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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 212 July 2009

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

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

Ladd v. Research Triangle Inst., 2009 WL 1919007 (4th Cir. 2009)(Unpublished).

The Fourth Circuit held that Ladd was a statutory employee of RTI under the borrowed servant doctrine while working in support of RTI's contract in Iraq and therefore his suit for damages was barred under the Defense Base Act. RTI contracted with USAID to rebuild municipal water and sewage facilities in Iraq and obtained Ladd's services by contract with his direct employer, Chemonics. Ladd was injured in Iraq while working on a project directed by RTI.

In *White v. Bethlehem Steel Corp.,* 222 F.3d 146, 149 (4th Cir. 2000), the Fourth Circuit held that the borrowed servant doctrine applies under the LHWCA to provide immunity from suit both to an employee's general or contract employer and to other "employers who 'borrow' a servant from" that employer. A person can be in the general employ of one company while at the same time being in the particular employ of another "with all the legal consequences of the new relation." *See Standard Oil Co. v. Anderson,* 212 U.S. 215, 220 [(1909)]. In order to determine whether an employee is a borrowed servant, courts "must inquire whose is the work being performed ... by ascertaining who has the power to control and direct the servants in

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

the performance of their work." *Id.* at 221-22. The Supreme Court noted, however, the importance of "distinguishing between authoritative direction and control, and mere suggestion as to details or the necessary cooperation." *Id.* at 222. The authority of the borrowing employer does not have to extend to every incident of an employer-employee relationship; rather, it need only encompass the servant's performance of the particular work in which he is engaged at the time of the accident. If that is the case, the only remedy of the employee is through the LHWCA. In order to determine direction and control, a court may look at factors such as the supervision of the employee, the ability to unilaterally reject the services of an employee, the payment of wages and benefits either directly or by pass-through, or the duration of employment.

Here, the evidence established that RTI exercised the requisite "authoritative direction and control" over Ladd. In particular, Ladd's contract with Chemonics expressly stated that while in Iraq, he would report to an RTI manager who would be responsible for monitoring his performance, and that his salary was subject to approval by RTI. Also, Ladd stated at deposition that RTI had control over him in Iraq and had the power to fire or reassign him.

[Topic 4.1.1 Borrowed Employee Doctrine]

B. Benefits Review Board

***R.H. v. Todd Pacific Shipyards, Inc.*, __ BRBS __, BRB No. 09-0177 (July 23, 2009).**

The Board held that the district director did not abuse her discretion in approving a rehabilitation plan, as Employer failed to demonstrate that she did not comply with the regulatory criteria. 33 U.S.C. §939(c)(2); *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRES 13(CRT)(9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *see also Cooper v. Todd Pacific Shipyards Corp*., 22 BRBS 37 (1989); 20 C.F.R. §702.501-702.508. The regulatory factors relevant to a determination of the propriety of a vocational rehabilitation plan are few: the employee must be permanently disabled (§702.501); the goal is to return the employee to remunerative employment within a "short" period of time, and it must restore or increase the employee's wage-earning capacity (§702.506); and medical data and other pertinent information must accompany the OWCP's referral of the case to a rehabilitation counselor (§702.502). Neither the Act nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan. *Meinert*, *supra*.

Here, Ms. Clawson, a vocational rehabilitation specialist, developed a plan aimed at retraining Claimant to become a Mechanical Drafter, which involved Claimant's enrollment in a one-year program at a technical college. Ms. Clawson adequately documented the wages Claimant would earn upon completion of the program; as Claimant had no earnings at the time the plan was implemented, the plan would return Claimant to remunerative employment. She also demonstrated how Claimant's vocational background and aptitude testing fit well with the new skills he would obtain. Moreover, she explained that the physical requirements of the plan did not exceed Claimant's most recent restrictions. Although Claimant had undergone a knee surgery after the draft plan was prepared, Employer failed to show that the plan was based on outdated physical limitations, as Ms. Clawson ascertained his post-surgery residual restrictions. Notably, since the program was scheduled to last only one year, contrary to Employer's contention, the goal of obtaining a vocational objective in a short period of time was satisfied.

The Board further held that the identification of alternate jobs by employer does not preclude claimant from participating in a retraining program, make his retraining program unnecessary, or make him ineligible for such a program. *Meinert*, 37 BRBS at 166. The objective of vocational rehabilitation is to "return permanently disabled persons to gainful employment...through a program of reevaluation or redirection of their abilities, or retraining in another occupation, *or* selective job placement assistance." 20 C.F.R. §702.501 (emphasis added).

Lastly, the Board rejected Employer's contention that it was deprived of due process because it was afforded only 14 days to respond to the proposed plan and because Claimant began his course of study before the plan was approved. The Ninth Circuit, in whose jurisdiction this case arose, has held that a rehabilitation plan does not, in itself, deprive an employer of its property. *Castro*, 401 F.3d at 978, 39 BRBS at 24(CRT). Violation of Employer's due process rights was not established, as Employer was afforded an opportunity to comment on the plan prior to its approval by the district director, the district director insured that the plan was based on updated restrictions, and employer had not established a harm to a protected property right.

[Topic 39.3 Secretary's Authority to Direct Vocational Rehabilitation]

***G.S. v. Marine Terminals Corp.*, __ BRBS __, BRB No. 08-0611 (July 31, 2009).**

On reconsideration, the Board modified in part its earlier decision in this case, *G.S. v. Marine Terminals Corp.*, 42 BRBS 100 (2008). The Board accepted Claimant's contention that it had erred in stating that, after the Section 20(c) presumption is rebutted, claimant bears the burden of persuading the ALJ that intoxication was not the sole cause of his injury, 33 U.S.C. §903(c), 920(c); rather, employer bears the burden of persuasion on this issue as it is an affirmative defense.

Accordingly, the Board modified its earlier decision, deleting the contrary language, *see G.S.*, 42 BRBS at 103. In addition, the last two substantive paragraphs of the opinion were deleted, 42 BRBS at 103-104, and the following discussion was substituted. As the ALJ did not properly address the record as a whole, and summarily stated that intoxication was not the sole cause of Claimant's injury, the ALJ's conclusion was vacated and the case remand. In particular, the ALJ did not weigh the relevant evidence or assess the merits of the physicians' opinions based on their credentials or the reasoning they provided. In addition, the ALJ did not weigh the testimony of Mr. Yockey. Moreover, the ALJ inappropriately speculated that the fall may have been due to Claimant's being distracted, careless, or in a hurry to relieve himself, without considering that such factors may have been directly related to his alcohol consumption. The ALJ may not infer without a basis in the record that some other factor caused Claimant to fall. On remand, the ALJ must discuss and weigh the relevant evidence, including the degree of Claimant's intoxication, and explain the basis for her decision to credit particular evidence.

The Board rejected Claimant's contention that the Board erred in focusing on intoxication as the sole cause of Claimant's fall over the railing, rather than as the sole cause of his injury. If intoxication was the sole cause of claimant's fall, then intoxication also was the sole cause of his injury. *Shearer v. Niagara Falls Power Co.*, 150 N.E. 604 (N.Y. 1926).

[Topic 3.2.1 Solely Due to Intoxication; Topic 20.8 Presumption That Employee Was Not Intoxicated]

***J.T. v. Global Int'l Offshore, Ltd.*, __ BRBS __, BRB Nos. 08-0119 and 08-0119A (July 29, 2009).**

Claimant worked for Global in 1995-1996. In 1996-1997, he worked for Keller; and the ALJ's finding that Claimant was a covered employee during that time was not appealed. In 1998, Claimant worked for Global as a barge foreman on the *Iroquois* in Louisiana and off the coast of Mexico. Thereafter, and until his heart attack in 2002 caused him to stop working, he worked overseas for Global in ports of Malaysia, Singapore, and Indonesia.

Claimant filed a claim for benefits for his hearing loss, upper extremity trauma, and heart condition against Global; the ALJ then joined Keller. It was undisputed that Claimant suffered from an upper extremities impairment and hearing loss. The ALJ determined that Keller was the responsible employer; this and other findings were challenged on appeal.

Estoppel: The Board rejected Claimant's contention that Global was the responsible employer as it was estopped from denying coverage under the Act (based on the crew-member and extrateritoriality defenses) by virtue of his employment contract. The Board held that the doctrine of promissory estoppel was not applicable as there was a contract between the parties. Moreover, the contract was not a guarantee of coverage under the Act; rather, it was a guarantee that if workers' compensation was implicated, then compensation would be paid pursuant to laws of Claimant's home country, which could include workers' compensation under state law. Coverage under the Act is provided only for those employees who satisfy the Act's coverage requirements. As promissory estoppel was not applicable and as the ALJ rationally found that equitable estoppel was not applicable due to a lack of detrimental reliance, the ALJ correctly permitted Global to defend against coverage.

Coverage: Keller contended that, contrary to the ALJ's findings, Claimant was a covered employee during part of his employment with Global in 1998-2002 and that, therefore, Global was the responsible employer. First, Keller asserted that Claimant was not a member of a crew when he worked on the *Iroquois* in Louisiana in 1998 because, for a portion of that employment, his duties were land-based and he was only an "expectant seaman." Contrary to Keller's contention that the ALJ must consider Claimant's work in phases, the Supreme Court emphasized in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 370 (1995), that the fact-finder must consider the "total circumstances" of employment, and it stressed in *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 353-54, 26 BRBS 75, 82-83(CRT)(1991), that the key is the connection to the vessel not the job. *See Lacy v. Southern*

California Ship Servs., 38 BRBS 12, 15 (2004). Because a vessel remains a "vessel" whether it is moving, moored, or at the dock undergoing repairs, a claimant's status does not change with the movement or non-movement of the vessel. Rather, when a maritime worker's basic assignment changes, his member of a crew status may change as well. As the ALJ found that Claimant was hired for service on and to the *Iroquois* and that all of his duties contributed to the function or mission of that vessel, she rationally concluded that the period of employment while the barge was docked should not be isolated from the remainder of the assignment at sea.[2] Claimant can be a member of a crew even though a portion of his duties are tasks stereotypical of longshoremen.

Second, Keller argued that Claimant worked on a covered situs when he worked as a land-based employee for Global in ports of Asia in 1998-2002 because waters in foreign ports are covered sites pursuant to *Weber v. S.C Loveland Co. [Weber I]*, 28 BRBS 321 (1994), *decision after remand [Weber II]*, 35 BRBS 75 (2001), *on recon*., 35 BRBS 190 (2002). The Board had previously acknowledged the trend in admiralty law to extend coverage into foreign waters to provide uniform coverage for American workers, especially when all contacts, except for the site of injury, are with the U.S. *Weber I*, 28 BRBS at 329; *see also Grennan v. Crowley Marine Servs., Inc.*, 128 Wash. App. 517, 116 P.3d 1024 (Wash. Ct. App. 2005). The Board held, however, that while Claimant had ties to the United States,[3] the ALJ rationally distinguished *Weber* and relied on Claimant's prolonged foreign assignment (1998-2002) to conclude that all of his contacts were with foreign countries, as his assignments never required him to enter the U.S. Consequently, Keller was the last responsible employer based on Claimant's 1997 employment

Average Weekly Wage ("AWW"): Claimant contended that the ALJ erred in calculating his AWW by averaging his earnings from 2000 and 2001 instead of using or including his higher earnings closer to the time his disability became manifest in 2002. Claimant asserted that he worked a full year prior to his 2002 heart attack and his 2000 earnings were diminished by the market situation and by his being out of work after his 1999 heart attack until May 2000. The Ninth Circuit, in whose jurisdiction this case arose, has held that AWW for latent traumatic injuries should be calculated

[2] The Board distinguished *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), and *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996).

[3] Claimant was a U.S. citizen who was working for a subsidiary of a U.S. company, and his initial contact with that company was in the U.S. Additionally, his employment contract provided that the workers' compensation law of his "country of origin" would apply.

as of the date disability commences. Here, the Board held that in determining the AWW under Section 10(c), it was not logical for the ALJ to reject the use of Claimant's more recent earnings because he worked a full year (based on her finding that he did not normally work 52 consecutive weeks) and to accept his earlier earnings because that was the last period he was physically able to work for a full year. In recalculating AWW on remand, the ALJ should use either Claimant's earnings during the 52-week period preceding the onset of his disability, or, alternatively, use all of his earnings between 2000 and 2002 in order to give effect to her finding that Claimant did not normally work 52 consecutive weeks. *See, e.g., Hall v. Consolidated Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998) (very rare that circumstances would permit earnings at time of injury to be wholly excluded from consideration); *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981) (if a range of years is used to calculate AWW, all wages during that period must be taken into account).

Maximum Compensation Rate: The Board reiterated its holding in *Reposky* that, pursuant to Section 6(b)(l), (c), a claimant is limited to the maximum compensation rate in effect at the time his disability commences, which is generally, but not necessarily, when the injury occurs, and not at the time the award is issued. *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65, 75 (2006), appeal dismissed, No 06-75690 (9th Cir. June 1, 2007); *see also Estate of C.H. v. Chevron USA, Inc.*, __ BRBS __, BRB No. 08-531 (Mar. 13, 2009); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Puccetti v. Ceres Gulf*, 24 BRBS 25(1990). As the Ninth Circuit has not addressed this issue, *Reposky* is controlling.[4] Under *Bath Iron Works Corp. v. Dir., OWCP*, 506 U.S. 153, 26 BRBS 151(CRT)(1993), hearing loss results in immediate injury and disability, and disability is complete as of the date of the last exposure to injurious noise. Thus, the maximum compensation rate for a hearing loss claim is determined as of the date of the last covered exposure to injurious noise. The ALJ properly applied *Bath Iron Works* and *Reposky* to determine that Claimant's hearing loss benefits are subject to the maximum compensation rate in effect at the time his hearing loss disability commenced, i.e., when he was last exposed to work-related injurious noise in 1997.

Disability/Hearing Loss: The ALJ erred in awarding compensation for Claimant's 39.4 percent monaural hearing loss as if it were a binaural impairment of 6.6 percent. The Board held that compensated for a work-related monaural impairment should be awarded pursuant to Section 8(l3)(A) of the Act. Although the Ninth Circuit has not addressed this issue,

[4] The Ninth Circuit has not addressed this issue but has two appeals pending. Price v. Stevedoring Services of America, No. 08-71719 (2008 WL 4133467); Roberts v. Sea-Land Services, No. 08-70268.

this is a well-settled matter. The Second, Fourth and Fifth Circuits have all reversed Board decisions to the contrary. Also, the Board effectively ended the monaural-binaural debate in *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994) (decision on recon. *en banc*), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding Inc. v. Dir., OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

Disability/Heart Condition: The ALJ determined that Claimant's 2002 heart attack was excluded from coverage because he was a member of a crew while working for Global. On appeal, Claimant contended he should have been permitted to present evidence showing that his covered employment with Keller contributed to his heart condition and his 2002 heart attack. There was nothing in the record to establish that Claimant had raised this theory before the ALJ and, thus, he could not raise it for the first time on appeal. Moreover, the ALJ rationally credited a medical opinion that the heart conditions were not work-related.

Suitable Alternate Employment: Restrictions from pre-existing conditions are to be considered in addressing a claimant's ability to work in alternate employment. However, disability related to a subsequent non-covered injury is not compensable. Thus, if a condition is the result of an intervening cause and is severable from the work-related condition, any disability related to that intervening cause is not compensable. Accordingly, the ALJ did not err in excluding physical restrictions not related to the upper extremity condition from her consideration (e.g., sedentary work restriction due to the heart attack). The ALJ did not err in rejecting Claimant's assertions that he would not be able to perform the security guard duties because of his poor spelling and writing skills, his lack of a high school diploma, or his hearing loss (correctable with a hearing aid). Finally, the ALJ did not err in concluding that Claimant was not diligent in seeking work. Claimant visited a number of employers identified in the labor market surveys, filled out applications, and participated in interviews. Nevertheless, the ALJ properly found that he was not actually seeking employment or willing to work, as he did nothing to improve his chances of getting a job, disqualified himself from consideration without proper basis, conducted no independent search, did not create a résumé, and conceded he probably would have turned down any offer because of his many doctors' appointments or because the pay was low.

[Topic 1.4.2 Master/member of the Crew (seaman); Topic 2.9 Section 2(9) United States; Topic 1.5.2 Navigable waters; Topic 10.4.4 Calculation of Annual Earning Capacity Under Section 10(c); Topic 6.2.1 Maximum Compensation for Disability and Death Benefits; Topic 8.13.7 Hearing Loss/Monaural Versus Binaural; Topic

21.2.2 New Issue Raised on Appeal; Topic 2.2.8 Intervening Event/Cause Vis-à-vis Natural Progression; Topic 8.2.4 Partial Disability/Suitable Alternate Employment]

***R.M. v. P & O Ports Baltimore, Inc.*, __ BRBS __, BRB No, 09-0113 (July 29, 2009).**

In a case of first impression, the Board set out a standard for determining the existence of an employer-employee relationship at the time of an injury, and held that no such relationship existed where Claimant was assigned by the union hall to work for Employer, but was not hired to work after he reported late and was replaced. Claimant proceeded to unload cargo despite being told by a superintendent, Captain Bond, that he could not work and was allegedly injured during a resulting altercation with the superintendent. The Board stated that an employer-employee relationship must be established before addressing the question of status under Section 2(3) based on the maritime nature of the work.

The Board observed that it has not previously addressed the issue of whether a claimant was in fact "employed" on the day of an injury, and, accordingly, relied on persuasive authority found in decisions from other jurisdictions. Citing state and federal case law, as well as secondary sources,[5] the Board set forth the following standard: In order for an employer-employee relationship to exist, there must be an express or implied contract of employment with the informed consent of both parties. The type of relationship and its duration depends on the facts of each case, and the belief of the parties is immaterial. When the relationship ceases, either permanently or temporarily, the liability of the employer under a compensation act also ceases. However the relationship ends, the worker must be given a reasonable time to leave the premises.

If an injury occurs before a worker has been hired, the basic rule is that there is no coverage. When a worker is hired through a union hall, an issue exists as to when he becomes an employee. Generally, hiring is not official until the worker is accepted by the employer at the job site; thus, any injuries that occur prior to this time are not the employer's responsibility. *Miller v. PH. Browning Steamship Co.*, 73 F.Supp. 185 (W.D.N.Y.), *aff'd*, 165 F.2d 209 (2d Cir. 1947) (claimant, injured walking along the deck of the ship before he was hired, was not covered under the Jones Act). *Miller* is discussed in Larson's treatise on workers' compensation

[5] Corpus Juris Secundum, Workers' Compensation, 99 C.J.S. § 1 *et seq.* (2000); 2 Larson's Workers' Compensation Law (2007).

as demonstrating the requirement of a binding agreement in existence between a claimant and employer at the time of injury in order for claimant to obtain compensation.[6]

Here, Claimant has failed to demonstrate error in the ALJ's finding that he had not been hired before he was injured. *Miller*, 73 F.Supp. 185. The ALJ credited the testimony of Mr. Bell and Captain Bond to find that Captain Bond had the ultimate control over whether Claimant was hired to work that day, and she rationally found that he was not hired to work after he reported late and was replaced. As there was no employer-employee relationship,[7] Claimant's injuries were not compensable.[8]

[Topic 75 Requisite Employer-Employee Relationship; Topic 75.1 Determining Employer-Employee Relationship; Topic 2.3 Employee; Topic 2.4 Employer]

[6] The Board noted, citing relevant precedent, that because the issue of the existence of an employment relationship is fact-intensive, the evidence may be sufficient to establish that the trip or activity resulting in injury prior to the hiring is sufficiently related to the employment such that the injury would be covered.

[7] This holding obviated the need to address Claimant's contention that the ALJ erred in finding that the injury did not occur in the course of his employment.

[8] The Board distinguished *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978), noting that, in that case, the claimant who stayed after his shift to talk with his supervisor when another employee attacked him was in an employment relationship and had not taken any actions which removed him from his employment.

II. Black Lung Benefits Act

U.S. Circuit Courts of Appeals

In *RAG American Coal Co. v. Director, OWCP [Buchanan]*, ___ F.3d ___, Case No. 08-1653 (7th Cir. Aug. 5, 2009), the administrative law judge awarded benefits in the miner's second claim under 20 C.F.R. § 725.309 based on a finding of total disability due to legal coal workers' pneumoconiosis, *i.e.* obstructive lung disease, emphysema, and chronic bronchitis stemming, in part, from the miner's coal dust exposure. Employer challenged the award of benefits on grounds that (1) the miner's second claim was barred by *res judicata*, (2) the miner did not demonstrate a "material change in conditions" since the denial of his prior claim, and (3) the administrative law judge's "refusal to apply ordinary principles of finality denied (Employer) due process of law."

The circuit court disagreed. It applied the pre-amendment regulations at 20 C.F.R. § 725.309 because the miner's second claim was filed in August 1998. Citing to *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1007 (7th Cir. 1997) (en banc), the court reiterated that a miner may "avoid the *res judicata* effect of the denial of his earlier claim if he establishes 'that there has been a material change in conditions.'" The court noted that the administrative law judge "found that (Claimant's) pulmonary disease had progressively and substantially worsened since the denial of his first claim, such that he established total disability due to pneumoconiosis." From this, it concluded that the miner demonstrated a material change since the prior denial warranting relief from *res judicata*.

Employer noted that the miner's first claim was denied on grounds that his emphysema and bronchitis were due solely to a 36 pack year cigarette smoking history and not due to the miner's 20 year coal mine employment history. From this Employer argued that Claimant should not be allowed to relitigate the cause of these conditions in his second claim. The court was not persuaded and concluded that this argument "leads right into RAG's sideswipe at the conclusion (both the DOL's and ours) that pneumoconiosis is progressive and latent."

The court affirmed the administrative law judge's conclusion that the opinions of Drs. Fino and Tuteur were entitled to less weight in the second claim because their views were premised on medical literature that was inconsistent with the views of the Department in the preamble to the amended regulations. Specifically, the court rejected a 1985 Surgeon General's report offered by Employer that simple pneumoconiosis "does not

progress in the absence of further exposure." It found, on the other hand, that the Department of Labor "cites numerous authorities created *after* 1985" supporting latency and progressivity and cited to 65 Fed. Reg. 79920 and 79971. The court likewise concluded that a 2004 report by the Surgeon General on the health consequences of smoking was not persuasive as it did not address latency or progressivity of pneumoconiosis. The court concluded that the "fact that pneumoconiosis may be progressive and latent justifies allowing a subsequent claim even without additional coal dust exposure since the denial of the earlier claim."

Similarly, the court affirmed the administrative law judge's disagreement with the premises of Drs. Fino, Tuteur, and Renn. The court noted that these physicians:

> . . . relied on medical studies and literature which indicated that pneumoconiosis seldom arose in an obstructive disease and that in miners who were long-term smokers, any obstructive disease resulted from only tobacco smoke, not coal dust exposure. The ALJ found that this view had been rejected by this court as contrary to the prevailing view of the medical community and substantial weight of the medical and scientific literature . . ..

As a result, the court affirmed the award of benefits in the miner's second claim based on the administrative law judge's finding that his respiratory condition had significantly worsened since denial of the first claim and he was now totally disabled due to coal workers' pneumoconiosis.

[**subsequent claim under 20 C.F.R. § 725.309; use of medical literature in weighing medical opinions**]

In *Greene v. King James Coal Mining, Inc.*, ___ F.3d ___, Case No. 08-4094 (6th Cir. July 30, 2009), the administrative law judge's denial of benefits was affirmed and the court concluded that the Department of Labor-sponsored examination conducted pursuant to 20 C.F.R. § 725.406 was sufficiently reasoned and documented to meet the Department's obligations. At issue was the administrative law judge's rejection of Dr. Baker's diagnosis of coal workers' pneumoconiosis on grounds that it was "lacking adequate support." Notably, the physician's opinion was compromised, in part, by reliance on erroneous smoking and coal mine employment histories. Moreover, the opinion was based on a positive x-ray interpretation underlying the report, whereas the administrative law judge concluded that the x-ray evidence on the record as a whole did not support a finding of the disease. Consequently, it was determined that Dr. Baker did not adequately

explain how he reached his medical conclusions in light of the miner's symptomatology and testing.

The Director, OWCP and Claimant argued that, "if Dr. Baker's opinion was so poorly reasoned and documented as to justify the ALJ's refusal to rely upon it, then the case must be remanded so the DOL can provide (Claimant) with a proper evaluation." The court disagreed and stated:

> In the end, DOL's duty to supply a 'complete pulmonary evaluation' does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of 'complete[ness]' is not whether the evaluation presents a winning case. The DOL meets its statutory obligation . . . when it pays for an examining physician who (1) performs all of the medical tests required by 20 C.F.R. §§ 718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion under 20 C.F.R. § 718.202(a)(4) that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

Slip op. at 19.

The administrative law judge also discredited the diagnosis of coal workers' pneumoconiosis by Dr. Brown, who was Claimant's treating physician. Here, Claimant maintained that Dr. Brown's opinion was entitled to greater weight by virtue of his status as a treating physician. The court rejected this argument and stated, "A medical opinion is not entitled to any additional weight simply because it was rendered by the claimant's treating physician"; rather, "the weight to be accorded a treating physician's opinion is based on its power to persuade." The administrative law judge concluded that Dr. Brown's opinion was entitled to little weight because it was "poorly" reasoned and documented stemming, in part, from Dr. Brown's reliance on an erroneous coal mine employment history, *i.e.* Dr. Brown relied on 18 years of coal mine employment and the administrative law judge found only 11 years of such employment.

Finally, with regard to Employer's experts, Drs. Westerfield and Broudy, the administrative law judge found that they were inadequately reasoned in their conclusions that the miner did not suffer from legal pneumoconiosis. In particular, it was determined that Dr. Westerfield's opinion was based on views that were hostile-to-the-Act. He concluded that the miner's respiratory impairment did not arise from coal dust exposure

because the impairment "arose after (Claimant) stopped working as a coal miner." The court agreed with the administrative law judge that this premise is "clearly contrary to the regulations recognizing that pneumoconiosis is 'a latent and progressive disease which may first become detectable only after the cessation of coal dust exposure."

Moreover, the court noted that, both Drs. Westerfield and Broudy "indicated their belief that pneumoconiosis generally causes a *restrictive* lung pattern, whereas (Claimant) exhibited chronic *obstructive* lung disease." (emphasis in original). The court concluded that "[t]his, too, is contrary to the regulations which define pneumoconiosis to include "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." Consequently, the court held that it was proper for the administrative law judge to discredit the opinions of Drs. Westerfield and Broudy.

The court concluded that "there was substantial evidence to support the ALJ's decision to deny (the miner's) claim for benefits because he failed to establish that he had pneumoconiosis."

[**complete evaluation under 20 C.F.R. § 725.406; treating physician's opinion; reliance on inaccurate smoking and employment histories; opinions premised on views that are "hostile-to-the-Act"**]