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NWLAA Case Law Review
Norman Cole, Editor

Appeals – Other

Board did not send employer its order but that did not excuse employer's failure to file a timely appeal to the circuit court. *Mining Energy, Inc. v. Director, OWCP*, 38 BRBS 85 (4th Cir 2004).

On 5/30/02 the Board issued its final order. On the same day it sent employer's counsel a copy of a Board decision, also dated 5/30/02, issued in a different case. It did not serve employer's counsel with the correct decision. On 10/28/02 employer petitioned for review in the circuit court.

The court dismissed the appeal, holding that the sixty days allowed to file an appeal begins when the decision is filed with the Clerk. Although the Board was required by administrative rule to serve a copy of the decision on the parties, the failure to serve the decision did not extend the period allowed to appeal or modify the statute to define "issuance" as meaning filing and serving. Furthermore, the due process clause did not guarantee a right to appellate review, providing that due process had been accorded in the tribunal of the first instance. In a footnote the court observed that because employer's counsel was served with an unrelated decision, employer was placed on notice that a decision in one of its cases likely had been rendered by the Board, and employer should have conducted an appropriate follow-up inquiry.

Employer entitled to cease payments as of date of decision. *Charpentier v. Orteco, Inc.*, 38 BRBS 575 (ALJ 2004).

The ALJ denied compensation, the Board reversed, and the 5th Circuit reinstated the ALJ's order. Employer began payment after the Board issued its order but ceased payment as of the date the 5th Circuit issued its decision. Claimant unsuccessfully requested rehearing and petitioned the Supreme Court for certiorari. Thereafter claimant sought payment of compensation until 5th Circuit's decision became final when all appeals were exhausted.

The ALJ held that the 5th Circuit's decision vacated the Board's opinions, so there was no order in effect requiring payment to claimant. Thus, employer was entitled to discontinue payment when the 5th Circuit issued its decision.

Attorney Fees – Entitlement

Fee awarded by OWCP when employer controverted but later accepted conference recommendation. *Clark v. Chugach Alaska Corporation*, 38 BRBS 67 (BRB 2004) (Peter Preston for claimant; Matthew Ammerman and Thomas Fitzhugh for employer/carrier).

Employer controverted a claim under the Defense Base Act. Claimant hired an attorney. At informal conference employer conceded that the injury was compensable and claimant was entitled to temporary disability, though the compensation rate was not mentioned because claimant's W-2 forms had not been received. Twelve days later the OWCP examiner addressed the AWW, but by then employer had started paying at a higher rate. In a subsequent letter employer accepted the informal conference recommendation. The district director then awarded a fee to claimant's counsel. Employer argued that no fee should be awarded because the claim had not been adjudicated.

The Board held that although there had not been adjudication of the claim, no party had sought formal adjudication, and claimant was not seeking additional compensation. Claimant met the plain language requirements for employer's liability under §28(a) because employer declined to pay benefits initially, claimant hired an attorney, and claimant then obtained payment of benefits sought. Claimant successfully prosecuted the claim, in that he obtained the disability and medical benefits he sought. "To require something more, such as an order or settlement ... exceeds the requirements of the Act and is not consistent with Congressional intent of securing prompt and voluntary payments."

Average Weekly Wage - §10(a)

§10(a) applied when worked 91% of available workdays and is based on a theoretical approximation of what claimant could have earned if he worked every available work day. *Gulf Best Electric, Inc. v. Methe*, 38 BRBS 99 (5th Cir. 2004).

Finding that claimant had worked 91% of the workdays available in the year before the injury, the court held that claimant had worked substantially the whole of the year preceding the injury. The ALJ used §10(c), citing concern over the fairness of possible overcompensation because he did not think §10(a) was designed to show what claimant could earn under ideal circumstances. This conclusion was contrary to *Ingalls Shipbuilding v. Wooley*, in which the court said that the calculation mandated by §10(a) "aims at a theoretical approximation of what a claimant could ideally have expected to earn had he worked every available work day in the year. The court remanded the claim for recalculation per §10(a).

In FN 1, the court noted that overcompensation alone did not usually justify applying §10(c) rather than §10(a) because overcompensation was built into the system institutionally. When congress amended §10 it must have realized that due to illness, vacations, strikes, etc., virtually no one works every working day of every week.

Causation – OD Claims

Stress claim cannot be based on legitimate personnel decision. *Pool v. Lambert's Point Docks, Inc.*, 38 BRBS 682 (ALJ 2004).

Claimant sought compensation for depression from work as superintendent and safety defendant, interactions with supervisors and co-workers, and termination of employment. After finding that the §20 presumption of compensability had been rebutted, the ALJ concluded that claimant failed to prove that his physical injury was causally related to working conditions. Furthermore, although it was undisputed that claimant entered the hospital immediately after his

termination of employment, a psychological injury resulting from a legitimate personnel action was not compensable because to hold otherwise would unfairly hinder an employer in making a legitimate personnel decision and conducting its business. *Marino v. Navy Exch.*, 20 BRBS 166 (BRB 1988). Claimant made serious mistakes on a project at work, subjecting employer to the possibility of enormous liability, and testimony indicated that claimant's termination was the proper consequence of his mistakes.

Employer/Employee – Independent Contractor

Independent contractor per relative nature of the work test. *Johnson v. C-Port, LLC*, 38 BRBS 625 (ALJ 2004).

Claimant injured his right knee on 6/23/03 while working as a welder on a ship terminal construction project. He testified that he had been working for C-Port on a slip construction project for two months and that he had previously worked for C-Port continuously for 1-2 years in 1998 or 1999, after which he worked at Martin Terminal until it was bought out by C-Port. Before 5/1/03, when he began the work at C-Port, he worked for several entities. He was paid an hourly rate without any benefits. He was told to give notice if he thought he would miss work and believed he would not keep his job if he missed 2-3 days of work in a row. Each day a C-Port supervisor gave instructions on what projects to complete, but he was not told how to weld. Claimant provided his own basic tools but C-Port provided equipment and materials. Occasionally, he was sent to other job sites run by C-Port. An undated indemnity agreement stated that claimant was an independent contractor and was responsible for providing his own insurance. He worked 50-60 hours per week for C-Port on the slip project. After the injury he did isolated welding work and some limited work for a welding contracting company.

The ALJ applied the relative nature of the work test which requires an examination of the nature of a claimant's work and the relation of that work to the alleged employer's regular business. Factors include the skill required to do the work, degree to which the work constitutes a separate calling or enterprise, the extent to which the work might be expected to carry its own accident burden, whether the work was a regular part of the employer's regular work, whether claimant's work was continuous or intermittent, and whether the duration of the claimant's work was sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job.

Applying the test here the ALJ concluded that claimant was not an employee. The nature of the work was specialized. His welding service was his own separate enterprise. He was not paid for days he did not work. His work was not a regular part of C-Port's business because the projects will end upon completion for the structure. His work history as a whole was not indicative of continuous regular work with C-Port.

Exclusions – Clerical

Clerical exclusion though work integral to shipbuilding. *Stalinski v. Electric Boat Corporation*, 38 BRBS 85 (BRB 2005).

Claimant worked in Quality Assurance from 1984 to 1996. She primarily worked in an office overseeing computer documentation and recording of pipe hangers and pipe joints installed by employees on US Navy submarines. The parties did not dispute that claimant's duties were integral to the vessel production process, but such work can be excluded if exclusively clerical and office oriented.

She did not inspect parts to be installed or handle shipbuilding materials. Her trips outside of the office were incidental to her clerical work and too sporadic to warrant coverage. On the rare

occasions when she worked out of the office she continued to do clerical work. Accordingly, she was excluded from coverage.

Exclusions – Jones Act

Vessel definition: used or capable of being used as a means of transportation on water. “In navigation” is element of vessel status as watercraft. *Stewart v. Dutra Construction Co.*, 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. Dutra contended that although claimant was a member of the Super Scoop’s crew, the Super Scoop was not a vessel for purposes of the Jones Act because its primary function was dredging rather than transportation and because it was stationary at the time of injury. The District Court granted summary judgment and the Court of Appeals affirmed.

An 1873 statute provided that in any act passed subsequent to 2/28/1871 a “vessel” includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water. The statute did not require a watercraft be used primarily for transportation. The LHWCA and Jones Act necessarily adopted this definition, which has not been changed by statute. Many cases used this definition to conclude that dredges were vessels. A watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

A vessel need not be in motion to qualify as a vessel, though it may lose its character as a vessel if it is withdrawn from the water for extended periods of time. The “in navigation” requirement is an element of the vessel status of a watercraft. It is relevant to whether the craft is used or capable of being used for maritime transportation. The issue is whether its use as a means of transportation on water is a practical possibility or merely a theoretical one. In some cases this may be a jury question.

Because the Super Scoop was engaged in maritime transportation at the time of claimant’s injury it was a vessel. Accordingly, the court reversed the decision of the Court of Appeals.

Floorhand/crane operator on submersible mobile oil drilling rig was Jones Act seaman. Rig was a vessel because it could be moved. *Reed v. Falcon Drilling Co., Inc.*, 38 BRBS 813 (ALJ 2005).

Claimant worked on three types of drilling rigs (submersible, offshore jack up, and inland barge), all of which operated over water. As a floorhand he broke down pike connections, and as a crane operator he unloaded boats and moved pipe from racks to the floor where it was connected to a drilling unit. When injured he was working as a crane operator on Falrig 77, which had 3 caissons providing buoyancy during submerging and emerging operations and was

designed to drill oil and gas wells at maximum water depth of 85 feet and drilling depth of 30,000 feet once the rig was towed to location. It had a crew of 28 and had to undergo US Coast Guard inspection and certification.

The ALJ held that the Falrig 77 was a vessel. It had the ability to be moved or towed from place to place on a regular basis. Claimant's duties contributed to the function of the vessel or the accomplishment of its mission, and claimant had a substantial connection to the vessel in terms of duration and nature. He spent 30% or more of his time in the service of the vessel.

Maximum & Medical Improvement

Date of maximum medical improvement when physician ceased treatment, not when claimant refused surgery. *Gulf Best Electric, Inc. v. Methé*, 38 BRBS 99 (5th Cir. 2004).

Claimant refused to undergo surgery recommended by his physician, but the ALJ concluded that claimant's refusal was reasonable and justified because there was no guarantee he would improve function with surgery. The ALJ nevertheless concluded that claimant reached maximum medical improvement on 6/8/00, apparently the date when claimant refused surgery, even though his physician continued to treat him until 9/13/01, hoping that he would improve. By then, the physician said that he had actually worsened and declared, in hindsight, 6/8/00 as the date of MMI.

HELD, the ALJ's decision to rely on the attending physician's retrospective determination was error and inconsistent with *Abbott v. La. Ins. Guaranty Assn*, 40 F3d 122 (5th Cir. 1994). One cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed even if, in retrospect, it turns out not to have been effective. As a matter of law, the date of MMI was 6/8/00.

Four years retroactive TTD ordered when claimant not reached maximum medical improvement because employer failed to fully authorize treatment. *Earnshaw v. Sea-Land Service, Inc.*, 38 BRBS 731 (ALJ 2004).

Without consulting claimant's physician, the adjuster assigned to the claim refused to authorize physical therapy for claimant's knee in excess of the frequency allowed in Alaska state claims even though she knew such limits were not applicable to LHWCA claims. Because the therapy ended prematurely, claimant's recovery was limited, and he was not able to reach maximum medical improvement. Although defense medical examiners subsequently questioned the veracity of claimant's complaints, the ALJ noted that competent physicians can hold divergent views about the causes of pain and appropriate treatment for it. "My role is not to determine whether Dr. Brooks' [defense IME] views about surgery and therapy are better supported than those of the treating physicians ... It is not the insurance adjuster's role either. These are precisely the issues the decision in *Amos v. Director* ... forbids me to become involved in. Evidence from Dr. Brooks does not prove that the treatment decisions of the doctors Claimant chose ... were beyond the pale of the debatable." Because claimant had been deprived of the physical therapy his physician had recommended, had not reached maximum medical improvement, and had not been able to return to suitable and gainful employment, the ALJ reinstated TTD retroactively and ordered it continued until claimant reached maximum medical improvement.

Medical Services – Other

Attending physician not entitled to deference when issue is not whether treatment is reasonable. *Darrell R. Grenz v. Cascade General*, designated as not-published (BRB #04-0550, 2/18/05) (George Wall for claimant; Gene Platt and Ronald Atwood for employer/carrier).

Employer discontinued payment of benefits based on a doctor's report stating that his work related burn condition had resolved. Claimant disagreed, based on reports from the attending physician, Dr. Noall. The ALJ discounted Dr. Noall's opinions, finding them inconsistent and unpersuasive. The Board, citing the 9th Circuit's opinion in *Amos v. Director*, noted that an ALJ may give special weight to a treating physician's opinion when there are conflicting opinions regarding the course of treatment and no doctor states that the course chosen by the claimant and his physician was unnecessary or unreasonable. Here, however, the issue was whether the injury continued to cause problems, not whether the course of treatment was reasonable. Under these circumstances, the ALJ may determine how to credit and weigh the evidence of record. The ALJ's findings were supported by the record and therefore were affirmed.

ALJ gives deference to attending physician but finds IME more persuasive. *Heinz v. Foss Maritime*, 38 BRBS 782 (ALJ Mapes 2005) (Greg Bunnell for claimant; Russell Metz for employer).

The ALJ observed that although a treating physician's opinion is entitled to special weight, and clear and convincing reasons must be given for rejecting an uncontroverted opinion of a treating physician, a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. In this claim the ALJ treating physician thought claimant reached maximum medical improvement on 2/24/03, whereas IME Dr. Button thought claimant reached maximum improvement on 2/16/00. The ALJ deferred to Dr. Button, citing six reasons why Dr. Button's conclusion was more persuasive than views expressed by other physicians.

Miscellaneous

§8(j) forfeiture not allowed because employer failed to use correct DOL form. *Cheetham v. Bath Iron Works Corporation*, 38 BRBS 80 (BRB 2004).

Employer paid PTD to claimant per Maine's workers' compensation act but subsequently received information that claimant was working. It then terminated payments and claimant's employment for fraudulently failing to report income while receiving workers' compensation. The ALJ awarded claimant PPD for his injury and declined to invoke the forfeiture provision of §8(j), though he did refer the case to the United States Attorney for an investigation per §31(a) because he concluded that claimant had knowingly and willfully made false statements or representations regarding his work status and earnings.

§8(j) entitles an employer to request earnings information from a claimant not more than semiannually on forms specified by the Secretary (LS-200). Instead of using the approved form, employer requested information every 90 days on a form issued by the State of Maine Workers' Compensation Board. It did not advise the claimant that failure to respond could result in forfeiture, nor did it warn of criminal penalties for fraudulent misrepresentation. The Maine form was not the equivalent of the LS-200. To obtain forfeiture per §8(j) employer must follow the established procedure and comply with the Act and regulations. Accordingly, the Board affirmed the ALJ's decision denying forfeiture.

Permanent Disability – *De Minimis* Award

***De minimis* award allowed because claimant had a permanent disability and significant potential that the injury would cause diminished earning capacity in the future.** *Keenan v. Director*, 38 BRBS 90 (9th Cir. 2004).

Following a shoulder injury claimant returned to work as a clerk and earned significantly more than he had earned at time of injury. The court held that if there was a chance of future changed circumstances which, together with the continuing effects of the injury, created a significant potential of future depressed earning capacity, he should receive a *de minimis* award to preserve the opportunity for modification. Future depressed earning capacity could occur if claimant lost his clerical position due to changed market conditions and had to compete in the open market for longshoreman jobs. His injury was permanent and substantial. The significance of the injury was a substantial factor in the significant potential of diminished capacity test articulated by *Rambo II*. The absence of economic loss thus far did not reflect an underlying absence of loss in physical function. Accordingly, the court held that claimant was entitled to a *de minimis* award.

DISSENT argued that a possible change in market conditions resulting in future layoffs is insufficient to justify a *de minimis* benefits. The injury itself must cause the diminished wage earning capacity. Furthermore, the ALJ held that with his seniority and history he was well positioned to obtain future longshore jobs. The majority erroneously implied that anyone with a permanent partial disability should receive a *de minimis* award. There must be a significant potential for future wage loss, not merely a current disability. Also, the dissent did not agree that claimant's injury was substantial. He had not seen a doctor for over a decade.

Permanent Disability – PTD

PTD because claimant diligently sought but could not secure employment. *Fortier v. Electric Board Corporation*, 38 BRBS 75 (BRB 2004).

Despite a continued job search claimant could not find suitable work because she either lacked the requisite experience or was overqualified. The ALJ held that security guard positions listed in employer's labor market survey might be suitable, but claimant was PTD due to her inability, despite due diligence to obtain any form of suitable alternate employment.

The Board agreed that employer need not act as an employment agency and find an actual job offer for the claimant or even convey to claimant information about current available jobs, but it must establish the existence of jobs open in the community that claimant could compete for an realistically and likely secure. The evidence employer offered regarding the security guard position was sufficient to demonstrate suitable alternate employment. Claimant, however, rebutted employer's showing of the availability of suitable alternate employment by diligently trying and failing to find a suitable job. Here, claimant contacted several employers listed in employer's labor market surveys and was unable to obtain employment and searched at other places not listed on the surveys. The ALJ's finding that claimant made a diligent effort to secure a position was rational and supported by substantial evidence.

PTD awarded in spite of sheltered employment as night security guard. *Campbell v. ADM/Growmark Rover System, Inc.*, 38 BRBS 773 (ALJ 2005).

Following a compensable injury employer offered claimant a position as a night gate guard. Before assigning claimant this position employer had not used an evening shift guard. The things claimant did as a night guard were previously either not done at all or taken care of by other employees on an *ad hoc* basis. The position required no specific training or certifications

and there was no on the job training. Duties involved signing vehicles in and out and walking around to check on general security. Claimant worked one month in this position and then was assigned to the day shift security guard position. The day job involved more than just signing in trucks and checking general security. Employer did not replace claimant on the evening guard shift.

The ALJ held that the night security job was sheltered employment. Observing that sheltered employment was employment that was designed for the primary benefit of the employee, a job for which the employee was paid even if he could not do the work or was unnecessary, or a position which the employee would not necessarily be replaced if he was terminated and where he was treated with “kid gloves, implying that the work was of little benefit to the employer and wages were not justified by his service, the ALJ held that employer had no need for the night security position before or after claimant performed it and there were few clerical tasks that would have justified paying claimant a salary at the top end of the scale for security guards. Therefore, claimant was entitled to PTD during the period he worked as a night shift security guard. (The day shift job was suitable and gainful employment, however.)

Permanent Disability – Scheduled PPD

ALJ denies *de minimis* scheduled PPD award. *Boyd v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 654 (ALJ 2004).

The District Director issued a compensation order awarding 10% PPD for the left leg. He had another surgery, returned to work, and sought additional PPD, which the ALJ refused to award. Claimant then filed a claim for a 1% nominal award, contending that he would need another surgery sometime in the future.

The ALJ held that *Potomac Elec. Power Co. v. Director, OWCP (PEPCO)*, 14 BRBS 363 (1980), limits claimant’s entitlement to compensation for PPD to the Act’s schedule. He is not entitled to additional compensation under §8(c)(21).

Permanent Disability – Unscheduled PPD

Shoulder is unscheduled per “situs of injury” rule. *Keenan v. Director*, 38 BRBS 90 (9th Cir. 2004).

Claimant had a right shoulder injury which restricted strength related activities especially above chest level. He returned to work as a clerk, earning significantly more than at time of injury. He sought a scheduled award, arguing that he had impairment in the use of his arm below the shoulder and the shoulder itself was an injury to the arm because the shoulder was a part of the arm.

The Court held that claimant was not entitled to a scheduled award. An injury to Body Part X resulting in functional impairment to Body Part Y is classified according to X and not according to Y, per the “situs of the injury” rule. Furthermore, a long line of cases hold that a shoulder injury is unscheduled.

PPD not based on difference between actual economic position and hypothetical economic position. *Keenan v. Director*, 38 BRBS 90 (9th Cir. 2004).

Following a shoulder injury claimant argued that even though he was earning significantly more than at time of injury, his loss of earning capacity should be calculated by comparing what he could have earned if he had not been injured with what he is actually earning. The court rejected

this argument, holding that disability should be based on the difference between pre-injury average weekly wage and post-injury wage earning capacity.

Situs – Adjoining Area

No situs when work 4-6 miles from waterfront in regular business area. *Hood v. Container Maintenance Corporation*, 38 BRBS 698 (ALJ 2004).

Claimant's last maritime employer before an audiogram was Container Maintenance. His employment met the status test because he worked as a chassis mechanic, and chassis were used to transport containers to and from the port. The employment was an essential or integral element of the loading or unloading process. Claimant nevertheless was not injured on a covered situs. The facility was located 4-6 miles from the waterfront and was not contiguous with any water. The area between the facility and the waterfront was filled with businesses, restaurants, and public roads. It was located in a business park. Claimant did not do actual work on the Port or an area closer to navigable waters. While there was a functional nexus to the waterfront, it did not have the requisite geographical nexus. It would be inappropriate to extend coverage so far inland to a regular business area.

Situs – Pier, Wharf

Temporary construction trestle adjacent to bridge not a covered situs (pier). *Gonzalez v. Tudor Saliba*, 38 BRBS 794 (ALJ Torkington 2005).

Claimant was assigned to work on a trestle that had been erected adjacent to a bridge that was being seismically retrofitted to protect against earthquake damage. The trestle was a temporary structure located at the Marin end of the bridge and consisted of mats supported by temporary pilings constructed by driving the piles through the bridge deck and placing the mats on top. The trestle extended into the Bay from the shoreline. As construction on the bridge progressed the mats and pilings furthest inshore had to be removed and reinstalled offshore. As it was built outwards it could only be accessed from the bridge. Claimant's work involved welding, fitting, and building and breaking down the trestle and assembling a handrail on the bridge. He worked over the water. The trestle was never used for loading or unloading material from ships or barges.

Claimant argued that the trestle was a pier and therefore covered. The ALJ held that the trestle was not covered because it was not a pier. At the time of the accident it did not extend from land to navigable waters. It was more analogous to an extension of the bridge, and bridges were generally excluded from coverage. It did not fit the 9th Circuit's definition of pier, in *Hurston v. Director, OWCP*, of "a structure built on pilings extending from land to navigable water."

Temporary Disability – Entitlement

ALJ denies *de minimis* TPD award. *Boyd v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 654 (ALJ 2004).

The District Director issued a compensation order awarding 10% PPD for the left leg. He had another surgery, returned to work, and sought additional PPD, which the ALJ refused to award. Claimant then filed a claim for a 1% nominal award, contending that he would need another surgery sometime in the future.

The ALJ held that was entitled to seek a *de minimis* TPD award per §8(e) and *Gillus v. Newport News & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.* 37 BRBS 120 (4th Cir. 2004), but he was not entitled to a *de minimis* award here because he had already received PPD and he had

reached maximum medical improvement. There was no evidence that his condition had changed or that his condition was temporary and was expected to improve. Thus, he did not have a claim for TPD and was precluded from a *de minimis* award.

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