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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 285
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I. Longshore and Harbor Workers' Compensation Act and Related Acts

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

***Tilcon N.Y., Inc. v. Volk (In re Complaint of Buchanan Marine, L.P.)*, 874 F.3d 356 (2nd Cir. 2017).**

Relevant to this review, the Second Circuit affirmed the district court's holding that a barge worker, who inspected and maintained moored barges used to transport rock from a quarried rock processing facility down the Hudson River, was not a "seaman" for purposes of the Jones Act, 46 U.S.C. §§ 30101-30106.

Wayne Volk worked at a quarried rock processing facility on the Hudson River, inspecting and maintaining barges used to transport rock. Volk was inspecting a moored barge when he slipped on some loose stone, injuring himself. He has not worked since the accident and has been receiving workers' compensation benefits under the LHWCA. Volk asserted claims against the barge company as his employer, the owner of the barge, and the operator of the rock processing facility, under the Jones Act, the LHWCA, general maritime law, and New York state law.

Jones Act Claims

Initially, the court discussed the interplay between the Jones Act and the LHWCA. Congress enacted the Jones Act in 1920 to provide heightened legal protections to seamen because of their exposure to the perils of the sea. The Jones Act allows seamen to recover for negligence against their employers. The LHWCA is a workers' compensation system, which provides compensation for injury to a broad range of land-based maritime workers; it

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

does not include "a master or member of a crew of any vessel," 33 U.S.C. § 902(3)(G). Thus, the two remedies are mutually exclusive.

To qualify as a seaman under the Jones Act, a maritime employee must have a substantial employment-related connection to a vessel in navigation, or to an identifiable group of such vessels. To have an employment-related connection to a vessel, the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission. This standard is liberal: the putative seaman need not aid in the navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work. Moreover, the worker's connection to the vessel must be substantial in both its duration and its nature. This inquiry focuses on whether the worker derives his livelihood from sea-based activities. Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore. The ultimate inquiry is whether, in light of the totality of the circumstances, the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. The Supreme Court has emphasized that it is important to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose. The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to the special hazards and disadvantages to which they who go down to sea in ships are subjected. The key is whether the individual had a sufficient relation to the navigation of vessels and the perils attendant thereon.

In this case, none of Volk's work was of a seagoing nature. His duties were limited to inspecting and repairing barges that were secured to the dock. Volk belonged to a union that represents equipment operators. He did not belong to a maritime union and did not hold "seaman's papers." He did not go to sea and he was not exposed to the "perils of the sea" in the manner associated with seaman status.[2] In contrast, a traditional Jones Act seaman normally serves for voyages or tours of duty. Thus, considering the total circumstances of Volk's employment, the court concluded as a matter of law that Volk does not qualify as a "seaman" within the meaning of the Jones Act, and affirmed the dismissal of his Jones Act claims against all three appellees.

Other Claims

The court affirmed the district court's dismissal of Volk's claims against his employer, Buchanan. The LHWCA's no-fault compensation structure is the exclusive remedy for injured workers against their employers. 33 U.S.C. § 905(a). However, a claimant retains the right to bring an action for damages "caused by the negligence of a vessel, . . . against such vessel as a third party." *Id.* § 905(b). As bareboat charterer of the barge, Buchanan is a dual capacity employer-vessel owner. Thus, if Buchanan were negligent in its vessel capacity in relation to Volk's injury, Buchanan would be liable under § 5(b) in the same manner as a third party. Volk did not challenge the district court's ruling that Buchanan was not acting as vessel owner in relation to Volk's injury, and therefore is liable exclusively for Volk's workers' compensation payments under the LHWCA. Because the compensation payments under the LHWCA are Volk's exclusive remedy as to Buchanan, his general maritime law and state law claims against Buchanan were properly dismissed.

[2] The court distinguished *Naquin v. Elevating Boats, LLC*, 744 F.3d 927 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1397, 191 L. Ed. 2d 359 (2015), stating that the shipyard worker in that case had a more substantial connection to seafaring vessels, including his operation of the vessels' marine cranes and jack-up legs and his occasional work aboard the vessels in open water.

The court further found that the district court erred in dismissing Volk's § 5(b) negligence claim against vessel owner, Franz, to the extent it was based on the alleged breach of Franz's duty to turn over a reasonably safe vessel. Franz was responsible for his "turnover duty." While he could not be responsible for the presence of excess stone, Franz arguably had a duty, as owner, to address the condition of the barge before turning it over to Buchanan. As § 5(b) of the LHWCA is the sole basis under which Volk can recover against Franz, his general maritime and state law claims were properly dismissed.

Further, the district court correctly held that Tilcon, the operator of the rock processing facility, has no LHWCA liability because it did not employ Volk or own the barge. The district court also correctly held that the general maritime claims asserted against Tilcon fail because Tilcon is not an owner of the barge and because Volk is not a seaman. Further, Volk is not entitled to maintenance and cure because he is not a seaman. The district court erred, however, in dismissing Volk's New York state law claims against Tilcon for negligence, gross negligence, and violations of N.Y. Labor Law § 200. The district court determined that these claims failed because the alleged hazard -- the presence of excess stone on the margin deck of the barge -- was open and obvious. This holding was based on an error of law. New York law utilizes a comparative negligence scheme, meaning the doctrines of contributory negligence and assumption of risk are not complete defenses as a matter of law.

[LHWCA v. JONES ACT - Master/member of the Crew (seaman); THIRD PARTY LIABILITY]

B. Benefits Review Board

***Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017).**

This case involved a claim for medical benefits and disability compensation for hearing loss. Claimant began working as a sheet metal mechanic for employer in 2003. During his employment, he underwent audiometric testing which revealed zero percent hearing loss. He sustained a work-related knee injury in 2009, and he has not worked since.[3] In 2014, claimant underwent an audiological evaluation conducted by Dr. McLain, who found a 17.2 percent noise-induced binaural sensorineural hearing loss and recommended hearing aids. That same year, Employer sent claimant to Dr. McGill, who found a binaural impairment of zero percent. Dr. McGill agreed claimant is a candidate for amplification, but stated that any change in claimant's hearing since he left the shipyard is not noise-related.

The ALJ accepted the parties' stipulations, and found that "the parties do not dispute that Claimant suffers from a sensorineural hearing loss and that he was exposed to work place noise." Nevertheless, the ALJ stated that claimant must prove that his hearing loss is work-related and, after weighing the evidence as a whole, concluded that claimant's hearing loss is not noise-induced and that he does not have a ratable hearing impairment. Thus, the ALJ denied both disability and medical benefits. Claimant appealed.

Stipulations

The Board reversed the ALJ's denial of medical benefits. The ALJ accepted the parties' stipulations which established that employer accepted liability for medical benefits and authorized claimant to get hearing aids. The ALJ gave no notice or explanation as to why he later "rejected" the stipulations. Moreover, whether the record evidence could

[3] This claim was resolved by an approved § 8(i) settlement.

support the fact stipulated, *i.e.*, causation, is not relevant to the acceptance of the stipulation. *Id.* at 31 (collecting cases). In light of the parties' stipulations, claimant is entitled to the stipulated medical benefits for his hearing loss.

Choice of Audiologist

Claimant further asserted that he is entitled to his choice of audiologist and that the ALJ need only decide whether his choice is reasonable. The Board rejected claimant's contentions on the grounds that he did not raise an issue to be addressed by the ALJ, and moreover, claimant is not entitled, by statute or regulation, to choose an audiologist.

Active supervision of a claimant's medical care is performed by the Secretary of Labor and his designees, the district directors. 33 U.S.C. § 907(b), (c); 20 C.F.R. § 702.401 *et seq.* It includes "[t]he determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee …." 20 C.F.R. § 702.407(b). Disputes over factual matters, such as whether authorization for treatment was requested by the claimant, whether the employer refused the request for treatment, or whether a physician's report was filed in a timely manner, are within an ALJ's authority to resolve. The Board concluded that, in raising the issue of choosing an audiologist, claimant did not raise an issue of fact to be addressed by the ALJ. Moreover, while § 7(b) provides that a claimant has the right to choose an attending physician, audiologists, like pharmacists, *Potter v. Electric Boat Corp.*, 41 BRBS 69 (2007), are not "physicians" within the meaning of the Act. Section 702.404 states in relevant part:

> The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law . . . Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term "physician" as used in this part.

20 C.F.R. § 702.404 (emphasis in original). Audiologists are not among those defined as a "physician." Thus, as with pharmacists, claimants do not have a statutory or regulatory right to choose their own audiologists. 33 U.S.C. § 907(b); 20 C.F.R. § 702.404.

The Board observed that with respect to medical benefits, there are purely legal and/or discretionary issues that remain within the purview of the district director, with the right of direct appeal to the Board. The Board concluded that, for the reasons stated in *Potter*, the selection of an audiologist concerns the "character and sufficiency" of a medical service and, therefore, falls within the scope of issues to be addressed by the district director, not the ALJ. Accordingly, the case was remanded to the district director to address the details of claimant's audiological care.

Disability Benefits

The Board affirmed the ALJ's denial of disability benefits for hearing loss.[4] The audiograms administered while claimant was employed revealed zero percent hearing impairment. In weighing the evidence, the ALJ noted that Drs. McLain and McGill are licensed certified audiologists, their audiometers were properly calibrated, the tests performed were accurate, and the results were reliable. Thus, substantial evidence supported the ALJ's finding the two 2014 audiograms are both credible and equally probative. Moreover, the ALJ correctly found that a claimant does not meet his burden of

[4] The BRB noted that a claimant need not have a ratable hearing impairment in order to be entitled to medical benefits.

establishing he is impaired when one of two equally probative audiograms demonstrates zero impairment. This is particularly true here, where substantial evidence in the form of testimony from the two audiologists specifically supports finding that the audiogram showing the least amount of hearing loss is the better evidence. Accordingly, the ALJ properly found that claimant did not meet his burden of establishing that he has a hearing impairment.

[EVIDENCE – Stipulations; POWERS OF ADMINISTRATIVE LAW JUDGES - Power in Relation to Section 7 Medicals; SECTION 7 MEDICAL BENEFITS; DISABILITY – HEARING LOSS – Determining the Extent of Loss]

***Goff v. Huntington Ingalls Industries, Inc.*, __ BRBS __ (2017).**

In reversing the ALJ's order granting employer's motion for summary decision, the Board held that the ALJ erred in concluding that the decedent's daughter's claim for death benefits was derivative of the decedent's widow's claim barred under § 33(g).

Decedent, Jack Goff, was exposed to asbestos in the course of his employment with employer and diagnosed with mesothelioma. He and his wife, Amelia, filed a civil tort claim against multiple asbestos manufacturers, installers, and distributors. Claimant died of his asbestos-related disease, and was survived by his wife and their adult daughter, Jennifer. Thereafter, Amelia signed, individually and in her capacity as executrix of Jack's estate, an agreement releasing from liability several defendants in the tort suit, without obtaining employer's prior written approval.

In this proceeding under the LHWCA, Amelia acknowledged that her claim for § 9 death benefits is barred pursuant to § 33(g).[5] Jennifer, however, continued her claim for death benefits, asserting that she did not sign, or receive any benefits from, the third-party settlements. The ALJ found that employer is entitled to summary decision because Jennifer's Section 9 claim is derivative of Amelia's Section 9 claim, and Amelia conceded her claim is barred by § 33(g). Claimant appealed.

The Board held that the summary decision was improper because there are disputed facts to be resolved and the ALJ misapplied the law. It stated that:

> While the Act provides for only one "death benefit," Section 9(b) makes it apparent that both a surviving spouse and eligible children may receive a portion of the "death benefit." 33 U.S.C. §909(b). In this respect, the [ALJ's] interpretation that Jennifer's entitlement as a "child" is derivative of Amelia's entitlement as a widow is not supported by the Act. Section 9(b) does not condition a child's entitlement on the surviving spouse's entitlement. The statute merely sets forth the recovery percentages for a surviving spouse and eligible children. Therefore, the [ALJ] incorrectly concluded that, because there is a widow who is not entitled to death benefits, Jennifer cannot "independently establish" her entitlement to benefits.

Slip op. at 7 (footnote and additional citations omitted). A child's entitlement to death benefits is based on the child's relationship with the decedent and whether she satisfies the Act's criteria and is not derivative of anyone else's entitlement. More generally, a survivor's *entitlement* to a portion of the death benefit is not derivative of another survivor's

[5] Prior written approval is necessary when the person entitled to compensation enters into a settlement with a third party for less than the amount of the employer's liability under the Act. 33 U.S.C. § 933(g)(1). Failure to obtain prior written approval, where required, results in the forfeiture of benefits under the Act. 33 U.S.C. § 933(g)(2).

entitlement; only the *amount* of the benefit each survivor receives may be affected by the existence of another eligible survivor. Further, to the extent the ALJ' analysis rests on to whom the employer would pay the benefits, the recipient could change depending on the facts.

The term "child" is defined in § 2(14). Relevant to this case, if a "child" is over 18, she must be "(1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability." 33 U.S.C. § 902(14). The applicability of this provision was raised in the parties' pleadings. However, it has not been determined, whether Jennifer was wholly dependent upon decedent and incapable of self-support by reason of mental or physical disability at the time of his death and whether she is entitled to any part of the death benefit. Thus, on remand, the ALJ must determine whether Jennifer met the criteria of § 2(14) at the time of decedent's death.

If the ALJ finds that Jennifer is entitled to death benefits, he must determine whether § 33(g) applies to bar her entitlement under the Act. Section 33(g) is an affirmative defense, and the employer bears the burden of proving that the claimant entered into a fully-executed settlement with a third party without complying with 33(g). In order to ascertain whether § 33(g) applies, the ALJ must determine whether Jennifer entered into any third-party settlements after Jack's death.[6] If she did not, her claim for benefits under § 9 is not barred. If she did, then the ALJ must next determine whether she obtained any proceeds from the third-party settlements,[7] whether the third-party settlements in the aggregate are greater or less than Jennifer's entitlement under the Act,[8] and whether she was required to obtain prior written approval or to give employer notice of the settlements.

[COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE – § 33(g) ENSURING EMPLOYER'S RIGHTS; SECTION 9 COMPENSATION FOR DEATH; DEFINITIONS - § 2(14) CHILD]

[6] The Board has held that the term "representative," as that term is used in § 33(g)(1), pursuant to § 33(c), means "legal representative of the deceased" and does not refer to an attorney.

[7] An employer bears the burden of establishing apportionment of a settlement among multiple "persons entitled to compensation."

[8] In this case, the appropriate comparison would be between the amount of Jennifer's compensation entitlement and the aggregate gross amount of the third-party settlements apportioned to her.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Westmoreland Coal Co. v. Stallard*, ___ F.3d ___, 2017 WL 5769516 (4th Cir. Nov. 29, 2017), the claimant had worked for approximately 30 years in qualifying coal mine employment ("CME") and had smoked cigarettes at a minimal rate for 39 years. Dating back to the early 1990s, and near the end of his CME, the claimant had received advice from several physicians that he should not return to CME because of his difficulty breathing.

The claimant filed the instant claim in March 2011, nearly 20 years after retiring from CME. Four physicians – Drs. Klayton, Gallai, Rosenberg, and Zaldivar – provided medical reports in the case. Dr. Klayton diagnosed the claimant as having clinical pneumoconiosis, while Dr. Gallai instead diagnosed legal, and not clinical, pneumoconiosis. Drs. Rosenberg and Zaldivar each opined that the claimant suffered from asthma and/or a smoking-related impairment, not black lung.

In awarding the claimant benefits, the ALJ found that the claimant timely filed his claim and suffered from a totally disabling respiratory or pulmonary impairment. In light of the claimant's length of CME, the ALJ found that the claimant invoked the 15-year rebuttable presumption, at Section 718.305, that he was totally disabled due to pneumoconiosis arising out of his CME. The ALJ found that the employer was unable to rebut the presumption and therefore awarded benefits. The Benefits Review Board affirmed the award, and the employer then appealed to the Fourth Circuit.

On appeal, the employer first challenged the ALJ's finding that the claim was timely filed pursuant to Section 725.308 of the regulations. The court disagreed, first concluding that the ALJ's decision accurately tracked "the relevant statutory and regulatory provisions," and that he therefore applied the correct standard in determining whether the claim was timely filed. Slip op. at 10. Furthermore, the court concluded that substantial evidence supported the ALJ's timeliness finding, thereby rejecting the employer's argument that, when taken together, the opinions of the three doctors who treated the claimant in the early 1990s put the claimant "on notice that he was totally disabled due to black lung disease." *Id.* In so concluding, the court noted that "[n]o one doctor communicated to [the claimant] a diagnosis of both total disability and black lung disease." *Id.*

Next, the employer argued that the ALJ erred by ignoring evidence related to the magnitude of the claimant's pre-retirement smoking history when he found that the claimant had smoked for two to four pack-years. Noting that "the totality of evidence [concerning the claimant's smoking history] is largely inconsistent," the court held that the ALJ acted within his discretion as factfinder in crediting the claimant's testimony as to the extent of his smoking habit, despite considering the employer's arguments concerning the other evidence of record.

Third, the employer alleged that the ALJ erred in discounting Dr. Rosenberg's opinion (1) based on the preamble to the 2001 regulatory amendments, and (2) in light of that physician's discussion of the FEV1/FVC ratio derived from pulmonary function testing. The court summarized Dr. Rosenberg's opinion in the following way:

> In particular, Dr. Rosenberg cited medical articles indicating that FEV1 and FVC measurements together decline in patients suffering from black lung disease such that the corresponding FEV1/FVC ratio ordinarily remains undisturbed. By contrast, because [the claimant's] FEV1/FVC ratio decreased over time, Dr. Rosenberg posited, the medical evidence indicated that [the claimant's] history of smoking was the "sole culprit" of his disabling lung disease.

Id. at 14. The court agreed with the ALJ's finding, however, that the above "hypothesis regarding FEV1/FVC ratios runs directly contrary to the agency's own conclusions in this

regard." *Id.*; *see* 65 Fed. Reg. 79,920-01, 79,943 (Dec. 20, 2000) (noting that COPD related to coal mine dust exposure "may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC"). In addition, the court concluded that Dr. Rosenberg selectively quoted studies that predated the preamble when interpreting them, while the more recent studies he referenced failed to address black lung; therefore, the court determined that they provided little support for the employer's contention that the ALJ had improperly discredited Dr. Rosenberg's opinion. Referencing (1) prior decisions in which it and the Sixth Circuit had rejected physicians' reliance on similar evidence to opine that claimants are not entitled to federal black lung benefits, and (2) "an ALJ's general prerogative to discount medical opinions at odds with the conclusions adopted by the agency itself, [the court concluded] that the ALJ did not err in rejecting Dr. Rosenberg's opinion regarding the FEV1/FVC ratio's ability to show particularized causation." Slip op. at 16, citing *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014).

Finally, the court dismissed the employer's contention that the ALJ misapplied the "rule-out" standard at Section 718.305(d)(1)(ii) when determining whether it had rebutted the 15-year presumption:

> The ALJ here did so based on all the evidence detailed above, and he did not lightly arrive at his conclusion that Westmoreland failed to rebut the statutory presumption. The decision below carefully laid out the components of each doctor's diagnosis and underlying rationales. The decision then meaningfully engaged with the medical science, relevant caselaw, and applicable regulations.

Id. at 21. Accordingly, the ALJ did not commit reversible error in finding that the employer failed to rule out a connection between the claimant's disability and his black lung disease.

In light of the above, the court concluded that the Board did not err in affirming the ALJ's award of benefits, and it thus denied the employer's petition for review.

[The preamble to the amended regulations: Fourth Circuit]

In *Frontier-Kemper Constructors, Inc. v. Director, OWCP* [*Smith*], ___ F.3d ___ 2017 WL 5897323 (Nov. 30, 2017), Frontier-Kemper, the employer and designated responsible operator, conceded the claimant's entitlement to benefits but challenged its liability.

Below, the ALJ found that Frontier-Kemper was a successor operator, in accordance with the Black Lung Benefits Act ("BLBA") and the implementing regulations. *See* 30 U.S.C. §932(i)(1); 20 C.F.R. §§725.492, 725.493(b)(1). In support of this finding, the ALJ relied upon the fact that Frontier Constructors and Kemper Construction formed a partnership in the 1970s ("the Partnership") and that the Partnership was reorganized into Frontier-Kemper in 1982. The ALJ found that the claimant had engaged in CME for the Partnership for 3 weeks in 1973 and 8 months in 1974, and for Frontier-Kemper for 3 months and two weeks in 2005. Combining these periods of CME, the ALJ thus found that Frontier-Kemper had employed the claimant for at least a year and was therefore the operator responsible for the payment of benefits. *See* 20 C.F.R. §725.494(c) (requiring that, in order for a responsible operator to be a potentially liable operator, the miner must have been "employed by the operator, or any person with respect to which the operator may be considered a successor operator, for *a cumulative period* of not less than one year (§725.101(a)(32))") (emphasis added). The Board affirmed the ALJ's finding of one year of cumulative CME with Frontier-Kemper, as well as his award of benefits.

Before the Fourth Circuit, Frontier-Kemper initially challenged the ALJ's application of a revised, 1977 definition of "operator" to the Partnership when he combined the claimant's CME with that entity and Frontier-Kemper. Of note, before 1977, the Federal Mine Safety and Health Act defined an "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." 30 U.S.C. §802(d) (1976). In 1977, this definition

was amended to include "any independent contractor performing services or construction at such time." 30 U.S.C. §802(d). Frontier-Kemper argued that, because the Partnership was not considered an "operator" during the time that the claimant was employed by that entity, the ALJ's application of the revised "operator" definition in determining that the claimant worked for Frontier-Kemper for at least a year created an impermissible, retroactive effect.

The court disagreed. In beginning its inquiry to determine whether the statute's application was impermissibly retroactive, the court first noted that Congress has not spoken clearly on "the statute's proper reach" concerning the 1977 definition of "operator." Slip op. at 10, quoting *Matherly v. Andrews*, 817 F.3d 115, 119 (4th Cir. 2016). The court concluded, however, that applying the revised definition in this case does not retroactively impair rights that Frontier-Kemper possessed when it acted, increase liability for past conduct, or impose new duties regarding already completed transactions. *See* slip op. at 10-12; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Specifically, the court emphasized that "affirming Frontier-Kemper's liability does not 'attach[] new legal consequences to events completed before [the statute's] enactment' in a way that offends 'familiar considerations of fair notice, reasonable reliance, and settled expectations' because the conduct giving rise to Frontier-Kemper's liability occurred when it employed [the claimant] in 2005." Slip op. at 10, quoting *Landgraf*, 511 U.S. at 270. Moreover, the court noted that the law does not function retroactively in a case like the present one: when "past facts antedating a statutory change are relevant, but not determinative, to establish liability in a case filed long after the statutory change has taken effect . . . ." Slip op. at 10. The court underscored that liability in the present case "attaches only because Frontier-Kemper chose to acquire the Partnership (four years after Congress expanded the BLBA to make the Partnership liable for black lung benefits), and because it chose to hire [the claimant] again in 2005." *Id.* at 11. Therefore, Frontier-Kemper had a sufficient "opportunity to modify its conduct in accordance with Congress's expansion of liability to coal mine construction companies . . . ." *Id.* The Fourth Circuit thus concluded that "there is no retroactive effect in applying the expanded definition of 'operator' to the Partnership for the purpose of combining [the claimant's] employment there with his later work at Frontier-Kemper." *Id.* at 12.

Finally, the court affirmed the ALJ's finding that the claimant worked for the Partnership and Frontier-Kemper cumulatively for at least one year and that Frontier-Kemper is accordingly liable for the payment of benefits.

In light of the above, the court affirmed the Board's decision below.

[Requirements for responsible operator designation: Successor liability]

Finally, the Fourth and Sixth Circuits each issued an unpublished black lung decision in November. *See* *Andalex Resources, Inc. v. Director, OWCP*, ___ Fed.Appx. ___, 2017 WL 5438993 (6th Cir. Nov. 14, 2017) (unpub.); *Elkay Mining Co. v. Smith*, ___ Fed.Appx. ___,2017 WL 5125630 (4th Cir. Nov. 2, 2017) (unpub.).

B. Benefits Review Board

In *Slone v. Canada Coal Co., Inc.*, BRB No. 16-0680 BLA (Oct. 30, 2017) (unpub.), the Board addressed an interlocutory appeal of a Decision and Order addressing whether Employer was properly named as the responsible operator.[9] Below, the administrative law

[9] The Board noted that "no party has identified a reason that the Board should accept this interlocutory appeal," and it further noted that it was not obvious "that the appeal should be accepted, since the responsible operator issue would be reviewable on appeal of a final decision on the merits of the case." Slip op. at 2 n.2. Although the Board stated that it "views with extreme disfavor the bifurcation of this case and the resultant interlocutory appeal," in order "to prevent further delay – and for that reason alone – the Board will

judge found that Employer, and not Kiah Creek, a later-in-time operator, was the responsible operator liable for benefits.

The present claim was Claimant's fourth. In Claimant's first claim, Employer, based on Claimant's testimony at a hearing held in February 2003, stipulated that it was the responsible operator. In that claim, the presiding judge denied benefits. In Claimant's second claim, the district director designated Employer as the responsible operator, finding that the evidence did not establish that Kiah Creek employed Claimant for at least one year and noting that Employer had stipulated in the initial claim that it was the responsible operator. The district director then denied benefits. The district director also denied benefits in Claimant's third claim, again designating Employer as the responsible operator in light of its stipulation in the initial claim.

In the present claim, the administrative law judge found Employer to be the responsible operator, based on its prior stipulation. As part of this finding, she concluded that Employer had fairly entered into this stipulation and, therefore, was bound by Section 725.309(c)(5)'s requirement that "any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim."[10]

On appeal, the Board rejected Employer's argument that that the administrative law judge erred in applying Section 725.309(c)(5). Specifically, the Board disagreed with Employer's contention that it should not be bound by the stipulation in the earlier claim because, in essence, it had contested the responsible operator issue in Claimant's second and third claims, in addition to the present one. *See* slip op. at 4, citing Employer's Brief at 17. In light of the purpose of Section 725.309(c)(5) – namely, "to prevent unnecessary litigation over uncontested issues" – the Board concluded that "employer has not identified any reason, nor can we discern any, to distinguish an immediate subsequent claim from successive subsequent claims." Slip op. at 7-8; *see* 62 Fed. Reg. 3337, 3353 (Jan. 22, 1997) ("Where a party's waiver of its right to litigate a particular issue represents a knowing relinquishment of that right, such waiver should be given the same force and effect in subsequent litigation of the same issue."). As the Board noted, the interest in barring the relitigation of an issue that had been previously conceded by a party would apply in an immediate subsequent claim and any later claims. Therefore, the Board "reject[ed] Employer's argument that an otherwise valid stipulation is binding only in an immediately subsequent claim." Slip op. at 8.

The Board also rejected Employer's assertion that the administrative law judge erred when she found that it had fairly entered into the earlier stipulation.[11] Quoting from the

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address this appeal." *Id.*, citing *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1983). Accordingly, the Board emphasized that the parties "should not expect that such appeals will be accepted by the Board in the future, absent a compelling argument as to why the case merits interlocutory review." *Id.*

[10] The administrative law judge further found that she would have dismissed Employer, if not for the earlier stipulation, based on a finding that Kiah Creek had more recently employed Claimant for at least one year. Because the Board affirmed the administrative law judge's finding predicated upon Employer's earlier stipulation, it did not address the administrative law judge's finding that Kiah Creek employed Claimant for at least one year. *See* slip op. at 10 n.18.

[11] A stipulation must have been fairly entered into by the parties in order to be binding. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 729-30, 25 BLR 2-405, 2-417-18 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-378-80 (4th Cir. 1996).

administrative law judge's Decision and Order, the Board noted that it could discern "no error in [her] finding that employer 'is bound by its previous stipulation of fact, made when it was in possession of the same facts that are the basis of its current argument, and when it had the opportunity to develop the same testimony from [claimant] that it relies on here.'" Slip op. at 9, quoting Decision and Order at 16. Therefore, the Board affirmed her finding that Employer must be held to its earlier stipulation, in accordance with Section 725.309(c)(5).

In light of the above, the Board affirmed the administrative law judge's Decision and Order and remanded the case "for adjudication of the merits of entitlement." Slip op. at 10.

[Application of 20 C.F.R. §725.309(d)(4)][12]

In *McCall v. Holbrook Mining Co., Inc.*, BRB No. 17-0033 BLA (Oct. 30, 2017) (unpub.), which also involved a subsequent claim, the administrative law judge awarded benefits pursuant to the 15-year rebuttable presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012). On appeal before the Board, Employer alleged that the administrative law judge erred in finding (1) that it was the responsible operator; (2) that Claimant worked for 15 years in qualifying coal mine employment ("CME"), thereby invoking the Section 411(c)(4) rebuttable presumption; and (3) that it did not rebut the presumption.

The Board first addressed Employer's challenge to the administrative law judge's responsible operator finding.[13] At issue was whether Claimant had worked as a "miner" when he was a night watchman for Employer from 1993 to 2000.[14] The Board noted that, below, "the administrative law judge accurately noted that the issue of whether employer is the responsible operator 'is actually whether . . . [c]laimant worked as a 'miner' for the [e]mployer.'" Slip op. at 3. In considering whether this work qualified as the work of a miner, the administrative law judge applied the rebuttable presumption at Section 725.202(a).[15] In so doing, the administrative law judge found that, based on Claimant's

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[12] Among other changes that were part of the 2013 amendments to the black lung regulations, Section 725.309(d)(4), issued on January 19, 2001, was renumbered to Section 725.309(c)(5). *See* 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[13] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the new evidence established total disability under Section 718.204(b)(2); accordingly, the Board also affirmed his finding that Claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(c). Slip op. at 3 n.4.

[14] The administrative law judge did not credit Claimant's work as a night watchman for Employer from 1988 to 1992 as the work of a miner because he found that Claimant's own "testimony 'conclusively establish[ed]' that claimant's duties prior to 1993 were limited to patrolling the mine site." Slip op. at 6 n.9, quoting Decision and Order at 13.

[15] According to this provision:

> A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation or transportation of coal, or any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:

testimony that this work occurred in or around a coal mine or coal preparation facility, Claimant had invoked this presumption; moreover, the administrative law judge found that Employer did not rebut it. Therefore, the administrative law judge found that Claimant worked as a miner during his time as a night watchman from 1993 to 2000.

The Board initially rejected the employer's argument "that the administrative law judge erred in requiring employer to rebut the Section 725.202(a) presumption that claimant's work as a night watchman was that of a miner." Slip op. at 4. It described as misplaced Employer's reliance on *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989) and *Navistar, Inc. v. Forester*, 767 F.3d 638, 25 BLR 2-659 (6th Cir. 2014), for the proposition that it is Claimant's burden to establish that his work as a night watchman constituted the extraction or preparation of coal. The Board noted, for example, that "20 C.F.R. §725.202(a) was amended to provide claimant with the rebuttable presumption, applied in this case, that his work constituted that of a miner" eleven years after the *Clemons* decision was issued. Slip op. at 5. In addition, the Board emphasized that "[n]either the Sixth Circuit, nor any other court, has invalidated the rebuttable presumption set forth at 20 C.F.R. §725.202(a)." *Id.* Accordingly, the Board affirmed the administrative law judge's finding that Claimant invoked the presumption that the work at issue constituted the work of a miner.[16] Furthermore, because Employer raised no other relevant arguments, the Board also affirmed the administrative law judge's finding that Claimant worked as a miner for at least a year for Employer. Therefore, the Board affirmed the administrative law judge's determination that Employer is the responsible operator in the present claim.

The Board went on to affirm the administrative law judge's finding that Claimant established over 15 years of qualifying CME[17] and, therefore, that he invoked the 15-year rebuttable presumption of total disability due to pneumoconiosis. In addition, the Board affirmed the administrative law judge's finding that Employer did not rebut this presumption.

In light of the above, the Board affirmed the award of benefits.

> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in the maintenance or construction of the mine site; or
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. §725.202(a) (emphasis added).

[16] The Board highlighted, as "noteworthy," the administrative law judge's decision to credit "claimant's testimony that his work as a night watchman encompassed non-security duties, including pumping water, washing and greasing mining equipment, and accompanying coal loaders into the pit (as required by safety inspectors)." Slip op. at 5 n.7, citing Decision and Order at 6.

[17] Of note, the Board affirmed the administrative law judge's decision to credit Claimant with full years of employment from 1993 through 1999, based on Claimant's testimony that he worked full-time for Employer for those years. *See* slip op. at 7-9. The administrative law judge did so despite acknowledging that Claimant's earnings during these years did not even equal the values contained in the 125-day table at Exhibit 610 of the *BLBA Procedure Manual* for those years. *Id.* at 7-8, quoting Decision and Order at 13. In addition to Claimant's testimony, the administrative law judge noted the "pattern of compensation," an apparent reference to Claimant's testimony that he was paid $150 a week for his full-time work for Employer. *See id.* at 7.

[Rebuttable presumption of "miner" status; Documentation supporting length of coal mine employment: Claimant's testimony]