



LHWCA CASELAW SUMMARY

Decisions published in Westlaw.com through June 30, 2011

Distributed July 5, 2011

Attorney Fees - Amount

District Director fee decision remanded due to improper reliance on workers compensation rates from OSB survey. Method used for cost of living adjustment must be disclosed.

Anthony v. Washington United Terminals, 2011 WL 1451828 (BRB 2011).

Matthew Sweeting sought a fee for services from March 2007 to January 2010 work @ \$425.00 per hour. The District Director concluded Tacoma was the appropriate market and awarded \$220.00 per hour. The District Director relied on an ALJ decision, wherein the ALJ relied on the Oregon State Bar 2007 Economic Survey and used a cost of living calculator from an undisclosed website to adjust the Portland, Oregon rates to rates for Seattle, Washington. As services were provided in Tacoma, she concluded the Portland rates must be adjusted downward to reflect the lower cost of living.

The Board held the District Director's discretion to use Tacoma as the relevant market was rational. It was appropriate to use a cost of living adjustment, but she must disclose the source of the adjustment and discuss her findings to permit judicial review. Reliance on workers' compensation rates from the OSB survey was improper because the Board rejected that part of the survey in another decision. The award was remanded for further consideration consistent with this opinion.

Fee must be based on evidence submitted. *Gardiner v. Electric Boat Corporation*, 2011 WL 1451834 (BRB 2011).

Following successful prosecution of claim, claimant's attorney submitted a fee petition, and employer objected to the hourly rate. Claimant's submission included an affidavit regarding his experience, affidavits from other attorneys in the same geographic location attesting to market hourly rates, and fee awards in other cases. Employer submitted documentation concerning hourly rates in the relevant geographic location. The District Director said he had previously determined the market rate and awarded a fee accordingly, but the Board reversed and remanded because the District Director did not identify the source of his findings. The District director must take into account the evidence and arguments offered by the parties and must provide an explanation for his hourly rate determinations. Prior fee award are not necessarily dispositive.

Fee reduction for excessive and unnecessary time and clerical work affirmed. Attorney allowed travel time by car, rather than plane, when explained. *Boroski v. Dyncorp International*, 2011 WL 1451827 (BRB 2011).

The ALJ significantly reduced the hours requested and completely denied hours requested by Mr. Gillelan, who assisted claimant's counsel. Categories of work considered on appeal included: (1) Excessive time. The BRB affirmed reductions because the ALJ fully considered the necessity of each entry and determined these entries were excessive in light of the overall circumstances of the case. (2) Clerical work, such as copying, scanning, organizing, and mailing, emailing, or faxing documents, making telephone calls related to scheduling issues, organizing and assembling files, and arranging for copying to be performed by Kinkos. BRB affirmed deductions because the ALJ provided a rational reason for the reduction. (3) Travel time for claimant's attorney between his office in Nashville and the hearing in Durham, North Carolina. The ALJ thought he should have taken a plane (1.5 hours) instead of driving (20 hours), but the Board said the need to bring seven banker's boxes of documents was reasonable and justified payment even though the trip took 20 hours. (4) Reduction of time devoted to responding to objections to fee petition (59.75 hours reduced to 8 hours. Reduction affirmed, as the response was excessive and unnecessary. (5) Mr. Gillelan's services. The ALJ rationally found they were unnecessary.

Christensen rates affirmed for Charles Robinowitz when no new information submitted. *Goodell v. Marine Terminals Corporation*, 2011 WL 2513703 (BRB 2011).

District Director and ALJ relied on the 9th Circuit decisions in *Christensen v. SSA*, 557 F.3d 1049 (9th Cir 2009), *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir 2009), and determined, in light of the Board's decisions following remand in *Christensen*, which involved the same claimant's attorney, they need not make new findings regarding the market hourly rate awarded to claimant's counsel. They adopted the rates awarded in *Christensen II*, 44 BRBS 39 (BRB 2010) (\$350 for 2006, \$357.50 for 2007, \$370 for 2008, \$392 for 2010; legal assistant paid \$136 for 2006, \$139 for 2007.) Employer appealed, challenging the hourly rates, arguing counsel's years of experience should not be compensated by use of the 95th percentile rates in the Oregon Bar Survey, and a case specific hourly rate must be calculated at each adjudicatory level of proceedings.

The Board affirmed. The documents offered by the parties in support of their positions on the applicable market rate are largely the same as those offered to the Board in *Christensen*. There was no abuse of discretion.

Fee reduction affirmed when counsel spent excessive time responding to employer's objections to fees. *Goodell v. Marine Terminals Corporation*, 2011 WL 2513703 (BRB 2011).

District Director reduced from two hours to one hour the time sought for preparing counsel's three page fee petition and allowed 4.25 hours, rather than 6.25 hours, as time claimed for responding to employer's objections to the fee request. The Board affirmed. While counsel is entitled to reply to employer's objections, he must exercise discretion in doing so. The District Director rationally determined the time claimed was excessive. There was no abuse of discretion.

Average Weekly Wage - §10(c)

§10(c) used when no evidence brief current employment would be permanent, and claimant had prior earnings elsewhere. *Alvarez v. International Contractors, LLC*, 2011 WL 1451836 (BRB 2011).

Claimant worked for employer for 20 days before the injury. The ALJ determined the record did not contain sufficient evidence that claimant's new employment would be permanent and declined to calculate AWW based solely on earnings from three weeks of work. Therefore, the ALJ calculated claimant's earnings from other employment in the preceding 49 weeks, added earnings from employer, and divided by 52 to calculate claimant's average weekly wage. The Board affirmed, as it was a reasonable estimate of claimant's earning capacity based on the limited evidence presented.

§10(c) calculation based on salary at time of injury when employer failed to prove future work would be intermittent. *Serafin v. Mid Marine Bulkhead, Inc.*, 2011 WL 2513705 (BRB 2011).

Claimant was injured September 26, 2007 when employed as a dock builder. In 2005 claimant earned \$59,000 while working as a dock builder for fewer than 52 weeks. In 2006 claimant was unemployed. Employer's general manager testified dock building was seasonal, depending on the amount of available work, and claimant was subject to a layoff at any time, but employer did not produce any tangible evidence to support this testimony. Two other workers testified they had worked for employer for 10 and 25 years without sporadic periods of non-work. Claimant testified he would have continued working without interruption absent his on the job injury. The ALJ concluded claimant's weekly salary with employer of \$1,100 as of the date of injury fairly represented what he might have continued to earn had his injury not occurred.

Causation §20 Presumption

New injury due to continued employment. Employer did not rebut presumption. *Masiello v. Northrop Grumman Shipbuilding, Inc.*, 2011 WL 145816 (BRB 2011).

In 2005 doctors placed screws in claimant's right foot to treat a compensable 2004 injury. Claimant's condition became worse with prolonged walking at work for the same employer. Doctors determined the screws had shifted, were pushing down on foot, and walking in steel toed boots aggravated the foot, resulting in lesions. Employer paid for medical services but contended his condition was the natural progression of the 2004 injury, rather than a new injury, and claimant was not entitled to modification due to the passage of time.

The Board observed a new injury could be compensable if it affected the underlying condition or caused the underlying condition to become symptomatic. Here, employer did not rebut the §20 presumption because employer's doctor did not state there was no work related aggravation of claimant's condition. Claimant sustained a new injury (*i.e.*, an aggravation of a prior injury).

Presumption not applied when ALJ rationally concluded work incident did not occur as described by claimant. *Prince Sadiq v. Service Employees International, Inc.*, 2011 WL 1451835 (BRB 2011).

Claimant testified he fell down a flight of 18-20 steps on January 6, 2006, landing on his back and hip, went to the employer's clinic, was given ibuprofen and returned to work. He also said he fell from the top of a bus on July 23, 2007. On August 25, 2007 a MRI revealed a herniation at L4-5. The ALJ concluded claimant was not credible and failed to establish the specific incidents on January 6 and July 23 occurred as alleged. Having failed to establish a *prima facie* case, the ALJ denied the claim for benefits.

The Board held claimant established the "harm" element but failed to prove an incident occurred at work that could have caused the harm. Claimant gave inconsistent accounts of the incidents, did not seek treatment for approximately a month, and when he did seek treatment, the records referenced chronic pain rather than the reported incidents. Claimant also denied prior hip problems but records proved otherwise. Claimant's inconsistent, uncorroborated, and contradicted evidence went beyond minor inconsistencies. The ALJ's conclusion was rational. Claimant failed to prove work accidents occurred as alleged.

Claimant did not invoke presumption when his testimony was rejected and his doctor's opinion and history on which doctor relied was speculative. *McElvaine v. Tradesman International, Inc.*, 2011 WL 1821546 (BRB 2011).

Claimant alleged he developed demyelinating polyneuropathy from exposure to harmful dusts while working as sandblaster for Newport news Shipbuilding in three weeks in June and July 2004. Claimant testified he constantly sandblasted eight hours a day for three weeks and was denied the use of a respirator. Employer's witness testified claimant sandblasted three or four hours a day for no more than four days, and claimant was not denied access to a respirator. Dr. Lee, claimant's doctor, could not determine the real cause, was not familiar with the chemicals to which claimant was exposed, but said anything was possible, and because claimant had no neurologic conditions before exposures and now has them, there likely is a relationship. The ALJ rejected claimant's testimony and Dr. Lee's speculative testimony regarding the extent of exposure and his speculative opinion. Therefore, the ALJ concluded claimant failed to establish working conditions existed which could have caused his demyelinating polyneuropathy and failed to invoke the Section 20(a) presumption. The Board affirmed.

Presumption overcome when employer contended work related aggravation ended within one week. *Resconsin v. AMSEC Corporation*, 2011 WL 1821533 (BRB 2011).

Dr. Gold testified that if claimant sustained an aggravation of a preexisting neck injury due to a work injury on November 19, 2004, it was short lived. Relying on this testimony, the ALJ concluded claimant's chronic pain after November 26, 2004 was not due to the work injury. Dr. Gold's testimony was sufficient to rebut the §20(a) presumption for the period beginning November 26, 2004. Also, given the absence of objective medical evidence to support claimant's claims of worsening pain after the work incident, the Board also affirmed the ALJ's findings claimant did not prove his present neck and shoulder injuries were caused, aggravated, or exacerbated by the work incident of November 19, 2004.

Death - Other

Suicide attempt not due to an irresistible impulse. *Kealoha v. Leeward Marine, Inc.*, 2011 WL 1821540 (BRB 2011).

Following compensable work injury, claimant attempted to take his own life by shooting himself in the head, causing extensive injuries. He sought disability and medical benefits related to the suicide attempt and resulting injuries. He alleged he had a psychological condition related to the work injury that caused him to try to kill himself. The ALJ concluded claimant's preexisting psychological condition was aggravated by the work injury, but per §3(c), the claim for injuries due to the failed suicide attempt was not compensable because it was intentional and not the result of an irresistible impulse caused by the work injury. The Board affirmed.

§3(c) is an affirmative defense. Employer had the burden to prove the injury was occasioned by the willful intent of the employee to injure or kill himself. When suicide is the result of an irresistible suicidal impulse due to a work related condition, it is not due to willful intent. The ALJ reviewed the evidence and rationally concluded claimant's shooting himself was not due to an irresistible impulse from the work injury but was due to a willful intent to kill himself.

Maximum Medical Improvement

Board reviews definition of maximum medical improvement. *Williams v. Service Employees International, Inc.*, 2011 WL 1451796 (BRB 2011).

A disability is permanent as of the date the condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. A specific statement regarding maximum improvement is not required. The ALJ may use the date a doctor assigned claimant an impairment rating or permanent restrictions as this may be sufficient to determine permanency. If more treatment is necessary, a possibility of improvement may exist, and, even if in retrospect the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. If surgery is anticipated, maximum medical improvement has not been reached. If, however, surgery is not anticipated or the prognosis after surgery is uncertain, the claimant's condition may be permanent. Treatment that may temporarily improve claimant's symptoms does not preclude an earlier date of MMI.

Medical Services - Other

Claimant's testimony alone not sufficient to justify surgery. Physician opinion required. *Williams v. Service Employees International, Inc.*, 2011 WL 1451796 (BRB 2011).

Following compensable left leg surgery, claimant's left leg was 17 mm longer than his right leg. He said an awkward gait produced pain in his hips and right leg and foot and testified his physician, Dr. Lindsey, suggested shortening the rod in the left leg. Employer refused to approve additional surgery. The ALJ found the condition compensable and ordered employer to authorize the surgery.

On appeal, Board affirmed the ALJ's decision regarding compensability, but because the record did not include an opinion from a physician recommending surgery to correct the leg length discrepancy, the Board held employer did not have to pay for the surgery.

Modification - Other

§8(i) agreement not subject to modification. *Hutcheson v. Sea Ray Boats, Inc.*, 2011 WL 2513708 (BRB 2011).

Claimant unsuccessfully appealed orders denying his claim for a back injury. While still on appeal before the 11th Circuit, claimant agreed to settle his claim per §8(i). Less than one year later, claimant petitioned for modification of the agreement. His request was denied. A §8(i) agreement is not subject to modification.

Modification - Change of Condition

Employer's inability to hire claimant as a new hire did not establish a change in economic condition justifying modification. *Cox v. Northrop Grumman Ship Systems*, 2011 WL 1821541 (BRB 2011).

The ALJ terminated compensation as of September 12, 2006 when claimant failed to respond to Employer's offer of suitable alternate employment. On August 22, 2007 claimant requested modification due to a change in economic condition, citing employer's refusal to hire him in August 2007. While this was pending, employer found work for claimant within his restrictions and rehired him October 2, 2007. In December 2007 claimant complained he was unable to do the work within his restrictions. He last worked for employer on December 12, 2007. Employer later confirmed it had no work within claimant's restrictions. Claimant amended the modification petition to seek disability due to change in condition as of December 13, 2007. The ALJ held there was no change in economic condition in August 2007 when employer failed to rehire him or in December 2007 when he was placed on medical leave. The ALJ also made several references to the proposition that modification cannot be used to relitigate previously decided issues.

The Board held the ALJ recited an incorrect legal standard, because modification may be based on new evidence, cumulative evidence, or further reflection on the evidence submitted, but the error was harmless because the ALJ rationally determined claimant did not establish a mistake in fact or change in economic condition. Claimant initially lost an available and suitable job due to his own violation of the applicable rules. Having violated the rules, he no longer was eligible for employer's return to work program for employees returning to work with work injury related restrictions. Work within restrictions was not available when he reapplied for employment in August 2007 or after December 13, 2007 does not establish a change in condition because the work injury was not the basis for any loss in wage earning capacity claimant sustained. Claimant's evidence did not establish the suitable work offered as part of the return to work program in August 2006 would not have remained available to him in August or December 2007 if he had accepted the prior offer of modified work and been part of employer's return to work program.

Permanent Disability - Motivation

Disability ended when claimant was terminated for misconduct and dropped from employer's return to work program. *Cox v. Northrop Grumman Ship Systems*, 2011 WL 1821541 (BRB 2011).

Employer offered claimant a modified job at his prior rate of pay and claimant failed to timely report for work. The ALJ terminated compensation as of September 12, 2006, the date on which employer's offer of suitable alternate employment expired. (Claimant subsequently unsuccessfully petitioned for modification.)

Permanent Disability - Unscheduled Disability

Earning capacity from current job adjusted downward based on percentage changes in NAWW. *Williams v. Service Employees International, Inc.*, 2011 WL 1451796 (BRB 2011).

The ALJ concluded a toll collector position in 2009 was representative of earning capacity but adjusted wages in 2009 to rate in effect for this position in 2003 by looking at the percentage changes in the NAWW from 2003 to 2009. As this was rational, supported by substantial evidence, and in accordance with law, the Board affirmed.

PPD measured by difference between average weekly wage and residual earning capacity. Future plan to return to USA with lower earnings irrelevant in PPD calculation. *Raymond v. Blackwater Security Consulting, LLC*, 2011 WL 1752169 (BRB 2011).

Claimant injured his back when in Afghanistan in May 2007. Claimant had planned to continue one year contracts sequentially and return to Arizona no later than August 2011. The ALJ concluded his average weekly wage was \$2,897.95. Because of the injury, claimant returned to the USA prematurely and secured new employment beginning January 7, 2008. The ALJ concluded claimant's residual earning capacity was \$798.83 as of January 7, 2008 and was \$985.51 as of January 1, 2009. Nevertheless, as of September 1, 2011 the ALJ awarded \$1 per week instead of PPD based on actual loss of wage earning capacity based on the belief claimant should not receive benefits indefinitely based on higher overseas wages when claimant had been planning to return to Arizona by August 2011. The Board reversed.

The date claimant planned to leave his overseas work is not a factor in awarding benefits. The statutory formula under §8(c)(21) is straightforward. It contemplates wages at the time of injury as the baseline for comparison with actual post injury earning capacity. ALJ erred in changing compensation rate based on his testimony regarding planned departure from Afghanistan.

Permanent Disability - Vocation Evidence

Vocational evidence insufficient because it failed to provide full information about jobs and failed to consider all of claimant's restrictions. *Fifer v. Marine Repair Services*, 2011 WL 1451830 (BRB 2011).

The ALJ awarded PTD until claimant went to work at his family's restaurant @ \$400 per week. In so doing, the ALJ rejected testimony from employer's vocational consultant who had identified six restaurant manager and assistant manager positions. Employer's

expert focused on the lifting requirements of the positions rather than whether the jobs required long term standing or provided rest breaks and whether claimant's use of medications could affect his ability to concentrate on the job. The ALJ rationally found employer failed to provide sufficient information about the jobs, as the expert did not provide all of the job duties or assess the job's suitability in terms of all of claimant's restrictions.

Settlements

§8(i) application incomplete for purposes of 30 day presumed approval if representative fees unresolved. *Erickson v. Sea-Star Stevedoring & Homeport Insurance Co.*, 2011 WL 2513688 (BRB 2011).

On March 22, 2010 the parties sent the ALJ a signed §8(i) application. The application stated each employer would pay a proportionate share and/or specific amount of fees. On April 20, 2010 the ALJ received an amendment to the application which resolved the apportionment of liability of each employer for claimant's attorneys fee. On April 29, 2010 the District Director filed an order approving the application, as amended by the supplement. Claimant's attorney (Matthew Sweeting) requested a 20% penalty, contending the agreement had been deemed approved on April 22, 2010, thirty days from submission of the application, because the ALJ had neither approved or disapproved the application within 30 days of submission. Although employer paid compensation on May 5, 2010, within ten days of April 29, 2010, claimant argued compensation was due by May 2, 2010, ten days from April 22, 2010. The District Director denied the request for penalties, and the Board affirmed.

The submission of the supplement suggests the initial application was incomplete. Consequently, the 30 day automatic approval period was tolled until the filing of the supplemental application. Payment was timely.

Evidence insufficient to set aside §8(i) agreement. *Hutcheson v. Sea Ray Boats, Inc.*, 2011 WL 2513708 (BRB 2011).

The ALJ denied a claim for low back injury. The BRB affirmed, and claimant appealed to the 11th Circuit. While on appeal, claimant agreed to a §8(i) agreement. The claim was remanded to an ALJ who on April 10, 2009 approved the agreement, noting claimant was represented by counsel who had assessed the risks of litigation and sought approval in claimant's best interests. He also determined the settlement was not procured under duress and was adequate. Claimant asked the ALJ to set aside the agreement. The ALJ and BRB refused. There was no evidence the agreement was procured by fraud or duress and no evidence claimant lacked the mental capacity to understand the settlement.

Status - Load/Unload/Repair/Break

Vacuuming debris from a bridge to a barge was not loading within the meaning of the LHWCA. This work was not maritime in nature or integral to maritime commerce. *Hough v. Vimas Painting Co.*, 2011 WL 2174854 (BRB 2011).

Claimant worked as a bridge vacuumer in a containment area on a bridge, using a hose attached to a recycler on a barge spudded below the bridge on the Ohio River to clean debris that fell during a blasting process used to clean the bridge. The debris included

dust, pigeon droppings, and paint chips. The debris was stored on an adjacent barge in a dumpster and was to be disposed of at the end of the project. When claimant's vacuum machine was shut down for repairs claimant helped move the debris bags from the recycler into the dumpster for three days.

Claimant contracted histoplasmosis. The ALJ concluded this resulted from work on the bridge, not the barge, and denied compensation.

The Board noted a bridge ordinarily is not a covered situs, but because claimant did some work on a barge, it affirmed the ALJ's conclusion claimant's injury did not occur on a covered situs because claimant did not develop the disease as a result of work on the barge. The Board also concluded claimant lacked status because operating the vacuum hose to move debris to the barge was not maritime employment. The vacuumed debris did not enable the barge to engage in maritime commerce, and claimant's role in vacuuming debris was not integral to any maritime purposes. His work was neither maritime in nature or integral to maritime commerce. Vacuuming of debris from a bridge did not constitute loading as that term relates to coverage under the LHWCA.

Temporary Disability - Other; Medical Services - Other

Compensation not suspended for refusal to attend IME when IME selection could be viewed as doctor shopping. *Sims, Sr. v. Ceres Gulf, Inc.*, 2011 WL 1451837 (BRB 2011).

In March 2007 Dr. Steiner examined claimant at employer's request. On January 31, 2008 Dr. Steiner again examined client and agreed with claimant's AP. Dr. Adatto, that claimant needed surgery. After surgery, Dr. Steiner re-examined claimant on July 29, 2008. Employer scheduled another exam with Dr. Katz for March 31, 2010. Claimant refused to attend, asserting employer had selected Dr. Steiner as its expert and could not change. An ALJ concluded claimant had not unreasonably refused to submit to an examination by Dr. Katz and refused to suspend compensation per §7(d)94).

On appeal, the Board observed the District Director is authorized to supervise medical care, can respond to a claimant's request to change physicians, order a change of physician when necessary or desirable, excuse a physician's failure to file a timely report, and appoint a qualified independent physician to examine the claimant. Only the ALJ had authority to address contested factual questions regarding medical care, including the necessity for and employer's liability for medical care, whether the claimant requested authorization of treatment, whether employer refused medical treatment, and whether treatment obtained or prescribed was reasonable and necessary. §7(d)(4) allows the ALJ or the district director to decide if compensation should be suspended due to claimant's refusal to be examined by employer's chosen physician.

Here, the ALJ had jurisdiction and rationally found claimant's refusal to see Dr. Katz was not unreasonable. Dr. Steiner remained capable and available, and the ALJ could view employer's motion as doctor shopping.