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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 179
December 2005 – February 2006

John M. Vittone
Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

COURTS

A. United States Supreme Court

B. Circuit Court Cases

Marinette Marine Corp. v. OWCP (No. 04-1933)(**7th Cir.** December 12, 2005).

At issue was which of two carriers should pay for the claimant's back surgery; whether this was an aggravation of a pre-existing injury or was it just the natural progression on an older injury. In this regard, the **Seventh Circuit** noted that the section 20(a) presumption is about whether the claimant's injury was compensable—whether it happened in the course of work—not about who has to pay for it. Section 20(a) plays no role in the determination of the responsible employer.

[Topics 20.2 Presumptions—Claim comes Within Provisions of the LHWCA; 20.2.4 Presumptions—ALJ's Proper Invocation of Section 20(a); 70.1 Responsible Employer—Generally; 70.5 Responsible Employer—Burdens of Proof]

Bayou Fleet, Inc. v. Director, OWCP, (Unpublished)(No. 04-61090)(2005 U.S. App. LEXIS 27655)(**5th Cir.** December 14, 2005).

In this causation issue case, the claimant seldom sought medical treatment because "he found rum and rest to be most helpful in relieving his pain." This matter has been to the Board and back twice. Initially the Board reversed the ALJ's determination that the claimant had not presented a *prima facie* case and thus had not invoked the Section 20(a) presumption. Next, the Board reversed the ALJ's finding that, if invoked, the presumption had been rebutted. The circuit court found that even if the Board

correctly concluded that the presumption was invoked, the ALJ's conclusion that the presumption would have been rebutted, was supported by substantial evidence.

[Topics 20.2.5 Presumptions—Failure to Properly Apply Section 20(a); 20.3 Presumptions—Employer Has Burden of Rebutal With Substantial Evidence]

Withhart v. Otto Candies LLC, (Unpublished)(No. 04-31267)(**5th Cir.** December 2, 2005).

The Jones Act does not bar a shipowner/employer from suing a negligent employee for property damage under general maritime negligence and indemnity claims. The court found that permitting the shipowner/employer's counterclaims would not narrow the remedies available to seaman-employees under the Jones Act.

[Topics 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act—Generally; 5.1.2 Exclusiveness of Remedy and third Party Liability—Right to Sue Employer If No Coverage]

Ham Marine, Inc. v. Director, OWCP, (Unpublished)(No. 04-60818)(**5th Cir.** Jan. 27, 2006).

Here the court upheld the ALJ's determination that a work-related injury was the natural result of an injury and was not aggravated, exacerbated or worsened by subsequent employment. The court found the ALJ's opinion to have been supported by substantial evidence, and to have been adequately explained as to why he gave greater weight to the testimony of one doctor over another.

[Topics 2.2.6 Definitions—Injury--Aggravation/Combination; 2.2.7 Definitions—Injury--Natural Progression; 20.5.1 Presumptions—Application of Section 20(a)—Causal Relationship of Injury to Employment]

Stevedoring Services of America v. Price, 432 F.3d 1112 (**9th Cir.** 2006).

The **Ninth Circuit** denied the claimant's attorney's request for attorney fees for time accrued successfully opposing the employer's petition for certiorari. The court found that although Section 28(a) authorizes the court to award fees in the successful prosecution of a claim where work was done before the court, it lacked jurisdiction because the work undertaken in successfully opposing the petition was not done "before" the circuit court. The **Supreme Court** denied the claimant's fee application "without prejudice to filing in the United States **Court of Appeals for the Ninth Circuit.**" However, the **Ninth Circuit** found that this did not explicitly delegate jurisdiction to it to grant the fee request. The court specifically noted that *Hensley v. Metropolitan Area Transit Authority*, 223 U.S. App. D.C. 317, 690 F.2d 1054 (**D.C. Cir.** 1982) construed an

analogous order as a jurisdictional predicate allowing a petitioner to seek fees before that court. "Despite our sister circuit's opinion and the policies underlying the LHWCA fee provisions, the plain language of § 928(c) is too restrictive to allow the leap required under *Hensley*. *Cf,. Christensen v. Stevedoring Services*, 430 F.3d 1032 (**9th Cir.** 2005).

[Topic 28.1.1 Attorney's Fees—Generally--Introduction]

Coleman v. New Orleans and BatonRouge Steamship Pilot's Assoc., ___ F.3d ___ (No. 04-30666 and 04-307000)(**5th Cir.** January 24, 2006).

Held, the New Orleans & Baton Rouge Steamship Pilots Association and the Crescent River Port Pilot's Association are not "employers" of river pilots within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. § 621.

[Topics 1.9 Jurisdiction/coverage—Maritime Employer; 2.4 Definitions—Employer]

Holmes v. Atlantic Sounding Co., Inc., ___ F. 3d ___ (No. 04-30732, Cons. No. 04-30750)(**5th Cir.** Jan. 19, 2006)(Previous opinion was withdrawn.).

The **Fifth Circuit** reversed the district court and held that a barge was a vessel for Jones Act purposes because it was practically capable of maritime transportation. The barge had a two-story, 50-bed dormitory on its deck. It was incapable of self-propulsion and was towed by tugs from place to place to house and feed employees during dredging projects at various locations. It was not intended to transport personnel, equipment, passengers, or cargo, and no evidence in the record reflected that it had ever done so. It did have a raked bow on each end and two end tanks where the rakes were for flotation. Citing *Stewart v. Dutra Construction Co.*, 543 **U.S.** 481 (2005), the **Fifth Circuit** found that it was a vessel for Jones Act purposes.

[Topic 1.4.3 Jurisdiction/Coverage—LHWCA v. Jones Act--Vessel]

C. Federal District Court Decisions/Bankruptcy Court

Gavrilovic v. Worldwide Language Resources, ___ F.Supp 2d ___, 2005 U.S. Dist. LEXIS 32134 (Civil No. 05-38-P-H)(Dist. Maine December 8, 2005).

This was a summary motion matter involving various claims filed by a linguistic worker including alleged employment discrimination in violation of both title VII of the Civil Rights Act of 1964, the Maine Human rights Act, retaliatory discharge in violation of Title VII, defamation, sexual misconduct, invasion of privacy and false-light publicity, intentional infliction of emotional distress and breach of contract. Worldwide is in the business of supplying foreign-language translators to clients, including the United States

military and various military contractors. The plaintiff first entered into a contract with Worldwide to work as a linguist at NATO headquarters in Kosovo. After Worldwide's contract to provide linguists to NATO ended, she was recommended for a site manager position serving the U.S. Military in Afghanistan. It was during this work period that the alleged claims occurred.

In ruling on the many counts, the magistrate addressed Worldwide's argument that it is entitled to summary judgment as to the breach of contract count inasmuch as the plaintiff relied on the incorporation of the federal Defense Base Act (DBA) into a written agreement and that the plaintiff allegedly did not fit the relevant definition of an "employee" for purposes of the DBA (which Worldwide contends is the definition imported from the Longshore Act.).

In denying the summary motion judgment on this specific count, the magistrate noted that:

> While the DBA does, indeed, apply provisions of the LHWCA to certain employees of defense contractors, it clearly does not import the LHWCA definition of "employee"—"any person engaged in maritime employment," 33 U.S.C. § 902(3) – into the DBA. To do so would defeat the purpose of the DBA, which was to broaden application of the LHWCA to new classes of employees. *See, e.g., Davilla-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (**1st Cir.** 2000)("The purpose of the Defense Base Act is to provide uniformity and certainty in availability of compensation for injured employees on military bases outside the United states."); Pearce v. Director, 603 F.2d 763, 765 (**9th Cir.** 1979)("Congress passed the Defense Base Act in order to provide workers' compensation coverage for specified classes of employees working outside the continental United States. Instead of drafting a new workers' compensation scheme, Congress extended the already established Longshoremen's Act, as amended, to apply to the newly covered workers.")(citation and internal quotation marks omitted); *see also, e.g.* 42 U.S.C. §§ 1651, 1654 (defining classes of covered and excluded employees). Thus, [the plaintiff] did not have to be a maritime worker to be covered under the DBA.

[Topic 60.2.1 Longshore Act Extensions—Defense Base Act--Applicability of the LHWCA]

Raytheon Engineers & Constructors, Inc., ___ F.Supp 2d ___ (2005 U.S. Dist. LEXIS 34911)(Case No. 3:05-cv-474-J-32MMH)(Middle Dist. Fla December 14, 2005).

This is a Defense Base Act claim arising out of employment on Johnston Atoll in the Pacific Ocean where the claimant was employed as a hazardous waste coordinator. At issue is the nature and extent of disability. The claimant injured his back and sought

treatment off of the island. Upon his return, he was unable to perform all of the physical functions of his job. (There was evidence that the employer had realized that he was unable to perform all of his job duties and was evaluating whether he was able to continue in his position.) Recognizing that he could not perform the coordinator job, which had never been modified to accommodate his physical limitations, the claimant resigned. He trained a replacement prior to leaving the island. At that point, the employer's evaluation (whether to accommodate him or move him to another job) ceased and was never concluded.

The court found that the ALJ had correctly concluded that there was substantial evidence that after the initial injury, when the claimant had returned to the atoll, he had physical restrictions which impeded his ability to perform many of the functions of a hazardous waste coordinator. His restrictions were not self-imposed as employer had argued. He was unable to ride forklifts, lift, open sea containers, crawl inside containers and check on drums, or bend over, all requirements of the job. The court further found that his resignation from the job he was not able to do did not increase the claimant's burden of proof, or as a matter of law, negate the fact that the substantial evidence establishes that he could not perform the duties of a hazardous waste coordinator, creating a *prima facie* case of total disability.

The employer presented no evidence of suitable alternative employment within a relevant community off of Johnston Atoll, but rather opted to try to meet its burden by contending that the claimant could have secured suitable alternative employment on the atoll. The court found that the employer's argument that its safety manager was "more than willing to accommodate" the claimant and "more than happy to continue to work with [him] and accommodate him" did not fulfill the company's burden to demonstrate that it had made suitable alternative employment available to him. The ALJ had correctly concluded that the only job made available to the claimant, that of hazardous waste supervisor, was not suitable alternative employment because the supervisor position "had the same physical demands as [his] former job as hazardous waste coordinator."

[Topics 8.2.4.2 Extent of Disability—Suitable alternate employment; Employer must show nature, terms, and availability; 8.2.4.3 Extent of Disability--Suitable alternate employment: location of jobs; 60.2.1 Longshore Act Extensions—Defense Base Act--Applicability of the LHWCA]

Rogers v. Army/Air Force Exchange Service, ___ F.Supp 2d ___ (Civ. Act. No. 3:04-CV-2403-P)(N. Dist. Texas Jan. 24, 2006).

The court granted summary motion to the defendants where the claimant's only remaining claim was a cause of action for compensation of medical benefits and the claimant had made no showing that an award under the LHWCA had been served. Without some showing that an award had been made, the court had no authority to grant the requested relief. The district court noted the **Fifth Circuit's** previous position that the scope of the district court's inquiry under Section 21(d) is limited to answering two

questions: 1) was a compensation order made and served in accordance with law, and 2) has the employer failed to comply with it.

[Topic 21.5 Review of Compensation Order--Compliance]

D. Benefits Review Board Decisions

Monta v. Navy Exchange Service Command, ___ BRBS ___ (BRB No. 05-0298)(Nov. 30, 2005).

The Board upheld the ALJ's determination that the claimant was entitled to pursue surgery if pain management was unsuccessful. The claimant's treating physician had opined that the claimant may be afforded some relief from a spinal fusion operation. The employer's physician opined that claimant suffered a minor strain to her low back, but had had sufficient time to recover and could return to her former work with no restrictions. He testified that it would be medical malpractice to perform the proposed surgery.

A third physician, a board certified neurosurgeon agreed to by both sides diagnosed the claimant as having "chronic low back pain syndrome, possible chronic lumbar strain at l4-5, based on degenerated disc disease at that level and chronic cervical strain, left side." The third physician stated that the claimant had not reached MMI and needed further treatment for her ongoing pain complaints, as well as physical rehabilitation. While he disagreed with the recommendation for surgery, he stated that the treating physician "is not alone among spinal surgeons who would accept just this type of case for the surgery he proposes," and opined that spinal fusion surgery would not constitute malpractice.

The Board cited to *Amos v. Director, OWCP*, 153 F.3d 051 (**9th Cir.** 1998), amended, 164 F.3d 480, 32 BRBS 144(CRT) (**9th Cir.** 1999), *cert. denied*, 528 **U.S.** 809 (1999), that "when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *See also* 1 Larson, Larson's Worker's Compensation Law §13.22(e)(1998)("In general, if claimant gets conflicting instructions on treatment from different doctors, and chooses to follow his or her own doctor's advice, this is not unreasonable.") Importantly, the Board noted:

> In the case cited by employer, *Black & Decker Disability Plan v. Nord*, 538 **U.S.** 822 (2003), the **Supreme Court** held that the Employee Retirement Income Security Act, unlike the Social Security Act does not require plan administrators to accord special deference to the opinions of treating physicians. *Nord*, 538 **U.S.** at 829-30. However, the **Court** did not proscribe a fact-finder from giving such deference, but rather stated that it was not appropriate to have a rule requiring such deference in the

> administration of a voluntary contractual plan. *Nord* thus does not overrule the holding in *Amos*. The court noted that some courts have approved of according treating physicians special deference under the Longshore Act and the Secretary of Labor has adopted a version of the rule for benefit determination under the Black Lung Benefits Act, 30 U.S.C. §901 et seq. *See* 20 C.F.R. §718.104(d)(5)(2002). *Nord,* 538 **U.S.** at 830.

Additionally, in relation to a Section 48(a) discrimination claim, the Board found that the ALJ was correct in finding discriminatory animus. First the ALJ noted evidence that the head of loss prevention began following the claimant when she shopped at the Exchange. Next, the employer had fired the claimant after she received a discount at the exchange without going through proper procedure to obtain the discount. This firing took place despite the fact that her supervisor had not reviewed the Navy Exchange Manual for procedure in receiving a discount, nor the claimant's statement to the Military Police, or the cashier's statement, before he made the decision to terminate the claimant. The supervisor noted that if the same incident had occurred between an associate and the wife of a petty officer, it would not have been considered a theft. The Board found that the ALJ had properly examined the totality of the circumstances regarding the claimant's discharge.

The employer also argued that the claimant should not have been ordered to be reinstated since the claimant had not reached MMI. The Board noted that the LHWCA and its regulations do not contain any specific guidance regarding the point at which a claimant's ability to perform her former job should be assessed. Thus, the Board found the ALJ's action to reinstate the claimant to her employment until an assessment could be made, to be reasonable under the circumstances. The Board further held that the Director's interpretation of the statue as permitting the assessment of the claimant's capabilities after she has reached MMI, to be reasonable and consistent with the purpose of the LHWCA. The Director had contended that assessing an employees' ability to qualify to perform the duties of her employment immediately after an injury would make the remedy of reinstatement unavailable to most injured employees, even if they are found to have been discharged in violation of the statute.

[Topics 23.5 Evidence—ALJ Can Accept Or Reject Medical Testimony; 48a.1 Discrimination Against Employees Who Bring Proceedings--Generally; Discrimination Against Employees Who Bring Proceedings--Determining If Employer Has Discriminated; 48a.2.4 Discrimination Against Employees Who Bring Proceedings--Penalty for Violation of Section 48a]

Jukic v. American Stevedoring, Inc., ___ BRBS ___ (BRB No. 05-0207)(Nov. 14, 2005).

At issue here was the ALJ's determination that he had given the parties to a Section 22 Modification proceeding sufficient time to present their cases. The ALJ had stated that the most recent extension of time was to be the "final" extension. Thus, the

ALJ had found that the request for an additional extension to submit additional deposition testimony or a hearing on the record, was not timely.

The Board vacated the denial of benefits. It noted that the claimant had unambiguously requested a hearing when the case was before the ALJ on his motion for modification:

> "As claimant requested a hearing prior to the close of record, albeit in the 'eleventh hour.' His request cannot be considered untimely. Moreover, although the [ALJ] gave reasons for believing that a deposition or hearing would be unnecessary because claimant's testimony would be irrelevant, a hearing allows the parties the opportunity to also introduce other evidence, which, if considered in conjunction with claimant's testimony, could make his testimony relevant to the resolution of the issue before the [ALJ]. Thus, until testimony or other evidence is actually presented and heard, its relevance is unknown, and it cannot be deemed irrelevant per se. Claimant, therefore, must be granted a hearing because he made a timely request for one."

[Topic 19.3 Procedure--Adjudicatory Powers; 19.3.6 Procedure—Formal Hearing]

Beumer v. Navy Personnel Command/MWR, ___ BRBS ___ (BRB No. 05-0413)(Nov. 15, 2005).

In this Nonappropriated Fund Instrumentalities Act case, the claimant slipped, hurting her knee, back and shoulder. During physical therapy to rehabilitate her knee after knee surgery, her back condition worsened. The ALJ found that the claimant could not return to her former job and that the employer had failed to establish the availability of suitable alternate employment. Additionally, the judge found that the employer was not entitled to Section 8(f) relief.

As to the issue of SAE, the employer contended that the ALJ erred by failing to determine the relevant geographic area for consideration; in this regard, the employer asserted that it was unduly prejudiced by the claimant's move from Ventura to Santa Maria, California While stating that the **Ninth Circuit** has not addressed the issue of determining the relevant labor market when there is a relocation post injury, the Board noted other circuits' case law. Additionally, the Board noted that the record contained no discussion of the claimant's motivation for relocating or ties to her new community. Furthermore, the Board noted that the employer had conducted labor market surveys in both locations, with most of the found positions in the claimant's new location. After examining all of the employment evidence, the ALJ had found that the employer failed to meet its burden of demonstrating the availability of suitable alternate employment. The Board found the ALJ's findings to be rational and supported by substantial evidence.

As to the Section 8(f) issue, the Board vacated the ALJ's finding that the claimant's knee condition did not satisfy the pre-existing element of Section 8(f). As to the contribution element, the Board noted that "To establish the contribution element, employer must show that claimant's subsequent injury alone would not have resulted in her permanent total disability…While a work-related aggravation of a pre-existing condition may satisfy the contribution element in a case where claimant is totally disabled, it is not sufficient if the evidence indicates only that the claimant's two injuries created a greater disability than the second injury alone…. Rather, if the claimant's second injury was enough to totally disable claimant, it is not relevant that claimant's pre-existing condition made his total disability even greater." The Board affirmed the ALJ's finding that the employer presented no evidence that the pre-existing back condition contributed to the claimant's present permanent total disability. Thus, the Board affirmed the ALJ's denial of Section 8(f) relief.

[Topics 8.2.4.2 Extent of Disability—Suitable alternate employment; Employer must show nature, terms, and availability; 8.2.4.3 Extent of Disability--Suitable alternate employment: location of jobs; 60.4.1 Longshore Act Extensions—Nonappropriated Fund Instrumentalities Act--Applicability of the LHWCA; 8.7.5 Special Fund Relief—The Disability Must Not Be Due Solely to the New Injury; 8.7.6 Special Fund Relief—In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater Than That Which Would Have Resulted from the Subsequent Injury Alone]

Charpentier v. ORTCO Contractors, Inc. ___ BRBS ___ (Decision and Order on Reconsideration)(BRB No. 04-0962)(January 31, 2006).

The ALJ had originally denied benefits in this matter on the grounds that the claimant did not establish that the decedent's death was work-related. The Board vacated and remanded, holding that a causal relationship between the decedent's employment and his fatal heart attack was established as a matter of law. On review, the **Fifth Circuit** reversed the Board's decision and held that substantial evidence supported the ALJ's initial determination. The **Fifth Circuit** vacated the Board's decision. The employer ceased payment of benefits as of May 23, 2003, the date of the court's decision. On August 29, 2003, the ALJ issued an order on remand reinstating the initial denial of benefits. The claimant filed a petition for Writ of Certiorari which was denied on December 1, 2003.

At issue is whether the claimant was entitled to compensation for the period from May 24, 2003, to December 1, 2003. The ALJ assigned to the case rejected the claimant's claim, denying additional benefits. On appeal the Board affirmed based on Section 21(c) (court of appeals may "set aside" the Board's decision and payments to claimant "required by an award" are to continue unless stayed by the court.). *Charpentier v. Ortco Contractors, Inc.*, 39 BRBS 55 (2005). Board also cited Rule 41(c) of the Federal Rules of Appellate Procedure, i.e., the mandate rule, which indicates that

the judgment of the court of appeals becomes final upon issuance and fixes the parties obligations as of that date.

On reconsideration the Board upheld its Section 21(c) holding that "as of the date of issuance of the **Fifth Circuit's** decision 'setting aside' the Board's order, as suggested by employer and determined by the [ALJ], there was no longer any amount 'required by an award' since that decision effectively terminated the prior award of benefits."

The Board went on to note that "While claimant's interpretations of Rules 41(b) and 41(d)(1) are correct, in that those provisions provide for a stay of the court's mandate until the issuance of the court's denial of a petition for rehearing, this does not alter the underlying fact that for purposes of Section 21(c) of the Act, there was no longer any amount 'required by an award' as of the date of the appellate court's initial decision….The appellate court's denial of a rehearing merely affirmed that tribunal's earlier decision to reverse the award of benefits in this case."

[Topic 21.3 Review of Compensation Order--Review by U.S. Courts of Appeals]

Kea v. Newport News Shipbuilding & Dry Dock Co, ___ BRBS ___, (BRB No. 05-0515)(Jan. 30, 2006).

The Board upheld the ALJ's finding that a letter did not represent a valid request for modification although the claimant asked in the letter that it be considered "a request for additional compensation in modification of the previous award and not a request for the scheduling of an informal conference." The claimant had previously received scheduled disability compensation as well as some temporary compensation.

The Board noted that while it may be implied that the employer conceded that the claimant reached MMI, the employer had not stipulated to this at any time. Additionally the Board noted that the claimant did not make any statement and took no further action regarding his request, until he received a doctor's assessment three plus years latter. Thus, the letter was viewed as an anticipatory filing. The Board also noted that the claimant specifically did not want an informal conference scheduled which the Board has held demonstrated an intent to "deliberately halt" the adjudication process.

[Topic 22.3.1 Modification—Requesting Modification—Determining What Constitutes a Valid Request]

Henderson v. Kiewit Shea, ___ BRBS ___ (BRB No. 05-0449)(Jan. 31, 2006).

Held, the definition of "injury" contained in Section 2(2) applies to the word "injury" in Section 9(f), such that an individual must establish his or her dependency at the time of the "work-related death."

[Topics 2.2 Definitions—Injury; 9.3 Death Benefits--Survivors]

E. ALJ Decisions and Orders

F. Other Jurisdictions

Suire v. The William G. Helis Co., 2005 La. LEXIS 2486 (La. S. Ct. Nov. 29, 2005).

A worker injured on a fixed platform in state territorial waters was not engaged in maritime employment and thus was neither a seaman nor a worker covered by the LHWCA. His remedy was state workers' compensation. Here the plaintiff, by amended petition, asserted that his original injury on the fixed platform was aggravated "as a result of the nature and circumstances of his employment in connection with his work and time spent aboard vessels until he was no longer able to work due to his injury. However, the Louisiana Supreme court noted that while the amended petition asserted a cause of action for aggravation of the injury while riding on navigable waters to and from the production facility, he failed to do so against a named defendant.

[Topics 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act; 1.4.3 Jurisdiction/Coverage—Vessel—Fixed Platform; 1.6.1 Jurisdiction/Coverage—SITUS—"Over water"—Place of Inception Is Critical; 1.7.1 Jurisdiction/Coverage—STATUS—"Maritime Worker"]

[ED. NOTE:** The following case is included for informational purposes only.**]

Lyons v. Newport News Shipbuilding & Dry Dock Co., 2005 Va. App. LEXIS 532, (Record No. 0304-05-1)(Vir. Court of App. December 28, 2005).

Held, as a matter of law, a *de facto* award existed under the Virginia Workers' Compensation Act for the period of time during which employer paid benefits under the LHWCA. Thus, the employer was entitled to a credit for the federal payments it made as against the *de facto* state award. The court cited *Ryan's Family Steak Houses, Inc. v. Gowan*, 32 Va. App 459, 463, 528 S.E. 2d 720, 722 (2000):

> Where the employer has stipulated to the compensability of the claim, has made payments to the employee for some significant period of time without filing a memorandum of agreement, and fails to contest the compensability of the injury [the period of disability, or the compensation rate], it is "reasonable to infer that the parties have reached an agreement as to the payment of compensation," and a *de facto* award will be recognized.

[ED. NOTE:** The following case is included for informational purposes only.**]

Songui v. City of New York, 2 A.D. 3d 706, 770 N.Y.S. 2d 103, (Index No. 10780/99)(Supreme Court of N.Y., Appellate Div. December 22, 2003).

The New York Court of Appeals held that the LHWCA does not preempt N.Y. Lab. Law § 241(6), as that provision allows for liability predicated on fault and is wholly consistent with the laudatory maritime goal of compensating injured maritime workers. The court noted that in determining whether federal maritime law preempts sate law, the test is whether the state law works material prejudice to a characteristic feature of maritime law or interferes with the harmony and uniformity of maritime law in its international and interstate relations.

In the instant case, a shipyard corporation entered into a contract with the City of New York to repair City-owned sanitation barges. The barges were moved by tugboat, as they had no motors or crews. The plaintiff, a welder, was hired by the shipyard for a temporary period of about two weeks to repair a hole on one of the barges, which was moored at a pier. After working for about a week, the plaintiff was injured when he fell from a scaffold located inside the barge. He commenced this action against the shipyard and the City based on the Jones Act and N.Y. labor laws.

The court found that the worker was a land-based worker with only a transitory connection to a local vessel in navigation. The City contended that the worker's N.Y. labor law claim was preempted by the LHWCA. Under the LHWCA , a vessel owner may only be held liable for its own negligence. While N.Y. labor law permits a property owner to be held vicariously liable for the negligence of a third party.

[Ed. Note: The following is included for informational value only.**]**

Hirneisen v. Champlain Cable Corp., 2006 Del. LEXIS 17 (No. 211, 2005)(January 17, 2006).

The Supreme Court of Deleware held: that although, the voluntary retirement and removal from the workplace of a decedent/employee may potentially disqualify a surviving spouse from eligibility for state benefits even where the death was caused by an occupational disease, a surviving spouse can recover death benefits independently and irrespective of whether the deceased employee received wages or disability benefits arising from the occupational injury or disease that caused his death.

Harvey's Casino v. Isenhour, 2006 Iowa App. LEXIS 124 (No. 5-850/04-1910)(Iowa Cout of Appeals February 1, 2006).

The Iowa Court of Appeals overturned the lower court and found that a floating gambling casino was a vessel and that the injured employees were members of the crew.

The court based this determination on *Stewart v. Dutra Construction Co.*, 543 **U.S.** 481 (2005). The casino boat was capable of being used as a means of transportation on water. The injured crew members (a slot attendant, a teller, and a floor host) contributed to the mission of the riverboat which was to operate as a gambling venue and therefore, were members of the crew according to the Iowa Court of Appeals.

[Topics 1.4.2 Jurisdiction/Coverage—LHWCA v. Jones Act—Master/member of the Crew; 1.4.3 Jurisdiction/Coverage—LHWCA v. Jones Act--Vessel]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Doe v. Chao*, ___ F.3d ___, Case No. 05-1068 (4th Cir. Jan. 24, 2006), a case stemming from a federal black lung claimant's pursuit of damages under the Privacy Act for the "wrongful disclosure of his Social Security number" by this Office, the court affirmed the district judge's finding that "Doe is entitled to costs and reasonable attorney fees even though he suffered no actual damages", and remanded the case for recalculation of attorney fees. The court rejected the government's argument that "because Doe sought money damages from the United States, and was awarded none, the only reasonable attorney fee is no fee at all." However, citing to *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), the court held that, in determining the reasonableness of a fee, the "most critical factor" is the "degree of success obtained." The court reasoned:

> Doe failed to recover any monetary award, despite the fact that damages were the primary goal of his suit. Because his underlying litigation was largely unsuccessful, it is unlikely that Doe may recover significant attorney fees.

Notably, the court concluded that it would not "disturb the district court's calculation of Buck Doe's litigation costs" as 5 U.S.C. § 552a(g)(4)(B) permits an award of "the actual costs of his action unrestrained by any reasonableness inquiry."

[**reasonableness of fees under the Privacy Act**]

By unpublished decision in *Yogi Mining Co. v. Director, OWCP [Fife]*, Case No. 04-2140 (4th Cir. Dec. 7, 2005), the court held that it was proper for the Administrative Law Judge to accord less weight to equivocal or speculative opinions regarding the etiology of opacities measuring greater than one centimeter on a chest x-ray. In so holding, the court stated the following:

> The ALJ . . . explained that he was according less weight to Drs. Scott and Wheeler because their opinions were equivocal on the abnormalities shown on Fife's X-rays, in that they could only opine that such spots were

> 'compatible with' or 'probably' tuberculosis. (citation omitted). Moreover, Scott and Wheeler both acknowledged that Fife's X-rays could indicate pneumoconiosis. (citation omitted). As the ALJ explained, 'not only were the physicians unable to offer a clear explanation for the abnormalities revealed on Fife's chest x-rays, Drs. Wheeler and Scott also were 'unable to unequivocally conclude that Mr. Fife does not suffer from pneumoconiosis.' (citation omitted). Although Scott and Wheeler were both dually qualified (B/BCR), the ALJ considered their opinions to be inconclusive, and he chose to rely instead on the unequivocal diagnoses of complicated pneumoconiosis by two other experts: Dr. Alexander, who was also dually qualified (B/BCR), and Dr. Forehand, a B reader. (citation omitted).

The court noted that one of the miner's treating physicians reported that the miner's test for tuberculosis produced negative results. In this vein, the court concluded that the Administrative Law Judge properly accorded "little evidentiary weight" to the CT-scan interpretations of Drs. Scott and Wheeler "because both had interpreted the scans as showing evidence of tuberculosis, while Fife had, in fact, tested negative for the disease." Moreover, in a footnote, the court noted that "[a] diagnosis of tuberculosis does not necessarily exclude the possibility that a miner also suffers from pneumoconiosis."

[**complicated pneumoconiosis**]

B. Benefits Review Board

By *Order* dated January 30, 2006, the Board concluded that it would publish its *per curium* decision in *Stolitza v. Barnes and Tucker Co.*, 23 B.L.R. 1-__, BRB No. 05-0209 BLA (Oct. 26, 2005) wherein the Administrative Law Judge's decision awarding benefits was vacated because the claim was barred based on *res judicata*. The Board reasoned that the district director had denied the miner's prior claim on grounds that it was untimely under 20 C.F.R. § 725.308, *i.e.*, the record contained a medical opinion of total disability due to pneumoconiosis that pre-dated the filing of the prior claim by more than three years. Importantly, the district director's denial became final since the miner did not appeal the decision. From this, the Board concluded that a subsequent claim filed by the miner was barred based on *res judicata* and reasoned as follows:

> The administrative law judge . . . erroneously considered the issue to be the propriety of the district director's 1992 denial of the prior claim as untimely filed under 20 C.F.R. § 725.308, where that denial is final and not subject to challenge. The pertinent issue is, rather: What effect does the district director's final denial of the prior claim have on the instant subsequent claim? We agree with the employer's argument that the district director's final denial of the prior claim based on its untimeliness is *res judicata* and its effect is to bar the filing of the instant subsequent claim. (citations omitted).

Slip op. at 4.

In a footnote, the Board acknowledged its holdings in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990) that the three-year statute of limitation period does not apply to subsequent claims as distinguishable from the present case: *to wit*, in *Andryka* and *Faulk* the initial claims were timely filed whereas in *Stolitza* the initial claim was untimely.

[**statute of limitations at 20 C.F.R. § 725.308**]

By published decision in *Bailey v. Dominion Coal Corp.*, ___ B.L.R. ___, BRB No. 05-0407 BLA (Dec. 29, 2005), the Board affirmed the Administrative Law Judge's granting of Claimant's request to withdraw his claim. Under the facts of the case, Claimant submitted a request to withdraw his claim with the district director after receiving an unfavorable opinion from the physician conducting the Department-sponsored examination. Claimant's representative asserted "[i]t is impossible to win his claim because he does not meet the disability standards" and it would result in "great cost and time to the claimant and to the Department of Labor to continue a case that we feel we cannot win at this time." The district director granted Claimant's request to withdraw on grounds that it was in his best interests and the Administrative Law Judge agreed. Pursuant to 20 C.F.R. § 725.306(b), the claim was considered not to have been filed and the Administrative Law Judge declined to require automatic admission of medical evidence generated in conjunction with the withdrawn claim if Claimant should again file a claim.

On appeal to the Board, Employer argued that it was not in Employer's best interests to have the claim withdrawn as it "paid to have claimant examined twice, thereby developing evidence that will not be included in the record, because of claimant's request for withdrawal." Moreover, Employer posited that this is a "waste of employer's financial resources and will hamper employer's ability to defend itself in any future claim."

The Board disagreed. It adopted the Director's position that § 725.306(a)(2) allows for withdrawal of a claim, if in the best interests of a claimant, prior to issuance of an effective decision. The Board concluded that the adjudicator is not required to consider Employer's interests. In addition, the Board stated that "employer has not shown a clear and specific basis for denial of claimant's request for withdrawal in this case."

The Board then rejected Employer's argument that evidence generated in conjunction with the withdrawn claim should be automatically included in the record of any subsequent filing without being counted under the evidentiary limitations at § 725.414 of the regulations. Employer reasoned that, in any future claim, it "risks showing the new examining physician too much relevant evidence" unless a ruling is

made to specifically include evidence underlying the withdrawn claim. The Administrative Law Judge declined to rule on the issue because she determined that, once the request to withdraw a claim is granted, it is considered not to have been filed under § 725.306(b). As a result, she was without authority to order the automatic inclusion of evidence into the record of any future claim. The Board agreed.

[**withdrawal of claim, considerations for and effect of**]

In *Webber v. Peabody Coal Co*, 23 B.L.R. 1-__, BRB No. 05-0335 BLA (Jan. 27, 2006)(en banc) (J. Boggs, concurring)[1], the Board issued critical holdings regarding application of the amended regulations:

> *Digital x-ray interpretations.* In adopting the Director's position, the Board held that digital x-ray interpretations are not considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718 as they do not satisfy the quality standards at Appendix A. As a result, the Board held that digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the Administrative Law Judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement."
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> *Admission of multiple CT-scan readings under § 718.107.* The amended regulatory provisions at § 725.414 do not provide specific limitations to the admission of evidence under 20 C.F.R. § 718.107. Nevertheless, in *Webber*, the Board adopted the Director's position that "the use of singular phrasing in 20 C.F.R. § 718.107" requires that "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence." The Board noted the Director's argument that:
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> > [L]imiting the affirmative evidence under 20 C.F.R. § 725.107 (sic) is consistent with the Secretary of Labor's goal of limiting evidence in order to avoid repetition, reduce the costs of litigation, focus attention on quality rather than quantity, and level the playing field between employers and claimants.
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> Slip op. at 8, n. 15. As a result, the Administrative Law Judge was instructed on remand to require each party to select one CT-scan reading and one interpretation of each digital x-ray. Further, the proffering party must provide evidence to support a finding under § 718.107(b) that the test or procedure is "medically acceptable and relevant to entitlement."

[1] The Board held oral argument in Chicago, Illinois on September 23, 2005 in this case along with *Harris*, *infra.*

Notably, *Webber* differs from the Board's earlier decision in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47, 1-59 (2004)(en banc), which held that the evidentiary limitations did not apply to "other medical evidence" under § 718.107 such as CT-scans.

Admission of Dr. Wiot's deposition testimony. The Board upheld the Administrative Law Judge's consideration of Dr. Wiot's deposition testimony under § 718.107(b) with regard to the medical acceptability and relevance of CT-scans and digital x-rays. The Board concluded that the "administrative law judge further acted within his discretion in severing and separately considering Dr. Wiot's additional testimony pertaining to the medical acceptability and relevance of these tests from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis . . .." In so holding, the Board stated the following:

> We agree with the Director that where a physician's statement or testimony offered to satisfy the party's burden of proof at 20 C.F.R. § 718.107(b) also contains additional discussion, if the additional comments are not admissible pursuant to 20 C.F.R. §§ 725.414 or 725.456(b)(1), the administrative law judge need not exclude the deposition or statement in its entirety, but may sever and consider separately those portions relevant to 20 C.F.R. § 718.107(b).

Slip op. at 10.

Merits of entitlement. The Board held that the Administrative Law Judge must provide a rationale for crediting the smoking history contained in certain medical reports over the history contained in other reports or Claimant's testimony. In particular, the Board held that "[w]hile the administrative law judge noted that the documented smoking histories varied, he did not explain why he chose to credit the health summary from Dr. Uhrig's office . . . over the other documented histories of record."

The Board upheld the Administrative Law Judge's weighing of the chest x-ray evidence under § 718.202(a)(4). Specifically, one chest x-ray yielded three positive readings, one by a B-reader and two by dually-qualified physicians. On the other hand, a B-reader and a dually-qualified physician interpreted the study as negative. The Administrative Law Judge held that the study did not preclude or establish the presence of pneumoconiosis. In affirming this holding, the Board concluded that the Administrative Law Judge is not required to "defer to the numerical superiority of the x-ray readings . . . or to the readings by physicians with dual qualifications." (citations omitted).

> Further, the Board upheld the Administrative Law Judge's decision to accord little weight to Dr. Spark's medical opinion on grounds that "the physician's credentials (were) not in the record, he did not provide any rationale for his diagnosis of pneumoconiosis, and the pulmonary function study he relied on was invalidated by two specialists."
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> Finally, the Board instructed that, on remand, the Administrative Law Judge must "address whether the medical opinion evidence is sufficient to establish the existence of either clinical or legal pneumoconiosis . . .."

[**"other medical evidence" under § 718.107; digital x-rays; weighing chest x-rays and medical opinions**]

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-___ (Jan. 27, 2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting), a case arising under the amended regulations in the Seventh Circuit, the Board again issued several important holdings regarding application of the amended regulations.

> *Physician's consideration of inadmissible evidence.* The Board held that a physician's medical opinion must be based on evidence that is admitted into the record in accordance with 20 C.F.R. § 725.414. In this vein, the Board concluded that the Seventh Circuit's decision in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126 (7th Cir. 1999), was not applicable to a claim filed under the amended regulations. In *Durbin*, the Seventh Circuit held that a medical opinion could be fully credited even if the physician refers to evidence that is not in the record. Because *Durbin* was decided prior to promulgation of the amended regulations, the Board concluded that it is not controlling. Rather, the Board stated that "[w]ithin this new regulatory framework, requiring an administrative law judge to fully credit an expert opinion based upon inadmissible evidence could allow the parties to evade both the letter and the spirit of the new regulations by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations."
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> Importantly, the Board held that "an administrative law judge is granted broad discretion in resolving procedural issues, particularly where the statute and the regulations do not provide explicit guidance as to the sanction that should result when the requirements of a regulation are not satisfied." Consequently, the Board stated that "a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion."
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> The Board noted that, when an Administrative Law Judge is confronted with an opinion that considers evidence not admitted into the

formal record, then he or she may exclude the report, redact the objectionable content, ask the physicians to submit revised reports, or consider the physicians' reliance on inadmissible evidence in deciding the probative value to accord their opinions. In *Harris*, the Board held that the Administrative Law Judge "appropriately indicated that exclusion is not a favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations."

Digital x-rays. In *Harris*, Dr. Wiot used the standard ILO classification form to conclude that a digital x-ray "contained no parenchymal or pleural abnormalities consistent with pneumoconiosis." On the other hand, Dr. Ahmed declined to interpret the study stating that NIOSH has "indicated that the ILO system does not permit the classification of digital x-rays for pneumoconiosis." In support of his statement, Dr. Ahmed attached a letter from NIOSH stating the following:

> The ILO system does not at this time permit the classification of digital films for pneumoconiosis. However, NIOSH is aware that digital systems are increasingly utilized for medical imaging and patient information. We are, therefore, also soliciting input and experience related to digital chest imaging for dust-related changes.

Slip op. at 7, n. 6. As a result, the Administrative Law Judge concluded that Dr. Wiot's interpretation was entitled to "little weight" based on Dr. Ahmed's statement. As in its decision in *Webber*, the Board concluded in *Harris* that the digital x-ray should be considered under, and weighed with, "other medical evidence" under § 718.107. As a result, it was error for the administrative law judge to accord little weight to Dr. Wiot's interpretation under § 718.202(a)(1) on grounds that it did not comply with the quality standards for standard film x-rays.

Subsequent claim under § 725.309. The Board held that, in a subsequent claim, the miner must demonstrate one of the "applicable conditions of entitlement" upon which the prior denial was based. Because Claimant failed to establish any element of entitlement in his initial claim, he "had to submit new evidence establishing at least one of these elements to proceed with his claim." In finding that the miner was now total disabled, the Board held that treatment notes recorded two to four years prior to the hearing were less probative as the miner's condition at the time of the hearing "is the relevant point in time for assessing claimant's ability to perform his usual coal mine employment."

CT-scans. Citing to its decision in *Webber*, *supra*, the Board held that "each party may proffer only one reading of each CT scan in support of its

> affirmative case and one reading in rebuttal of each reading submitted by the opposing party in support of its affirmative case." Consequently, the Board held that, on remand, the "administrative law judge must order the parties to select and designate their CT scan readings and must render a decision as to their admissibility."

[**digital x-rays; CT-scans; subsequent claims under § 725.309; consideration of inadmissible evidence**]

In *Teague v. Apple Coal Co.*, BRB No. 05-0489 BLA (Feb. 15, 2006) (unpub.), the Board affirmed the ALJ's finding that Employer failed to demonstrate "good cause" for exceeding the evidentiary limitations at 20 C.F.R. § 725.414. As an initial matter, the Board rejected application of the Fourth Circuit's decision in *Underwood v. Elkay Mining*, 105 F.3d 946 (4th Cir. 1997) on grounds that (1) *Teague* arose in the Sixth Circuit and (2) *Underwood* was decided under the pre-amendment regulations, which did not include the evidentiary limitations at § 725.414. In addition, the ALJ correctly concluded that Employer carried the burden to demonstrate "good cause" in support of admitting evidence in excess of the § 725.414 limitations. In this vein, the Board held that Employer's arguments that the excess evidence was (1) developed in conjunction with the state workers' compensation claim, (2) relevant and probative, and (3) equally available to the parties, was not sufficient to establish "good cause." In rejecting Employer's arguments, the Board cited to the published comments underlying the amended regulations to state that a purpose of § 725.414 "was to enable administrative law judges to focus on the quality, rather than the quantity, of evidence."

[**"good cause" to exceed evidentiary limitations not established**]