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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 256
September-October 2013

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Chief Judge

Paul C. Johnson, Jr.
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I. Longshore and related Acts

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

***Marathon Ashland Petroleum v. Williams*, __ F.3d __, 2013 WL 5745874 (6th Cir. 2013).**

The Sixth Circuit affirmed the ALJ's determination, on remand, of the date claimant reached maximum medical improvement ("MMI").

Claimant sustained a shoulder injury, and the ALJ's original decision awarded claimant permanent total disability ("PTD") benefits. The ALJ initially determined that claimant's unsuccessful attempt to return to a modified position with employer on 5/31/05 established that this was his MMI date. The BRB affirmed, and first appeal to the circuit court followed; the court disagreed with the MMI determination and remanded.[2] On remand, the ALJ credited claimant's treating orthopedic surgeon in finding that claimant reached MMI on 10/3/05, and left the rest of the award unchanged. The BRB affirmed and employer appealed.

The Sixth Circuit observed that its review of ALJ/BRB decisions is limited – the decision must be consistent with the law and supported by substantial evidence. When the question is whether the ALJ reached the

[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 refer to the Westlaw identifier.

[2] *See Marathon Ashland Petroleum v. Williams, 384 Fed.Appx. 476 (6th Cir.2010).*

correct result after weighing conflicting medical evidence, the scope of review is exceedingly narrow.

Here, substantial evidence supported the ALJ's finding that claimant established a prima facie case of total disability by showing that he could not return to his "usual work" as senior barge welder. Claimant's treating doctors, including Dr. Goodwin, a board certified orthopedic surgeon, testified that he would not be able to return to his pre-injury job. Further, claimant, a twenty-five year veteran employee, testified that he could not perform this work, and the ALJ did not err in giving this testimony great weight. Claimant's general care physician's opinion also supported the ALJ's finding. While employer's review doctor, Dr. Best, had a contrary opinion, claimant's treating orthopedist subsequently treated him three times and opined that claimant was unlikely to ever fully recover. Further, while Dr. Best opined that claimant could return to work because his former position had since been modified, this opinion does not support a finding that claimant could return to his "usual work." Also, claimant testified that he tried and was unable to perform such duties. Ultimately, the ALJ acted within her discretion when crediting claimant's testimony and the medical opinion of his treating doctor over that of employer's review doctor.

Further, substantial evidence supported the ALJ's determination that employer did not carry its burden of identifying suitable alternative employment that claimant was capable of performing. While employer's vocational expert identified twenty jobs that she believed claimant could perform, she failed to consider Dr. Goodwin's work restrictions, which the ALJ determined were controlling. For example, the expert included a number of sedentary and light duty jobs in her report, but provided no information as to whether those jobs complied with Dr. Goodwin's restriction on overhead lifting. Instead, her report was based on Dr. Best's opinion of claimant's abilities, which the ALJ afforded little weight.

Additionally, Claimant was entitled to an award of attorney fees for work done on appeal.

[Topic 21(c) REVIEW BY U.S. COURTS OF APPEALS - 21.3.4 Standard of Review; Topic 23.5 EVIDENCE - ALJ CAN ACCEPT OR REJECT MEDICAL TESTIMONY; Topic 23.6 EVIDENCE - ALJ DETERMINES CREDIBILITY OF WITNESSES; Topic 8.2.3 EXTENT OF DISABILITY - TOTAL DISABILITY Defined; Employee's *Prima Facie* Case; Topic 8.2.4 EXTENT OF DISABILITY - Partial Disability/Suitable Alternate Employment; Topic 8.2.4.5 EXTENT OF DISABILITY - Suitable alternate employment: vocational evidence]

***BPU Management, Inc./Sherwin Alumina Co. v. Director, OWCP*, 732 F.3d 457 (5th Cir. 2013).**

Reversing the ALJ/BRB, the Fifth Circuit held that claimant's back injury sustained while he was shoveling fallen bauxite back onto conveyor while in underground cross-tunnel to storage area did not occur in "other adjoining area" that was customarily used for unloading vessels.

Sherwin's facility includes both its manufacturing and its loading/unloading operations. Bauxite is unloaded from ships and moved directly into the alumina production process. Raw bauxite is unloaded from vessels using an overhead conveyor system, which carries it to the alumina processing facility and deposits it into "bins" located in a storage area. The bauxite remains in the storage area until it is needed; this varies from a few weeks to a period of years. Once a particular grade of bauxite is selected for alumina extraction, bauxite is drained into an underground "reclaim system." There, a "screw feeder" breaks the bauxite and deposits it on the "reclaim conveyor belt," which transports and drops the bauxite onto the "cross-tunnel conveyor." In turn, the cross-tunnel conveyor transports the bauxite to the "rod mill." Claimant was injured while shoveling fallen bauxite back onto the cross-tunnel conveyor.

The court initially observed that where, as in this case, the facts are not in dispute, LHWCA coverage is an issue of statutory construction and legislative intent, and should be reviewed as a pure question of law. Since claimant's injury did not occur on navigable waters or in one of the LHWCA's enumerated areas, in order to be covered, claimant had to show that his injury occurred in an "other adjoining area customarily used by an employer in loading [or] unloading … a vessel." This definition involves two components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be customarily used by an employer in loading or unloading a vessel). The geographic prong, which requires the area to border on or to be contiguous with navigable waters, was met in this case, where employer's entire facility, including the place of injury, adjoined navigable water.[3]

In concluding that the functional prong was met, the Board found that the cross-tunnel is used in the unloading process. It reasoned that the surface storage buildings above the cross-tunnel are connected to the docks by conveyor belts and thus a part of the unloading process. Because the storage buildings are used in unloading bauxite and do not house manufacturing facilities, the BRB reasoned that the cross-tunnels beneath

[3] *New Orleans Depot Servs., Inc. v. Director, OWCP*, 718 F.3d 384, 387 (5th Cir.2013) (en banc).

the buildings are necessarily involved in the unloading process. The court disagreed.

The court held that the functional prong of the situs test was not met, because the underground cross-tunnel to storage area was not customarily used for unloading vessels, since dock employees no longer exercised control over bauxite in storage and thus delivery of shipped cargo into storage area was a functional equivalent of surrendering cargo to receiving party for land transport. To satisfy the functional prong, the site of the injury need not be "exclusively" or "predominantly" used for unloading—only customarily. Moreover, the court looks to the general purpose of the area rather than requiring "every square inch of an area" to be used for a maritime activity. The mere act of loading, unloading, moving, or transporting something is not enough; rather such activities must be undertaken with respect to a vessel. The essential elements of unloading a vessel are taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area.[4]

Here, the court concluded that, unlike in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 47, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989), claimant was not injured while participating in unloading a vessel or conduct essential to that activity. The court reasoned that, while the Supreme Court has not provided a firm definition of unloading, *P.C. Pfeiffer Co. v. Ford* provides the most guidance:

> "[t]he P.C. Pfeiffer Court's rationale suggests a clear rule in the usual case where cargo is unloaded for ultimate shipment over land: Vessel-unloading includes the transfer of cargo from ship to shore only until it is surrendered for land transport. Because a shoreside industrial facility such as Sherwin's does not utilize any land transport, we must determine what part of Sherwin's bauxite intake process is the appropriate analog for the surrender of cargo to land transport.
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> We read Pfeiffer to hold that the surrender of cargo for land transport marks the end of the maritime unloading process because it is the point where the longshoreman's duty to unload and move the cargo ceases. Not coincidentally, the point of surrender is also the point at which the receiving party takes responsibility for the cargo. In the instant case, the point at which Sherwin's dock employees cease moving bauxite and deposit it for another 'party' to retrieve is when the bauxite is

[4] Although maritime unloading requires some nexus with a vessel, the Supreme Court has rejected a definition of unloading which stops the moment a vessel's cargo is unloaded onto the dock. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 267, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977).

> delivered into the storage area. Once the ore is deposited into storage, it is Sherwin's engineering employees who manage and control the bauxite's further movement. Because Sherwin's dock employees no longer exercise control over bauxite in storage, the delivery of bauxite into storage is the functional equivalent of the surrender of cargo for land transport."

Id. at *464 (citations omitted). Further, the operational layout of Sherwin's bauxite processing system reinforces the conclusion that the vessel-unloading process is complete long before bauxite reaches the cross-tunnels: bauxite only enters the cross-tunnel after it sits in a long-term storage stockpile, migrates to the bottom of its respective ore pile, is specifically selected by Sherwin's process engineers for production, is crushed in the screw feeder, and is finally transported towards the metal-extraction facility.

The court rejected claimant's contention that shoveling ore debris in the cross-tunnel is part of unloading because it is essential to the unloading process. The record indicated that an extraordinary amount of additional bauxite could be deposited in outdoor storage before unloading would have to cease. Cleaning an area so far removed from any unloading operations is not integral to the unloading process.

The court concluded that "[b]ecause the delivery of shipped cargo into Sherwin's storage area is the functional equivalent of surrendering the cargo to a receiving land carrier, we conclude that this is where the vessel-unloading process ends. Thus, we hold that Sherwin's underground cross-tunnels are not customarily used for unloading vessels and do not satisfy the LHWCA's functional prong." *Id.* at *465.

[Topic 1.6.2 SITUS - "Over land"]

***Petitt v. Sause Bros.*, 730 F.3d 1173 (9th Cir. 2013).**

Reversing the ALJ/BRB, the Ninth Circuit held, as a matter of first impression, that claimant's quarterly automatic raises of $0.25 were general wage increases that did not reflect increased wage-earning capacity ("WEC").

The Board's interpretation of the LHWCA is a question of law reviewed de novo and is not entitled to any special deference. Under the LHWCA, wage-earning capacity of a partially disabled employee is determined under Section 8(h). The objective in determining WEC is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. The Act contemplates that the current dollar amount of post-injury WEC be adjusted downward to account for post-

injury inflation and general wage increases. Under the LHWCA, wage increases required by a union contract are treated as general wage increases, because they represent industry-wide pay rates, rather than individual's skill or responsibility. Conversely, merit or promotion-based wage increases are factored into a claimant's WEC and include raises received for expanding one's duties or learning new skills.[5]

Here, claimant injured his back in 2003 while earning $15 per hour as a welder for employer. Around 2007, claimant began working as an electronics assembler for a different employer. Claimant's current employer provides its employees an automatic $0.25 per hour raise every three months until their wages reach $13.50 per hour.

The Ninth Circuit held that claimant's quarterly automatic raises of $0.25 given by a non-union employer, and described by employer as "seniority raises," were general wage increases that did not reflect increased earning capacity in the open market, where the quarterly raises were not accompanied by any increase in an employee's productivity, skill, or responsibility. In concluding otherwise, the ALJ relied primarily on the testimony of the chief executive officer for claimant's current employer, who labeled the quarterly pay increases as "seniority raises." Although this court previously held that wage increases because of seniority may be factored into a claimant's WEC, the present case is distinguishable because claimant's seniority is not accompanied by any increase in his productivity, skill, or responsibility that would make him more valuable on the market if he left his current employer. Claimant testified that after two or three months on the job, an electronic assembler's productivity does not rise. His increased length of service makes him more valuable only to his current employer. Accordingly, the court held that "under the LHWCA, scheduled wage increases given by a non-union employer to all employees in a certain class based solely upon seniority are a general increase in wages and do not increase a claimant's wage-earning capacity." *Id.* at *1177. The case was remanded to recalculate claimant's partial disability benefits.

[Topic 8.9 WAGE-EARNING CAPACITY]

***Riley v. Alexander/Ryan Marine Servs. Co.*, __ F.Supp.2d __, 2013 WL 5774872 (S.D. Tex. 2013).**

Relevant to this review, the district court granted defendants' motion for a summary decision on the plaintiff's Jones Act claim based on its finding that the plaintiff was not a Jones Act seaman, because the Mad Dog oil and

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[5] It was undisputed that the ALJ properly increased claimant's WEC based on a merit increase of $0.55 per hour.

gas spar platform in the Gulf of Mexico where claimant worked is not a vessel. The court stated that a vessel is defined for the purposes of the Jones Act as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U .S.C. § 3; *see also Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 490, 125 S.Ct. 1118, 160 L.Ed.2d 932 (2005). In this case, the court concluded that, unlike the Super Scoop dredge in *Stewart*, "[t]he Mad Dog is not practically capable of maritime transportation, as opposed to mere movement," as it is held in place by eleven mooring lines and would take sixteen months to disconnect. *Id.* at *3. Rather, the Mad Dog spar is permanently connected to the sea floor, similar to the floating gas-production platform that was found not to constitute a vessel in *Mendez v. Anadarko Petroleum Corp.,* 466 F. App'x 316 (5th Cir.2012), *cert. denied,* __ U.S. __, 133 S.Ct. 979, 184 L.Ed.2d 760 (2013). The court rejected plaintiff's attempted to distinguish *Mendez* on the ground that the Mad Dog spar is capable of lateral movement from well to well, stating that "this argument misses the difference between movement and transportation." *Id.* at *4. The court noted that, while *Menez* predates the Supreme Court's decision in *Lozman v. City of Riviera Beach*, __ U.S. __, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013), the holding in *Lozman*, if anything, tightened the requirement for vessel status.

[Topic 1.4.3 LHWCA v. JONES ACT – "Vessel"]

B. Benefits Review Board

***Delgado v. Air Serv International, Inc.*, __ BRBS __ (2013).**

The Board vacated the ALJ's order granting employer's motion for summary decision and dismissing the claim based on lack of coverage under Section 1(a)(5) of the Defense Base Act ("DBA").[6] The ALJ found that as claimant worked for employer pursuant to assistance awards -- *i.e.,* employer's cooperative agreement with the U.S. Department of State ("DOS") and a grant from the U.S. Agency for International Development ("USAID"), and not pursuant to a contract, his claim is not covered under § 1(a)(5). The ALJ, relying on *University of Rochester v. Hartman*, 618 F.2d 170, 172 (2[d] Cir. 1980), looked to the definitions of "contract," "grant" and "cooperative agreement" provided in the Federal Grant and Cooperative Agreement Act of 1977 ("the Grant Act"). The ALJ found that neither the DOS cooperative agreement nor the USAID grant is a "contract" within the meaning of the DBA, and thus claimant is not covered under § 1(a)(5).

Agreeing with the OWCP Director, the Board held that the ALJ incorrectly interpreted § 1(a)(5) as requiring employer to have entered into

[6] Claimant did not challenge, and the BRB did not address, the ALJ's findings of no coverage under §1 (a)(1)-(4) and (6).

a contract with the United States or an agency thereof as a prerequisite to coverage under § 1(a)(5). The ALJ erred in finding the Second Circuit's analysis under § 1(a)(4) in *Hartman* to be applicable to the issue of coverage under § 1(a)(5), as § 1(a)(4) expressly requires that the employee be engaged in employment "under a contract entered into with the United States," as a condition of coverage. By contrast, § 1(a)(5) requires only that the employee's employment be "under a contract approved and financed by the United States," or any agency thereof. The Board concluded: "[w]e agree with the Director's reading, which gives effect to the textual distinction between subsections (a)(4) and (a)(5), and we therefore concur in his position that Section 1(a)(5) does not require the employee to have been working under a contract *to which the United States is a party*." Slp op. at 7. The BRB rejected employer's contention that the term "contract" must be analyzed in the same manner under both subsections (a)(4) and (a)(5) so that the Grant Act analysis is consistently applied under both subsections. This interpretation is inconsistent with the canon of statutory construction that "a statute must, if possible, be construed in such fashion that every word has some operative effect," and contravenes the Supreme Court's recent pronouncements on statutory construction.

Here, the evidence, construed in the light most favorable to claimant, supports a finding that claimant's work under a contract with employer was at least partially financed by the USAID grant, which would satisfy the "financed by the United States" requirement of § 1(a)(5). Further, a genuine issue of material fact exists with respect to the "approved . . . by the United States" prong of § 1(a)(5), as the USAID Agreement could support a finding that claimant's work was performed under an employment contract that was approved by USAID through its grant to employer. While employer asserted that the record contains no explicit evidence that claimant's employment agreement was approved by the United States and the ALJ could rationally find that it was not so approved, "[a]cceptance of employer's argument would require that the evidence be weighed and that inferences be drawn in favor of employer, neither of which is permissible in ruling on a motion for summary decision. Not only must there be no genuine issue as to evidentiary facts, but there must be no controversy regarding inferences to be drawn from those facts." Slip op. at 8 (citations omitted). In considering whether to grant summary judgment, the court is to construe all evidence in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes.

Finally, the Board rejected Employer's contention that § 1(a)(5) does not provide coverage because neither the DOS or USAID agreements nor claimant's employment agreement include the provisions set forth in § 1(a)(5) regarding the securing of compensation under the DBA. The BRB agreed instead with the Director's position that the § 1(a)(5) provision

regarding the securing of compensation under the Act is not an element of coverage but, rather, merely a ministerial requirement to be included in documents where DBA coverage otherwise exists. The BRB noted that employer's position is undercut by the terms and structure of the DBA.

[Topic 60.2 DEFENSE BASE ACT - Coverage; Topic 19.4.2 PROCEDURE - Summary Decision]

***Czikowsky v. Ocean Performance, Inc.*, __ BRBS __ (2013).**

The Board vacated the ALJ's determination that claimant was excluded from LHWCA coverage under Section 2(3)(F), as amended in 2009, and remanded for consideration of coverage under the pre-2009 version of § 2(3)(F), 33 U.S.C. §902(3)(F) (2006).

Claimant sought benefits for the hearing loss he sustained while working for employer as a marine mechanic. His work involved repairing boats that employer sold to customers as well as inflatable boats used by the town's fire department as rescue vessels. Claimant asserted that while he mostly repaired recreational vessels, he also worked on "commercial" vessels – *i.e.*, the fire department boats and charter boats (claimant deduced that some of the boats were used as charter boats based on the hours logged).

The ALJ found that the amended § 2(3)(F), 33 U.S.C. §902(3)(F) (amended 2009)(Supp. 2011), and its implementing regulations, 20 C.F.R. §701.501 *et seq.*, exclude claimant from coverage. The regulation states that the focus of the definition of "recreational vessel" is on the manufacturer's intent in building the boat, and the ALJ found that the boats claimant repaired were intended for recreational purposes. As the amended Act excludes an employee who repairs *any* recreational vessels, the ALJ denied benefits on this basis.

The Board concluded that the pre-2009 version of § 2(3)(F) is applicable to this case, and not the amended version. The parties agreed that 4/10/09, the date of claimant's first audiogram, is the "date of injury," making the amended version applicable. However, the Board noted that the Department issued regulations effective 1/30/12, redefining the phrase "date of injury" for purposes of determining the applicability of amended Section 2(3)(F). 76 Fed. Reg. 82117, 82118, 82129; 20 C.F.R. §701.504. For a hearing loss injury, the regulations provide that the date of injury is the date the individual was exposed to harmful workplace noise. If the date of injury is before 2/17/09, the former version of § 2(3)(F) applies; if it is on or after 2/17/09, the amended version applies. The BRB stated that "because hearing loss due to noise exposure occurs over a period of time, the date of last exposure is not the relevant date for ascertaining the

applicability of the amended version of Section 2(3)(F) – if any injurious noise exposure occurred prior to February 17, 2009, regardless of whether there was additional exposure afterward or whether the audiogram identifying the loss was administered afterward, the earlier version is applicable." Slip op. at 4. Here, as some of claimant's noise exposure occurred before the effective date of the amendment, the amendment does not apply.

The pre-2009 version of § 2(3)(F) states that, provided they are covered by state law, "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length" are excluded from the Act's coverage. As the record contained no evidence regarding the length of the vessels claimant repaired, the BRB remanded the case to the ALJ for further consideration. Further, the BRB rejected as disingenuous claimant's contention that the ALJ erred in finding he was covered by state workers' compensation law, as the settlement of claimant's state law claim stated that the parties are subject to state law.

Finally, the BRB also rejected claimant's contention that the ALJ erred in denying coverage by using "something akin to a substantial portion test." Claimant's assertion is based on his position that he worked on both commercial and recreational vessels and that it does not matter how his work was apportioned; as long as some of it was on commercial vessels, he is covered. While claimant is correct that the "substantial portion" test is not a valid test for determining coverage, the ALJ, having determined that *all* of claimant's work was performed on recreational vessels, did not address how claimant's work was apportioned between recreational and commercial vessels. On remand, the ALJ will have to determine whether at least some of claimant's work is covered.

[Topic 1.11.12 EXCLUSIONS TO COVERAGE - Recreational vessel construction/repair]

II. Black Lung Benefits Act

A. U.S. Circuit Court of Appeals

In *Consolidation Coal Co. v. Director, OWCP [Burris]*, ___ F.3d ___, Case No. 12-1330 (7th Cir. Oct. 8, 2013), the court affirmed the award of benefits to a miner with a 45-pack-year smoking history, a number of health problems including heart and lung disease, and 23 years of coal mine employment, where the miner's work for Employer was at a surface mine rather than at an underground mine site.

Starting with the procedural issues before the court, the miner's first claim was abandoned under 20 C.F.R. § 725.409. At the hearing before the Administrative Law Judge, Employer conceded the presence of a totally disabling respiratory impairment in the second claim and conceded the threshold requirement (of establishing an element of entitlement previously adjudicated against the miner) was demonstrated under 20 C.F.R. § 725.309 in this subsequent claim.

On appeal, Employer argued that the threshold requirement under 20 C.F.R. § 725.309 was not met because evidence supported a finding of total disability in the miner's first, abandoned claim, but the court disagreed for three reasons. First, the court held:

> [S]tipulations and concessions bind those who make them and Consolidation is therefore bound by its concession below that Burris is totally disabled and has met his burden of demonstrating a change in one of the conditions of entitlement.

Second, in the subsequent claim, the miner was not required to present medical evidence that differed qualitatively from evidence presented in the prior claim, *i.e.* evidence showing progression or worsening of the miner's condition. The miner's first claim was abandoned, which operated as a denial on all grounds. As a result, for purposes of the threshold determination in the second claim, the miner was required only to present evidence sufficient to establish an element of entitlement previously adjudicated against him—here, evidence of a totally disabling respiratory impairment. Third, the court reiterated that the 15-year presumption that the miner suffers from a total disability due to pneumoconiosis also may be used to satisfy the threshold requirement of 20 C.F.R. § 725.309.

Turning to invocation of the 15-year presumption, the court affirmed the Administrative Law Judge's finding that the miner's working conditions at the surface mine were substantially similar to conditions underground. Here, the court noted the judge properly analyzed the miner's testimony and found the miner provided "sufficient evidence of the surface mining

conditions in which he worked," which the Administrative Law Judge, based on his expertise, compared "to conditions known to prevail in underground mines."

In rebutting the presumption, the court reiterated Employer must demonstrate either the miner does not suffer from clinical or legal pneumoconiosis, or pneumoconiosis was not a "contributing cause" to the miner's disability. The court stated, "In rebutting the presumption, we have noted that the employer faces an uphill battle." When weighing medical opinions on rebuttal, the court held it was proper to accord less weight to a physician who "relied on general statistics without relating them to (the miner) in particular," and less weight also may be accorded a physician's opinion that is premised on an underestimation of the miner's exposure to coal mine dust.

[**threshold requirement of 20 C.F.R. § 725.309; 15-year presumption**]

In *Kanawha Coal Co. v. Director, OWCP [Kuhn]*, ___ Fed. Appx. ___, 2013 WL 4828724 (4th Cir. Sept. 11, 2013)(unpub.)(per curiam), the court held a miner who performs work above ground at an underground mine site "was not required to prove that his work conditions were substantially similar to the work conditions in an underground mine" in order to invoke the 15-year presumption.

[**15-year presumption and above ground mining at an underground mine site**]

B. Benefits Review Board

In *Thorne v. Eastover Mining Co.*, ___ B.L.R. ___, BRB No. 13-0136 BLA (Sept. 27, 2013), the Board upheld automatic entitlement to survivor's benefits pursuant to Section 1556 of the Patient Protection and Affordable Care Act (PPACA), where the miner was eligible for benefits at the time of his 2010 death based on an award issued by an Administrative Law Judge in 1986. Employer maintained that, as a practical matter, the miner's federal award was offset by his state award such that he was not "eligible" for benefits at the time of his 2010 death for purposes of automatic entitlement. The Administrative Law Judge disagreed. The Board stated:

> [T]he administrative law judge's finding, that the offset of the miner's federal black lung benefits by the state award (as opposed to termination of the award) did not affect the miner's eligibility for benefits under the Act, is consistent with the applicable regulations.

Slip op. at p. 3. Consequently, the finding of automatic entitlement was affirmed.

[**automatic entitlement; miner "eligible" for benefits at the time of death**]