



NWLAA Caselaw Review
Norman Cole, editor

Attorney Fees – Amount

Attorney fees reduced due to limited success. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (BRB 2000) (Charles Robinowitz for claimant; Ronald Atwood for employer/carrier).

Claimant sought TTD, PTD, and a higher average weekly wage. He prevailed on the average weekly wage issue but was awarded TPD instead of TTD for somewhat more than two months and was awarded 10% scheduled PPD rather than PTD. The ALJ reduced the fee by 5 hours and reduced the requested rate from \$200 to \$190 per hour. The OWCP awarded two-thirds of the requested fee. The Board affirmed because the ALJ and the district director had rationally accounted for claimant's limited success.

Attorney Fees – Mitigation/Tender

Fees not limited when defendant did not timely accept OWCP recommendation. *Staffex Staffing v. Director, OWCP*, 34 BRBS 105 (5th Cir. 2000).

Employer paid compensation based on a \$490.24 average weekly wage. After an informal conference the OWCP examiner recommended PTD based on this average weekly wage. Employer did not timely accept the recommendation but shortly before hearing agreed to PTD but based on an average weekly wage of \$108.02. Claimant used services of an attorney and secured a larger award at hearing. Claimant's attorney therefore was entitled to a fee per §28(b).

Death – Amount of Award

Overpayment to one child credited against benefits due a second child. *Valdez v. Crosby & Overton*, 334 BRBS 185 (BRB 2000) (affirming prior decision at 34 BRBS 69 (BRB 2000)).

Decedent was survived by a spouse and two children, Brad and Josh. Employer paid excess compensation on behalf of Brad. Because §9(b) provides for payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children, the Board noted that employer may be entitled to a credit for the overpayment against the additional compensation owed to Josh. The OWCP was instructed to determine the specific amount owed or credited.

Death – Qualified Beneficiary

State law controls definition of widow. *Angelle v. Steen Production Services, Inc.*, 34 BRBS 157 (BRB 2000).

Decedent shared a room with claimant in claimant's mother's home in Louisiana, but decedent was killed before they were married. The ALJ held that claimant was not a widow under Louisiana law and was not a dependent either. Coverage depended on whether claimant was decedent's wife at time of death without the benefit of a marriage ceremony. In *Trainer v. Ryan-Walsh Stevedoring Co.*, 10 BRBS 852 (5th Cir. 1979), the 5th Circuit held that state law controlled whether a claimant is the wife of an employee. The Board followed this decision in other cases. Here, the ALJ correctly concluded that claimant was not decedent's wife at time of death per Louisiana law, but the case was remanded for reconsideration of whether claimant was a dependent.

Discrimination

Discrimination when employer routinely denied leave of absence to workers with controverted compensation claims. *Strickland v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 604 (ALJ 2000).

Employer denied claimant's request for a leave of absence because it had a policy to always deny such leaves when the employee's workers' compensation claim was controverted. In the absence of a workers' compensation dispute, employer would have allowed the supervisor of personnel to grant or deny the request according to the merits of the individual case.

The ALJ held that employer treated claimant (and workers' compensation claimants) differently, and this constituted a discriminatory act. The ALJ awarded TTD for various periods and ordered employer to pay a \$1,000 penalty to the Special Fund for violation of §49.

Interest

Overpayment of PTD cannot offset interest. *Mace v. SSA*, 34 BRBS 639 (ALJ Torkington, 2000) (Charles Robinowitz for claimant; Dennis VavRosky for employer).

Employer contended its overpayment of compensation eliminated any duty to pay additional penalties and interest. The ALJ disagreed. Interest becomes due after the employer receives notice of the injury. Interest is not compensation and thus cannot be offset against overpayments of compensation. The ALJ therefore ordered employer to pay interest on past due compensation, plus a 20% penalty, plus interest on the unpaid interest.

Modification – Change in Condition

Threshold evidence of change of condition. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (BRB 2000).

To obtain modification employer must demonstrate a change in physical or economic condition from the time of the initial award to the time modification is sought. Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence that there has been a change in claimant's condition. This is limited to consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of §22. Once petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding.

Employer may not attempt to establish alternate employment for the first time in a modification proceeding merely because it now possesses evidence it chose not to offer in the initial proceeding. When employer presents no evidence of suitable alternate employment at the initial proceeding and on modification no evidence of extenuating circumstances that prevented it from doing so, or a change in the claimant's economic position, employer is not entitled to modification based on evidence of the current availability of jobs. If employer presented evidence of suitable alternate employment at the initial hearing which was rejected by the ALJ, employer is not necessarily precluded from presenting in a modification proceeding evidence of a change in economic conditions.

The Board held that employer produced sufficient evidence to bring the claim within the scope of §22 and remanded the claim to the ALJ for further consideration.

Modification – Other

ALJ can order continuing temporary disability after hearing, subject to change per modification petition. *Admiralty Coatings Corp. v. Emery*, 34 BRBS 91 (4th Cir. 2000).

Employer challenged an ALJ O&O, affirmed by the Board, which awarded temporary disability beyond the date of the 5/29/96 hearing. The court affirmed, stating that if employer thought claimant had regained his pre-injury earning capacity or had otherwise reached maximum medical improvement, it could move under §22 for modification of the initial award. Employer argued that this relief would be inadequate because the statute forbids recouping overpayments between the date of MMI and the date of the modification decision. In a footnote, the court said that §22 permits a carrier to deduct past overpayments from benefits due after the modification date. The court also found no denial in due process.

Permanent Disability – Employer's Burden

One suitable job plus others generally available sufficient to justify PPD award. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (BRB 2000) (Charles Robinowitz for claimant; Ronald Atwood for employer/carrier).

Claimant injured his knee on 10/4/96, reached maximum medical improvement on 6/2/97, and returned to alternative work on 5/4/98. Employer identified one specific assembler position that was suitable and available as of 3/25/97 and other positions that were generally available. The ALJ held that claimant did not diligently seek alternate employment and awarded TPD from 3/25/97 to 6/2/97 and 10% scheduled PPD thereafter.

The Board held the evidence was sufficient to establish suitable alternate employment. Employer described one specific job opportunity but vocational experts testified that there were similar assembler jobs available in the community during the relevant time period, thus establishing the availability of multiple positions like the one specifically described.

Permanent Disability – Other

Knee injury caused back injury but claimant limited to scheduled award. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (BRB 2000).

Claimant sustained work related injuries to left foot, left hip, and right knee. He sought compensation for these injuries and for low back which developed as a result of the right knee injury.

This decision primarily concerns modification, but employer also contended that claimant was limited to a scheduled PPD award per *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 14 BRBS 363 (S.Ct. 1980). The Board agreed. Because claimant had a permanent partial disability due to an injury to a scheduled member he was limited to that recovery and could not receive an unscheduled award for loss of earning capacity.

Permanent Disability – PTD

No credit when employed in unsuitable employment. *Smothers v. Bunge Corporation*, 34 BRBS 618 (ALJ 2000).

Claimant returned to work for employer at a job that was in excess of his restrictions and earned \$31,559.84. The ALJ held that this was not suitable alternative employment. The ALJ awarded claimant PTD and held employer was not entitled to a credit for the wages claimant received.

Status – Integral Employment

Cleaner in machine shop. Status depends on whether integral employment. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 153 (BRB 2000).

Claimant cleaned up shavings, debris, and waste material left behind by machinists engaged in ship construction work. The ALJ held that claimant lacked status because a worker engaged in general cleaning duties is not covered. The Board reversed and remanded for further consideration because a worker engaged in general cleaning could be covered if these duties are an integral part of an essential to the overall ship construction process. The determinative consideration is whether the ship loading/unloading process could continue without claimant's function. The Board also quoted a First Circuit case which held that it was not necessary that shipbuilding come to an immediate halt without claimant if the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs.

Status – Load/Unload/Repair/Break

Dredge worker had status: unloaded dredge materials. *Loyd v. Ram Industries, Inc.*, 34 BRBS 610 (ALJ 2000).

Employer operated a dredge on Bayou LaBatre to deepen the navigable channel. Dredged material was pumped through a pipeline with assistance of additional pressure provided by a booster and then eventually deposited into a dump pit. Claimant monitored the function of the booster and checked the pipeline for leaks. He occasionally operated a bulldozer to move the dredged material out of the way of the pipeline. He occasionally went on board the dredge to obtain diesel fuel. He was injured when checking the booster.

Claimant had status because his duties were essential to the unloading of the dredged material. He was to ensure that material traveled through the pipeline and he occasionally operated a bulldozer to move material away from the pipeline to make sure it remained unclogged.

Status – Other

Carpenter working on platform attached to pilings working on navigable waters and therefore had status. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

Claimant worked as a form carpenter on the Chesapeake Bay Bridge Tunnel. He performed most of his work on a platform which was placed over pilings and moved to another set of pilings

after the work was completed. He injured his knee when working on one of these platforms as it was being secured in place.

Employer argued that claimant's work involved building a bridge to aid land travel, not navigation. The ALJ found that claimant was not on a fixed platform and was injured over navigable waters. Per *Perini*, claimant had situs and therefore met the status requirement. The Board affirmed. It is not claimant's designation as a bridge worker or his work on a bridge itself that conveys coverage. It is his employment upon actual navigable waters at the time of injury which determines the applicability of the Act.

Temporary Disability – Other

Labor market survey justified payment of TPD. No absolute entitlement to TTD before maximum medical improvement. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (BRB 2000) (Charles Robinowitz for claimant; Ronald Atwood for employer/carrier).

Claimant injured his knee on 10/4/96, reached maximum medical improvement on 6/2/97, and returned to alternative work on 5/4/98. Employer identified one specific assembler position that was suitable and available as of 3/25/97 and other positions that were generally available. The ALJ held that claimant did not diligently seek alternate employment and awarded TPD from 3/25/97 to 6/2/97 and 10% scheduled PPD thereafter.

The Court rejected claimant's contention that he was not required to seek work prior to his condition reaching maximum medical improvement. If an employer is not willing to hire someone whose condition is not yet stabilized, this fact will become apparent upon a diligent job search. Claimant is not entitled to TTD merely by alleging he did not seek work because he was unsure if he would be hired or because he preferred another type of work to that identified by employer.

Third Party – Notice/Consent

“Person” in §33 does not include the federal government or its entities. *Milam v. Mason Technologies*, 34 BRBS 168 (BRB 2000).

Claimant filed a third party action against the United States under the Federal Tort Claims Act and entered into a settlement for \$50,000 without prior written approval of the employer/carrier. The ALJ terminated claimant's disability and medical benefits per §33.

HELD, §33 does not apply because the United States is not a third “person” within the meaning of the Act. §2(1) defines person as an individual, partnership, corporation, or association. The plain meaning of the statute is clear and does not include the federal government. Consequently, claimant did not forfeit entitlement to compensation.

§8(f) – Absolute Defense

Employer raised new reason to allow §8(f) relief. ALJ should determine if defendant could reasonably have anticipated this argument when originally seeking §8(f) relief. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 100 (4th Cir. 2000).

Employer filed a timely §8(f) application based on a preexisting hearing loss and left foot injury. The district director denied the application. After a formal hearing employer supplemented its application with a report documenting a preexisting back condition. The ALJ permitted the amendment and allowed relief based solely on the preexisting back condition. The Board affirmed.

HELD, when employer amended its application to include the new ground, the ALJ was obligated to credit the Director's absolute defense unless employer could not have reasonably anticipated the liability of the fund on the late asserted ground at the time employer filed its application before the district director. The Court remanded the claim so that the ALJ could make findings on this issue.

§8(f) – Greater Disability

Preexisting impairment must contribute to compensable impairment to justify §8(f). (Retired worker?). *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (BRB 2000).

Claimant had 25% impairment due to asbestosis and was awarded 25% PPD [presumably as a retired worker whose disability equals impairment]. Employer sought §8(f) relief based on preexisting leg amputations. The Board held that only those preexisting disabilities which played a part in claimant's compensable disability can properly serve as the basis for §8(f) relief. Because claimant's leg amputations could not have, as a matter of law, contributed to his respiratory disability, employer was not entitled to §8(f) relief.

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