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LHWCA CASELAW SUMMARY

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Appeals - Other

Ninth Circuit defers to Director's construction of statute unless unreasonable or contrary to legislative intent. *Price v. SSA*, ___ F.3d ___, 2010 WL 5094248 (9th Cir 2010).

The Director, like the employer, contended interest should be simple, rather than compound. The court afforded considerable weight to the Director's construction of the statute and deferred to that view because it was not an unreasonable reading of statute and was not contrary to legislative intent. Judge O'Scannlain agreed with the result but noted the 9th Circuit's deference to the Director's reasonable litigating position conflicted with Supreme Court precedent and three other circuits. He thought the 9th Circuit should revisit the law governing deference to the Director's litigating position.

Attorney Fees - Amount

ALJ awards Charles Robinowitz \$316.42 per hour for services in 2008. Survey of Law Firm Economics found persuasive. *Dibartolemeo v. Fred Wahl Marine Construction*, 2010 WL 3514186 (BRB 2010).

Mr. Robinowitz sought \$375/hr initially and then \$400/hr for preparing response to objections. ALJ Etchingham awarded \$316.42 plus \$110 for legal assistant. Claimant appealed. Mr. Robinowitz submitted the 2008 Morones Survey of commercial litigation rates and affidavits of Crow, Goldsmith, and Markowitz. The ALJ said the Morones Survey was hourly rate of elite sub group of commercial litigators and insufficient to establish a proxy rate. Crow was commercial litigator and unqualified to gauge market rate for claimant's counsel's services, as he was unfamiliar with LHWCA litigation. Goldsmith and Markowitz did not provide examples of hourly rates approaching \$350 to \$400 charged by attorney engaged in work similar to claimant's counsel. Because claimant did not establish a normal billing rate or suitable proxy, the ALJ looked at the 2007 edition of the Survey of Law Firm Economics in areas of employment, maritime, personal injury, and workers' compensation lawyers with more than 31 years experience. Based on this he found average proxy market rate \$266.60, and then adjusted it to \$309 to

account for counsel's expertise, in upper quartile of attorneys surveyed. He made an additional 2.4% adjustment for 2008, yielding \$316.42.

The ALJ found the OSB 2007 survey did not support rate a above \$316.42. He also thought it was less credible than the Survey of Law Firm Economics, which is published every 4-5 years. The OSB survey did not show rates for maritime or employment law.

The Board affirmed. In the absence of production of satisfactory evidence to establish a reasonable hourly rate, the ALJ acted within his discretion to determine hourly rate based on statewide data in Survey of Law Firm Economics. He rationally found a statewide survey best established a proxy rate for services since it measured hourly rates charged by lawyers employing legal stills most comparable to those required in longshore practice.

The ALJ found counsel's proxy rate was in upper quartile, rather than higher rate for attorneys in 9th decile because Mr. Crow, Mr. Goldsmith, and Mr. Markowitz were unfamiliar with hourly rates charged by attorneys performing work similar to counsel's actual practice. The ALJ's reliance on his own evaluation of counsel's expertise to find counsel is entitled to a rate received by attorneys in upper quartile was reasonable, within his discretion, and in accordance with the law.

Counsel objected to including rates charged by workers compensation attorneys. The ALJ could rationally find workers' compensation rates should be included because this category of work requires skills similar to those employed in longshore claims. The ALJ is afforded considerable discretion in determining factors relevant to market rate in a given case and is not bound by the Board's determinations in other cases.

Matthew Sweeting awarded \$235.00 per hour, but remanded for District Director to reconsider in light of *Christensen* and *Van Skike*. *Hedberg v. Marine Terminals Corporation*, 2010 WL 4035099 (BRB 2010); *Gates v. Todd Pacific Shipyards*, 2010 WL 4035102 (BRB 2010).

Mr. Sweeting sought fee of \$425 per hour. The District Director awarded \$235.00 per hour. Awards were remanded because the District Director relied on fees awarded in other claims and did not address *Christensen* and *Van Skike* in determining the hourly rate. On remand, the District Director was advised she could decline to rely on the evidence submitted by claimant's counsel in support of his requested hourly rate, but if she did so, she must provide a reasoned explanation of her rejection of such evidence.

Charles Robinowitz awarded \$370 per hour for 2008 and \$384 per hour for 2009. Rates for Oregon workers' compensation not considered. No enhancement for delay. *Estate of Roberta A. Stramiello v. Service Employees International, Inc.*, 2010 WL 4035104 (BRB 2010).

Mr. Robinowitz sought \$375/hour plus 1.5 hours of legal assistant @ \$120/hour. The ALJ reduced rates to \$275 and \$110 respectively. On appeal, the Board vacated and remanded. On remand, the ALJ addressed *Christensen* and *Van Skike*, and based an award on same rates allowed by the Board in *Christensen*, *i.e.*, 2008 rate of \$325.50, 2009 rate of \$338.00, and legal assistant 2007 rate of \$139.74.

Claimant argued rates for workers' compensation attorneys in the 2007 OSB Survey were not market rates. In *Christensen*, the Board held rates for workers' compensation attorneys reflected in the OSB Survey should not be included in the hourly rate

calculation. As the ALJ adopted the Board's decision on this issue, it modified the fee award to allow \$370 for 2008 and \$384 for 2009.

Delay was not so egregious or extraordinary to require a delay enhancement. Delay was due to appeals of fee award, so no enhancement for delay was appropriate.

Charles Robinowitz awarded \$309/hour based on Survey of Law Firm Economics; Later awarded \$384/hour in same case by different ALJ. *Eberly Sherman v. Department of Army/NAF*, 2010 WL 4539441 (BRB 2010); 2010 WL 5015072 (BRB 2010).

ALJ Etchingham initially awarded Mr. Robinowitz \$275/hour plus \$110/hour for his legal assistant. The Board remanded because the ALJ exclusively relied on contemporaneous longshore cases to set the hourly rate. On remand the ALJ found the appropriate rate for services was \$309, and \$110 of legal assistant. Mr. Robinowitz sought \$400 based on his resume and estimation of the value of his services in non longshore cases, the 2008 Morones Survey of commercial litigation rates in Portland, affidavits from Wm. Crow, Phil Goldsmith, and David Markowitz, and fee award based on hourly rate of \$325 in *Valentine v. Equifax* (2008). The ALJ held the Morones Survey was rate of elite sub group of commercial litigators and insufficient to establish a proxy. Mr. Crow, a commercial litigator, was unqualified to gauge the market rate for services because he is unfamiliar with longshore litigation. Mr. Goldsmith and Mr. Markowitz did not provide any examples of hourly rate of \$350 to \$400 charged by attorney in work similar to that of claimant's counsel. ALJ found rate in *Valentine* unpersuasive because he did not credit counsel's subjective assertion his trial skills are comparable to the attorney in that case and it was unclear if these skills were comparable to those required in this case. ALJ held counsel's assertion he averaged \$325 to \$400/hour in non longshore cases cannot serve to prove requested rate of \$400 is reasonable.

The ALJ relied on 2007 data from the Survey of Law Firm Economics, which measures skills familiar to those used in longshore claims, and factors specific to claim such as years of experience, geographic location. Overall ability. He averaged rates in survey for employment, maritime, personal injury, and workers' compensation law, and the hourly rate charged by lawyers who have more than 31 years experience. He found average proxy market rate of \$266.60. He adjusted this to upper quartile rate of \$309 to account for expertise.

The Board held the appropriate community could be the state of Oregon because the district court is located in Portland and its jurisdiction includes the entire state. The ALJ acted within his discretion to use the hourly rate base don statewide data in the Survey of Law Firm Economics.

The ALJ could rationally find that workers' compensation rates should be included because this category of work requires skills similar to those employed in longshore claims. The ALJ did not focus solely on the rates perceived in workers' comp cases but considered the standard hourly rates of the practice of employment, maritime, personal injury and workers' compensation law. The ALJ is afforded considerable discretion in determining factors relevant to a market rate in a given case and is not bound by the Board's determinations in other cases.

The ALJ rationally found evidence offered by claimant's counsel did not establish a rate of \$150 for a legal assistant was reasonably commensurate with the services provided.

Counsel was not entitled to an enhancement for delay.

In the second claim, involving a dispute about fees following a §8(i) settlement, Judge Gee deferred to the Board's findings in *Christensen* on remand (43 BRBS 145) and awarded \$338 per hour. Because Judge Gee had improperly considered fees for Oregon workers' compensation attorneys as reflected in the Oregon State Bar economic survey (see 44 BRBS 39), the Board awarded \$384.00 per hour for 2009 services.

Josh Gillelan awarded \$460/hour for 7/08 thru 2/10 based on Laffey Matrix. *Boroski v. Dyncorp International*, 2010 WL 4035096 (BRB 2010).

Mr. Gillelan, whose practice is limited to LHWCA appeals, and whose office is in Washington D.C., was entitled to a fee based on the *Laffey Matrix*, applicable to services in United States District Courts in Washington, D.C.. For the period July 2008 through February 2010 the appropriate rate was \$460.00 per hour.

Attorney Fee - Entitlement

No fee awarded when informal conference failed to result in recommendation. *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 2010 WL 3879584 (BRB 2010); *Coney v. Holt Cargo Systgems, Inc.*, 2010 WL 5015075 (BRB 2010).

In *Thompson*, Claimant, who no longer was working for employer, sought TPD. The District Director did not issue a formal recommendation because, among other reasons, there was insufficient wage information to calculate an average weekly wage. When claimant provided the missing information, employer paid TPD. The District Director awarded a fee for services before the OWCP. Employer appealed. The Board reversed. The District Director did not issue a written recommendation for purposes of conferring liability for a fee per §28(b). No fee could be awarded under that statute. The matter was remanded to address claimant's liability for the fee per §28(c) (out of compensation fee).

In *Coney*, employer voluntarily paid compensation but claimant sought payment for periods when compensation was not paid as well as continuing disability and medical benefits and interest. Although informal conferences were conducted, the district Director's written response stated, "Parties will discuss the doctors they will consider for their choice of IME and further action will be taken as indicated." No agreement was reached, but the parties discussed the matter and attempted to resolve it. At hearing, the ALJ awarded PTD. The ALJ held §28(a) did not apply because the Employer paid compensation. The ALJ also denied a fee per §28(b) because there was no written recommendation which the employer rejected. The Board affirmed the ALJ's conclusion regarding §28(b) but remanded because the record did not indicate if the employer paid compensation within 30 days of service of the claim from the OWCP.

No fee when compensation paid within 30 days of employer's receipt of OWCP notice of claim, notwithstanding earlier controversy. *Ferro v. Northrop Grumman Ship Systems, Inc.*, 2010 WL 4539440 (BRB 2010). *Accord, Haywood v. Northrop Grumman Shipbuilding, Inc.*, 2010 WL 4539435 (BRB 2010).

On September 12, 2008 claimant filed a claim for 20.9% hearing loss and simultaneously sent employer a copy. On September 25, 2008 employer controverted the claim. On October 8, 2008 the district director served employer with formal notice of the claim. On

October 23, 2008 employer accepted the claim and commenced payment of 20.9% binaural hearing loss. On November 19, 2008 claimant disagreed with the AWW calculation. On June 8, 2009 the district director recommended a slightly higher AWW, which employer rejected, but claimant did not challenge employer's objection and agreed employer had paid the correct amount. Claimant's attorney sought fees from August 20, 2008 to January 18, 2010. The district director awarded a fee because employer had controverted the claim. The Board reversed.

Employer had 30 days from the date the claim was formally served on employer to pay compensation to avoid liability for a fee per §28(a). The earlier controversion was irrelevant because employer paid benefits within the statutory 30 day time frame.

Fees allowed per §28(b) when claimant received more than employer was willing to pay, even though employer had been paying more than final award pending receipt of order. *Carey v. Ormet Primary Aluminum Corporation*, 2010 WL 4968693 (5th Cir 2010).

Employer paid compensation based on an average weekly wage of \$1,423.92 but subsequently requested an informal conference when it contended certain holiday, vacation, and container royalty payments should not be considered. At the informal conference employer contended the average weekly wage was \$1,169.33. The district director recommended payment based on \$1,423.92. Employer continued payment at the same rate. After a hearing, the ALJ rejected employer's arguments but somehow determined the average weekly wage was \$1,369.15. Claimant's attorney requested a fee.

§28(b) requires an informal conference, a written recommendation, employer's refusal to adopt the recommendation, and employee's procuring services of a lawyer to achieve a greater award than what employer was willing to pay. The Court concluded claimant's attorney was entitled to a fee. The amount paid or tendered by the employer is the additional compensation, if any, to which the employer believes the employee is entitled.

Average Weekly Wage - Post Injury Factors

Post injury earnings considered in calculation of average weekly wage. *Schbot v. L-3 Communications*, 2010 WL 4035105 (BRB 2010).

Claimant was injured January 22, 2007 but continued working despite complaints of pain and did not suffer a loss of wages until March 2007. The ALJ considered earnings through the last day of employment when calculating average weekly wage. The Board affirmed. Per §10(c), the ALJ has the discretion, in appropriate cases, to consider circumstances existing after the date of injury where prior earnings do not realistically reflect claimant's wage earning potential. The ALJ's calculations were based on rational finding that post injury contractual wages were consistent with earnings for three weeks preceding the injury and all of earnings best represent wage earning capacity due to the injury.

Average Weekly Wage - §10(c)

Average weekly wage based on highest rate of pay three weeks before disability. *Olds v. L-3 Communications*, 2010 WL 4539437 (BRB 2010). (Defense Base Act claim)

Claimant was hired to work as an executive assistant at a site in Iraq. She earned \$1,442.31 per week while in US for training, \$2,001.20 per week in Kuwait, and \$2,451.93 in Iraq. Before this job claimant's earnings came from tutoring or teaching Kuwait or from her contracting company in Kuwait. The ALJ calculated average weekly wage based on three weeks earnings in Iraq. Her contract required work 12 hours per day, seven days per week, and included hazard pay. It created a voluntary or "at will" relationship but was predicted to last one year, though this was not guaranteed. Employer argued the ALJ should have used a blending method, including pre injury and pre-deployment wages because claimant had an "at will" contract rather than a one year contract. The Board disagreed.

There is no error calculating average weekly wages earned during a short period of employment provided the fact finder considers prior earnings. As the ALJ here acknowledged claimant's differing levels of wages while working for employer but nevertheless awarded benefits based on the highest wages claimant was earning when she last aggravated her back and stopped working, the finding was rational and supported by substantial evidence.

Causation - §20 Presumption

Mere evidence of preexisting condition does not rebut §20(a) presumption. *West v. ITT Corporation*, 2010 WL 5015078 (BRB 2010).

Claimant experienced left leg pain while working for his employer in Iraq, subsequently had back pain, and was treated with surgery. The ALJ concluded claimant had invoked the §20(a) presumption, but employer had not produced substantial evidence to rebut it. The Board affirmed. Mere evidence claimant had a pre-existing condition cannot rebut the presumption in view of the aggravation rule. One of employers witnesses attributed claimant's condition is part to his employment injury. That testimony was insufficient to rebut the presumption.

Presumption not rebutted when employer's evidence indicated there was no injury but ALJ did not find it persuasive. *Root v. Electric Boat Corporation*, 2010 WL 5015069 (BRB 2010).

Union steward filed a stress claim based on acrimonious interactions with his supervisor involving collective bargaining agreement's overtime provisions and the manner in which overtime and travel assignments were distributed among employees. Dr. Traboulsi diagnosed major depressive disorder and generalized anxiety disorder and took him off work. Dr. Harrop, employer's examiner, concluded claimant did not have a psychiatric condition and could return to work without restrictions. Although a medical opinion that claimant did not sustain a psychological injury supported by a proper foundation may constitute substantial evidence to rebut the presumption, here, the ALJ concluded Dr. Harrop's opinion was inconsistent with the range of symptoms documented by Dr. Traboulsi and with the claimant's containing course of treatment with medications for

depression and anxiety. Thus, it was insufficient to constitute substantial evidence sufficient to rebut the presumption. It did not constitute evidence a reasonable mind might accept as adequate to support a finding of rebuttal.

Presumption not rebutted when employer's witnesses did not state injury did not aggravate degenerative disc disease or render pain symptomatic. *Norris v. Service Employees International, Inc.*, 2010 WL 4035106 (BRB 2010).

Employer argued claimant's condition was due to his preexisting degenerative disc disease. Employer's experts did not state the May 10, 2006 work incident did not aggravate claimant's preexisting degenerative cervical disc disease or render his pain symptomatic. The opined a traumatic incident could contribute to or render the underlying condition symptomatic. If claimant's work caused his underlying condition to become symptomatic or otherwise worsened his symptoms, claimant sustained a work injury. Therefore, employer did not present substantial evidence the preexisting condition was not aggravated by his employment with employer.

No presumption if claimant fails to prove injury. *Banguera v. Atlantic Sounding, Inc.*, 2010 WL 4539436 (BRB 2010).

The ALJ concluded claimant failed to establish an accident occurred at work that could have caused his back condition, as claimant's differing descriptions of how he was hurt and lack of corroborating evidence rendered his testimony incredible. Therefore, the ALJ did not invoke the §20(a) presumption. As claimant failed to establish the work incident or accident element necessary to invoke the presumption, the Board affirmed.

Course & Scope - Aggressor

Willful intent to injure another. Controversion affirmed. *Haydel, Jr. v. Gramercy Alumina, LLC*, 2010 WL 4034098 (BRB 2010).

Claimant was injured during a physical altercation with his supervisor regarding a job assignment. Claimant testified he did not touch, push, or initiate contact with his supervisor, and it was the supervisor who grabbed him, picked him off the ground, shook him, and pushed him into the dock. The ALJ credited contrary testimony from employer's witnesses and concluded claimant lacked credibility. There was substantial evidence to support this conclusion. Claimant was denied compensation because his conduct reflected a willful intention to injure the supervisor, per §3(c).

Death - Amount of Award

When two of three children settled third party claim, resulting in significant credit, third child not entitled to increase in compensation. *Welch v. Fugro Geosciences, Inc.*, 2010 WL 4926238 (BRB 2010).

§9(c) provides when there is no surviving spouse, children shall share in equal parts 66-2/3% of decedent's average weekly wage, unless there is only one child, in which case he/she receives 50% of such wage. Three children were entitled to compensation. Two settled their third party claims, resulting in a significant credit and termination of their compensation. The third contended he was entitled to increased compensation as the only child entitled to compensation. The ALJ and Board disagreed. The settlement

replaced benefits due by way of a §33(f) credit. Employer was not required to increase payment of death benefits to another eligible claimant not involved in the settlement and who remained entitled to a share of the death benefit.

Death - Qualified Beneficiary

Evidence insufficient to prove claimant received over half of her support from decedent.

Welch v. Fugro Geosciences, Inc., 2010 WL 4926238 (BRB 2010).

Claimant lived with decedent at time of his death but was not legally married according to the law in the state where claimant lived with decedent. §9(d) states if there is no surviving spouse or child, death benefits may be granted to a dependent of the decedent who is not otherwise eligible under §9, as that term is defined in 26 USC §152. That statute defines a dependent as including an individual, over half of whose support for the calendar year was received from the taxpayer, and who has principal place of abode at the home of the taxpayer and is a member of the taxpayer's household. Claimant testified she relied on decedent for support at time of death. This was insufficient to establish she received over half of her support from decedent at time of death.

Hearings - Evidence

Party seeking to admit evidence must exercise due diligence in developing it. *Stewart v. Universal Maritime Service Corporation*, 2010 WL 4539438 (BRB 2010).

After a hearing the ALJ awarded total disability because claimant could not return to former employment as a mule operator, and employer had not established availability of suitable alternative employment. The ALJ refused to admit post hearing evidence regarding another longshoreman who were restricted to light duty but who could perform work as a top loader. The ALJ noted it was not claimed or shown that exhibits offered for the first time in employer's post hearing brief could not have been offered prior to closing of the record. The Board affirmed the ALJ's evidentiary ruling, noting the ALJ had considerable discretion on ruling on request for admission of evidence. Moreover, a party seeking to admit evidence must exercise due diligence in developing it prior to hearing.

Interest

Interest on compensation should be calculated as simple interest at weekly average 1 year constant maturity Treasury yield. *Price v. SSA*, ___ F.3d ___, 2010 WL 5094248 (9th Cir 2010).

Claimant argued interest on past due compensation should be calculated as compound interest, rather than simple interest. The Director, like the employer, contended interest should be simple, rather than compound. The court afforded considerable weight to the Director's construction of the statute and deferred to that view because it was not an unreasonable reading of statute and was not contrary to legislative intent.

Maximum & Minimum Compensation

TTD and PPD subject to maximum compensation rate on date of injury. PTD subject to maximum compensation rate during period of entitlement. *Roberts v. Director, OWCP*, 625 F.3d 1204, 2010 WL 4483972 (9th Cir 2010).

Claimant was injured on February 24, 2002. At time of injury his average weekly wage was \$2,853.08, and the maximum compensation rate was \$966.08. Per an October 12, 2006 Decision and Order, claimant was awarded periods of TTD, PTD, and PPD, but never more than the maximum compensation rate as of the date of injury:

Type	Period	Rate Awarded	Max Comp Rate
TTD	03/11/02 – 09/30/02	\$996.08	\$966.08
TTD	10/01/02 – 09/30/03	\$996.08	\$996.54
TTD	10/01/03 – 09/30/04	\$996.08	\$1,030.78
TTD	10/01/04 – 07/11/05	\$996.08	\$1,047.16
PTD	07/12/05 – 09/30/05	\$996.08	\$1,047.16
PTD	10/01/05 – 10/09/05	\$996.08	\$1,073.64
PPD	10/10/05 – continuing	\$966.08	\$1,073.64

(When awarded PPD, claimant’s residual earning capacity was \$720.00 per week, which would have yielded PPD of \$1,422.05 but for a maximum compensation limit.)

§6(b)(1) states the rate of compensation shall not exceed 200% of the applicable NAWW. §6(c) states “determinations [of the NAWW] with respect to the period shall apply to employees * * * currently receiving compensation for PTD * * * during such period, as well as those newly awarded compensation during such period.”

The court first concluded “newly awarded compensation” meant “newly entitled to compensation.” Because claimant became newly entitled to compensation in fiscal year 2002 (March 11, 2002), the ALJ properly applied the 2002 fiscal year maximum (\$966.08) to compensation for TTD and PPD rather than the maximum compensation rate on October 12, 2006, when the ALJ formally awarded compensation.

Regarding PTD, claimant was entitled to receive PTD from July 12, 2005 through September 30, 2005 and from October 1, 2005 through October 9, 2005. Claimant was entitled to receive compensation subject to the maximum compensation rate in each period (\$1,047.16 and \$1,073.64).

Modification - Mistake in Fact

Modification can address mistake in average weekly wage. *Mallet v. Service Employees International, Inc.*, 2010 WL 5015065 (BRB 2010).

Claimant agreed to work for one year in Afghanistan at a monthly rate of \$2,583, plus additional amounts for Foreign Service (5%), Area Differential (25%), and Danger Pay (25%), with leave paid at straight time. He was injured after 17 weeks. To calculate an AWW of \$1,038.60, the ALJ took wages paid for 17 weeks and added 35 weeks at the contract rate, including foreign service, area differential, and danger pay, and then subtracted six weeks of leave at straight pay. Claimant was awarded compensation on

this basis and later petitioned for modification, contending the judge had used an inappropriate blending approach prohibited by *K.S. v. Service Employees International, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009). The ALJ denied modification because claimant had not asserted a change in his physical or economic condition or an alleged a mistake in a determination of fact, and claimant could have remedied the alleged error by filing a motion for reconsideration or an appeal.

The Board held average weekly wage was an issue of law and fact, subject to modification. §22 displaces traditional notions of finality and provides the only recourse where a prior decision has become final. Therefore the ALJ erred in finding claimant's challenge of the ALJ's average weekly wage could not be addressed through modification. Nevertheless, as claimant's average weekly wage was based only on his overseas earnings, that method accords with law. There was no mistake in fact.

Permanent Disability - Motivation

Motivation to return to work not relevant until employer establishes suitable alternate employment. *Stewart v. Universal Maritime Service Corporation*, 2010 WL 4539438 (BRB 2010).

The ALJ awarded PTD because claimant could not return to usual and customary employment and employer did not establish availability of suitable alternative employment. Employer argued the ALJ failed to discern whether claimant exercised due diligence in seeking alternative employment. The Board held claimant did not have to establish diligence in seeking unemployment until after employer established suitable alternative employment. As employer did not meet this burden, it was not necessary to evaluate whether claimant demonstrated he diligently tried and was unable to secure employment.

Permanent Disability - Unscheduled PPD

Post injury earnings not representative of earning capacity. *Harris v. Electric Boat Corporation*, 2010 WL 4035103 (BRB 2010).

Following a compensable injury when employed to paint submarines, claimant returned to work as a *part time* school bus driver. The ALJ concluded claimant's actual wages were not representative of residual earning capacity as of the date a labor market survey identified three *full time* school bus driver jobs within 50 miles of claimant's home (plus 10 part time jobs). The ALJ adjusted the full time jobs to reflect the rate at time of injury and awarded PPD accordingly. The Board affirmed because the decision to find full time jobs suitable and available and average the wages of the three full time positions was rational and in accordance with law.

Responsibility - LIE Rule; Causation - §20 Presumption;

§20 presumption applies to individual employers, not to claim; Responsibility should be evaluated sequentially, not simultaneously. *Albina Engine & Machine v. Director, OWCP*, ___ F.3d ___ (9th Cir 12/10/2010). <http://www.ca9.uscourts.gov/datastore/opinions/2010/12/10/09-70592.pdf>

In general, courts have followed two rules to evaluate responsibility. The first rule, generally applied in occupational disease claims, is known as the occupational disease rule or last employer rule. The responsible employer is the maritime employer who last exposed the worker to injurious stimuli prior to the date upon which the worker became aware that he was suffering from an occupational disease arising out of employment. The second rule, generally applied in injury and cumulative trauma claims, known as the two-injury rule, aggravation rule, or special application of the last employer rule provides: if disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, the prior injury is responsible. If, however, the subsequent injury aggravated, accelerated or combined with the prior injury, thus resulting in claimant's disability, the subsequent injury is responsible.

This claim concerned the interplay between the §20(a) presumption and application of the last employer rule. Decedent died due to an asbestos related disease and filed claim against three employers: WISCO, Albina, and Lockheed, in that order. WISCO conceded decedent had been exposed to asbestos. Albina and Lockheed denied exposure, but the ALJ initially held there was some evidence of exposure at Albina and Lockheed, and Lockheed had not presented any evidence to prove otherwise. On prior appeals, the Board held claimant invoked the §20(a) presumption if the elements were satisfied with respect to any employer. All employers then had a simultaneous burden to prove claimant was not exposed to anything injurious, or injurious exposure occurred in subsequent maritime employment. After several appeals, the 9th Circuit reversed and designated Lockheed as responsible.

In a multiple employer claim for occupational disease, the §20(a) presumption must be invoked against each employer before that employer may be found liable for payment of benefits. Each employer may rebut the presumption with substantial evidence it was not the last responsible employer. "Substantial evidence" includes evidence claimant was not harmed by injurious stimuli at that employer or by evidence of exposure to injurious stimuli at a subsequent covered employer. Once an employer rebuts the presumption, it may be found liable only if a preponderance of the evidence supports a finding that employer is responsible.

The analysis with respect to each employer should be applied sequentially, beginning with the last (most recent) employer, and need not be conducted for earlier employers once a responsible employer is found. The sequential-analysis approach in no way removes basic causation from the inquiry as to whether the last employer is potentially responsible.

Settlements

§8(i) medical settlement set aside when ALJ did not explain how settlement amount was adequate. Award of PPD set aside when ALJ's findings not supported by substantial evidence. *Bomback v. Marine Terminals Corporation*, 2010 WL 4539434 (BRB 2010).

An ALJ approved a \$15,000 §8(i) medicals only agreement, stating the agreement appeared to be reasonable, adequate, and not the result of duress. The director appealed. The agreement indicated employer had paid \$1,906.14 in 2007, \$1,606.22 in 2008, and no medical expenses in 2009 through the date of the agreement, and therefore parties believed \$15,000 was adequate. Medical records did not discuss the likelihood of need for future treatment. One doctor indicated arthroscopic surgery was possible. The agreement did not include an estimate of claimant's need for future medical treatment or an estimate of the cost of such treatment that would enable the ALJ to explicitly determine if the \$15,000 agreed upon was adequate to cover claimant's future medical expenses. As the ALJ summarily found the settlement adequate without considering the future need for treatment or the probability of success if the case were formally litigated, the approval was vacated and remanded.

The ALJ also approved a stipulation awarding claimant 7% PPD for the lower extremity based on cumulative trauma. Dr. London opined the portion of the knee attributable to the injury for which employer was liable was 7%, but this opinion did not account for the aggravation rule, and there was no medical opinion indicating claimant's total knee impairment was 7%. Other reports rated total impairment of 16% and 41%. Although employer claimed a credit for a prior award, information regarding the credit was not evident in the stipulation submitted to the ALJ. Furthermore, claimant could receive PTD if the knee injury prevents return to usual and customary employment, and the parties did not stipulate to the existence of suitable alternate employment, nor did employer submit evidence of such. Therefore, the award was vacated to allow the ALJ to consider the extent of disability due to the knee impairment and employer's entitlement to a credit.

§8(i) medical settlement set aside; no proof settlement amount was adequate. *D'Ambrosi v. APM Terminals, Inc.*, 2010 WL 5015066 (BRB 2010).

Claimant filed a hearing loss claim with APM Terminals and Ports America. Claimant and Ports America agreed to a compensation order for 31.4% PPD for hearing loss, plus fees. The Director indicated he would not oppose §8(f) relief. Both employers also sought approval of a §8(i) settlement of future medical care for \$1,500. The ALJ issued a Compensation Order awarding 34.1% PPD plus §8(f) relief. This was not appealed. He also issued a separate order approving the §8(i) settlement. The Director appealed. The Board vacated the order.

The proposed settlement stated parties wished to avoid the hazards and uncertainties of trial and costs of appeal, but in this claim entitlement to medical care was never disputed. The proposed agreement did not provide an estimate of the cost of future medical treatment, and parties did not attach a transcript of claimant's deposition which allegedly indicated claimant had already obtained hearing aids. Even if claimant had already obtained hearing aids, their cost should have been itemized in the application. Additionally, the parties provided no information regarding future cost of treatment or

information on collateral sources available for payment of medical expenses. Therefore, the agreement did not include sufficient information to support a finding the agreement was not inadequate.

Status - Integral Employment

Occupational health nurse lacked status. Employment not integral. *Gelinas v. Electric Boat Corporation*, 2010 WL 4926239 (BRFB 2010).

Claimant, an occupational health nurse, treated injured employees in employer's medical clinic, responded to ambulance calls in the shipyard, performed physical examinations, audiograms, EKG's, and stocked radiological control supplies. She sought compensation for hearing loss. The ALJ concluded, and Board agreed, her work was not integral to the shipbuilding process because failure to perform her duties would not have impeded employer's shipbuilding activities. Although her duties undoubtedly were useful to employer providing medical care for injured employees and performing preemployment medical evaluations, her duties were not integral to the shipbuilding process, and her employment was not covered under the LHWCA.

§8(f) - Other

§8(f) vacated when ALJ did not explain date of maximum medical improvement or average weekly wage. *Bomback v. Marine Terminals Corporation*, 2010 WL 4539434 (BRB 2010).

Claimant and employer agreed claimant should receive \$875.00 per week as of September 30, 2006 for a cervical injury. They asked the ALJ to approve the agreement and award §8(f) relief, recognizing their stipulation was not binding on the Director. The ALJ approved the stipulation and awarded §8(f) relief. The Director appealed. The Board vacated the order because the record did not contain any evidence of suitable alternative employment or explain why claimant's disability changed from total to partial as of September 30, 2006. Additionally, there was contradictory evidence regarding the date of maximum medical improvement. The Board directed the ALJ to discuss the conflicting evidence. Furthermore, the record contained no explanation of how the parties arrived at a compensation rate of \$875 per week, and there was no supporting evidence for the agreed average weekly wage. In the absence of specific findings regarding the date of maximum medical improvement and post injury wage earning capacity, the finding the Special Fund must assume liability was vacated and remanded for further consideration.

§8(f) - Greater Disability

Preexisting disability but no proof of combining. *Glindeman v. Crofton Diving Corporation*, 2010 WL 5015073 (BRB 2010).

Claimant injured his cervical spine, had surgery, and was unable to return to his former employment. Employer sought §8(f) relief on the basis of a prior left great toe fracture, non-insulin dependent diabetes, irritable bowel syndrome, mild narrowing of the patellofemoral joint compartment, mild mixed hyperlipidemia, and anxiety disorder. These were manifest conditions which had not created any actual work restrictions but qualified as a preexisting disability because they were serious, lasting medical problems, and cautious employer would be motivated to discharge the employee because of a greatly increased risk of employment related accident and compensation liability. Nevertheless, Employer failed to prove the preexisting condition combined with the injury to result in total disability. Employer's expert did not explain how the preexisting conditions played a contributory role.

§8(f) - Preexisting Manifest Disability

Manifest element not proven. *Boroski v. Dyncorp International*, 2010 WL 4035096 (BRB 2010).

The ALJ concluded exposure to chemical vapors in 2000 caused loss of vision, preventing claimant from returning to work as a helicopter pilot. Dr. Goldberg reviewed medical records from 1988 through 2002 and reported claimant had suffered from genetic eye abnormalities for some time, and the disorder would have been apparent to a specialist on examination prior to 2002. Although this testimony was sufficient to prove a preexisting permanent partial disability for purposes of §8(f), it was not sufficient to satisfy the manifest element. Without a documented diagnosis there must be sufficient unambiguous information in the available record regarding a serious lasting physical condition. It is not sufficient if the disabilities would have been discoverable by means of further testing.