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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 157
February - March 2002

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

Demette v. Falcon Drilling Co., Inc., ___ F.3d ___ (No. 00-30165) (5th Cir. Jan. 16, 2002)[En Banc Petition Pending].

[ED. NOTE: This opinion was substituted for a previous one styled the same and reported at 253 F.3d 840 (5th Cir. 2001).**]**

In determining that an OCSLA case was covered by the LHWCA and that the LHWCA did not invalidate an indemnity agreement, the Fifth Circuit, for the first time, specified the "exact contours of the situs test" established by Section 1333 of the OCSLA.

The Fifth Circuit formulated a specific rule:

The OCSLA applies to all of the following locations:
(1) the subsoil and seabed of the OCS;
(2) any artificial island, installation, or other device if
(a) it is permanently or temporarily attached to the seabed of the OCS, and
(b) it has been erected on the seabed of the OCS, and
(c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
(3) any artificial island, installation, or other device if
(a) it is permanently or temporarily attached to the seabed of the OCS, and
(b) it is not a ship or vessel, and
(c) its presence on the OCS is to transport resources from the OCS.

Matson Terminals, Inc. v. Berg, ___ F.3d ___ (No. 00-71391) (Jan. 29, 2002).

When both of a claimant's knees are injured in one accident, Section 8(c)(22) indicates that there should be two liability periods. Since the claimant's two knees were discrete injuries under Section 8(f), the Ninth Circuit found that the Board and ALJ were correct in imposing two 104-week liability periods on the employer. "It is irrelevant that the injuries arose from the same working conditions or that they arose from a single cause or trauma. What is relevant is that the working conditions caused two injuries, each separately compensable under Section 8(f)."

[Topics 8.4.4 Multiple Scheduled Injuries/Successive Injuries]

Delaware River Stevedores, Inc. v. Director, OWCP, ___ F.3d ___ (No. 01-1709) (3rd Cir. Jan. 30, 2002).

At issue here was whether the claimant's condition was a natural progression of an original injury or the result of an aggravation or acceleration. In addressing the issue, the court agreed with the Board's acessment that "[i]f the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act" and that "where claimant's work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for the resulting temporary total disability." The court then cited approvingly the last responsible employer rule as applied by *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986) ("If on the other hand, the [subsequent] injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the [subsequent] injury is the compensable injury, and [the subsequent employer] is...responsible..."). Lastly, the court agreed with the Board that "[t]he fact that the earlier injury was the 'precipitant event' is not determinative." The determinative question is whether the claimant's subsequent work aggravated or exacerbated the claimant's condition first manifested earlier.

[Topic 2.2.7 Natural Progression]

Christensen v. Georgia-Pacific Corp, ___ F.3d ___ (No. 00-35922) (9th Cir. Feb. 1, 2002).

[ED. NOTE: While the forum for "905(b) negligence claims is federal district court, the Ninth Circuit's general language as to "coverage" under the LHWCA is noteworthy here.]

At issue in this "905(b)" claim [33 U.S.C. 905(b)] was whether the district court had properly granted a motion for summary judgment when it held that, as a matter of law, the injury was not a foreseeable result of the appellee's acts. The Ninth Circuit reversed, finding that genuine issues of material fact existed as to breach of duty and proximate cause that must be resolved at trial.

Under Section 905(b), a claimant can sue a vessel for negligence under the LHWCA. However the Supreme Court has limited the duties that a vessel owner owes to the stevedores working for him or her. *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, (1981) (A vessel owes three duties to its stevedores: the turnover duty, the active control duty, and the intervention duty.).

In *Christensen*, the Ninth Circuit noted that "Coverage 'does not depend upon the task which the employee was performing at the moment of injury." [Ninth Circuit cites *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978); H. Rep. No. 98-570, at 3-4 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2736-37.] The court found that claimant "was engaged as a stevedore and routinely worked at loading and unloading cargo from ships. Therefore, he is covered by the LHWCA."

[Topics 1.7.1 Status–"Maritime Worker" ("Maritime Employment"); 5.2.1. Exclusiveness of Remedy in Third Party Liability–Generally]

Newport News Shipbuilding & Dry Dock Co. v. Rowsey, (No. 01-1995) (4th Cir. February 12, 2002) (Unpublished.).

Here the claimant was denied benefits by the ALJ and appealed to the Board. Noting that the official record had not been forwarded to its office, the Board stated that it could not consider the merits of the appeal without the record. The Board therefore dismissed the appeal and remanded it to OWCP for reconstruction of the record. Employer filed a petition for judicial review arguing that the ALJ's decision was automatically affirmed pursuant to the Omnibus Consolidated Recisions and Appropriations Act. The Director moved that Employer's appeal should be dismissed as Newport News is not an aggrieved party under the LHWCA. The Fourth Circuit agreed, noting that "Because the ALJ denied [Claimant's] claim for workers' compensation benefits and Newport News has not been required to pay benefits, Newport News has made no showing that it has suffered an injury in fact."

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

Weaver v. Director, OWCP, ___ F.3d ___ (No. 00-60475) (5th Cir. February 26, 2002).

This case interprets the fee-shifting provision of the LHWCA found at Section 28(a). Citing *Watkins v. Ingalls Shipbuilding, Inc.*, (No. 93-4367) (5th Cir. Dec. 9, 1993) (Unpublished), the court held that an attorney could recover only those fees incurred after the 30th day following the receipt of formal notice from the district director. [*Watkins* has precedential status because it was decided before the Fifth Circuit changed its rules.] The court further ruled that, as to fees accrued between the formal notice and controversion of the claim (the 30th day following receipt of notice), these fees may be assessed against the employer if the employer controverts a claim within the 30 day window

and other triggers have been satisfied. These other triggers are: (1)there is formal notice, (2) there is a successful prosecution by the claimant, and the claimant uses an attorney to prosecute the claim.

[Topic 28.1.3 Attorney Fees--When Employer's Liability Accrues]

Johnston v. Director, OWCP, ___ F.3d. ___ (No. 01-70201) (9th Cir. February 22, 2002).

In this case interpreting Section 8(c)(21), the court considered whether, in a situation where actual wages have remained constant, a claimant's post-injury earnings must be adjusted for inflation in order to be considered on equal footing with wages at the time of injury. The Ninth Circuit held that the actual wages–without adjustments for inflation–"fairly and reasonably represent [the claimant's] wage-earning capacity" as required by Section 8(h). The court agreed with the Board that "the fact that the wages claimant earned in his post-injury job may not have kept pace with inflation is not due in any part to claimant's injury." Here the claimant had resumed the same job he had prior to the injury, albeit in a part-time capacity. As a result of a collective bargaining agreement, claimant's wage rate as a dock supervisor remained unchanged between the time of his injury and the period during which he worked part-time.

[Topic 8.9.1 Wage-earning Capacity–Generally; 8.9.5 Wage-earning Capacity–Inflation]

B. Federal District Court

Olsen v. Triple A Machine Shop, Inc., (No. C01-3354 BZ (ADR)) (N. Dist. of CA.) (Dec. 14, 2001)(Unpublished) (Order Granting Defendant Triple A Machine Shop's Motion To Dismiss)(Final Judgment entered December 17, 2001).

In *Olsen*, the Northern District of California ruled that it does not have jurisdiction over a LHWCA Modification Request. The district court, citing *Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (**9th Cir.** 1987), noted that it only has jurisdiction to enforce orders in relation to LHWCA matters.

[Topics 21 and 22]

C. Benefits Review Board

Sowers v. Metro Machine Corp., ___ BRBS ___ (BRB No. 00-1141) (Jan. 3, 2002) (*en banc*).

In this *en banc* situs issue case the Board upheld its original panel opinion affirming the ALJ's finding that the claimant was not injured on a covered situs. The claimant was injured at one of the employer's two facilities adjacent to navigable water. The claimant was injured at the Mid-

Atlantic facility used for prefabricating steel components and painting items for Navy ships that are under repair at the employer's other facility, the Imperial Docks, where there are wet and dry docks. Ninety-five percent of the items sent to Mid-Atlantic for repair, or returned to the main shipyard after completion, are sent over land by truck. The remaining five percent are too large or too heavy to be trucked and are sent by barge.

The ALJ found that the Mid-Atlantic facility was not a covered situs pursuant to *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998). The ALJ noted that the claimant was engaged in fabrication of ship components that had to be shipped elsewhere before they were installed on the vessels and that the workers at the Mid-Atlantic facility did not engage in ship repair at the water's edge, and thus the work could be done at any site. The fact that the large components occasionally had to be shipped by barge was deemed insufficient to cover the site under the LHWCA, as this was not the customary method of transportation.

The Board, first in a panel opinion, and now *en banc*, held that the ALJ properly applied *Brickhouse*. Although the employer's facility was contiguous with navigable waters, and thus had a geographic nexus to navigable waters, the facility did not have the functional nexus with navigable waters required by the Fourth Circuit's Brickhouse decision. The Board noted that this facility was used to fabricate vessel components for ships undergoing repair at the employer's other facility, but this activity did not require more than the rare use of the navigable river.

[Topic 1.6.2 Situs–"Over land"]

Burley v. Tidewater Temps, Inc., ___ BRBS ___ (BRB No. 01-0405) (Jan. 17, 2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. § 702.338 ("...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

> Moreover, given the importance of the excluded evidence in this case and the **administrative law judge's use of permissive rather than mandatory language in his pre-hearing order**, employer's pre-hearing submission of its labor market survey to claimant ...does not warrant the extreme sanction of exclusion.

(Emphasis added.)

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the

permissive rather than mandatory language ("Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.")

In ruling in favor of the employer on this issue, the Board distinguished this case from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros*., 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that Durham did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished *Smith* as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in Burley, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

[Topics 23.1 Evidence–ADA; 19.3 Adjudicatory Powers; and 20.2.4 ALJ's Proper Invocation of Section 20(a)]

Weber v. S.C. Loveland Co. (Weber III), ___ BRBS ___ (BRB Nos. 00-838, 00-838A and 00-838B) (Jan. 30, 2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92 (CRT) (5th Cir. 2001) (Contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents

a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

[Topics 1.5.2 Jurisdiction–"Navigable Water;" 2.5 "Carrier;" and 8.7.1 Applicability and Purpose of Section 8(f)]

Jenkins v. Puerto Rico Marine, Inc., ___ BRBS ___ (BRB. No. 01-0447) (Feb. 6, 2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the Eleventh Circuit and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. § 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application

as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

[Topics 8.10.4 Settlements–Time Frame; 8.10.7 Settlements–Attorney Fees; 28.9 Attorney Fees–Settlements]

Furguson v. Newport News Shipbuilding and Dry Dock Co., ___ BRBS ___ (BRB No. 01-0504) February 14, 2002).

In this matter, claimant's prior counsel filed a fee petition documenting services rendered on claimant's behalf. The district director refused to impose liability for a fee on the claimant, stating that he was unable to determine if the claimant understood his counsel's representation, including its necessity and reasonableness, whether or not there had been a successful prosecution, and claimant's ability to pay the fee. The Board found that the district director erred in declining to consider his fee petition listing services allegedly rendered while the case was before the district director. Citing 20 C.F.R. § 702.132, the Board found that counsel was in conformance with the regulations. Furthermore, the Board stated, " [W]hile the district director chastises Mr. Donaldson for his failure to create a record before an administrative law judge supportive of his position regarding the payment of a fee, the applicable regulations implementing the Act provide for the compilation of an administrative file which give the district director the requisite information needed for the consideration of counsel's fee petition.....Thus, the administrative file in the district director's possession should contain all of the information needed for that official to adequately consider the fee proposed by claimant's former counsel."

[Topic 28.4 Attorney Fees–Application Process]

Morrissey v. Kiewit-Atkinson-Kenny, ___ BRBS ___ (BRB No. 01-0465) (February 8, 2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail

system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under *contracts with the United States, or an agency thereof*, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

Finally the Board rejected coverage directly under the LHWCA. The rock where the tunnel was being drilled rose above the surface of the water at the point where the claimant was injured. The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway. Thus, the Board found that the injury did not occur on navigable water. As to the claimant's contention that he was injured on a "marine railway," the Board rejected this allegation after examining the definition of "marine railway" and noting that the claimant did not contend that the railway used in the tunnel played any part in removing ships from the water for repair.

[Topic 1.6 Jurisdiction–Situs; 60.2.1 Extension Acts–Defense Base Act–Applicability of the LHWCA; 60.2.2 Extension Acts–Defense Base Act–Claim Must Stem From a "Contract" For "Public Work" Overseas; 60.3.1 Extension Acts–Outer Continental Shelf Lands Act–Applicability]

Esposito v. Sea-Land Service, Inc., ___ BRBS ___ (BRB No. 01-0461) (February 12, 2002).

Here the Board rejected the claimant's assertions that the employer's actions amounted to a constructive approval of a third-party settlement. The Board found that the employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. The Board noted the very limited participation of the employer and found that it was less than in some other cases where the Board had previously held that Section 33(g)(1) applied. Employer here was a named defendant in the tort suit; thus, it did not appear in the case on the claimant's side. Second, the employer was dismissed from the case nearly one and one-half years before the trial and settlement, and the employer's attorney remained active only for discovery purposes. The Board further noted that "While there is conflicting evidence as to whether [employer's attorney] was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the ...settlement, the [ALJ] found that [employer's attorney] was not involved in the negotiations themselves, and he did not sign or consent to the general release." The Board found that employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement and render Section 33(g)(1) inapplicable.

Next the Board addressed an issue of first impression, namely whether Section 33(g)(2) provides claimants with a means for retaining their entitlement to medical benefits despite having lost their entitlement to compensation. Referencing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 , 26 BRBS 49 (CRT) (1992); the language of Section 33(g) itself; and the implementing regulation, 20 C.F.R. § 702.281, the Board concluded that a claimant must obtain the prior written approval of a settlement for an amount less than his entitlement under the LHWCA.

[Topic 33.7 Third-Party Settlements–Ensuring Employer's Rights–Written Approval of Settlement; 33.7.4 Third-Party Settlements–Medical Benefits]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Peabody Coal Co. v. Groves*, ___ F.3d ___, Case No. 00-3867 (6th Cir. Jan. 17, 2002), the Sixth Circuit held that it was proper for the ALJ to accord greater weight to the opinion of a miner's treating physician. Citing to its decision in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993), the court stated that treating physicians' opinions may be entitled to greater weight than the opinions of other physicians of record, but it noted that ALJs "'are not required to credit treating doctors' opinions either standing alone or where there is conflicting proof in the record.'" The court cited to the amended regulatory provisions at 20 C.F.R. § 718.104(d)(5) (2000) which provide that weight accorded to the

treating physician's opinion must "also be based on the credibility of the physician's opinion in light of its reasoning and documentation" and "other relevant evidence as a whole."

[**treating physician's opinion**]

In *ARMCO, Inc. v. Martin*, 277 F.3d 468 (4th Cir. 2002), the court applied the pre-amendment provisions at 20 C.F.R. § 725.493(a)(1) (1999) to hold that the 125-day rule may only be used to determine the proper responsible operator and it cannot be used to determine the claimant's length of coal mine employment for purposes of the entitlement presumptions at 20 C.F.R. § 718.301.[1] In this vein, the court noted that 20 C.F.R. § 725.493(b) (1999) provides a two-step inquiry in determining whether the named operator is properly responsible for the payment of benefits:

> Under the first step, a court must determine whether a miner worked for an operator for 'a period of one year, or partial periods totaling one year.' 20 C.F.R. § 725.493(b) (1999). If the court determines that this one-year requirement has been met, it must then undertake the second inquiry of whether a miner's employment during that one year was 'regular,' *i.e.* whether, during the one year, the miner 'was *regularly employed* in or around a coal mine.'

Id. at 474. In particular, the court found that the "regulations provide that responsible operator liability does not arise unless an operator employed a miner for one calendar year during which the miner regularly worked for that operator, defining 'regularly worked' to be a minimum of 125 days." In support of its position, the court cited to Board and circuit court decisions which reached the same result: *Croucher v. Director, OWCP*, 20 B.L.R. 1-68, 1-72 to 1-73 (1998); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 876 (10th Cir. 1996); and *Director, OWCP v. Gardner*, 882 F.2d 67, 71 (3rd Cir. 1989). The court noted that the Third Circuit explained that:

> This two-step inquiry means that 'the one-year employment requirement sets a floor for the operator's connection with the miner, below which the operator cannot be held responsible for the payment of benefits. The 125 day limit relates to the minimum amount of time the miner may have been exposed to coal dust while in the employment by the operator.' (citation omitted).

Id. at 475. In so holding, the court rejected the position taken by the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989) that, if a miner works for 125 days, then s/he will be credited with one year of coal mine employment for purposes of 20 C.F.R. § 725.301 (1999).

[**application of 125-day rule to determine length of coal mine employment**]

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[1] Although the amended regulatory provisions were not applicable, the court stated that the new regulations clarified the earlier regulatory provisions and the court's holding was consistent with the amended provisions. *Id.* at 475.

By unpublished decision in *Eggers v. Clinchfield Coal Co.*, Case No. 01-1198 (4th Cir. Feb. 12, 2002)(unpub.), the circuit court held that the Board "clearly erred" in directing that the record be reopened on grounds that the circuit court's decision in *Grigg v. Director, OWCP*, 28 F.3d 416, 418 (4th Cir. 1994) "clarified" its position with regard to rebuttal under 20 C.F.R. § 727.203(b)(3). The court stated that "[t]he conclusion that a 'clarification' in the law in *Grigg* justified a reopening of the record in this case is . . . totally indefensible for several reasons." Initially, the court noted that the *Grigg* standard was in place during the time the original record was developed in the claim. Moreover, the court found that the *Grigg* holding was irrelevant as "there is not, and never has been, any controversy regarding whether the miner had a respiratory impairment." The court vacated the ALJ's decision, which was based on an improperly reopened record, and remanded the case for further consideration. The court expressed its disappointment that the claim had been pending for two decades and noted that "[b]lack lung claims frequently take an unusually long time to adjudicate and these delays can serve as a potent source of frustration both for benefits claimants and for employers who must defend claims based on evidence that sometimes was developed decades ago."

[**reopening record by BRB "clear error"**]

B. Benefits Review Board

In *Johnson v. Royal Coal Co.*, ___ B.L.R. ___, BRB 01-0388 BLA (Feb. 28, 2002), Claimant served *Requests for Admission* on Employer and Director to which Employer responded and admitted certain matters, but remained silent on other matters. The Director failed to respond. At the hearing, Employer's counsel withdrew controversion of all issues listed on the CM-1025 except the existence of pneumoconiosis and disability causation. At that time, Claimant's counsel "did not contend that employer had already admitted the existence of pneumoconiosis and that claimant's total disability is due to pneumoconiosis due to its failure to respond to claimant's request for an admission on these matters." The hearing proceeded on the merits. For the first time in its closing brief, Claimant argued that, pursuant to 29 C.F.R. § 18.20, Employer admitted the existence of pneumoconiosis as well as the etiology of Claimant's disability in failing to respond to his requests for admissions. The Board upheld the ALJ's denial of benefits and concluded that the "statement of issues (on the CM-1025) prepared by the district director is of critical importance, as the regulations contemplate that this document will provide the road map for the hearing." The Board further stated the following:

> The alleged admissions that claimant points to under 29 C.F.R. § 18.20 are in conflict with the issues listed on the Form CM-1025 pursuant to the black lung regulations, yet claimant does not explain his apparent assumption that the black lung procedures are trumped by 29 C.F.R. § 18.20 because of employer's technical error in drafting its response to the request for admissions.

Citing to 20 C.F.R. § 725.455(a), the Board noted that the ALJ was not bound by technical or formal

rules of procedure except as provided by the Administrative Procedure Act and 20 C.F.R. Part 725. Moreover, Claimant did not appear to rely on Employer's alleged admissions in preparing for trial. The Board concluded that the provisions at 29 C.F.R. § 18.20 were "inapplicable in the procedural context of this case because the black lung regulations are 'controlling.'" The Board further noted that, even if 29 C.F.R. § 18.20 was applicable, Claimant waived his right to rely on Employer's alleged admissions because he failed to raise this issue at the hearing.[2]

[**requests for admissions at 29 C.F.R. § 18.20**]

[2] Administrative Appeals Judge Betty Jean Hall dissented and noted that Claimant's requests for admissions were not served on Employer until after referral of the case for a hearing. She did not find that there was a conflict between the provisions at 20 C.F.R. Part 725 and the procedural rules at 29 C.F.R. § 18.20, "Simply put, the provisions for requesting admissions furnish a supplemental or additional method of narrowing the issues as well as a procedure for extracting admissible evidence." Judge Hall concluded that "[t]he holding of the majority disturbs me because it effectively eliminates requests for admission as a tool for developing evidence and narrowing issues in Black Lung cases."