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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 178
July – November 2005

John M. Vittone
Chief Judge (Longshore)

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

COURTS

A. United States Supreme Court

B. Circuit Court Cases

West v. Dynair CFE Services, Inc., (Unpublished) (No. 04-14536)(**11th Cir.** August 15, 2005).

The **Eleventh Circuit** upheld the federal district court in this Defense Base Act case where the claimant was found to be a borrowed servant of the "employer" and not entitled to bring a negligence or strict liability claim since Section 5(a) of the LHWCA forecloses such actions. Here the claimant was a pilot injured in a crash in Columbia. DynCorp, the borrowed employer, had contracted with the U.S. State Department to eradicate coca plants in Columbia. The contract called for fixed wing pilots to fly aircraft and conduct aerial spraying missions. Dyncorp had no pilots to fly its aircraft, so it subcontracted with East to provide qualified fixed wing pilots. The claimant was one of these pilots.

[Topics 5.2.1 Exclusiveness of Remedy and Third Party Liability—Generally; 60.2.1 Longshore Act Extensions--Defense Base Act—Applicability of the LHWCA]

Omega Protein Inc., v. Druilhet, ___ F.3d ___ (Unpublished)(No. 05-60165 Summary Calendar)(August 16, 2005).

At issue was whether there was substantial evidence to support the ALJ's finding that the employer failed to establish the existence of suitable alternate employment. While working as a dock supervisor, the claimant was sucked in by a ten-inch suction hose normally used by the employer to remove fish from the holds of vessels. He

sustained a broken right femur and pelvis, as well as injuries to his gallbladder, kidneys and teeth. He returned to work, at his regular wage rate, in a lighter duty position as a night shift supervisor. Subsequently he was terminated when that position was eliminated. The employer offered him work as a warehouse clerk but he declined.

The employer did not dispute that the claimant made a prima facie showing that he was disabled. The employer never identified suitable jobs available in the relevant labor market. Rather, it offered him a specific job which he declined to accept. The court found that there was sufficient evidence to support the ALJ's conclusion that the claimant could not perform the offered job.

The employer also argued that the claimant failed to prove that he actively sought employment other than the offered position. However, the court noted that this duty on the part of a claimant is not triggered until the employer establishes the availability of suitable alternate employment. "In the LHWCA's burden shifting scheme, where [the employer] failed to satisfy its burden to establish the availability of suitable alternate employment, the burden does not shift back to [the claimant] to establish that he actively sought employment.

[Topics 8.2.4 Extent of Disability--Partial disability/Suitable Alternate Employment; 8.2.4.1 Extent of Disability--Burdens of Proof; 8.2.4.2 Extent of Disability--Suitable alternate employment: Employer must show nature, terms, and availability]

Ceres Gulf, Inc. v. Director, (Unpublished)(No. 04-60771)(Summary Calendar)(5th Cir. Aug. 5, 2005).

The sole issue for the court was whether the Board erred in upholding the ALJ's decision denying a Section 8(f) claim. In this case, the court noted that because the worker was permanent partially disabled, the employer had the burden of establishing four elements in order to obtain relief. The fourth element, needed in cases of permanent partial disability, is that the new injury must be made materially and substantially greater than what it would have been had the worker suffered the current injury alone. The **Fifth Circuit** examined the evidence of record and noted the ALJ's analysis. In denying the employer Section 8(f) relief, the court then stated, "We have said before that 'this court does not have the expertise necessary to properly evaluate the complex and frequently conflicting testimony of neurological surgeons, orthopedist (sic), and other medical experts on this score. Instead, we must leave this particular fact finding decision precisely where Congress placed it—with the ALJ."

[Topic 8.7.6 Special Fund Relief-- In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone; 19.3 Procedure—Adjudicatory Powers; 19.3.5 Procedure—ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon]

Hoda v. Rowan Companies, ___ F.3d ___ (No. 04-30080)(**5th Cir.** July 29, 2005).

In this third party indemnity action involving offshore exploration and production, enforcement of the indemnity clause depended on whether or not the contract was maritime in nature. The Louisiana Oilfield Anti-Indemnity Act, La. Rev. Stat. Ann. § 9:2780, invalidates indemnity provisions if the contract in "non-maritime." If a contract is a "maritime" agreement, federal maritime law does not bar enforcement of an indemnity provision. The **Fifth Circuit** concluded that torquing up and torquing down blow-out preventers from a jack-up drilling rig used as a work platform "is an integral part of drilling, which was the primary purpose of the vessel" on which the borrowed worker was injured. Thus, there was a maritime contract and the indemnity provision was valid.

[Topic 5.2.2 Exclusiveness of Remedy and Third Party Liability—Indemnification; 60.3.1 Longshore Act Extensions--Outer Continental Shelf Lands Act—Applicability of the LHWCA]

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

Riverwood Int'l. Corp. v. Employers Ins. Of Wausau, ___ F.3d ___ (No. 04-30608)(**5th Cir.** Aug. 4, 2005).

In order to determine if there was workers compensation insurance coverage here, there had to be a determination as to whether an asbestos-related disease is a "bodily injury by accident" as that term is interpreted under several workers' compensation and employers' liability insurance policies. The **Fifth Circuit** found that the policies in question were subject to only one reasonable interpretation—that an asbestos-related injury is not a "bodily injury by accident" under the policies in question. "When the plain terms of the Policies are viewed as a whole, it is clear that an asbestos-related disease is not a 'bodily injury by accident.'"

[Topic 2.2.13 Definitions—Occupational Disease: General Concepts; 2.2.15 Definitions—Occupational Disease vs. Traumatic Injury]

Uzdavines v. Weeks Marine, Inc., ___ F.3d ___ (Docket No. 03-40084)(**2nd Cir.** Aug. 3, 2005).

The **Second Circuit** up held the ALJ's finding that there was no jurisdiction since the decedent qualified as a member of a crew of a vessel. The court noted that in all material respects, the bucket dredge in the instant case was indistinguishable from the dredge at issue in *Stewart v. Dutra Construction Co., Inc.*, 125 S.Ct. 1118, ___ **U.S.** ___ (2005). The court also noted that the **Supreme Court's** decision in *Stewart* supersedes

the three-part test that the **Second Circuit** had previously developed in *Tonnesen v. Yonkers Constracting Co.*, 82 F.3d 30 (**2nd Cir.** 1996)(A floating structure would not qualify as a 'vessel in navigation' if, *inter alia*, the 'transportation function performed by the [purported vessel] was merely incidental to its primary purpose of serving as a work platform.).

The court also found that the employer was not collaterally estopped from litigating the coverage issue in this widow's claim when the employer had previously used Section 33(g) as a defense in the worker's disability claim. The court agreed with the ALJ that the coverage issue had not been previously litigated. Additionally the court noted that in the previous claim the parties had stipulated that the stipulations were in no way binding with respect to any other claims brought against the employer. Likewise, the court found that judicial estoppel did not apply since the parties' stipulation concerning the scope of the LHWCA was limited to the decedent's disability claim, and therefore, the employer was not taking an "inconsistent" position by now asserting, as a defense to petitioner's survivor's claim, that the decedent was not covered.

[Topics 1.4.2 Jurisdiction/Coverage—Master/member of the Crew (seaman); 1.4.3 Jurisdiction/Coverage—Vessel; 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies]

Stewart v. Dutra Construction Co., Inc., ___ F.3d ___ (Nos. 99-1487, 00-1090, 02-1713)(**1st Cir.** Aug. 9, 2005), *on remand from Stewart v. Dutra Construction Co., Inc.*, 125 S.Ct. 1118, ___ **U.S.** ___ (2005).

On remand from the **Supreme Court**, the employer tried to persuade the court that a jury must decide whether the "SUPER SCOOP" was a vessel. The employer argued that factual disputes lingered as to whether the dredge was capable of maritime transportation. The **First Circuit** answered thusly: "This is whistling past the graveyard. The **Supreme Court** addressed this very issue and found that no factual questions remain open. Because Dutra is trying to relitigate a point squarely addressed and authoritatively resolved by the **Supreme Court**, its effort is doomed to failure." The employer also tried on remand to assert that the worker was not a seaman. After noting the uncontradicted evidence of record, the circuit court stated: "We need go no further. The **Supreme Court** decision, viewed against the backdrop of the record and the proceedings to this point, shows beyond hope of contradiction that the plaintiff must be regarded as a seaman for Jones Act purposes."

[Topics 1.4.2 Jurisdiction/Coverage—Master/member of the Crew (seaman); 1.4.3 Jurisdiction/Coverage—Vessel]

Bunch v. Canton Marine Towing Co., Inc., 419 F.3d 868 (**8th Cir.** August 23, 2005).

The **Eighth Circuit** reversed and remanded a district court's granting of Summary Judgment wherein that court had found that a barge cleaner who worked on a cleaning barge moored to the bed of the Missouri River was not a Jones Act seaman. The **Eighth Circuit** found that under the Jones Act, a vessel is not defined by its capability for self-propulsion. Rather, it reasoned that a vessel was any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. While the barge was moored to the riverbed by spud poles, it was originally built for navigation. The court noted that while the barge did not have propellers and did not move by itself, it had been moved from its mooring to travel across the river while the employee had worked for the employer. Thus, the court found that it was a vessel in navigation and that the employee had a substantial connection to it.

[Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act, 1.4.3 Jurisdiction/Coverage--Vessel]

C. Federal District Court Decisions/Bankruptcy Court

Nordan v. Blackwater Security consulting, LLC, ___ F. Supp. 2d ___ (E.D. N.C., West Div.)(Aug. 11, 2005).

In this Defense Base Act claim, a plaintiff estate administrator sued the defendant, asserting state law claims for wrongful death and fraud. The defendant security company removed the matter to federal court asserting complete preemption under the DBA Thereafter the defendants moved to dismiss the complaint and the estate administrator moved to remand to state court.

The defendants provided security personnel for a catering company in the Middle East. The estate administrator alleged that the decedents were sent on a security mission with inadequate training, tools, and information. The defendants contended that the DBA completely preempted the state law claims, and alternatively, that the suit presented "unique federal interests" requiring federal jurisdiction. The court remanded the case and upon review of the DBA's scheme for compensation claims, the court concluded that it did not completely preempt state law claims. The DBA lacked a provision for bringing a cause of action in the federal district courts. Instead, the court found that the DBA provided for the exclusive filing of a wrongful death claim with the Secretary of Labor, adjudication by a deputy commissioner or administrative law judge, initial review by the Benefits Review Board, and appellate review by a federal court of appeals. The court reasoned that as the federal district courts were not involved in the DBA claims adjudication process, the court lacked jurisdiction. The court also questioned whether a claim of "unique federal interest" was sufficient to confer federal jurisdiction and concluded that such a claim was inapplicable; "This asserted unique federal interest, however, being based upon coverage under the DBA, assumes the very conclusion which this court lacks jurisdiction to reach, namely that the decedents in this case are covered as

employees under the DBA. As discussed above, …, although this issue is plainly a federal question, it is not an issue which this court has jurisdiction to address."

[Topics 60.2.1 Longshore Extension Acts—Defense Base Act—Applicability of the LHWCA; 60.2.4 Longshore Extension Acts—Defense Base Act—Substantial Rights Determined Under provisions of LHWCA as Incorporated into the DBA]

Rogers v. Army/Air Force Exchange Service, (Civ. Act. No. 3:04-CV-2403-P)(N. D. Texas July 28, 2005).

In this perplexing case, the federal district court denied a Motion to Dismiss where a former worker sued for (1) a Title IIV EEOC complaint, defamation, and (3) enforcement of an OWCP order. The *pro se* plaintiff alleged that a hostile work environment caused her to suffer stress and depression to the extent that she required medical attention. She claims that after she had a telephone hearing [Informal conference?] with representatives of DOL and AAFES's insurance company, that although DOL ordered AAFES to pay her medical compensation for her treatment, AAFES' insurance company denied her claims for compensation.

The defendant contended that federal district court should dismiss the enforcement charge since the plaintiff's claim for denial of compensation of medical benefits lacked subject matter jurisdiction under the LHWCA. In essence, the defendant argued that the LHWCA does not provide district courts with jurisdiction to review a compensation order. Without noting that the matter has never made its way up to OALJ, the federal district court, finding for the claimant, found that the plaintiff was not asking for review of the order, but rather was alleging that AFFES failed to comply with the OWCP order. The federal district court construed this complaint as a request for enforcement of a compensation order and cited Section 21(d). The court then gave the parties 60 days to file a Motion for Summary Judgment. Apparently the federal district court overlooked the word "final" in Section 21(d) wherein a beneficiary of an award may apply for enforcement when an order has become final.

[Topic 21.5 Review of Compensation Order—Compliance]

D. Benefits Review Board Decisions

Pedroza v. National Steel & Shipbuilding Co., (Unpublished)(BRB No. 05-0419)(August 10, 2005).

The Board re-affirmed its holding in *Marino v. Navy Exchange*, 20 BRBS 166 (1988), that personnel actions are not "working conditions" under the LHWCA, and consequently affirmed the denial of benefits in this psychological injury claim. In the instant case the Board stated that there was no dispute that the claimant has a psychological injury but found that a forklift accident did not cause the psychological

injury. The Board further noted that the psychological injury was not due to generally stressful working conditions, but rather was caused by job action warnings and demotion, which were legitimate personnel actions. The Board noted that this determination that injuries resulting from legitimate personnel actions do not arise from a claimant's working conditions is based on sound policy considerations. This rule has been practices in areas outside longshore law. Further, the Board, while recognizing the lack of precedential value of unpublished decisions, noted that the **Sixth** and **Ninth Circuits** have issued such decisions upholding decisions following *Marino*. *Army & Air Force Exchange Service v. Drake*, 172 F.3d 47 (No. 96-4229)(**6th Cir.** Dec. 3, 1998)(table); *Turner v. Todd Pacific Shipyards Corp*., 990 F.2d 1261 (No. (1-70524)(**9th Cir.** April 8, 1993)(table).

[Topics 2.2 Definitions—Injury; 2.2.2 Definitions—Arising Out Of Employment; 2.2.9 Definitions—Course of Employment; 20.2.3 Presumptions--Occurrence of Accident or Existence of Working conditions Which Could Have Caused the Accident]

Lynch v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 04-0808)(July 13, 2005).

This matter involves the issue of choice of treating physician and whether the district director or ALJ has jurisdiction to decide the matter. Here, when the claimant's treating orthopedist closed his private practice, the claimant chose his family physician as his new treating physician. The employer responded that the claimant should see an orthopedic specialist. The claimant then chose an orthopedic surgeon who had previously treated the claimant years ago for a non-work-related knee injury. The employer objected on the basis that the claimant should seek treatment by a spine specialist. The employer wanted the claimant to seek treatment from the former partners of the doctor who had closed his private practice.

In a Memorandum of Informal Conference, the claims examiner stated that the claimant's chosen orthopedic surgeon does not specialize in the treatment of backs and agreed with the employer that the claimant should treat with a spine specialist. The claims examiner located a "neutral" spine specialist and ordered the employer to schedule an appointment for the claimant with that doctor. That doctor examined the claimant and recommended that he seek treatment from a pain management doctor and follow-up with him as needed.

The claimant requested a referral to OALJ to address the claim's examiner's memorandum directing the claimant to seek treatment from the claim's examiner's doctor and the refusal of the claim's examiner to authorize claimant's choice of doctors as his treating physician. The ALJ denied the employer's Motion for Summary Decision wherein the employer argued that the ALJ lacked jurisdiction to address the issue, as the choice of physician issue is solely within the discretion of the district director.

In the denial, the ALJ stated that, "if claimant's counsel still wishes for Dr. Stiles [claimant's choice after his first choice resigned private practice] to be the treating physician, it would be helpful if counsel presented a concise description of Dr. Stiles practice regarding treatment of the spine."

At a subsequent formal hearing the ALJ found that he had jurisdiction to resolve the issue of the claimant's choice of a treating physician because there was a factual dispute as to Dr. Stiles' qualifications to treat the claimant's back condition. The ALJ noted that the claimant's counsel was to provide additional details addressing the nature of Dr. Stiles' practice and that no such documentation was submitted. The ALJ declined to take judicial notice of Dr. Stiles' specialization based on his familiarity with Dr. Stiles from prior cases. Instead, the ALJ reasoned that the claimant's counsel had appeared before him in several hundred cases arising under the LHWCA, and accepted counsel's "testimony" at the hearing that Dr. Stiles treats spinal impairments.

On appeal, the Board found that the claimant had "good cause" for requiring a new physician and thus did not need to obtain approval from the employer or district director in order to treat with Dr. Stiles. However, notwithstanding that the claimant had a right to choose a new attending physician, the district director had the authority under Section 702.406(b) and Section 702.407(b), (c), to address the employer's objection to Dr. Stiles' qualifications to treat the claimant's back condition and to order a change in the treating physician.

Next the Board noted that "despite the authority the district director has over certain medical matters, the Board has declined to interpret the provisions of Section 7(b) of the Act, or Section 702.407 of the regulations, in such a manner as to exclude the [ALJ's] jurisdiction over questions of fact." As there was a disputed issue of fact (i.e., the doctor's qualifications and whether he specializes in spinal injuries) the Board held that the ALJ had the statutory authority to address the reasonableness of the claimant's choice of physician.

As to the ALJ's designation of the claimant's treating physician, the Board found that the ALJ properly found that the claimant is entitled to his choice of physicians who treats spinal impairments. However, the Board noted that counsel's statements in briefs to the ALJ were not part of the evidentiary record. Furthermore, the attorney did not testify at the hearing . Accordingly, the Board vacated the designation of treating physician. The Board noted that while claimant was given the opportunity by the ALJ to submit evidence as to Dr. Stiles' qualifications, only the doctor's CV was submitted. Although the record was left open, the claimant's brief stated that further information from Dr. Stiles was unavailable.

Inasmuch as claimant was provided ample opportunity by the [ALJ] to present specific evidence of Dr. Stiles' qualifications to treat back injuries, we will not remand this case to the [ALJ] for further findings of fact. We instead remand this case to the district director. On remand, the district director should issue an order addressing and resolving the parties' contentions regarding claimant's choice of Dr. Stiles as his treating

physician. The district director's order should 'determine the necessity, character, and sufficiency" of any medical treatment to be provided by Dr. Stiles, and determine whether treatment by another physician is desirable or necessary in the interest of the employee."

[Topic 7.4.1 Medical Benefits--Free Choice of Physician—Authorization by Secretary; 7.5 Medical Benefits—Change of Physicians]

Wheeler v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 04-0742)(Sept. 22, 2005).

In this previous "Unpublished" case, the Director filed a motion to publish, which although opposed by the employer, has been granted.

Pearson v. Jered Brown Brothers, ___ BRBS ___, (BRB No. 04-0964)(Sept. 23, 2005).

In this situs issue matter the claimant was injured while manufacturing connectors for a pontoon to be incorporated into an elevated causeway structure system that the employer was building for the U.S. Navy. The employer was a manufacture of ship components and maritime products, operations it facility on a site with river frontage. The employer had relocated its operation from Michigan in order "to be on a deepwater site with ocean shipping capabilities," and it advertises "access to shipping by water right off [its] property." Pilings were installed on the river adjoining the employer's property in order to allow barges to dock. Although the employer had yet to pursue its plans to build piers alongside its property, it had shipped some products, notably three large cranes and a launch table for Cape Canaveral, by barge from its waterfront. Nevertheless, the majority of its output was delivered by truck or rail.

In reversing the ALJ, the Board noted that an "adjoining area" found in Section 3(a) must have a maritime use, but need not be used exclusively or primarily for maritime purposes. The Board noted that the **Eleventh Circuit** (wherein this employer is located) follows the **Fifth Circuit's** standard enunciated in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (**5th Cir.** 1980)(*en banc*), *cert. denied*, 452 **U.S.** 905 (1981)("The perimeter of an "area" is defined by function; thus, the area must be customarily used by an employer in loading, unloading, repairing or building a vessel."). After examining the facts, the Board found that the employer's facility was used for a maritime purpose and thus met the *Winchester* "function" requirement. The facts established both a geographical and functional nexus required under *Winchester*.

[Topic 1.6.1 Jurisdiction/Coverage—Situs—"over water;" 1.7.1 Jurisdiction/Coverage—Status—"Maritime Worker"(Maritime Employment"); 1.9 Jurisdiction/Coverage—Maritime Employer]

Charpentier v. Ortco Containers, Inc., ___ BRBS ___ (BRB No. 04-0962)(Sept. 23, 2005).

This is a novel Section 21(c) issue. The claimant contended that he was entitled to benefits for the period between when the **Fifth Circuit** vacated the Board's decision and instructed that the case be remanded to OALJ for reinstatement of the initial decision which denied benefits to the claimant, and when the **Supreme Court** denied *certiorari*. the claimant maintained that section 21(c) mandates that the employer continue with the payment of an award, unless a stay is specifically granted, pending a final decision on the claim. The employer argued that in order for Section 21(c) to be applicable, there must be an award requiring payment. The employer maintained that once the **Fifth Circuit's** decision was issued, there was no longer any award in existence requiring payment, as that decision was a final decision as defined by Section 21(c) of the LHWCA.

The language of Section 21(c), pertinent to the claimant's contentions on appeal is that the court has authority to "set aside" a Board order and that "[t]he payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. "No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier." Interpretation of this portion of Section 21(c), via its plain meaning, reveals that the employer is obligated to continue "the payment of amounts required by an award" throughout the adjudicative process until the issuance of a final decision. As of the date of issuance of the **Fifth Circuit's** decision "setting aside" the Board's order, as suggested by employer and determined by the ALJ, there was no longer any amount "required by an award" since that decision effectively terminated the prior award of benefits. Contrary to the claimant's assertion, it therefore became unnecessary at that point for the employer to file a stay of payment since, by virtue of the **Fifth Circuit's** decision, there was no longer "an award" requiring the payment of benefits.

Additionally, the Board noted application of the "mandate rule." A corollary of the law of the case doctrine, this rule provides that a lower court on remand must "implement both the letter and the spirit of the [appellate court's] mandate," and may not disregard the "explicit directives" of that court. The **Fifth Circuit's** decision herein explicitly directed that the case be "remanded to the ALJ for reinstatement of the ALJ's initial holding, which denied benefits to the claimant. To require, as the claimant suggested, the employer to continue to pay benefits while the *writ of certiorari* was pending before the **Supreme Court** would be in conflict with the **Fifth Circuit's** plain and unambiguous mandate conclusively establishing that the claimant was not entitled to benefits.

Additionally, the Board noted that the finality of federal court decisions is dictated by the Federal Rules of Appellate Procedure. Under Rule 41, which pertains to mandates issued by federal courts, an appellate court's mandate, which unless otherwise directed by the court consists of a certified copy of the judgment, is effective as of the

date of issuance. Fed. Rule App. Proc. Rule 41. More specifically, under Rule 41(c), the judgment of the court of appeals becomes final upon issuance and fixes the parties' obligations as of that time. Fed. Rule App. Proc. Rule 41(c). The judgment's effectiveness is not delayed until receipt of the mandate by the trial court, in this case the Board or the ALJ, or until that tribunal acts upon it.

Consequently, the Board found that the plain meaning of the phase "required by an award" as articulated in Section 21(c) of the LHWCA, as well as the application of Rule 41(c) of the Federal Rules of Appellate Procedure, dictate that the Board affirm the ALJ's finding that the claimant was not entitled to benefits for the period between the **Fifth Circuit** denial and the **Supreme Court's** issuance of the *writ of certiorari*.

[Topics 21.3 Review of Compensation Order--Review By U.S. Courts of Appeals; 21.2.12 Review of Compensation Order--Law of the Case; 85.5 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies--"Law of the Case Doctrine"]

Schuchardt v. Dillingham Ship Repair, ___ BRBS ___ (BRB No. 05-0125)(Sept. 29, 2005).

In this responsible employer issue case the Board found that "all of the parties erroneously conflate the issues of responsible employer and causation." The Board noted that the causation determination is made without reference to a particular covered employer. That is, the Section 20(a) Presumption is not invoked against a particular employer; instead, the evidence of record must be considered to determine if the evidence is sufficient to invoke the Section 20(a) presumption on behalf of a claimant. In other words, in the instant case, if the claimant establishes a prima facie case, Section 20(a) applies to connect the decedent's asbestosis-related death to his exposure to asbestos. In a multiple employer case, any of the employers can rebut the Section 20(a) presumption by producing substantial evidence that the decedent's death was not related to or hastened by his employment exposure. If any of the employers rebuts the presumption, the presumption no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion.

If the death is found to be work-related, then the employers must establish which of them is liable for benefits. Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (**2d Cir.**), *cert. denied*, 350 **U.S.** 913 (1955), the responsible employer in an occupational disease case is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising our of his employment. The claimant does not bear the burden of proving which employer is liable; rather, each employer bears the burden of establishing it is not the responsible employer. In order to establish that it is not the the responsible employer, an employer must demonstrate either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the

employee was exposed to injurious stimuli while working for a subsequent covered employer.

In the instant case, the Board held that the ALJ erred by stating that the claimant invoked the Section 20(a) presumption against only particular employers in order to determine which of then is liable. It further held that as a matter of law, the claimant established that the decedent's death was related to his asbestos exposure during the course of his employment as a welder/fitter and that there was no evidence sufficient to rebut the Section 20(a) presumption with regard to causation. The burden of proof therefore was on each of the decedents covered employers to establish that it was not the responsible employer without the benefit of the Section 20(a) presumption.

On remand, the Board specifically instructed that the ALJ reconsider the responsible employer issue consistent with law, bearing in mind the principle that each employer bears the burden of proving it is not liable for the claimant's benefits without reference to the Section 20(a) presumption.

[Topics 20.2.1 Presumptions—*Prima Facie Case;* 20.3 Presumptions—Employer Has Burden of Rebuttal With Substantial Evidence]

Kirkpatrick v. B.B.I., Inc., ___ BRBS ___ (BRB No. 05-0123)(Oct. 12, 2005).

At issue in this OCSLA case is the nature of the claimant's total disability and one carrier's right to reimbursement. Previously the Board affirmed the ALJ's initial decision and held that the claimant satisfied the OCSLA status and situs requirements and was covered under the OCSLA, that Sections 12 and 13 of the LHWCA were inapplicable to the claim of a carrier, Houston General Insurance Company, and its successor in interest following insolvency, Texas International Solutions, LLC (collectively referred to as Houston General) for reimbursement from Insurance Company of North America, now known as Ace, USA (collectively referred to as INA), and were satisfied by the claimant when he originally filed his claim for benefits, that the claimant was entitled to benefits under the LHWCA, that none of the carrier's equitable defenses applied to this case, that the plain language of the insurance policies established that the carrier's policy covered work off the coast of Louisiana where the claimant was injured and, thus, that the carrier was liable for the claimant's benefits.

The claimant was injured while working in an office on an offshore oil platform that was still under construction. When he reached for the phone, he injured his back. After undergoing five surgeries, and suffering a post-injury stroke; he was totally disabled. Huston General, voluntarily paid claimant disability and medical benefits from 1989 until May 2, 2001, when it disputed its liability for benefits.

Subsequent to the ALJ's decision on remand, the district director approved a settlement between the claimant and INA for future benefits due. The settlement

provided for INA to pay the claimant a lump sum of $284, 000, $10,000 of which is for his attorney's fee and the remainder for permanent total disability and medical benefits commencing May 3, 2001. INA waived its rights to appeal the ALJ's and Board's decisions regarding the "responsible carrier" issue as they affect claimant; however, INA made no admission to being the responsible carrier and reserved its appellate rights regarding that issue as it pertains to Houston General's reimbursement claim. The same day the settlement was approved, INA appealed the ALJ's Decision and Order on remand.

On appeal, INA argues that its settlement with the claimant constitutes a "change in underlying circumstances" affecting this case in two ways. First, INA argues that the settlement makes the law of the case doctrine inapplicable such that it would be necessary to revisit the responsible carrier issues related to the reimbursement claim. (Those issues include coverage under the OCSLA, the doctrines of equitable estoppel, laches, and "jurisdictional" estoppel, and whether the claimant's work was "temporary" and therefore covered under Houston General's policy.)

Secondly, INA contended that the settlement divested the Board and the ALJ of the authority to resolve the reimbursement dispute between the two carriers pursuant to *Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT)(5th Cir. 2001), *rev'g 3*3 BRBS 81 (1999), rendering the Board's holding that INA must reimburse Houston General and its rejection of the equitable defenses moot. It also argued that *Tarver v. Bo-Mac Contractors, Inc*., 384 F.3d 180, 38 BRBS 71(CRT)(**5th Cir.** 2004), *aff'g* 37 BRBS 120 (2003), *cert. denied*, 125 S.Ct. 1696 (2005), constitutes intervening law addressing the issue of coverage under the OCSLA.

The Board rejected the assertion that the 2004 settlement agreement constituted a change of the underlying circumstances of the case and prohibited the use of the law of the case doctrine. The Board noted that the settlement could not constitute an "underlying" circumstance because it was agreed upon after the decisions in this case were issued. Generally, to show a change in underlying circumstances, a party must demonstrate that new evidence related to the facts of the case has come to light. In the instant case, the settlement occurring after the fact, does not change the circumstances related to the claimant's injury or the coverage of the insurance policies. Moreover, although INA settled with the claimant and resolved his interest in this case, it did not admit to being the responsible carrier and it retained its right to dispute that issue as between the carriers for benefits owned prior to May 3, 2001. "Thus, as to the dispute regarding the responsible carrier under the [LHWCA], the settlement changed nothing. As there has been no change in the underlying circumstances of this exception to the application of the law of the case doctrine does not apply." The Board held that the law of the case doctrine applied. Additionally, the Board found that *Tarver* does not address OCSLA coverage.

As to whether or not there is jurisdiction as to the reimbursement issue, the Board noted that this issue arose as a natural result of the responsible carrier ruling and clearly is "in respect of" the claimant's compensation claim. Therefore, the Board rejected the

assertion that the settlement between the claimant and INA divested the Board of jurisdiction to address this issue.

[Topic 19.1 Procedure—The Claim: Generally; 21.2.12 Review of Compensation Order--Law of the Case; 60.3.1 Longshore Extension Acts—OCSLA; 70.12 Responsible employer—Responsible Carrier; 85.5 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies—"Law of the Case" Doctrine]

Richardson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 05-0151)(Oct. 24, 2005).

Here the Board found that substantial evidence supported the ALJ's finding that the claimant established a *prima facie* case. The ALJ had determined that the claimant worked in cramped quarters where he was regularly exposed to dust and fumes from grinding, sanding, painting and welding, and that the claimant had established that working conditions existed with the employer which could have caused his COPD. The Board affirmed these findings of fact as rationale and supported by substantial evidence. It also affirmed the ALJ's conclusion that the claimant sustained a work-related obstructive disease as a result of his inhalation of welding fumes.

The employer also alleged that the claimant's third-party settlements barred recovery under Section 33(g). The claimant had claimed in his third-party lawsuit that he suffered from "exposure to toxic substances including asbestos…which caused him to sustain severe injury to his body and respiratory system, resulting in his impairment and disability." However, the Board noted that the only relevant information for purposes of Section 33(g), are the actual terms of the settlement agreement. According to its terms, the settlement agreement between the claimant and the third-party covered "all injuries and/or disorders, allegedly resulting from exposure to and/or contact with, asbestos and/or products containing asbestos, including but not limited to, claims for asbestosis, pneumoconiosis and any other alleged asbestos-related injury, disease and/or disorder." The document later reiterated that the claimant agreed to release the third-party of any other claims "arising out of, relating to, or resulting from, or in any way connected to [claimant's] alleged exposure to asbestos products, or other products mined, manufactured, distributed, marketed and/or sold by [the third-party].

The Board, thus concluded that it was clear from the disability claimed and covered by the third-party settlements that related exclusively to the claimant's exposure to asbestos, that it does not by its very terms, cover the claimant's disability related to his COPD.

As the Board has previously held, in order for Section 33(g) to apply, the disability for which the claimant seeks compensation under the LHWCA must be for the same disability for which he recovered from third parties. As the third-party settlements are for asbestos-related conditions, they do not involve the same disability, i.e., COPD

related to inhalation of substances other than asbestos, for which the claimant obtained benefits under the LHWCA.

The Board also upheld the ALJ's determination that the employer had not established the contribution element for Section 8(f) relief. "The employer's 'mere generalized statements' that the claimant's pre-existing asthma was the primary, if not exclusive, cause of his present impairment, did not quantify the extent of the claimant's permanent impairment from his work-related obstructive lung disease alone.

[Topic 20.2.1 Presumptions—*Prima Facie Case;* 33.7 compensation for Injuries Where Third Persons Are Liable-- Ensuring Employer's Rights—Written Approval of Settlement]

Gonzalez v. Tutor Saliba, ___ BRBS ___ (BRB Nos. 05-0406 and 05-0406A)(Oct. 26, 2005).

In this situs issue matter, the claimant was injured on a temporary construction trestle adjacent to a bridge, erected between the four foot wide area between the east and west bound spans and near the shore. The trestle was connected to both spans and consisted of timber mats supported by pilings. The trestle was constructed by driving piles through the bridge deck and into the bay and placing the mats on top of beams placed across the pilings. Its purpose was to allow cranes and other machinery access to the bridge, which was not closed to vehicular traffic during the construction project. The trestle originally extended over San Francisco Bay from the Marin County shoreline. It was 1200 feet long, 28 feet wide and two feet above the bridge deck. As work on the bridge progressed, the trestle could no longer be attached to the shoreline. It was moved down the length of the bridge span and eventually could be accessed only from the bridge. Most of the pilings supporting the trestle were temporary, but some were incorporated into the bridge on a permanent basis. The claimant worked on the trestle and the bridge; he welded, fitted, built and broke down the trestle and assembled a handrail on the bridge. He wore a life jacket during this employment. The trestle was not used to load or unload vessels; all materials for the project were transported by truck onto the bridge. On the day of the claimant's injury, he was working on the trestle over the bridge, after the mats attached to the shoreline had been removed in order that they could be reinstalled at the other end of the trestle. Thus the trestle was no longer connected to the shore.

The Board found that although the trestle was not to be an "everlasting," permanent structure, its characteristics and its connection to a permanent, non-covered site compel the conclusion that the claimant was not injured on "navigable waters." Additionally, the Board found that the trestle was not a "pier" pursuant to Section 3(a) or an "adjoining area customarily used" for a maritime purpose and therefore affirmed the ALJ's finding that the claimant's injury does not fall within the LHWCA's coverage.

[Topics 1.6.1 Jurisdiction/Coverage--Situs—"Over water," 1.6.2 Jurisdiction/Coverage—Situs--"Over land;" 1.7.3 Bridge Building]

E. ALJ Decisions and Orders

F. Other Jurisdictions

Grennan v. Crowley Marine Services, Inc., 2005 Wash. App. LEXIS 1788 (No. 55134-5-1)(July 25, 2005).

This state court held that the situs of a maritime worker's injuries off Sakhalin Island, Russia, falls within the coverage of the LHWCA. "The [LHWCA] was enacted to create a uniform system to compensate longshoremen and harbor workers for workplace injuries regardless of the situs of the injuries. This underlying purpose is one of the bases that overcomes the presumption that the LHWCA is not to be applied outside the territorial limits of the United States."

The claimant had worked for Seattle based Crowley Marine Services for over 29 years. At the time of his injury he was involved in transporting materials for the construction of oil facilities. He worked exclusively on the barges and tugs at the Russian work site and lived aboard a Crowley tug. He was forbidden by Russian immigration officials to go onshore.

After his injury, the claimant timely filed a claim for compensation under the LHWCA, but requested the withholding of payments pending his litigation in state court for coverage under the Jones Act and unseaworthiness under the general maritime law. In state court, the employer asserted the affirmative defense that the worker's exclusive remedy was under the LHWCA. As the trial drew near, the claimant moved to strike this affirmative defense on two grounds: (1) first the claimant argued that he did not meet the LHWCA's "status" requirement because he was a "seaman," and (2) his injury had not occurred at a "situs" covered by the LHWCA within "navigable waters of the United States," as that term is used in the LHWCA. The state court granted summary judgment to the employer and denied the claimant's motion to strike the grounds of the affirmative defense.

In making its holding that the situs of the claimant's injury was within the LHWCA, the state court noted that, "In considering the rights and liabilities arising from injury to a longshoreman working on board a ship in navigable waters, we are governed by federal law as to the substantive issues in the case. The rights and liabilities of the parties are within the full reach of the admiralty jurisdiction and measured by the standards of maritime law." The state court cites two circuit cases and one Board decision. *Reynolds v. Ingalls*, 788 F.2d 264 (**5th Cir.** 1986), *cert. denied*, 479 **U.S.** 885 (1986)(Since "the navigable waters of the United States" was undefined by the LHWCA, the court looked to admiralty cases for meaning and concluded that the term had often

been used in conjunction with the term "high seas.); *Kollias v. D & G Marine Maint*. ,29 F.3d 67 (**2nd Cir.** 1994); *cert*. *denied*, 513 **U.S.**1146 (1995)(The court concluded that the LHWCA overcomes the presumption against extraterritoriality because the affirmative intention of the Congress is clearly expressed and Congress intended the LHWCA to apply extraterritorially to cover workplace injuries suffered on the high seas. "A central purpose underlying the LHWCA was thus to create 'a uniform compensation system' in which a longshoremen's…coverage did not depend on the precise site of his injury."); and *Weber v. S.C. Loveland Co*., 28 BRBS 321, 1994 WL 712512 (1994)(Board traced the history of cases developing the law on the subject of coverage under the LHWCA for workplace injuries on the high seas. Looking to admiralty cases dealing with extending coverage to those injured in foreign territorial waters, the Board determined that the rationale for extending coverage in those cases—enforcement of a uniform system of compensation workers—applied to the LHWCA.).

[Topics 1.5.2 Jurisdiction/Coverage—Development of Jurisdiction/Coverage—Navigable waters; 1.6.1 Jurisdiction/Coverage—Situs—"Over Water;" 2.9 Definitions—United States]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Killman v. Director, OWCP*, 415 F.3d 716 (7th Cir. 2005), the court remanded the claim for further consideration of whether the miner demonstrated "total disability" through the medical opinions at 20 C.F.R. § 718.204(b)(2)(iv). In this vein, the court stressed the importance of determining whether the physicians had an accurate assessment of the duties of the miner's last coal mining job. Upon review of their reports, the court noted that "[t]he physicians who concluded that Killman was not disabled either misstated Killman's tasks or did not discuss them at all." Some of these physicians reviewed the reports of Dr. Cohen, who concluded that the miner was disabled, but the court was not convinced that the other physicians clearly understood the miner's job duties:

> [E]ven if the other doctors had made it clear that they had reviewed all of Dr. Cohen's reports, we still have no way of knowing whether they understood the underlying factual background. Logically, it is likely that the doctors paid more attention to Dr. Cohen's medical opinion than to his account of the details of Killman's work history.

Because the court could not discern the basis of the administrative law judge's weighing of the evidence, it concluded that the judge's decision was not supported by substantial evidence and remanded the claim for further consideration.

[**physician's understanding of job duties must be determined**]

By unpublished decision in *Wilce v. Director, OWCP*, Case No. 04-3998 (3rd Cir. July 8, 2005), the court rejected a widow's challenge to the subsequent claims provisions at 20 C.F.R. § 725.309 as "discriminatory against women in violation of the equal protection guarantee applicable to the federal government through the Fifth Amendment." The widow argued that § 725.309 "allows a miner to file a duplicate claim where he or she can establish a material change in his or her condition, but bars a survivor claim unless it is a request for modification . . .." She posits that since most "survivors" are women, the regulation is discriminatory.

The court determined that, although more women file survivors' claims than men, the regulation was "facially neutral." Given that pneumoconiosis is a latent and progressive disease, the provisions at § 725.309 properly reflect that a miner should be able to file a subsequent claim based on a change in his or her condition. On the other hand, the "relevant conditions of entitlement" are not subject to change in a survivor's claim since the miner is deceased.

[**constitutionality of § 725.309 upheld**]

B. Benefits Review Board

In *Morgan v. Shamrock Coal Co.*, BRB Nos. 05-0278 BLA and 05-0278 BLA-A (Oct. 24, 2005) (unpub.), the Board vacated application of the three year statute of limitations at 20 C.F.R. § 725.308 to Dr. Clark's medical determination of total disability due to pneumoconiosis underlying the miner's first claim in accordance with *Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). The Director maintained before the Board that Dr. Clark's medical determination was insufficient to trigger the limitations period because it was "unreasoned." The Board held that "[s]uch a factual finding . . . is up to the administrative law judge based on his review of the prior (ALJ) decision . . . and the medical evidence of record."

[**application of three year statute of limitations in the Sixth Circuit**]

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.)[1], Dr. Baker examined Claimant and concluded that he suffered from a "Class II impairment" under the *Guides to the Evaluation of Permanent Impairment* and had "a second impairment, based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." As a result, Dr. Baker stated that "[t]his would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations."

In view of the foregoing, the Board determined that the ALJ properly rejected the opinion:

> Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class II impairment is insufficient to support a finding of total disability. (citation omitted). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment,. . . the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability.

In addition, the Board stated:

> [I]n view of our holding that the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not

[1] It is noted that, in recent weeks, there have been a series of unpublished Board decisions with the same holdings as set forth in this summary.

considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

The Board also upheld the ALJ's finding that Dr. Hussain, who conducted the Department of Labor-sponsored examination of Claimant, did not provide a reasoned opinion regarding the presence or absence of clinical pneumoconiosis. Notwithstanding this deficiency in the report, the Board agreed with the Director that his duty to provide a complete, credible pulmonary evaluation under § 725.406 was discharged. In particular, Dr. Hussain also found that Claimant was not totally disabled and the ALJ relied on this component of Dr. Hussain's opinion, along with other medical evidence of record, to deny benefits.

Finally, the Board upheld the ALJ's exclusion of certain Director's and Employer's exhibits based on the evidentiary limitations at 20 C.F.R. § 725.414.

[**use of AMA guides; recommend no further exposure to coal dust; sufficiency of Department-sponsored examination; exclusion of Director's and Employer's exhibits under § 725.414**]

In *Allen v. Director, OWCP*, BRB No. 05-0716 BLA (Sept. 29, 2005)(unpub.), the first claim filed by a surviving adult disabled child of the miner was denied on grounds that he was married, *i.e.* dependency was not established. No appeal was taken and, when the survivor filed a second claim for benefits under 20 C.F.R. § 725.309, the Board held that Claimant had to demonstrate that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." Further, the Board noted that, under § 725.309(d)(2), the "applicable condition of entitlement" was the condition upon which the prior denial was based, *i.e.* dependency. Said differently, Claimant must "submit new evidence establishing that he is an eligible surviving dependent of the miner pursuant to 20 C.F.R. §§ 725.209, 725.221, in order to be entitled to benefits."[2] Absent demonstrating that this condition of entitlement has "changed" since the prior denial, benefits would have to be denied.

[**threshold determination under § 725.309**]

In *Broughton v. C & H Mining, Inc.*, BRB No. 05-0376 BLA (Sept. 23, 2005)(unpub.), the ALJ properly discredited the opinion of Dr. Simpao, who conducted the Department of Labor-sponsored examination of Claimant, on grounds that Dr. Simpao's diagnosis was based on 18 years of coal mine employment where the ALJ found 8.62 years established on the record. However, the Board denied Claimant's request that the claim be remanded for another pulmonary evaluation under § 725.406. In particular, the Board agreed with the Director that Claimant was provided with a pulmonary evaluation in compliance with § 725.406 but "Dr. Simpao's reliance on an

[2] Importantly, the Board agreed with the Director that Claimant would automatically be entitled to benefits on this Part B claim provided that he demonstrates "dependency."

incorrect coal mine employment history was not a flaw attributable to Dr. Simpao, but instead was an inaccuracy provided by claimant who reported his employment history to the physician."

[**sufficiency of Department-sponsored pulmonary examination under § 725.406**]

In *Lovins v. Arch Mineral Corp.*, BRB No. 05-0201 BLA (Sept. 30, 2005) (unpub.), the Board denied the miner's request that his claim be remanded for another department-sponsored pulmonary evaluation where the ALJ "did not discredit Dr. Hussain's disability opinion entirely," but found only that it was outweighed by a contrary opinion of record.

[**sufficiency of Department-sponsored pulmonary examination under § 725.406**]

In *Bailey v. Consolidation Coal Co.*, BRB No. 05-0324 BLA (Sept. 30, 2005) (unpub.), the ALJ properly discredited physicians' opinions that x-ray and CT-scan evidence revealed the presence of possible self-healing tuberculosis, histoplasmosis, inflammatory disease, tumor, sarcoidosis, or idiopathic interstitial fibrosis on grounds that these opinions "were not supported by the miner's hospital treatment records which did not make any reference to these other conditions." In so holding, the Board rejected Employer's argument that the ALJ's weighing of the evidence "erroneously shifted the burden of proof to employer to disprove the existence of pneumoconiosis by requiring (that the physicians) conclusively establish alternative diagnoses in order to rule out the existence of pneumoconiosis."[3]

In addition, the Board upheld the ALJ's finding that coal workers' pneumoconiosis substantially contributed to the miner's pneumonia which, in turn, caused his death. In so holding, the Board stated:

> We note that as the Secretary observed when promulgating Section 718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000).

Slip op. at 6 (emphasis in original).

[**existence of pneumoconiosis; hastening death**]

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[3] Notably, the Board has issued inconsistent holdings regarding whether discrediting a physician's diagnosis on grounds that it is not supported by the miner's hospitalization and treatment records impermissibly shifts the burden to the employer to affirmatively demonstrate that the miner suffers from a disease other than coal workers' pneumoconiosis. Hopefully, the Board will consider issuing a published decision on this issue.