



P.O. Box 9124 Portland, Oregon 97207

NWLAA Case Law Review
Norman Cole, Editor

Appeals – Other

Filing requires formal action by OWCP. *Grant v. Director, OWCP*, 41 BRBS 49 (9th Cir 2007).

On December 13, 2005 an ALJ issued an Order of Dismissal and sent it to the OWCP. Upon receipt the next day the OWCP took no further action; it neither dated, filed, or served it on the parties, contrary to 20 CFR §702.349. On January 18, 2006 claimant mailed a notice of appeal to the BRB. The BRB summarily dismissed the appeal.

HELD, filing requires an affirmative, formal act, which was not done here. Because such action was not completed, it is immaterial for purposes of the appeal whether filing also requires service of the order upon the parties by the District Director. Claimant's notice of appeal was premature because the order was not filed.

Attorney Fees - Amount

\$350/hour denied; \$250/hour awarded. *B.C. v. SSA*, 41 BRBS 107 (BRB 2007) (Charles Robinowitz for claimant; John Dudrey for Employer/carrier.)

Attorney sought \$350/hour but was awarded \$250/hour for most services. ALJ rejected claimant's evidence of higher hourly rates awarded to attorneys in longshore cases in other cities and rejected his statement that he had charged clients \$275 to \$300/hour because attorney did not indicate if those fees were contested, nor did he discuss which factors may have led to awards of those rates. The ALJ also rejected evidence regarding rates awarded to counsel by the 9th Circuit in *B.C.* and by the Oregon Court of Appeals and declined to rely on the Laffey Matrix and Marones Survey. ALJ's findings were rational, and the ALJ did not err in relying on evidence of awards granted by other ALJ's to counsel.

Attorney Fees – Entitlement

Penalty for late payment of award is compensation. Fees available from District Court per §28(a) if attorney secures entitlement to penalty, but no fees available for services in other forums. *Tahara v. Matson Terminals, Inc.*, 41 BRBS 53 (9th Cir 2007).

Six days after a compensation order awarding \$104,163,81, employer delivered a check payable to claimant to claimant's attorney. The attorney returned the check by mail, stating he was not authorized to accept it. Claimant received payment more than 10 days after the award and then sought and received a supplementary order awarding a 20% penalty. Claimant filed a complaint in district court seeking enforcement of the order. Employer filed a complaint with the Hawaii Office of Disciplinary Counsel (ODC) regarding the attorney's conduct. Eventually, the district court awarded judgment on the pleadings. Attorney then sought \$31,500 in fees, of which \$20,000 was for defending himself before the ODC. District Court awarded \$6,060.00. Claimant appealed.

Court held that the 20% penalty was compensation because it was a money allowance payable to an employee. Because claimant utilized an attorney to secure payment of compensation that the Employer declined to pay, claimant was entitled to a fee per §28(a). Services performed before the ODC were not services necessarily done "before" this court. Therefore, the District Court lacked jurisdiction to award fees under §28 for those services. The award of \$6,060.00 was affirmed.

Insolvent claimant not ordered to pay fee to attorney. *R.A. v. Murphy Exploration & Production Co.*, 41 BRBS 1205 (ALJ 2007).

BRB held that Employer was not liable for payment of attorney fees even though claimant had been awarded greater benefits than those recommended by the District Director. The Board indicated that fees could be a lien against compensation after taking into account claimant's financial circumstances. On remand, the ALJ found that amount claimed was reasonable, but because claimant was not financially able to pay the fees, and his monthly income almost exceeded his monthly living expenses, he lacked the ability to pay any reasonable amount for fees. The ALJ voiced objection to the circuit court's decision on which the Board relied but nevertheless held that claimant's attorney could not recover a fee from the claimant.

Average Weekly Wage - §10(a)

§10(a) used, looking at shipyard wages only, even though claimant had additional income from self-employment. *A.D. v. Northrop Grumman Ship Systems*, 41 BRBS 769 (ALJ 2007).

In the year before a February 16, 2005 injury, claimant worked as shipfitter 176 8-hour days, 23 10-hour days, and 7 holidays. (176+23+7 = 212.) Beginning August 2004 claimant worked a second job as a self employed commissioned mortgage loan originator. The ALJ calculated an average weekly wage based on shipyard earnings only because the injury did not affect his ability to perform work as a mortgage originator. The ALJ also used §10(a) because claimant

worked substantially the whole of the year, even though at some point his schedule shifted from 5 days to 4 days per week, based on working 212 days (including holidays). (212 was more than 75% of 260 days a five day per week worker employed all year would work.)

Not unfair or unreasonable to use §10(a) based on exceptionally high Iraq wages.
V.S. v. USA Environmental, Inc., 41 BRBS 839 (ALJ 2007).

Claimant worked as a ammunition handler in Iraq from January, 2005 until November 25, 2005, when he developed work related gastrointestinal symptoms. The employment offer indicated he would work 6 days per week. He worked 276 days from January to November, or 90% of the 300 days required of a six day per week worker. Therefore, he worked substantially the whole of the year. Employer argued §10(a) could not fairly and reasonably be applied because his earnings in Iraq were extraordinary and atypical. Citing *Proffitt v. Service Employers International, Inc.*, BRB 06-0306 (8/14/06), the ALJ concluded that claimant's injury cost him the loss of future earnings in Iraq, and post injury events generally are irrelevant in consideration of AWW, and wages paid were consistent with job he was performing. Therefore, the ALJ used §10(a) based on earnings from Iraq employment.

Average Weekly Wage - §10(c)

§10(c) allows consideration of post injury factors and earnings of similar workers.
S.K. v. Service Employers International, Inc., 41 BRBS 123 (BRB 2007).

Claimant worked as a school teacher in Houston before working in Iraq as a laundry worker. She was injured after spending 5-3/7 weeks in Iraq, having earned \$4,776.12, or \$879.82/week during 5 weeks of work. In a modification proceeding, claimant argued that the ALJ did not consider earnings of similarly situated employees or the amount of overtime claimant would have been expected to work. Based on earnings of other employees, claimant argued she would have earned \$1,475 to \$1,525.85/week. The ALJ refused to consider prospective wages. The Board reversed and remanded, holding that per §10(c), the ALJ can consider post injury factors where earnings do not realistically reflect claimant's wage earning potential, and may consider wages of employees similar to the claimant. (Also, the ALJ should have divided by 5, rather than 5-3/7 weeks.)

Concurrent Disability – PPD/PTD/TD

Concurrent scheduled award not allowed if onset is after PTD. *B.S. v. Bath Iron Works Corporation*, 41 BRBS 97 (BRB 2007).

Claimant worked for employer from 1987 until 3/15/04, when he stopped due to a compensable back condition which resulted in TTD from 3/15/04 through 5/24/04 and PTD thereafter. Claimant also sought compensation for hearing loss based on

a 10/24/04 audiogram, though he also had audiograms when employed. The ALJ awarded compensation for both injuries as long as total compensation did not exceed maximum compensation.

The Board held that claimant could not receive scheduled PPD and total disability simultaneously if the scheduled disability had its onset after total disability. If PPD is based on the 10/24/04 audiogram, and the date of injury is 3/15/04, the date of last injurious exposure preceding the audiogram, claimant is not entitled to a separate award for hearing loss. The case was remanded to determine if claimant was entitled to a scheduled award based on hearing loss that predated claimant's total disability. In that event, he can receive a scheduled award for the appropriate number of weeks to the point he became totally disabled, at which point any scheduled award would terminate.

The Board also indicated that if claimant had a prior unscheduled disability, it would fashion a different result, because the average weekly wage for the new injury should reflect the residual loss of earning capacity, so claimant could receive both awards without experiencing double recovery.

Employer/Employee – Borrowed Servant

Temporary staffing company not the employer. Indemnity clause not enforced.

C.L. v. ITS Enterprises, Inc., 41 BRBS 1069 (ALJ 2007).

ITS, a staffing company, sent workers to ESCO. ESCO controlled wages, hours, and conditions of employment. ITS only provided payroll and insurance services. ESCO did not have LHWCA insurance. ITS allowed its LHWCA policy to lapse before the claimant's date of injury. The ALJ concluded that ESCO was responsible for payment of compensation because it had control over the claimant and the work he performed. Additionally, the ALJ refused to enforce an indemnity provision in the contract between ITS and ESCO because interpretation of the agreement was not integral to deciding the compensation claim.

Hearings – Other

Compensation can be suspended before Order suspending compensation issued.

B.C. v. International Marine Terminals, 41 BRBS 101 (BRB 2007).

Employer suspended compensation from December 21, 2005 to August 2, 2006 due to claimant's refusal to be reexamined by Dr. Colvin. The ALJ found that claimant's refusal was not reasonable or justified and concluded that employer properly suspended benefits, per §7(d)(4). The Board held that this section did not require employer to obtain an order prior to suspending benefits due to claimant's unreasonable refusal to undergo and examination or treatment. Furthermore, suspension can be retroactive to date of commencement of the refusal. "Claimant is not entitled to control the circumstances under which he will

be examined and cannot reasonably refuse to be examined by a physician of employer's choosing on the ground that he lacks confidence in the physician."

Interest

Simple, not compound interest due on past due compensation at rate specified in 28 USC §1961. *B.C. v. SSA*, 41 BRBS 107 (BRB 2007)(Charles Robinowitz for claimant; John Dudrey for Employer/carrier.)

The Board declined to overturn longstanding precedent that under normal circumstances, prejudgment interest awards under the Act should be calculated on a simple, rather than compound, basis, and based on 28 USC §1961 (weekly average 1 year constant maturity Treasury yield, as published by the Federal Reserve).

Medical Services – Choice of Physician

No justification to change physicians. *B.M. v. Port Labor Services*, 41 BRBS 1092 (ALJ 2007).

Claimant treated with his physician for more than seven years after injury. This physician performed three surgeries, prescribed therapy, and provided other treatment but was not willing to perform additional surgery. Claimant sought a second opinion, and the new physician offered surgery as a treatment option. Both physicians were board certified orthopedic surgeons. The ALJ held that claimant failed to show good cause for a change in physician. The first physician did not fail to adequately provide care or demonstrate disinterest.

Miscellaneous

ILWU lien acknowledged. *B.S. v. Ceres Marine Terminals, Inc.*, 41 BRBS 1150 (ALJ 2007).

ALJ held that Hampton Roads Shipping Association – International Longshoremen's Association Welfare Fund was entitled to a lien, per §17, on claimant's disability, not to exceed the amount of the lien or the amount of disability owed to claimant, whichever was less.

Permanent Disability - Other

ALJ defers to AMA Guides as reasonable. *T.P. v. P&O Ports Baltimore, Inc.*, 41 BRBS 1121 (ALJ 2007).

Employer's expert relied on *AMA Guides*, 5th edition, to rate 12% impairment, which included pain, loss of function, and loss of endurance. Claimant's doctor

rated 22%, based on 12% under *Guides*, plus 10% for subjective factors (pain, loss of function, and loss of endurance). The ALJ concluded that the use of the *Guides* was not mandatory but was rational and reasonable. The ALJ relied on the rating from employer's expert, finding his opinions well reasoned and well documented.

Situs – Navigable Waters, Adjoining Area

Airplane flying over ocean to and from Hawaii was not “on navigable waters” or on an adjoining area. *C.C. v. Tecnico Corporation*, 41 BRBS 129 (BRB 2007).

Claimant's employer sent him to Hawaii to install sheet metal on a ship and paid for flights to and from Hawaii and east coast and paid for part of his travel time. He developed bilateral deep vein thrombosis and superficial phlebitis due to sitting during the long flights. The Board held that claimant was not on navigable waters when he was over or above it on this flight.

The Board distinguished *Zapata Haynie Corporation v. Barnard*, 24 BRBS 160 (4th Cir 1991), where claimant was on navigable waters when in an airplane engaged in a traditional maritime activity of fish spotting. Here, claimant's work was traditionally land based, and claimant was not required to do his job from the aircraft. He was commuting, and the commercial airplane was not engaged in any maritime activity.

The injury also was not on an adjoining area because the airliner was not customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel.

§8(f) – Preexisting Manifest Disability

§8(f) denied because prior audiogram was not presumptively valid. *T.C. v. Maersk Pacific, Ltd.*, 41 BRBS 779 (ALJ 2007).

None of the four prior Kaiser audiograms had an accompanying report explaining the results to the claimant. They therefore did not meet the regulatory standards to be considered presumptive evidence of the level of hearing loss. A 5th audiogram from Dr. Brosanan provided no indication that the equipment had been calibrated and therefore did not meet the standard for presumptive evidence. The ALJ refused to grant §8(f) relief because none of the prior audiograms was presumptively valid.

Note: §8(13)(C) of the LHWCA states when an audiogram is presumptive evidence of the amount of hearing loss sustained. 20 CFR §702.441(b) outlines elements necessary to establish presumptive validity of an audiogram. 20 CFR §702.321(a)(1) states: “If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements

of Sec. 702.441. Neither the Board or any court has held that 20 CFR §702.321(a)(1) is valid with respect to §8(f) applications.

For purposes of §8(f) in 1st Circuit, preexisting disability must be manifest before claimant leaves employment. *W.D. v. Bath Iron Works Corporation*, 41 BRBS 119 (BRB 2007).

W.D. worked until January 26, 1987 but had his last exposure to asbestos in 1970. He had emphysema caused by a long history of smoking, a cardiac condition, and work related asbestosis. Asbestosis was diagnosed in March, 2005. Pulmonary function test in 1981 showed an obstructive respiratory deficit. The ALJ concluded that prior to diagnosis of asbestosis, claimant had a preexisting lung disability due to smoking that was manifest to employer and that contributed to a materially and substantially greater disability than the disability caused by asbestosis alone and awarded §8(f) relief. Director appealed, contending that non-occupational pulmonary disease was not manifest prior to the last injurious exposure to asbestos. This case arose in the 1st Circuit. The Board held that per *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 32 BRBS 19 (1st Cir 1998), the date of injury in a latent disease does not occur at the time of exposure. The retiree's preexisting disability must have been manifest to the employer prior to the date he left employment. The second injury occurs when the claimant becomes aware of his injury and not when last exposed to injurious stimuli during employment.

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