Administrative law judges' authority in LHWCA cases has limits

By Michael H. Weier ■ December 4, 2015

The U.S. Department of Labor Benefits Review Board (Board) in the matter of *Pisaturo v. Logistec Connecticut*[1] declared an administrative law judge (ALJ) impermissibly substituted his own judgment for expert medical opinion when the ALJ quintupled a claimant's permanent partial disability (PPD) award.

On October 31, 2005, Joseph Pisaturo (claimant), a longshore worker, fell and struck the left side of his face during the course of his employment for Logistec Connecticut, Inc. (employer). The workplace fall caused nose and left eye socket (orbit) fractures and displaced the left eyeball within the orbit. Claimant filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA).[2] The employer accepted the claim and authorized medical treatment, including three surgical procedures to repair the facial fractures.

A dispute arose between claimant and employer when the claim was ready for closure. Claimant requested a hearing before an administrative law judge (ALJ) to address his entitlement to a PPD award. In support of his benefits request, claimant submitted the opinion of his treating ophthalmologist, who declared the workplace injury to the left eye caused residual diplopia (double vision) and concomitant permanent visual impairment of 30 percent.

In response, the employer offered the opinion of an independent ophthalmologist who reviewed claimant's medical records and declared claimant's diplopia resulted in 7.5 percent impairment of the visual system in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Sixth Edition* (AMA Guides).

The ALJ rejected the permanent impairment rating of the treating ophthalmologist as unsubstantiated because he failed to explain the basis for his opinion. In contrast, the ALJ noted the employer's expert provided a thorough description of the bases for his impairment rating, including reference to the AMA *Guides*. Accordingly, the ALJ determined claimant was entitled to a PPD award of 7.5 percent impairment of the left eye.

Claimant filed a timely motion for reconsideration and requested the ALJ increase the PPD award. The ALJ noted a PPD award for impairment to a specified body part must be based upon an assessment of impairment to the injured body part.[3] In this matter, the ALJ concluded the employer's expert rating of 7.5 percent was for permanent impairment of the visual system and

the Board took exception to the ALJ's conversion factor

Continued

Reinisch Wilson Weier PC
LAW OFFICES

PORTLAND: 10260 SW Greenburg Rd., Suite 1250, Portland, OR 97223 ● T 503-245-1846 / F 503-452-8066
SEATTLE: 159 South Jackson Street, Suite 300, Seattle, WA 98104 ● T 206-622-7940 / F 206-622-5902
www.rwwcomplaw.com

Michael H. Weier is now **Of Counsel** *(formerly firm President and Managing Attorney) at Reinisch Wilson Weier PC. He may be reached at 503.452.7268 or michaelw@rwwcomplaw.com.*

not specifically for the left eye. As the ALJ previously determined the opinion of claimant's expert was unsubstantiated, the ALJ was effectively compelled to accept the rating of the employer's expert.

The ALJ noted a discrepancy between the LHWCA that requires the PPD award to be based upon a rating of permanent impairment of the specific body part, the left eye, and the AMA *Guides*, which offers calculations of impairment to the visual system.

In order to address the apparent incongruity, the ALJ devised a conversion factor. The ALJ declared a 5:1 ratio for rating of permanent left eye impairment under the LHWCA and impairment of the visual system under the AMA Guides. Thus, while the ALJ accepted the rating of 7.5 percent impairment, he performed a conversion, multiplied the rating by five and awarded claimant 37.5 percent impairment of the left eye. The employer appealed the ALJ's PPD award to the Board.

Axiomatic Longshore procedural law provides the Board must affirm that the ALJ's findings of fact and conclusions of law, if supported by substantial evidence, are rational and in accordance with the law.[4] A PPD award for a scheduled disability, such as injury to an eye, is predicated solely on the existence of a permanent anatomical impairment to the body part, and economic loss is not considered in determining an impairment rating under the schedule.[5] As recognized by the ALJ and the parties, the claimant's industrial injury caused damage to one eye; thus, the scheduled award is properly based on the extent of impairment to the injured eye.[6]

In its decision, the Board accepted the ALJ's finding that claimant's expert opinion lacked a basis for support; whereas, the employer's expert articulated a compelling rationale for his opinion and rating. However, the Board took exception to the ALJ's conversion factor and the quintupling of the rating and PPD award.

The Board declared the ALJ "impermissibly substituted his own judgment for that of [employer's expert] by devising a conversion factor to adjust [the expert's] impairment rating." [7] Accordingly, the Board determined there was not substantial evidence for the ALJ's PPD award and thereby reduced claimant's PPD award from 37.5 percent to 7.5 percent of the left eye.

The Board's decision in *Pisaturo v. Logistec Connecticut, Inc.* is an all-too-infrequent declaration that decisions of administrative law judges are not impenetrable in matters governed by the LHWCA. The Benefits Review Board admittedly must accept an ALJ's findings of fact and conclusions of law, if rational and supported by the evidence and the law. The decision in *Pisaturo*, however, is a comforting and clarion reminder that ALJs are not medical experts and must look to the evidentiary record for findings and the law for conclusions. ALJs cannot devise their own systems of calculating and awarding

Continued

benefits to claimants.

Employers, insurers or third-party LHWCA administrators with questions regarding any longshore matters should contact attorney Matt Fisher for assistance. ■

---

[1] *Joseph Pisaturo v. Logistec Connecticut, Inc. and Signal Mutual Indemnity Association, et al.*, BRB No. 14-0214 (October 14, 2015).

[2] 33 U.S.C. §901 et seq.

[3] 33 U.S.C. §908(c)(5), (19).

[4] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

[5] Section 8(c)(1-20) of the Act, 33 U.S.C. §908(c)(1-20); *Soliman v. Global Terminal & Container Service, Inc.,* 47 BRBS 1, 2 (2013); *See also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

[6] Soliman, 47 BRBS at 4; *See also National Steel & Shipbuilding Co. v. Director, OWCP*, 703 F.2d 417 (9th Cir. 1983).

[7] *Pisaturo*, supra.

Reinisch Wilson Weier PC
LAW OFFICES

PORTLAND: 10260 SW Greenburg Rd., Suite 1250, Portland, OR 97223 ● T 503-245-1846 / F 503-452-8066
SEATTLE: 159 South Jackson Street, Suite 300, Seattle, WA 98104 ● T 206-622-7940 / F 206-622-5902
www.rwwcomplaw.com