U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 216 November 2009

John M. Vittone
Chief Judge

Stephen L. Purcell
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

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

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

***Bayou Steel Corp. v. Evanston Ins. Co.*, No. 08-31206, 2009 WL 3753538 (5th Cir. Nov. 10, 2009)(unpub.).**

Reversing the district court, the Fifth Circuit held, *inter alia*, that an insurance policy exclusion for suits brought "pursuant to" the LHWCA does not exclude coverage for negligence claims brought by longshoremen against insured third parties under Section 33 of the LHWCA because such claims are not created by that provision and thus do not constitute claims "pursuant to" the LHWCA. Rather, based on the plain language of the statute and pertinent case law, the court decided to "read § 933 as having one purpose: to make it clear that the longshoreman's historic maritime tort action against third parties was unaffected by the provisions of the LHWCA." The court distinguished *Beaumont Rice Mill, Inc. v. Mid-Am. Indemnity Ins. Co.,* 948 F.2d 950 (5th Cir.1992), on the ground that the policy exclusion in that case denied coverage for "any losses arising out of injuries covered under the LHWCA." In *Beaumont*, the fact that the injured longshoreman's injuries were covered under the LHWCA triggered the exclusion. By contrast, here, the court had to look to the nature of the injured

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

longshoreman's claims against the insured, rather than looking at whether his injuries were covered under the LHWCA.

[Topic 33.1 Claimant's Ability to Bring Suit Against a Potentially Negligent Third Party]

***M.M. v. Univ. Maritime APM Terminals*, Nos. 08-2304, 08-2312, 2009 WL 4251119 (4th Cir. 2009)(unpub.).**

The Fourth Circuit summarily affirmed the Board's decision in *M.M. v. Universal Maritime APM Terminals*, Nos. BRB Nos. 08-0213, 08-0213A; and *Universal Maritime APM Terminals v. M.M.*, Nos. BRB Nos. 08-0212, 08-0212A (Sept. 30, 2008).

B. U.S. District Courts

***Eysselinck v. Dir., OWCP*, Civ. Action No. H-07-4589, 2009 WL 3837370 (S.D.Tex. Nov. 12, 2009).**

The district court adopted the Magistrate Judge's recommendation to affirm the Benefits Review Board's denial of benefits to a widow who sought death benefits under the Defense Base Act ("DBA") on the ground that her husband's suicide arose out of his employment in Iraq because it was the result of post-traumatic stress disorder ("PTSD").

The court stated that although, in the usual case, the taking of one's own life with willful intention to do so would negate the possibility of recovering benefits, the Fifth Circuit has carved out an exception for suicide that is the result of insanity. First, the court rejected the claimant's objection that she had not been afforded the benefit of Section 20(d), which presumes that "the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." In considering the effect of this presumption, the Supreme Court has stated, "[i]ts only office is to control the result where there is an entire lack of competent evidence." *Del Vecchio v. Bowers,* 296 U.S. 280, 286, 56 S.Ct. 190 (1935). Because the present case presented a voluminous record, under *Bowers,* the presumption did not apply. The court further noted that *Bowers* suggests that the presumption only applies to situations where accidental death is disputed as an alternative to suicide. The reasoning in *Bowers* was not controlling, as that case did not present the issue of mental impairment overcoming the will of the decedent.

The court further rejected the claimant's objections to the Magistrate Judge's characterizations of the suicide as an "impulse type action" and of the decedent's death as suicide. The significance of this wording was *de minimis,* as the Judge considered the heart of the argument, i.e. the factual support for the administrative law judge's ("ALJ") decision that there was insufficient proof of PTSD.

Claimant additionally argued that as an alternative to PTSD, the decedent may have committed suicide as a result of depression. In denying remand on this issue, the Magistrate Judge concluded that Dr. Sieberhagen implicitly eliminated depression as a contributing cause of the decedent's suicide. The court acknowledged that Dr. Sieberhagen's deposition indicated that depression was present simultaneously with PTSD. However, the issue before the ALJ was whether PTSD could overcome the voluntary intentions of the decedent such that his suicide could be described as involuntary. The record contained only incidental remarks concerning depression. To the extent symptoms of PTSD were identical to symptoms of depression they were discounted by the ALJ after weighing the evidence. To the extent they differed, the claimant did not argue depression caused the suicide before the ALJ and could not raise this argument at the eleventh hour. The court further noted that it is unclear whether depression would even support a legal argument that the suicide was involuntary. Although it is widely accepted depression causes suicide it does not automatically follow that the decedent took his own life involuntarily if he was suffering solely from depression.

The remainder of the claimant's objections concerned the alleged improper weighing of the evidence. The court concluded that substantial evidence supported the ALJ's decision. The ALJ gave greater credence to expert testimony that there was insufficient proof of the symptoms of PTSD because 1) the decedent had not been exposed personally to life-threatening events, and 2) he had not been diagnosed with PTSD prior to his suicide.

[Topic 3.2.2 Willful Intention]

***Makris v. Spensieri Painting, LLC*, __ F.Supp.2d __, 2009 WL 3824368 (D.Puerto Rico Nov. 17, 2009).**

Plaintiffs were employed by Spensieri Painting, LLC to carry out a sandblasting and painting job at the Arecibo Observatory in Puerto Rico pursuant to Spensieri's contract with Cornell University. Cornell had previously entered into an agreement for the management and operations of the National Astronomy and Ionosphere Center ("NAIC") with the National

Science Foundation, a federal agency of the United States. Pursuant to this agreement, NAIC was created as a national research center to be operated by Cornell. NAIC operates the Arecibo Observatory.

Plaintiffs brought claims against Cornell University and NAIC, with Spensieri as a codefendant, under Puerto Rico's statutory tort provision based on injuries allegedly sustained while performing this work. Cornell filed a motion to dismiss, contending that plaintiffs were covered employees under the DBA and that, having provided benefits for their work-related injuries, Cornell was entitled to immunity from tort liability. Indeed, Plaintiffs had been awarded benefits under the DBA in proceedings before the Department of Labor and an appeal had been filed with the Benefits Review Board. Plaintiffs and Spensieri opposed the motion, alleging, *inter alia*, that the DBA was inapposite because the labor performed did not involve public work. The district court denied Cornell's motion on the ground that the issue of DBA coverage was pending a resolution in parallel proceedings before the Department of Labor and the Supreme Court of the State of New York, giving rise to the possibility of inconsistent findings.

In discussing various provisions of the DBA, the court invoked two recent law review articles: Greta S. Milligan, *The Defense Base Act: an Outdated Law and its Current Implications,* 86 U. Det. Mercy L.Rev. 407, 411 (Spring 2009) and *Bypassing Redundancy: Resolving the Jurisdictional Dilemma under the Defense Base Act,* 83 Wa.L.R. 219 (May, 2008).

[Topic 60.2.2 Claim Must Stem From a "Contract" For "Public Work" Overseas]

***Bonilla-Olmedo v. United States*, Civil No. 08-1842 (FAB/CVR), 2009 WL 4015653 (D.Puerto Rico Nov. 12, 2009)(unpub.).**

In denying the United State's motion to dismiss a suit brought by the widow of an employee of a nonapropriated fund instrumentality under the Federal Tort Claims Act ("FTCA"), the district court stated that the exclusivity of the remedies under the Nonappropriated Fund Instrumentalities Act ("NFIA") was not ripe for adjudication and unsupported by defendant's averments in the motion to dismiss. The court stated that only a judicial or administrative determination that the injuries or death are compensable under the LHWCA would bar an employee from bringing an FTCA suit, and therefore acceptance of LHWCA compensation paid voluntarily by employer or its carrier would not bar an FTCA suit. *See Vilanova v. United States*, 851 F.2d 1 (1st Cir. 1988)(application for benefits under the LHWCA and acceptance of such benefits paid voluntarily does not bar suit under the

FTCA, but a settlement approved by the Labor Department amounts to collateral estoppel); 4 Arthur Larson, *The Law of Workmen's Compensation* § 90.50-51(c)(1993)(concluding that an administrative approval of benefits should only be *res judicata* where the eligibility issue was actually litigated). The defendant's motion to dismiss did not aver that a report of injuries or death was filed with the Department of Labor, but rather stated that the employee's death was not job-related. The court noted that once the issues are submitted to the Department of Labor, the lawsuit at issue could be stayed or abated pending resolution.

[Topic 5.1 Exclusivity of Remedy]

C. Benefits Review Board

***Christensen v. Stevedoring Servs. of Am.*, __ BRBS __, BRB No. 03-0302 (2009).**

This case was before the Board on remand from the Ninth Circuit, which had vacated the Board's earlier award of attorney fees at an hourly rate of $250. *Christensen v. Stevedoring Servs. of Am.*, 557 F3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *see also Van Skike v. Dir., OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), *vacating in pert. part D. V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007).

The Ninth Circuit held that the hourly rate should be calculated with reference to the "prevailing market rates in the relevant community," but declined to specify either the appropriate market or the evidence to be used in determining a "market" rate. The Board stated that, pursuant to the Ninth Circuit's decision in *Christensen*, it had to determine a "reasonable" hourly rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT), citing *Blum v. Stenson*, 465 U.S. 886, 896 n.l 1 (1984). Counsel should be awarded a fee "commensurate with those which [he] could obtain by taking other types of cases." *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT).

Community: Employer contended, based on the statement in *Christensen* that the "relevant community" is usually where the district court sits, *id.* at 1053, that the relevant community in this case was either all of Oregon, the greater Portland metropolitan area, or the city of Portland. Claimant, in turn, sought to define it as "downtown Portland." The Board held that counsel's "community" is the city of Portland, as counsel has his

office there and thus his business overhead is based on the economic circumstances of the urban area.

Similar Services/Other Types of Cases: In support of the requested hourly rates (i.e., $350 for 2006 and $400 for 2009), Claimant's counsel relied on the "Morones Surveys" of 2004 and 2008 and two affidavits, contending that he should receive an hourly rate commensurate to that which is paid to commercial litigation attorneys. Employer responded with the "Skerritt Affidavit" and the Oregon Bar Survey, contending that commercial litigation work is not comparable. The Board concluded that rates paid to commercial/business litigators in Portland do not provide an appropriate basis for setting a market rate. Mr. Skerritt's affidavit established that, in the relatively small legal market of Portland, a workers' compensation practice and a business litigation practice cannot be viewed as "similar." Moreover, the rates set out in the Morones Surveys are for firms with five or more attorneys specializing in commercial litigation. The Board credited Mr. Skerritt's assertion that work in business litigation is often delegated to less experienced attorneys and paralegals at a lower cost to the client, and that a solo practitioner could not expect a client to pay him $400 per hour to perform all the work himself. The Board relied instead on the 2007 Oregon Bar Survey, which the United States Federal District Court for the District of Oregon uses as its baseline for attorney's fee rates,[2] stating:

> "After review of the types of attorney work presented in the Bar Survey, we hold that general plaintiff civil litigation cases supply evidence of a 'similar' market for counsel's services in Portland. Moreover, we hold that his hourly rate should be set by reference to an average of the rates for workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation cases. This methodology is appropriate because it accounts for the actual nature of counsel's work, which involves primarily workers' compensation and personal injury cases, and it incorporates rates he could receive from paying clients for similar services."

Rate for Attorney of "reasonably comparable skill, experience, and reputation:" Considering that the claimant's counsel has 40 years of experience and has successfully handled many cases before the Board and the Ninth Circuit, the Board used the 95th percentile rates from the 2007 Bar Survey in calculating the rate for 2006, thereby arriving at the hourly rate of $308. For the ensuing years, the Board used the percentage

[2] *See* http://www.ord.uscourts.gov/attomey fee statement.pdf

increase in the Federal locality pay table for Portland,[3] thereby arriving at the hourly rates of $314.50 for 2007, $325.50 in 2008, and $338 in 2009. For 2009, the Board also awarded legal assistant fees at the requested hourly rate of $150.

[Topic 28.6.1 Hourly Rate]

***Beckwith v. Horizon Lines, Inc.*, __ BRBS __, BRB No. 08-0416 (2009).**

The Board first held that, contrary to the employer's contention, claimant's counsel was entitled to an attorney's fee as he successfully defended the district director's award of vocational rehabilitation before the Board, resulting in the employer's withdrawal of its appeal. The Board also rejected employer's contention that the fee request had to be disallowed because claimant failed to demonstrate the need for a co-counsel. The Board concluded that this was not a co-counsel case, as only one attorney appeared before the Board and filed a fee petition.

The Board concluded that 1.8 hours claimed by claimant's counsel for the preparation of the initial fee application was not unreasonable. However, the Board disallowed 8 of the 16.3 hours expended in responding to employer's objections to the fee petition. Both parties failed to heed the Supreme Court's admonition that, "A request for attorney's fees should not result in a second major litigation." Slip. op. at 3, citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). It was unnecessary for counsel to escalate the fee issues by filing both a reply and a motion to strike the objections. The Board instructed that, "The attorney fee requests generated by needless pleadings are not reasonably commensurate with the necessary work performed in conjunction with the appeal." *Id.*

Turning to the issue of the hourly rate, the Board stated that in cases arising in the Ninth Circuit the hourly rate had to be calculated with reference to the "prevailing market rates in the relevant community." *Christensen*, *supra*; *Van Skike*, *supra*. The Board held that the claimant's counsel's hourly rate had to be based on the "prevailing market rate" in Washington, D.C., where counsel maintains his office, and that the rate should be set by reference to the Laffey Matrix in cases where the relevant geographic area is the District of Columbia. *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

[3] http://www.opm.gov/oca/09tables/index.asp

The Board thereby overruled its earlier holding in *Van Skike* that the Laffey Matrix is inapplicable to cases arising in the Ninth Circuit.

Counsel is entitled to the prevailing market rate in Washington, D.C., as he maintains his office in this city and thus bears the overhead costs associated with this market. In addition, he participated in this case only at the Board appellate level and thus did not have any contacts with the local area where claimant resides. This result is not inconsistent with *Christensen*, as the Ninth Circuit stated only that "generally" the geographic area is where the district court sits. This result also comports with 20 C.F.R. §802.203(d)(4) which states, "The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status." *See generally Jeffboat, LLC v. Dir., OWCP*, 553 F.3d 487, 42 BRBS 65(CRT) (7th Cir. 2009) (permitting rate where out-of-town counsel practices).

The Laffey Matrix is derived from the decision of the U.S. district court in D.C. in *Laffey*, *supra.* The Laffey Matrix may be accessed at the Department of Justice website, http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html. This site states: "This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks is prepared [and updated] by the Civil Division of the United States Attorney's Office for the District of Columbia. The matrix is intended to be used in cases in which a 'fee-shifting' statute permits the prevailing party to recover 'reasonable attorney's fees." The Longshore Act is such a fee-shifting statute, and the decision in *Christensen* is premised on the principle that a "reasonable attorney's fee" is calculated in the same manner in all federal fee-shifting statutes. Both the D.C. Circuit and the Ninth Circuit subsequently rejected the portion of the circuit decision in *Laffey* which held that the prevailing community rate could not be used where counsel's usual rate was lower than that rate. The rates provided in the Matrix are applicable from June 1 to May 31 for a given year. The Matrix provides an hourly rate of $440 until June 1, 2008 for an attorney with over 20 years of experience, and of $465 in the year thereafter. The Board awarded counsel the requested current hourly rate of $460 for all services performed in this case between March and July 2008, stating that this rate is supported by the Matrix.

[Topic 28.6.1 Hourly Rate; Topic 28.6.2 Compensable Services]

***Zamora v. Friede Goldman Halter, Inc.*, __ BRBS __, BRB No. 08-0857 (2009).**

The Board held that, under the 2001 version of the Texas Insurance Code, Texas Property and Casualty Insurance Guaranty Association ("TPCIGA") may be held liable for claimant's counsel's fees for services performed after carrier was declared impaired, but cannot be held liable for fees incurred prior thereto. The employer declared bankruptcy and its assets were placed in a trust; its carrier was declared "impaired" in October 2001. Thereafter, the claimant, employer and TPCIGA entered into a Section 8(i) settlement.

The Board initially determined that there is no conflict between the Longshore Act and the Texas Insurance Code, and thus the ALJ erred in finding that the Longshore Act preempts the state statute. Thus, the issue of TPCIGA's liability for the attorney's fee turned on whether it is authorized to make such payments under the Texas statue. The Board held that it is. It was undisputed that the law in effect at the time carrier became "impaired" in October 2001 was to be used in assessing TPCTGA's liability under the Longshore Act.[4] The 2001 version of the Texas satute provides that TPCIGA "shall pay covered claims that exist before the designation of impairment [of the insurer] or that arise within 30 days after the date of the designation of impairment[.]" A "covered claim" is "an unpaid claim of an insured or third-party liability claimant" that is within the coverage and limits of the insurance policy as well as the limits set by the Texas statute. The 2001 Texas Insurance Code specifically states that a "'[c]overed claim' shall not include supplementary payment obligations, including … attorney's fees and expenses . . . incurred prior to the determination that an insurer is an impaired insurer under this Act." As this language does not specifically exclude fees incurred after the determination of impairment, the Board held that post-impairment fees are included in "covered claims." Contrary to TPCIGA's assertion, claimant's counsel had standing to assert a claim for an attorney's fee, as he fit within the Texas statute's definitions of "claimant" and "person."

The Board next stated that the employer was liable for attorney's fees under Section 28(a), as the claimant successfully prosecuted his case by obtaining a Section 8(i) settlement. As employer's carrier was bankrupt, and TPCIGA was statutorily relieved of the duty to pay fees incurred prior to carrier's impairment under the Texas statute, the employer was the only potentially liable party for the pre-impairment fees, and pursuant to Section 4(a) of the LHWCA, the employer retained primary liability for the pre-insolvency fees.

[4] In contrast to the applicable 2001 version, the later versions of the Texas statute state that the association's liability is limited to "covered claims" and that "covered claims" do not extend to any attorney's fees, interest or penalties, regardless of when they were incurred.

Finally, the Board rejected TPCIGA's challenge to the amount of the fee award. First, TPCIGA has not shown that an hourly rate of $225 for services rendered in 2007 and 2008 is unreasonable, and cited only longshore cases from 2002 and 2004 as support for a lower hourly rate. Contrary to TPCIGA's contention that the ALJ disregarded the quarter-hour billing minimum, the ALJ scrutinized the entry at issue pursuant to *Conoco, Inc. v. Dir., OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999), properly awarding the requested fee because the letter was four pages long. The Board also rejected TPCIGA's contention that the ALJ summarily dispose of its objections, as the ALJ addressed each objection individually.

[Topic 19.10 Bankruptcy; Topic 28.1 Attorney's Fees - Generally]

***Touro v. Brown & Root Marine Operators*, __ BRBS __, BRB No. 09-0500 (2009).**

The Board first rejected the contention raised by the claimant, the injured employee's widow, that the ALJ erred in denying her motion to continue the formal hearing because Brown and Root's ("B&R") failure to comply with the claimant's pre-trial discovery requests resulted in a highly prejudicial trial "with surprise witnesses and exhibits." First, claimant's counsel withdrew his request for a continuance once the parties agreed to leave the record open post-hearing. Second, B&R ultimately complied with the claimant's request to depose a witness and this evidence was admitted into the record post-trial. Thus, the claimant did not sustain any prejudice in the prosecution of her claims as a result of the ALJ's denial of a continuance. There was also no violation of the claimant's due process rights, as she was provided notice and an opportunity to be heard prior to the ALJ's issuance of his decision.

The Board next affirmed the ALJ's determination that the decedent employee's employer, Hugh O'Conner, Inc. ("HOC"), was not a "subcontractor" for B&R, and thus B&R could not be held liable for the benefits sought by the claimant pursuant to Section 4(a) of the LHWCA due to HOC's insolvency. The Fifth Circuit has stated that Section 4(a) "premises liability on a finding that the principal is subject to some contractual obligation, which it, in turn, passed in whole or in part to the subcontractor." *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). The Fifth Circuit referred to this as a "two contract" requirement. *Id.* The court also noted that the LHWCA readily distinguishes between employers who are owners and those who are

general contractors working under contractual obligations to others. *Compare Dir., OWCP v. Nat'l Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), *with Dailey v. Edwin H Troth, t/a EHT Constr. Co.*, 20 BRBS 75 (1986) *and Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005). After discussing this and other relevant precedent, the Board concluded that the ALJ's application of the "two contract" rule was in accordance with the standard espoused by the Fifth Circuit. The ALJ properly found that B&R was the owner of the barge upon which decedent worked, and as such, was not under a contractual obligation to refurbish the barge. Moreover, the ALJ rationally found that there was no evidence that B&R was in the business of refurbishing barges or that B&R's own employees usually performed this type of work.

[Topic 4.1.1 Contractor/Subcontractor Liability; Topic 19.02 Due Process – Formal Hearings, Evidence; Topic 19.3.6 Formal hearing; Topic 19.3.6.2 Discovery]

***Balonek v. Texcom, Inc.*, __ BRBS __, BRB No. 09-0519 (2009).**

The Board held that a cable technician who was injured while installing cables in a building at a shipyard, which cables were to be used to link the Navy and the Marine Corps to the same computer system, did not satisfy the status test under Section 2(3) of the LHWCA because her work did not involve maintenance or repair to a system that was integral to the construction, repair, loading or unloading of a vessel. In *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995), the Fourth Circuit, within whose jurisdiction this case arose, held that a pipefitter involved in the construction of a power plant at a shipyard which would eventually produce electricity for use at the shipyard, was not a covered employee. Prevetire was not a covered employee because his job was not integral to building, loading or unloading ships, or repairing or maintaining equipment or structures used for such activities, and Congress did not intend to cover every employee at a shipyard regardless of function. *Id.; see also Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001)(carpenter involved in construction of a warehouse on shipyard not covered); *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005)(employee of a plumbing and heating company involved in renovating a ship shed not covered); *Southcombe v. A Mark, B Mark, C Mark*, 37 BRBS 169 (2003)(claimant involved in construction of a "mega-yacht" service facility at a marina under construction not covered).

Here, the ALJ found that, even if shipbuilding work occurred around the claimant, her work did not involve loading or unloading ships, or

maintaining or repairing equipment used in the loading or unloading process. It was immaterial that, unlike in *Prevetire*, the shipyard work occurred in and around her work area and that the building was not under construction. Like in *Prevetire*, claimant's presence at the shipyard was temporary and would cease when she completed her assignment, in contrast to those cases where the claimants performed "continuing maintenance and repairs to shipyard equipment and/or buildings that were used for maritime purposes." Slip. op. at 4, n.3. Further, the cable system on which claimant worked was under construction and was not in use at the time of her injury. Even if the system would later be integral to a maritime purpose, such future use is insufficient to confer coverage. Slip. op. at 4-5, citing *Prevetire, supra; Boyd, supra; Southcombe, supra; Moon, supra*. Moreover, the ALJ found that the cabling installed by claimant was not essential or integral to the building, repairing, loading, or unloading of ships. Rather, the purpose of her work was to connect branches of the military on the same network system. Citing cases involving claimants engaged in generally land-based occupations, the Board concluded that the claimant's work did not satisfy the status element of Section 2(3) as it did not involve maintenance or repair to a system that was integral to the construction, repair, loading or unloading of a vessel.

[Topic 1.7.1 "Maritime Worker" ("Maritime Employment"); Topic 1.7.2 "Harbor-worker"]

D. Other Jurisdictions

***DiBenedetto v. Noble Drilling Co.*, __ So.3d __, 2009 WL 3387042 (La.App. 4 Cir. 2009)**.[5]

The Court of Appeals of Louisiana held, *inter alia*, that the longshoreman's state tort claims against former employers and executive officers of the former employers were not barred by the exclusive remedy provision of the LHWCA, 33 U.S.C. § 905(a). Plaintiff did not seek benefits under the LHWCA, choosing instead to file a tort claim in a state court based on his mesothelioma resulting from work-related asbestos exposure.

Section 5(a) provides that "[t]he liability of an employer ... shall be exclusive and in place of all other liability of such employer to the employee ...." Reversing the trial court, the Louisiana court of appeals held that the federal compensation scheme is not the worker's exclusive remedy against his former employer. The court relied on the Supreme Court's statement in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 720, 100 S.Ct. 2432, 2436, 65

[5] The court denied rehearing on November 18, 2009.

L.Ed.2d 458 (1980), that the 1972 extension of LHWCA coverage for land-based injuries was enacted to supplement, rather than supplant, state compensation law. In *Sun Ship*, the Court held that a state may apply its workers' compensation scheme to land-based injuries that also fall within the coverage of the LHWCA. The court in the present case further relied on the Supreme Court's statement in a footnote in *Sun Ship* that the exclusivity provision in Section 5(a) of the LHWCA has not been construed to exclude remedies offered by other jurisdictions. *Sun Ship, Inc.,* 447 U.S. at 722, 100 S.Ct. at 2438, fn. 4. The court stated:

> "We recognize that the *Sun Ship* case differs from the instant case in that Sun Ship involved a situation where plaintiffs were eligible for benefits under both the LHWCA and state compensation laws. Here, plaintiff's illness is covered by the LHWCA, but is not covered by the version of the Louisiana Workers' Compensation Act in effect at the time of his first alleged significant tortious exposure to asbestos. Although not exactly the same, we find that the scenario in the instant case is similar to that in the *Sun Ship* case. Based on the reasoning in *Sun Ship*, we reason by implication that the plaintiff in this case is not limited to recovery under the LHWCA."

The court concluded that the fact the state Worker's Compensation Act in effect at the time of his first alleged significant tortuous exposure to asbestos did not cover mesothelioma did not mandate exclusive recourse under the LHWCA, but left him free to pursue other remedies under state law as it existed at the time of such exposure, including a state court tort action.

The court further held, reversing the trial court, that the plaintiff's state tort claims against executive officers of the former employers were not barred by the exclusive remedy provision in Section 33(i) of the LHWCA. Relying on the same rationale outlined above, the court stated that, "Because of our holding that plaintiff's claims against his employers are not barred by the LHWCA, we likewise hold that his claims against the executive officers of those companies are similarly not barred."

[*Editor's Note*: Although the court acknowledged that *Sun Ship* involved the issue of concurrent jurisdiction for state and federal workers' compensation laws, it nevertheless extended, without any explanation, the *Sun Ship* rationale to the present case involving a state court tort action and the issue of exclusivity of liability and resulting remedies under Section 905(a) of the LHWCA.**]**

[Topic 5.1.1 Exclusive Remedy; Topic 33.9 Exclusive Remedy Against Officers/Fellow Servants of Employer]

II. Black Lung Benefits Act

Benefits Review Board

By unpublished decision in *Hansen v. The Wackenhut Corp.*, BRB No. 09-0179 BLA (Nov. 27, 2009) (unpub.), a claim arising in the Tenth Circuit, the Board held that a security officer working for a security company at a coal mining site may qualify as a "miner" under the Act. The Administrative Law Judge concluded that the "situs" requirement for coverage was satisfied as the miner "worked in or around a coal mine or coal preparation facility." The Board affirmed this finding as unchallenged on appeal.

However, turning to the "function" requirement, *i.e.* whether Claimant performed duties essential to the extraction and preparation of coal, the Administrative Law Judge found that this requirement was not met and stated:

> While the job duties were very important to securing property and contributed to ensuring the safety of the employees at the mine site, the duties were not integral or essential to the actual extraction, preparation, or transportation of coal.

In so holding, the Administrative Law Judge adopted the Director's position in the claim.

On appeal, the Director changed his position and argued before the Board that Claimant's duties could satisfy both the "situs" and "function" prongs to qualify him as a "miner" under the Act. Notably, the Director cited an unpublished Sixth Circuit decision, *Sammons v. EAS Coal Co.*, 1992 WL 348976 (6th Cir. Nov. 24, 1992), wherein the court "made a distinction between those security guards who do traditional security work, . . . and those who perform duties that are necessary to ensure the safe operation of the mine." The Director likened Claimant's job duties to whose of the "mine inspector" and argued:

> An individual employed by a coal mine operator to monitor the health and safety environment at its coal mines is involved in an activity founded not only on a concern for the health and safety of coal mines but also on a concern for maximizing the industrial process. Increased industrial production is a necessary by-product of a coal mine's safe environment. Because of this, a mine inspector employed by a coal mine operator is engaged in a function that is necessarily related to the extraction or preparation of coal. In the instant case, [c]laimant performed many of the duties of a mine inspector; consequently, those duties satisfy the function test.

Slip op. at 7 (quoting from the Director's Brief at p. 4).

The Board agreed with the Director's position on appeal. As a result, the Administrative Law Judge's decision was vacated in part and the claim was remanded for further consideration of whether Claimant's job duties satisfied the "function" requirement to qualify him as a "miner" under the Act.

[**security guard; qualifying as a "miner" under the Act**]