



P.O. Box 9124 Portland, Oregon 97207

NWLAA Case Law Review
Norman Cole, Editor

Appeals - Issues

Employer failed to raise §8(f) before Director, OWCP, but Director waived defense. *Devor v. Department of the Army*, 41 BRBS 77 (BRB 2007).

Claimant failed to request §8(f) at the OWCP level. The Director did not raise or plead this defense at the OALJ level. Therefore, the Director waived this defense.

Appeals – Timeliness

Time to appeal decision tolled when motion for reconsideration filed. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (BRB 2007).

A request for reconsideration within 10 days of filing of an ALJ Decision and Order tolls the time for filing an appeal of the decision with the Board. 20 CRF §802.206(f) contemplates one appeal of a case to the Board and provides that if a motion for reconsideration is filed with the ALJ, a previously filed notice of appeal is premature, and any party desiring Board review must wait until the ALJ resolves the motion and files his decision. At that time, the initial decision and any decisions on motions for reconsideration may be appealed.

Attorney Fees - Amount

250/hour reasonable. Rate awarded to other LHWCA attorneys relevant but not alone determinative. Laffey Matrix, and Morones Survey not credited. *D.V. v. Cenex Harvest States Cooperative*, 41 BRBS 84 (BRB 2007) (Charles Robinowitz for claimant; John Dudrey for employer/carrier).

Attorney sought \$350/hour but ALJ found that \$250 was commensurate with necessary work performed, given complexity of issues and good quality of representation. District Director awarded \$235.00.

Claimant cited *Missouri v. Jenkins*, 491 US 274 (1989) and *Blum v. Stenson*, 465 US 886 (1984), which require a fee in fee shifting statute to be based on

prevailing market rates. The 4th Circuit recognized in a longshore case that evidence of fee awards in comparable cases is generally sufficient to establish the prevailing market rates in the relevant community. The ALJ provided a rational basis for rejecting claimant's assertion that \$350 was his normal billing rate since he had not billed paying clients at that rate and also rejected counsel's assertion that \$350 was the market rate in Portland with trial attorneys with his experience, as the affidavit lacked information from which the ALJ could judge its accuracy. The *Laffey* matrix was based on a very small sampling in complex years long litigation by preeminent counsel and bears no resemblance to normal LHWCA cases. Reference to the Morones Survey was rejected because claimant failed to establish his firm's comparability to the firms in the survey, which were commercial litigation firms.

Attorney Fees - Entitlement

Claimant can be ordered to pay fees per §29(c) when no fees payable by employer. *Andrepoint v. Murphy Exploration & Production Company*, 41 BRBS 73 (BRB 2007), on reconsideration. (Prior decision reported at 41 BRBS 1 (BRB 2007).)

Even though claimant successfully established entitlement to PPD and PTD, the Board held that claimant's attorney was not entitled to a fee. §28(a) did not apply because employer had paid some compensation. §28(b) did not apply because employer had *accepted* the OWCP recommendation that claimant was *not* entitled to additional compensation. On reconsideration, the Board affirmed its prior decision.

The Board remanded to the ALJ to consider liability for fees per §28(c), payable as a lien on compensation, but the ALH must consider claimant's financial circumstances.

Board denies fees under §26(b) when some compensation paid, controversy develops, but no informal conference held, except in circuits that specifically hold otherwise (i.e., 9th Circuit). *Davis v. Eller & Company*, 41 BRBS 58 (BRB 2007).

Employer voluntarily paid some TTD. Claimant successfully sought reinstatement before an ALJ. The ALJ awarded \$14K in fees and costs, even though no informal conference had been held. On appeal, the Board noted that it previously approached fee liability consistent with 9th Circuit caselaw, which allowed fees, regardless of the literal terms of the statute, if claimant's counsel established entitlement to increased compensation. Noting that the 4th, 5th, and 6th Circuits had taken a strict construction approach to fee liability under §26(b), the Board concluded that it hereafter would follow the strict construction approach in all circuits except those that had specifically followed the 9th Circuit. Here, because no informal conference had been held, and §26(a) clearly was not applicable, claimant's counsel was not entitled to an employer paid fee.

Average Weekly Wage - §10(a)

Holidays counted as days worked per §10(a) when not paid for the holiday. *D.T. v. Rogers Terminal & Shipping Corporation*, 41 BRBS 531 (ALJ Etchingham, 2007) (Charles Robinowitz for claimant; Wm. Tomlinson for employer).

In the year before his injury, claimant, a longshoreman, earned \$63,644.08. He actually worked 223 days (86% of available days). He received 120 hours of vacation pay but could have worked every day in the year and still received this payment. He was paid for 14 holidays but worked on four of them.

The ALJ held that §10(a) applied because, per *Matulic v. Director, OWCP*, claimant worked more than 75% of the workdays of the measuring year. Furthermore, citing *Price v. SSA*, 38 BRBS 25 (9th Cir 2004), claimant's employment was not seasonal or intermittent, and there were no fixed, determinable periods of inactivity during claimant's work year that justified using §10(c). Vacation did not count toward a day worked because it was payable whether or not claimant worked. The ALJ counted holidays for which claimant was paid but did not work as a work day because claimant received wages for an actual day off work. Claimant therefore worked 233 days (223 actually worked + 10 holidays paid but not worked). This resulted in an average daily wage of \$273.15, yielding annual earnings of \$71,019.14 and an AWW of \$1,365.75.

Course & Scope - Other

Claimant's unsafe, unreasonable, and unjustified behavior removed him from course and scope of employment. *N.R. v. Halliburton Services*, 41 BRBS 403 (ALJ 2007).

Claimant had a one year contract to work in Afghanistan as an electrician on an army base, chose to end the contract early, and was attempting to leave the base and return to the US without a military escort, contrary to established policy, his contract, and direct orders from military police. He was injured when military police tried to stop him from leaving the base. The ALJ held that claimant's behavior and conduct transcended the "zone of special danger" and flaunted the very reason for expanded protection afforded under the Defense Base Act. He became so thoroughly disconnected from the service of his Employer that it would be unreasonable, unjustifiable, and irrational to conclude that his injuries arose out of and in the course of his employment.

Credit – Other Claims

No credit/lien for short term disability benefits paid by Railroad Retirement Board. Not made by a qualifying trust fund. *S.K. v. Duluth, Missabe, and Iron Range Railway*, 41 BRBS 447 (ALJ 2007).

Claimant's carpal tunnel syndrome was compensable and resulted in temporary disability. The Railroad Retirement Board (RRB) paid claimant \$10,380.00 for short term disability. Employer asserted a lien for reimbursement of RRB benefits, *i.e.*, an offset of benefits due to claimant under the LHWCA. The Board held no offset was allowed. §16 prohibits assignment and release, except per §8(i). §17 provides an exception if benefits are paid to claimant from a trust fund under §302(c) of the Labor Management Relations Act of 1947. In those circumstances, the Secretary shall authorize a lien on benefits in favor of the trust fund. Employer failed to prove that RRB benefits were made by a trust fund of a nature described at 20 USC §186(c). Claimant may be liable under 45 USC §362(o) to reimburse the Employer, but the LHWCA prohibits offset of the amount paid to claimant by the RRB.

Medical Services – Other

ALJ has jurisdiction over necessity, authorization, and refusal of medical treatment. District Director has jurisdiction of character and sufficiency of medical treatment and choice of pharmacy. *Potter v. Electric Boat Corporation*, 41 BRBS 69 (BRB 2007).

Several claimants with accepted claims wanted to select a different mail order provider for prescription medication than the provider designated by employer, claiming that the designated provider's services were inappropriate or delayed. The district director held that employer met its §7(a) obligations, but claimants sought a hearing before an ALJ. The ALJ held that the type of "facts" raised by claimants should be decided by the district director, with right of appeal to the Board. Claimants appealed the ALJ's decision.

The Board held that claimants did not have a right to select a pharmacy or provider of prescription medication. The district director had authority to supervise medical care and had authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished. The ALJ retained authority to address issues of fact concerning medical benefits such as whether claimant requested authorization for treatment and employer refused the request, and whether specific treatment was necessary for the work related injury.

Here, claimants did not raise issues of fact concerning authorization or refusal or necessity of medical care that require adjudication by an ALJ. The issues fall within the district director's supervision of care, as they concern the character and sufficiency of any medical care furnished or to be furnished the employee.

Modification - Other

Petition was not anticipatory filing. *Kea v. Newport News Shipbuilding & Dry Dock Company*, 41 BRBS 23 (4th Cir 2007).

Seven days after a formal compensation order awarded claimant temporary disability for his leg injury claimant's attorney sent the OWCP a claim for compensation with a request for *permanent* disability and modification of the prior award. Claimant did not request an informal conference. Eventually, after obtaining evaluations from physicians, the parties agreed that claimant had 14% impairment, but employer refused to pay because claimant failed to file a timely petition for modification. The ALJ and Board held that the initial letter to the OWCP was a anticipatory filing which was not sufficient to constitute a valid petition for modification.

The Court reversed. The initial letter indicated an actual intent to seek compensation for a particular loss, *i.e.*, permanent partial disability, and was not a vague request to preserve a right to any and all benefits that might become due in the future. The prior compensation order only awarded temporary disability. Furthermore, there was no requirement in the Act that an informal conference be sought or scheduled in conjunction with a request for modification. After claimant filed a valid petition "everyone dropped that ball. That is unfortunate, but it does not change the sufficiency of the modification request or render the request untimely."

Status – Significant Time; Load/Unload/Repair/Break

Status because occasional, but regular job moving containers between terminal and railhead, other terminals, or warehouse within Port of Oakland, *i.e.*, when involved in intermediate steps of moving cargo between ship and land transportation *W.B. v. Sea-Logix*, 41 BRBS 89 (BRB 2007).

Claimant spent the majority of his time transporting containers between marine terminals and inland customers outside of the Port of Oakland. One time per month, on average, claimant moved cargo from a marine terminal to a railhead, between maritime terminals, or from a marine terminal to employer's adjacent warehouse, all located within the Port of Oakland. The claim was based on cumulative trauma to head, back and knee during employment from March 1, 2003 to the date of the hearing.

Claimant spent at least some time in covered activity. The Board rejected the "point of rest" theory, which advocates coverage only for those employees who move cargo from the vessel to the initial point of rest on the pier or terminal area. Instead, coverage extends to workers involved in intermediate steps of moving cargo between ship and land transportation, as here. His membership in the Teamster's union was not determinative.

§8(f) – Preexisting Manifest Disability

§8(f) allowed when preexisting disability and second injury arose out of same employment with same employer. *Electric Boat Corporation v. Demartino*, 41 BRBS 45 (2d Cir 2007).

Although the court did not find that exposure to asbestos after 1970 was sufficient to establish a second injury for purposes of §8(f) relief, the Court held that §8(f) relief was available to an employer where an employee's preexisting disability and second injury both arise out of the same course of employment with the same employer. This conclusion encourages employers to retain partially disabled employees. The possibility that an unscrupulous employer might deliberately cause a worker to suffer a second injury to limit their liability should not defeat the employer's claim for §8(f) relief absent evidence suggesting employer engaged in such a practice.

Preexisting disability when returned to regular work after first injury but with permanent physical restrictions. *Devor v. Department of the Army*, 41 BRBS 77 (BRB 2007).

Claimant injured his right shoulder while working for employer in 1977. After two surgeries he returned to work with restrictions. In the following year he tripped at work, hit his head and shoulder against the wall, and was diagnosed with a chronic rotator cuff tendonitis/tear and had another surgery. ALJ held that claimant did not have a preexisting disability for purposes of §8(f). The Board observed that a preexisting permanent partial disability is not limited to an economic disability but includes any serious lasting physical condition that would motivate a cautious employer to discharge the employee because of an increased risk of compensation liability. Claimant's prior shoulder injury was a serious, lasting condition for which his doctor assigned permanent physical restrictions, sufficient to qualify under §8(f).

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