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**NWLAA Case Law Review**  
Norman Cole, Editor

### **Appeals – Other**

**Pending remand on responsibility dispute, employer initially found responsible must continue payment of compensation.** *Schuchardt v. Dillingham Ship Repair*, 40 BRBS 1 (BRB 2005).

ALJ found Dillingham responsible for payment of compensation for death. On appeal, the Board held that the ALJ had incorrectly applied the §20 presumption and remanded the claim to determine the correct employer based on a correct application of law. Although the Board vacated the prior decision the Board held that inasmuch as decedent's death was related to employment and claimant was entitled to compensation, Dillingham remained liable for payment of compensation pending a finding that it was not the responsible employer.

### **Attorney Fees – Amount**

**Fee reduced from \$215 to \$200/hour consistent with complexity of issues, customary fee in same geographic area, and other factors. When travel time allowed.** *Baumler v. Marinette Marine Corporation*, 40 BRBS 5 (BRB 2006).

After considering customary rates for similarly complex cases in the same geographical area consistent with factors in 20 CFR §702.132, the ALJ found a rate of \$200/hour was reasonable. The Board affirmed. Claimant did not show that the ALJ abused his discretion.

Fees for attorney travel time and expenses are compensable where the travel is reasonable, necessary, and in excess of that normally considered to be part of overhead. Travel could be unreasonable if competent local counsel is available, but there must be evidence to support this conclusion.

### **Average Weekly Wage - §10(a)**

**Holidays not counted as day worked per §10(a) when claimant only worked on holidays at request of employer.** *Middleton v. Northrop Grumman Ship Systems, Inc.*, 40 BRBS 176 (ALJ 2006).

Employer argued claimant worked 251.5 days if paid holidays were counted as days of work. Otherwise, claimant worked 242.5 days. The ALJ said it was important to know if holidays were available work days on which claimant could elect to be paid rather than work, as was the case with vacation, or days on which the employer minimized its operations and did not expect employees to work. Here, claimant worked on a holiday only because he was called and asked to work. The holidays here therefore were not considered as available work days. (More days counted results in a lower average weekly wage.)

### **Credit – Same Claim**

**Overpayment recovered out of entire bi-weekly PPD payments rather than in installments when claimant working full time.** *Chang v. APM Terminals, Inc.*, 40 BRBS 113 (ALJ 2006).

Claimant received disability benefits from 3/1/04 through 4/05, when he was working, resulting in an overpayment. Claimant argued that the overpayment should be recovered by reducing each payment by 20% (8.59 years for full recovery). Employer argued that 100% of each future payment should be used to recover the overpayment (1.72 years for full recovery). The ALJ held that the method of recovering an overpayment could vary depending on the circumstances. Full recovery was appropriate here (100%) because claimant was working full time. If he needed time loss in the future it was to his advantage to have the overpayment paid off. If claimant's work status changed he could apply for an adjustment.

### **Death – Other**

**Irresistible impulse to commit suicide not proven.** *Eysselinck v. Ronco Consulting Corp.*, 40 BRBS 55 (ALJ 2006).

Surviving spouse and children of deceased contended that the worker committed suicide due to an irresistible impulse caused by work related post traumatic stress disorder. The record contained conflicting opinions from medical experts. The ALJ found employer's expert more persuasive and held that when confronted with a combination of work related and non-work related stressors claimant made an irrational decision to end his life but did not act as a result of an irresistible impulse. Claimant was not entitled to compensation.

**One year statute of limitations for death due to prior traumatic injury.** *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (BRB 2006) (Charles Robinowitz for claimant; John Dudrey for employer/carrier). (Note: The reported on-line decision is incomplete.)

Worker sustained a knee injury, and employer made its last payment of compensation in 7/01. On 4/10/02 the worker died in car crash caused by his own inebriation. On

6/6/03 claimant filed claim for death benefits contending death was due to drinking caused by depression resulting from the knee injury.

There was no evidence that depression and drinking were peculiar hazards. Death did not result from a latent disease, so the two year statute of limitations did not apply. Therefore, the one year statute of limitations for filing a claim for death applied. (There remained a material issue of fact regarding when the surviving spouse had knowledge that the injury caused death.)

### **Insurance – Coverage**

**Borrowing employer responsible. ALJ has no authority to interpret contract between lending employer and its carrier regarding obligation to extend coverage to employee of borrowing employer.** *Dinh v. Structure Services, Inc.*, 40 BRBS 200 (ALJ 2006).

Employer had LHWCA coverage with Carrier. Kye borrowed employer's employees and was a borrowing employer. Employer agreed to indemnify Kye for compensation claims filed by any borrowed employees. Carrier contends it was not subject to this indemnity agreement, refused to pay compensation when Kye's employee was injured, and contended that Kye was responsible for payment of compensation. The ALJ held that Kye, as borrowing employer, was responsible for payment of compensation, but the ALJ refused to order Carrier to pay compensation. The ALJ concluded he lacked authority to interpret contract provisions between Employer and Carrier.

### **Medical Services – Other**

**ALJ decided that medical services compensable but fee for medical services should be referred to OWCP before formal hearing.** *Smith v. Hurlburt Air Force Base Morale, Welfare, and Recreation Fund*, 40 BRBS 172 (ALJ Dorsey 2006).

Employer objected to the amount a physician charged for surgery. The ALJ held that fee disputes should be submitted to the OWCP initially. The amount the District director finds payable was then subject to a formal hearing requested by a party or by the treating surgeon.

### **Miscellaneous**

**No forfeiture for failing to report earnings when compensation not being paid.** *Delaware River Stevedores v. Difelto*, 40 BRBS 5 (3d Cir 2006).

When not paying compensation employer sent claimant three forms LS-200 per §8(j). Claimant did not return the forms. The ALJ did not award compensation to claimant during the period claimant did not report income. Although the Court thought there were good reasons why an insurer who had a possible obligation to pay compensation would want to know if a worker had income, the administrative rule, 20 CFR §702.285(a), unequivocally conditioned the obligation to report earnings on payment of

compensation. Because employer was not paying compensation, no forfeiture was allowed due to claimant's refusal to report his income.

### **Permanent Disability – Hearing Loss Claims**

**Additional 4% scheduled PPD awarded to worker with work related hearing loss due to tinnitus.** *Fisher v. Georgia Pacific Corp*, 40 BRBS 69 (ALJ Dorsey 2006) (Greg Bunnell for claimant; Del Brenneman for employer).

Worker filed a claim for hearing loss after retirement. The ALJ awarded 16.5% PPD to claimant for work related binaural hearing loss but also awarded an additional 4% due to tinnitus. The decision implies that the additional 4% is payable as a scheduled award even though nothing in the opinion suggests that claimant lost earning capacity due to his tinnitus.

**Permanent Disability – Hearing Loss Claims. ALJ averaged audiograms to calculate binaural PPD.** *Fisher v. Georgia Pacific Corp*, 40 BRBS 69 (ALJ Dorsey 2006) (Greg Bunnell for claimant; Del Brenneman for employer).

Claimant had a series of employer sponsored audiograms prior to retirement in 1997. The last employer sponsored audiogram in 1995 showed 6.6% binaural loss. From 2003 to 2005 claimant had additional audiogram which showed 26.3%, 27.2%, and 30.9%, in that order. Finding that on-site audiograms were the best measure of hearing loss when administered, the ALJ nevertheless refused to conclude that the 1995 audiogram reflected all of claimant's work related hearing loss. He therefore averaged the 1995 and the 2003 audiograms (6.6% and 26.3%) to calculate 16.5% due.

### **Permanent Disability – Other**

**Strain resolved. Degenerative disc disease caused symptoms thereafter.** *Mason v. Gulf Best Electric Co.* 40 BRBS 9 (ALJ 2006).

Claimant injured his back in 1989, received time loss, and eventually returned to his regular job, though sometimes other workers helped with the heavier lifting. In 2004 he sought more treatment and was laid off because he could not do his regular work. The ALJ held that although claimant had sustained a compensable strain, his ongoing complaints were due to the natural progression of degenerative disc disease, unrelated to the claim.

### **Situs – Adjoining Area**

**Use of the river, even for a small amount of time, sufficient to establish situs.** *Pearson v. Jared Brown Brothers*, 40 BRBS 2 (BRB 2006).

Claimant was injured while manufacturing connectors for a pontoon to be incorporated into an elevated causeway structure system that employer was building for the United

States Navy. Employer, a manufacturer of ship components and maritime products, operated its facility on a 110-acre site with 150 feet of river frontage, along the Brunswick River in Georgia. Employer's business was "within the vicinity" of the Brunswick River, and its facility was used to fabricate and construct marine parts. Employer relocated to this location to facilitate its maritime business. It shipped three large cranes by barge from its facility and used the river as a starting point for its testing of the pontoon system. The Board initially held (39 BRBS 59 (2005)) that the location had a geographical and functional nexus required under *Texports Stevedore Co. v. Winchester*, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981).

On reconsideration, *en banc*, the Board again reached the same conclusion. Only a small portion of employer's manufactured goods were shipped by water, but employer also tested pontoons while they were floating in the river. The use of the river in this manner, in addition to the small percentage of goods actually shipped via the river (1%) was sufficient to establish that the employer's facility had the requisite geographic nexus with the Brunswick River.

### **Status – Integral Employment**

**Worker constructing maritime facility had status.** *Healy Tibbits Builders, Inc. v. Director, OWCP*, 40 BRBS 13 (9<sup>th</sup> Cir 2006).

Healy Tibbits had a contract with the Navy to replace a 28 foot deck with a 50 foot deck where submarines docked. Decedent was hired by a subcontractor to dig a trench for new electrical and communication lines. The court held that harbor workers entitled to coverage included any worker who directly engaged in construction of a maritime facility, even if the worker's specific job was not maritime in nature. The court declined to interpret "employee" in a way that distinguished between those who repair equipment used in loading and unloading and those who built the facilities at which that same process took place. According to the court, both groups were essential to the loading and unloading of ship, and many of the skills necessary to repair the equipment used in that process were no more maritime in nature than those necessary to build a facility like the submarine berths in this case.

### **Third Party – Calculation of Lien/Credit**

**When compensation forfeited per §33(g)(2), claimant also must reimburse defendant for its lien for previously paid compensation.** *Benbrook v. Amerado Hess Corp.*, 40 BRBS 190 (ALJ 2006).

Claimant entered into third party settlement without giving employer notice and forfeited entitlement to compensation. Additionally, claimant was required to reimburse employer for previously paid compensation and medical benefits.

### Third Party – Other

**Maritime tort claim not subject to state act statute of limitations.** *Strong v. B.P. Exploration & Production, Inc.*, 40 BRBS 1 (5<sup>th</sup> Circuit 2006).

Claimant was injured on 10/1/98 when employed by Cardinal on a project to plug an oil well on the outer continental shelf off the Louisiana coast and received payment under LHWCA. In February, 2003 he filed a third party suit in federal court against Amoco, contending that the Outer Continental Shelf Lands Act (OCSLA) incorporated Louisiana law, which tolled the statute of limitations while claimant received benefits under the LHWCA. Otherwise, claimant's suit was barred by the statute of limitations. The court observed that three conditions must be met before state law is adopted as a surrogate federal law under OCSLA: (1) The controversy must arise on a sites covered by the OCSLA; (2) Federal maritime law must not apply of its own force; (3) The state law must not be inconsistent with federal law. Claimant conceded #1 and #3 were satisfied.

The Court held that claimant stated a maritime tort claim by asserting that his injury was caused by the cluttered, unsafe condition of the lifeboat deck. The Supreme Court consistently applied maritime law to actions arising out of a failure to adequately satisfy that duty. Thus, federal maritime law applied of its own force precluding incorporation of state law under OCSLA and prescribing claimant's third party claim.

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