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QUARTERLY LHWCA CASELAW SUMMARY

Decisions published in WESTLAW through February 27, 2023;
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Appeals – Final Orders

Appeals after remand from Board should be filed with the Board or, sometimes, in the Court of Appeals. *Dutra Group, Inc. v. Director, OWCP*, 2023 WL 332750 (9th Cir. 21-71411, 1/20/23) (unpublished) (on appeal from *Zaradnik v. Dutra Group, Inc.*, (BRB 16-0128, 16-0128A, 7/27/21) (unpublished)).

> On December 9, 2016 the Board issued a decision affirming the ALJ's compensability finding but remanding to reconsider the nature of the disability. On March 17, 2021 the ALJ on remand approved a stipulation agreeing claimant was at maximum medical improvement on January 28, 2012, was permanently and totally disabled, and, with the Director's consent, awarding employer §8(f) relief. The stipulation also stated, "The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit. There was no appeal to the Board. On June 1, 2021 employer filed a motion asking the BRB to declare its 2016 decision final, thereby enabling an appeal to the 9th Circuit. The Board denied the motion because in the absence of an appeal to the Board it had no jurisdiction. In footnote 2 the Board stated employer should have filed a timely appeal of the ALJ's Order Approving Stipulations seeking summary affirmance of the decision and noting the appeal was for the purpose of preserving its right to appeal the underlying Board decision. Employer appealed. The Court denied the petition.

After the ALJ issued an order resolving the issues on remand employer could have preserved its ability to obtain judicial review of the Board's 2016 order by filing an appeal to the Board within thirty days *or* filing a petition in the Court of Appeals within sixty days, which is permitted when the Board has already determined the contested issue in an earlier decision and appeal to the Board after remand would be futile. A summary affirmance adhering to a previous ruling in the same case would be a purely ministerial act. As employer did not file a timely appeal to the Board (or the Court of Appeals) the Board lacked jurisdiction to grant employer's motion.

Causation – Intervening Injury

§20(a) presumption applicable to secondary/consequential injuries. *Barwari v. Titan Corporation*, 2023 WL 2182704 (BRB 20-0494 (1/19/23) (unpublished).

Translator in Kuwait and Iraq filed a claim for diabetes and hypertension and for depression as a consequence of these work related injuries. The ALJ invoked the §20(a) presumption as to claimant's diabetes and hypertension, held employer rebutted the resumption, but ultimately found diabetes and hypertension were not work related, and neither was the depression because it allegedly was brought on by the diabetes and hypertension. On appeal the Board held claimant's diabetes was compensable as a matter of law because employer did not rebut the presumption. As to depression, which claimant alleged was a consequence of his diabetes, the Board held the §20(a) presumption applied to the primary injury *and* to the secondary injury. To be entitled to the §20(a) presumption linking the secondary psychological injury to employment claimant must sufficiently allege his depression or its aggravation or hastening could have naturally or unavoidably resulted from the primary injury (diabetes). If claimant does so the ALJ must assess whether employer submitted substantial evidence of an intervening or independent cause of the depression or that it did not naturally and unavoidably result from his diabetes. If employer rebuts the resumption the matter must be decided on the record as a whole, with the burden of persuasion on the claimant.

Causation - §20 Presumption

ALJ improperly considered credibility when deciding if claimant invoked §20(a) presumption. *Hood v. Reefer Express, LLC*, 2023 WL 2182706 (BRB 21-0245, 1/31/23) (unpublished).

Claimant alleged injuries to his back working for employer on June 10, 2015, November 30, 2015, and August 24, 2016. The ALJ held claimant was not entitled to compensation for the November 2015 and August 2016 injuries. He did not invoke the §20(a) presumption because he lacked credibility due to his varying iterations of how the accident occurred. The Board reversed and remanded, citing *Rose v. Vectrus Systems Corporation*, reconsideration en banc, 2023 WL 111367 (BRB 20-0279, 12/29/22), which held credibility can play no role in addressing whether a claimant established a prima facie case. Because claimant sufficiently produced evidence of harm and working conditions that could have caused it, claimant invoked the presumption. On remand the ALJ should address the remaining causation analysis and any other remaining issues.

In 5th Circuit, witness credibility can be considered when determining if claimant invoked the §20(a) presumption. *Apaza v. SOC-SMG, Inc.*, 2023 WL 2182705 (BRB 21-0076, 1/30/23) (unpublished).

ALJ held claimant did not invoke the §20(a) presumption in support of his claim for hearing loss because the audiogram on which he relied was "highly questionable" because it provided no calibration information or other indicia of reliability and therefore did not provide evidence of harm. It lacked information regarding the conditions under which testing was performed, the qualifications of the person administering the test, and whether appropriate medical criteria were used. The Board affirmed, noting the case was subject to 5th Circuit precedent, including *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116 (5th Cir. 2016), which held the ALJ has authority to address witness credibility in determining whether the claimant made a prima facie case and may draw inferences and conclusions from the evidence.

Board explains shifting burdens when invoking and rebutting §20(a) presumption. *Rose v. Vectrus Systems Corporation*, Reconsideration en banc, 2023 WL 111367 (BRB 20-0279, 12/29/22).

Claimant sought compensation for PTSD. DME neuropsychologist testified there was no credible evidence of believable symptoms, but even if valid it they would not reach the level of PTSD diagnosis. The ALJ credited the DME's report, concluded claimant was not credible, and held claimant's lack of credibility undermined opinions of other doctors and therapists who relied on claimant's reporting of her symptoms in forming their diagnosis. The ALJ concluded claimant did not suffer a psychological harm and did not establish a prima facie case to invoke §20(a).

On appeal claimant argued the ALJ improperly required her to prove she suffered a harm by a preponderance of the evidence. In its initial decision, *Rose v. Vectrus Systems Corp.*, 2021 WL 2375837 (BRB 20-0279, 5/25/21) (unpublished), the Board held the ALJ did not err in assessing claimant's credibility in determining whether her subjective reports of symptoms to her physicians were sufficient to establish a prima facie case. As medical providers on whom claimant relied largely based their diagnosis on claimant's self reporting of her symptoms, the ALJ acted within her discretion to find claimant's lack of credibility tainted the diagnosis of her doctors and practitioners and therefore their diagnosis of a work related psychological injury could not be given weight. On reconsideration, en banc, the Board reversed its prior decision.

To invoke the §20(a) presumption claimant bears an initial burden of production. Employer bears a burden of production to rebut. The claimant then bears a burden of persuasion to establish a work-related injury by a preponderance of the evidence. The burden of production applies equally to physical and psychological injuries. Claimant need only produce "some evidence" of a harm and "some evidence" of either a work incident or working conditions that had the potential to result in or contribute to that harm. Claimant's theory as to how the injury arose must go beyond mere fancy. "Credibility does not come into play in addressing whether a claimant has established a prima facie case. Application of a 'some evidence' standard at invocation, in the presence of a burden of production rather than persuasion analysis, does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence at step one. Rather, it involves having a claimant present some evidence or allegation that if true would state a claim under the Act." If the employer produces substantial evidence showing otherwise the presumption drops from the case and the claimant must bear the overall burden of persuasion and establish the injury is work related by a preponderance of the evidence. At the third step of the analysis the ALJ may weigh the evidence, assess the credibility of the witnesses and make any reasonable inferences.

In this claim claimant testified and submitted doctors' and therapist's statements regarding her psychological symptoms and diagnosis sufficient to constitute "some evidence" to support her allegation she sustained a harm. She also produced "some evidence" she encountered working conditions that could have caused her psychological injury. The ALJ improperly discussed and analyzed claimant's credibility in addressing whether she established the elements of her prima facie case for invocation of the §20(a) presumption. As a matter of law claimant satisfied the initial burden of production. The claim

was remanded for the ALJ to address whether employer's evidence was sufficient to rebut the presumption.

FN 34 acknowledged this decision conflicted with the 5th Circuit's decision in *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 127 (5th Cir. 2016). Therefore, the Board will apply this holding in all cases except those arising within the jurisdiction of the 5th Circuit.

DISSENT, Judge Buzzard, agreed claimant invoked the presumption but he would have addressed and vacated as irrational and unsupported the ALJ's discrediting of claimant's testimony and opinions of her medical experts.

DISSENT, Judge Boggs, would again hold the ALJ permissibly found claimant's testimony not credible and consequently opinions of doctors who relied on claimant's self-reported symptoms were tainted.

Employer did not rebut §20(a) presumption. *Barwari v. Titan Corporation* (BRB 20-0494 (1/19/23) (unpublished).

Translator in Kuwait and Iraq filed a claim for diabetes and hypertension and for depression as a consequence of these work related injuries. The ALJ invoked the §20(a) presumption as to claimant's diabetes and hypertension, concluded employer rebutted the presumption, but ultimately found diabetes and hypertension were not work related. In finding the presumption rebutted for diabetes the ALJ relied on Dr. Edelman, who stated work in Iraq including stress and food consumed could have helped bring on diabetes a little sooner … it's possible that it accelerated, but I don't think I'm prepared to say it's more likely than not."…. "I really can't tell you if it is more likely than not but [stress from overseas employment] may have contributed to [Claimant's diabetes occurring sooner.]

On appeal the Board held Dr. Edelman did not explicitly contend it was more likely than not working conditions did not aggravate claimant's diabetes. His statement was too equivocal to sever the potential for claimant's work to have aggravated or hastened his diabetes and therefore did not rebut the §20(a) presumption. As Dr. Edelman's opinion was the sole rebuttal opinion, claimant's diabetes was aggravated by his employment as a matter of law.

Presumption not rebutted when defense expert found no evidence of work related component but did not affirmatively address whether dust exposure aggravated the condition. *Hill v. Northrop Gruman* (BRB 21-0565, 12/29/22) (unpublished).

> Claimant produced evidence his exposure to dusty conditions and fumes from burn pits aggravated his interstitial lung disease (ILD), sufficient to invoke the §20(a) presumption. Employer's expert, Dr. Rosen, reported the cause of ILD was unknown. It was an ordinary disease of life that can develop absent any work related dust exposure. She found no evidence of a work-related component to claimant's injuries. The ALJ held this was insufficient to rebut the presumption. Employer appealed. The Board affirmed.
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> In cases arising in the Eleventh Circuit the opinion of a physician that, to a reasonable degree of medical certainty, no relationship exists between an injury and the employment accident or exposures alleged to be the cause of the injury is sufficient to rebut the §20(a) presumption. Here, Dr. Rosen's opinion did not address dust or dust exposure. She did not address whether exposure to environmental dust or other particulates could aggravate the underlying ILD.

Hearings - Issues

Remand improper when employer's withdrawal of controversion did not cover all issues scheduled for a hearing. *Fraker v. Triple Canopy*, 2023 WL 2326909 (BRB 21-0511, 12/22/22)) (designated published on 02/27/23).

> Claimant compensably injured his lumbar spine, right knee, right hip, right groin, and cervical spine on April 25, 2019. Two days later he injured his left shoulder after falling when his right knee gave out. Claimant amended the claim to include the left shoulder injury. Employer initiated TTD retroactive to May 1, 2019 but a dispute arose regarding medical services and entitlement to disability. After an informal conference a claims examiner recommended employer authorize surgery for the knee and shoulder. Employer authorized the knee surgery, refused to authorize the shoulder surgery, but continued payment of TTD.
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> Hearing was scheduled, but before it convened employer sought remand to the OWCP, stating it would withdraw its controversion of claimant's entitlement to shoulder surgery but there was no reason to award ongoing TTD, subject to modification, because it had not controverted claimant's right to that compensation. The ALJ granted the request for remand, relying on 20 CFR §702.351 which states "whenever a party withdraws his controversion of

the issues set for a formal hearing, the administrative law judge shall halt the proceedings . . . and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315." Claimant appealed. The Board reversed.

20 CRF §702.315 instructs the district director to enter a compensation order only when agreement is reached on all issues. 20 CRF §702.351 can only apply when no unresolved issues remain (citing *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990). When employer withdrew the controversion of claimant's entitlement to shoulder surgery the only remaining issue was claimant's continued entitlement to TTD. There was no agreement on TTD, so the district director lacked the power to "dispose of the claim" per 20 CFR §702.315, and the ALJ should not have granted the motion to remand.

Hearings – Reconsideration and Other Motions

No abuse of discretion to deny receipt of new evidence post decision and order when claimant had not proceed with diligence. *Eason v. Virginia International Terminals, LLC* (BRB 21-0636, 12/29/22) (unpublished).

After a hearing January 16, 2020 and February 20, 2020, following injury on February 18, 2018, the ALJ, on March 24, 2021, held claimant was able to return to work with no restrictions as of November 15, 2018 and was not disabled in any capacity as of November 29, 2019. Claimant filed a motion for reconsideration and a request to reopen the record to admit additional evidence. The ALJ denied both motions, noting three of the four documents claimant sought to admit on reconsideration were not available at time of hearing but claimant gave no legitimate justification for not submitting the one that was available and no reason why the other three could not have been submitted before the Decision and Order Denying Benefits was issued. Also, claimant's assertion the four exhibits indicated he had no preexisting neck problems before the accident was a belated attempt to relitigate the issues already decided against claimant. The proposed new evidence was not submitted timely and did not support claimant's arguments. Claimant appealed. The Board affirmed.

Although the ALJ may admit post-hearing evidence the party wishing to include the evidence must proceed with diligence. If a party wishes to submit new evidence in an effort to change an ALJ's decision he generally must file a motion for modification. Here, one report should have been available before the hearing, but claimant failed to present it or explain why he did not do so. The remaining documents post-dated the hearing but existed before the ALJ rendered a decision, but claimant made no effort to submit them before

issuance. A party is not entitled to relitigate the claim on reconsideration or raise issues which should have been anticipated before the ALJ decided the claim. See FRCP 59(e). The ALJ had discretion to deny the request to consider new evidence, some of which was generated over one year before claimant filed his motion to reopen the records.

Hearings – Withdrawal and Dismissal

Remanded to reconsider eligibility for withdrawal of claim to pursue alternative civil claim against uninsured employer. *Cadrecha v. Ben M. Radcliff Construction, Inc.*, 2022 W: 17850552 (BRB 22-0296, 11/23/22) (unpublished).

Claimant sustained significant injuries working at a shipyard operated by Huntington Ingalls, Inc. (HII) when employed as an iron worker by Favre's Steel Erections LLC (Favre), an uninsured subcontractor of an insured company, Ben M. Radcliffe Construction, Inc. (BMRC). Favre's state claim insurer began payment of compensation. §5(a) states if an employer fails to secure payment of compensation an injured employee may elect to claim compensation under the chapter or maintain an action at law or in admiralty for damages. A contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by §904.

Claimant filed a civil suit against Favre, BMRC, and HII and two other subcontractors and also filed a claim under the LHWCA with BMRC. At a later date he filed a motion with the district director to withdraw his LHWCA claim to pursue the state tort action. The district director denied the request because if Favre did not have coverage, BMRC, who hired Favre, was liable, so claimant and the employer retained the right to litigate the issue of insurance coverage under the LHWCA. Claimant appealed. The Board remanded for reconsideration.

20 CRF §702.225 allows a living claimant to withdraw a claim without prejudice prior to adjudication if the district director determines it is for a proper purpose and in the claimant's best interest. Withdrawal of a claim to first seek a civil remedy is a proper purpose as a matter of law, but the district director should consider factors such as the likelihood of success, the amount of potential recovery, and the ability to re-file the claim under the Act in the event the claimant loses the civil claim on the merits.

Third Party – Notice/Consent

§33 forfeiture when claimant contended employer/carrier approved settlements but LS-33 or similar forms were not filed. *Pelker v. Owens Corning Fiberglass*, 2023 WL 2182708 (BRB 22-0027, 22-0027A, 1/27/23) (unpublished) (appeal pending in 9th Circuit).

> ALJ concluded decedent died due to an asbestos related disease and Owens Corning Fiberglas/Travelers (OCF), as the last employer to expose the worker to asbestos was responsible. Claimant, however, was not entitled to compensation because she did not obtain written approval of the settlements via form L-33 or equivalent document, and there was no constructive approval because OCF did not participate in the underlying litigation or settlement negotiations or take any direct action to ensure protection of its offset rights. The Board affirmed, noting the ALJ's finding "there was nothing in the record to show claimant's attorney and OCF's attorneys reached any written agreement."
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> Note from caselaw editor: Although not stated in the Board's decision claimant contends the record proves, unequivocally, claimant's attorney and OCF/Travelers's attorney agreed OCF/Travelers would approve all past *and future* third party settlements if claimant gave OCF/Travelers notice of each settlement and retained net proceeds in trust so employer/carrier's lien could be satisfied if the controversion was reversed. Claimant contends this agreement *was* confirmed in writing but concedes a Form LS-33 was not sent to OWCP. Travelers' attorney, in a declaration submitted prior to hearing, stated he had only approved past settlements with bankruptcy trusts. The ALJ focused on the absence of a filed LS-33 or similar form and made no specific findings regarding the terms of the agreement. On appeal the Court will be asked if a failure to file a LS-33 or similar form should result in forfeiture if the employer/carrier had otherwise approved past and future settlements based on agreed conditions.

Surviving spouse barred from LHWCA compensation after disclaiming interest in third party settlement when her son, with power of attorney, settled claims and failed to secure consent from employer/carrier. *Siver v. Kaiser Aluminum & Chemical Corporation*, 2022 WL 17850549, BRB 21-0426, 11/7/22 (published 3/3/23). (Appeal pending 9th Circuit)

> Decedent was allegedly exposed to asbestos as a marine electrician. Undisputed facts included:

- October 17, 2007: Decedent died and was survived by his heirs, consisting of his widow, Ruth Siver, and his sons, Marvin and Anton Siver. His will identified Ruth as his sole beneficiary, making her the successor-in-interest of his estate.
- December 17, 2007: Ruth grants Marvin a durable power of attorney.
- September 29, 2008: Represented by Brayton Purcell LLP (BP), the heirs filed a civil survival and wrongful death suit against various third parties. Ruth was explicitly listed as a plaintiff.
- On May 31, 2009: Ruth, through BP, signs two disclaimers. The first disclaimed her interest in property to which she was entitled as a beneficiary of Decedent's estate, including all current and net proceeds from lawsuits and claims filed by Decedent and/or Decedent's estate in connection with his exposure to asbestos that would belong to Decedent's estate and were negotiated after Decedent's death. The second disclaimed of her interests in any ongoing or future third party civil lawsuit based on injuries and death caused by Decedent's asbestos exposure. It requested BP pursue on her behalf a claim arising under the LHWCA. Neither disclaimer mentioned, modified, or revoked the durable power of attorney. There was no evidence either disclaimer was filed with any court or provided to any other party before Marvin presented it as part of the record in this case.
- October 16, 2009: Still represented by BP, Ruth filed a claim under the LHWCA.
- 2010 and 2011: Marvin executes on behalf of himself and Decedent's heirs and estate seven third party settlement agreements in the survivor/wrongful death lawsuits for a total of $32,089.22. Settlements with Consolidated Insulation, Inc. (CII) for $20,000 and with CBS Corporation (CBS) for $5,000 apportioned proceeds 20% for survivor action and 80% for wrongful death action. Marvin signed as CBS settlement as "successor-in-interest." The settlements included Ruth in the class of plaintiffs who settled their claims and released CII and CBS from any and all liability relating to Decedent's exposure to asbestos, thereby (according to the ALJ) foreclosing Employer's ability to protect its right to a §33(f) setoff of the amount of these settlements against future obligations and to protect its right to reimbursement form the proceeds of the settlement in the amount of any payment already made. Ruth did not sign any of the settlements. According to the ALJ there was no language in the settlements contradicting the plain reading that Marvin was acting on behalf of the successor-in-interest and on behalf of Decedent's heirs. There was no evidence Marvin notified any LHWCA employer or carrier of the settlements.
- May 24, 2015: Ruth died.
- September 27, 2019: Employer filed a Motion for Summary Decision, contending Ruth was barred from any recovery per §33(g) because she entered into the CII and CBS settlements for an amount less than

employer's liability for compensation without obtaining employer/carrier's consent.

The ALJ granted Employer's motion. Under California law the disclaimers did not alter Marvin's authority to enter into a binding contract on Ruth's behalf because the disclaimers were not executed in the same manner as the power of attorney and did not modify the durable power of attorney. It was not filed in any court, shared with any third party, or notarized. The documents affirmatively asserted Marvin was authorized to act on behalf of Decedent's successor-in-interest with respect to the wrongful death action, and according to the will, Decedent's sole beneficiary and successor-in-interest was Ruth.

The Board distinguished prior decisions in *Hale v. BAE Sys. San Francisco Ship Repair*, 801 F.App'x 600 (9th Cir. 2020) and *Verducci v. BAE Sys. San Francisco Ship Repair*, 801 F. App's 600 (9th Cir. 2020), where decedents' widows signed similar disclaimers but their LHWCA claims were not barred. The court created a distinction between "entering into" a settlement for purposes of §33(g) and "being bound by" a settlement under California contract law. There was a lack of evidence the daughters, who signed the settlements acted as agents on the behalf of the widows. Here, however, Ruth was Decedent's sole successor-in-interest when Marvin had her explicit power of attorney to file and settle lawsuits on her behalf and when Ruth was the sole person entitled to compensation under the LHWCA. Also, Marvin, as a consequence of the notarized power of attorney, was Ruth's agent at all relevant times. The power of attorney was never modified or revoked before death. The settlement documents identified Ruth as plaintiff and heir. Ruth "entered into" the settlements and was "bound by" them under law of contracts. Judge Gould's dissent in *Hale* and *Verducci* supports this result.

In footnote 15 the Board noted Ruth did not receive any of the third party funds, but that was not dispositive because a party could settle claims for nothing or give the proceeds to family members but still have entered into the settlements. Furthermore, the settlements paid BP as "trustees for the heirs of Dave Siver," which the ALJ found necessarily included Ruth.

In footnote 18 the Board said creating an distinction between entering into and being bound by a settlement would permit claimants to unilaterally bargain away funds to which the employer might be entitled. "In addition to unnecessarily blurring what should be a straight-forward matter of contract law, the distinction potentially writes Section 33(g) out of the statute.