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NWLAA Case Law Review
Norman Cole, Editor

Appeals – Issues.

Issue not raised before ALJ not considered on appeal. *Stewart v. Dutra Construction Co.*, 39 BRBS 54 (1st Cir 2005), on remand from Supreme Court, 39 BRBS 5 (S.Ct. 2005).

On remand from the Supreme Court, employer argued that even if the dredge was a vessel in navigation claimant was not a Jones Act seaman. The court refused to consider this argument due to employer's failure to raise these legal theories in the prior proceeding.

Appeals – Payments Pending/Stays

Payment not due pending claimant's appeal seeking reinstatement of order awarding compensation. *Charpentier v. ORTCO Contractors, Inc.*, 39 BRBS 55 (BRB 2005).

ALJ denied compensation. The Board found compensation was due. The 5th Circuit held that Board had applied incorrect legal standard and ordered reinstatement of the ALJ's decision denying compensation. Claimant petitioned for writ of certiorari with the Supreme Court and sought payment of compensation for the period between the date of the Court of Appeals order and the Supreme Court order denying writ of certiorari. Interpreting §21(c), which states that "payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court," the Board held that no payment was due. The 5th Circuit's decision meant that there no longer was any amount "required by an award." To require payment would be in conflict with the 5th Circuit's plain and unambiguous mandate conclusively establishing that claimant was not entitled to benefits.

Attorney Fees - Amount

\$300/hr to lead attorney, \$275/hr to associate lead attorney, and \$225/hr to associate attorney in complex case when attorneys especially skilled. *Baker v. Manson Construction Co.*, 39 BRBS 427 (ALJ Etchingham 2005) (John Hillsman for claimant; Richard Wooten for employer).

Claimant's attorney sought fees and costs of \$127,884.37 before OALJ from 12/9/01 through 3/31/05 (309 hours for lead attorney, 19.5 hours for associate lead attorney, 3 hours for associate). ALJ held lead counsel in the highest regard, found the case complex, and considered employer's counsel's rate of \$250/hour telling, as well as employer's counsel's fees of \$228,000, almost double that requested by claimant's counsel. Claimant recovered \$165,858.00, which was a good result. The ALJ awarded \$300/hr to claimant's lead counsel and \$275 and \$225 to other counsel, plus \$125/hr for the paralegal. Some hours claimed were reduced, primarily because the service had more to do with a Jones Act claim than with a LHWCA claim. Total approved fee was \$97,520.50.

\$235/hr awarded for most experienced LHWCA attorneys in Southern California. *Trejo v. American Ship Management*, 39 BRBS 422 (ALJ Mapes 2005).

ALJ awarded \$235/hour to claimant's attorney as this is the rate usually awarded to the most experienced LHWCA attorneys in Southern California.

Attorney Fees - Entitlement

Fee denied when overall result unfavorable to claimant. *Heinz v. Foss Maritime*, 39 BRBS 381 (ALJ Mapes, 2005) (Greg Bunnell for claimant; Russell Metz for employer).

ALJ awarded PTD for greater period of time than defendant had voluntarily paid but at a lower average weekly wage than paid, resulting in \$7,559.66 net overpayment. The ALJ denied claimant's request for fees and costs because claimant was not the prevailing party.

Causation - §20 Presumption.

§20 presumption invoked for claimant, not against a particular employer. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (BRB 2005); *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (BRB 2005).

In an occupational disease/death claim, causation is evaluated without reference to a particular employer. Any employer can rebut the presumption by producing substantial evidence that the injury was not related to or hastened by employment exposure. If rebutted, the presumption no longer controls. Once causation is established each employer bears the burden of proving that it is not the responsible employer either by proving that there was no exposure to injurious stimuli in quantities that had the potential to cause the disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer.

Death – Amount of Award

Death benefit not capped by worker's AWW. *Weeks v. US Elevator Corporation*, 39 BRBS 25 (BRB 2005).

The worker died on 6/15/76, and spouse and children were awarded death benefits. In 2002 employer asserted that benefits, with annual adjustments, now exceeded the worker's average weekly wage and therefore should be capped. In *Director, OWCP v. Rasmussen*, 9 BRBS 954 (S. Ct. 1979), the Supreme Court held that the 1972 amendments, which capped disability at a percentage of the NAWW, did not apply to death benefits due to omission of the term "death" benefits from §6(b). §9(e) of the 1984 Act states that in computing death benefits the total benefits shall not exceed the lesser of the worker's average weekly wage or the benefit the worker would have been eligible to receive under §9(b)(1). The Board held in *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (BRB 1997), that the §9(e) cap was applicable only to the initial calculation of death benefits. Therefore, benefits under the 1972 Act are not capped by the decedent's average weekly wage when the §10(f) adjustments cause the award to exceed the AWW. (They can be capped at 200% of the NAWW.)

Death – Other.

Declarations of deceased employee admissible to prove working conditions and the harm elements of a *prima facie* case. If corroborated, and un rebutted, testimony is sufficient to establish compensability. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (BRB 2005).

§23(a) provides that declarations of a deceased employee concerning the injury shall be received and shall, if corroborated by other evidence, be sufficient to establish the injury. "Injury" includes the working conditions element as well as the harm element of a *prima facie* case. If the declarations are corroborated and un rebutted they are sufficient to establish compensability.

Employer/Employee - Subcontractors

Subcontractor hired to renovate building was not a subcontractor, per §4(a), of a company in the shipbuilding and repair business. *Boyd v. Hodges & Bryant*, 39 BRBS 17 (BRB 2005).

Decent worked for H&B, a plumbing, heating, and air conditioning concern, and claimed exposure to asbestos while on a H&B job at NNS installing pipe in Ship Shed #4. H&B had no LHWCA coverage, so NNS was joined as a potentially liable general contractor per §4(a). The ALJ held that H&B was not a subcontractor of NNS.

A general employer can be secondarily liable when an injured employee is engaged in work that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors. *Director, OWCP v. National Van Lines*, 11 BRBS 298 (DC Cir 1979), *cert. den.* 448 US 907 (1980).

NNS was the owner of Ship Shed #4 and was not under a contractual obligation to renovate the building. NNS was in the shipbuilding and repair business and not in the building renovation business, and there was no evidence that NNS employees usually performed this type of work. NNS contracted out a job to an independent contractor but H&B was not a subcontractor with the meaning of §4(a).

Estoppel

Employer's stipulation that worker's claim was subject to LHWCA did not collaterally estop employer from arguing in death claim that deceased was Jones Act seaman.

Uzdavines v. Weeks Marine, Inc., 39 BRBS 47 (2d Cir 2004).

Collateral estoppel, *a.k.a.* issue preclusion, applies when (1) the identical issue was raised in a prior proceeding; (2) the issue was actually litigated and decided in the prior proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits. Here, when the worker sought compensation for asbestosis employer stipulated that the claim was subject to the LHWCA but obtained dismissal based on violation of §33. When the survivor filed a claim for compensation for death, employer argued that the worker was a Jones Act seaman. Because the parties did not litigate coverage, and counsel for employer stated that the stipulation was not binding regarding other claims brought against the employer, employer was not collaterally estopped from asserting its Jones Act argument in response to the survivor's claim.

Exclusions - Clerical

Data processors do not analyze data. This claimant not exclusively engaged in data processing and not subject to exclusion. *Lockheed Martin Corporation v. Morganti*, 39 BRBS 37 (2d Cir 2005).

Morganti spent 40% of his time testing equipment used for sonar equipment by the Navy on the Paganelli, a research barge moored on Cayuga Lake. Employer argued he was excluded as an employee engaged exclusively in data processing. The court observed that no caselaw had defined data processing but concluded that data processing did not encompass analysis of data in the sense of examining the meaning the data or drawing conclusions from the data. Morganti verified the facial validity of each test he ran by inspecting test results. He decided if results supported the conclusion that the test had been correctly administered. This task was analytical, so he was not exclusively employed to perform data processing.

Shipyard field cost clerk and payroll technician lacked status. Excluded as clerical worker. *Fountain v. Northrop Grumman Ship Systems, Inc.*, 39 BRBS 353 (ALJ 2005).

As field cost clerk in payroll department beginning in 1977 claimant gathered timecards from each of the shops, passing through the production yard to do so. In 1997 claimant became a payroll technician and group leader in timekeeping. Employees scanned their

badges to clock in rather than punch a time card. Claimant received daily printouts and went to the field to obtain corrections from supervisors. This work was excluded as clerical worker. Trips to shop were incidental to clerical function.

Shipyard senior engineer not exclusively engaged in clerical or data processing work.
Wheeler v. Newport News Shipbuilding & Dry Dock Co., 39 BRBS 49 (BRB 2005).

Claimant's employment duties as a senior engineering analyst was not exclusively clerical or data processing. He reviewed specifications for parts to be used in construction or repair of a vessel to ensure their accuracy and suitability, utilizing various database systems, computer programs, and if necessary visual inspection of parts. If parts were incorrect he would meet with engineers to recommend the appropriate part. He had to read and interpret papers and drawings.

Exclusions – Jones Act

Floating platform with clamshell bucket capable of limited self propulsion was vessel in navigation. *Stewart v. Dutra Construction Co.*, 39 BRBS 54 (1st Cir 2005), on remand from Supreme Court, 39 BRBS 5 (S.Ct. 2005).

Dutra operated a dredge, the Super Scoop, which was a massive floating platform from which a clamshell bucket was suspended beneath the water. It dumped the sediment on one of two scows floating alongside. It had a captain and crew, navigation lights, ballast tanks, and a crew dining area, but it had limited means of self-propulsion. It moved long distances by tugboat but navigated short distances by manipulating anchors and cables. On the Boston "Big Dig" project, where claimant was injured, it moved this way once every couple hours, covering 30-50 feet each time.

Claimant maintained the mechanical systems on the Super Scoop and was injured when on board Scow #4. He was feeding wires through a hatch when the scow collided with the Super Scoop, causing claimant to plunge through the hatch to the deck below. Claimant filed suit against Dutra under the Jones Act and a §5(b) suit against the "vessel" owner for negligence.

On remand from the Supreme Court, the court held that claimant was a Jones Act seaman. No factual dispute remained regarding whether the Super Scoop was a vessel capable of maritime transport.

Oiler on dredge was Jones Act seaman. *Uzdavines v. Weeks Marine, Inc.*, 39 BRBS 47 (2d Cir 2004).

Decedent worked on a bucket dredge – a large barge with a crane that scooped silt and placed it in the barge. It had a limited capacity to move itself with steel spuds. Claimant worked for 3-4 consecutive weeks as an oiler making sure that everything was running properly while the dredge was in the middle of the water and gradually moving across the

channel. His claim for asbestosis was dismissed due to a §33 violation, but after his death his survivor sought compensation.

Based on *Stewart v. Dutra Construction Co.*, 125 S. Ct. 1118 (2005), claimant conceded that the dredge was a vessel. The court held that it was in navigation (used, or capable of being used, as a means of transportation on water) because it was actively used to deepen navigation channels and could not have performed this task without the ability to transport equipment and workers across navigable waters. The deceased had a substantial connection to the vessel, without any consideration of his prior work history, that was substantial in terms of duration and nature and was not merely transitory or sporadic. Therefore the decedent was a Jones Act seaman and exempt from coverage under the LHWCA.

Cleaning barge held in place by spuds was vessel in navigation. *Bunch v. Canton Marine Towing Co., Inc.* 39 BRBS 59 (8th Cir 2005).

Claimant spent 90% of his work time on a cleaning barge moored to the bed of the Missouri River with spud poles. The barge contained water pumps, vacuum tanks, cleaning tools, a generator, a CB radio, and a satellite. It was moved once from the Illinois side of the river to the Missouri side during claimant's employment. Claimant was ferried daily to and from the barge aboard the *Sir Joseph*. He spent 10% of his time working as a deck hand on the *Sir Joseph*. Claimant was injured climbing aboard the *Sir Joseph* one day.

The court held that the cleaning barge was a vessel and thus in navigation. It was not permanently moored or anchored and it had been moved during the time claimant was employed. It was built for use in navigation and was moored in the river rather than to the shore. It floated. It may be near the outer limits of what the court would recognize as a vessel, but a vessel is not defined by its capability for self propulsion. As no other facts were disputed, claimant was found to be a Jones Act seaman.

Work on derrick barge was work as Jones Act seaman; assisted with movement of vessel. *Elliott v. Connolly Pacific Co.*, 39 BRBS 400 (ALJ Mapes 2005).

Claimant spent 75-80% of his time on three derrick barges used to unload rocks from a freight barge and use rocks to construct outer perimeter of a pier. Also working on the barges were four other workers: barge foreman, crane operator, oiler, and deck engineer. The barges moved by a process called fleeting in which the barges would slack off some anchor lines and tighten other anchor lines.

Claimant's work contributed to the mission of the barges. His connection to the vessel was substantial and certainly in excess of a 30% rule of thumb applied in other cases. A construction worker who works on barge that is anchored or secured to a pier and is on the barge when it moves is not a seaman but a worker who works on board construction barges during periods when they are being moved and assists in such movement can be a Jones Act seaman, as here, where claimant was on board when the vessel was moved and was exposed to hazards of the sea. His job was more consistent with deckhand.

Exclusions - Other

Souvenir photographer on battleship *Missouri* lacked status as employee of retail outlet. *Peru v. Sharpshooter Spectrum Venture, LLC*, 39 BRBS 43 (BRB 2005).

The Battleship Missouri Memorial operates the museum vessel *Missouri* in Pearl Harbor and subleased employer a part of the premises to use for photography production and concession site. Claimant took pictures of tourists on the vessel and offered them for sale from a booth on the pier as tourists disembarked. He banged his head on a ladder on the vessel.

Claimant was an employee of a retail outlet and therefore excluded from coverage. An outlet need not be a store in the traditional sense of having four walls and a front door. The sale of phonographs is a retail function and sufficient to come within the exclusion. Furthermore claimant's duties did not involve maritime activities.

Hearings - Evidence

Hearsay admitted. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (BRB 2005).

A transcript of a third party's testimony in a prior unrelated claim that asbestos was present at employer's shipyard was admissible but was not alone sufficient to prove that the decedent was exposed to that asbestos.

Attorney representation at hearing is not evidence. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (BRB 2005).

The ALJ accepted claimant's counsel's representation that Dr. Stiles treated spines and concluded that claimant was entitled to treat with Dr. Stiles. On appeal, the Board held that the ALJ could not rely on an attorney's representation to reach this decision.

Insurance - Coverage

Carrier burden to prove it did not provide coverage. *Belcher v. Richmond Steel Company*, 39 BRBS 235 (ALJ 2005).

Insurance ledger cards from the Virginia Workers Compensation indicated the carrier provided coverage starting in 1958. The carrier submitted a policy that indicated workers' compensation coverage, including LHWCA coverage, from 1/1/62 to 1/1/63. Claimant ended his employment for the employer in 1961 but testified that he saw claim forms with the carrier's name on it during his employment. The court held that the carrier had the burden to show the inapplicability of an insurance policy because the relevant documents could only be within the carrier's exclusive control. Carrier failed to meet its burden and was found responsible.

Medical Services – Other.

ALJ has authority to decide factual disputes including whether physician is qualified to treat claimant. District Director can determine necessity, character, and sufficiency of treatment. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (BRB 2005).

After the treating orthopedist retired claimant selected orthopedist Dr. Stiles. Employer objected, contending that claimant should select a spine specialist. After an informal conference the claims examiner agreed that claimant should select a spine specialist and directed claimant to see Dr. Carlson. On appeal, the Board held that the ALJ had jurisdiction over factual disputes, including whether claimant requested authorization, whether employer refused, whether treatment was reasonable and necessary, whether the physician's report was filed timely, and whether Dr. Stiles was qualified to treat claimant. The Board remanded the case to the district director to determine the necessity, character, and sufficiency of any treatment to be provided by Dr. Stiles and determine if treatment by another physician is desirable or necessary in the interest of the employee.

Responsibility – Hearing Loss Claims

First audiogram not determinative. Second audiogram determinative, so second and last employer responsible. *Universal Maritime Services v. Perry*, 39 BRBS 33 (4th Cir 2005).

On 10/26/00, when employed by Ceres, claimant had a baseline audiogram at the end of the work day, after exposure to usual loud noise at work. The test was administered by a technician. On 10/30/00 he began working for Universal. On 12/26/00 he had a second audiogram, but this test was performed after he had not worked for five days and was administered by an audiologist. Experts testified that the audiograms were contradictory and both could not be accurate. The ALJ found the second audiogram determinative and therefore found Universal responsible. BRB and Court affirmed.

Settlements

Settlement not set aside. Unrepresented claimant did not lack capacity to understand. *Spatcher v. Jacksonville Shipyards*, 39 BRBS 229 (ALJ 2005).

Claimant asked the ALJ to set aside a settlement for a small amount of monaural hearing loss because he was illiterate, had an IQ of 50, was mentally retarded, and claimed he did not understand nature of the settlement which he signed when not represented by counsel. There was no evidence interpreting the IQ scores in relation to his ability to understand matters. Experienced counsel initially negotiated the settlement. The OWCP approved the settlement as adequate. Claimant failed to establish he lacked mental capacity to understand or comprehend the settlement agreement.

Status – Integral Employment

Work renovating building was not maritime in nature. Lacks status. *Boyd v. Hodges & Bryant*, 39 BRBS 17 (BRB 2005).

Decedent worked for H&B, a plumbing, heating, and air conditioning concern and claimed exposure to asbestos while on a H&B job at NNS installing pipe in Ship Shed #4. At the time of employment Ship Shed #4 had been gutted and was undergoing total renovation and was not in use for shipbuilding. Decedent's work involved plumbing, heating, and air conditioning which was not inherently maritime employment. His failure to perform the job would not eventually impede the shipbuilding process. His presence on the premises was temporary.

Welder injured during training and certification school who lacked certification lacked status. *Taylor v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 22 (BRB 2005).

Claimant was hired as a welder at employer's shipyard but had to be certified before he could work on any Navy contracts. Therefore, employer ran a training and certification school for all employees. He was injured when in training.

Claimant's duties as welder trainee are not covered. They were not essential or integral to shipbuilding. The projects worked on by trainees were not used in construction or repair of ships. There was no guarantee he would ever work on a ship, since he had to receive his certification first.

Shipyard field cost clerk and payroll technician lacked status. Duties not integral to shipbuilding. *Fountain v. Northrop Grumman Ship Systems, Inc.*, 39 BRBS 353 (ALJ 2005).

As field cost clerk in the payroll department beginning in 1977 claimant gathered timecards from each of the shops, passing through the production yard to do so. In 1997 claimant became a payroll technician and group leader in timekeeping. Employees scanned their badges to clock in rather than punch a time card. Claimant received daily printouts and went to the field to obtain corrections from supervisors. This work was not integral to loading, unloading, constructing or repairing a vessel. Trips to shop were incidental to clerical function.

Union agent lacked status. *Warren v. Lockheed Shipbuilding*, 39 BRBS 444 (ALJ Etchingham 2005) (Charles Robinowitz for claimant; Russell Metz for employer/carrier).

Claimant's work history included work as a manager of Local 541, Seattle Ship Scalers union, which merged with Laborer's Local 252, and as business agent for the local. He helped enforce the collective bargaining agreements with the various shipyards by handling complaints and grievances that employees brought to him. His office was 3-7 miles from the shipyard. He spent 50-70% of his time in the office and otherwise spent time at shipyards investigating complaints and resolving disputes or socialized with workers.

The ALJ held that this employment lacked status. He had no authority to interrupt work and was not an integral or essential part of unloading or loading a vessel.

Status – Navigable Waters

Status due to injury on navigable waters on shuttle boat ride from barge to shore.

Lockheed Martin Corporation v. Morganti, 39 BRBS 37 (2d Cir 2005).

Morganti spent 40% of his time testing equipment used for sonar equipment by the Navy on the Paganelli, a research barge moored on Cayuga Lake. He had a fatal accident on a shuttle boat returning him to shore from the Paganelli. The Paganelli had been moored to buoys since 1982, but the Paganelli could be disconnected from the buoys within minutes. Cayuga Lake is connected to the Erie Canal system which means that a boat could sail to any ocean connected port in the world.

Cayuga Lake is a navigable waterway because it is used or is susceptible of being used as a highway for commerce. Because the lake is physically capable of supporting shipping it is possible at any time for an interstate commercial vessel to enter the lake.

Morganti's time on the Paganelli was time on navigable waters, rather than time on a fixed platform. Therefore, the court declined to consider application of the transient and fortuitous exception.

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