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NWLAA Case Law Review
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Attorney Fees – Entitlement

Claimant must pay attorney fees when Director initiated litigation and employer did not participate or withhold compensation. *Terrell v. WMATA*, 36 BRBS 69 (BRB 2002), on reconsideration, 36 BRBS 133 (BRB 2002).

Claimant was awarded compensation, and employer was awarded §8(f) relief. Thereafter, claimant petitioned for modification. Employer and the Director opposed the petition, but claimant moved to have employer dismissed from the case. The ALJ agreed, and in a subsequent order awarded claimant PTD and ordered the Director to pay an attorney fee. The Director appealed the dismissal of employer as a party. Claimant filed a brief urging affirmance. Employer did not file a brief. The Board held employer was a necessary party, remanded the case to the ALJ for a new hearing, and held that the fee could not be assessed against the Director.

The Board also held that employer was not liable for fees for work before the Board. Employer was excluded from the initial proceedings and did not participate. Employer was not an active litigant and did not participate in the appeal or suspend compensation or contest the compensability of the claim. The Board ordered claimant to pay a fee for services before the Board as a lien on compensation. On reconsideration, the Board noted that counsel's work was necessary, in that he advocated a position that protected his client's interests, and claimant retained his PTD award. The Board allowed a fee of \$4,148.00 plus costs payable out of claimant's award.

Fees awarded when insurer paid providers instead of reimbursing family for funeral expenses. *Melgoza v. SSA*, 36 BRBS 740 (ALJ 2002).

Melgoza was killed in work related accident. After a 9/20/99 informal conference the claims examiner suggested that survivors send employer's insurer any unpaid or unreimbursed funeral expense receipts. On 11/17/99 survivors' attorney sent employer's attorney a copy of receipts for funeral expenses. Instead of reimbursing the widow for these expenses the carrier paid the providers directly. The widow was not reimbursed until 10/17/00, shortly before trial.

The insurer neither controverted the widow's right to funeral expenses or paid them within 14 days. Survivors' counsel is entitled to be compensated for the time reasonably expended to recover those expenses.

Because Survivors' counsel did not prevail on all issues the ALJ awarded 15% of the amount requested in the fee petition.

Credit – Other Claims

No credit for §8(i) settlements paid by other possibly responsible employers. *New Orleans Stevedores v. Ibos*, 36 BRBS 93 (5th Cir 2003).

Decedent's last three employers as stevedore were Valor, Anchor, and NOS. He quit working due to mesothelioma, filed a claim, and died due to the disease. His surviving spouse (claimant) filed a claim for compensation due to death. Claimant negotiated §8(i) settlements with Valor and Anchor and went to hearing against NOS only. The ALJ found NOS responsible but awarded NOS a credit for net settlement proceeds paid by Valor and Anchor.

HELD, the Nash (*Strachan Shipping Co. v. Nash*) credit doctrine allows credit for the amount of a prior scheduled award against a later scheduled award based on a later injury to the same scheduled member. Here, however, the settlements were alternative to an entire award against either one of the settling employers. The Nash credit doctrine does not apply in this context, alternative liability for a single occupational injury, because the aggravation rule also does not apply. Furthermore, §3(e) permits a credit for any past recovery for the same injury, disability, or death under "any other workers' compensation law" or under the Jones Act. §3(e) does not permit a credit under the LHWCA itself.

DISSENT by Judge Jones argues that Nash is a judicially created rule, so one cannot defend the majority's decision by reference to §3(e). The majority's decision allows double recovery.

Estoppel

Judicial estoppel precludes LHWCA claim when prior Jones Act suit. *Newman v. Consolidated Coal Company*, 36 BRBS 926 (ALJ 2002).

Claimant was employed on a towboat when he was injured attempting to secure a barge. Employer initially paid compensation voluntarily under the LHWCA. Claimant filed a Jones Act suit for negligence and unseaworthiness in state and federal court and alleged he was a member of the crew. Employer initially contested status as a seaman but then stipulated that he was a seaman. At trial claimant offered evidence he was a deckhand on employer's vessel. The jury returned a verdict for over \$1.3 million but the federal judge effectively nullified the jury verdict, and the 3d Circuit affirmed. Employer terminated its voluntary payment of benefits, and claimant submitted a claim for benefits under the LHWCA.

The ALJ held that the claim under the LHWCA was precluded by the doctrine of judicial estoppel. Even though claimant was not able to prove that employer was negligent he was able to invoke the court's jurisdiction under the Jones Act by representing himself as a seaman. Having benefited by taking that position in court, he is precluded by judicial estoppel from now asserting that he is not a seaman.

Exclusions – Other

Excluded employee of recreational operation. *Boomtown Belle Casino v. Bazor*, 36 BRBS 79 (5th Cir. 2002).

Claimant was hired as the chief engineer of the "Boomtown facility," the land based operations of a casino. The casino was on a boat floating in the Harvey Canal, but a new casino boat was under construction at Avondale shipyard, and a "main" building was under construction at the Boomtown facility. Until the main building was completed patrons waited in a temporary tent. Claimant supervised the operation, and his duties included making sure the gangplank was not too steep and reviewing wiring of slot machines, data processing equipment, and security

systems in the vessel that was under construction at Avondale. He suffered a stroke and later died when in the temporary tent and sought compensation under the LHWCA. The ALJ and BRB held that he satisfied status and situs requirements.

HELD, §2(3)(B) excludes individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. Application of this statute turns on the nature of the employing entity and not on the nature of the duties an employee performs. The court rejected *Huff v. Mike Fink Restaurant*, 33 BRBS 179 (BRB 1999), which held that the inquiry centered on the claimant's assignable duties at the time of injury rather than the corporate purpose or structure of the employer. Because the casino was a recreational operation claimant was not covered by the LHWCA.

Hearings – Other

Default orders not allowed under LHWCA. *McCracken v. Spearin, Preston and Burrows, Inc.*, 36 BRBS 136 (BRB 2002).

Employer's insurer became insolvent, and the insurer's attorney attempted to obtain a 90 day stay of the hearing but was allowed to withdraw on the date of hearing. Three days before the hearing employer requested a continuance to allow time to obtain a new attorney but the ALJ did not receive this until the morning of the hearing. Nobody appeared on behalf of the employer or the insolvent carrier. The ALJ did not receive any evidence but instead granted claimant default judgment against employer, ordering it to pay claimant PTD, medical benefits, and an attorney fee.

On appeal, the Board held that there was no procedure for a default judgment in the LHWCA or in applicable rules. Even if a rule applied, employer demonstrated good cause for not appearing at the hearing. Also, the ALJ's decision was not based on substantial evidence because no evidence was received. The case was remanded to allow both parties to submit evidence on the merits.

Miscellaneous

District court lacks jurisdiction to provide injunctive relief to LHWCA claimant. *Olsen v. Herman*, 36 BRBS 67 (N.D. California, 2001).

Plaintiffs brought civil actions against over 50 federal defendants relating to handling of plaintiff's LHWCA claims, alleging that they had failed to provide the worker with legal assistance, failed to supervise medical management, failed to accommodate his disability, and had conspired to deprive him of benefits. The district judge held that it lacked jurisdiction to provide any relief because of the legislative history, purpose, and comprehensive remedial design of the LHWCA. That act provided plaintiff with sufficient due process and outlined the method of hearings and appeals to address disputes. Also, the Administrative Law Judges and the District Director, who were named as defendants, had absolute immunity from suit because they acted in their quasi-judicial capacity, and plaintiffs neither pleaded exhaustion under the Federal Tort Claims Act or offered any evidence to that effect.

Modification – Other

Untimely modification claim. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (BRB 2002).

Claimant injured his back on 1/18/90 and on 6/4/90 during employment. He received temporary disability and medical services, but in an order that became final on 11/1/96 an ALJ held that claimant was not entitled to PPD due to his injuries.

In 6/99 claimant quit working as a security guard due to back pain, and in 4/00 he quit working a second job as an evidence clerk. He had additional surgery, and on 6/5/00 he filed a claim for temporary disability and medical benefits arising from the surgery. Employer paid for the medical services but refused to pay additional disability.

The ALJ and the Board rejected claimant's contention that he had sustained a new injury and therefore had filed a timely claim. Instead, claimant was denied compensation because he had not petitioned for modification within one year of the ALJ's denial of his claim for permanent disability.

Permanent Disability – Other

Evidence of post injury employment relevant. Based on unique facts, relevant labor market was in USA and overseas. *Patterson v. Omniplex World Services*, 36 BRBS 149 (BRRB 2003).

Claimant was injured when working as a security guard at the United States Embassy construction site in Moscow. His injury was subject to the Defense Base Act. Employer offered evidence of alternative jobs near claimant's home in Trenton Missouri, in Fort Wayne, Indiana, and in Washington, D.C.. In 2/99 claimant returned to work as a security guard in Nigeria for a different employer. In 6/99 he had a heart attack, prompting him to return to the United States where he had a second heart attack. He had not returned to work as of the hearing on 10/11/00.

The ALJ held that the only relevant labor market was Trenton, Missouri, and employer had not demonstrated suitable and available work in that labor market. Accordingly, the ALJ awarded temporary disability followed by PTD. Post hearing employer learned that in 11/00 claimant had returned to work as a security guard in Tanzania. The ALJ refused to reopen the record to receive and consider this evidence.

HELD, evidence that claimant is actually working at a suitable job should be considered regardless of the labor market defined for discussing potential job opportunities in the open market. The ALJ abused his discretion in denying the motion to reopen the record since the evidence is material and relevant.

Given claimant's employment history, the relevant labor market cannot be limited solely to the Trenton, Missouri area. Based on the unique facts of this case the relevant labor market for purposes of establishing the availability of suitable alternate employment includes both the Trenton, Missouri area and overseas locations where jobs similar to those claimant has performed are available which are suitable given his post injury restrictions.

If claimant can perform post injury jobs, such jobs must be considered.

Responsibility – Last Injurious Exposure Rule

Latency defense rejected. *New Orleans Stevedores v. Ibos*, 36 BRBS 93 (5th Cir 2003).

Decedent's last three employers as a stevedore were Valor, Anchor, and NOS. He quit working due to mesothelioma, filed a claim, and died due to the disease. His surviving spouse (claimant) filed a claim for compensation due to death. Claimant negotiated §8(i) settlements with Valor and Anchor and went to hearing against NOS only. The ALJ held that decedent was last exposed to asbestos when employed by NOS and found NOS responsible. NOS argued that exposure during its period of employment could not have caused the disease due to the latency period of mesothelioma.

HELD, there need not be a true causal link between the exposure at NOS and the decedent's mesothelioma. After the employee makes a prima facie case of entitlement the burden shifts to the employer to prove that the exposure did not cause the employee's occupational disease or the employee was performing work covered under the LHWCA for a subsequent employer when exposed to injurious stimuli. Here, NOS had to prove that asbestos did not cause mesothelioma regardless of whether the exposure at NOS caused or had the potential to cause decedent's mesothelioma.

Vocational Rehabilitation

Suitable employment not available due to participation in OWCP approved voc rehab plan.
Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 36 BRBS 85 (4th Cir. 2002).

After a compensable injury claimant began an OWCP sponsored vocational rehabilitation program with the goal of obtaining an AA degree in Graphics Communications. Claimant's AWW was \$588.21, and the OWCP estimated that claimant could earn \$432.69/week after training. When claimant was two courses short of obtaining his degree employer offered him a new job as a senior engineering analyst with an equivalent weekly salary of \$597.46, but employer stipulated that claimant would be terminated with or without notice at any time. Claimant did not think he could do the job and attend school at the same time, so he declined the job but offered to start after he obtained his degree. Employer rejected this proposal and then terminated compensation as of 1/97, when claimant rejected the job. Claimant obtained his degree and on 12/29/97 began work for the *Newport News Gazette* @ \$314.28 per week. On an unspecified date this company went bankrupt, but later claimant found another job that paid \$360.00 per week. After several appeals, remands, and petitions for modification, claimant was awarded PTD when he was in the vocational training program and PPD based on earnings from his post injury jobs. Employer contended he should not receive any permanent disability based on the job that claimant rejected.

The court held that when a job offer arises when a claimant is enrolled in a vocational rehabilitation program, the ALJ must decide if the claimant has demonstrated that suitable alternative employment is reasonably unavailable. The ALJ should consider if completion of the program will increase claimant's wage earning capacity, but that factor is not dispositive. Although not specifically stated in the opinion, the court implied that other factors that should be considered include whether enrollment precludes any employment, whether employer agreed to the program, and whether the claimant demonstrated diligence in completing the program. On this record the ALJ's conclusion that claimant could not participate in the program and work simultaneously was supported by the record, and because claimant was only one semester from obtaining his degree it was unreasonable for employer to make claimant choose between the program and a new job.

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