



P.O. Box 9124 Portland, Oregon 97207

NWLAA Case Law Review

Norman Cole, Editor

Appeals – Final Orders

Employer compelled to disclose names and addresses of companies identified by defendant's vocational expert. Employer's appeal dismissed as premature. *Newton v. P&O Ports Louisiana, Incorporated*, 38 BRBS 23 (BRB 2004).

Employer appealed an ALJ's Order Granting Motion to Compel Discovery after employer refused to honor a subpoena directing production of names and addresses of companies which had been contacted by defendant's vocational expert. The Board held that the appeal was premature because the decision was reviewable on appeal from a final judgment, and the decision did not involve any serious due process considerations.

Attorney Fees – Amount

Small recovery may justify smaller fee in spite of large effort. *Avondale Industries, Inc. v. Davis*, 37 BRBS 113 (5th Cir. 2003).

ALJ approved termination of TTD but ordered employer to pay for future psychiatric treatment for claim related depression and awarded a \$736.50 penalty. Claimant's attorney sought \$30,000 in fees but was awarded \$15,500. Employer appealed.

The court held that because §28(b) requires a showing of success by the claimant, the ALJ must apply the factors set forth in *Hensley v. Eckerhart*, 461 US 424 (1983). This requires a two step analysis. First, the ALJ must award a fee only for work done in the successful claims. Second, the success obtained on the remaining claims should be proportional to the effort expended by counsel. The ALJ determined that counsel's work was intimately related to the claims on which claimant was successful but failed to take into account the fact that claimant only recovered \$736.50 plus future medical costs.

§28(b) specifically requires an ALJ to base fees on the difference between the amount awarded and the amount tendered or paid. The difference here equals future medical costs plus \$736.50, but the ALJ made no attempt to quantify the award and take it into consideration when determining fees. The \$15,500 fee may be excessive. The court remanded the case for consideration of this factor.

Portland attorney awarded \$250/hr. *Shaver v. Cascade General*, BRB No. 02-0613 (unpublished, 9/15/03) (Douglas Swanson for claimant; Ronald Atwood for employer/carrier).

Board awarded claimant's counsel fees for 5.50 hours @ \$200/hour for services on appeal and an additional 0.25 hours @ \$250/hour for responding to employer's objections to the fee petition.

Additionally, claimant's legal assistant was paid for 14.00 hours @ \$85.00/hour. The Board deemed the rate reasonable in light of the services performed and the geographic area where the case arises.

Fees awarded out of compensation when defendant not in existence and not insured.

Anderson v. Industrial x-ray Engineering, 38 BRBS 1 (ALJ 2003).

ALJ awarded compensation but found that defendant was no longer in existence and had no LHWCA coverage at the time of claimant's injury. Claimant anticipated that compensation would be paid by the Special Fund but agreed that the Special Fund could not be ordered to pay fees. Accordingly, the ALJ awarded claimant's attorney a fee as a lien on compensation if the fee could not be collected from the employer.

Limited fee awarded for work on state workers' compensation claim. *Vantassel v. Pool California Energy Services*, 38 BRBS 11 (ALJ Mapes 2004).

Claimant was awarded compensation under the Outer Continental Shelf Lands Act extension of the LHWCA and requested payment of \$74,430.00 in fees plus costs, less credit for \$540.00 awarded as fees for services associated with a state workers' compensation claim. The petition included 188 items totaling 111.6 hours related to a parallel state compensation claim. The ALJ concluded that the claimant had the burden to show that services in the state claim were necessary to establish compensation under the LHWCA. Based on the information provided the ALJ allowed only 8.0 hours of the hours claimed.

The ALJ also responded to objections to specific services provided in the LHWCA claim and disallowed some hours as excessive or unnecessary, ultimately awarding claimant \$40,720.00 in fees.

Attorney Fees – Entitlement

Claim made in spite of absence of presumptively valid audiogram. Fee due when controversion withdrawn after receipt of valid audiogram. *Avondale Industries, Inc. v. Craig*, 37 BRBS 109 (5th Cir. 2003), *Avondale Industries, Inc. v. Alario*, 37 BRBS 116 (5th Cir. 2003), affirming *Craig v. Avondale Industries*, *Alario v. Avondale Industries*, *Howard v. Avondale Industries*, 35 BRBS 164 (BRB 2001).

In three claims claimant forwarded uninterpreted audiogram with a letter requesting compensation and medical services. Employer controverted but subsequently paid compensation after obtaining a second audiogram with an interpretation. Claimant's counsel sought a fee. Employer argued its obligation to respond began only after it had received a valid audiogram and medical report. Its response therefore was timely and in the correct amount and eliminated an entitlement to fees. The Board rejected employer's argument, and the court affirmed (in the two cases appealed and reported as of BRBS release 644).

§28(a) makes no mention of the term "evidence" and does not require evidence be provided when a claim is filed. A claim requires only a writing disclosing an intention to assert a right to compensation. All claims were valid and were controverted. Respondent was entitled to an attorney fee.

Employer did not reject OWCP recommendation when delay due to claimant's failure to provide documentation. *Cachola v. Hickam Youth Center*, 37 BRBS 967 (ALJ 2003).

Claimant sought an adjustment in average weekly wage based on earnings from a second job. The recommendation of informal conference states that claimant was aware employer could not pay the additional compensation until claimant provided employer with the necessary documentation. When employer did not receive information from claimant it obtained the

information by its own means and then voluntarily paid claimant the additional compensation. Claimant's attorney requested a fee. The ALJ held that the employer had not refused to accept the recommendation of the informal conference. The delay in payment was not a de facto refusal because it was not the result of employer's action or inaction. Employer cannot be expected to calculate claimant's average weekly wage without accurate information regarding additional earnings. Claimant is not entitled to an award of fees.

Claimant's appeal prevents enforcement action. *Christensen v. SSA*, Case 03-1409-KI, decision of Judge Garr M. King (District Court Oregon, 4/9/04) (John Dudrey for employer/carrier; Charles Robinowitz for claimant).

ALJ awarded claimant's attorney \$16,614.73 in fees after claimant successfully obtained an award of PPD and PTD and entitlement to medical care for a psychiatric disorder. The ALJ held that the award was subject to the maximum weekly limitation of §6(b)(1). Claimant appealed this portion of the decision and sought an increase in fees if successful on appeal. The appeal was pending when claimant filed an action in District Court to enforce the ALJ's award. Four days after the action was filed employer paid the full award of fees and costs. Claimant then sought an additional award of fee and costs from the enforcement action.

The Court dismissed claimant's petition on summary judgment because the fee award could only be enforced, per §21(d), if employer had failed to comply with an order that had become final. Because claimant appealed the ALJ's decision, the award had not become final and therefore could not be enforced. The plain language the LHWCA provides that an award of fees and costs is not final if the compensation order has been appealed, and the 9th Circuit has not held that fees may be final as to one party but not to another.

Fee denied for services after rejection of defense settlement offer when ultimate recovery less than offer. Fee reduced due to partial success. *Olson v. Marine Terminals Corp.*, 38 BRBS 8 (ALJ Mapes 2004) (Peter Preston for claimant; Wm. Tomlinson for employer/carrier).

Claimant sought PTD for injury to knee and back. On 1/24/03, prior to hearing, employer offered to settle the claim for \$80,000. Claimant rejected the offer. The ALJ denied compensation for back but awarded \$13,786.68 in additional benefits for the knee.

The ALJ held that claimant's attorney was not entitled to fees for services after 1/24/03. Also, because the issues claimant raised were severable, requiring different evidence and legal analysis, claimant was not entitled to compensation for work in connection with the back injury. The ALJ determined that two-thirds of the allowable hours were devoted to the back injury issue. Therefore, claimant was awarded one-third of the fee requested for services before 1/24/03.

Claim – Excuses/Exceptions

Payment under state workers' comp award tolled statute of limitations. *Reed v. Bath Iron Works Corporation*, 38 BRBS 1 (BRB 2004).

Claimant injured his back on 11/12/85 during employment for employer and was awarded compensation under the Maine compensation Act. He retired in 2/96 but in 8/99 received a \$25,000 settlement of that claim due to a work related aggravation. He next sought compensation under the Maine Act for total disability after his 2/96 retirement, but on 11/99 he was found ineligible for total disability, except for brief period when recuperating from surgery, because he had failed to prove that, as a retired worker, he had a loss of earning capacity. Employer made its last payment pursuant to this award on 12/2/99. In April, 2000 claimant filed a claim for compensation under the LHWCA for PTD from the date of his retirement.

§13(a) states that "if payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of last payment. The

Board held that “award” had reference to an award under the LHWCA. Thus, employer’s payment under the Maine Act, though compelled by a Maine compensation judge, was a payment “without an award” within the meaning of the LHWCA. Because the claim was filed within one year of the last payment, it was timely.

Course & Scope – Other

Zone of special danger applied in Defense Base Act claim. *Kalama Services, Inc. v. Director, OWCP*, 37 BRBS 122 (9th Cir. 2004).

The US Government contracted with Kalama to provide operational and maintenance services on Johnston Atoll, a United States possession located 700 miles west-southwest of Hawaii in the Pacific Ocean. It is two miles long and one-half mile wide and is used by the U.S. military to store and dispose of chemical, nuclear, and other toxic weapons. Kalama hired claimant to manage a Self Help Store on the resident. After completing work on 7/25/99 claimant went to two bars, had four drinks, and at the second bar injured his left hip. Claimant and witnesses provided different accounts of the incident, but the ALJ viewed it as horseplay.

The Court observed that injuries resulting from reasonable and foreseeable recreational activities in isolated or dangerous locales arose out of a zone of special danger and are compensable. The ALJ correctly applied this doctrine, finding that the atoll provides limited recreational opportunities and the military expressly authorizes social clubs on the island. The presence of social clubs serving alcohol to employees who experience lengthy periods of isolation on the atoll creates a foreseeable risk that horseplay might take place from time to time.

Credit – Other Claims

Credit denied for §8(i) settlement from other potentially responsible employer. *Johnson v. Metropolitan Stevedore Co.*, 38 BRBS 165 (ALJ 2004).

Claimant sought compensation for hearing loss against SSA, Pasha, and Metropolitan. Prior to hearing claimant settled the claim with Pasha for \$39,000 in indemnity benefits, \$3,500.00 in future medical expenses, and attorney fees. The ALJ found Metropolitan responsible for payment of compensation (\$45,985.41 in PPD) but denied Metropolitan credit for compensation paid by Pasha based on the 9th Circuit’s decision in *Alexander v. Director*. The money from Pasha was not a benefit claimant received for hearing loss under the Act.

Employer/Employee – Borrowed Servant

Leasing company deemed employer. *Menard v. Coastline, Inc.*, 38 BRBS 95 (ALJ 2004).

Coastline was in the business of onshore and offshore fabrication work. It entered into an employee leasing agreement with AMS whereby AMS provided Coastline with employees and agreed to provide workers’ compensation and liability insurance and hold Coastline harmless for all loss or expense due to injuries sustained by AMS employees. Claimant was hired by AMS and worked several weeks on a Coastline project on a jack up rig until he was injured. Claimant thought he was working for Coastline but he had submitted an employment application to AMS. Coastline furnished tools but AMS retained the right of discharge and obligation to pay. After considering the nine part test for determining if a worker is a borrowed servant stated in *Ruiz v. Shell Oil Co.* (5th Cir. 1969) and *Gaudet v. Exxon Corp* (5th Cir. 1977), the ALJ held he was an employee of AMS.

Exclusions – Jones Act

Deckhand/rigger not a Jones Act seaman. *Lacy v. Southern California Ship Services*, 38 BRBS 12 (BRB 2004).

Employer provided water taxi and supply service to vessels at anchor in the Long Angeles/Long Beach Harbor. It maintained a fleet of seven vessels, ranging from 100 feet to 30 feet or smaller. Employer hired operators to captain the vessels, deckhands to perform necessary crew and dock work, and dockside only employees who did not work on vessels. Claimant was a deckhand who did work on land and on vessels. If he was assigned to a vessel he prepared the cargo nets and pallets for loading, loaded them onto the vessels, handled dock lines on leaving and returning to the dock, and rode in the vessel to deliver the supplies or passengers to the hip. When in transport his main duty was to make sure the supplies were secure. He typically spent the time drinking coffee. When the vessel arrived he assisted in loading the supplies to the ship or transferring passengers to or from the ship. He spent 35% of his work time on vessels. He was injured when loading cargo from one of employer's boats to a ship at anchor in the harbor.

The ALJ concluded that claimant's work contributed to the function of the vessel, but claimant did not have a connection to the fleet of vessels that was substantial in nature. He spent most of his time on vessels drinking coffee and only 10% performing seaman tasks such as maintenance or steering. The Board held that claimant need not aid navigation to have a substantial connection with the vessel, but the error was harmless because the bulk of claimant's job required him to do land based loading, unloading, storing, and disposing of items transported by employer's vessels. He was not a sea-based worker. He did not sleep on the vessels and did not get paid per vessel trip. The Board could not say, as a matter of law, that it was unreasonable for the ALJ to conclude that claimant was a longshoreman and not a member of the crew.

Hearings – Discovery

Employer compelled to disclose names and addresses of companies identified by defendant's vocational expert. Employer's appeal dismissed as premature. *Newton v. P&O Ports Louisiana, Incorporated*, 38 BRBS 23 (BRB 2004).

Employer appealed an ALJ's Order Granting Motion to Compel Discovery after employer refused to honor a subpoena directing production of names and addresses of companies which had been contacted by defendant's vocational expert. The Board held that the appeal was premature because the decision was reviewable on appeal from a final judgment, and the decision did not involve any serious due process considerations.

Miscellaneous

Automatic stay in bankruptcy not applied in LHWCA claim. *Whetstone v. Jeffboat, LLC*, 38 BRBS 111 (ALJ 2004).

After claimant filed a claim for compensation employer filed for Chapter 11 protection under the US Bankruptcy Code and requested a stay of all proceedings. The ALJ held that the stay did not prevent him from issuing a decision on the merits pursuant to the police and regulatory power exception of 11 USC §362(b)(4) and *In re Mansfield Tire & Rubber Co.*, 660 F2d 1108 (6th Cir 1981).

Permanent Disability – *De Minimis* Award

ALJ concludes *de minimis* awards not allowed for scheduled injuries. *Totten v. Newport News Shipbuilding & Dry Dock CO.*, 38 BRBS 22 (ALJ 2004).

The parties agreed that claimant was entitled to 11% PPD for the left lower extremity, and employer paid the award per an order dated 2/6/02. Notwithstanding this award, claimant sought a *de minimis* award for his scheduled injury. The ALJ concluded that only claimants who have an unscheduled disability are eligible for a *de minimis* award, whereas the schedule is the exclusive remedy for partial disability to listed body parts. Accordingly, the ALJ granted summary judgment because there was no issue of material fact in dispute, and as a matter of law claimant was limited to a scheduled award recovery.

Permanent Disability – Other

Pelvic area injury compensated with *de minimis* unscheduled PPD, not scheduled and unscheduled PPD. *Bond v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 151 (ALJ 2004).

Claimant was pinned across the waist by a heavy steel plate and sought scheduled PPD of 7% for the left lower extremity and 51% for the right lower extremity plus an unscheduled award. Employer argued that because the situs of claimant's injury was his waist he was limited to an unscheduled award. The ALJ noted that the 5th and 1st Circuits followed the view argued by the employer, but the 4th Circuit had not addressed this question. The ALJ concluded that because the situs of claimant's injury was his pelvic area and his legs were not actually struck by the steel plate, he was limited to an unscheduled award. Because he did not have a current loss of wage earning capacity, but there was a significant likelihood that he would incur a loss of earning capacity in the future, he was awarded \$1.00 per year as PPD.

Settlements

§8(i) settlement not enforceable without claimant signature. *O'Neil v. Bunge Corporation*, 38 BRBS 7 (9th Cir. 2004) (Meagan Flynn for claimant; Jay Beattie for employer).

Claimant and employer agreed to settle the claim for \$63,000.00 per §8(i). Employer's attorney sent claimant's attorney a proposed settlement agreement. According to an affidavit submitted by employer's attorney, claimant said he would sign the application when he returned from a hunting trip, but he died before signing the agreement. Thereafter, Edward O'Neill, claimant's brother and representative of his estate, signed the agreement, and claimant's attorney sought approval based on Edward's signature. Employer indicated it would not honor the agreement. The ALJ and the Board held that there was no enforceable settlement agreement. The 9th Circuit affirmed.

§8(i) and regulations provide that an application must be approved by the deputy commissioner or ALJ, signed by all parties, and must be a self sufficient document which can be evaluated without further reference to the administrative file. The court declined to read into the LHWCA approval process an exception for an unsigned settlement, as this would undermine the administrative efficiency that the regulations seek to achieve, introducing uncertainty about the claimant's actual acceptance of the proposed settlement. Without claimant's signature the issue of his actual acceptance would be open to dispute, complicating the administrative approval process and perhaps fostering litigation. Edward's signature did not cure the deficiency because he was not a party in the settlement negotiations and his signature was not contemplated by the applicable rule (20 CFR §702.242).

Status – Integral Employment

Barrel dumper who picked up and emptied trash barrels in shipyard had status. *Jernigan v. Newport News Shipbuilding & Dry Dock*, 38 BRBS 77 (ALJ 2004).

Claimant operated heavy equipment in employer's shipyard and spent most of her time operating a barrel dumper that picked up 55 gallon drums or barrels filled with trash. She spent 40% of her time picking up barrels that contained scrap metal, including welding rods. She developed back pain attributed to the bumpy ride on the heavy equipment.

The ALJ found this claim similar to *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (BRB 2002), in which a barrel dumper operator who picked up barrels of trash and shipbuilding materials, was awarded compensation because this work was integral to shipbuilding and repair process. The ALJ drew an inference that if claimant did not complete her duties the shipbuilding process would be impeded. Therefore, emptying trash, especially scrap metal, was integral to the shipbuilding operation and necessary to keep employer in compliance with federal safety and health regulations. Accordingly, claimant had status under the LHWCA.

Temporary Disability – Other

Court approves *de minimis* temporary disability award for a scheduled injury. *Newport News Shipbuilding & Dry Dock Co. v. Gillus*, 37 BRBS 120 (4th Cir. 2004) (affirming *Gillus v. Newport News Shipbuilding & Dry Dock Company*, 37 BRBS 93 (BRB 2003)).

Employer paid TTD to claimant during several periods due to a compensable knee injury. Her physician opined that she had progressive arthritis of the left knee and that she probably will need a total knee replacement in the future, timing uncertain. Claimant requested a minimal and ongoing compensation award, citing the Supreme Court's *Rambo II* decision. The ALJ awarded a *de minimis* award of 1% of her average weekly wage because her condition was likely to deteriorate and impair her earning capacity in the future.

The Board rejected employer's contention that *de minimis* awards were not available for schedule injuries because the Act takes into account the effect of disability as it may naturally extend into the future. Also, claimant had not claimed or been compensated for any permanent disability, and her condition was not termed permanent by her physician. Thus, her request was really an award for TPD benefits per §8(e).

On appeal, the 4th Circuit affirmed. Claimant did not contest the Board's conclusion that claimant's injury was a temporary partial disability under §8(e). A claimant's future earning capacity may be considered when issuing an award under §8(e).

Third Party – Notice/Consent

§33 bar depends on reason for disability. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (BRB 2004).

Claimant sought compensation for asbestosis and pleural thickening due to inhalation of asbestos and COPD due to inhalation of smoke and paint fumes during thirty years of work. At hearing claimant admitted he did not have asbestosis and sought medical monitoring only. The ALJ granted his request. While the claims were pending, he accepted settlements from two asbestos manufacturers without employer's consent. The ALJ barred the claim for asbestos related disease and COPD based on §33.

The Board agreed that claimant was a "person entitled to compensation" when he entered into the third party settlements but remanded the claim to the ALJ to determine if asbestosis was

claimant's only work related disability, in which case §33 would apply, or if claimant was disabled by both asbestosis and COPD, in which case §33 would not bar the claim because under the aggravation rule, COPD would be considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third party claims. If work related COPD was a cause of claimant's disability, he was entitled to compensation for the entire disability and the asbestos related settlements cannot bar the claim under §33.

Survivor who settled worker's claim not subject to §33 bar. *Mabile v. Swiftships*, 38 BRBS 19 (BRB 2004).

Decedent received a \$114,475.00 from the carrier plus more than \$350,000 from several third party defendants to settle his claim. After his death claimant sought compensation for death and also settled some additional claims with the remaining third party defendants for \$412,000. The settlement documents reserved claimant's right to pursue compensation for death under the LHWCA, specified that settlement of the third party claim was limited to settlement of the decedent's claim for pain and economic loss, and dismissed all claims that claimant had in her own capacity. The LHWCA defendant argued that claimant was not entitled to compensation due to the failure to secure its consent to the \$412,000 settlement.

The Board held that claimant was not a person entitled to compensation. The claim for death was a separate claim. Thus, claimant was not barred from receiving compensation, and employer was not entitled to a credit from the third party receipts.

§8(f) – Absolute Defense

Absolute defense applied. *Newport News Shipbuilding & Dry Dock Co. v. Firth*, 38 BRBS 1 (4th Cir. 2004).

Claimant requested an informal conference to determine eligibility for PPD. Employer advised the OWCP that a conference should not be scheduled, and claimant should forward his LS-18 as soon as he deemed necessary. The OWCP noted that employer had not submitted an application for §8(f) relief, and that when the case was transferred the Solicitor would assert the absolute defense. At the OALJ level the parties reached agreement on date of maximum medical improvement and extent of PPD, but employer asked the ALJ to award relief per §8(f). The ALJ awarded relief but the Board reversed, holding that the plain statutory and regulatory language provided no exception to the procedural requirement to submit the request to the director when permanency becomes known or is an issue in dispute. The Court affirmed. Employer did not comply with the unambiguous language of statute. Furthermore, employer was responsible for any lack of consideration the claim received from the Director and could not now use its own actions to avoid the unambiguous procedural requirement of §8(f)(3).

NWLAA Case Law Review is published and distributed to **NWLAA** members for educational purposes only. The information and the opinions expressed herein should not be acted upon without legal advice. All rights are reserved. No part of the **NWLAA Case Law Review** may be reproduced without the written consent of the **NWLAA** and its officers.

The opinions expressed in the **NWLAA Case Law Review** do not necessarily reflect those of SAIF Corporation, for whom Mr. Cole works.