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NWLAA Case Law Review
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Attorney Fees – Entitlement

Employer responsible for fees after formal notice and for thirty days. *Weaver v. Director, OWCP*, 36 BRBS 12 (5th Cir. 2002).

04/92: Claimant files for hearing loss. 02/11/92: Employer controverts claim. 02/12/92: Employer receives notice of claim from OWCP. 09/92: Employer initiates voluntary payments and tenders settlements. ALJ later awarded less than the amount tendered. The BRB held that claimant's attorney was entitled to fees for services before employer began voluntary payment in 9/92. On remand, the District Director ordered claimant to pay for fees on work done before 3/12/92 (30 days after receipt of formal notice by Ingalls). Employer was ordered to pay the remaining amount for work done after 3/12.

Receipt of notice by employer is a prerequisite to recovery of fees. Any fees before receipt of notice cannot be charged against the employer, based on 5th Circuit precedent. Fees incurred before 2/12/92 cannot be charged against Ingalls.

Regarding fees from 2/12/92 to 3/12/92 (30 days after notice): Fee shifting provision contemplates four triggering events for assessing fees against the employer: (1) formal notice; (2) employer controversion of the claim; (3) successful prosecution by the claimant; (4) use of an attorney to prosecute the claim. The employer's act of declining to pay may be triggered either on the 30th day or at any time before that day by a controversion of the claim.

Fees incurred within the 30 day window may be assessed against the employer. If the employer controverts a claim within the 30 day window, and the other triggers have been satisfied, the fees accrued thereafter may be assessed against the employer even though they are incurred before the 30th day following receipt of notice. The claim was reversed and remanded for recalculation of fee award.

Average Weekly Wage - §10(a)

Claimant worked 75.7% of 260 days. §10(a) calculation proper. *Price v. Stevedoring Services of America*, 36 BRBS 56 (BRB 2002).

The ALJ applied §10(a) to calculate claimant's average weekly wage because he worked 197 days during the 52 weeks before his injury and was a five day per week worker. Per *Matulic v. Director, OWCP*, 32 BRBS 148 (9th Cir. 1998), because claimant worked 75% or more of the workdays in the year preceding the injury (75.7% of 260 days), use of §10(a) was proper. By setting the threshold at 75% of the available days any "overcompensation" that would result is not unfair, per the 9th Circuit.

Average Weekly Wage – Other

Average weekly wage based on date of injury, not date disability was manifest. *Deweert v. SSA*, 35 BRBS 120 (9th Cir. 2001), as amended on denial of rehearing *en banc*, 36 BRBS 1 (9th Cir. 2002) (Charles Robinowitz for claimant; John Dudrey for employer/carrier).

Claimant longshoreman injured his low back on 10/31/93. Employer paid TTD for two periods when he was not working: 11/17/93 to 4/3/94 and 4/29/94 to 7/5/94. After a hearing the ALJ award claimant a *de minimis* award of \$1.00 per week due to a significant possibility that he may in the future experience a loss of wage earning capacity due to the injury.

The ALJ calculated claimant's average weekly wage based on earnings prior to 10/31/93. Claimant argued the time of injury was 11/16/93, the day he became aware of his disability, per *Johnson v. Director, OWCP*, 911 F2d 247 (9th Cir. 1990). The later date would make his average weekly wage \$40.43 higher.

The court refused to adopt claimant's position. In *Johnson* the court observed that in most cases of traumatic injury the time of injury will coincide with the time the worker is disabled. In an exceptional case, an injury could be the time when the disability becomes manifest. Johnson's disability was latent and unknown for years. Here, claimant was aware of the injury the day it occurred and made a doctor's appointment within the next few days. This was not the kind of exceptional case envisioned by the court in *Johnson*.

Causation - §20 Presumption

Presumption applied to find Gulf War Syndrome compensable. *Frans v. General Dynamics Corp.*, 36 BRBS 1 (ALJ 2001); *Keenan v. General Dynamics Corporation*, 36 BRBS 27 (ALJ 2001).

Frans worked in Saudi Arabia as a tank mechanic for General Dynamics during the Gulf War. Keenan maintained mobile mass spectrometers on a nuclear, biological, and chemical detection vehicle in Saudi Arabia, Kuwait, and Iraq during the same conflict. They alleged they were exposed to unknown toxic agents during this employment and developed a variety of symptoms known as Gulf War Syndrome. The ALJ considered conflicting medical evidence on the subject, applied the §20 presumption, and concluded that employer's evidence was not sufficient to overcome the presumption. He therefore awarded compensation to each worker.

Claim – Excuses/Exceptions

Untimely claim when filed more than one year after last payment and medical reports did not constitute a claim. *Deering v. Ingalls Shipbuilding, Inc.*, 36 BRBS 204 (ALJ 2002).

On 12/17/96 claimant felt something pop in his back when at work. He sought treatment, returned to restricted duty several times, and injured his back a second time at work on 1/6/99. Employer voluntarily paid compensation for the 1996 injury until 5/18/98. Claimant briefly returned to work in 2/00 but could not continue after his physician imposed restrictions which employer could not accommodate. He filed a formal claim for the 1996 injury on 3/6/00.

The claim was filed more than one year after the last payment of compensation. An attending physician's report which indicates the possibility of a continuing disability, filed within one year of the termination of voluntary payments, can meet the filing requirements of §13(a). The reports here indicated claimant had a disc herniation but was on limited duty. Claimant was earning full wages, and at the time the modified job was considered suitable. Upon receipt of the medical reports the DOL closed its file. The only issue concerning the 1996 claim concerned the computation of average weekly wage. The Claimant did not meet the timely filing requirements under §13(a).

Credit – Other Claims – PPD/PTD/TD

Credit allowed if PPD plus PTD more than maximum compensation. *Price v. Stevedoring Services of America*, 36 BRBS 56 (BRB 2002).

Claimant injured his back in 1979 and was awarded PPD based on a loss of earning capacity of \$294.02 per week. He subsequently was awarded PTD due to a 7/3/98 injury at SSA/Homeport, based on an average weekly wage of \$1,525.90. The ALJ allowed Homeport a credit to the extent the PPD for the 1979 injury plus the PTD awarded for the 1998 injury exceeded the maximum compensation rate.

The Board held that per *Brady Hamilton Stevedoring Co. v. Director, OWCP*, 29 BRBS 101 (9th Cir. 1995), claimant was entitled to PTD [maximum compensation rate], with annual adjustments, but Homeport was entitled to a credit for PPD due as a consequence of the 1979 injury.

Estoppel/Election of Remedies

Judicial estoppel applied to bar inconsistent positions. *Whitford v. Bush Oceanographics Equipment Co.*, 36 BRBS 157 (ALJ 2002).

Claimant filed a civil complaint seeking recovery under the Jones Act. Employer sought summary judgment, contending that claimant was not a seaman at time of injury because the ship was not “in navigation.” Claimant’s counsel agreed claimant was not a seaman. The court granted the motion for summary judgment, holding that the Jones Act did not apply. Claimant then filed a state claim and a LHWCA claim. Employer contended in the state claim that claimant’s remedy was limited to the LHWCA and contended in the LHWCA claim that claimant was a member of the crew and was excluded from the LHWCA. The ALJ held that employer was judicially estopped from asserting that claimant was a Jones Act seaman because employer took a clearly inconsistent position in a prior proceeding and the prior position was accepted by the court. The ALJ implied that employer would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

The ALJ did not apply collateral estoppel because the controlling legal principles governing the definition of seaman had significantly changed since the initial proceeding.

Exclusions – Jones Act

Tug boat maintenance engineer subject to Jones Act. *Burke v. Great Lakes Towing Co.*, 36 BRBS 255 (ALJ 2002).

Claimant worked as a sailing engineer, port representative, and shore side maintenance man. As a sailing engineer (25% of his time) he monitoring engine room machinery, doing emergency repairs to main engine, and helping desk hand with line handling during a tow. As a port representative (1% of his time) he maintained the condition of the storage trailer and surrounding property, promoting goodwill between the company and the ship captains, supervising and coordinating maintenance and repair programs. As maintenance engineer (75% of his time) he performed maintenance on the two tugs while at dock, including keeping boilers running, cleaning fireboxes and burners, maintaining electrical systems, fixing gauges, general maintenance so that the tugs would be ready to accept a tow at any time.

The ALJ held that claimant was a member of the crew of a vessel. His duties a tug maintenance engineer contributed to the function of the vessels and his job was critical to the tugs’ mission. He had a substantial connection to a vessel in navigation as shown by the nature and duration of his duties as maintenance engineer. He therefore was excluded from coverage under the LHWCA.

Hearings – Dismissal/Withdrawal

Failure to obey discovery orders results in dismissal. *Morriss v. Marine Terminals Corporation*, 36 BRBS 223 (ALJ Karst, 2002).

Claimant, who filed a claim for psychiatric injury, was ordered to sign an authorization to release psychological records. He failed to comply in spite of warnings about possible severe sanctions. The ALJ concluded that claimant had thwarted the discovery process, prejudiced employer by his delay, willfully disobeyed court orders, and persistently and continually failed to prosecute his complaint. Per FRCP 41(b), allowing involuntary dismissal for contumacious conduct, the ALJ dismissed the claim with prejudice.

Interest

Interest awarded as of earliest date physician rated impairment. *Barney v. Ingalls Shipbuilding, Inc.*, 36 BRBS 76 (ALJ 2002).

Claimant was awarded 10% PPD for the left upper extremity and 7.5% for the right upper extremity based on a 4/6/01 report from Dr. Wiggins. Employer began payment on 4/12/01. The ALJ held that without this impairment rating there would be no way that employer would have known and thus would have been able to immediately pay the exact amount due to claimant. Employer knew or should have known about claimant's condition in 4/01, so interest was due on unpaid compensation accruing on or after 4/6/01. As payment was begun on 4/12/01 no interest was due.

Medical Services – Other

Medical services for hearing loss allowed, though no ratable loss. *Weikert v. Universal Maritime Service Corporation*, 36 BRBS 38 (BRB 2002).

The parties stipulated, and an ALJ concluded that claimant had a work related hearing loss. Claimant did not have ratable impairment and only sought medical services. Employer challenged an award of medical benefits, contending that claimant had not sustained an injury within the meaning of the Act. The BRB held that nothing in §7 requires a claimant to sustain a ratable impairment before he is entitled to medical benefits. Claimant need only sustain a work related injury.

Miscellaneous

LHWCA does not allow “voluntary order”. *Seguro v. Universal Maritime Service Corporation*, 36 BRBS 28 (BRB 2002).

After a knee injury employer agreed that claimant was PTD but sought relief per §8(f). In a 1987 D&O an ALJ noted the stipulation to PTD, did not incorporate an award of benefits to claimant in the order, and denied §8(f) relief. In 1998 employer filed a petition for modification contending that claimant had been capable of suitable alternate employment since at least 1/1/85.

The Board held there was no provision in the Act or the regulations for a “voluntary order” unless the parties agreement was embodied in a formal order issued by the district director or administrative law judge. Voluntary payments by employer do not equate to a final order. As no final compensation order was ever issued in this case, the claim before the ALJ must be viewed as an initial claim for compensation. [Claimant was PTD until 7/28/95, but on remand the ALJ also should consider claimant's contention that his knee caused impairment of the back.]

Modification – Change in Condition

Modification effective on date of change of condition. *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (BRB 2002).

In 1990, pursuant to a stipulation, claimant was awarded PPD for a loss of earning capacity. Employer was allowed §8(f) relief but subsequently petitioned for modification based on claimant's increased earnings as a walking boss. In an earlier appeal the Board held that an award could be increased or reduced as of the date of injury but could only be terminated as of the date an ALJ's order is filed. On remand the ALJ terminated claimant's award as of 3/23/01, the date his order was filed. The Director appealed, contending that the order modifying the award could be retroactive.

After reconsideration and consideration of *Universal Maritime Services v. Spitalieri*, 34 BRBS 85 (2d Cir. 2000), reversing 33 BRBS 164 (BRB 1999), the Board adopted 2d Circuit's the holding in *Spitalieri* and held that a modifying order terminating compensation based on a change in physical and/or economic condition may be effective from the date of the change in condition. A termination is a decrease within the meaning of §22 in all circumstances. A credit is available for a decrease when benefits are still owing. The Board also held that the award should be terminated as of 12/1/98 and granted the Special Fund a credit for compensation paid after that date if benefits are resumed.

Permanent Disability – *De Minimis* Award

Nominal PPD award denied. *Price v. Stevedoring Services of America*, 36 BRBS 56 (BRB 2002).

Claimant injured his back in 1979 and was awarded PPD based on a loss of earning capacity of \$294.02 per week. He was injured again on 10/2/91 when employed by SSA/Eagle, had surgery, and returned to work until 7/2/98 when his physician recommended he retire due to back pain. When he retired he was working for SSA/Homeport. The ALJ ordered Eagle to pay TTD from 10/3/91 to 11/23/92, denied a nominal award due to the 1991 injury, and ordered Homeport to pay PTD as of 7/3/98 (due to an aggravation of his injury).

The ALJ rejected claimant's testimony that his claimed inability to perform catwalk jobs after the 1991 injury had reduced his earning capacity, noting that jobs for longshoremen had increased, there were fewer longshoremen, and claimant had worked as many hours in 1996 and 1997 as he did in 1990. This finding was supported by substantial evidence. Additionally, the evidence did not support claimant's assertion of a significant possibility of future economic harm. Claimant was not entitled to a nominal award due to the 1991 injury.

Permanent Disability – Scheduled PPD

Ankle sprain rated as foot, not leg. *Clay v. Stevens Shipping & Terminal Co.*, 36 BRBS 91 (ALJ 2002).

Claimant injured his right ankle. The ALJ reviewed prior decisions and concluded that the BRB and the Circuit Courts more often treated an ankle injury as an injury to the foot. Also, per §8(c)(15), amputation of a leg below the knee is considered to be the equivalent to the loss of a foot whereas amputation above the knee represents loss of the leg. By analogy to the ankle, an area below the knee is an injury to the foot rather than the leg.

Permanent Disability – Unscheduled PPD

PPD not based on what job at injury would have paid if no injury. *Sestich v. Long Beach Container Terminal*, ___ BRBS ___ (9th Cir. 5/20/02).

Claimant initially returned to work as a crane operator and in 1992 was awarded \$150.00 per week in PPD. He subsequently became unable to work as a crane operator but found work as a marine clerk. In 1998 his earnings as a clerk were more than double his average weekly wage, and his award was modified (terminated as of 2/23/98). Claimant argued that but for his injury he would have earned \$25,000 more than his current earnings as a clerk. The court held that even if this was true, the statute requires PPD to be calculated by comparing post injury wage earning capacity with the average weekly wage at time of injury. Even when claimant's post injury earnings are adjusted to reflect inflation since the date of injury they were substantially higher than the average weekly wage. The ALJ correctly terminated claimant's benefits.

No adjustment for inflation when actual wage level remained the same. *Johnston v. Director, OWCP*, 36 BRBS 7 (9th Cir. 2002).

Longshoreman returned to work at the same job at the same rate of pay but worked fewer hours due to his injury. He later retired and was awarded PPD based on the difference between his actual post injury earnings and his average weekly wage. Claimant contended his post injury wages should be adjusted for inflation.

HELD, an inflationary adjustment is only necessary when actual wages do not reasonably reflect residual earning capacity or when there is no evidence of the post injury job's wage rate at the time of his injury. Claimant confused earning capacity, as defined by the statute, with spending power. No adjustment was needed here.

Permanent Disability – Vocational Evidence

ALJ concludes light duty does not exist on waterfront. *Jacobson v. Marine Terminals Corp.*, ___ BRBS ___ (ALJ Dorsey, 6/28/02) (Charles Robinowitz for claimant, Del Brenneman for MTC/Majestic, Dennis VavRosky for Columbia Grain/Liberty NW, Wm. Tomlinson for Jones, John Dudrey for SSA/Homeport).

The ALJ cited the collective bargaining agreement between the ILWU and the PMA, which indicated that a longshoreman was required to do heavy physical labor in the holds, on the decks of ships and barges, and on the dock, and the Coast Labor Relations Committee memo which listed essential job qualifications as including a need to climb ladders in excess of 20 feet, the ability to lift every conceivable kind of freight or equipment weighing up to 100#, and the ability to drive, push, or manipulate dock equipment. Based on these documents and testimony from claimant and other longshoremen the ALJ concluded that accommodation of workers with limited capacities was often impossible. Employment through a dock preference board was not available as a matter of right.

Based on claimant's restrictions, including a compensable psychological condition, and the above documents and testimony, the ALJ rejected employer's vocational evidence indicating claimant was capable of returning to work in some longshore jobs. The ALJ was particularly critical of the vocational experts' failure to consider claimant's psychiatric condition when evaluating his suitability for employment.

Responsibility – Other

§8(i) settlement terms determined responsibility for medical services. *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (BRB 2002) (William Hochberg for claimant; Robert Madden for employer).

SSA and Jones agreed to a lump sum payment to claimant per §8(i) for a work related hearing loss. The agreement stipulated that Jones would be liable for future medical expenses and SSA would be dismissed from future liability. Sometime thereafter claimant sought reimbursement from Jones for state-of-the-art digital hearing aids which cost \$4,140.00. Jones contended the upgrade and replacement of hearing aids was based on hearing loss that preexisted its 2/98 claim.

HELD, the plain language of the agreement states that future medical expenses would remain the responsibility of Jones. Jones cannot challenge its liability for hearing aids on the basis that it is not the responsible employer under the Act. Once claimant's injury was found related to work place noise exposure the responsible employer became responsible for the entire loss, not just the injury at Jones.

Settlements

Thirty day deadline to approve settlement tolled when OWCP lacked jurisdiction while case was on appeal. *Jenkins v. Puerto Rico Marine, Inc.*, 36 BRBS 1 (BRB 2002).

While case was pending before 11th Circuit parties agreed to a §8(i) settlement. The District Director received the application on 9/29/00. The 11th Circuit issued an order of dismissal on 10/30/00, but the case was not returned to the OWCP until 1/4/01. The District Director approved the settlement on 1/16/01. Claimant requested a penalty, contending that the settlement should have been deemed approved 30 days after 9/29/00. The Board agreed that the 30 day period did not begin until 1/4/01, when the District Director received the remanded case. Furthermore, until then, the application was not complete as claimant's attorney's statement of time and expense was in the record that had been forwarded to the 11th Circuit. Therefore, as a matter of law, the 30 day period was tolled until the application was complete.

Unsigned settlement not enforceable. *O'Neil v. Bunge Corp.*, 36 BRBS 25 (BRB 2002), affirming 35 BRBS 317 (ALJ 2001) (Greg Bunnell for claimant, Wm. Tomlinson for employer).

The parties agreed to a §8(i) settlement of disability and medical services for \$63,000 plus \$1,500 fees. Claimant died before he signed the agreement. The agreement did not include a term that stated it would be null and void if claimant died prior to approval.

HELD, the agreement is not enforceable under §8(i) or administrative rules as it was not signed by claimant or submitted for administrative approval prior to his death.

Situs – Navigable Waters

Tunnel in bedrock 400 feet under the ocean not a covered situs. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (BRB 2002).

Claimant was injured while working in a sewage discharge or outfall tunnel under construction 400 feet below the ocean floor in bedrock. The Board held that although the Atlantic Ocean is

navigable, the location of claimant's injury was more like an injury on a permanently affixed oil drilling platform than an injury on navigable waters. The bedrock where claimant was injured was at all times dry ground, and the tunnel was not used as a waterway. The injury was not on a covered situs.

Status – Integral Employment

Machine shop cleaner had status. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (BRB 2002).

Claimant cleaned up shavings, debris, and waste material left behind by machinists engaged in ship construction work while the machines were in operation. The ALJ initially held that claimant lacked status because one engaged in general cleaning duties was not covered. The Board reversed and remanded for further consideration because one engaged in general cleaning could be covered if these duties were integral part of an essential to the overall ship construction process. 34 BRBS 153 (BRB 2000).

On remand the ALJ again denied coverage because even though one could argue that an unlimited accumulation of trash will eventually bring most businesses to a halt, there was no testimony from claimant or a co-worker regarding the nature and function of the shop she cleaned, the amount of trash that accumulated, and the impact on the shop's function from the failure to clean it up or remove it. The Board reversed because the ALJ erred in not drawing the rational inference that claimant's failure to perform her job inevitably would impede the shipbuilding and repair process despite his recognition that such an inference was possible. The conclusion that claimant's ongoing clean up efforts were integral to the shipbuilding and repair process was compelled by the facts in this case the court's decision in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 23 BRBS 96 (S.Ct. 1989) (employees performing janitorial services cleaned spilled coal from loading equipment to prevent equipment malfunctions and were covered because their work was essential to the loading or unloading process).

Status – Load/Unload/Repair/Break

Truck driver transporting cargo to/from port holding/storage yard did not have status. *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (BRB 2002).

Claimant transported containers and/or trailers between the Crowley Maritime Yard at the Port in Port Everglades and the US Customs facility located within the Port but not within the Crowley Yard and/or the East Coast Railroad yard located outside of the Port. 5-10% of the time he transported containers to areas away from the Port. He occasionally made deliveries and/or pickups alongside dock but never went on ships as containers at dockside were loaded onto and unloaded from ships by "mule drivers." Claimant's duties began only after the containers/trailers had been made road worthy and released for delivery.

The BRB concluded the case turned on determining the point at which cargo moves from the stream of maritime commerce and longshoring operations to the land based portion of its ultimate destination. The containers, once placed in the storage yard, were ready to leave maritime commerce and transfer to land transportation. Claimant was not involved in an intermediate step in moving cargo between ship and land transportation. His job involved the landward transportation of cargo. He performed the first step in the overland delivery of goods unloaded from ships and the last step in the transportation of goods to be loaded. He was involved in the land based stream of commerce and not involved in maritime activities and therefore lacked status under the LHWCA.

Third Party – Notice/Consent

Failure to obtain consent to settlement results in forfeiture of disability and medical benefits.
Esposito v. Sea-Land Services, Inc., 36 BRS 10 (BRB 2002).

Claimant initiated a third party suit against multiple parties, including the employer. Employer was dismissed, but employer's attorney continued to participate for purposes of discovery only. Prior to trial, and after employer had paid nearly \$138,000 in disability and medical services, claimant agreed to a settlement with one of the remaining defendants for \$60,000. Neither claimant or his attorney asked employer to approve the settlement, apparently because they did not know that approval was necessary. Employer terminated benefits. (Claimant's counsel received the \$60,000 check but did not cash it.)

Employer's limited participation in this case did not constitute approval of the settlement.

The Board rejected claimant's argument that by giving employer notice he satisfied §33(g)(2) and only forfeited disability, but not medical benefits. If claimant either fails to comply with the written approval requirement of §33(g)(1) or fails to give notice to employer where written approval is not required (a settlement exceeding compensation entitlement or a judgment), then the forfeiture provision of §33(g)(2) applies and explicitly includes medical benefits. The Board thought this conclusion was consistent with the Supreme Court's decision in *Cowart* and with 20 CFR §702.281.

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