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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 228 December 2010-January 2011

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

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

***Albina Engine & Machine v. Director, OWCP, et al.*, __F.3d __, 2010 WL 5029538 (9th Cir. 2010).**

Reversing the Board, the Ninth Circuit prescribed the burden of proof in identifying a responsible employer in occupational disease cases involving multiple employers. This case involved a claim for death benefits stemming from decedent's death from mesothelioma as a result of work-related exposure to asbestos at three different shipyards. Decedent's employers, in chronological order, were WISCO, Albina and Lockheed. While the ALJ initially held Lockheed liable, after two BRB remands another ALJ held Albina liable. In keeping with the BRB's instructions, on the second remand, the ALJ weighed all of the evidence regarding decedent's exposure to asbestos at the three employers and determined that Lockheed's evidence was entitled to greater weight. The ALJ noted that WISCO admitted such exposure, and that decedent had done essentially identical work for Albina. The ALJ found that Lockheed had met its burden of showing (more likely than not) the absence of exposure, while Albina did not.

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

Agreeing with the Director, OWCP, the court concluded that the correct way to apply the "last employer rule" was to analyze the evidence regarding each employer separately and sequentially. The court held that in occupational disease cases involving multiple employers, an ALJ should consider sequentially, starting with the last (most recent) employer, (1) whether § 20(a) presumption of compensability has been invoked successfully against that employer, (2) whether that employer has presented substantial, specific and comprehensive evidence so as to rebut the § 20(a) presumption,[2] and (3) if the answer to the second question is yes, whether a preponderance of the evidence supports a finding that that employer is responsible for claimant's injury. Once a responsible employer is found, the ALJ need not continue analysis for earlier employers. Slip. op. at *7 (citations omitted). Here, the most recent employer, Lockheed, was the last responsible employer liable for the payment of benefits, as it did not submit any evidence, let alone substantial evidence, to rebut the evidence against it. 33 U.S.C.A. § 920(a).

The court concluded that the Board erred in holding: (1) that the § 20(a) presumption is irrelevant to the question of liability in a multi-employer case; (2) that each employer must show by a preponderance of the evidence that it is not the last responsible employer; and (3) that the evidence regarding each employer should be analyzed simultaneously.[3] The § 20(a) presumption is relevant to the question of liability in a multi-employer case, and not just to the question of whether a claim is compensable in the first instance. The presumption is invoked only if a claimant alleges[4] that his injury arose out of and in the course of his employment, which implies employment with a particular employer. Additionally, imposing on employers a burden of proof other than pursuant to statute would be invalid under § 7(c) of the Administrative Procedure Act ("APA")[5] and *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). The court noted its own and the Fourth Circuit's prior decisions recognizing that §

[2] The court noted that the presumption may be rebutted with substantial evidence showing either that claimant was not harmed by injurious stimuli at that employer or that claimant was exposed to injurious stimuli at a subsequent covered employer. However, the latter method of rebuttal is likely to be available only to establish that a covered employer not named in the claim is responsible for the injury.

[3] The Board's three decisions in this case were ("McAllister I")(Aug. 19, 2005); ("McAllister II")(Apr. 26, 2007), and ("McAllister III")(Dec. 30, 2008).

[4] The court noted that claimant must offer "some evidence" to give rise to the presumption.

[5] The APA provides that, except as otherwise provided by statute, proponent of rule or order has burden of proof applies to adjudications under the LHWCA. 5 U.S.C.A. § 556(d).

20(a) applies to the determination of a responsible employer, and it was not persuaded by the contrary analysis in *Marinette Marine Corp. v. Dir., OWCP*, 431 F.3d 1032, 1035 (7th Cir. 2005).[6] Further, the "rational connection" rule is not violated if the presumption is imposed only on employers against whom claimant offers some evidence.

In prescribing a sequential analysis of the evidence, the court recognized the need to accord deference to the Director's interpretations of the LHWCA, and noted the Director's view that simultaneous analysis results in uncertainty and confusion, and may lead to anomalous or inconsistent result. The court stated that a sequential analysis simplifies the ALJ's analytical task and thus expedites claimant's receipt of benefits, and also makes it easier for employers to anticipate potential liability. It does not affect the burdens of proof already in place. The court distinguished decisions cited by the Board as supporting simultaneous analysis, stating that *Todd Pac. Shipyards Corp. v. Dir., OWCP ("Picinich")*, 914 F.2d 1317, 1319 (9th Cir.1990)[7] addressed the level of exposure sufficient to establish causation, while *Buchanan v. Int'l Transp. Serv.*, 1999 WL 197777 (BRB Mar. 26, 1999), aff'd sub nom. *Int'l Transp. Servs. v. Kaiser Permanente Hosp.*, Inc., 7 F. App'x 547 (9th Cir.2001) (mem.) dealt with the allocation of liability in a two-employer case involving a traumatic injury.[8] The court noted that it was not dictating the order of proof or any other aspect of the ALJ's case management. The court, however, disagreed with the Director's position that, in applying the sequential method, each employer should be required to disprove its liability by a preponderance of the evidence, stating that the Director's brief did not sufficiently account for APA § 7(c): the rule would impose on each employer a burden of proof other than that created by § 20(a), which is not permitted under *Greenwich Collieries*.

[Topic 70.2 Occupational Disease Cases and the *Cardillo* Rule; Topic 70.5 Responsible Employer – Burdens of Proof]

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[6] The court also distinguished the Board's holdings in *Buchanan v. Int'l Transp. Serv.*, 1999 WL 197777, at *4 (BRB Mar. 26, 1999); *Lins v. Ingalls Shipbuilding, Inc.*, 1992 WL 213839 (BRB Aug. 18, 1992), at *2; and *Susoeff v. S.F. Stevedoring Co.*, 1986 WL 66392, at *2 n. 2 (BRB Nov. 28, 1986).

[7] The court noted that the First Circuit misinterpreted the holding in Picinich as requiring a higher standard than "some evidence" to invoke the § 20(a) presumption. Bath Iron Works v. Brown, 194 F.3d 1, 5 n. 4 (1st Cir.1999).

[8] With respect to the aggravation rule applicable to injury or cumulative trauma cases, the court noted that "[i]t would be irrational to attempt such an analysis without consideration of the evidence regarding working conditions at both employers, and thus a simultaneous analysis is called for in injury cases." Slip. op. at *7.

***Carey v. Ormet Primary Aluminum Corp.*, __ F.3d __, 2010 WL 4968693 (5th Cir. 2010).**

Vacating the Board's denial of attorney's fees to claimant, the Fifth Circuit held that claimant satisfied the fourth requirement for an award of attorneys fees under § 28(b) allowing such fees for a controversy over additional compensation, namely, that he procured services of attorney to achieve a greater award than what employer was willing to pay after director's written recommendation. The employer actively argued it owed claimant one amount, but voluntarily paid claimant a second, higher, amount recommended by the district director, and the ALJ subsequently ruled against employer, but awarded a third, middle amount. Claimant utilized the services of an attorney to obtain an award greater than the amount to which employer believed he was entitled. In adopting the interpretation of § 28(b) advocated by the Director, OWCP, the court noted that the amount of deference it owes to the Director's interpretation of the LHWCA is determined by such factors as the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Employer voluntarily paid claimant benefits for his work-related injury under the LHWCA based upon an AWW of $1,423.92. Employer subsequently requested an informal conference, contending that certain holiday, vacation, and container royalty benefits (collectively, "premium pay") were improperly included in the AWW calculation and thus the AWW should be $1,169.33. The district director issued a written memorandum of informal conference, rejecting employer's argument. Employer contested this decision by requesting a hearing before an ALJ, but did not reduce the compensation rate through the time of the hearing. The ALJ rejected employer's argument that the AWW should not include premium pay; however, the ALJ determined that claimant's AWW was $1,369.15.[9] The ALJ denied claimant attorney's fees under § 28(b) on the ground that no greater compensation was received after the informal conference, and the BRB affirmed.

The court noted that § 28(b) requires all of the following: (1) an informal conference, (2) a written recommendation from the deputy or Board, (3) the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation. The court held that the third requirement was satisfied in

[9] The court remanded the case for the ALJ to clarify the calculation of claimant's AWW, as this figure is necessary to determine the reasonable attorney's fee under § 28(b).

this case because "[i]rrespective of any voluntary continuation of payment, Ormet sought to overturn the director's recommendation through litigation. Ormet's attempt to avoid characterization of its actions as a refusal of the director's recommendation borders on frivolous." Slip. op. at *3.

The court further held that the fourth requirement was met, stating that

> "Like the employee in *Savannah Machine*,[10] Carey was temporarily paid an amount higher than the amount "to which [Ormet] believe[d] the employee is entitled." 33 U.S.C. § 928(b). Ormet sought a formal hearing before an ALJ to argue for a reduction in the benefit amount it was paying-a reduction to the amount "to which [the employer] believe[d] the employee is entitled." Id. Although Carey accepted some compensation, he is not "precluded from collecting attorney's fees incurred in an action to recover adequate compensation under the Act." See Savannah Machine, 642 F.2d at 889. Carey "thereafter utilize[d] the services of an attorney at law" to obtain an award "greater than the amount" to which Ormet believed he was entitled. 33 U.S.C. § 928(b); see also Savannah Machine, 642 F.2d at 890."

Slip op. at *4 (footnotes omitted). The court also noted in support decisions from the Sixth and Fourth Circuits. The court concluded that *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415 (5th Cir. 2009)[11] does not compel a different result: unlike *Andrepont*, a plain text reading of § 28 here makes it clear that "the amount paid or tendered by the employer" is "the additional compensation, if any, to which they [the employer] believe the employee is entitled;" and, further, *Andrepont* did not overrule *Savannah Machine*.

[Topic 28.2.3 ATTORNEY'S FEES – 28(b) EMPLOYER'S LIABILITY -- District Director's Recommendation]

[10] *Savannah Machine & Shipyard Co. v. Dir., OWCP*, 642 F.2d 887 (5th Cir. 1981).

[11] Holding that an unfavorable recommendation from the district director on the issue of additional compensation, even if the claimant was later successful on that issue before the ALJ, would preclude the claimant's recovery of attorney's fees pursuant to § 28(b) of the LHWCA. *Id.* at 423.

***Consolidation Coal Co. v. BRB, et al. [Smith]*, __ F.3d __, 2010 WL 5176847 (3d Cir. 2010).**

The Third Circuit held that claimant, who was employed as a diesel mechanic at employer's Robena facility and was injured while repairing a "Terex" machine used in the coal loading process in a garage located approximately one hundred yards from the Monongahela River, satisfied both the status and situs prerequisites to coverage under the LHWCA.

Citing *Chesapeake and Ohio Railway Company v. Schwalb*, 493 U.S. 40, 45 (1989), the court concluded that an employee who repairs or maintains loading equipment, even discontinuously, meets the status requirement. Here, the ALJ found that the Terex is used, at least in part, to load stockpiled coal into the de-stock hopper, which transfers the coal to a conveyor belt, which then transfers the coal to a barge on the river. Testimonial evidence revealed that repair of equipment, such as the Terex, by claimant was essential to the loading and unloading of coal from vessels, and that cessation of barge loading at Robena would eventually occur if a mechanic like claimant did not service heavy equipment used in the loading process. The fact that cessation would not occur immediately was not found to be dispositive. Thus, the court concluded that substantial evidence supported the ALJ's conclusion that claimant's repair work was essential to, and an integral part of, the chain of events ensuring the continuation of the loading or unloading process, distinguishing *Sea-Land Serv., Inc. v. Rock,* 953 F.2d 56 (3d Cir. 1992) (insufficient nexus to loading or unloading found where claimant, a courtesy van driver, may have occasionally transported longshoremen within employer's maritime facility, but job description did not include this responsibility).

In holding that the garage where claimant was injured was a covered situs, the court adopted a broad reading of "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," 33 U.S.C. § 903(a), stating that this approach is consistent with *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) ("The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage."). In defining "adjoining area," the court held that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the [Act]. To require absolute contiguity . . . would frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity." Slip op. at *7 (c*iting Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514-15 (5th Cir.1980). The court further cited decisions from the Third and Ninth Circuits, and expressly

declined to adopt the Fourth Circuit's approach wherein a site must be contiguous with, or otherwise touch, navigable waters. The court added that it "view[ed] the ALJ's finding that the garage is located within and around essential elements of the loading operation of the maritime component of the Robena, specifically next to the stockpiled coal and 150 feet from the de-stock hopper, is evidence consistent with this conclusion." *Id.*

In addressing the "customarily used by an employer in loading" prong of the situs test, the court concluded that the garage had a maritime purpose because it was used to house and repair equipment essential to the loading and unloading of coal. The court thereby adopted the "functional nexus" test employed by the Fifth and Ninth Circuits. It was not dispositive that the garage was also used to repair equipment not essential to the loading of coal on vessels.

[Topic 1.6.2 Situs, "Over land;" Topic 1.7.1 "Maritime worker" ("Maritime Employment")]

***Price v. Stevedoring Servs. of Am., Inc.*, 627 F.3d 1145 (9th Cir. 2010).**

Affirming the Board and agreeing with the Director, OWCP, the Ninth Circuit held that interest due under the LHWCA may be calculated as simple interest at the rate defined in 28 U.S.C. § 1961(a). Claimant asserted that the rate defined in 26 U.S.C. § 6621 better reflects the cost of borrowing money and that most disabled employees need to borrow. The court rejected this argument, stating there is no evidence to prove disabled employees need to borrow, and, even if that were the case, the Director's position was not unreasonable. The court elaborated that § 1961(a) adjusts its interest rate based on changes in the market, and that "applying a market-sensitive interest rate to past due compensation is an appropriate - and certainly not an unreasonable - way to compensate for this loss." *Id.* at 1149. The court added that disabled employees receive another source of compensation from penalties levied against employers for late payments.

The court also rejected claimant's alternative argument that interest at the rate defined in § 1961(a) must be compounded. While federal courts use compounded interest at the rate defined in § 1961(a), this section of the Code does not directly apply to compensation under the LHWCA, and the Director is not bound to accept all the provisions of 28 U.S.C. § 1961(b). The court found that the Director's opinion that simple interest at the rate defined in § 1961(a) should be used, was not unreasonable. In a concurring opinion, Judge O'Scannlain urged the court to reconsider its deference to the Director's litigating opinions, stating that such deference does not comport

with *United States v. Mead Corp.*, 533 U.S. 218 (2001), which held that *Chevron* deference applies only to agency statutory interpretations promulgated via a relatively formal administrative procedure, such as notice-and-comment rulemaking.

Agreeing with the Board, the Ninth Circuit further rejected claimant's contention that the maximum limit on compensation had to be determined as of the time of the ALJ's decision, stating that

> "[a]s explained in our recent opinion in *Roberts v. Director, OWCP,* 625 F.3d 1204 (9th Cir.2010), 33 U.S.C. § 906(b) and (c) require us to apply the maximum compensation rate from the fiscal year in which the individual becomes entitled to compensation (i.e., the date of injury), not the rate in place for the fiscal year when the ALJ issues a formal compensation award."

627 F.3d at 1148.

[Topic 65.8.3 Computation of Interest – Applicable Rate of Interest; Topic 6.2.1 Commencement of Compensation - Maximum Compensation for Disability and Death Benefits]

***Craven v. Dir., OWCP*, No. 09-60963, 2011 WL 116649 (5th Cir. 2011)(unpub.).**

In affirming the Board's reversal of the ALJ's decision awarding claimant attorney's fees under § 28(b), the Fifth Circuit held that the statutory requirement of a written recommendation was not met where the district director's memorandum of informal conference stated that a recommendation could not be issued due to lack of the necessary wage and medical information; the ALJ's finding that employer acted in bad faith in failing to submit the wage information was not supported by substantial evidence, and thus equitable relief for bad faith, if ever available under § 28(b), was not available here.

Employer paid claimant TTD benefits, but then reduced them to PPD payments. Following an informal conference, a claims examiner issued a memorandum of informal conference, advising the parties that she could not issue a recommendation because she lacked the necessary wage and medical information. However, the parties did not timely receive the memorandum, most likely due to Hurricane Katrina. Claimant subsequently requested a second informal conference. The district director informed claimant that no further informal conference was needed, and claimant

requested a formal hearing. It was uncontested that employer received the memorandum after claimant had requested a formal hearing and only two days before the case was referred to the OALJ. The ALJ awarded claimant additional TTD benefits. The ALJ further awarded § 28(b) attorney's fees on equitable grounds, concluding that employer's refusal to provide the requested wage information had the same result as a denial of a recommendation to pay a specific rate. The ALJ found that employer acted in bad faith, and reasoned that when formalities are lacking through no fault of the claimant, the employer should not secure a windfall. The Board reversed the fee award, holding that § 28(b) "contains no equitable exclusion which would nullify the three statutorily enumerated criteria for fee liability to be assessed under that section;" and remanded for the ALJ to address claimant's liability for attorney's fee under § 28(c).

The Fifth Circuit held that because the statute expressly requires a written recommendation, claimant was not entitled to fees under § 28(b).[12] Slip op. at *2, citing *Andrepont v. Murphy Exploration & Prod. Co.,* 566 F.3d 415, 420 (5th Cir.2009). The ALJ's determination that "when formalities [are] lacking through no fault of the Claimant 'the Employer should not secure a windfall'" constituted an erroneous standard and was inconsistent with *Andrepont*. The court further stated that it did not have to resolve in this case whether equitable relief for bad faith is available under § 28(b), as the ALJ's finding that employer acted in bad faith in not supplying wage information requested by the district director was not supported by substantial evidence. To the extent this court had recognized non-statutory exceptions to the rule that each side pays its own fees, it required that the losing party have acted in bad faith, e.g., by willfully violated a court order. Such precedent requires a finding that a "fraud has been practiced upon [the court], or that the very temple of justice has been defiled." *Id.* at *3 (citations omitted). The court had previously noted, but left unresolved, the potential tension regarding the ability of a court to exercise its equitable powers to assess attorney's fees for bad faith conduct in the face of a statute prescribing when fees may be assessed. Nor did the court resolve this issue in this case, as bad faith had not been established; the only evidence was the mere fact that employer did not respond to the memorandum, and employer's assertion that this was due to its delayed receipt of the memorandum was uncontested. The court noted that since claimant had requested referral to the OALJ before employer's receipt of the memorandum, even if employer had acted immediately upon its receipt of the memorandum, it is unlikely that the district director could issue an

[12] Noting Fifth Circuit precedent recognizing the four prerequisites to liability under § 28(b). Slip op. at *2, citing *Carey v. Ormet Primary Aluminum Corp.,* No. 10-60075, 2010 U.S.App. LEXIS 25029, at *8 (5th Cir.Dec.8, 2010); the court noted that the Fourth and Sixth Circuits recognize the same four requirements.

informal recommendation. *Id.* at *3 n.5, *citing* 20 C.F.R. § 702.316; *Devor v. Dep't of the Army,* 41 BRBS 77, 84 (2007) (stating that no written recommendation was made where the claimant requested referral concurrently with notifying director that claim would not settle). Thus, assuming *arguendo* that an equitable exception exists to § 28(b)'s requirements, it was not available here.

The court further found that § 28(b) was not applicable; and that claimant waived his additional claims by failing to raise them before the BRB (*i.e.*, that an interpretation of § 28(b) which makes an informal recommendation a prerequisite to an award of attorney's fees violates § 19(d) of the LHWCA, due process, and several sections of the APA; and that fees could be awarded under Federal Rules of Civil Procedure 26 and 37 for failure to cooperate in discovery.)

[Topic 28.2.3 ATTORNEY'S FEES – 28(b) EMPLOYER'S LIABILITY -- District Director's Recommendation]

***American Marine Corp. v. Director, OWCP, et al. [Bowes]*, 2010 WL 5263744 (9th Cir. 2010)(unpub.).**

The Ninth Circuit denied employer's petition for review of a Board decision affirming an ALJ's award of benefits under the LHWCA to a commercial diver. Claimant worked as a diver, and his duties also included non-diving activities of loading and unloading barges, pier and shop cleanup, welding and construction work, and equipment maintenance. He was injured while performing buoy maintenance from Chevron's off-shore mooring facility. The ALJ found that claimant's injury occurred on navigable waters and thus fell within the coverage requirements of the Act. *See* 33 U.S.C. §§902(3), 903(a). The ALJ further held that claimant was not excluded from coverage as a member of a crew of a vessel under Section 2(3)(G), based on his findings that claimant's only substantial connection to employer's vessels were his diving-related duties and time expended as a passenger traveling to and from the offshore worksites, to which claimant devoted about 21.3 to 23.6 percent of his time. On appeal, employer argued that the commercial diver was a member of a crew of a vessel for purposes of § 2(3)(G).

Citing *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Ninth Circuit used the "30 percent" test, by which an employee does not qualify as a member of a crew of a vessel if he "spends less than about 30 percent of his time in the service of a vessel in navigation." The Ninth Circuit deferred to the ALJ's determination that the commercial diver spent less than 30 percent of his time in the service of a vessel in navigation, explaining that "the

determination of what duties should be counted as 'in the service of a vessel in navigation' for purposes of applying the 30 percent rule of thumb is a factual question for the ALJ." Slip op. at *1.

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

B. U.S. District Courts

***Service Employees Int' l, Inc. v. Dimensions Int'l, et al. [Holguin]*, Civil Action No. H-09-2878, 2010 WL 5173305 (S.D.Tex. 2010).**

The district court dismissed without prejudice an appeal from a Board decision in a Defense Base Act case, on the ground that the Board's order remanding the case to the ALJ was not "final" for purposes of Section 21(c) of the LHWCA, as extended by DBA. Claimant injured his back in 2005 while working for Dimensions in Iraq, and received treatment and TTD benefits. In 2007, he returned to work briefly with SEII in Afghanistan, but then had an incident that caused increased back pain and ceased working. The ALJ found, *inter alia*, that Dimensions was the last responsible employer, as the 2007 incident constituted a "natural progression" of the 2005 injury. The Board reversed this determination and held SEII liable, instructing the ALJ to address on remand a related issue of AWW; further, the Board vacated the award against Dimensions for TTD benefits during the period when claimant was employed with SEII (*i.e.*, prior to his aggravation injury), and instructed the ALJ to address this issue remand. The court noted that the test for finality is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. In this case, the court concluded that an order remanding the case to the ALJ for further findings of liability and damages is not final. It further rejected petitioners' argument that the BRB's order was final for purposes of appeal because the sole issue presented on appeal – *i.e.*, the determination of the last responsible employer/carrier - was not remanded to the ALJ for further findings. The court noted that this type of piecemeal trial and appellate litigation is what the "finality" rule is intended to avoid. Once the ALJ has entered an order on remand, the parties may appeal not only the Board's affirmance of the ALJ's final order but also the propriety of the Board's remand order.

[Topic 21.3.5 Finality/Interlocutory Appeal]

***Ellison v. Caddell Constr. Co. Inc.*, Civil Action No. 6:09-3093-JMC-BHH, 2010 WL 5125338 (D.S.C. Nov. 10, 2010).**

The plaintiff, a former employee of the defendant, contended that he was injured while working at a construction site of the U.S. Consulate in Juarez, Mexico. Specifically, the plaintiff contends that while he was under the duress of those job-related injuries, two agents of the defendant conspired to, and did, cause him additional harm by injecting him with a substance intended to mask his job-related injuries; and that the defendant acted with gross negligence in subsequently failing to provide proper medical care. The defendant contended that the plaintiff's case must be dismissed because the DBA is his exclusive remedy.

The court noted that the only federal court to have addressed the issue of whether the exclusivity provision of the DBA, 42 U.S.C.A. § 1651(c), includes intentional torts is the Southern District of Texas, which held that the injury must be both "undesired and unexpected," that is, an "accident" in order to be covered by the DBA. *Fisher v. Halliburton,* 703 F.Supp.2d 639 (S.D.Tex.2010). That court further concluded that if the injury is "undesired and unexpected," then the DBA is the exclusive remedy, regardless of the styled-claim actually pled by the plaintiff, intentional or otherwise. Here, the plaintiff's suit did not seek justice for his job-related injury, but for the alleged harm caused by subsequent intentional acts. The court concluded that, as the plaintiff alleged more than an accidental injury, 33 U.S.C. § 902(2), this fact would appear to remove the entire case from the DBA's ambit, in light of the way *Fisher*, and now this court, has construed the Act.

[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 2.2.3 Injury (fact of)]

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

***Big R Towing, Inc. v. David Wayne Benoit, et al.*, Civil Action No. 10-538, 2011 WL 43219 (U.S.D.C. W.D.La. Jan. 5, 2011).**

David Wayne Benoit allegedly injured his back and hip while employed by Big R Towing as a towboat captain. His status as a Jones Act seaman was not contested and he was paid maintenance and cure benefits by Big R Towing. Thereafter, based conflicting medical evidence, Big R Towing filed suit for declaratory relief on the issue of maintenance and cure due for

Benoit's back and hip surgery. Benoit counterclaimed seeking damages under the Jones Act and other maritime law provisions. During a settlement conference conducted by the district court, Big R Towing agreed to pay Benoit $150,000 in exchange for release of all claims. Since Benoit was receiving Social Security disability benefits, part of the consideration for the settlement was that Benoit would be responsible for protecting Medicare's interests under the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(2).

By consent of the parties, a motion was made for the court to determine the future medical expenses in order for Benoit to set aside funding, taking Medicare's interest into account, so that Medicare would remain as a secondary payer. After a hearing on the medical evidence, the court ordered Benoit to set aside $32,000 for back surgery and $20,500 for hip surgery or therapy, and to reimburse Medicare for any services provided prior to the order. The court observed that Medicare currently does not have a mechanism "for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement or recovery of future medical expenses incurred in liability cases." Slip op. at *2.

[Topic 8.10.3 Section 8(i) Settlements – Structure of Settlement]

C. Benefits Review Board

***Bomback v. Marine Terminals Corp.*, __ BRBS __ (2010).**

[**Ed. Note:** In December 2010, the Board published this decision, which had been issued in October 2010 and summarized in the October 2010 issue of the Recent Significant Decisions Digest].

***Stanhope v. Electric Boat Corp.*, __ BRBS __ (2010).**

The Board's decision, rejecting claimant's attorney's fee petition, collects case law from the Supreme Court, Circuit Courts and the Board addressing determination of reasonable hourly rates for purposes of attorney fee awards.[13] The Board described the applicable standard as follows:

> The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a 'reasonable attorney's fee' under a federal fee-shifting statute, such as the Longshore

[13] The Board initially recognized that case law governing determination of a "reasonable attorney's fee" under other federal fee-shifting statutes applies to fee determinations under the LHWCA. Slip op. at 2 n.3.

> Act. *See Perdue v. Kenny A.,* 130 S.Ct. 1662 (2010); *City of Burlington v. Dague,* 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986); *Blum v. Stenson,* 465 U.S. 886 (1984). An attorney's reasonable hourly rate is 'to be calculated according to the prevailing market rates in the relevant community.' *Blum,* 465 U.S. at 895; *see also Kenny A.,* 130 S.Ct. at 1672. The burden falls on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum,* 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America,* 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009); *see also Westmoreland Coal Co. v. Cox,* 602 F.3d 276 (4th Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP,* 522 F.3d 657 (6th Cir. 2008).

Slip op. at 2-3 (footnotes omitted)

In this case, the Board held that claimant's counsel did not provide the Board with sufficient information to determine reasonable hourly rates in this case. First, as in *Maggard v. Int'l Coal Group, Knott County, LLC,* __ BLR __, BRB No. 09-0271 BLA (Apr. 14, 2010), counsel's fee petition did not identify the normal billing rate for the two attorneys and paralegal who performed services in this case, as required under the Board's regulations,[14] but only identified their requested rates ($315 and $85, respectively). Thus, "[a]s claimant's counsel has failed to make any declaration regarding the normal hourly rates that she seeks for cases similar to this one, this defect must be cured before the Board addresses counsel's fee petition." Slip op. at 3-4. The Board noted that counsel cited the complex legal and factual issues involved in this case and the benefits obtained for claimant as well as counsel's extensive experience litigating Longshore cases, stating that "[t]hese are relevant factors that may be considered by the Board in determining a reasonable hourly rate for the work of each person identified in the fee petition." Slip op. at 4 n.6 (citations omitted).[15]

[14] 20 C.F.R. §802.203(d)(4).

[15] The Board did not expressly reconcile this statement with the holding in *Van Skike v. Dir., OWCP*, 557 F.3d 1041 (9th Cir. 2009), that an hourly rate may not be reduced due to lack of complexity of the case, as novelty of the case and complexity of the issues are considered, instead, in arriving at a reasonable number of hours.

The Board further held that counsel failed to provide sufficient information relevant to the prevailing market rates in the relevant community, where she relied on a summary assertion regarding hourly rates for specialized legal services and paralegal services in southeastern Connecticut, her years of experience, her Longshore expertise, and the "Adjusted *Laffey* Matrix" adjusted for Hartford, Connecticut. The Board stated that "claimant's counsel has not demonstrated that the *Laffey* Matrix, which has been accepted as an indicator of the hourly rates of litigation attorneys in Washington, D.C., is a reliable measure of the prevailing market rates in Connecticut or other locations outside of Washington, D.C."[16] Slip op. at 5 (citing decisions rejecting the *Laffey* Matrix as evidence of market rates outside of Washington, D.C.). The Board stated that it was not deciding the question of whether the *Laffey* Matrix may be appropriately considered in determining the prevailing market rates for a Connecticut-based attorney. However, the Board clarified that it does not consider the "Adjusted *Laffe*y Matrix," which uses a different method for updating the hourly rates for D.C. attorneys than that used by the U.S. Attorney's Office, to be a reliable indicator of the prevailing rates for D.C. attorneys. *Id*. at 6.

As in *Maggard*, the Board allowed claimant's counsel to submit an amended fee petition. Slip op. at 7 (citing, *inter alia*, *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049 (9th Cir. 2009)(Board should give fee applicant opportunity to cure defect if it could not be reasonably anticipated). The Board suggested that, to establish prevailing market rates, counsel could submit "affidavits of other lawyers in the relevant community who are familiar with counsel's skill and experience and could attest to the prevailing rates charged in the community by comparable attorneys for similar services," as well as "[e]vidence regarding the fees that counsel has received for work involving cases of similar complexity." Slip op. at 7 (citations omitted). Notably, in rejecting employer's citation to a 2008 Board fee award, the Board stated that while it "may consider the rates awarded in recent cases as some inferential evidence of the prevailing market rates in the relevant community, prior fee awards are not necessarily dispositive of the hourly rate determination in a particular case. Rather, the Board must also consider the evidence submitted by the parties regarding prevailing market rates." *Id.* at 3 n.5 (citing decision by Fourth, Ninth and Sixth Circuit and BRB, with a general reference to Second Circuit decisions).

[Topic 28.6.1 Attorney's Fees - Hourly Rate]

[16] The Board distinguished on this basis its prior holdings in *Beckwith v. Horizon Lines, Inc.,* 43 BRBS 156 (2009), and *Holiday v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB No. 06-0345 (Aug. 11, 2010).

***Aitmbarek v. L-3 Communications*, __ BRBS __ (2010).**

While working for employer, claimant suffered two injuries, a back injury on 5/23/05 and a back and ankle injury on 1/9/06. Employer paid temporary total disability ("TTD") benefits from 1/21/06 through 2/3/07 and medical expenses. The parties then entered into stipulations that, among other things, entitled claimant to permanent partial disability ("PPD") benefits for his back injury beginning 2/4/07 (stipulated date of MMI) and PPD benefits for his ankle injury for 43.2 weeks beginning 7/28/06. The ALJ accepted the parties' stipulations, and granted employer's request for § 8(f) relief, unopposed by the Director, OWCP. On appeal, the Director, OWCP asserted that the ALJ erred in approving the stipulations as they are not supported by substantial evidence and do not accord with law.

The Board described as follows the standard governing orders based on stipulations. Well-established law provides that stipulations between private parties offered in lieu of factual evidence are not binding on any party if they evince an incorrect application of law. In addition, stipulations between an employer and a claimant which affect the liability of the Special Fund are not binding on the Special Fund absent the participation of the Director. Moreover, although the Director did not participate before the ALJ, he has standing to appeal the ALJ's order based on stipulations because he may challenge before the Board erroneous legal and factual determinations which affect the proper administration of the Act. Slip op. at 4 (citations omitted).

Vacating the ALJ's determination, the Board held that the parties' stipulations were not legally sound because they failed to provide compensation for claimant's 5/23/05 back injury. The Board explained that Sections 15(b) and 16 of the LHWCA do not permit a claimant to waive his right to compensation or to release or commute his right to compensation; and that the only exception is "a valid and approved agreement pursuant to Section 8(i)." Slip op. at 5 (citations omitted).

The Board also vacated the ALJ's approval of the compensation rate agreed to by the parties. As of 1/9/06, claimant's average weekly wage ("AWW") was $2,136.50, and thus the corresponding compensation rate exceeded the maximum rate permitted by Section 6(b)(1) of the Act. The maximum compensation rate at this time was $1,073.64. However, the parties stipulated to a maximum compensation rate of $1,030.78. The Board directed the ALJ to correct this error on remand.

After a review of relevant caselaw, the Board also vacated the ALJ's approval of the parties' stipulation to waive claimant's entitlement to interest

on past due compensation. The Board agreed with the Director's position that the ALJ erred in concluding that, because this was not a contested case, claimant was permitted to waive his entitlement to interest. The Board stated that, under the Act, "interest is mandatory and cannot be waived in contested cases." *Id.* at 6 (citations omitted). However, an exception may be made under a valid and approved Section 8(i) settlement agreement. The Board stated that "[t]he parties cannot 'compromise' issues via stipulations as they would in a Section 8(i) settlement, because a claimant cannot waive his right to compensation outside of the Section 8(i) framework." Slip op. at 7. (citation omitted). The Board distinguished cases relied upon by the ALJ, as they addressed waiver of interest in the context of a § 8(i) settlement.

The Board next addressed the Director's contention that the ALJ erred in refusing to establish a schedule for the payment of concurrent awards based on the parties' agreement that claimant was paid in full. The Board concluded that, even though the parties stipulated the employer had paid in full, the ALJ "should have set forth the types of benefits due claimant for each time period. This would have ensured claimant's receipt of the full amount of compensation for his 2006 back and ankle injuries, including employer's payment for 104 weeks of [PPD] for the back injury, as well as ensuring that employer paid the full amount owed for temporary disability for the 2005 and 2006 injuries and that the Special Fund commenced its payments at the proper time." *Id.* at 9 (citations omitted).

Finally, the Board agreed with the Director that the ALJ had to clarify the awards due claimant in accordance with the law governing concurrent awards. A scheduled award may not coincide with a TTD award; rather, it lapses and resumes when total disability is terminated. Therefore, any stipulations for the payment of TTD and PPD benefits "may not contain overlapping dates." Slip. op. at 9 (citation omitted). PPD awards may be paid concurrently, provided the total amount does not exceed what claimant would receive in PTD benefits; if it does, the unscheduled award is given priority and the scheduled award is pro-rated. Here, claimant was awarded TTD compensation for his back injury and PPD compensation for his ankle injury at the same time. Thus, the PPD benefits for claimant's ankle must be deferred until 2/4/07, when the TTD benefits for his back lapse. However, 2/4/07 is the same date the ALJ ordered PPD benefits for the back injury to commence; and, concurrent payment of PPDs would exceed the maximum compensation rate set forth in § 6(b)(1). The BRB instructed the ALJ to clarify the awards on remand; and also to consider whether claimant's back reached MMI on 2/4/07 in light of his subsequent back surgery, and whether claimant is entitled to additional total disability benefits after this surgery.

[Topic 19.3.6.1 ADJUDICATORY POWERS - Issues at Hearing; Stipulations; Topic 15.2 INVALID AGREEMENTS – AGREEMENT TO WAIVE COMPENSATION INVALID; Topic 16.1 ASSIGNMENT AND EXEMPTION FROM CLAIMS OF CREDITORS - GENERALLY; Topic 8.10.1 SECTION 8(i) SETTLEMENTS – Generally; Topic 65.5.1 INTEREST – Mandatory; Topic 8.4.3 Concurrent Awards of Permanent Disability; Topic 8.4.2 CONFLICTS BETWEEN APPLICABLE SECTIONS – Permanent Partial v. Permanent Total; Topic 6.2.1 Maximum Compensation for Disability and Death Benefits]

***Thornton v. Northrop Grumman Shipbuilding, Inc.*, __ BRBS __ (2010).**

On 8/10/93, claimant injured his right knee at work. Employer paid claimant compensation for 15% permanent impairment of his right leg. Ten years later, on 6/2/03, claimant injured his left knee at work and employer paid claimant compensation for 43% permanent impairment of his left leg, the last payment due 4/4/09. On 9/18/07, claimant suffered an increased impairment of his right leg, and employer declined to pay compensation for the increased right leg impairment until 4/4/09.

Rejecting claimant's contention that multiple scheduled PPD awards should be paid concurrently if the underlying impairments arise out of different injuries, the Board held that
"whenever a claimant sustains two or more scheduled permanent partial disabilities, the awards are to run consecutively pursuant to the plain language of Section 8(c)(22)." Slip op. at 6. The Board, thus, affirmed the ALJ's determination that claimant was due compensation for his increased right leg impairment beginning 4/4/09.

Section 8(c)(22) states:

> In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply. (Emphasis added).

The Board reasoned that the plain meaning of the phrase 'in any case' "encompasses 'any' situation in which the claimant is entitled to multiple scheduled awards, regardless of whether they arise from one accident or claim or from multiple accidents or claims." Slip op. at 4. The Board noted that "in any case" appeared seven other times in the Act, and that in this section it was equivalent to the word "whenever." This interpretation is also consistent with *Brandt v. Avondale Shipyards, Inc.*, 16 BRBS 120 (1984), in which the Board affirmed two consecutive PPD award under the schedule relying on § 8(c)(22) and *Potomac Electric Power Co. v. Dir., OWCP (PEPCO)*, 449 U.S. 268 (1980), and rejecting claimant's contention that combined compensation for his two PPDs was to be awarded under to § 8(c)(21). Noting that this case arose in the Fourth Circuit, the Board further stated that claimant's argument did not comport with *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999), which held that the rate of compensation for a combination of partial disabilities may not exceed that payable for a total disability. Here, concurrent payment for claimant's left and right leg impairments would exceed the rate payable for a total disability.

The Board noted case precedent holding that if claimant sustains both a scheduled and an unscheduled PPD arising from either a single accident or multiple accidents, the awards may run concurrently, subject to the maximum compensation rate; and noted that such cases are not governed by a specific provision such as § 8(c)(22). Slip op. at 6 n.5.

[Topic 8.3.26 PERMANENT PARTIAL DISABILITY - Section 8(c)(22) Multiple Scheduled Injuries; Topic 8.4.4 CONFLICTS BETWEEN APPLICABLE SECTIONS - Multiple Scheduled Injuries/Successive Injuries; Topic 8.4.3 CONFLICTS BETWEEN APPLICABLE SECTIONS - Concurrent Awards of Permanent Disability]

***Zepeda v. New Orleans Depot Services, Inc.*, __ BRBS __ (2010).**

Following a review of relevant Fifth Circuit and Board caselaw governing situs and status, the Board affirmed the ALJ's determination of the last maritime employer with respect to a hearing loss claim, holding that claimant, a marine container repair mechanic, who worked in a yard approximately 300 yards from a navigable waterway, satisfied both elements of coverage.

Employer contended that its Chef Yard facility was not a covered situs within the meaning of the LHWCA. The issue was whether the Chef Yard constituted "other adjoining area" under Section 3(a) of the LHWCA. The Board reasoned that the Fifth Circuit has held that "the perimeter of an area

is defined by function rather than labels or fence lines" and that an area may be adjoining if it is "close to or in the vicinity of navigable waters." Slip op. at 3-4, *citing Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514, 12 BRBS 719, 727 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). Further, loading and unloading need not be present; rather, "[i]t is sufficient that the area is associated with items used in the loading and unloading process." Slip op. at 6. Here, Employer's yard is used to repair and store marine transportation containers and the waterfront is 300 yards away, accessible by road. The Board stated that it is not dispositive that non-maritime businesses are located in the area.

The Board also rejected employer's contention that claimant was not a covered employee under the Act. In concluding that claimant met the status requirement, the Board stated that both "[r]epair and maintenance of equipment used in the loading and unloading process" are covered employment. Slip. op. at 6, *citing Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).

[Topic 1.6.2 Situs, "Over land;" Topic 1.7.1 "Maritime worker" ("Maritime Employment")]

***Bogden v. Consolidation Coal Co.*, __ BRBS __ (2011).**

Overruling in pertinent part *Sproull v. Stevedoring Servs. of Am.*, 28 BRBS 271, 277 (1994) (*en banc*), the Board held that an attorney is entitled to a reasonable attorney's fee award for time spent preparing a fee petition in a case arising under the LHWCA. The Board amended the ALJ's decision to the extent it denied attorneys' fees for 1.1 hours expended by claimant's counsel in drafting a fee petition.

Citing *Sproull*, the ALJ concluded that preparing a motion for attorneys' fees is not reasonably necessary to protect claimant's interests, and thus, cannot be recouped by counsel because it is a clerical task which is part of an attorney's general overhead expense. Slip op. at 3. The Board stated that, following *Sproull*, it has since taken the position espoused by the Ninth Circuit, that the "Longshore Act, like other federal fee-shifting statutes, authorizes the award of a reasonable fee for time spent preparing attorney fee applications because, ultimately, uncompensated time spent in preparing a fee request diminishes the value of the attorney's fee eventually received." Slip op. at 4 (*citing Anderson v. Dir., OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996)). The Board has taken this position in all circuits in which this issue has arisen. It further noted that while the Third Circuit, in which this case arose, has not addressed this issue under the LHWCA, it has

consistently awarded reasonable fees for time spent drafting fee petitions under other federal fee-shifting statutes. The Board stressed that this position does not apply to cases arising under the Black Lung Benefits Act, as the corresponding regulation provides that "[n]o fee approved shall include payment for time spent in preparation of a fee application." Slip op. at 4 n.3 (*quoting* 20 C.F.R. §725.366(b)).

[Topic 28.6.3 ATTORNEY'S FEES - Fee Petition]

II. Black Lung Benefits Act

Benefits Review Board

In a prior issuance of the *Recent Significant Decisions,* the Board's decision in *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-__, BRB No. 09-0666 BLA (Sept. 22, 2010) was summarized. In that case, the Board adopted the Director's position and upheld the constitutionality of § 1556(c) of the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148 (Mar. 23, 2010) providing for automatic entitlement in certain survivors' claims.

Recently, in *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-__, BRB No. 10-0113 BLA (Dec. 22, 2010)(pub.), the Board reiterated its holding that the automatic entitlement provisions of the PPACA were constitutional. Moreover, the Board held that, for purposes of applying the automatic entitlement provisions of the PPACA to a survivor's claim, it is the date of filing the survivor's claim, not the filing date of the miner's claim, which controls applicability of the amendments. In so holding, the Board adopted the Director, OWCP's position and stated:

> [G]iven that the recent amendments make derivative entitlement available to survivors who were previously required to file claims, that Section 932(l) does not prohibit filings for which there is an administrative need, and that survivors will need to file some sort of paperwork to ensure that they receive benefits, we reject employer's assertion that it would 'contravene the plain language of [Section 932(l)] to determine the applicability of [Section 1556] based on the date a survivor's claim is filed.'

Slip op. at 5.

[**automatic entitlement provisions of the PPACA, date of filing of survivor's claim is controlling**]

In *Lynch v. Old Ben Coal Co.*, BRB Nos. 10-0209 BLA and 10-0209 BLA-A (Dec. 8, 2010) (unpub.), the Board held that the Administrative Law Judge erred in dismissing Old Ben Coal Company as the responsible operator on grounds that it was not capable of assuming liability for the payment of benefits. Adopting the position of the Director, OWCP, the Board further determined that it was error for the Administrative Law Judge to place the

burden of proof on the Director to establish Employer's financial ability to pay benefits and stated:

> Contrary to the administrative law judge's finding, once the Director has properly named a potentially liable operator, the Director no longer bears the burden of establishing that the named operator continues to be capable of paying benefits. Rather, the regulation specifically provides that '[i]t shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits . . ..'

Slip op. at 15.

Under the relevant facts of the claim, the Administrative Law Judge found that Employer had declared bankruptcy and could not pay benefits. Moreover, since the company qualified as a "self-insurer" under 20 C.F.R. § 725.706, the Administrative Law Judge concluded that the issue was whether "the security given by Old Ben to secure its liability . . . was sufficient to secure the payment of benefits in the event the claim is awarded." While he noted that the Director asserted that a surety bond existed to pay the benefits, the Administrative Law Judge found that "the Director failed to produce the bond and, therefore, failed to prove either its existence or its validity."

The Board held that the Director "established that there was a surety bond posted by Old Ben when it was authorized to self-insure, pursuant to 20 C.F.R. § 726.104(b)." The Board noted that Employer conceded that it posted a bond, although Employer argued that "the original bond was no longer valid, or has been replaced by subsequent bonds, including the Frontier Bond." The Board held that these arguments were beyond the jurisdiction of the Administrative Law Judge and Board to decide. The issue of whether a surety bond is valid must be decided in federal district court.

[**designation of responsible operator; bankruptcy and surety bond**]