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NWLAA Case Law Review
Norman Cole, Editor

Attorney Fees – Amount

Portland attorney awarded \$225/hr in non-complex case. *Roots v. Columbia Grain*, 38 BRBS 436 (ALJ Gee 2004 (Charles Robinowitz for claimant; Delbert Brenneman for employer/carrier); *Pittman v. Marine Terminals Corp.*, 38 BRBS 440 (ALJ Dorsey) (Charles Robinowitz for claimant; Robert E. Babcock for employer/carrier).

In *Roots* claimant's counsel (Charles Robinowitz) sought \$22,675.00 in fees plus \$1,406.05 costs based on 88.5 hours of attorney time @ \$250.00/hr and 5.5 hours of legal assistant time @ \$100.00/hr. The ALJ observed that the case was not complex and did not involve important legal precedent and awarded \$225.00 per hour. Employer did not object to \$100.00/hour for the legal assistant. Mr. Robinowitz therefore was awarded \$20,587.50 in fees for his time plus fees for the legal assistant and costs.

In *Pittman*, the claim was settled per §8(i) with payment of \$6,725.00 to claimant for temporary and permanent disability plus \$22,879.08 to the Department of Health and Human Services (compromising its claim for reimbursement of \$34,318.63). Claimant retained entitlement to medical services. Claimant's attorney (Charles Robinowitz) sought payment for 26.75 hours of attorney services @ \$250.00 per hour plus 6.0 hours of legal assistant services @ \$100.00 per hour plus \$246.50 costs. The ALJ's decision includes a good discussion of factors that should be considered when evaluating a fee award. He found a 2/02 affidavit from attorney David Markowitz not persuasive because Mr. Markowitz knew nothing about the case and therefore did not evaluate the reasonableness of the hours, complexity of the issues, quality of the work, or result obtained. Furthermore, years of practice and general reputation were not important factors. The rates Mr. Robinowitz received in other matters that were fully tried or appealed were not controlling because this case was a settled. References to usual rate in this type of case was not controlling because no rate could be charged without approval from an OWCP or an ALJ. After evaluating the case and considering what other ALJ's have awarded Portland attorneys, the ALJ awarded a fee based on \$225.00 per hour.

Attorney Fees – Entitlement

No fee awarded when employer fully accepted conference recommendation. *Harris v. Raytheon Technical Services*, 38 BRBS 494 (ALJ 2004).

After an informal conference the claims examiner issued a recommendation that employer authorize a knee surgery and pay TTD during recovery. Employer immediately accepted the recommendation and repeatedly asked claimant's attorney when claimant planned to schedule the surgery. Instead of responding to this request claimant's counsel requested referral to the OALJ. Seven months after receiving authorization claimant had surgery and employer paid all of the associated benefits. Claimant's attorney sought fees for 14 hours before the OALJ.

HELD, because employer accepted the recommendation and claimant did not succeed in getting a greater award, employer is not liable for claimant's attorney's fees at the OALJ level. The pursuit of the matter before the OALJ was unnecessary. There was no controversy warranting referral, and employer had tendered the medical benefits and temporary disability benefits sought by claimant. The ALJ therefore refused to award fees.

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 51 (9th Cir 2004) (amending and superceding decision at 38 BRBS 25 (9th Cir. 2004) (John Dudley 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

Testimony of witness in unrelated civil action sufficient to prove asbestos exposure and invoke §20 presumption. *McAllister v. Lockheed Shipbuilding*, 38 BRBS 526 (ALJ Mapes 2004) (Peter Preston for claimant; Russell Metz for Lockheed/Wausau; Dennis VavRosky for Albina/Fireman's Fund; Norman Cole for WISCO/SAIF Corporation).

Deceased worked for WISCO, Albina, and Lockheed, in that order, and died due to mesothelioma. All parties agreed that mesothelioma was due to inhalation of asbestos, but Lockheed contended there was no evidence that the worker inhaled asbestos during its employment. The ALJ concluded that testimony from surviving spouse and a statement signed by Dr. Zbinden describing statements deceased made were insufficient to prove asbestos exposure at Lockheed. Reported decisions in other claims finding Lockheed responsible for asbestos related diseases did not prove exposure during the period when the deceased worked for Lockheed. The ALJ credited 1984 testimony from George Noregaard, a former superintendent of Owens Corning who had offices at Lockheed's shipyard from 1957 to 1971 or 1972 in connection with suits brought by other workers that almost all crafts were in the vicinity when his company installed and removed insulation materials that contained asbestos.

Although Lockheed was not represented at Mr. Noregaard's deposition and was not a party to the litigation that led to his deposition, the ALJ held that the testimony was relevant and was needed to best ascertain the rights of the parties/ Similar testimony had been admitted under FRE 807 in other claims. The testimony was sufficient to warrant application of the §20 presumption. Because Lockheed did not rebut the presumption, it was responsible for payment of compensation. (Note: This case is on appeal to the BRB.)

BRB could make legal conclusion that medical report was insufficient to rebut §20(a) presumption. *Bath Iron Works Corporation v. Preston*, 38 BRBS 60 (1st Cir. 2004).

Claimant contended workplace harassment aggravated symptoms of a preexisting neurological condition, paramyoclonus multiplex, which caused involuntary shaking of the head and arms. The shaking tended to become worse under stress. Claimant said he was ridiculed, called derogatory names (Shake & Bake), and members of the crew sometimes tried to startle him so that the shaking would become more pronounced. He eventually stopped working on advice of

his treating physician. Dr. Kolkin testified that stress and fatigue would transiently exacerbate symptoms, but claimant would return to baseline with removal of the stress. Dr. Bourne testified that claimant's physical illness and his perception of deterioration of his health had caused his psychological condition (anxiety and depression). The ALJ denied benefits but the BRB held that the ALJ had not determined whether the stress and harassment had occurred. The Board also held that opinions from Dr. Kolkin and Dr. Bourne were inadequate to rebut the §20(a) a presumption if the ALJ found that the alleged stress and harassment had actually occurred.

On remand, the ALJ granted benefits but groused that he had been "prompted by the Board" to do so after the Board had substituted its opinion for the trier of fact. The BRB affirmed.

HELD, the Board's conclusion that opinions from Drs. Koklin and Bourne were insufficient to rebut the §20(a) presumption was a legal conclusion. Dr. Kolkin said that stress could aggravate claimant's preexisting condition. This statement did not sever the causal link between claimant's aggravated symptoms and his work environment. Dr. Bourne only addressed claimant's mental state and therefore did not rebut a presumption that claimant's physical injury was caused by his workplace environment.

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 51 (9th Cir 2004) (amending and superceding decision at 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) prohibits 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 no over-compensated, and the Board erred in reducing the 1998 award by the amount of the 1979 award.

Credit – Same Claim

ALJ orders overpayment recovered in installments. *Bell v. Crowley Maritime Corp.*, 38 BRBS 547 (ALJ 2004).

Employer appealed an order awarding compensation to children-beneficiaries based on an average weekly wage of \$656.56. The BRB vacated the average weekly wage, and on remand the ALJ decreased the AWW to \$517.30, thereby creating an overpayment of \$19,487.43. Employer unilaterally began suspension of compensation for 95 weeks to recover its overpayment, and claimant sought an order declaring employer in default and seeking interest and penalties.

The ALJ held that employer was entitled to recover its overpayment, but he concluded that he had authority to order employer to recover its overpayment in installments. He allowed employer withhold increments from compensation equal to the amount over the overpayment divided by the

number of weeks the children were likely to remain eligible to benefits. The ALJ also denied claimant's request for a penalty and, apparently, did not award an attorney fee.

Discrimination

Termination was not retaliatory under state law. *Carter v. Tennant Company*, 38 BRBS 73 (7th Cir. 2004).

When claimant applied for work at Tennant Company he completed a questionnaire that asked if he had ever had any occupational injuries, accidents or illnesses or lost time from work due to a work related injury or illness. He failed to state that he had previously injured his back when working for Gurnee School District (and that he was still receiving compensation for that injury). The application he signed warned that misrepresentation or omission could result in termination of employment. Approximately five months after he was hired, and a short time after Gurnee had terminated payment for claimant's earlier claim because of a failure to attend an IME, claimant told his supervisor that he had again injured his back. When Tennant learned about the prior injury it terminated claimant's employment. Claimant then filed a state suit seeking damages for a retaliatory termination. The suit was removed to United States District Court, but the court granted summary judgment for Tenant.

Illinois law holds that a worker cannot prove that termination was a consequence of filing a workers' compensation claim if the employer has a valid basis, which is not pretextual, for discharging the employee. Because employer discharged claimant for providing false information on his application, claimant could not prove that his termination was because he filed a claim.

Additionally, even though Illinois law prohibits an employer from asking employees if they have ever filed a claim for benefits under a workers' compensation act or received benefits under a workers' compensation act, nothing prohibited employer from asking if claimant had ever had an occupational injury, accident or illness or lost time from work for a work related injury or illness or saw a doctor for a work related injury or illness.

Exclusions – Jones Act

Casino riverboat operating crew were seamen. *Harkins v. Riverboat Services, Inc.*, 38 BRBS 80 (7th Cir 2004).

The Showboat Mardi Gras Casino is a real ship that was built in Florida and sailed to East Chicago. Passengers gambled in the vessel's casino.

Plaintiffs were members of the "marine crew." They were not waiters or croupiers but were responsible for the operation of the ship and safety of the ship's passengers. They spent most of their time doing housekeeping chores because the boat spent 90% of its time moored to a pier, and when it did sail, it was away from shore for no more than four hours at a time.

Plaintiffs filed a suit for overtime pay under the Fair Labor Standards Act. That act exempts from its overtime provisions persons employed as seamen. A jury found for the defendant.

The Court observed that seamen were entitled to maintenance and cure and were entitled to file suit under the Jones Act, but because of the nature of their work they were not entitled to overtime pay. When a person employed on a ship, even so atypical a one as a gambling boat, is classified as a seaman for purposes of entitlement to the special employment benefits to which seamen are entitled, a presumption arises that they are seamen under the FLSA as well. Plaintiffs failed to rebut this presumption. None of them worked as a croupier, cashier, bouncer, dealer, waiter, or entertainer. The jury could reasonably find that they were members of the

ship's operating crew. They performed duties necessary to the operation of the vessel because it was a ship rather than because it was a casino.

Hearings – Discovery

Claimant not obligated to reimburse employer for missed IME appointment. *Bavaro v. Bethlehem Steel Corp*, 38 BRBS 377 (ALJ 2004).

Claimant failed to attend a scheduled examination with employer's independent medical examiner and requested \$75.00 reimbursement for the cost of a no-show. The ALJ denied reimbursement because nothing in the LHWCA or regulations provided authority for the request, and employer's request was not based on a motion to compel discovery. §7(d)(4), which permits suspension of compensation when claimant refuses to submit to medical or surgical treatment or to an examination selected by the employer, is inapplicable because claimant was not receiving compensation that could be suspended and there was no evidence that claimant missed the appointment in an attempt to prejudice employer's discovery process, nor was employer prejudiced by rescheduling the examination one month later, which was still nearly one year before the hearing date.

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 51 (9th Cir 2004) (amending and superceding decision at 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

Employer failed to prove fifth surgery was unreasonable. *Ballard v. Morrison Construction*, 38 BRBS 498 (ALJ 2004).

Claimant sought authorization for 5th surgery for his 1993 left foot injury. Claimant's physicians thought the pain was due to a neuromata in the foot. They found a visible bulge near the lateral aspect of claimant's leg near the lateral maleolus which they thought was responsible for the pain and felt that the recommended procedure had an excellent chance of reducing (but not eliminating) the pain. Employer's expert found no acute anatomical aberration on examination and testified that the surgery was unreasonable and unnecessary because claimant's pain was from the central nervous system but was felt in the extremity. Therefore, he thought that an operation affecting a neuromata in the foot would not alleviate pain.

Citing *Amos v. Director, OWCP*, 153 F3d 1051 (9th Cir 1998), the ALJ concluded that employer had failed to prove that opinions of treating physicians were unreasonable. Employer only demonstrated that its expert had a different diagnosis as to the source of claimant's pain, but this

did not mean that the recommended surgery was unreasonable or unnecessary. Furthermore, employer's expert was not a specialist in this field of surgery and had never performed or witnessed the recommended surgery, and he admitted that claimant's physicians were skilled physicians.

Miscellaneous

No §8(j) forfeiture if employer is not paying compensation. *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (BRB 2004).

Following a 12/15/99 knee injury employer paid TTD to 9/6/00. Claimant returned to unrestricted work on 9/20/00 and filed a claim for compensation, seeking additional disability. On 10/1/01 claimant requested transfer of the case to the OALJ. Employer served claimant with a form LS-200, Request for Earnings, seeking information regarding earnings from employment or self employment from 12/15/00 to the present. Claimant did not respond to the LS-200 request. At employer's request, an ALJ issued an Order forfeiting claimant's entitlement to benefits after 10/1/01 per §8(j) until such time as claimant submitted a Form LS-200. Claimant did not appeal the order.

At a 5/7/03 hearing the parties stipulated that claimant had a 25% impairment of the lower extremity. Employer contended that it had no obligation to pay the award because of the forfeiture order. Claimant then filed a Report of Earnings for 9/17/00 to the present. The ALJ held that claimant had forfeited entitlement to benefits for all periods prior to 6/27/03. Claimant appealed.

HELD, claimant was not adversely affected or aggrieved in fact by the forfeiture order until a second ALJ relied on it to deny compensation. Therefore, the first order did not conclusively resolve the issue.

§8(j) requires a disabled employee to report earnings, and 20 CFR §702.285(a) requires an employee to whom [an employer/carrier] is paying compensation to report earnings. Legislative history indicates Congress intended to limit the reporting obligation and forfeiture penalty to employees who were receiving compensation concurrently with the request for earnings information.

Claimant did not become disabled merely by filing a claim. An employer cannot require claimant to submit an earnings report unless employer or the Special Fund is paying compensation, either voluntarily or pursuant to an award, at the time the request for information is made. Otherwise, the forfeiture provision cannot be applied.

Permanent Disability – Employer's Burden

Injured longshoreman incapable of returning to other longshore work due to medication and lack of physical capacity. *Wolff v. Marine Terminals Corp.*, 38 BRBS 506 (ALJ Mapes 2004) (Charles Robinowitz for claimant; William Tomlinson for employer/carrier).

Following a compensable injury, the injured longshoreman could not return to the job he performed on the date of injury. Employer contended he was capable of performing other longshore work that would enable him to earn \$1,100.00 per week. Employer relied on testimony from vocational consultant Roy Katzen that claimant could obtain employment as a master console operator, clerk/checker, and second console/barge man and on testimony from Dr. Seres that claimant was capable of performing these jobs and use of 5-6 Vicodin per day did not prevent him from doing this work (nor did he need that much medication). Claimant testified that the medication made him feel a little lightheaded. Dr. Grossenbacher testified that after taking Vicodin it was inadvisable to operate or be around heavy equipment. Mr. Huckfeldt, claimant's

vocational consultant, testified that the Pacific Coast Maritime Safety Code precludes members of claimant's union from working if they were using stimulants or narcotics that interfered with their ability to do their jobs.

The ALJ concluded that none of the jobs employer identified were suitable because they were inconsistent with safety rules, and because of the medication, claimant lacked capacity to maintain constant alertness, work at fast pace, or operate or work near machinery. Accordingly, claimant was awarded PTD.

Situs – Adjoining Area

Injury on public highway 65-70 miles from port not on covered situs. *Jorgensen v. Marine Terminals*, 38 BRBS 554 (ALJ Mapes 2004) (Gregory Bunnell for claimant; Dennis VavRosky for employer/carrier).

Claimant fell asleep when driving on US Highway 26 near Seaside, Oregon, 11-12 miles from his home, after he had completed a job for Marine Terminals in Portland, Oregon, approximately 65-70 miles to the east. The site of the accident was several miles from the nearest navigable water, and claimant was not engaged in any maritime task when the accident occurred. He was entitled to pay for his travel time, and for that reason the ALJ concluded he had status as a maritime worker. Nevertheless, the injury did not occur on a maritime status, as it was not on navigable waters or an adjoining pier, wharf, dry dock, terminal building way, maritime railway, or other adjoining area. The ALJ granted defendant summary judgment.

Situs – Navigable Waters

Barge slip under construction was not filled with water and was not a covered situs. Site did not have prior maritime purpose. *Tarver v. Bo-Mac Contractors, Inc.*, 38 BRBS 71 (5th Cir 2004).

Employer was constructing two barge slips on vacant, dry land near the intracoastal waterway in Carlyss, Louisiana. Claimant was injured on the land side of the excavation when a beam came loose and pinned him to a scaffolding. At the time of injury the site had been cleared and the slip holes had been excavated but the land between the holes and the waterway had not yet been removed. Sometime after the injury employer filled the slips with water by removing the wall of land between the excavated area and the navigable waterway. The BRB held that the injury was not on a covered situs.

The court affirmed. The nature of the area is evaluated at the time of injury unless a construction site is carved out of a covered situs to support navigation in the future. The construction site here was not serving a maritime purpose and the site had not previously facilitated navigation.

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The **NWLAA Case Law Review** is provided by Norman Cole. Mr. Cole previously worked as trial counsel for SAIF Corporation for 26 years. As of May 23, 2005 he will be at the Portland, Oregon firm of Sather, Byerly & Holloway, where he will continue to represent employers and carriers in workers' compensation claims under the Oregon Compensation Act and the L&HWCA.