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 # 217 December 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]

***Austin v. Weeks Marine, Inc.*, 2009 WL 4852909, No. 09-0288-ag (2nd Cir. Dec. 17, 2009)(unpub.)**

The Second Circuit upheld the Benefits Review Board's ("Board") decision affirming the ALJ's denial of the claimant's claims for compensation and medical benefits under the LHWCA. On appeal, the claimant asserted that the Board erred in concluding as a matter of law that the ALJ's factual finding that the employer had not officially assigned the claimant to the World Trade Center site was sufficient to establish that Austin's injuries were not incurred "in the course of [his] employment" under Section 2(2) of the LHWCA. The court agreed that whether an employee is assigned to a particular work site is not dispositive of whether an injury was incurred in the course of employment. However, contrary to the claimant's assertion, neither the ALJ nor the Board relied on assignment as the dispositive factor. First, although the ALJ did conclude that the claimant was never assigned to work at the World Trade Center site, the ALJ also concluded that he "was not engaged in maritime work at the [World Trade Center] project during his employment with [Weeks]," more generally. In its review, the Board concluded that substantial evidence supported the ALJ's finding that the claimant "was not at the [World Trade Center] site at the behest of

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

employer" and thus the ALJ's denial of the claim was proper. The phrase "at the behest of employer" adequately addressed the requirement that the injury occur "in the course of employment," generally, to merit compensation under the LHWCA.

[Topic 2.29 Course of Employment]

***Butcher v. Superior Offshore Int'l, Inc*., No. 09-30211, 2009 WL 4885026 (5th Cir. Dec. 17, 2009)(unpub.).**

The Fifth Circuit affirmed the district court's summary judgment determination that the plaintiff was not a Jones Act seaman as his connection to the vessel MAGGIE was not substantial in duration and nature. *See Chandris, Inc. v. Latsis,* 515 U.S. 347, 368, 115 S.Ct. 2172, 2190 (1995). The plaintiff was a painter/blaster. It was undisputed that all of the painting and blasting work was done on the fixed platform, which is not a vessel. *See Hufnagel v. Omega Servs. Indus.,* 182 F.3d 340, 347 n. 1 (5th Cir.1999). Although the plaintiff performed some tasks on board the vessel, such as occasionally filling paint pots and sweeping sand, his testimony showed these to be incidental and minor in nature. *Id.* at 347. Plaintiff agreed with counsel's question that he worked thirty percent of his time on board the vessel but this included time spent for meals and breaks, which does not make him a seaman. *See id.* Furthermore, plaintiff's testimony describing his daily activities showed that he spent less than thirty percent of his time actually working on board the MAGGIE. Therefore, he could not be considered a seaman. *See Chandris,* 515 U.S. at 371, 115 S.Ct. at 2191.

[Topic 1.4.2 Master/member of the crew (seaman)]

***Grand-Isle Shipyard, Inc. v. Seacor Marine, LL*C, __ F.3d __, 2009 WL 4597975 (5th Cir. 2009)(en banc)(Circuit Judges Garza, Elrod, Southwick and Owen, dissenting).**

A company responsible for repairing and maintaining offshore platforms (Grand Isle) brought action against a company responsible for transporting offshore workers (Seacor) seeking a declaration that it was not obligated to indemnify Seacor in a lawsuit related to an injury sustained by Grand Isle's employee aboard a Seacor vessel. On rehearing en banc, the Fifth Circuit reversed the panel's decision,[2] as well as several prior Fifth

[2] *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 543 F.3d 256, 2008 WL 4292752 (5th Cir. 2008).

Circuit decisions, and held that: (1) the focus-of-the-contract test determines the situs of the controversy in contract cases under the Outer Continental Shelf Lands Act ("OCSLA"); and (2) adjacent state law, in this case the law of Louisiana, applied as surrogate federal law, thereby rendering the contract's indemnity provision unenforceable.

For adjacent state law to apply as surrogate federal law under the OCSLA, three conditions must be met: (1) the controversy must arise on a situs covered by OCSLA, in other words, the subsoil seabed, or artificial structures permanently or temporarily attached thereto; (2) federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with federal law. 43 U.S.C.A. § 1331 et seq.; *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969); *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir.1990). The district court's conclusion that the second and third *PLT* conditions were met was not challenged on appeal, and the circuit court agreed. As to the second condition, the contract, which called for maintenance work on a stationary platform located on the OCS, was not a maritime contract and therefore maritime law did not apply of its own force.

The question presented by this appeal was what law governs the resolution of a contractual dispute, here enforceability of an indemnity provision, when the underlying tort which triggered the contractual indemnity claim occurred on navigable water on the Outer Continental Shelf ("OCS"), but the contract that creates the indemnity obligation calls for a majority of the work to be performed on stationary platforms on the OCS.

When, a tort occurs on navigable water on the OCS, as opposed to a stationary platform, and a non-seaman is injured, maritime law applies to the ensuing tort action by that worker against third parties. Here the Fifth Circuit overruled its earlier decisions that have applied this same rule to a contractual indemnity dispute and looked to the site of the tort to determine the situs of the controversy. Instead the Court held that the "focus-of-the-contract test is the appropriate test to apply in determining the situs of the controversy in contract cases." *Id.* at *1. This test looks to where the contract contemplates that most of the work will be performed: the OCSLA situs requirement is met for adjacent state law to apply as surrogate federal law if a majority of the performance called for under the contract is to be performed on stationary platforms or other OCSLA situses enumerated in the statute, as opposed to non-OCSLA situses such as aboard vessels on navigable water on the OCS. *Id*. Here, the indemnity dispute arose on an OCSLA situs, given that a majority of the maintenance work called for under the contract was to be performed on stationary platforms on the OCS. As the *PLT* test was met, Louisiana law applied as surrogate federal law under

the OCSLA. In turn, the Louisiana Oilfield Indemnity Act ("LOIA") rendered the indemnity agreement at issue unenforceable, and the summary judgment in favor of Grand Isle was therefore affirmed.

[Topic 60.3.4 OCSLA v. Admiralty v. State Jurisdiction]

***Trachsel v. Rogers Terminal & Shipping Corp.*, __ F.3d __, 2009 WL 5125785 (9th Cir. 2009).**

Agreeing with the ALJ and the Board, the Ninth Circuit held that in calculating claimant's average annual earnings under Section 10(a) of the LHWCA, unworked paid holidays should be included in the number of days the claimant was employed in the year preceding his injury.

In applying Section 10(a), an ALJ must first determine the total income earned by the claimant in the 52 weeks before the injury, then divide that number by the number of "days when so employed." The result is then multiplied by either 300 or 260, depending on whether the worker is a six-or five-day worker, to determine his average yearly wage. *Id.* To find the average weekly wage, the average annual wage is divided by 52. 33 U.S.C. § 910(d)(1).

The court agreed with the Fifth Circuit's reasoning in *Ingalls Shipbuilding, Inc. v. Wooley,* 204 F.3d 616, 618 (5th Cir. 2000), which considered whether vacation days constitute days employed under Section 10(a). In *Wooley*, the Fifth Circuit concluded that the ALJ should be charged with making findings as to whether particular vacation payments constitute a "day worked" or an "additional compensation to be added to [the worker's] annual wage." *Id.* Where compensation represents a day worked, it constitutes a "day so employed" under Section 10(a). Additional compensation and benefits not tied to a particular date, however, are not counted as a day employed. As stated in *Wooley,* this distinction serves Section 10(a)'s goal of a "theoretical approximation of what a claimant could ideally have been expected to earn in the year prior to his injury." Slip. op. at *2, citing *Wooley*, 204 F.3d at 618 (internal quotation marks and citation omitted). That approximation includes what the claimant would have earned had he worked every available work day in the year. Accordingly, *Wooley* held that vacation days taken as a lump sum payment do not replace any actual work days and thus should not be included under 10(a); by contrast, vacation days used to receive pay on a particular day that the employee chose not to work should be included under 10(a). Citing *Wooley*, the Ninth Circuit concluded that,

> "Similarly, when an employee does not work and is paid for a particular holiday, the holiday must be included to approximate what Trachsel could theoretically have been expected to earn. *Id.*
>
> Following *Wooley,* we conclude that a day should be included as a 'day [ ] ... so employed' under section 910(a) if the employee is paid for that day as if he actually worked it. The BRB correctly adopted this rule. And the ALJ properly applied it, concluding that Trachsel's unworked paid holidays counted as 'work days' and should be counted as days employed. Additionally, for those days where Trachsel received vacation pay and also worked, the ALJ correctly counted them only once."

Slip. op. at *3.

Claimant contended that "days when so employed" does not include days for which an employee is paid but does not work, relying on *Matulic v. Dir., OWCP,* 154 F.3d 1052, 1057 (9th Cir. 1998) ("[W]e conclude, as a matter of law, that a worker's receipt in future years of disability benefits computed on the basis of 18% more days (including vacation, holiday, and sick days) than he actually worked in the measuring year is not sufficient basis to find the § 910(a) presumption rebutted.") Rejecting this reasoning, the court stated that the critical issue in *Matulic* was when Section 10(a) should be applied as opposed to Section 10(c), not what days constitute "days when so employed." Thus, *Matulic's* reference, in passing, to the days the claimant "actually worked" had little relevance.

[Topic 10.2.5 Calculation of Average Weekly Wage Under § 10(a)]

***Mancini v. Dan P. Plute, Inc.*, No. 08-72537, 2009 WL 4912140 (9th Cir. 2009)(unpub.).**

The Ninth Circuit vacated the Board's award of attorney's fees to claimant's counsel, Joshua T. Gillelan II, pursuant to § 28(a) of the LHWCA at an hourly rate of $250, and remanded the matter to the Board. Counsel for the prevailing party is to be awarded reasonable attorney's fees as typically calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson,* 465 U.S. 886, 895 (1984). In the Ninth Circuit, the "relevant legal community" is the litigation forum. *See Christensen v. Stevedoring Servs. of Am.,* 557 F.3d 1049, 1053 (9th Cir. 2009). Here, counsel represented the claimant before the Board in

Washington, D.C. Counsel's law office is also located in Washington, D.C. *See* 20 C.F.R. § 802.203(d)(4) ("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.") Nevertheless, strict application of the "forum rule" may sometimes yield unreasonable results, so "rates outside the forum may be used if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Camacho v. Bridgeport Fin., Inc.,* 523 F.3d 973, 979 (9th Cir. 2008). Therefore, if on remand the Board determines the forum to be in a location other than Washington, D.C., the Board should consider whether it was necessary for the claimant to resort to the national market, including Washington, D.C., to find adequate representation for the employer's original appeal.

In defining "relevant community" in this case, the Board looked solely at other awards issued by ALJs, Directors, and the Board in prior LHWCA decisions. This narrow definition of "relevant community" is inappropriate, because there is no private market for attorney's fees under the LHWCA. *See* 33 U.S.C. § 928(e); *Christensen,* 557 F.3d at 1053. Therefore, it is necessary to define the "relevant community" more broadly than only the LHWCA bar. In addition to the exclusive reliance on past LHWCA cases to define "relevant community," the Board erred by defining the market rate solely in terms of what ALJs, Directors, and the Board awarded fee applicants in prior cases. In the Ninth Circuit, an award of attorney's fees based solely on past fee awards is considered unreasonable, because "holding the line" at a flat rate does not define the relevant "market rate." *See Christensen,* 557 F.3d at 1053; *Moreno v. City of Sacramento,* 534 F.3d 1106, 1115 (9th Cir. 2008); *see also Student Pub. Interest Research Group of N.J. v. AT & T Bell Labs.,* 842 F.2d 1436, 1446 (3d Cir. 1988).

In determining the market rate for a prevailing attorney, one must look to what private attorneys of comparable ability and reputation charge their paying clients for work of similar complexity. *See Blum,* 465 U.S. at 895 & n. 11. Once the prevailing attorney offers evidence of a market rate, there is a presumption of reasonableness, and the court may not reduce that rate without explaining the basis for its decision. *See Christensen,* 557 F.3d at 1054-55. Here, counsel introduced sufficient evidence, by reference to the *Laffey* matrix, to demonstrate that the requested hourly rate of $435 was reasonable in Washington, D.C. for attorneys at the highest experience level *(i.e.,* more than nineteen years). The Board wrongly disregarded this evidence and made no attempt to determine what comparable attorneys in Washington, D.C. charged for similar services.

The court further noted that although the Board's order on the merits held that Plute "was wholly absolved of liability," Plute was ordered to pay the attorney's fee. Because Plute did not file a cross-appeal on this issue, the court was unable to consider whether Plute or Perini had the ultimate fee liability, but suggested that the Board address this issue on remand.

[Topic 28.6.1 Hourly Rate]

***Newport News Shipbuilding and Dry Dock Co. v. Holiday*, __ F.3d __, 2009 WL 5126220 (4th Cir. 2009).**

Agreeing with the Board, the Fourth Circuit held that the evidence underlying the ALJ's conclusion that the employer rebutted the claimant's *prima facie* showing of an aggravation of a January 31 back injury (which did not occur on a covered situs) was "no evidence at all," as the evidence "failed to address the material change in the claimant's condition that occurred while he worked on February 10." Slip op. at *4. The evidence showed only that the claimant injured his back on January 31 and experienced a continuation of pain thereafter, but did not address the fact that on February 10, claimant's back materially worsened while he repeatedly bent over to pick up boxes and drill them. The court rejected the employer's assertion that by proving the existence of the January 31 injury, which caused the same symptoms as the February 10 injury, it proffered substantial evidence that the second injury was merely a natural outgrowth of the first. Although the employer did not have to provide affirmative evidence directly ruling out an aggravation, evidence is not substantial if it cannot respond to the *prima facie* case. Slip. op. at *5, citing *Parsons Corp. v. Dir., OWCP,* 619 F.2d 38, 41 (9th Cir. 1980) ("The statutory presumption ... may be overcome by evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment.").

Although it affirmed the Board's decision on the merits, the Fourth Circuit vacated and remanded the Board's award under Section 28(a) of attorney's fees to claimant's counsel, Joshua T. Gillelan, at the rate of $250 per hour, down from his requested hourly rate of $420 per hour, holding that it was an abuse of discretion for the Board to look to an hourly rate appropriate ten years ago, arbitrarily adjusted with no regard to the facts of the case or the lodestar factors. The court reasoned as follows.

Hensley v. Eckerhart instructs that under a statutory fee-shifting provision, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation

multiplied by a reasonable hourly rate." Slip op. at *5, citing *Hensley*, 461 U.S. 424, 433 (1983). Under this "lodestar analysis", "[t]he party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Id.*, citing *Hensley,* 461 U.S. at 433. The tribunal then determines an appropriate fee. *Id.* The LHWCA's fee-shifting requirement compels a lodestar analysis.

Turning first to the hourly rate, the court observed that the applicable Department of Labor's regulation states that "[t]he 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." 20 C.F.R. § 802.203(d)(4). The court further stated:

> "In the usual case, we have said that an attorney identifies the appropriate hourly rate by demonstrating what similarly situated lawyers would have been able to charge for the same service. Typically, this means an attorney will demonstrate the market rate for services in the geographic jurisdiction of the litigation. However, the BRB has the power to set awards with reference to its own past determinations, *Newport News Shipbuilding & Dry Dock Co. v. Brown,* 376 F.3d 245, 251 (4th Cir.2004), which undermines the ability of an attorney to make out a reasonable hourly rate with reference to what other attorneys earn for similar services. That said, lodestar analysis requires far more than consideration of just these factors.
>
> The Supreme Court has recognized these twelve factors as guides to the tribunal's determination of a reasonable hourly rate in a lodestar analysis: (1) time and labor required; (2) novelty and difficulty of the questions; (3) requisite skill needed to perform the service properly; (4) preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Blanchard v. Bergeron,* 489 U.S. 87, 92 n. 5 (1989); *Robinson* [*v. Equifax Info. Servs., LLC, 560 F.3d 235,*] at 243-44. The ultimate conclusion rests with the tribunal, which is closer to the adjudication and has a better understanding of this inherently factual matter. The tribunal must assess an overall reasonable rate with actual attention to

> the facts of a given case, and provide 'detailed findings of fact with regard to the factors considered.'"

Slip op. at *5 (additional internal citations omitted).

In this case, the Board relied on its ten-year old decision in which it held that a successful Savannah-based attorney was entitled to $200 per hour, in keeping with fees it had awarded attorneys in that region. The Board thus assumed that this ten-year old rate was a reasonable basis for an hourly rate today, and adjusted it upwards by the arbitrary amount of $50. This is an abuse of discretion. The BRB generally can look to previous awards in the relevant marketplace as a barometer for how much to award counsel in the immediate case. Slip op. at *6, citing *Brown,* 376 F.3d at 251. But, an hourly rate appropriate ten years ago, arbitrarily adjusted with no regard to the facts of the case or the lodestar factors, is not necessarily appropriate today. Slip. op. at *6, citing, *inter alia*, *Christensen v. Stevedoring Servs. of Am.,* 557 F.3d 1049, 1054-55 (9th Cir.2009) (The BRB must "make ... determinations [of the relevant community and the reasonable hourly rate] with sufficient frequency that it can be confident-and we can be confident in reviewing its decisions-that its fee awards are based on current rather than merely historical market conditions.").

The court instructed that on remand the Board should consider the proper geographic market in which to determine the correct hourly rate, consistent with this opinion and the Fourth Circuit's earlier guidance on this issue. In *Nat'l Wildlife Fed'n v. Hanson,* the court held that the "[t]he community in which the court sits is the appropriate point for selecting the proper rate." 859 F.2d 313, 317 (4th Cir.1988). However, the court then identified a two-step test for tribunals to utilize when considering whether extrajurisdictional counsel were entitled to home market rates. First, tribunals should ask if extrajurisdictional counsel rendered services that were truly available in the visited market. *Id.* Second, tribunals should ask if the party that hired the extrajurisdictional attorney chose reasonably, or whether they chose an unnecessarily expensive attorney. *Id.* In *Rum Creek Coal Sales, Inc. v. Caperton,* 31 F.3d 169, 174 (4th Cir.1995), the court looked specifically at extrajurisdictional appellate counsel, stating that in that context the *Hanson* test "need not even be considered." 31 F.3d at 179. The court clarified that "*Rum Creek* does not suggest that appellate counsel automatically qualify for their home market rates; it recognizes that *Hanson* turns on inquiries about the lawyer and client, not the posture of the litigation. Thus, the BRB should consider *Hanson* and *Rum Creek* to decide if Gillelan's hourly rate should be determined with reference to Georgia [where the claimant resided] or Washington, D.C." Slip op. at *6.

On remand, the Board should also explain how it determines a reasonable rate within the relevant geographic market. The court rejected counsel's contention that the Board was constrained to consider the *Laffey* matrix because he is a Washington, D.C. attorney, stating that "the mere fact that Gillelan practices in Washington, D.C. is insufficient to accord him that market, let alone any rate within it. Further, the *Laffey* matrix is a useful starting point to determine fees, not a required referent. The BRB may consider, but is not bound by, the *Laffey* matrix." Slip op. at *7 (internal citation omitted).

The court further held that the Board did not abuse its discretion in deducting 1.05 hours from counsel's total requested time because those hours insufficiently related to appellate work. 0.65 hours spent in obtaining the record from the Board to enable the ALJ's consideration on remand was not reasonably related to appellate work. The Board also reasonably deducted 0.4 of the 0.9 hours that counsel spent securing and reviewing a copy of the ALJ's decision on remand from the BRB and preparing the fee application. Counsel argued that obtaining the remand decision was necessary because the LHWCA requires a successful appeal before he could apply for his fee. However, he knew his client had succeeded when the BRB issued its summary affirmance order, so he had no need for the underlying ALJ determination. Since counsel did not provide evidence specifying what portion of the 0.9 hours he spent obtaining the ALJ determination, the Board did not abuse its discretion in disallowing slightly less than half of that time. Just like an attorney applying for a fee has the burden of establishing the reasonableness of his hourly rate with specific evidence, "[t]here is no logical reason not to apply that principle to the hours aspect of the lodestar analysis." Slip op. at *7, n.12.

[Topic 2.2.6 Aggravation/Combination; Topic 28.6 Factors Considered in Award; Topic 28.6.1 Hourly Rate; Topic 28.6.2 Compensable Services]

***Hart v. Matson Terminals, Inc.*, No. 08-74063, No. 07-1004 (9th Cir. Dec. 29, 2009)(unpub).**

The Ninth Circuit affirmed the Board's determination that substantial evidence supported the ALJ's conclusion that a 1996 audiogram was the best measure of the claimant's work-related hearing loss. The ALJ considered the results of twelve audiograms, performed from 1978 to 1996 while the claimant was employed by Matson, as well as two audiograms performed after his retirement. Based on the audiogram evidence, the ALJ determined that while the claimant's hearing loss progressed during his employment, it

had not significantly increased subsequent to his retirement, and further relied on medical opinions supporting this conclusion.

The court rejected the claimant's contention that *Bath Iron Works Corp. v. Dir., OWCP*, 506 U.S. 153 (1993), requires employers to conduct an audiogram at retirement in order to protect themselves from liability for further hearing loss after retirement. *Bath Iron Works* specifically noted that a determination of the amount of hearing damage caused was not an issue in that case. *Id.* at 165. Therefore, the language regarding "freezing" hearing loss is not a change to an employer's duties under the law. *Bath Iron Works* does not state that an employer *must* perform an audiogram at retirement or that, if the employer does not, it will automatically be responsible for all hearing loss. Instead, *Bath Iron Works* points out that an employer may protect itself from liability for post-retirement hearing loss by performing an audiogram at retirement. While there is no affirmative duty imposed by *Bath Iron Works*, employers (who fail to follow the advice of *Bath Iron Works*) may often be found liable for post-retirement hearing loss.

[Topic 8.13.1 Section 8(c)(13) Introduction and General Concepts -- Determining the extent of loss]

B. U.S. District Courts

***Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, __ F. Supp.2d __, 2009 WL 4729906 (E.D.Pa. 2009).**

The district court granted in part and denied in part a motion to remand filed on behalf of 444 plaintiffs seeking remand of their actions to Mississippi state court for lack of subject matter jurisdiction. In particular, twenty-five of these cases had been removed to the federal court based on federal jurisdiction under the OCSLA. The plaintiffs asserted, *inter alia*, that their OCSLA-related claims were intertwined with valid Jones Act claims and that, since a Jones Act case brought in state court is not removable under federal question jurisdiction, their cases had to be remanded.

The court concluded that the plaintiffs' claims properly invoked OCSLA jurisdiction and did not fit within the purview of the Jones Act, relying on the Fifth Circuit precedent in the absence of Third Circuit precedent on this issue. The court reasoned that the plaintiffs' claims fell within the grant of authority in OCSLA, since they were based on injuries sustained while working on oil rigs -- exploring, developing or producing oil in the subsoil and seabed of the continental shelf. See 43 U.S.C. § 1349(b). Additionally, workers on fixed drilling rigs are not on vessels, and therefore do not fall

within the jurisdiction of the Jones Act. Therefore, plaintiffs' activities did not qualify them as seamen under the Jones Act.

[Topic 60.3.2 OCSLA – Coverage (Situs, Status, "But for" Test); Topic 1.4.2 Master/member of the crew (seaman)]

***Cooper v. Int'l Offshore Servs.*, Civil Action No. 09-4816, 2009 WL 5175216 (E.D.La. Dec. 17, 2009).**

Where the plaintiff was injured in the course of his employment with defendants aboard a vessel owned by defendants, the district court held that, under the doctrine of *res judicata*, the District Director's formal compensation order approving a Section 8(i) settlement of the plaintiff's LHWCA claim, which by its terms released defendants from "any and all claims" arising out of the injury, precluded the plaintiff's subsequent Section 5(b) claim against defendants as vessel owners.

The court noted that an injured maritime worker may bring an action under the LHWCA against his employer for workers' compensation, *see* § 904, and against an owner for its vessel's negligence, *see* § 905(b). Congress amended the LHWCA to allow maritime workers to sue their employers who are also vessel owners under both sections. However, the compensation order approving the Section 8(i) settlement warranted the application of the doctrine of *res judicata* on the plaintiff's Section 5(b) claim. All four elements to bar a claim by *res judicata* were met: Cooper agreed to a settlement of his claims through an administrative procedure of the Department of Labor, his employer and the insurance carrier were parties to the action, there was a formal compensation order based on the settlement, and Cooper did not exercise his rights to appeal the order. According to the agreement and the final order, the employer and its carrier were released from liability "for all payments of compensation and future medical benefits under the [LHWCA]" as a result of the injury.

[Topic 8.10.1 Section 8(i) Settlements – Generally; Topic 85 Res Judicata, Collateral Estoppel, Full Faith & Credit, Election of Remedies]

C. Benefits Review Board

***Dryden v. Dayton Power & Light Co.*, __ BRBS __ , BRB. No. 09-0315 (2009).**

The Board affirmed the ALJ's determination that the site of claimant's injury is an "adjoining area" pursuant to Section 3(a) where claimant, employed as a coal handling operator at employer's electricity generating facility (Stuart Station), was injured while operating a water valve (PIV 15) located between a power plant and the Ohio River, underneath the overhead, outdoor system of conveyor belts that carries coal from the river barges to the power plant.[3]

In construing "adjoining area," the courts have generally recognized that the phrase encompasses both a geographic and functional nexus with navigable water. Regarding the geographic nexus, the Fifth and the Ninth Circuits have held that an area can be an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and is customarily used for maritime activity. The Fourth Circuit, in contrast, has held that an "adjoining area" must be a discrete shoreside structure or facility that is actually contiguous with navigable waters. *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996)(additional citations omitted). The Board observed that this case arose in the Sixth Circuit, which has not interpreted the word "adjoining," and that *Sidwell* has not been applied outside of the Fourth Circuit's jurisdiction. Here, since the ALJ found that the site at issue was adjacent to the Ohio River, a geographic nexus with navigable waters was established; and thus, contrary to employer's assertion, *Sidwell* would not compel a different result. The Board observed in a footnote that, under *Sidwell*, an entire adjacent facility used for a maritime purpose is a covered situs, and thus the fact that PIV 15 is located 1000 to 1500 feet from the Ohio River did not alter the result as the facility is used for unloading vessels. Additionally, while employer asserted that a road separates the facility from the water's edge, the ALJ described it as an access road and, thus, part of the facility; the ALJ found that Stuart Station has no public roads or buildings separating it from the waterfront.

Turning to the functional nexus, the Board observed that a site must have a customary maritime use, but need not be used exclusively or

[3] The ALJ also found that claimant's regular employment was integral to unloading coal from vessels and thus satisfied Section 2(3) status requirement, and the parties stipulated that claimant is a maritime employee.

primarily for such maritime purposes. Here, "[t]he primary issue in this case … is whether claimant was injured in an area used for a maritime activity, the unloading of coal barges, or in the electricity generating facility." The Board first concluded that the ALJ's determination that the entirety of Stuart Station is a covered situs was overbroad. In order to meet the "function" requirement, an adjoining area must be used for the loading, unloading, repairing or building of vessels. Where a facility is used for both maritime and non-maritime functions, the Board has recognized that there is a point at which the loading and unloading process ceases, and the manufacturing process begins, and vice versa. The inquiry in "mixed-use cases," *i.e.,* those involving a site with both a manufacturing and a maritime component, concerns whether the claimant's injury occurred in the area used for unloading vessels, as that area has a functional relationship with navigable water. In this case, as the power plant is used for generating electricity, the area of the plant itself cannot be brought into coverage simply because coal is shipped by barge and unloaded at another portion of the facility. Nevertheless, the Board affirmed the ALJ's finding of coverage under the Act, as the ALJ's findings established that claimant was injured outside the plant in the area where conveyors used to unload coal vessels are located. The outdoor system of conveyor belts is used in unloading the barges on the river, and the belts are not within the power plant itself. Thus the area of the conveyor belt system, which includes PIV 15, has a functional relationship with the Ohio River.

Employer contended that claimant was not injured in an "adjoining area," asserting that the unloading process ceases once the coal leaves conveyor belt 4 for storage or is diverted onto conveyer belt 50 where it enters the electricity generating process. Employer further asserted that as PIV 15, the fire hydrant it serviced, and the nearest conveyor belt, 8C, are in the storage pile area at Stuart Station, the area where claimant was injured is not an "adjoining area" under §3(a). The Board rejected employer's contentions of error. Slip op. at 6, citing *Prolerized New England Co. v. Benefits Review Bd.*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) (area adjacent to river used for both loading via conveyor system and manufacturing meets the situs requirement). The area is adjacent to the river and is customarily used for the maritime activity of unloading coal from barges (moreover, PIV 15 serviced a fire hydrant used for fire protection and to wash belts used in the unloading of coal). Although case precedent supports finding that maritime manufacturing areas are not covered situses, there is no basis in law for apportioning the conveyor unloading system outside of the power plant into covered and

uncovered situses.[4] *See Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), *aff'g* 40 BRBS 19 (2006); *Prolerized New England Co.*, *supra*; *Uresti v. Port Container Indus., Inc.*, 34 BRBS 127 (2000) (Brown, J., dissenting), *aff'g on recon*. 33 BRBS 215 (2000) (Brown, J., dissenting).

The Board further held that the ALJ's determination that employer was not entitled to a Section 14(j) credit for a sum it paid claimant pursuant to its Illness and Disability Plan was supported by substantial evidence. To establish entitlement to a §14(j) credit, employer must establish that the benefits (e.g., paid under a salary continuance plan) were intended as advance payments of compensation. Here, the ALJ reviewed employer's Employee Manual and found no indication that employer intended the length of service-based payments made to compensate claimant for a long-term disability to be advance payments of compensation. Contrary to employer's contention, the fact that the payments were for a disability does not per se establish that these payments were intended as advance payments of compensation under §14(j). A disability may be work-related or non work-related. Moreover, it was not irrational for the ALJ to credit the years of service-based calculation used to determine the amount of long-term disability benefits paid by the Plan as evidence that these payments were not intended by employer as advance payments of compensation. This service-based calculation is distinct from benefits under the Act, which compensate the injured worker for lost wages, and thus are calculated based on the lost wage-earning capacity of the injured employee, rather than the number of years the worker was employed by an employer.

[Topic 1.6.2 Situs – "Over land"]

[4] The Board noted that a related concept applicable to the "maritime employee" requirement of §2(3) is reflected in the "point of rest" theory, which was rejected by the Supreme Court, *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 274-279, 6 BRBS 150, 166-167 (1977). The Supreme Court subsequently held specifically that those involved in the intermediate steps of loading and unloading are covered under the Act. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979).

II. Black Lung Benefits Act

[there are no decisions to report for this month]