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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 167
September -October 2003

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

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

Bazor v. Boomtown Belle Casino, ___ S.Ct. ___ (Mem), 2003 WL 21180139 (Oct. 6, 2003), *cert denied.*

As previously noted in the Digest and Supplement, in denying status to the claimant, the Fifth Circuit had held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (5th Cir. 2002). The Fifth Circuit had found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage »individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The Fifth Circuit further had found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

[Topics 1.4.3.1 Jurisdiction/CoverageCFloating Dockside Casinos; 1.6.2 SitusCOver land; 1.7 Status; and 1.11.8 ExclusionsCEmployed by a club, camp, recreational operation, restaurant, museum, or retail outlet]

B. Circuit Court Cases

Stewart v. Dutra Construction Co., ___ F.3d ___, (No. 02-1713) (1st Cir. Sept. 4, 2003)

In this A905(b)@ and Jones Act case the First Circuit granted summary judgment against the Jones Act claim after finding that there was not a Avessel in navigation@ for purposes of the Jones Act. The court next determined that it need not labor over Avessel status@ for purposes of the LHWCA: AAlthough the LHWCA permits an employee to sue in negligence only in the event of an injury caused by the negligence of a vessel, 33 U.S.C. ' 905(b), the LHWCA=s definition of >vessel= is >significantly more inclusive than that used for evaluating seaman status under the Jones Act.=@ Citing *Morehead v. Atkinson-Kiewit*, 97 F.3d 603 (1st Cir. 1996)(*en banc*).

As to the 905(b) matter, the court addressed the Adual capacity@ issue where the Longshore employer is also the vessel owner. If a dual capacity defendant=s alleged acts of negligence were committed in its capacity *qua* employer (for which it is immune from tort liability under 905(b)) or *qua* vessel owner (for which it may be held liable under 905(b)). The Circuit Court rejected using a Afunctional@ approach because it increased uncertainty and contravened the Congressional intent behind the LHWCA by expanding vessel owner liability. The court concluded that the dual capacity vessel could be held liable under 905(b) only to the extent that it breached its duties of care while acting in its capacity as a vessel.

[Topics 5.2.1 Exclusiveness of Remedy & Third Party LiabilityCGenerally; 5.2.3 Exclusiveness of Remedy & Third Party Liability--Dual Capacity States of Maritime Employer]

Avondale Industries, Inc. v. Davis, ___ F.3d ___ (No. 02-60468)(5th Cir. Oct. 21, 2003).

Once again, the circuit court applies *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Fifth Circuit noted the two step process applicable to an award of attorney=s fees: (1) The ALJ should confine the fee award only to work done on the successful claims. (2) The success obtained on the remaining claims should be proportional to the efforts expended by counsel. The court acknowledged that when a party achieves only partial or limited success, then compensation for all of the hours reasonably expended on the litigation as a whole may be an excessive amount. Here, after determining that counsel=s work was Aintimately related@ to the claims on which the claimant was successful, the ALJ reduced the entire fee by one third in light of the fact that the attorney was only successful on four of six claims. However, the Fifth Circuit found that the ALJ failed to take into account the fact that the claimant recovered a limited amount in penalties and interest, plus future medical costs when reducing the fees in light of the success obtained. The court noted that the ALJ failed to quantify the claimant=s award and take that into consideration when determining the amount of the attorney=s fee award.

[Topics 28.5 Attorney FeesCAmount of Award; 28.6.4 Attorney FeesCLosing On An

Issue]

Jensen v. Weeks Marine, Inc., ___ F.3d ___ (No. 03-4492)(2nd cir. October 6, 2003).

Here the Second Circuit clarified the proper legal standard for an ALJ to apply in Section 22 Modification Petitions. In the ALJ=s Decision and Order, he found that the claimant had not injured his lower back, that he had injured his leg, that he had reached maximum medical improvement with a residual permanency of 4%, and that the employer=s evidence of alternate employment was insufficient. Accordingly, the ALJ awarded permanent total disability benefits. Employer subsequently developed additional medical evidence about the claimant=s condition as well as additional vocational evidence, with the claimant=s cooperation. (Prior to the initial hearing, the claimant had refused to cooperate with the employer=s assessment.)

The ALJ assigned the Petition for Modification denied the request, reasoning that the evidence presented by the employer could have been discovered by the initial hearing and that employer was merely attempting to re-litigate issues resolved by the first hearing. On appeal to the Board, the Board held that the employer had proffered evidence that, if credited, could establish an entitlement to modification. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999)(*Jensen I*).

The Second Circuit, however, stated, A[T]he Board=s language in its first decision may be read to imply that a section 22 movant must make some >threshold= proffer of new evidence before it is entitled to a review of the entire recordYThis impression would be error. As the Supreme Court has ruled, an ALJ may modify a prior order >to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, *or merely further reflection on the evidence initially submitted*.= [*Citing O=Keefe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, at 256 (emphasis added by the court). Thus [Employer] was not required to show that the evidence it had developed was not available before the first hearing in order to secure a modification hearing.@

The Circuit Court went on to state, AThe Board=s citation to *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982) may add to the confusion. Although *General Dynamics* contains some language about finality, *see id.* At 26 (A[p]arties should not be permitted to invoke 22 to correct errors or misjudgments of counsel@), the holding of the opinion is directed towards the moving party=s failure to raise a Section 8(f) affirmative defense in the prior proceeding. *Id.*; *see also* 33 U.S.C. ' 908(f)(3) (AFailure to present [a 8(f) request prior to Yconsideration shall be an absolute defense to Y liability@). We believe that it is better to resist reading the *General Dynamics* dicta too broadly. *Cf. Old Ben Coal Co.*, 292 F.3d at 545 (nothing that finality language in *General Dynamics* is inconsistent with Supreme Court precedent and statutory language).@

[Topics 22.3 ModificationCDetermining what Constitutes a Valid Request; 22.5 Attorney FeesCMistake of Fact]

C. Benefits Review Board Decisions

Wheeler v. Newport News Shipbuilding and Dry Dock Co. [Wheeler IV], ___ BRBS ___ (BRB No. 02-0846) (Sept. 12, 2003).

In the original Decision and Order, the ALJ awarded permanent total disability after finding that the employer had failed to establish suitable alternate employment. On appeal, the Board affirmed the ALJ=s finding that the positions identified by the employer were unsuitable due to either the claimant=s poor verbal skills or lack of experience. However, the Board stated that the employer raised a legitimate argument that the claimant=s refusal to meet with the employer=s vocational expert in person may have prevented the employer from being aware of the claimant=s verbal deficiencies and from forming an accurate picture of her verbal qualifications, and thus form considering this factor in conducting the labor market survey.

The Board in *Wheeler I* observed that the employer might elect to remedy this situation by submitting a new labor market survey by way of a petition for modification under Section 22. The Board explained that the claimant=s refusal to meet with the vocational expert at the time of the initial proceeding should not preclude the employer=s attempt to improve its evidence of suitable alternate employment upon its receipt of additional vocational information, as this would permit the claimant to benefit through her lack of cooperation.

Subsequently the ALJ granted the employer=s motion for modification on the basis that a mistaken determination of fact was shown in his initial award of permanent total disability benefits. Citing to several cases, the Board in *Wheeler II* noted that the jurisprudence makes clear that the scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification

That said, the Board in *Wheeler II* concluded that the ALJ properly exercised his discretion in granting modification in this case based on a mistake in fact. AIn the instant case, on modification the [ALJ] rationally found that claimant deliberately frustrated employer=s vocational rehabilitation efforts, and significantly exaggerated her symptomsY Claimant=s failure to cooperate with employer=s vocational efforts at the time of the initial proceeding denied employer a full opportunity to develop its evidence of suitable alternate employment. As employer=s new evidence of suitable alternate employment provides a basis for a mistake in fact in the initial finding of total disability, the [ALJ] acted within his discretionary authority in reopening the claim under Section 22.@

The Board concluded, AEmployer attempted to show that claimant is not totally disabled by producing evidence of suitable alternate employment at the initial hearing; employer=s ability to meet this burden was affected by claimant=s lack of cooperation with employer=s vocational efforts. On modification employer presented evidence arguably providing a more accurate evaluation of claimant=s capabilities. Under these circumstances, the

[ALJ=s] decision to reopen the case and reconsider whether claimant is totally disabled serves the interest of justice under the Act.@

[Topics 22.3 ModificationCDetermining what Constitutes a Valid Request; 22.5 Attorney FeesCMistake of Fact]

Terlemezian v. J.H. Reid General Contracting, ___ BRBS ____ (BRB No. 03-0185)(Sept. 30, 2003).

In this status case, the claimant was a Adock builder foreman@ on a road project at Ports Elizabeth and Newark where he was responsible for driving sheet piling for a cofferdam. The Board upheld the ALJ=s opinion that the claimant did not have status. The claimant had contended that his work was integral to the loading process as the road project was designed to alleviate delays in loading and unloading while rail cars are brought in and out of the port. The Board affirmed the ALJ=s finding that the claimant was not a covered employee as his work was not an essential element of the loading process. The Board noted that while the project the claimant was working on had the potential to affect the loading and unloading process in the future by increasing the volume of containers moving through the port, it did not affect the loading and unloading process at the time of the claimant=s injury. AMore importantly, claimant has not demonstrated that his work on the project was integral to the loading or unloading process or that his failure to perform his work would impede that process.@ The Board stated that the claimant has not established a sufficient nexus between a road project designed to improve the movement of rail cars and trucks in land transportation in the future and the actual task of loading and unloading containers from ships on the docks or in moving cargo in intermediate steps within the port.

[Topic 1.7.2 Jurisdiction/CoverageCStatusCHarbor Worker]

Marks v. Trinity Marine Group, ___ BRBS ___ (BRB No. 03-0209)(Oct. 14, 2003).

This is the appeal of an Attorney Fee Award issued by a district director. At issue here is whether or not a guaranty association is liable for pre-insolvency attorney=s fees under the LHWCA. The Board held that the state law regarding the scope of the guaranty association=s responsibilities precludes the guaranty association=s liability for the payment of the claimant=s pre-insolvency attorney=s fees in this case, notwithstanding its liability for the claimant=s compensation benefits. In reaching this opinion, the Board cited to *Frank v. Kent Guidry Farms*, 816 So.2d 969, 972 (La. Ct. App. 2002), *writ denied*, 847 So. 2d 1273 (La. 2003); La. R. S. 22:1379(3)(d); *Castille v. McDaniel*, 620 So. 2d 461 (La.Ct.App. 1993). In *Frank*, the state appellate court stated:

Louisiana law is clear that LIGA is not an Ainsurer@ for purposes of applicable

> statutes imposing penalties, attorney fees and therefore cannot be assessed penalties and attorney fees under our jurisprudence. It is true that the penalties and attorney fees were imposed prior to [the carrier=s] insolvency and cast in the judgment rendered in the trial court and now on appeal. Although LIGA is obliged to the extent of covered pre-insolvency claims, [La.R.S. 22:1382], pre-insolvency obligations for statutory penalties and attorney fees are not covered claims.

[Topics 28.1.2 Attorney FeesCSuccessful Prosecution; 28.2 Attorney FeesCEmployer=s Liability]

Tarver v. BO-MAC Contractors, Inc., ___ BRBS ___ (BRB No. 03-0131)(Oct. 15, 2003).

In this situs issue case, the Board overturned the ALJ=s finding of coverage based on circuit case law that was issued subsequent to the ALJ=s decision. Here the claimant was a welder involved in the construction of barge slips on undeveloped land adjacent to the intracoastal waterway. He was injured on the land side of the excavation. At the time of his injury the slip walls were in place and some water would enter into the excavated hole at high tide through a pipe in the wall. The ALJ had found that the injury occurred on a covered situs because the site had a maritime purpose, even though it was incomplete.

Subsequent to the ALJ issuing his decision, the Fifth Circuit issued *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, ___ S.Ct. ___, 2003 WL 21180139 (Oct. 6, 2003)(No. 02-1637) (Future maritime use does not suffice to confer situs.) The Board acknowledged that A[a]lthough the barge slip under construction was being built solely for maritime purposes, we are constrained by the foregoing case law to hold that this site is not covered pursuant to Section 3(a) of the Act.@ The Board noted that the circuit case law now makes the nature of the site prior to its completion a deciding factor. It further noted that although the site was suitable for maritime uses, at the time of the claimant=s injury, neither the site nor any immediately surrounding areas was used for a maritime purpose. AThe Fifth Circuit=s decisionsY.contemplate either that, at the time of claimant=s injury, the location have a current maritime use, or that the site of the project under construction had been navigable waters or another covered site previously.@

[Topic 1.7.2 Jurisdiction/CoverageCStatusCHarbor Worker]

Morganti v. Lockheed Martin Corp., ___ BRBS ___ (BRB No. 03-0149)(Oct. 20, 2003).

In this coverage case, the Board upheld the ALJ=s finding of situs/navigability of a lake;

but reversed his findings that the worker did not have status, or was excluded under the clerical exclusion of the LHWCA. The decedent here had worked for an employer who manufactures sonar transducers for the United State Navy. He was a test engineer. As such, he worked 70 % of his time on land, and 30% of his time testing the devices over water on a barge that had been moored for 20 years for that purpose. (Of the 30% of his time spent over water, 1% was spent on a 32 foot shuttle boat going between land and the moored barge.) While untying a boat line, the worker fell into the lake and drowned.

The Board found that the ALJ correctly held that an economic viability test should not be applied when determining whether a waterway is navigable for purposes of the LHWCA. In doing so, the Board noted that the ALJ correctly applied the Second Circuit=s @navigability in fact@ test to determine if the waterway is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.

As to the status issue, the ALJ had found that the worker=s job was not maritime, that the moored barge was a fixed platform, that the worker was transiently over navigable water only 1% of his work time, and that even if the worker did have coverage, he was specifically excluded by the clerical worker exclusion of Section 2(3)(A). In reversing the ALJ, the Board made the following legal determinations.

Citing to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), the Board stated that a claimant who is injured or dies on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision. The Board found that the ALJ had incorrectly applied *Bienvenu v. Texaco, Inc.*, 1964 F. 3d 901,32 BRBS 217(CRT)(5th Cir. 1999)(*en banc*)(*Held* that a worker injured upon navigable waters in the course of employment Ameets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous.@). Finding that Ait is clear that decedent=s presence on navigable waters was neither transient nor fortuitous, the Board noted that it need not determine if *Bienvenu* should be followed in this Second Circuit case.

In determining that the decedent was a maritime worker, the Board found that the ALJ was mistaken in relying upon case law construing a Avessel in navigation@ under the Jones Act, when the issue presented was decedent=s coverage under the LHWCA. While the Board acknowledged that under the Jones Act, the key to seaman status is an employment-related connection to a Avessel in navigation,@ the Board went on to state, AThe courts have developed tests for determining whether a floating structure is a >vessel in navigation= or a work platform.@ According to the Board, AA structure may be a vessel for other purposes, yet it will not meet the Jones Act test unless it is >in navigation.= An employee injured on a floating structure which is not a >vessel in navigation= is thus not entitled to recover under the Jones Act but has his remedy under the Longshore Act as he is not excluded as a >member of the crew= under Section 2(3). As the test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the pertinent issue of coverage under *Perini*, the [ALJ] erred in relying on it.@ The Board summed, AAs claimant was injured on a structure afloat on navigable waters, claimant was covered under the Act.@

The Board reversed the ALJ=s finding that the decedent=s presence on navigable waters at the time of his injury and death was transient since it found that the decedent worked over navigable water 30% of the time.

While the Board noted that the decedent=s employment responsibilities required him to input the data necessary for the computer to run the appropriate test and print results, it held that it was incorrect to characterize the work as clerical and data processing work. AThe mere fact that an employee utilizes a computer in his job and inputs data does not convert a professional engineer utilizing computer skills into a clerical worker.@

[Topics 1.4.3 Jurisdiction/CoverageCVessel; 1.4.4 Jurisdiction/CoverageCAttachment to Vessel; 1.7.1 Jurisprudence/CoverageCStatus; 1.11.7 Jurisdiction/CoverageCClerical/secretarial/security/data processing employees]

Hucks v. Newport News Shipbuilding & Dry Dock Company, (Unpublished)(BRB No. 03-0168)(Sept. 29, 2003).

In this attorney fee issue case, the Board refused to extend (to the Fourth Circuit) the Fifth Circuit=s recent requirement that an informal conference must be held in order to recover attorney fees:

> We reject employer=s contention that it is not liable for claimant=s attorney=s fee under Section 28(b) due to the absence of an informal conference. Following the decision of the United States court of Appeals for the Ninth Circuit in National Steel & Shipbuilding Co. v. U.S. Dep=t of Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the Board has held that an informal conference is not a prerequisite to employer=s liability for a fee pursuant to Section 28(b). *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001)(Fifth Circuit holds that an informal conference is a prerequisite to fee liability under Section 28(b)).

[Topic 28.1.2 Attorney FeesCSuccessful Prosecution]

Carrol v. M.Cutter Co., ___ BRBS ___ (BRB Nos. 03-0189 and 03-0189A)(Oct. 30, 2003).

At issue here was whether the employer had to pay for supervision 24 hours per day for a claimant who suffered a head injury resulting in cognitive impairment, especially affecting his short-term memory. (See Section 7(a) of the LHWCA noting that an employer shall furnish such medical, surgical, and other attendance or treatmentYas the nature of the injury or the

process of recovery may require.)

According to the evidence, the claimant is capable of Aperforming the basic activities of caring for himself, such as eating, dressing, bathing and toileting. He also has the mobility to get around his house and his neighborhood.@ Nevertheless, the claimant=s treating physician and the independent medical examiners all agree that he needs 24-hour supervision for several reasons: he is not always aware of his surroundings; he sometimes gets lost or, he forgets things (e.g., to take his medicine or to exercise). The uncontradicted testimony shows that the claimant sometimes engages in unsafe activities when he wanders around the house at night, such as putting a kettle on the stove, turning on the burner, and then going to sleep. Uncontroverted evidence further revealed that he has used power tools and become distracted, nearly severing his fingers, that he has gotten lost and needed to rely on his five-year-old granddaughter to find his way home from the store, and that he does not remember to take his medications on a regular basis. Additionally, it was noted that the claimant gained over 100 pounds after his injury because he would eat several times a day, having forgotten when he had previously eaten.

The Board held that the ALJ erred in limiting the employer=s liability to less than the 24 hours prescribed by the treating physician and recommended without contradiction by the other medical examiners. The Board stated that while the ALJ rationally found that the claimant does not need 24-hour paid licensed attendant care, it was nevertheless undisputed that he could not be left alone. The Board found that family members cannot be commandeered for services for free, regardless of their willingness to serve and that, to the extent that family members are willing to perform the services employer is obliged to provide, they must be paid, albeit at a reduced rate.

[Topics 7.3.1 Medical Treatment Provided By EmployerCNecessary Treatment; 7.3.2 Treatment Required By Injury; 7.3.7 Attendants]

D. ALJ Decisions and Orders

[ED. Note: The following is a Discovery Order issued by an ALJ while this case was pending before OWCP, pursuant to *Maine v. Brady-Hamilton Stevedore Co*., 18 BRBS 129 (1986) (*en banc*).**]**

Newton v. P &O Ports, Inc. (OWCP No. 07-163948) (Oct. 2003).

This AOrder Granting Claimant=s Motion To Compel Discovery, Denying Employer=s Motion To Quash Subpoena Duces Tecum, and Denying Employer=s Motion For Protective Order@ involves vocational information. Here the claimant filed a Motion to Compel Discovery, seeking enforcement of a subpoena issued by OALJ for the names and addresses of the companies identified as suitable alternate employment by employer=s vocational expert. The employer resisted the subpoena arguing that an employer need not produce to a claimant the identity of suitable alternative jobs located by the employer.

The ALJ found that the employer Aconflates the substantive standards for proving suitable alternative employment with the standards for discovery.@ He explained that the former involves a determination on the merits, while the latter is procedural in nature. The ALJ noted that the substantive standards for suitable alternative employment, as noted in *New Orleans (Gulfwide) Stevedores v. Turner [Turner]*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), do not govern the discovery dispute before OALJ.

According to 18 C.F.R. '18.14, under the rules of discovery, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. In distinguishing between the substantive suitable alternative employment standard of *Turner* and the standard for discovery, the ALJ explained that evidence that is not required to prevail on the merits may nonetheless be evidence that is admissible. AInformation that need not be divulged voluntarily to prevail on the merits may nonetheless be information that reasonably may lead to the discovery of admissible evidence. Handcuffing discovery with substantive standards would disqualify from discovery all information that is helpful yet substantively unnecessary.@ The ALJ also found that employer=s reliance on policy concerns was misplaced and that the sought after information was not privileged.

[Topics 19.3.6.2 ProcedureCDiscovery; 27.2 Powers of ALJs--Discovery]

E. Other Jurisdictions

[ED. Note: The following case is included for informational purposes only.**]**

Dukes v. Rural Metro Corp., South Carolina Supreme Court (S.C. No. 25730) (Oct. 13, 2003).

In this state workers= compensation case, a paramedic was accidentally shot by a co-worker while they were both on a paid smoking break. In reversing the trial court, the South Carolina Supreme Court found that the worker=s injury did not arise out of his employment since there was Ano nexus@ connecting his job as a paramedic to the handgun. The Apersonal comfort@ doctrine (acts necessary to life, comfort, and convenience at work while strictly personal acts, are considered incidental to work and injuries which happen while performing these acts are considered as having arisen out of employment) did not apply to a worker who was playing with a gun newly acquired by his fellow gun enthusiast co-worker.

[ED Note: The following is included for informational purposes only.**]**

Hall v. White, Getgey, Meyer & Co., LPA, ___ F.3d ___ (No. 01-50981) (5th Cir. Oct. 1, 2003).

This is a legal malpractice action against a law firm that represented a worker for

disability benefits against an insured. The firm=s failure to supplement responses to interrogatories led to the exclusion of the worker=s medical expert witness at trial and forced the worker to settle with the carrier for a nominal amount.

[ED. Note: The following FELA hearing loss case is included for informational purposes only.**]**

Mix v. Delaware & Hudson Railway Co., Inc., ___ F.3d ___ (No. 02-9200) (2nd cir. Sept. 23, 2003)

At issue here is whether a plaintiff complaining of a gradual hearing loss injury can assert a cause of action based upon injuries sustained during the three-year period preceding the filing of his FELA claim. [Summary motion was upheld as to the period of claimed loss that proceeded the three year tolling period.] While the Second Circuit refused to apply the Acontinuing tort doctrine@ espoused by the plaintiff, the court, nevertheless, also refused to follow the circuits that bar FELA claims based upon injuries suffered during the three-year period of limitations. The Second Circuit decided that it would Arely upon the plain language of the discovery rule, which provides that the statute of limitations accrues upon the plaintiff=s discovery of both his injury and its cause.@ The court explained that under such a rule a plaintiff can recover for injuries suffered during the three-year period preceding the suit, if those injuries are sufficiently distinct from those previously suffered. It further noted that a plaintiff can also recover for aggravation to existing injuries, provided that the aggravation was caused by a distinct act of negligence whose existence and relationship to the injury was unknown prior to the three-year period preceding the suit.

[ED. Note: The following state court case is included for informational purposes only. It should further be noted that at the time this Digest went to press, the opinion had not been released for publication in the permanent law reports and until such time as it is released, it is subject to revision or withdrawal.**]**

Jefferson v. Cooper/T. Smith, ___ So.2d ___ (No. 2002-CA-2136)(La. App. 4 Cir. Oct. 1, 2003), 2003 WL 22383756.

A worker=s widow brought this negligence action against the New Orleans Dock Board (a quasi state corporation which controls dock operations on the New Orleans water front) as owner of docks, wharves, and warehouses on the Mississippi River which may have posed a danger to dock workers/longshoremen by exposing them to asbestos. The state district court entered a summary judgment for the Dock Board. On appeal, the state appellate court held that there is a material issue of fact as to whether the Dock Board knew or should have known of dangers posed by asbestos at the time the worker was a longshoreman and that this precluded a grant of summary judgment.

II. Black Lung Benefits Act

Benefits Review Board

In *Gross v. Dominion Coal Corp.*, ___ B.L.R. ___, BRB No. 03-0118 BLA (Oct. 28, 2003), the ALJ properly held that Claimant=s petition for modification was timely filed. Employer and Director argued that the ALJ erred in adding seven days to the one year time period at 20 C.F.R. ' 725.310 (2000). Indeed, the Board noted that the ALJ erroneously applied the former provisions at 20 C.F.R. ' 725.311(c) (2000), which state that A[w]henever any notice, document, brief or other statement is served by mail, 7 days shall be added to the time within which a reply or response is required to be submitted.@ Because the claim at issue was pending on January 19, 2001, the Board held that the ALJ should have applied the amended regulatory provisions at 20 C.F.R. ' 725.311(c) (2001), which specifically deleted the seven day grace period Abecause it had generated confusion as to the deadline for filing a modification petition.@ Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,920, 79, 977 (Dec. 20, 2000).

Nevertheless, the Board held that the petition was timely filed. In support of this finding, the Board held that the phrase Aprior to one year after the rejection of a claim@ means Abefore the 365th day ends@ (including a case involving a leap year). Therefore, contrary to arguments of Employer, the Board held that Claimant had 365 days Afrom the effective date of the Board=s decision rejecting his claim in which to request modification.@

The Board held that its decision became effective on November 6, 1998, the date on which the decision was filed with the Clerk of the Board. 20 C.F.R. '' 802.403(b), 802.406, 802.407(a), 802.410(a); *Stevedoring Servs. of America v. Director, OWCP [Mattera]*, 29 F.3d 513 (9th Cir. 1994); *Butcher v. Big Mountain Coal Co.*, 802 F.2d 1506 (4th Cir. 1986); *Pifer v. Florence Mining Co.*, 8 B.L.R. 1-498 (1986).

From this, the Board held that Aday one of the 365 days for claimant to request modification was November 7, 1998, and day 365 was November 6, 1999.@ Because November 6, 1999 was a Saturday, Claimant had until Monday, November 8, 1999 to file the petition. As a result, the Board concluded that Claimant=s request for reconsideration, which was received by the district director on November 8, 1999, was a timely filed petition for modification.

Turning to the merits of the claim, the Board upheld the ALJ=s finding that pneumoconiosis was a Asubstantially contributing cause@ of the miner=s total disability under 20 C.F.R. ' 718.203(c)(1) (2001). Specifically, the Board held that Dr. Forehand=s opinion supporting causation was well-reasoned where he concluded that the miner=s respiratory impairment arose from a combination of his 29 year smoking history and 25 years of working as a roof bolter in the mines. Dr. Forehand stated that pneumoconiosis and tobacco abuse both Alead to the type of airflow limitation@ demonstrated by objective testing of record. Contrary to Employer=s argument, the Board concluded that Dr. Forehand was not required to Aspecify relative contributions of coal dust exposure and cigarette smoking to establish that claimant=s total disability@ was due to pneumoconiosis.

In this vein, the Board noted that the amended regulatory provisions at 20 C.F.R. ' 718.204(c) (2001) were intended to codify, not displace, existing circuit court case law on the issue of causation. The Board then cited to pre-amendment Fourth Circuit case law, *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n. 8 (4th Cir. 1995), and stated that pneumoconiosis must be Aat least a contributing cause@ of the miner=s total disability, although it Acannot play a merely *de minimus* role.@