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LHWCA CASELAW SUMMARY

Decisions published in WESTLAW through December 6, 2020
Decisions posted by BRB at https://www.dol.gov/brb/decisions.htm:
published through September 23, 2020; unpublished through October 30, 2020
Distributed December 6, 2020

Attorney Fees - Amount

District Director must explain why requested fee payable by claimant was reduced. *Carr v. Earl Industries, Inc.*,, 2020 WL 6505203 (BRB 20-0281, 10/23/20) (unpublished).

> Claimant's counsel submitted a petition to the district director seeking $5,122.14 in fees, payable by the claimant. The district director acknowledged claimant's agreement to pay the fee but summarily awarded a $1,000.00 fee. The Board remanded. The district director must provide specific reasons if she does not approve the fee and provide specific reasons for an alternative fee award.

Claim – Date of Awareness

Claim for sleep disorder construed as claim for psychological condition and separate sleep disorder. Dissent argues heightened pleading and proof requirement contrary to law. *Carrasco v. Triple Canopy, Inc.*, 2020 WL 6505179 (BRB 19-0485, 19-0485A, 9/29/20) (unpublished).

> Claimant worked for employer as a security guard in the Green Zone in Baghdad from October 2005 until his termination in October 2010. He returned to Peru to work as a taxi driver but developed sleep problems allegedly due to his work schedule, nightmares, hypervigilance, loneliness,

anxiety, negative thoughts, and distrust of others. He first sought medical attention in August 2016 from a doctor who diagnosed work related PTSD. On October 14, 2016 he filed a claim stating: "As a result of living and working in a war zone and experiencing the horrors of war [I] suffered psychological injury." In the prehearing statement and closing argument he sought benefits for a "harm in the form of psychological symptoms" with his sleep disorder comprising his "primary concern." The ALJ concluded claimant filed a claim for psychological injury/PTSD *and* for a sleep disorder, proved his sleep disorder was compensable, but failed to prove he had PTSD or any other mental disorder. Because claimant was aware of his work related sleep disorder no later than October 2010 his claim for the sleep disorder was untimely.

The Board affirmed the ALJ's conclusion regarding timeliness but held claimant did not make a claim for an independent sleep disorder. As claimant did not established the existence of a psychological condition it is unclear how claimant's sleep problems manifest a psychological condition distinct from PTSD. On remand the ALJ must determine if claimant proved his sleep symptoms were a psychological harm resulting from a compensable psychological condition or that his sleep disorder constitutes a discrete psychological harm.

DISSENT agreed claim was time barred but thought claimant was entitled to medical services for his work related sleep disorder because claimant adequately pleaded and developed his claim and working conditions caused his sleep disorder. Whether considered satisfied by his original claim form or alternatively, subsequently amended by his brief, claimant met the Act's pleading requirements. Nothing required claimant to prove he suffered from what the majority terms a psychosocial condition distinct from PSD to receive medical benefits for his work related sleep disorder. The act cover work related sleep conditions whether they are a distinct disorder or merely symptoms of a broader disorder, whether psychological or non-psychological in nature. All that mattes is the condition, however classified, be a work related harm. The majority's heightened pleading an proof requirements plainly misconstrue the Acts requirements.

Evidence – Expert Medical Evidence

Dosimetry tests unpersuasive. *Monnens v. TEMCO, Inc.*, 2020 WL 6505201 (BRB 20-0255, 10/30/20) (unpublished).

Claimant had 12.5% binaural impairment per a May 2004 audiogram, nearest in time to the beginning of claimant's employment in 2005. He

retired on July 31, 2015 and had another audiogram on October 2017 showing 36.3% binaural impairment. The ALJ awarded compensation. Employer appealed. The Board affirmed.

Employer relied on dosimetry testing on five supervisory employees on January 30 and October 4, 2018 allegedly showing claimant's work would have exposed him only to non-injurious noise and on testimony from an expert witness, Dr. Langman. The ALJ held testing did not account for claimant's specific work duties of periodic inspections of the facilities. Dosimetry confirmed lay testimony that certain areas of the facility were very loud to dangerously loud, and on some days clamant was in these areas for extended periods. The ALJ gave little weight to Dr. Langman's opinion work could not have caused any hearing loss for several reasons, including Dr. Langman did not approach the case in an objective manner, his opinion was undermined by an inaccurate understanding of claimant's work duties, and he relied on the OSHA standard for the time weighted average and exchange rate (90 dB, 5 dB) rather tan the NIOSH standard (85 decibels, 3dB). Given the dispute over the proper methodology for interpreting dosimetry testing, the testing shows at least a genuine possibility noise exposure at the facility could have contributed to claimant's hearing loss.

Exclusions – Jones Act

Substantial connection to vessel in nature when worked on jack-up vessel when jacked up adjacent to dock and never assigned to sail on the vessel. Dissent argued decision contrary to Supreme Court caselaw. *Sanchez v. Smart Fabricators Texas LLC*, 970 F.3d 550 (5th Cir. 2020).

Sanchez worked for SmartFab as a welder 65 of 67 days on the deck of a jack-up drilling rigs owned by Enterprise. He was injured when he tripped on a pipe welded to the deck of the rig. He sued SmartFab in state court under the Jones Act. SmartFab removed the case but Sanchez argued the Jones Act precluded removal. The district court denied the motion to remand and granted Smart Fab's motion for summary judgment because Sanchez was not a Jones Act seaman. Sanchez appealed.

To have coverage under the Jones Act the employee's duties (1) must contribute to the function of the vessel or to the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation or an identifiable group of vessels that is substantial in duration and nature. The parties agreed Sanchez contributed to the function of the vessel or to the accomplishment of its mission and agreed Sanchez met the duration requirement. The dispute concerned whether he met the nature

test. The district court held he was not exposed to the perils of the sea and therefore did not meet the nature case. The Court reversed because Sanchez could be exposed to the perils of the sea even if his duties were on a vessel jacked up next to a dockside pier or at anchor in navigable water.

DISSENT, citing *Harbor Tug & Barge Co. v. Papai*, 515 US 347 (1995), held the inquiry should concentrate on whether the employee's duties took him to sea, which would be helpful in distinguishing land based from sea based employees. Here, all of Sanchez' welding work was done when the rig was jacked up adjacent to the dock, and he was never assigned to sail on a vessel. He only had to take two steps off the rig onto land every evening at the end of his shift. His work was essentially land based, never exposing him to the perils of the sea.

Not Jones Act seaman when repairing crane on barge. *Doty v Tappan Zee Constructors, LLC*, 2020 WL 6164333, __ Fed Appx ___ (2d Cir. 20-36-cv, 10/22/20) (unpublished).

Doty maintained and repaired vessels and equipment appurtenant to materials barges, tug boats, work boats, and crane barges used in construction of the Governor Mario M. Cuomo Bridge. The construction site had four stationary and moored crane barges. Aside from taking a boat between moored barges Doty did not work aboard a vessel while it was traveling over water. He was injured when repairing a crane attached to a barge. He sued under the Jones Act and alternative under §5(b) of the LHWCA. The district court held he was not a Jones Act seaman. He performed maintenance work exclusively on stationary vessels rather than vessels navigating over water. He did not assist in navigation of any vessel. He did not have maritime license. He went home at the end of his shift and did not sleep on the vessel. The Court affirmed.

Exclusions - Other

Excluded from coverage because employer could not have assigned claimant to work on a recreational boat 65 feet or more in length. *Kniceley v. Michael Bybovich & Sons Boat Works*, 2020 WL 5877768 (BRB 20-0154, 9/23/20).

Claimant worked for employer as a marine carpenter from June 2011 until his injury on October 12, 2012. Until injured claimant constructed recreational vessels under 65 feet, and employer had no vessels under construction greater than 65 feet. After the injury, when on modified duty, clamant worked on recreational vessels over 65 feet. Claimant received compensation under the Florida state compensation act but sought LHWCA

compensation. The ALJ granted employer's motion for summary decision. Claimant appealed, arguing employer had the capacity to construct vessels greater than 65 feet and post injury on light duty claimant worked on such vessels. The Board affirmed.

§2(e)(F) excludes individuals employed to build any recreational vessel under 65 feet in length if subject to coverage under a state worker's compensation law. Before the injury employer constructed only recreational vessels less than 65 feet, so claimant was not "engage in" qualifying maritime employment at any point through the time of injury and could not have been assigned to work on vessels exceeding 65 feet because employer did not have any projects involving construction of such vessels until February 2013, after claimant returned to work post injury. That employer, when the business was started, intended to engage in construction of vessels in excess of 65 feet and anticipated claimant would work on such vessels did not undermine the conclusion employer did not engage in such work and thus it was not assignable to claimant until after his injury.

Hearings - Issues

Claim for PPD necessarily includes claim for *de minimis* PPD. *Calvert v. Vigor Marine, LLC*, (BRB 20-0169, 9/23/20) (unpublished).

The ALJ awarded temporary disability based on an average weekly wage of $1,814.73 for various periods from November 14, 2014 through November 12, 2015 and PTD from November 13, 2015 through November 18, 2015. As of November 19, 2015 claimant was able to return to his usual employment, but his post injury earning capacity was $1,566.29. The ALJ awarded no PPD because any loss of earning capacity was caused by a reduction in work hours due to a fluctuation in employer's business cycle. Claimant requested reconsideration to seek a nominal (*de minimis*) award. The ALJ refused to consider eligibility for a nominal award because claimant did not timely raise it. On appeal the Board held a claim for a greater award implicitly includes a claim for a lesser degree of disability, such as a nominal award. It remanded to address claimant's claim for a nominal award.

Interest

Cost of refinancing a home not compensation or interest under the LHWCA. *Aegis Defense Services, LLC v. Martin*, 2020 WL 5946712, __ Fed. Appx ___ (9th Cir. 19-70566, 19-70588, 10/7/20) (unpublished), affirming *Martin v. Aegis Defense Services, LLC*, 2019 WL 523792 (BRB 18-0122, 18-0122A, 1/28/19).

> Claimant contended he had to refinance his home because the employer wrongfully controverted his claim. He sought reimbursement for his refinancing costs. The ALJ denied this request. The Board affirmed, stating house modification and moving expenses are reimbursable if medically necessary for treatment of a work related condition, but refinance and subsequent expenses here were not related to medical treatment and were not medically necessary. There was no authority in the Act or regulations to provide reimbursement for refinance expense. 9th Circuit affirmed. Neither the LHWCA or its regulations expressly authorize reimbursement of this type of expense for a carrier's wrongful termination of benefits, and the money he borrowed on his home was not used to cover medical costs. The LHWCA does not provide a remedy for incidental financial consequences caused by delayed compensation.

Medical Services – Choice of Physician

Employer not responsible for treatment when claimant changed physician without referral from attending physician or consent of employer or district director. *Dundlow v. Huntington Ingalls Industries, Inc.*, (BRB 20-0343, 9/28/20) (unpublished).

> Claimant initially treated with Dr. Prezella, who diagnosed a lumbar herniated disc and lumbar degenerative disc disease. Dr. Prezella released claimant to return to full duty work on May 1, 2018, referred him to a pain management specialist, and told him to return as needed. Claimant did not return to Dr. Pezella or return to work. Instead, without securing a referral from Dr. Prezella or permission from the employer/carrier, claimant sought treatment from neurosurgeon, Dr. Singh, who referred claimant to neurologist, Dr. Nanavaty. He also received treatment from orthopedic surgeon, Dr. Goss, and then was treated by Dr. Kent. The Board affirmed the ALJ's conclusion claimant was not entitled to temporary disability after May 1, 2018 and held employer was not responsible for claimant's medical costs after May 17, 2018 because Dr. Pezella did not send claimant to see Drs. Singh, Navavaty, Kent, or Goss, nor did claimant seek authorization from the employer or the district director to seek treatment with any of those physicians.

Responsibility – Last Injurious Exposure Rule

First injury became responsible again when second injury caused temporary aggravation. *Stamper v. Washington United Terminals, Inc.*, (BRB 19-0364, 9/9/20) (unpublished).

> On April 17, 2016 claimant injured his neck when employer was insured by ALMA. Based on an October 25, 2016 defense medical examination concluding claimant temporarily aggravated his preexisting cervical degenerative disc disease and could return to work without restrictions ALMA controverted compensation and medical benefits on December 15, 2016. Claimant returned to work for employer on eight shifts in January but told his attending physician the work aggravated his neck. Claimant filed a new claim with the new insurer, Signal, who controverted. The ALJ held Signal had not rebutted the presumption claimant sustained a temporary aggravation but both insurers had rebutted the presumption as to claimant's current condition. Therefore each carrier had a simultaneous burden to prove the current neck disability was due to the injury when the other carrier was on the risk. ALMA did not show claimant's ongoing cervical condition was related to his return to work in January 2017 but Signal proved the work in January did not contribute to claimant's cervical condition as of June 27, 2017. Therefore, ALMA was responsible for claimant's current condition. ALMA appealed, but the BRB affirmed, concluding the ALJ followed the applicable law and weighed the evidence when concluding the January 2017 work activity only caused a temporary aggravation from January 16 to June 27, 2017.

Third Party Claims – Other

Tort immunity when employer had coverage even if its insurer did not pay benefits. *Raicevic v. Fieldwood Energy LLC*, 979 F.3d 1027, 2020 WL 6588595 (5th Cir. 19-40580, 10/28/20).

> Waukesha employed Raicevic to work on an Fieldwood's offshore platform. He slipped and fell when responding to an alarm in the mechanic's room and sued Fieldwood and the platform operators for negligence. A jury found Fieldwood and Raicevic were each 50% responsible for the injuries. The district court held Raicevic was Fieldwood's borrowed employee which meant Fieldwood was immune from tort liability if, per §905(a), it had secured payment of compensation under the LHWCA. On appeal Raicevic argued he was not a borrowed employee and Fieldwood had not secured payment of compensation because the insure had not paid any benefits. Reviewing the

nine factors outlined in *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969), the court affirmed the finding Raicevic was a borrowed employee. It also held the requirement to secure payment meant the employer must buy insurance or receive approval to pay compensation benefits directly.