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NWLAA Case Law Review
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Attorney Fees – Amount

Fees awarded for work before controversy. *Lopez v. SSA*, 39 BRBS 85 (BRB 2005).

Claimant filed claims with several employers, but the last employer was found responsible. That employer was responsible for payment of fees for claimant's counsel's services relating to asserting claims against other employers because services were part of a combined claim based on a cumulative trauma theory. This included services prior to controversy.

Attorney Fees – Entitlement

Award is not final if either party appeals. No fees due until award is final. *Christensen v. SSA*, 39 BRBS 79 (9th Cir 2005).

ALJ awarded PPD plus \$16,614.73 in fees and costs. Claimant appealed to seek additional PPD and an increase in fees. Defendant did not pay. Claimant filed an enforcement action in district court. Defendants paid the fees, mooting that part of the claim, but claimant sought additional fees arising out of the enforcement action. The district court granted summary judgment to defendant.

§21 provides that an award is final unless proceedings for the suspension or setting aside of such order are instituted. Fees are not due until after the underlying compensation order becomes final. The plain language of the statute means fees were not due pending claimant's appeal, notwithstanding defendant's failure to appeal. The award was not final, so the district court lacked subject matter jurisdiction to entertain claimant's attorney's fees enforcement action.

9th Circuit had no authority to award fees for successful opposition to employer's petition for writ of certiorari before the Supreme Court of the United States. *SSA v. Price*, 39 BRBS 85 (9th Cir 2006).

§28(a) states a court may approve an attorney's fee for work done before it by the attorney for the claimant. Therefore the 9th Circuit lacks jurisdiction to award fees undertaken in

successfully opposing employer's petition for certiorari. Although the order had the unfortunate effect of allowing fees to be charged to the client, it was Congress' role or that of the agency to address this state of affairs.

Discrimination

Reinstatement ordered based on finding of discrimination per §49 but claimant's ability to return to work should be evaluated as of date of maximum medical improvement.

Monta v. Navy Exchange Service Command, 39 BRBS 104 (BRB 2005).

ALJ concluded that claimant was terminated in violation of §49 and ordered reinstatement, but said that this should be assessed when claimant had completed treatment for her injury and reached maximum medical improvement. Employer argued that reinstatement was inappropriate if claimant was presently incapable of returning to regular work. The Board observed that the regulations offered no guidance regarding the point at which claimant's ability to perform the former job should be assessed but thought that the ALJ's decision was reasonable. Therefore, claimant was entitled to reinstatement until she can be assessed to determine whether she is able to perform her former employment after reaching maximum medical improvement.

Exclusions – Jones Act

Craft that moved but did not transport anything was not a vessel per *Stewart v. Dutra Construction*. *Holmes v. Atlantic Sounding Co.*, 39 BRBS 67 (5th Cir. 2005).

The BT-213 was a barge on which a two story fifty bed "quarters package" was mounted, where employees were housed and fed during dredging projects at various locations. It was not intended to transport personnel, equipment, passengers or cargo, nor was there evidence that it had ever done or was capable of doing so. Temporary running lights were installed when it was under tow. It carried no running lights, radar, compass, engines, navigational aids, lifeboats, steering equipment, or lifeboats, though it did have bollards and life rings and portable water pumps. It's "crew" consisted of two cooks and two janitors. Claimant, a cook, was injured when a television set hit her head and shoulders when she opened her locker.

Pre-*Stewart*, the 5th Circuit viewed a vessel as a structure designed or used for transportation of passengers, cargo or equipment from place to place across navigable waters. Nonvessels were constructed to be used primarily as a work platform, were moored or secured at the time of the accident, and although capable of movement and sometimes moved, any transportation function was merely incidental to the platform's primary purpose.

The 5th Circuit held that *Stewart* defined vessel for both the Jones Act and the LHWCA and had not fundamentally altered 5th Circuit vessel jurisprudence, though the court could not rely on whether the transportation function was primary or incidental to its purpose or on whether it was in motion at time of injury. §3 was merely the starting point for determining whether a watercraft is a vessel.

Crafts permanently affixed to the shore and theoretically but not practically capable of transportation are not vessels. The absence of permanent mooring or frequency of movement does not automatically bar non-vessel status.

The court held that BT-213 was not a vessel. It did not transport cargo, equipment or personnel, though it was moved multiple times. Movement is not transportation. If movement was the test, anything that floats would be a vessel.

BT-213 did not provide housing on open seas. It was incapable of movement by itself (unlike spud barges). The room and board module were not “equipment” that was transported. Equipment is an item loaded onto a vessel at one location and transported to another to perform a specific function. It does not include the appurtenance that contributes to the mission or function of the putative vessel itself.

DISSENT argued that the BT-213 is practically, not just theoretically, used or capable of being used, as a means of transportation on water, was not permanently moored or rendered practically incapable of transportation or movement, and therefore met the Supreme Court standard of vessel.

Hearings – Discovery

Employer’s IME request reasonable based on circumstances. *Arsement v. Production Hook-Up Service*, 39 BRBS 684 (ALJ 2005).

Employer suspended compensation per §7(d) after claimant refused to submit to examination by a neurosurgeon. Prior to employer’s request claimant had treated with or been examined by eight doctors of varying specialties, three of whom were “second opinions” at employer’s request (an orthopedic surgeon, a psychiatrists, and a pain management anesthesiologist). Employer wanted claimant to be seen by a neurologist or a neurosurgeon to evaluate claimant’s RSA and an associated request for surgical sympathectomy. The ALJ agreed it was unreasonable for claimant to refuse to submit to the examination. Claimant did not show his refusal was justified by the circumstances. Therefore, claimant was ordered to attend the exam when scheduled. Because employer had reinstated compensation the ALJ did not decide if suspension was justified and instead ordered payment of TTD as of November 2, 2000.

Hearings – Other

BRB had jurisdiction to address issue of reimbursement between carriers. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (BRB 2005).

ALJ initially held that Houston General was liable for benefits until May 2, 2001 despite a finding that INA was the responsible carrier liable for benefits due to claimant. Houston General had paid \$656,374.39 and wanted reimbursement from INA. On appeal, the Board held that there could not be two responsible carriers for one injury. It remanded the case to address the issue of reimbursement. The ALJ held that Houston General was entitled to

reimbursement of the full amount. After this decision, however, the OWCP approved a lump sum settlement of \$284,000 for the remainder of PTD and medical benefits commencing May 3, 2001. INA did not admit it was the responsible carrier. On the day the settlement was approved INA appealed the ALJ's decision and asserted that there had been a change in circumstances.

The Board held that the settlement changed nothing. The resolution of claimant's interest did not eliminate the issue of which carrier was liable for benefits prior to May 3, 2001. The identity of the responsible employer is "in respect of" claimant's compensation claim. As there was no error in the ALJ's decision, it was affirmed.

Medical Services – Other

Deference to treating physician who wanted to perform surgery when one examiner thought would be malpractice and another thought it would be inappropriate but not malpractice. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (BRB 2005).

Claimant's physician proposed surgery that a consultant thought would constitute medical malpractice. A third physician who examined claimant according to joint agreement of the parties said he would not recommend surgery but would not view it as malpractice. ALJ gave deference to the attending physician per *Amos v. Director, OWCP*, 32 BRBS 144 (9th Cir 1999), *cert. den.* 528 US 809 (1999). When the patient is faced with two or more valid medical alternatives it is the patient, in consultation with his own doctor, who has the right to chart his own destiny.

Modification – Change in Condition

No change of condition when increased wages not due to general increase in wages, claimant's seniority, or claimant's experience. *Arney v. Newport News Shipbuilding and Dry Dock Co.*, 39 BRBS 755 (ALJ 2005).

Employer sought modification of a 1985 PPD award. Claimant continued to work in the same clerk position he had at the time of his award. The ALJ thought that any increase in earning capacity seemed due to general wage increases and increases in seniority. Although claimant received three merit increases in the intervening years (in addition to cost of living increases), employer did not explain the basis for the merit increase and therefore failed to prove that these raises reflected a change in earning capacity.

Responsibility – LIE Rule

Second insurer responsible per aggravation rule. Contribution to symptoms. *Marinette Marine Corporation v. OWCP*, 39 BRBS 82 (7th Cir 2005).

Claimant injured his back on 4/8/97 when insured by Crum & Forster. He had surgery and eventually returned to work with restrictions. In May, 2001, when employer was insured by Signal, claimant's back locked up when he stepped on a ledge. His condition became

progressively worse. The ALJ concluded that the May, 2001 incident had an aggravating effect on claimant's earlier injury and found Signal responsible. The Board affirmed (even though the ALJ had improperly applied the §20 presumption, but this error was harmless). The 7th Circuit affirmed, observing that the aggravation rule does not require a later injury to fundamentally alter a prior condition. "It is enough that it produces or contributes to a worsening of symptoms."

Five hours in last employment responsible, but not responsible for payment of medical services prior to date of its employment. *Lopez v. SSA*, 39 BRBS 85 (BRB 2005).

Claimant sustained a series of accidents with different employers but returned to the casual board where his work activities exacerbated his symptoms. He filed a claim against several employers, including SSA where he had worked five hours before becoming temporarily totally disabled and having surgery. The ALJ found SSA responsible as the last employer to have subjected claimant to trauma that aggravated and accelerated his underlying bilateral shoulder, knee and elbow conditions. SSA, as the last employer, failed to prove that claimant's disability was due solely to the natural progression of his prior injuries.

SSA was found responsible for payment of medical benefits as of 4/8/03, when it employed claimant, as it could not be held liable for any expenses related to treatment provided prior to that time.

Situs – Pier, Wharf; Adjoining Area

Trestle adjacent to bridge was not a pier or adjoining area. *Gonzalez v. Saliba*, 39 BRBS 80 (BRB 2005).

The trestle on which claimant was injured was a temporary structure erected between the east and west bound spans of the Richmond San Rafael Bridge. It was constructed with timber supported by pilings driven through the bridge deck and into the bay. It allowed cranes and machinery to access the bridge while simultaneously allowing vehicular traffic to drive across the bridge during construction. The trestle originally extended from the shoreline but as work progressed it was moved down the length of the bridge and only could be accessed from the bridge.

The trestle was not a pier because it did not extend over the water from shore. It was built between the two spans of the bridge. It was not on navigable waters because it was an extension of the bridge.

Status – Integral Employment

Handyman in port facility lacked status. *Pinto v. A.G. Ship Maintenance Corp.*, 39 BRBS 777 (ALJ 2005).

After an injury claimant was transferred to a facility claimant described as a yard with a lot of containers and a lot of warehouse inside. He did handyman work there, including

cleaning the yard and warehouse, painting, making pallets and boxes, and fixing a roof. Claimant lacked status because this work had nothing to do with loading or unloading cargo on ships or any other maritime function.

Carpenter/roofer building cold storage facility to be used to store products on wharf lacked status. *Albright v. Insulated Structures, Inc.*, 39 BRBS 807 (ALJ 2005).

Claimant fell through roof insulation when working as carpenter/roofer for employer who had a contract to build a cold storage facility that would be used to store products on a wharf on navigable waters. He lacked status because his duties were not integral to the loading or unloading process. His work was perhaps integral to the storage process but not the loading and unloading process. His employer was contracted only to provide and install the single-ply roof membrane for the freezer building, the loading dock, and the battery/machine room and seal the wall/roof junction with urethane foam.

Temporary Disability – Calculation

No annual adjustments for TTD prior to date of maximum medical improvement. *Reposky v. Metropolitan Stevedoring Co.*, 39 BRBS 664 (ALJ Torkington 2005).

When injured in October, 1995, claimant's average weekly wage was \$1,259.64, two-thirds of average weekly wage was \$839.76, but the maximum compensation rate in October, 1995 was \$782.44. On July 27, 2005, claimant was awarded PTD as of August 13, 2003, when the maximum compensation rate was \$996.54. Claimant argued that TTD paid to August 13, 2003 was subject to the maximum compensation rate in effect at the time of the award in 2005. The ALJ, citing *Puccetti v. Ceres Gulf*, 24 BRBS 25 (BRB 1990), held that the maximum compensation rate for all periods prior to the August 13, 2003 was the maximum compensation rate in effect at the time of the 1995 injury.

Third Party – Notice/Consent

No bar when settlement based on condition not subject to LHWCA claim. *Newport News Shipbuilding & Drug Dock Co.*, 39 BRBS 74 (BRB 2005).

Claimant filed claims for COPD and asbestos related disease. At hearing claimant averred he did not have asbestosis and only wanted medical monitoring for his asbestos exposure. Claimant entered into settlements with third parties regarding his asbestos related disease without securing employer's approval. Claimant was awarded disability due to his COPD but also allowed medical monitoring for his asbestos exposure. Because third party settlements were related exclusively to exposure to asbestos, they did not cover his disability related to his COPD. Therefore, the claim was not barred by §33(g).

§10(h)

PTD annual increases effective as of date of maximum medical improvement rather than date award granted. *Reposky v. Metropolitan Stevedoring Co.*, 39 BRBS 664 (ALJ Torkington 2005).

When injured in October, 1995, claimant's average weekly wage was \$1,259.64, two-thirds of average weekly wage was \$839.76, but the maximum compensation rate in October, 1995 was \$782.44. On July 27, 2005, claimant was awarded PTD as of August 13, 2003, when the maximum compensation rate was \$996.54. The ALJ held that per §6(c) because claimant was "newly awarded" compensation in 2005 he was entitled to adjustments in PTD payments up to the maximum compensation rate effective that year as of the date of maximum medical improvement. [Based on facts stated in the decision, it appears that through September 30, 1997 the maximum compensation rate was less than two-thirds of claimant's average weekly wage. As of October 1, 1997, PTD payments were more than \$839.76 per week.]

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