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QUARTERLY LHWCA CASELAW SUMMARY

Decisions published in WESTLAW through 08/20/22
Decisions posted by BRB at https://www.dol.gov/brb/decisions.htm:
published through 07/26/2022; unpublished through 07/26/2022
Published September 1, 2022

Attorney Fees - Amount
Evidence – Other

ALJ refusal to receive additional exhibits with claimant's reply to employer objections to fees affirmed. No denial of due process. *Hendricks v. Trapac, LLC*, 2022 WL 3552135 (BRB 21-0348, 7/29/22) (unpublished).

> ALJ directed claimant's counsel to serve his fee petition on opposing counsel and then ordered parties to initiate a verbal discussion to amicably resolve any dispute concerning the amount of fees requested. Then, within thirty days of the date of the initial fee petition counsel should file a final petition incorporating any agreed changes. Employer had 21 days to file a statement of objections, and claimant's attorney could file a reply within 14 days. Employer did not identify specific objections to claimant's itemization before claimant's attorney filed his petition. [This was not stated in the Board's decision.] In written objections employer argued claimant was not entitled to payment for time and travel to participate in mediation sessions related to claimant's third party suit and was not entitled to time and travel to San Francisco (from San Diego) because claimant could have hired competent counsel in San Francisco. In reply, claimant attached affidavits explaining why his participation in a third party mediation was necessary to claimant's LHWCA claim and explaining why other attorneys in San Francisco employer identified were unwilling or less qualified to represent the claimant. The ALJ refused to receive the additional exhibits because he did

not want to create a second litigation over attorney fees and exhibits should have been submitted with the initial petition. Regarding travel, he stated numerous longshore practitioners from that area regularly appeared before him in longshore matters, and no serious argument could be made by claimant that there were no competent attorneys in the San Francisco Bay area. Claimant appealed, contending the ALJ specially permitted submission of a reply, and excluding the supporting exhibits was a denial of due process of law. Claimant also objected to the ALJ's rate determination.

The Board affirmed denial of time and travel expense, concluding claimant had a meaningful opportunity to submit any and all evidence he deemed necessary to support his fee request with this final petition. Claimant did not sufficiently explain why the excluded declarations could not have been submitted with his final petition. The ALJ neither violated counsel's right to due process and did not act in a manner that was arbitrary, capricious, or an abuse of discretion. (The Board remanded for further consideration of the appropriate rate.)

Attorney Fees - Amount

Partial success means partial fee. *Hernandez v. National Steel and Shipbuilding Co.*, 2022 WL 2643443 (BRB 21-0350, 6/23/22) (unpublished).

Claimant filed a petition to modify an April 27, 2010 compensation order, alleging worsening of his left knee and mistake in fact as to calculation of a stipulated average weekly wage for his 2008 knee injury. He also filed a claim in 2014 alleging cumulative trauma to back and hip. The ALJ awarded TTD, PPD for the left knee, held claimant sustained a work related back and hip injury, but denied the claim for ongoing disability for the back and hip. The Board and Court of Appeals affirmed. Counsel sought fees from OWCP and OALJ. For OWCP services counsel sought $25,382.11 representing 15.4, 42.7, and 6.3 hours his time, associate attorney time, and paralegal time, plus $192.61 costs. District director awarded fees at the requested hourly rate, but reduced hours to 13.35, 12.7, and 5.3, denied the costs, and awarded $12,453.75. Employer appealed, contending the award was excessive in view of results achieved, and the district director failed to correctly apply *Hensley v. Eckerhart*, 46 US 421 (1983). The Board agreed with employer.

Claimant prevailed in establishing entitlement to medical treatment for his back and hip injury, a higher AWW for his 2008 left knee injury, but because of prior compensation payments, claimant did not obtain additional compensation or monetary relief. He did not prevail on his claim for PTD due to the left knee, back, and hip, or combination of those injuries or for further

compensation for his scheduled left knee injury. He achieved partial or limited success. The district director improperly rejected Employer's *Hensley* argument without adequate explanation. The district director should have considered claimant's overall success in terms of the entirety of the claims raised and determine if claimant achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award.

DISSENT, Judge Buzzard, argued *Hensley* distinguished between two types of cases: those in which counsel in one lawsuit pursued distinctly different claims for relief based on different facts and legal theories and those where counsel's time was devoted to a series of discrete claims but generally to the litigation as a whole involving a common core of facts or claims based on related legal theories. In the former time spent on unsuccessful claims is not compensable. In the latter, the focus should be on the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation. This case belongs in the latter category. A fee should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Here, claimant established work relatedness of his hip and back injuries, overcame arguments the claims were untimely, not subject to modification an unrelated to work, and claimant was awarded all past, present and future medical care for his knee, hip, and back and was awarded $45,722.16 as compensation for a scheduled knee injury. Money need not change hands for claimant to be deemed successful in his claim.

Claim – Date of Awareness

Claim timely when no entitlement to temporary disability. *Turner, Sr. v. Electric Boat Corporation*, 2022 WL 2116124 (BRB 21-0545, 5/31/22) (unpublished).

On November 1, 2017 claimant struck his left knee on a piece of exposed steel when descending a ladder in a submarine. He had immediate pain told his supervisor, co-worker, and general foreman, did no more work for the rest of the shift, but returned to work the next day. He continued to have pain but did not seek treatment until October 29, 2018, when he reported the injury to claimant's yard hospital. Employer issued LS-202 on October 31, 2018. Claimant filed his claim on February 12, 2019, which employer controverted as untimely. In March 2019 claimant saw his PCP and was referred to an orthopedist, Dr. Hutchins, who saw him April 16, 2019. On May 17, 2019 Dr. Hutchins opined the knee condition was due to the earlier work injury and resulted in 5% impairment. The ALJ held the claim was untimely because no claim was filed within one year of November 1, 2017, when claimant had the requisite awareness. The ALJ ordered employer to pay for medical treatment only.

The Board noted an employee is aware of the full character, extent and impact of the injury when the employee knows or should know the injury is work related and will impair earning power. The statute was not tolled because claimant missed no time from work, so the employer did not have to file a LS-202. The ALJ's finding that November 1, 2017 was date of awareness was reversed because that could not be the date when he knew or should have known his work injury impaired his earning power. The claim was timely as a matter of law, having been filed within one year of October 29, 2018, when he reported the accident to employer's yard hospital and also timely from April 16, 2019, when he saw Dr. Hutchins.

DISSENT, Judge Boggs, would reverse and remand to the ALJ to determine the date of awareness.

Exclusions – Jones Act

No Jones Act coverage when vessel was not in navigation due to extensive repairs. *Jarvis v. Hines Furlong Line, Inc.*, 2022 WL 1929364 (6th Cir., 21-5937 6/6/2022).

Hines Furlong owned the vessel M/V *Warren Hines*, an inland tug boat, which was at National Maintenance shipyard for complete refurbishment from September 2017 to June 2019. Jarvis had been a deckhand working on tug boats but was sent to the *Warren Hines* in April 2018 after a non occupational illness placed him light duty. He and several of his co-workers assisted with demolition, painting, helping with plumbing, pulling, wires, chipping, and other tasks. In April 2019, when repairs were mostly done, Jarvis was injured on the *Warren Hines*. He filed suit under the Jones Act, general maritime law, and for maintenance and cure. The District Court granted summary judgment in favor of Hines Furlong. The 6th Circuit affirmed.

The dispositive issue was whether the vessel was in navigation. If a vessel is under repair the extent of the repairs bears on whether the vessel is capable of being used for transportation. At some point repairs become sufficiently significant that the vessel can no longer be considered in navigation. Vessels undergoing minor repairs can be in navigation, while vessels undergoing major overhauls or renovations can be taken out of navigation. Here, the work qualified as a major renovation. There was extensive hull work, the old interior was removed and replaced, there was a lot of electrical work and plumbing, fuel tanks were cleaned and emptied, water pumps were replaced, work on the main engine included a new cooling system, and bow work was

done. The vessel spent most of its time on dry dock. When not on dry dock it lacked operational engines to qualify as a vessel in navigation.

Interest

Interest on costs allowed if extraordinary outlay and exceptionally protracted delay. Rate based on 28 USC §1961. *Seachris v. Brady-Hamilton Stevedore Co.*, 2022 WL 2116121 (BRB 17-0581, 05/16/22) (unpublished).

Court of Appeals instructed BRB to determine if an award of interest on costs was appropriate because of the exceptionally protracted period the case was pending, having been filed in 2005, in which costs were incurred between 2007 and 2016. The Board held interest could be awarded if the attorney made an extraordinary outlay of expenses and the time between payment and reimbursement was exceptionally protracted.

The Board also held interest, if due, should be based on 29 USC §1961, *i.e.,* the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment (the same rate payable to injured workers).

Medical Services - Other

Medical marijuana does not qualify as reasonable and necessary treatment under the LHWCA. *Garcia v. Calzadilla Construction Corporation*, 2022 WL 3551711 (BRB 21-0063, 07/26/2022).

Claimant, receiving PTD, sought reimbursement for payment of medical cannabis infused cookies and edibles obtained as medical treatment prescribed by claimant's Puerto Rico doctor. Puerto Rico law allows for the prescription of medical marijuana, and claimant's doctor characterized marijuana edibles as one of the only treatments that best works for the patient. Employer refused reimbursement. The ALJ held marijuana remained a controlled substance under federal law and could not constitute reasonable and necessary medical treatment under the LHWCA. The Board affirmed.

The Controlled Substance Act ["CSA"], 21 USC §801 *et seq*., places all substances which in some manner are regulated under federal law into one of five schedules. Marijuana is classified as a Schedule I controlled substance so, under federal law, it "has no currently accepted medical use in treatment in the United States." *United States v. Oakland Cannabis Buyers' Coop*, 532

US 483, 491 (2001) (holding there is no medical need defense for the manufacture and distribution of Schedule 1 controlled substances) (quoting 21 USC §812(b)(1)(B)). This claim arises under a federal act, so the ALJ must accept the CSA as binding federal law in discerning whether marijuana constitutes medical care which is recognized as appropriate for the medical profession for the care and treatment of the injury. Through the CSA classification the government has explicitly recognized marijuana has no currently accepted medical use in treatment in the United States.

Permanent Disability – Scheduled PPD

Monaural hearing impairment with tinnitus compensated as binaural PPD. *Tower v. Total Terminals International*, 2022 WL 3551824 (BRB 21-0319, 07/26/22).

Claimant had work related hearing loss rated as 0% in the right ear and 9.375% in the left ear. He qualified for hearing aids in both ears and had 2-4% impairment for tinnitus. The employer argued claimant was entitled to $7,361.03 for monaural PPD because he did not have measurable binaural impairment and therefore could not receive an award for tinnitus. Claimant argued his monaural hearing impairment could be converted to 1.56% binaural impairment, so he should received 3.56% to 5.56% binaural PPD, worth $10,756.61 to $16,799.65. The ALJ granted employer's motion for summary decision and denied claimant's similar motion. Claimant appealed. The Board reversed. The 6th edition of the AMA *Guides* specifically provides for compensation for tinnitus by converting claimant's monaural impairment to a binaural impairment. The claimant does not need measurable hearing loss in both ears to be entitled to compensation for tinnitus.

DISSENT, Judge Boggs, agreed claimant was entitled to compensation for tinnitus, but would have added the 4% tinnitus rating to the 9.3756% monaural rating to reflect an award of 13.375% monaural impairment.

Scheduled PPD is not payable as unscheduled PPD even if the record lacks evidence of an impairment rating. *Brown v. Huntington Ingalls, Inc.*, 2022 WL 2116122 (BRB 21-0404, 5/16/22) (unpublished).

On June 9, 2017 claimant injured his left calf. His doctor cleared him to return to work with restrictions on March 5, 2018. Employer obtained a labor market survey identifying several jobs his doctor approved as suitable. Claimant did not return to work, and on June 4, 2018 returned to his doctor with complaints of left knee pain. The doctor concluded the knee problem was a consequence of left calf weakness and resulting limp. Claimant had

total knee replacement surgery on August 27, 2020. The ALJ held the calf and knee conditions were compensable. For the calf he awarded TTD through March 4, 2018 and unscheduled PPD as of March 4, 2018 because there was no evidence of an impairment rating necessary to calculate a scheduled award. For the knee the ALJ awarded ongoing TTD from February 26, 2019. He suspended PPD during periods when claimant was entitled to TTD. The Board reversed.

Per *PEPCO v. Director, OWCP*, 449 US 268 (1980), the schedule is the exclusive remedy for compensating a claimant for PPD to listed parts of the body. Claimant cannot receive an award for loss of wage earning capacity. If evidence regarding impairment is non-existent or in equipoise, claimant cannot satisfy his burden of proof and has not established entitlement to PPD benefits. On remand the ALJ can reopen the record to provide parties an opportunity to submit evidence of impairment. Also, any PPD should be suspended during a period of TTD.

Settlements

ALJ cannot alter terms of proposed settlement agreement. *Benson v Air Force Central Welfare Fund, Travis AFB*, 2022 WL 3552129 (BRB 21-0214, 7/26/22) (unpublished).

Parties submitted a §8(i) agreement to the ALJ stating claimant made a claim for medical benefits, or reimbursement of such benefits and for future medical benefits, but not for disability. Claimant continued to work for employer without any loss of income but planned to retire at the end of December 2020. The ALJ approved the settlement, concluded the settlement was adequate, not procured by duress, and resolved call claims for compensation and medical benefits. Claimant appealed, contending she only agreed to settlement of medical benefits, not disability. The Board agreed. Having found the settlement adequate and not procured by duress, the ALJ could not modify the terms of the agreement. The Board modified the order to eliminate the reference to resolving all claims for compensation to reflect the agreement only resolved claims for medical benefits.

Temporary Disability - Entitlement

Claimant's credible testimony can support entitlement to temporary disability. *Miken v. ICTSI Oregon, Inc.*, 2022 WL 2304235 (9th Cir. 20-71272 (6/27/22) (unpublished).

> The ALJ denied TPD from August 18, 2014, the date of injury, to September 25, 2015, the date claimant first saw a doctor for his knee, because he failed to show he was incapable of performing the job because of the injury. The court held this was the wrong legal standard. Per *Jordan v. SSA Terminals, LLC*, 973 F.3d 930 (9th Cir. 2020), credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his or her past work. The claim was remanded to consider claimant's pain testimony and his physician's notes which corroborated his testimony. Both potentially could support a finding of disability under the standard articulated in *Jordan*.