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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 289
June – July 2018

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I. Longshore and Harbor Workers' Compensation Act and Related Acts

A. U.S. Circuit Courts of Appeals[1]

There are no decisions to report.

B. Benefits Review Board

***Zumwalt v. National Steel Shipbuilding Co.*, ___ BRBS ___ (2018)(en banc).**

The Board affirmed its order[2] dismissing the appeals as untimely because claimant's motion for reconsideration to the ALJ was untimely and the appeals were not filed within 30 days of the date the original decision was filed by the district director.

The ALJ awarded claimant's counsel fees, and the district director filed the ALJ's decision and served it on the parties and their counsel by mail on the same date. Thirteen days later, claimant faxed a motion for reconsideration to the ALJ. The ALJ denied the motion as untimely. The ALJ stated further that if he were to address the motion for reconsideration

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at __) pertain to the cases being summarized and, where citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *__).

[2] *Zumwalt v. National Steel & Shipbuilding Co.*, BRB Nos. 17-0048/A (Apr. 26, 2017).

on the merits, he also would deny it. Claimant appealed and employer cross-appealed. The Board dismissed both appeals as untimely.

Applicability of *Bowman* and *Shah*:

First, the Board rejected claimant's contention that, because the ALJ addressed his motion for reconsideration substantively, the time for filing an appeal was tolled. The Board noted the Ninth Circuit's unpublished decision which held that, because the ALJ in that case "entertained or considered" the motion for reconsideration on the merits, the time for filing an appeal was tolled until the date the ALJ's order denying reconsideration was filed with the district director. *Shah v. Worldwide Language Resources, Inc.*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir. 2017)(unpub.)(*citing Bowman v. Lopereno*, 311 U.S. 262 (1940)). In *Shah*, the ALJ summarily denied the motion for reconsideration but did not address the employer's contention that the motion was untimely. In the present case, the Board held that the decision in *Shah* did not apply because the ALJ specifically denied reconsideration on the ground that the motion was untimely. The ALJ's statement that he would have denied the motion on the merits did not supplant his primary finding that the motion was untimely filed.

20 C.F.R. § 802.206 vs. 29 C.F.R. § 18.93:

Claimant asserted that his motion for reconsideration to the ALJ was governed by the OALJ's procedural regulations at 29 C.F.R. § 18.93, in conjunction with 29 C.F.R. §§ 18.30 and 18.32. Rule 18.93 provides that a motion for reconsideration must be filed no later than 10 days after service of the decision on the moving party. Claimant asserted that Rules 18.30 and 18.32 provide three additional days for filing a motion for reconsideration with an ALJ, rendering his motion, filed on the 13th day, timely.

The Board disagreed and held that the period for filing a motion for reconsideration with an ALJ is controlled by the Board's regulation at 20 C.F.R. § 802.206(b)(1) because it is the more specific program regulation that takes precedence over the OALJ regulation at 29 C.F.R. § 18.93, pursuant to 29 C.F.R. § 18.10. Section 802.206(b)(1) provides that a motion for reconsideration in a case arising under the Longshore Act or its extensions is timely when it is "filed not later than 10 days from the date the decision or order was filed" in the district director's office.

The Board also rejected claimant's alternative contention that, if his motion for reconsideration was governed by 20 C.F.R. § 802.206, it also was timely under the holding in *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001). In *Galle*, the Board and the court of appeals held that the 10-day period under § 802.206(b)(1) must be calculated using the method set forth in Fed. R. Civ. P. 6(a), which, at the time, excluded intermediate Saturdays, Sundays, and holidays from the computation. However, because Rule 6(a) was amended in 2009, the calculation used in *Galle* no longer applies. While this amendment was accompanied by the lengthening of the period in Fed. R. Civ. P. 59(e) (motion to alter the judgment), Rule 59(e) does not apply to proceedings under the Act in view of the specific reconsideration provisions discussed above. Accordingly, the Board held that "in determining the timeliness of a motion for reconsideration filed with the [ALJ], the 10-day period under Section 802.206(b)(1) counts calendar days, unless the last

day falls on a weekend or a holiday, in which case the period will run until the next business day. *See* 20 C.F.R. §802.221(a)." Slip op. at 10.

In this case, claimant's motion for reconsideration was filed 13 calendar days after the ALJ's decision was filed in the district director's office. Therefore, the time for filing a notice of appeal was not tolled until the ALJ acted on the motion and the appeals were not timely filed with respect to the filing of the original decision.

In dicta, the Board stated that, even if 29 C.F.R. § 18.93 were the controlling regulation, claimant's motion for reconsideration to the ALJ was untimely filed. It rejected claimant's contention that Sections 18.30 and 18.32 provide three additional days for filing a motion for reconsideration with an ALJ. The Board stated that the service by mail provision of Section 18.30(a)(2)(ii)(C), (D), as referenced in Section 18.32(c), applies to service on the parties of items filed with the OALJ. It does not refer to service by either the district director or the ALJ. In addition, the OALJ Rules were specifically modeled on and intended to conform to the Federal Rules of Civil Procedure. 29 C.F.R. § 18.32(c) is modeled on Fed. R. Civ. P. 6(d), which is not applicable to a time period running from the date of entry of a judgment.

[PROCEDURE – Motion for Reconsideration]

***Zaradnik v. The Dutra Group, Inc.*, __ BRBS __ (2018).**

The Board held that the ALJ did not abuse her discretion in deferring a ruling on an attorney's fee petition while an appeal was pending.

The ALJ issued an order deferring a ruling on claimant's counsel's fee petition in view of the pending appeal at the Ninth Circuit. Counsel appealed the order, asserting that Ninth Circuit policy requires trial courts to promptly determine attorney fee applications so as to avoid piecemeal appellate litigation.

The Board initially held that claimant's appeal of the ALJ's Order Deferring Ruling on Fee Petition was reviewable under the "collateral order doctrine." The order satisfied the three-pronged test articulated by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), as the order conclusively held the fee petition in abeyance, and this issue is collateral to the merits of the case and is effectively unreviewable after a final order issues.

Next, the Board rejected claimant's counsel's assertion that the ALJ erred in holding his fee petition in abeyance until all appeals are exhausted. An ALJ may issue a fee award while an appeal of the underlying compensation order is pending, if it furthers the goal of administrative efficiency. However, the ALJ does not abuse her discretion in declining to issue a fee award while an appeal is pending. Claimant must have "successfully prosecuted" her claim before employer can be held liable for any attorney's fee, *see* 33 U.S.C. § 928(a), (b), and both the degree of claimant's success and the amount of benefits awarded are factors in determining the amount of a fee award. These factors may not be quantifiable until all appeals are exhausted. While the Ninth Circuit has expressed a preference that piecemeal litigation over the merits and fees be avoided, there is no case precedent mandating that an ALJ issue a fee award while appeals are pending.

Moreover, even if a fee award is entered, it is not final and enforceable until all appeals in the case are exhausted. Claimant's counsel may seek to have the delay in the payment of his fee taken into consideration by the ALJ in determining the amount of the attorney's fee.

[ATTORNEY'S FEES - Procedure]

***Jarrett v. CP & O, LLC*, BRBS (2018).**

Granting employer's motion for reconsideration, the Board substituted this decision for its prior published decision that had overlooked employer's response due to a docketing error.[3] Having considered employer's contentions, the Board reached the same conclusions and reversed the ALJ's determination that the claim is barred under Section 3(c) of the LHWCA because claimant intended to injure himself.

Claimant alleged that he sustained injuries at work when the shuttle truck he was driving was involved in a collision with another shuttle truck. Employer asserted that the claim is barred under § 3(c), because claimant intended to injure himself by placing his shuttle truck in a position to be struck by another truck driven by Ms. Oliver.

Section 3(c) of the Act provides in pertinent part: "No compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. § 903(c). Section 20(d) of the Act affords a claimant the benefit of a presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. § 920(d). To rebut the § 20(d) presumption, employer must produce substantial evidence that claimant's injury was due to his willful intent to injure himself. Upon production of evidence sufficient to support a finding of intentional, self-inflicted injury, the presumption falls out of the case and the case must be decided on the record as a whole, with claimant bearing the burden of persuasion that the injury is covered under the statute.

In this case, the ALJ found that claimant was entitled to the § 20(d) presumption that he did not intend to injure himself, but that employer rebutted the presumption. The ALJ found, *inter alia*, that claimant knowingly broke the rules for operating a shuttle truck. The ALJ concluded that the evidence as a whole established that claimant willfully intended to injure himself such that Section 3(c) barred the claim.

The Board disagreed, stating:

> We reverse the [ALJ's] findings that employer rebutted the Section 20(d) presumption and that the claim is barred by Section 3(c). First, there is no direct evidence that claimant intended to injure himself. Second, the facts found by the [ALJ] may establish that claimant was negligent, but such conduct does not preclude recovery under the Act pursuant to Section 3(c). Indeed, pursuant to Section 4(b) of the Act, "Compensation shall be payable

[3] See *Jarrett v. CP & O, LLC*, 51 BRBS 41 (2017), summarized in the *Recent Significant Decisions – Monthly Digest # 286* (Dec. 2017 – Jan. 2018).

> irrespective of fault as a cause for the injury." 33 U.S.C. § 904(b). Contributory negligence is not a defense to employer's liability. In *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940), the court observed that the Act "is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, [or] illegality." *Id.*, 112 F.2d at 17. "Violations of rules implicate fault," contrary to Section 4(b) of the Act. *G.S. [Schwirse] v. Marine Terminals Corp.,* 42 BRBS 100, 101 (2008), *modified in part on recon.*, 43 BRBS 108 (2009). Thus, claimant's knowledge of the rules for operating a shuttle truck, and negligent violation thereof, do not establish an intent to injure himself.

Slip op. at 4-5 (footnote and additional citations omitted).

Moreover, the other evidence on which the ALJ relied to find "intent" could not support the inferences he drew. The ALJ's finding that intent was demonstrated by claimant's years of prior operation of shuttle trucks without collision was belied by the evidence that claimant was terminated by employer due to his having a third vehicle accident within seven months. In addition, the police report could not support a finding that claimant intended to injure himself. The police officer testified that Ms. Oliver's shuttle truck drifted forward prior to the accident, and he opined that both claimant and Ms. Oliver were at fault. The ALJ also improperly relied on the fact that claimant was an "experienced" litigant, who was aware that he could claim benefits based on the aggravation rule. The mere fact that claimant previously exercised his right to file claims is not evidence of subjective intent to injure himself. Taken in isolation or as a whole, and in light of § 4(b) of the Act, the record evidence did not support a conclusion that claimant willfully intended to injure himself.

The Board, therefore, reversed the ALJ's findings that employer rebutted the Section 20(d) presumption and that Section 3(c) bars the claim, and it remanded the case to the ALJ for consideration of remaining issues.

[COVERAGE – OTHER EXCLUSIONS – § 3(c) Willful Intention]

***Malta v. Wood Group Production Services*, __ BRBS __ (2018).**

Agreeing with the Director of the Office of Workers' Compensation Programs ("OWCP"), the Board affirmed the ALJ's determination that claimant, an offshore warehouseman who loaded and unloaded vessels at employer's fixed platform, was engaged in "maritime employment" and thus met the status requirement under Section 2(3) of the Act.

Under Section 2(3) of the Act, a covered employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. § 902(3). Generally, a claimant satisfies the status requirement as a maritime employee if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. To satisfy this requirement, claimant need only "spend

at least some of [his] time" in indisputably maritime activities. Slip op. at 4 (citations omitted).

In this case, claimant worked for employer as an offshore warehouseman at its Black Bay Central Facility, a fixed platform in Louisiana state waters. Claimant's duties included shipping, receiving, warehousing, and dispatching tools and supplies to different operators for use on various satellite platforms, and loading and unloading vessels at various times throughout the day. He was injured while unloading a pressurized cylinder from a vessel via a cargo basket. The only issue before the ALJ was whether claimant met the "status" requirement under the Act.[4] The ALJ found claimant satisfied the status requirement because he spent 25 to 35 percent of his work day loading and unloading supplies from third-party vessels that originated in Venice, Louisiana.

The Board affirmed the ALJ's finding that claimant was engaged in maritime employment, and thus entitled to coverage under Section 2(3), based on both his overall job, a portion of which involved loading and unloading vessels, and the covered employment duties he was performing at the moment of injury, *i.e.*, unloading the pressurized cylinder from a cargo basket. The Board rejected employer's contention that, in light of *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g denied,* 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), claimant's unloading and loading of equipment and tools for use in the oilfield were unrelated to maritime commerce and did not serve a maritime purpose or involve the movement of cargo. The Board found *Munguia* factually distinguishable. It concluded that:

> We affirm the [ALJ's] finding that claimant was engaged in maritime employment. Claimant is entitled to coverage based on both his overall job, a portion of which involved loading and unloading vessels, and the covered employment duties he was performing at the moment of injury. We reject employer's contention that this case is similar to *Munguia.* The [ALJ] judge properly found this case distinguishable in that claimant did not merely load his personal gear onto small transport vessels. Rather, claimant used a crane to load and unload third-party supply vessels with, among other items, pipes, valves, compressors, and repair parts.

Slip op. at 5 (citations omitted). The Board noted that in *Coastal Prod. Services Inc. v. Hudson,* 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), the Fifth Circuit affirmed the finding of coverage for a claimant who spent 9.7 percent of his work time engaged in loading oil onto transport barges and servicing equipment necessary to load the oil onto barges. That the majority of the claimant's time was spent in activities relating solely to uncovered oil and gas production did not detract from his routine, non-episodic maritime activities. Thus, the mere fact that the claimant's work is in the "oil and gas industry" is not sufficient to deny coverage.

[4] In an earlier published decision in this case, the Board had held that the Central Facility is a covered situs pursuant to Section 3(a) of the Act. *Malta v. Wood Group Prod. Services*, 49 BRBS 31 (2015).

Citing *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983), the Board also rejected employer's contention that claimant had to establish an additional "independent connection" to maritime commerce in order to be covered under the Act. Such a showing is not required because claimant was directly involved in the loading or unloading of vessels. The cases cited by employer involved employees who, unlike claimant in this case, were not directly involved in the loading or unloading of vessels. Slip op. at 6 n.4 (collecting cases). The ALJ properly concluded on the facts in this case that it is of "no consequence [to the status inquiry] that the cargo being unloaded would be used for oil production work." Slip op. at 7 (footnote and citations omitted). Consequently, the Board also rejected employer's contention that the equipment and tools being transferred by claimant could not be considered "cargo" because they were not being loaded as part of "the chain of transferring cargo from vessel to land transport," but instead were being moved from the "point of delivery to the point of consumption."

Accordingly, the Board affirmed the ALJ's award of benefits to claimant.

[Section 2(3) – STATUS (Offshore Drilling; Cargo)]

***Victorian v. International-Matex Tank Terminal*, __ BRBS __ (2018).**

Claimant injured his neck, left shoulder, and arm while working as an assistant shift foreman at employer's Gretna Facility. The ALJ awarded claimant continuing compensation for temporary total disability and medical benefits for his neck injury. He denied claimant's motion for reconsideration of the finding that his labrum tear is not related to the work accident. Both parties appealed. The OWCP Director urged rejection of employer's arguments.

Coverage:

For a claim to be covered by the Act, a claimant must establish that his injury is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act, and that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a). Thus, in order to demonstrate that coverage exists, a claimant must satisfy both the "status" and the "situs" requirements of the Act.

Situs:

Claimant's injury occurred at storage tanks within employer's Gretna terminal. A "terminal" is one of the sites specifically enumerated in Section 3(a). The ALJ noted that the Act and case law do not define the term "terminal," and he thus gave weight to the Occupational Safety and Health Administration's definition of a "marine terminal" at 29 C.F.R. § 1917.2, and Webster's Dictionary definition of terminal and terminus. The ALJ found that the Gretna facility is within these definitions. The Board agreed, stating:

> We affirm the ALJ's conclusion that employer's Gretna Facility is a maritime situs under Section 3(a). In this case, the definition of "terminal" used by the ALJ describes both the physical attributes of the area and the maritime purpose

> of the docks, pipelines and storage tanks at employer's Gretna facility, which is to move waterborne shipments from vessel to shore and product from shore to vessel. Substantial evidence of record supports the finding that the Gretna facility ships and receives the overwhelming majority of its liquid bulk product from vessels at a dock on its property, and has 60 storage tanks for the liquid bulk product that is unloaded directly from ship to tanks and stored there.

Slip op. at 5 (citation omitted).

The Board rejected employer's contention that its Gretna facility is not a covered situs because "manufacturing" and treatment processes also takes place there. Where a site has functionally and/or geographically distinct loading/unloading and manufacturing areas, the latter are not covered under the Act. In this case, the ALJ found that employer's facility does not contain separate manufacturing facilities. He found that no specific storage tanks or area of the facility is dedicated solely to blending and sparging liquid bulk product. Moreover, approximately 70 percent of the product stored at the terminal does not get blended or sparged in the storage tanks, but is shipped onto vessels from the tanks in the form in which it was received.

The Board concluded that:

> Based on the evidence that employer's entire Gretna facility adjoins navigable waters, that approximately 70 percent of the product is not blended or sparged, and that the lower percentage of product subject to these processes is not conducted at any fixed, dedicated location within the Gretna facility, we affirm the ALJ's conclusion that claimant was injured at a "terminal" pursuant to Section 3(a), as the loading and unloading of vessels constitutes a substantial part of the employer's business activity at its Gretna facility.

Slip op. at 6 (footnote and citation omitted). The Board did not address the ALJ's alternate finding that claimant was injured at an "other adjoining area" under Section 3(a).

Status:

The Board also affirmed the ALJ's finding that claimant was engaged in maritime employment pursuant to Section 2(3). Employer challenged this finding on the grounds that claimant job duties at the time of his injury were related to sparging, and further argued that his overall duties were not integral to the loading/unloading. The Board concluded that:

> The ALJ permissibly gave significant weight to evidence that claimant regularly participated in the loading and unloading process by directing and monitoring the flow of liquid bulk product to and from vessels and the tank yard. Thus, claimant's job duties were integral to the loading and unloading process. Moreover, contrary to employer's reliance on the fact that claimant's injury occurred during a tank-to-tank sparging transfer, the ALJ properly focused on claimant's employment as a whole. His conclusion that at least some of claimant's regular job duties were integral to the loading and unloading of vessels is amply supported by substantial evidence of record.

Slip op. at 8 (citations omitted).

Maximum Medical Improvement:

The Board affirmed the ALJ's finding that claimant's neck condition was not at maximum medical improvement ("MMI"). In the absence of any evidence that claimant scheduled or cancelled the recommended cervical spine surgery, the ALJ acted within his discretion in relying on evidence that claimant intended to have surgery and the doctor's opinion that claimant's neck would not be at MMI until a year after surgery.

Due Diligence:

The Board affirmed the ALJ's finding that claimant established due diligence in seeking alternate work based on credited evidence, including claimant's testimony and a job application log. Where, as here, it is uncontested that claimant cannot return to his usual work because of his work injury, and the ALJ finds that employer established the availability of suitable alternate employment, claimant is considered totally disabled if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. In this case, the ALJ permissibly found that claimant diligently sought suitable work and that he and his wife credibly testified that he applied for all of the positions in employer's labor market surveys, that they were unable to document all of the positions he applied for through an employer's website, and that claimant also applied for positions in-person.

Left Shoulder Injury:

The ALJ found claimant entitled to the Section 20(a) presumption that his labrum tear is related to the work injury based on claimant's description of immediate pain in his neck and upper extremity and the diagnosis of a shoulder strain made the following day. The Board concluded that the ALJ did not err in finding that employer rebutted the § 20(a) presumption. The employer's burden on rebuttal is one of production, not persuasion. Thus, the Fifth Circuit has held that, to rebut the § 20(a) presumption, employer need only offer substantial evidence that throws factual doubt on claimant's *prima facie* case. Here, the ALJ properly found that the opinion of claimant's treating physician, Dr. Lundgren, that claimant's shoulder pain was a "new issue" and his treatment notes documenting negative impingement signs and full range of motion were sufficient to rebut the § 20(a) presumption.

The Board further affirmed the ALJ's conclusion that claimant failed to establish by a preponderance of the evidence that his labrum tear is related to the work accident. The ALJ rationally gave determinative weight to Dr. Lundgren's opinion that it was "not more probable" that claimant's work accident caused the labrum tear. Moreover, there was no medical opinion of record affirmatively linking claimant's labrum tear to the work accident.

[Section 2(3) – STATUS (Loading and Manufacturing; Amount of Time in Maritime Employment); Section 3(a) – SITUS (Enumerated Sites; Mixed-Use Facilities); NATURE OF DISABILITY: Permanent v. Temporary Disability; EXTENT OF

DISABILITY: Diligence in Seeking Work; Section 20(a) PRESUMPTION OF CAUSATION (Cases Where the Presumption Was Rebutted; Evaluating the Evidence]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

The Fourth Circuit and Sixth Circuit each issued an unpublished black lung decision in June. In *Trump v. Eastern Assoc. Coal Corp.*, No. 17-1273, 2018 WL 3006102 (4th Cir. June 15, 2018), the Fourth Circuit granted the miner's widow's petition for review. Below, the Benefits Review Board most recently had affirmed the administrative law judge's decision to discredit the claimant's medical expert's opinion on the cause of the miner's death. On appeal, the Fourth Circuit agreed with the claimant that substantial evidence did not support the administrative law judge's decision to reject this expert's death causation opinion as unduly general and speculative. As the Board had refrained from considering the administrative law judge's other reasons for discrediting the expert's opinion, the Fourth Circuit remanded the case to the Board to further consider these reasons.

In *Island Creek Coal Co. v. Hill*, No. 17-3858, 2018 WL 3202954 (6th Cir. June 29, 2018), the Sixth Circuit considered the employer's appeal related to a miner's request to modify a denial of benefits in his black lung claim. Notably, the parties had agreed that the 15-year rebuttable presumption did not apply to this modification request. Below, the Board most recently had affirmed the administrative law judge's award of benefits on modification. On appeal, the Sixth Circuit rejected the employer's argument that the administrative law judge erred in finding that the miner had established the presence of legal pneumoconiosis. In so doing, the court concluded that the administrative law judge did not err in relying on the preamble to the 2001 regulatory amendments when weighing the employer's experts' opinions.

The Third, Sixth, and Eleventh Circuits issued unpublished black lung decisions in July. In *Island Creek Coal Co. v. Hunt*, No. 17-3994, 2018 WL 2018 WL 3359204 (6th Cir. July 10, 2018), the Sixth Circuit concluded that substantial evidence supported the administrative law judge's finding that the miner was entitled to benefits pursuant to the 15-year rebuttable presumption. *See* 30 U.S.C. § 921(c)(4).

The Third Circuit denied the employer's petition for review in *Consolidation Coal Co. v. Director, OWCP* [*Funka*], No. 17-2067, 2018 WL 3409144 (3rd Cir. July 12, 2018). In *Funka*, the Third Circuit considered and rejected the employer's contention that the administrative law judge had abused her discretion when she directed, on remand, that certain evidence be excluded so as to comply with the evidentiary limitations. It also rejected the employer's argument that the administrative law judge erred in weighing the medical opinion evidence.

In *Drummond Co., Inc. v. Cox*, No. 17-15511, 2018 WL 3575355 (11th Cir. July 25, 2018), the Eleventh Circuit denied the employer's petition for review of an award of benefits in a miner's claim. In denying the petition for review, the Eleventh Circuit found no basis for the employer's argument that the miner's claim was untimely filed because it was filed more than three years after the miner received a medical determination that he was totally disabled due to black lung. *See* 20 C.F.R. §725.308(a). The court highlighted evidence indicating that the claimant had in fact timely filed his claim for benefits.

B. Benefits Review Board

In an unpublished decision, *Metcalfe v. Harlan KY VA Coal, Inc.*, BRB No. 17-0291 BLA (June 29, 2018) (unpub.), the Board addressed the employer's challenge to its designation as the responsible operator. The basis for the employer's argument was that Jericol Mining, Inc. ("Jericol"), had employed the miner for at least a year after he had worked for the employer.[5]

Below, the administrative law judge found that the miner worked for Jericol for 1.10 years, but further determined that the employer did not establish that Jericol was financially capable of paying benefits.[6] Therefore, the administrative law judge concluded that the employer was the properly named responsible operator.

In addressing the employer's appeal, the Board noted that, according to 20 C.F.R. §725.495(d), in any case referred to the Office of Administrative Law Judges in which the designated responsible operator "is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation." Moreover, if the reasons given "include the most recent employer's failure to meet the conditions of §725.494(e), the record shall also contain a statement that the Office has searched the files it maintains . . . and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of §725.494(e)(1) or (e)(2)." *Id.* The regulation further states, "In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming liability for a claim." *Id*.

The Board agreed with the employer that the Director, Office of Workers' Compensation Programs ("OWCP"), had failed to meet its duty to investigate Jericol's ability to assume liability for the payment of benefits. The Director conceded that the record contained no statement as to Jericol's insurance coverage and that Jericol's ability to pay benefits is presumed. In light of the Director's concession that OWCP did not meet its obligations under Section 725.495(d), the Board vacated "the administrative law judge's finding that employer is the responsible operator because it did not produce evidence showing that Jericol was financially capable of assuming liability for benefits." Slip op. at 5.

The Board also rejected the Director's contention that reversal of the administrative law judge's determination was not warranted because he had erred in finding a full year of coal mine employment with Jericol. Instead, the Board concluded that the administrative law

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[5] Of note, the responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A "potentially responsible operator" is determined in accordance with 20 C.F.R. §725.494(a)-(e); of importance for purposes of the instant case, one of the necessary conditions for being a "potentially responsible operator" is that the operator must be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(e).

[6] One way for an employer to be relieved from liability in a black lung claim is to establish that another operator more recently employed the miner *and* that that operator is financially capable of assuming liability for the payment of benefits. *See* 20 C.F.R. §725.495(c)(2).

judge had allowably found that income-based evidence established one year of employment with that company.

In light of the above, the Board "reverse[d] the administrative law judge's finding that [the] employer is the responsible operator and direct[ed] payment of benefits by the Black Lung Disability Trust Fund." *Id.* at 6.

[Requirements for responsible operator designation: Ability to pay]

In an unpublished decision, *Lake v. Black Mountain Coal Mining*, BRB No. 17-0492 BLA (July 23, 2018) (unpub.), the Benefits Review Board addressed the employer's appeal of an administrative law judge's award of benefits in a miner's subsequent claim.

On appeal, the employer alleged that the administrative law judge erred in admitting medical reports from Dr. Ajjarapu as supplemental reports to Dr. Habre's original medical report. Below, the claimant had selected Dr. Habre to conduct the U.S. Department of Labor-sponsored complete pulmonary evaluation. *See* 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. Dr. Habre submitted an original report and a supplemental report based on this evaluation. However, Dr. Habre was unavailable to review later-developed evidence that was contrary to his conclusions; therefore, the district director requested that Dr. Ajjarapu examine the claimant without conducting any new objective testing. Based on this examination and her review of Dr. Habre's reports and other evidence, she prepared two additional reports.

Before the administrative law judge, the Director, Office of Workers' Compensation Programs, sought to admit (1) Dr. Habre's original report as the original report from the Department-sponsored complete pulmonary evaluation, and (2) Dr. Ajjarapu's reports as supplemental reports to this original report. Employer objected, arguing that admission of Dr. Ajjarapu's reports was improper because she did not perform the Department-sponsored evaluation. The administrative law judge admitted Dr. Ajjarapu's reports, concluding that were properly admissible as supplemental reports.

On appeal, the Board agreed "that Dr. Ajjarapu's reports are not supplemental reports . . . ." Slip op. at 4. Of note, the black lung regulations state that "[s]upplemental reports *prepared by the same physician* must be considered part of the physician's original report." 20 C.F.R. §725.414(a)(1) (emphasis added). As Dr. Habre prepared the original report, Dr. Ajjarapu's later reports were not rightly categorized as supplemental reports. Accordingly, the Board remanded the matter to the administrative law judge for further consideration.

Addressing the merits of the case, the Board concluded that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis, as he failed to address all relevant evidence on the issue of the claimant's smoking history. The Board therefore also vacated the administrative law judge's finding that the evidence established that the claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment.

[Medical reports under 20 C.F.R. § 725.414]