the physical chest bumping by claimant, the defensive shove and the fall to the ground by claimant, claimant solely brought about the entire situation and was not entitled to compensation per §3(c).

Hearings – Other

Time to file motion for reconsideration based on FRCP 6(a) (excluding weekends and holidays). *Galle v. Director, OWCP*, 35 BRBS 17 (5th Cir. 2001).

A motion for reconsideration must be filed not later than 10 days from the date the ALJ's decision is filed. FRCP 6(a) excludes weekends and holidays from the time computation when the period is less than eleven days. 29 CFR §18.4 requires that intervening weekends and holidays be included in the time computation. Claimant's motion for reconsideration and subsequent appeal was timely if judged per FRCP 6(a) but untimely if judged per 29 CFR §18.4. The Court held that the 10 day period must be calculating using the method set forth in FRCP 6(a), so claimant's motion and appeal were timely.

No jurisdiction to hold hearing to determine if drug/alcohol records improperly disclosed. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (BRB 2001).

Claimant signed a written consent to release records that concerned drug and alcohol abuse and treatment but subsequently objected to receipt of these records, contending that the type of release required by 42 USC §290dd-2(b) had not been used. Claimant asked the ALJ to hold a hearing to determine if the statute and supporting regulations had been violated. The ALJ admitted the records but did not rely on them to reach any conclusions.

HELD, the Act vests jurisdiction over a claim of compensation. The ALJ does not have authority to hold a hearing to determine if 42 USC § 290dd-2(b) had been violated. Any error the ALJ may have committed in receiving the documents is harmless in light of his decision not to consider any reference to claimant's drug and alcohol treatment in his consideration of the merits of the case.

Miscellaneous

MVA on way home not on covered situs (OCSLA claim). *Martin v. Pride Offshore Inc.*, 34 BRBS 192 (BRB 2001).

After a seven day hitch on employer's platform on the Outer Continental Shelf claimant was transported to the Louisiana mainland by helicopter, where his car was parked. He began a long drive home and was injured in a MVA 130 miles from the lot. He attributed the accident to exhaustion due to long hours of work on the platform.

HELD, situs under the OCSLA requires an injury on an OCS platform or on the waters above the OCS and does not extend to injuries on land or on state territorial waters.

Modification – Other

Timeliness of motion for modification based on §22, not §13. *Moore v. Virginia International Terminals, Inc.*, 35 BRBS 28 (BRB 2001).

In 1990 the district director issued a compensation order awarding temporary and permanent disability for a 1986 injury to wrists. In 1991 claimant filed medical reports with the district director's office indicating his condition was deteriorating. He filed a petition for modification in 1992. The ALJ held that the motion for modification was timely under §22, relying on the medical reports filed in 1991, within one year of the last payment per the 1990 order. On appeal, the 4th Circuit reversed, finding the modification petition untimely. Within one month of the court's decision claimant filed a letter with the OWCP which requested modification of the decision of the Court of Appeals pursuant to §22. Claimant contended he had received payment under the state compensation act, and employer had made payments after a Virginia Supreme Court decision on 6/6/97. The ALJ analyzed timeliness of the motion under §13 as if it were a new claim based on the 1986 injury and held that the state award did not toll the statute of limitations, so the claim was not timely filed.

HELD, the ALJ should not have evaluated timeliness of the 1999 motion for modification under §13. Per §22 the request for modification must occur within one year of the last payment of compensation or rejection of a claim. The 4th Circuit's decision constitutes a rejection of a claim, so the 1999 motion raised a question of whether there was a mistake in the determination that his prior motion was untimely filed. The motion was well within the one year time limit.

On the merits, the 1992 motion filed *prior to* payments made by an employer cannot be filed within one year after the last payment. Claimant challenged no underlying facts but instead raised a legal theory not raised previously. §22 cannot be used to raise issues involving only a new legal interpretation or to correct errors of law. Claimant did not establish a change in condition or mistake in determination of fact. The Board affirmed the ALJ's denial of modification, albeit on other grounds.

Notice

Untimely notice of hearing loss claim. *Yeager v. Fisherman's Boat, Inc.*, 1999-LHC-2881, OWCP 14-128246 (ALJ DiNardi, filed 3/6/01)(Michael Pozzi for claimant, Ray Warns, Russell Metz, and Robert Madden for employer/carriers).

Claimant retired in 4/93. On 11/17/97 a physician administered an audiogram which showed 34.4% hearing loss. Claimant received the audiogram and learned that he had a work related hearing loss. Claimant did not submit claims to the OWCP until 10/98 (re Fishermen's Boat, Lockheed, Unimar, Marine Industries NW, and Todd Pacific). An ALJ later joined Foss and Harbor Transport in response to a motion from Fishermen's Boat. The employment at Foss was his last maritime employment but claimant had no memory of his work activities there.

The ALJ held that claimant had a work related hearing loss, but was not entitled to compensation due to failure to give notice timely. The time for filing notice (30 days) began to run on 11/17/97. The ALJ found employers were prejudiced by the failure to give timely notice because they were prevented from immediately following up on the claim by contacting co-workers and supervisors to determine when and where he was exposed to loud noises and what work he did. Also, claimant was vague regarding what he did and where he worked.

Permanent Disability – *De Minimis Award*

***De minimis* award allowed.** *Barbera v. Director, OWCP*, 35 BRBS 27 (3d Cir. 2001).

Employer challenged coverage and right to compensation. After a three day hearing the ALJ awarded several months of TTD and medical benefits but declined to award a *de minimis* PPD award in spite of a finding that claimant had a serious back condition that was likely to deteriorate and might cause loss of wage earning capacity in the future. The Board affirmed. The court held that the ALJ's original determination that claimant had a serious back condition that was likely to deteriorate and could cause a loss of wage earning capacity was supported by substantial evidence and justified a nominal award retroactive to 9/1/91 when claimant stopped receiving his regular salary from employer. The Court did not define "nominal" award.

Permanent Disability – Employer's Burden

Relevant labor market was in new residential area. *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (BRB 2001).

Claimant injured his right ankle in 1991 when working near Beaumont, Texas. In 1996 he moved to Hemphill, Texas because he had recently obtained custody of his sons and had determined that Hemphill, Texas was a cheaper and better environment in which to raise them. The ALJ held that employer had not established availability of suitable alternate employment in Hemphill and awarded PTD. Employer argued that the relevant community was Beaumont.

HELD, the 4th Circuit rejected employer's contention that the relevant labor market is always the location where the claimant was injured. *See v .WMATA*, 28 BRBS 96 (4th Cir. 1994). Where claimant relocates the ALJ should consider his motivation for relocating, the legitimacy of that motivation, the duration of the stay in the new community, ties to the community, and the degree of undue prejudice to employer in providing alternate employment in a new location. The Board followed *See* in *Wilson v. Crowley Maritime*, 30 BRBS 199 (BRB 1996), and the 1st Circuit followed *See* in *Wood v. USDOL*, 31 BRBS 43 (1st Cir. 1997). The ALJ properly applied the relevant factors and determined the relevant labor market was in Hemphill. (Even if the labor market had been in Beaumont employer failed to establish suitable and available employment in that area.)

Permanent Disability – Scheduled PPD

CTS award for upper extremity, not hand. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (BRB 2001).

After bilateral carpal tunnel releases, the ALJ awarded 28% PPD for each upper extremity. Employer argued that claimant should receive an award for the hands, but the Board held that it was well established that an injury to the wrist may be compensated as a permanent partial disability to the arm if there is evidence in the record which supports a finding of impairment to the arms. The AMA *Guides, 4th edition*, though not mandatory, states that the wrist functional unit represents 60% of the upper extremity function. Evidence was deemed sufficient to support the ALJ's award.

Responsibility – Hearing Loss Claims

Last employer before audiogram responsible. *Benjamin v. Container Stevedoring Co.*, 34 BRBS 189 (BRB 2001).

Claimant filed a hearing loss claim with Container Stevedoring and SSA based on the following sequence of events:

01/09/91	Audiogram – results unknown.
02/04/91	Audiogram – 28.5% binaural impairment. Claimant files a claim with his last employer, Container Stevedoring.
04/03/91	Claimant retires. SSA was employer prior to retirement.
01/12/94	Audiogram – 18.8% binaural impairment.
09/25/96	Audiogram – 34.0% binaural impairment. Claimant files another claim with SSA.

Container Stevedoring and SSA conceded that they had exposed claimant to injurious noise. The Director contended Container Stevedoring was responsible for 28.5%, and SSA was responsible for 34%, subject to a credit for compensation payable by Container Stevedoring. The ALJ found the 9/25/96 audiogram was the best measure of claimant's hearing loss, found SSA responsible, but per §8(f) ordered the Special Fund to pay 28.5% and SSA to pay 5.5%.

The Board held that there was a single injury, and claimant was entitled to be compensated for his entire disability resulting from the combination of his exposure to noise while working for Container Stevedoring and SSA. SSA, as the last employer before the determinative audiogram, was responsible but was entitled to relief per §8(f), as awarded by the ALJ.

Responsibility – LIE Rule

Last maritime employer rule rational and not unconstitutional. *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 35 BRBS 12 (4th Cir. 2001).

The ALJ and the Board found employer responsible for asbestos related disability and death because it was the last maritime employer to expose the worker to injurious doses of asbestos, notwithstanding subsequent non-maritime employment exposure to asbestos. The 4th Circuit agreed with the 9th Circuit's 1983 decision in *Todd Shipyards v. Black* and held that the last maritime employer rule was a reasonable administrative measure that was consistent with the purposes of the LHWCA and was not unconstitutional.

Situs – Adjoining Area

Situs because "in vicinity" of navigable waters. *Stratton v. Weedon Engineering Company*, 35 BRBS 1 (BRB 2001).

On 1/4/91 claimant injured his back again while using chemicals to clean and rust proof pipes at employer's clean shed next to its shop facility. This facility was two miles by streets from the Jacksonville Port area. It was 50 feet from a now-unused but still navigable canal and 1.5 miles by canoe along the canal to the port area. The surrounding area housed a mixture of maritime and non-maritime businesses and residences. After appeals and remand, the ALJ initially held that claimant was injured on a covered situs.

HELD, decisions of the 5th Circuit issued prior to close of business on 9/30/81 are binding precedent in the 11th Circuit unless specifically overruled by the 11th Circuit. This case is governed by *Texports Stevedore Co. v. Winchester*, 6 BRBS 265*, aff'd on reh'g en banc*, 12 BRBS 719 (5th Cir. 1980), *cert. den.*, 452 US 905 (1981). An adjoining area must have a maritime use but need not be used exclusively or primarily for maritime purposes. The 5th Circuit took a broad view of adjoining area and was not restricted by fence lines or other boundaries. An area can be adjoining if it is close to or in the vicinity of navigable waters or in a neighboring area. The perimeter of an area is to be defined by function. It must be customarily used by an employer in loading, unloading, repairing or building a vessel. Determination requires an examination of the pin point area and the surrounding area and the character of the surrounding properties but is one factor to be considered.

The clean shed here had a maritime function and met the liberal geographical criterion developed by the 5th Circuit as it was 300-400 feet from the navigable St. John's River. The facility is near the river and adjacent to a canal which leads to its navigable waters. It is "within the vicinity" of the St. John's River. The situs test was satisfied.

Third Party – Notice/Consent

Settlement without approval of insurer excused when claimant unaware of carrier's participation. *Meaux v. Franks Casing Crew & Rental Tools, Inc.*, 35 BRBS 17 (BRB 2001).

Following a compensable injury employer's carrier became insolvent, and the policy was canceled. Employer's claims processor notified claimant to direct further correspondence to the appointed receiver. Claimant pursued a third party claim and on 4/7/87 secured employer's approval to a third party settlement. In the meantime employer asked the Louisiana Insurance Guaranty Association (LIGA) to take over its Longshore claims. When LIGA refused, employer filed suit. Claimant was unaware of these proceedings. LIGA eventually reversed its position but then contended claimant was not entitled to compensation due to failure to secure LIGA's approval of the third party settlement.

The ALJ held that claimant had no knowledge that any carrier was potentially liable for his claim. Once employer's carrier became insolvent, employer was directly liable for payment of benefits. Under these circumstances employer's consent to the settlement satisfied §33(g) as it in essence became the employer and carrier. LIGA entered the case via state law and only after substantial litigation. It is unreasonable to suggest that claimant's failure to obtain LIGA's approval bars his claim.

Vocational Rehabilitation

TTD due during participation in VR program. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (BRB 2001).

Claimant developed CTS and was unable to return to usual and customary employment. From 11/3/97 to 8/15/98 and from 11/1/98 to 12/7/98 he enrolled in a VR program paid for by employer per the California Workers' Comp Act. Upon completion he secured employment as a printing press operator. From 8/16/98 to 10/31/98 claimant worked as an Instructional Aid. He reached maximum medical improvement on 12/8/98. The ALJ awarded TTD during the VR program and TPD during the period claimant was employed.

Employer agued that the claim was not subject to *Abbott* (29 BRBS 22 (5th Cir. 1994)) because claimant was enrolled in a state sponsored training program and claimant had a scheduled injury. The Board rejected these arguments, noting that claimant participated in the program with the knowledge and support of the employer and with the approval of the DOL, and the program

satisfied the LHWCA's policy of promoting rehabilitation of injured workers. Also, even though claimant had a scheduled injury his interests were furthered since he obtained additional skills which enhanced his ability to resume his place to the greatest extent possible as a productive member of the labor market, and employer avoided the possibility of a PTD award.

§8(f) – Absolute Defense

Post hearing petition for §8(f) relief untimely. Director did not raise untimeliness defense.
Ceres Marine Terminal v. Hinton, 35 BRBS 7 (5th Cir. 2001).

ALJ awarded claimant PTD. Employer filed motion for reconsideration and was permitted to submit additional vocational evidence. Employer also filed a petition for §8(f) relief. After considering the additional evidence the ALJ affirmed the PTD award and denied §8(f) relief because the petition was not filed timely.

Employer contended that because the Director did not raise the affirmative defense of untimeliness, it waived that defense. The Court held that employer was obligated to submit the application at or before the initial hearing unless special circumstances excused its delay. Because employer did not contend that circumstances excused it from presenting its claim prior to or at the hearing, the ALJ did not err in rejecting as untimely employer's §8(f) claim presented on motion for modification.

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