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## NWLAA Case Law Review Norman Cole, Editor

### Attorney Fees – Entitlement

**Unsuccessful prosecution & recovery was less than tender. No fees.** *Richardson v. Continental Grain Co.*, 37 BRBS 1103 (9<sup>th</sup> Cir. 2003) (Meagan Flynn for claimant, Thomas McElmeel for employer/carrier).

Employer voluntarily paid compensation for a knee injury from 10/22/97 to 1/31/98 and for a subsequent back injury from 12/10/96 to 5/5/97. Employer stopped paying in May, contending that claimant was fabricating his back injury. On 5/21/97 employer received a claim for his back injury. Nearly two years later the employer offered to settle both claims for \$5,000. Claimant rejected the offer. The back and knee claims were consolidated for hearing. The Board concluded that claimant was entitled to \$932 for his knee injury and nothing more for his back. He had not fabricated his injury, but its influence had ended in 3/97. The Board denied claimant's request for fees for his back and knee claims.

No fees were due in the back claim because the prosecution was not successful. He did not obtain some actual relief that directly benefited him. There was no actual relief – only the possibility of future relief.

No fees were due in the knee claim because claimant did not satisfy his burden of showing how much of the \$5,000.00 settlement offer was for each claim. Absent such evidence, the \$932.00 award for the knee (plus zero for the back) was less than \$5,000 and was sufficient to constitute a tender. The only contingency was that claimant drop both claims, a term that is implicit in all tenders because they are made to satisfy a debt or obligation.

### Claim – Date of Awareness

**Death claim timely. Lack of subjective and objective awareness of relationship of death to employment.** *Bath Iron Works Corp. v. USDOL (Knight)*, 37 BRBS 67 (1<sup>st</sup> Cir. 2003).

Claimant's spouse died due to an asbestos related cancer (mesothelioma). At time of death no physician had told claimant or her spouse that the cancer was due to asbestos. Three years later claimant filed a claim for compensation due to his death after her attorney had secured a report from another physician who concluded that the cancer had been caused by inhalation of asbestos. Claimant contended she first learned of a causal link between her spouse's death, asbestos, and employment in 8/99, when she read the new medical report, three months before she filed a claim. The ALJ concluded that claimant had no reason to believe, much less suspect, that there existed a relationship between her husband's disease, his death, and his employment until 8/99. Employer argued that although claimant may not have actually known, by reason of

medical advice, that there was a relationship, she should have known through exercise of reasonable diligence.

The Court held that substantial evidence supported the ALJ's findings with respect to her lack of subjective knowledge and objective knowledge. Evidence supported the ALJ's finding that claimant had no reason to believe, much less suspect, that the cancer was anything other than fortuitous. Furthermore §20(b) created a presumption that notice of injury and claim for benefits were timely filed.

### Credit – Other claims

**Two successive separate injuries. Settlement of one injury does not absolve other injury from payment but other injury will be entitled to an appropriate credit, not necessarily equal to settlement funds.** *New Haven Terminal Corp. v. Lake*, 37 BRBS 73 (2d Cir 2003).

Claimant injured his back on 2/17/93 when working for New Haven as a longshoreman. His AWW at the time of this injury was \$782.82. He had a second injury on 11/25/97 when employed by Logistec but settled this claim on 7/7/99 for \$30,000 plus \$8,059.47 in fees and costs. The settlement was premised on an AWW of \$629.32. In the meantime claimant pursued his claim against New Haven. The ALJ awarded temporary and permanent disability for periods between 2/17/93 and 11/25/97 based on a residual earning capacity of \$489.79 (a loss of \$293.03) but terminated payments after 11/24/97 because disability then was due solely to the 1997 injury – an intervening cause which broke the chain of causation between the 1993 injury and claimant's present condition. The ALJ also held that claimant had completely recovered from the 1993 injury when the 1997 injury occurred and the second injury had aggravated the first injury. The BRB reversed, holding that the defense of intervening cause applied only to non work related events, and noting that there was no evidence to support the finding that the 1993 injury had resolved before 1997. New Haven appealed.

The Court held that the last employer rule, which usually applies in occupational disease claims, was not a defense. The aggravation rule, also known as the two injury rule, applies to multiple discrete and exacerbating injuries, and provides that where an injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. It is not a defense for the first employer but is an extension of liability that promotes administrative efficiency and guarantees full recovery. Permitting the employer to use the rule as a defense would frustrate the goal of complete recovery. The credit doctrine may still apply, however, to reduce the last employer's compensation by the amount of prior compensation paid for the aggravated injury.

The claim was remanded to determine whether and to what extent the first injury contributed to the second injury. If the settlement with the second employer was in good faith and was not done to manipulate the aggravation rule, claimant may still recover from the first employer. The ALJ should determine if the second settlement was excessive so as to convince claimant not to pursue a full recovery, per the aggravation rule, and instead seek a partial recovery from the first employer. The ALJ should determine if the settlement overcompensated claimant for Logistec's share of the liability and then credit any overcompensation to New Haven's liability. If it undercompensated claimant for Logistec's share, New Haven should only pay for its share of the liability, and not for Logistec's.

Claimant demonstrated he was disabled in physical and economic terms due to work related injuries in 1993 and in 1997, but the court did not think it was clear to what extent the 1993 injury contributed to his current disability.

### Exclusions – Jones Act

**Deckhand on rig/crane barge Jones Act seaman. Barge was a vessel in navigation, not work platform.** *Temple v. Associated Terminals, LLC*, 37 BRBS 493 (ALJ 2003).

Claimant was assigned to the *Russel Knight*, a barge with a crane affixed to it which was brought by tug boat to an ocean going vessel to unload the cargo of the ship onto cargo barges in the middle of the Mississippi River. He spent 60-85% of his time on the crane barge by doing various tasks, including maintenance of the crane and operation the winches, but he also assisted loading and unloading operations by serving as a flagman for the crane operator (when on the ocean going vessel) or by helping to remove the covers of the cargo barge. Claimant was injured when he was sandwiched between two fiberglass covers on a cargo barge and sought compensation under the LHWCA. Employer asserted he was a Jones Act seaman on a vessel.

HELD, the *Russel Knight* is a vessel. Its was constructed to transport the crane and its crew to ships and barges anchored in the Mississippi River for the purpose of loading and unloading cargo. Even though it served as a work platform its transportation function was hardly incidental to its function.

Claimant's duties contributed to the function of the vessel in accomplishing its mission, which was to load and unload cargo. Claimant had a connection to the vessel that was substantial in duration and nature. He was a Jones Act seaman and not covered by the LHWCA.

### Miscellaneous

**Employer/owner of vessel immune from civil suit because any negligence occurred in role as employer, not as vessel owner.** *Stewart v. Dutra Construction Co.*, 37 BRBS 93 (1<sup>st</sup> Cir. 2003).

Dutra owned and operated a dredge, the *Super Scoop*, and the *Scow 4*, which transported and dumped in the sea material dredged by the *Super Scoop*. Claimant spent most of his time on the *Super Scoop* maintaining its mechanical systems but occasionally did maintenance tasks on the *Scow 4*. One day, when working on the *Scow 4*, the *Super Scoop's* crew moved the scow, causing claimant to fall through an unguarded open hatch. He filed a Jones Act and a §5(b) suit against Dutra. In prior litigation that employer was granted summary judgment on the Jones Act claim because the *Super Scoop* was not a vessel in navigation. In this decision claimant contested an earlier decision granting summary judgment on the §5(b) claim.

For purposes of the LHWCA all parties agreed that the *Super Scoop* and *Scow 4* were vessels. The issue was whether the employer's alleged negligence was committed in its capacity as employer, for which it is immune from liability, or as a vessel owner, for which it may be held liable under §5(b). The court rejected a "functional" approach that would focus on the specific activities of the employee to determine if the employee's actions were benefiting the defendant in its capacity as vessel owner or employer at the time of injury. Claimant was hired to perform tasks relating to dredging and occasional maintenance work on both vessels. He was performing his regular duties as an engineer on a dredging operation. Such work is was not inherently vessel oriented and not employment oriented. The claim was barred by §5(b).

The owner of a dual capacity vessel can be liable if it breaches any of three duties: (1) Turnover duty – the duty to turn over the ship and its equipment in such condition that an expert and experienced stevedore will be exercise of reasonable care carry on its cargo operations with reasonable safety; (2) After stevedoring operations have begun the owner will be liable if it maintains active control over an area or operation and is negligent in this capacity. A ship owner has the duty to intervene if it acquires knowledge that the vessel or equipment poses a danger and the stevedore is not exercising reasonable care to protect its employees from that risk.

These arguments were not raised before the district court, so the appellate court refused to consider them on appeal.

**Order of forfeiture applies to scheduled PPD in addition to TTD. Employer was not paying compensation when questionnaire sent.** *Briskie v. Weeks Marine, Inc.*, 37 BRBS 583 (ALJ 2003).

On 2/11/03 ALJ Brown issued an Order of Forfeiture as of 12/15/00 because claimant had failed to respond to employer's LS-200 request for earnings information. Claimant reached maximum medical improvement and returned to regular employment on 9/20/00. He argued that he should receive 25% scheduled PPD for his right lower extremity notwithstanding the forfeiture order and that no response to the LS-200 was necessary because he was not receiving compensation when he received the LS-200. He finally responded to the LS-200 on 6/27/03.

Factors that determine whether an employee has a duty to respond include whether the employer was paying or may have to pay benefits for the period during which it requests a reporting. Only the claimant can make this determination. Claimant bears the risk of not reporting. Here, he considered himself a disabled employee as he planned to pursue ongoing claims. He forfeited all benefits for all periods prior to 6/27/03 when he finally responded.

#### **Modification – Change in Condition**

**Modification does not require proof of change of condition or newly discovered evidence. Modification may occur upon further reflection of the record.** *Jensen v. Weeks Marine, Inc.*, 37 BRBS 99 (2d Cir. 2003).

An ALJ held that claimant had not injured his low back but had permanent impairment of his leg equal to 4%. Finding vocational evidence insufficient, the ALJ awarded PTD. Employer then developed additional medical and vocational evidence and petitioned to modify the award. The ALJ denied the motion, finding that employer could have obtained and presented this evidence at the initial hearing. Employer appealed, and the BRB remanded with instructions to consider the evidence that suitable alternative employment was available. The ALJ awarded unscheduled PPD. Both parties appealed, and the Board directed the ALJ to review the entire record. The ALJ denied modification and employer appealed again. The Board remanded again and directed the ALJ to consider the specific evidence offered by employer and to determine if there was a change in circumstances. The ALJ granted the motion for modification to all already paid PPD award, thereby denying future disability. Claimant appealed.

The court held it was not necessary for a modification petitioner to make some threshold proffer of new evidence before it is entitled to a review of the entire record. The ALJ is not bound by any prior fact findings. The ALJ should reconsider all of the evidence for any mistake of fact or change in conditions.

The ALJ's ultimate finding on remand that claimant could perform in suitable alternate employment, when viewed in light of the record as a whole, is supported by substantial evidence.

#### **Modification – Mistake in Fact**

**Modification allowed after claimant impeded vocational evaluation.** *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (BRB 2003).

Claimant injured both knees and initially was awarded PTD after the ALJ found employer's vocational evidence inadequate to prove suitable employment was available because of claimant's poor verbal skills or lack of experience. On appeal employer argued that claimant had refused to meet in person with employer's vocational expert, and that prevented him from knowing about claimant's verbal deficiencies. The Board affirmed the decision but suggested that

employer could petition for modification based on a mistake in fact. Employer did so, and the ALJ awarded scheduled disability in lieu of PTD.

The Board noted that an ALJ has broad discretion to correct mistakes of fact based on new evidence cumulative evidence, or further reflection on the evidence initially submitted. Claimant's failure to cooperate justified a reexamination of the evidence. As employer's new evidence provided a basis for a mistake in fact, the ALJ acted within his authority to reopen the claim under §22. Furthermore, on modification employer presented evidence that provided a more accurate evaluation of claimant's capabilities. The ALJ was not bound by prior determinations of fact and was entitled to base a decision on all of the evidence. Substantial evidence supported his conclusion that a telephone surveyor job was available and suitable.

### **Permanent Disability – Unscheduled PPD**

**Layoff from post injury suitable employment did not entitle claimant to PPD.** *Daniels v. Dataline, Inc.*, 37 BRBS 529 (ALJ 2003).

Following a compensable injury on 4/4/00 claimant returned to work for employer in a higher paying, less physically demanding, but suitable job as an administrative assistant from 4/17/00 through 9/8/00. She was laid off on 9/8/00 due to an economic reduction in force. The ALJ concluded that administrative assistant job became her regular or usual employment. Because the injury did not prevent her from returning to this work, and the administrative assistant job paid more than her job at time of injury, he concluded that she had not experienced a loss of wage earning capacity and was not entitled to compensation.

### **Status – Integral Employment**

**Safety trainer lacked status.** *Scott v. Trump Indiana, Inc.*, 37 BRBS 83 (7<sup>th</sup> Cir. 2003).

Claimant's employer, Total Marine, contracted with Trump Indiana to supply and service the *Trump Casino's* life rafts and provide life raft training to *Trump Casino* employees. Claimant developed a training course on the deployment of life rafts and safe evacuation of a ship and taught this course to personnel from the *Trump Casino* and other clients. The majority of the training was at Total Marine's facility in Mokena, Illinois, but claimant estimated he spent 25% of his time on client vessels "servicing or doing needs analysis, developing training or doing on-site training." On 4/4/97 claimant was injured while observing a life raft drill on the *Trump Casino*. He filed suit against Total Maine under the Jones Act and against Trump Indiana under §5(b) of the LHWCA. The court granted summary judgment. Claimant did not appeal the Jones Act decision but did appeal the decision on the §5(b) claim.

HELD, claimant did not have status as a maritime employee. His position was Director of Training. As such he spent his time on clients' vessels servicing or doing needs analysis, developing training or doing onsite training. He was not directing or participating in a safety drill. He was merely observing it. He fell outside the scope of the LHWCA.

**Road construction foreman on port property lacked status.** *Terlemezian v. J.H. Reid General Contracting*, 37 BRBS 112 (BRB 2003).

When a train crossed McLester Street within the port property, found to be a covered situs, it prevented car and truck traffic from moving. Claimant was a foreman on a project designed to lower the roadway for vehicular traffic and build a bridge over the road for the rail traffic. He was injured during this work.

HELD, claimant lacked status. The project had the potential to increase the volume of containers moving through the port but it did not affect the loading or unloading process at the time of injury. His work was not integral to loading or unloading or that his failure to perform the work would impede

the process. The road improvement project was to remote from the stream of maritime commerce to confer status as a maritime employee.

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