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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 158
April 2002

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

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

[ED. NOTE: Although the following ADA decision is not a LHWCA case, it is nevertheless noteworthy for LHWCA purposes. In this case the Court sets a new rebuttable presumption standard that an accommodation requested by a disabled employee under the ADA is unreasonable if it conflicts with seniority rules for job assignments. This was a 5-4 decision by J. Breyer, with two concurrences (J. Stevens and J. O'Connor) and two dissents (J. Scalia with J. Thomas joining, and J. Souter with J. Ginsburg joining).**]**

U.S. Airways, Inc., v. Barnett, ___ U.S. ___ (No. 001250) (April 29, 2002).

Held, an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an accommodation is not reasonable. However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case. The Court took a middle ground here rejecting both the positions of the airline and its employee. The airline had argued that a proposed accommodation that conflicts with an employer-established seniority system should be automatically unreasonable. The employee had argued that the employer should have the burden to show the accommodation's conflict with seniority rules constitutes an undue hardship.

Justice Breyer noted that various courts have properly reconciled "reasonable accommodation" and "undue hardship" in a practical way that does not create a dilemma for employees. The justice explained that those courts have held that an employee "need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases," while the employer "then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." He went on to state that the "the seniority system will prevail in the run of cases" because "the typical seniority system provides important employee benefits by creating, and fulfilling employee expectations of fair, uniform

treatment."

B. Circuit Courts of Appeals

Nunez v. B & B Dredging, Inc., ___ F.3d ___ (No. 00-30993) (5th Cir. April 23,2002).

Worker was not a "seaman" under the Jones Act, even though he was permanently assigned to a dredge, since he spent only approximately 10 per cent of his work time aboard the dredge. The circuit court noted the Supreme Court's analysis in *Chandris v. Latsis* resolved this issue and quoted the Supreme Court :

> "The Court stated 'a maritime worker who spends only a small fraction of his working time onboard a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are.' The Court stated further that 'generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30% of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."

The circuit court also said, "The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea."

[Topic 1.4 Jurisdiction–LHWCA v. Jones Act]

Smith v. Principi, ___ F.3d ___ (No. 01-7050) (Fed. Cir. 2002).

[ED. NOTE: This Veterans Claim is included in the materials for informational purposes only.**]**

Here the Board of Veterans' Appeals dismissed the appeal of a claim where interest was not paid on the ground that no statute authorized the payment of interest. The United States Court of Appeals for Veterans Claims, likewise did not give the claimant relief. The Federal Circuit scrutinized the relevant statutes and found that a broad reference to "equitable relief" does not constitute a waiver of the n-interest rule. The court further found that public policy, no matter how compelling, cannot be a ground for finding a waiver in the absence of express statutory language.

Macktal v. Chao, Secretary of Labor, ___ F.3d ___ (No. 01-60195) (April 8, 2002).

[ED. NOTE: This whistle blower case is included for informational purposes only.**]**

The de novo issue here for the court was whether the (Administrative Review Board) ARB has inherent authority to reconsider its decisions when the Energy Reorganization Act does not mention reconsideration by the ARB of its orders. The court noted that while it has never expressly held so, it has generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions. It went on to note that the reasonableness of an agency's reconsideration implicates two opposing policies: "the desirability of finality on one hand and the public's interest in reaching what, ultimately, appears to be the right result on the other." After weighing these policies, the court found thsat in this instance, the ARB had the inherent authority to reconsider its decision.

Jones v. CSX Transportation, ___ F.3d ___ (No. 01-14786) (11th Cir. April 11, 2002).

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

This is a claim under the Federal Employers' Liability Act (FELA) for emotional distress damages based on the fear of contracting cancer. The district court dismissed that claim because the plaintiffs made no showing of any objective manifestations of their emotional distress. In upholding that dismissal, the circuit court found that by requiring an objective manifestation it could avoid "unpredictable and nearly infinite liability." It noted that several other circuits also require objective manifestations, and that this includes some that have dealt with Jones Act claims. The plaintiffs had based their claims for emotional distress on Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (Held, a worker exposed to asbestos could not recover for negligently inflicted emotional distress based on his fear of contracting cancer until he exhibited symptoms of a disease.) The plaintiffs in Jones argued that they had exhibited symptoms of an asbestos-related disease, i.e. asbestosis. However, because the sole ground of CSX's motion was the plaintiffs' failure to show objective manifestations of their emotional distress, and because the district court granted partial summary judgment on this basis alone, the circuit court did not address the question of whether Buckley permits recovery for the plaintiffs' fear of contracting cancer when they have exhibited symptoms of an asbestos-related disease but not of cancer specifically.

Kuhn v. Kenley Mining Co., (No. 01-2255) (4th Cir. April 4, 2002) (Unpublished).

This Black Lung Benefits Act fee case is noted here because the attorney fee section of the Black Lung Act and regulations are derived from the LHWCA. The Fourth Circuit, citing 33 U.S.C. § 928(a) and 20 C.F.R. § 725.367(a), held that "the statute does not permit the fees of a lay representative to be shifted to an employer."

C. Benefits Review Board

Watkins v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 01-0538) (March 5, 2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

[Topics 1.7.1 Status–"Maritime Worker;" 1.3 No Section 20(a) Presumption of Coverage; 20.6.2 Section 20(a) Presumption–Does Not Apply to Jurisdiction.]

O'Neil v. Bunge Corp., ___ BRBS ___ (BRB No. 01-0541) (March 15, 2002).

For this matter geographically within the Ninth Circuit (but without pertinent Ninth Circuit case law), the Board relied on *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609, 34 BRBS 15 (CRT) (5th Cir. 2000), *aff'g* 32 BRBS 29 (1998). To hold that where a decedent dies without having signed a proposed settlement agreement, and the agreement had not been submitted for administrative approval prior to death, it is not an enforceable settlement agreement under Section 8(i).

Additionally, the Board noted that the ALJ had not erred in refusing to enforce the proposed agreement under common law contract principles since Section 8(i) provides the only basis for settlement of claims under the LHWCA and Sections 15(b) and 16 of the LHWCA prohibit the settlement of claims except in accordance with Section 8(i) and its implementing regulations.

[Topic 8.10.2 Settlements–Persons Authorized; 8.10.3 Structure of Aettlement; Withdrawal of Claim/Settlement Agreement]

Seguro v. Universal Maritime Service Corp., ___ BRBS ___ (BRB Nos. 01-0542 and 01-0542A) (March 18, 2002).

There is no provision under the LHWCA or the regulations for a "voluntary order" unless the parties agreement is embodied in a formal order issued by the district director or ALJ. Moreover, voluntary payments by an employer do not equate to a final order.

In the original claim in the instant case, the parties stipulated to all issues, including permanent disability, with the exception of Section 8(f) Trust Fund relief. In the original Decision and Order, the ALJ noted the parties stipulations, but did not incorporate an award of benefits to the claimant into his order. He stated that the only disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

Subsequently, the employer filed a Motion for Modification alleging that claimant had become capable of suitable alternate employment and the employer also filed a Motion for Partial Summary Decision, seeking a ruling that there was no final compensation award contained in the original Decision and Order. A second ALJ granted the partial Motion for Summary Decision, holding that there was no compensation award in place. The employer then stopped making payments. A third ALJ heard the employer's request for modification and found that there had been a "voluntary compensation order." Both the second and third ALJ decisions are the subject of this appeal.

On appeal, the Board found that the original Decision did not constitute a final compensation order and thus, Section 22 was not applicable as the initial claim for benefits had never been the subject of a final formal compensation order prior to the adjudication by the third ALJ hearing the modification. Therefor, the claim before the third ALJ must be viewed as an initial claim for compensation.

[Topics 19.6 Formal Order Filed with District Director; 19.4.2 Summary Decision; 22.1 Modification–Generally]

Jeschke v. Jones Stevedoring Co., ___ BRBS ___ (BRB No. 01-0553) (March 21, 2002).

Here the claimant was prescribed bi-neural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a hearing-loss claim against two employers and entered into a Section 8(i)settlement with one who accepted

responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA..

[Topics 8.13.1 hearing Loss–Introduction and General Concepts; 8.13.4 Hearing Loss–Responsible Employer and Injurious Stimuli; 8.10.1 Settlements–Generally]

Weikert v. Universal Maritime Service Corp., ___ BRBS ___ (No. 01-552) (March 21, 2002).

The requirements of Section 8 of the LHWCA do not apply to a claim for medical benefits under Section 7 of the LHWCA. The Board held that a claimant need not have a minimum level of hearing loss (i.e., a ratable loss pursuant to the AMA Guides) to be entitled to medical benefits.

The Board also reject the employer's assertion that this case was controlled by *Metro-North commuter Railroad v. Buckley*, 521 U.S. 424 (1997). *Buckley* involved a railroad employee who had been exposed to asbestos and sought to recover under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (FELA), medical monitoring costs he may incur as a result of his exposure. Because *Buckley* had not been diagnosed with any asbestos-related disease and was not experiencing any symptoms, the Supreme Court held that he was not entitled to medical monitoring. Besides coming under another act, the Board specifically noted that in the instant longshore case, the ALJ specifically found that the claimant has trouble hearing and distinguishing sounds and, thus, has symptoms of hearing loss.

Next the Board addressed the ALJ's delegation to the district director the issue as to whether hearing aids were a necessity in this matter. While noting that there are several instances where the district director has authority over certain medical matters, the Board stated that it has "declined to interpret the provisions of Section 7(b) of the [LHWCA], or Section 702.407 of the regulations,..., in such a manner as to exclude the [ALJ] from the administrative process when questions of fact are raised." Thus, the Board found, "the issue of whether treatment is necessary and reasonable, where the parties disagree, is a question of fact for the [ALJ]."

The Board also stated that, "Contrary to employer's contention, the absence of a prescription for hearing aids from a medical doctor, as required by Virginia law, does not make claimant ineligible for hearing aids, or medical benefits, under the [LHWCA]. While claimant

must comply with specific provisions under Virginia law before he is able to obtain hearing aids, claimant's compliance or non-compliance with state requirements does not affect the authority of the [ALJ] to adjudicate claimant's entitlement to medical benefits under the [LHWCA]." **[Topics 7.3.1 Medical Treatment–Necessary Treatment; 8.13.1 Hearing Loss–Introduction and General Concepts]**

McKenzie v. Crowley American Transport, Inc., ___ BRBS ___ (BRB No. 01-0565) (April 3, 2002).

Here the Board held that the case law defining "maritime employment" is not so broad as to include a trucker engaged in the land-based movement of cargo outside of the employer's terminal to locations in a port and to the rail head nearby. In other words, this status case turned on determining the point at which cargo moves from the stream of maritime commerce and longshoring operations to the land-based portion of its ultimate destination.

Specifically, the claimant testified that his job duties as a truck driver at the time of his accident consisted of transporting containers and/or trailers between the maritime yard at the port and the U.S. Customs facility, also located within the port but not within the maritime yard and/or the railroad yard which is located outside the port. He also stated that about 5-10 percent of the time he would transport containers to areas away from the port, such as to Miami. The claimant stated that usually his deliveries would originate or end at a holding yard in the maritime yard, although occasionally he would be required to make deliveries and/or pick-ups alongside the dock, termed "hot loads." He stated that at no time did he ever board any ships, as the containers at the dockside were loaded onto and unloaded from ships. The manager of intermodal transportation and trucking operations concurred with the claimant's description of his work. Specifically, he stated that there were other drivers hired by another entity that transported cargo inside the port facility, while cargo moved into or out of the port facility.

In reaching its decision, the Board noted that the claimant's primary job duties, which involved the transport of cargo between a holding yard at the port and a rail yard outside the port, are not covered activities. "[C]laimant drove a truck not to move cargo as part of a loading process, but to start it on its overland journey." The Board also noted that the fact that the claimant may have made stops inside the port does not alter the fact that he was an overland truck driver. The evidence established that on the occasions that the claimant drove to customs, he continued on to his destination beyond the port.

[Topic 1.7.1 Status]

Ravalli v. Pasha Maritime Services, ___ BRBS ___ (BRB No. 01-0572) (April 8, 2002).

A modifying order terminating compensation based on a change in the claimant's

physical and/or economic condition may be effective from the date of the change in condition. Having no Ninth Circuit precedent, the Board adopted the Second Circuit's position in *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2nd Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001). The Board now finds it logical to hold that a termination of benefits is a "decrease" within the meaning of Section 22 in all circumstances, with the statutory caveat that a credit is available for a decrease where benefits are still owing. To the extent that the instant case is inconsistent with the Board's decision in *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993) ("the Act does not provide for retroactive termination."), it is overruled.

[Topic 22.1 Modification–Generally]

Edmonds v. Al Salam Aircraft Co., Ltd., (BRB No. 01-0602) (April 5, 2002) (Unpublished).

In this Defense Base Act case the issue was the extent of the "zone of special danger" concept. Claimant was hit by a car while attempting to cross a highway in order to go to the supermarket Saudi Arabia. The ALJ found that claimant, although not injured while performing the duties of his employment, was nevertheless in the "zone of special danger" created by his overseas job. The employer here appealed, arguing first, that driving in Saudi Arabia is no more dangerous than driving in the United States. Second, the employer urged the Board to reconsider the "zone of special danger" doctrine "in light of the 21st Century, since applicability of this doctrine, as exemplified by past case precedent, is premised on an antiquated view of the world outside of the United States."

After noting Supreme court jurisprudence on the "zone of special danger" doctrine, the Board declined to address the employer's invitation to reconsider the doctrine "in light of the 21st Century, since the Board's use and application of the 'zone of special danger' doctrine stems directly from the binding precedent of the Supreme Court's decisions... ." Next the Board noted that the instant case was no one in which the claimant was "so thoroughly disconnected" from work for the employer that it is unreasonable for his injuries to be covered, as the ALJ found that claimant's injuries were related to his living and working conditions in Saudi Arabia. The Board noted that the ALJ had determined that the employer did not provided the claimant with on-base housing, convenient transportation to and from the base, or fresh food at the commissary on the housing compound, and it was reasonable for him to buy food off-base. The ALJ had also found that the claimant was always on call and his hours of work were not consistent; thus it was reasonable for him to drive his own car. Lastly, the ALJ determined, based in part on the claimant's credible testimony and a pamphlet distributed by the employer's predecessor that driving in Saudi Arabia presented hazards not found in the United States.

[Topic 60.2.7 Extension Acts–Defense Base Act, Course and Scope of Employment, "Zone of Special Danger"]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Kuhn v. Kenley Mining Co.*, Case No. 01-2255 (4th Cir. Apr. 4, 2002)(unpublished), the Fourth Circuit cited to 33 U.S.C. § 928(a) and 20 C.F.R. § 725.367(a) to hold that "the statute does not permit the fees of a lay representative to be shifted to an employer."

[**lay representative's fees**]

In *Kentland Elkhorn Coal Corp. v. Director, OWCP [Hall]*, ___ F.3d ___, Case No. 00-4470 (6th Cir. Apr. 24, 2002), the Sixth Circuit applied the amended regulatory provisions at 20 C.F.R. § 718.204(b) (2002) and affirmed the ALJ's finding that the miner's total disability was due to coal workers' pneumoconiosis. In so holding, the court concluded that the ALJ properly accorded greater weight to the opinions of Drs. Saha, Younes, and Sikder over the contrary opinion of Dr. Fino on grounds that Dr. Fino's opinion was equivocal or vague. In particular, Dr. Fino concluded that the degree of the miner's obstruction could not be determined, but then concluded that the miner could return to his usual coal mine work. The court found that Dr. Fino's conclusion that the miner could return to his previous coal mine employment to be problematic given that Dr. Fino stated that he could not measure the level of the miner's obstruction. On the other hand, the court found that each of the remaining physicians conducted a "thorough examination" of the miner and found that he was totally disabled. The court noted that, "[c]ombined with the fact that Hall's previous work in the coal mines required heavy exertion and exposure to large amounts of dust, the ALJ properly concluded that Hall was totally disabled as 20 C.F.R. § 718.204(b)(1) defines that term."

The court then addressed the issue of designation of the proper responsible operator. Initially, it found that Desperado Fuels was not the responsible operator as it did not employ Claimant for a period of one year. In so holding, the court concluded that time spent receiving disability benefits should be excluded in computing the length of time Claimant worked for Employer. Specifically, the miner worked for Desparado Fuels from March 6, 1989 to July 7, 1989. He suffered a work-related injury and received disability benefits from July 8, 1989 until June 12, 1990. The court held that the time period during which the miner received disability benefits could not be used to satisfy the requirement of one year of employment with Desperado Fuels. Distinguishing the Board's holding in *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986), the court noted that the miner in *Boyd* was kept on the payroll after his injury and continued to work for the employer after the injury. In the present case, Claimant quit working for Desparado Fuels after his injury and he did not even work for the company for 125 days prior to his injury.

The court then determined that the ALJ erroneously dismissed the other named operators–Coleman and Grassy Creek. Upon review of the evidence, the court concluded that

these entities had a predecessor/successor relationship and the Claimant worked for the entities for more than one year. However, because the claim was "fully litigated on the merits" and Claimant was determined to be entitled to benefits, the court found that the parties would be prejudiced by a remand to the ALJ to designate Coleman/Grassy Creek as the proper responsible operator. As a result, the court dismissed Kentland from the case and held that the Black Lung Disability Trust Fund was liable for the payment of benefits.

[**weighing medical opinions; designation of responsible operator**]

In *Gray v. Peabody Coal Co.*, Case No. 01-3083 (6th Cir. Apr. 19, 2002)(unpublished), the Sixth Circuit held that the ALJ erred in according greater weight to the consultative opinions of Drs. Fino and Branscomb over the opinion of a treating physician on grounds that Drs. Fino and Branscomb had superior credentials. Citing to *Tussey v. Island Creek Coal Co.*, 9982 F.2d 1036 (6th Cir. 1993), the court held that an ALJ may discount a treating physician's opinion if it is "not well reasoned or well documented, or is problematic in some other way." However, the court stated that "[w]here the ALJ determines that the treating physician's opinion is well reasoned and well documented, the ALJ must give more weight to that opinion than to those of other physicians, even where those other physicians have superior qualifications."

[**weighing medical opinions; treating physicians**]

In *Scott v. Mason Coal Co.*, ___ F.3d ___, Case No. 99-1495 (4th Cir. May 2, 2002), a copy of which is attached, the court held that the ALJ erroneously accorded greater weight to the opinions of Drs. Castle and Dahhan, who found that the miner's disability was not caused by coal workers' pneumoconiosis, because the physicians concluded that the miner did not suffer from the disease contrary to the ALJ's findings. Citing to *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court stated the following:

> [A]n ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total respiratory disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the questions of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain.

The fact that Drs. Dahhan and Castle stated that their opinions would not change even if the miner suffered from pneumoconiosis did not alter the court's position that the opinions could carry little weight pursuant to its holding in *Toler*:

> Both Dr. Dahhan and Dr. Castle opined that Scott did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus, their opinions are in

> direct contradiction to the ALJ's finding that Scott suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at most.

Indeed, the court found that the opinions of Drs. Dahhan and Castle could not outweigh a contrary "poorly documented" opinion linking the miner's disability to his pneumoconiosis, because the contrary opinion was based on a finding of coal workers' pneumoconiosis consistent with the ALJ's findings.

[**weighing medical opinions on etiology of total disability**]

B. Benefits Review Board

In *Ramey v. Triple R Coal Co.*, ___ B.L.R. 1-___, BRB Nos, 01-0817 BLA, 01-0917 BLA-A, and 01-0817 BLA-B (Apr. 17, 2002), the Board held that settlements under the Black Lung Benefits Act are prohibited:

> The Board has previously recognized and accepted the Director's contention that neither the Act, nor the regulations promulgated thereunder, provide authority for the settlement of a claim and has, therefore, held that there is no question that settlement of claims under the Act is prohibited, as the settlement provisions of the LHWCA were expressly excluded from incorporation into the Act.

Slip op. at 7.

[**settlement of claim prohibited**]