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 # 175
January – February 2005

John M. Vittone
Chief Judge

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

Proposed Amendment to Medicare Secondary Payer Act

At its Mid-Winter Meeting, the House of Delegates of the ABA accepted the recommendation of the Tort, Trial and Insurance Practice Section and the Section of State and Local Government Law recommending that the Medicare Secondary Payer Act be amended to correct problems which exist in the implementation of settlements in Longshore and other workers compensation cases.

Law Review Article

"Gambling on Seaman Status: The Plight of Riverboat Casino Employees in Light of Amended State Gaming Statutes," 29 Tulane Maritime Law Journal 139 (Winter 2004), has just been published.

A. United States Supreme Court

Stewart v. Dutra Construction Co., ___ **U.S**. ___ (S. Ct. No. 03-814)(February 22, 2005).

In an eight justice opinion (Chief Justice Rehnquist did not take part), the **Supreme Court** held that a dredge is a "vessel under the Jones Act and LHWCA. The court noted that the LHWCA does not define "vessel" but that Sections 1 and 3 of the Revised Statutes of 1873 specifies that, in any Act passed after February 25, 1871, "'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The **Court** noted that this definition has remained virtually unchanged to the present and continues to supply the

default definition of "vessel" throughout the U.S. Code. The **Court** noted that prior to the passage of both the Jones Act and LHWCA, the Court had treated dredges as vessels. "Then as now, dredges served a waterborne transportation function: In performing their work they carried machinery, equipment, and a crew over water. This Court has continued to treat § 3 as defining 'vessel' in the LHWCA and to construe § 3 consistently with general maritime law."

The **Court** did note the "sensible" distinction between watercraft temporarily stationed in a particular location and those permanently anchored to shore or the ocean floor... The **Court** explained that a watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

The **First Circuit** had held that the dredge was not a "vessel" because its primary purpose was not navigation or commerce and because it was not in actual transit at the time of the claimant's injury. The Supreme Court found that neither prong of that test was consistent with § 3's text or general maritime law's established meaning of "vessel." Section 3 requires only that a watercraft be used, or capable of being used, as a means of transportation on water, " not that it be used primarily for that purpose. Similarly, a vessel does not need to be in motion to be "in navigation." The court noted that the "in navigation" requirement is thus relevant to whether a craft is "used, or capable of being used," for naval transportation and that that inquiry may involve factual issues.

[Topics 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act—Generally; 1.4.3 Jurisdiction/Coverage—Vessel; 1.4.3.1 Jurisdiction/Coverage—Floating Dockside Casinos]

[ED. NOTE: *When reading the following case, the reader should be mindful of the* ***Supreme Court's*** *ruling in Stewart v. Dutra Construction Co., ___* ***U.S****. ___ (S. Ct. No. 03-814)(February 22, 2005), noted above.****]***

Martin v. Boyd Gaming Corp., ___ **U.S.** ___; ___ S.Ct. ___, (S. Ct. No. 04-570) (**Cert. denied** February 28, 2005).

The **Fifth Circuit** had held that a floating casino securely moored during gaming activity served no transportation function and was therefore, not a vessel. *Martin v. Boyd Gaming Corp.*, ___ F.3d ___ (03-30459)(**5th Cir.** July 8, 2004). Thus a plaintiff employed on the floating casino could not be a Jones Act seaman. The floating casino in question had been designed and constructed as a vessel, and built as a replica of a 19th Century paddle-wheel steamer, carried a valid certificate of inspection from the U.S. Coast Guard and had been required by the Louisiana Legislature to conduct gaming cruises until 2001, after which it was allowed to stay dockside for gaming and only moved twice a year so that its mooring area could be dredged. The plaintiff, employed as a cocktail waitress, slipped and fell and sued under the Jones Act. The **Fifth Circuit** held that once the floating casino was withdrawn from navigation so that transporting

passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was not a vessel.

[Topics 1.4.2 Master/member of the Crew (seaman); 1.4.3 Vessel; 1.4.3.1 Floating Dockside Casinos]

[ED. NOTE:** The following is provided for informational value.**]

Commissioner of Internal Revenue v. Banks, ___ **U.S**. ___ (No. 03-892)(January 24, 2005).

This eight justice opinion (Kennedy delivered the opinion of the **Court**; Rehnquist did not take part in the decision) held, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee. The **Court** did not address the contention that the application of the anticipatory assignment principle (contingency fee principle) would be inconsistent with the purpose of statutory fee-shifting provisions since there was a settlement here and no court-ordered fee award or any indication in the contract with his attorney or the settlement, that the contingent fee paid was in lieu of statutory fees that might otherwise have been recovered.

B. Circuit Court Cases

Gulf Best Electric, Inc. v. Methe, ___ F.3d ___, (No. 03-60749) (**5th Cir.** Nov. 1, 2004).

[ED. NOTE:** The publication status of this case has been changed by the **Fifth Circuit** from Unpublished to Published. It was previously reported in the November—December Digest.**]

[Topics 8.1.1 Disability--Nature of Disability (Permanent v. Temporary)—Generally; 21.3.2 Review of Compensation Order—Review By U.S. Courts of Appeals—Process of Appeals; 22.1 Modification—Generally; 10.2.1 Determination of Pay—Average Weekly Wage in General—Section 10(a); 10.2.4 Determination of Pay—Average Weekly Wage in General—"Substantially the Whole of the Year"]

Gulley v. Director, OWCP, ___ F.3d ___ (Nos. 04-1427 & 04-1645)(**7th Cir.** Feb. 8, 2005).

This Black Lung Benefits Act case is noted because Section 21 of the LHWCA is incorporated by reference in the Black Lung Benefits Act. *See* 30 U.S. C. § 932(a). The court found that Section 21 authorizes a party to petition for review only if it is "adversely affected or aggrieved by a final order of the Board…." In the instant case,

since the employer was not injured by the Board's order, which overturned an award of benefits, the court found that the employer could not seek circuit court relief and thus, dismissed the employer's cross-petition for review for lack of jurisdiction. The court cited to *Bath Iron Works Corp. v. Coulombe*, 888 f.2d 179, 180 (1st Cir. 1989)(per curium).

However, in *Coulombe,* the Board had reversed an ALJ's conclusion that the employee was ineligible for medical benefits, but affirmed the decision denying reimbursement because the requirement for filing a report was not met. The court found that because the Board ruled in petitioner's favor on the award, its discussion of respondent's eligibility was "pure dicta." ***[ED. NOTE:*** *Shouldn't the issue of eligibility have been reached before that of whether a report had been timely filed?**]*** Thus, the **Fifth Circuit** arrived at its conclusion that "a party cannot appeal a judgment entered in its favor, because it lacks a 'personal stake in the appeal' sufficient to support appellate jurisdiction."

[Topic 21.3.6 Review of Compensation Order--Review By U.S. Courts of Appeal—Standing]

Virginia International Terminals, Inc. v. Edwards, ___ F.3d ___ (No. 04-1338)(**4th Cir.** Feb. 16, 2005).

In reversing the Board's award of attorney fees, the **Ninth Circuit** noted that neither Section 28(a) nor 28(b) was applicable. Under Section 28(a), "filing a claim" refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim. Failing to hold an informal conference or issue a written recommendation on a supplemental claim is fatal to a claim of attorney's fees under Section 28(b).

Here the claimant, injured on February 22, 2002, filed an LS-203 on February 28, 2002 seeking disability. The employer voluntarily paid temporary total disability benefits for a period beginning on February 26, 2002 and filed a "Payment of Compensation Without Award" form with OWCP dated March 18. Employer terminated disability payments as of March 31, 2002 because a doctor had cleared the claimant to resume work on April1. Thus, within eighteen days of the initial filing of the claim related to the February 22 injury, the employer had voluntarily paid disability benefits for the period from February 26 through March 31.

Several months later, on July 29, 2002, claimant sent a letter to OWCP requesting disability benefits relating to the same February 22 injury for the period from February 23 through February 25 and requesting a conference. The district director, via letter requested medical evidence to support the demand for additional benefits noting that employer claimed that there was no support of loss time until February 26th. Subsequently, after the matter was referred to OALJ, rather than undergoing formal adjudication, the employer paid benefits for the three contested days. Claimant's attorney

filed a petition for $117.00 for attorney's fees for work in connection with the request for the three days' supplemental benefits.

As to Section 28(a), the court first analyzed the term "filing a claim" and found that that term referred to a formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim. "Thus [the claimant's] submission of an informal letter, referring back to a claim previously 'filed' via the requisite LS-203 form and requesting a modification of the benefits received for the same injury, did not constitute a 'claim for compensation having been filed' under section 928(a)."

After noted the wording of Section 28(b), the court found that a claimant is not entitled to an attorney fee under that section unless certain criteria are met. "Where 'the employer or carrier pays or tenders payment of compensation without an award… and thereafter a controversy develops over the amount of additional compensation,' section 928(b) requires all of the following: (1) an informal conference, (2) a written recommendation from the [district director] ……, (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." In noting that none of these four conditions was fulfilled, the court specifically stated that the failure to hold an informal conference or issue a written recommendation was fatal to the claim under the plain terms of the section.

[Topics 28.1.3 Attorney's Fees—When Employer's Liability Accrues; 28.2 Attorney's Fees—Employer's Liability; 28.2.1 Attorney's Fees—Employer's Liability—Controversy; 28.2.3 Attorney's Fees—Employer's Liability—District Director's Recommendation; 28.2.4 Attorney's Fees—Employer's Liability—Additional Compensation]

Kelly v. Red Fox Companies of New Iberia, Inc., (Unpublished)(No. 04-60538)(**5th Cir.** Feb. 2, 2005).

Once again, the court holds that the failure to obtain written approval of a settlement with a third party placed an absolute bar on the receipt of further compensation from an employer or the employer's carrier under Section 33(g). Simply because an employer waives a right to subrogation does not mean the employer would not be prejudiced by the settlement. The employer would still have an interest in the third-party settlement agreement since the proceeds of the settlement would be off-set against the employer's compensation liability. Thus, written notice is still required.

Claimant also argued that his due process rights were violated when the employer failed to copy him with the written notice of suspension of benefits that was sent to DOL pursuant to statutory requirements. Section 14©. The court found that the claimant failed to demonstrate how this action by a private insurance carrier deprived the claimant of a protected property interest without due process of law. *See, In re Compensation*

Under the Longshore & Harbor Workers Compensation Act, 889 F.2d 626 (**5th Cir.** 1990) (finding that the review process for compensation orders issued under LHWCA satisfied the requirements of due process); *see also Kreschollek v. S. Stevedoring Co*. 223 F.3d 202, 206-7 (**3d. Cir**. 2000)(finding that termination without notice by private insurer of LHWCA benefits does not constitute a violation of employee-recipient's procedural due process rights).

[Topics 33.7 Compensation for Injuries Where Third Persons are Liable--Ensuring Employer's Rights—Written Approval of Settlement; 19.1 Procedure—The Claim: Generally; 19.3 Procedure--Adjudicatory Powers; 21.210 Review of Compensation Order--Stay of Payments]

Dolan v. Kvaerner Philadelphia Shipyard, (Unpublished)(No. 04-2002)(3rd Cir. February 23, 2005).

The court agreed with the Board and the ALJ that the claimant had not established that he suffered a work-related harm. The claimant had alleged an injury shortly after being hired. He was terminated after testing positive for a controlled substance while undergoing a routine post-accident drug test.

[Topics 20.2.1 Presumptions—Prima Facie Case; 20.2.2 Presumptions—Injury; 20.2.3 Presumptions—Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident]

C. Federal District Court Decisions

Cohen v. Pragma Corp., ___ F. Supp. 2d ___ (Misc. Case No. 04-269 (RJL))(Jan. 5, 2005); 2005 U.S. Dist. LEXIS 2251; 2005 WL 350582 (D.D.C.).

A federal district court judge in the District of Columbia held that since an employee's injuries occurred (diagnosis of pulmonary fibrosis as a result of exposure to a toxic environmental pollutant in Almaty) in the United States, rather than in Almaty, Kazakhstan where she was worked on a United States Economic Development Project, the LHWCA applied rather than the Defense Base Act (DBA).

After the Board affirmed the ALJ's decision providing relief to the claimant, she filed a Motion to Enforce Final Administrative Award. Pragma had argued that the federal district court of the District of Columbia lacked subject matter jurisdiction, since under the DBA, a claimant must seek enforcement from the federal district court for the judicial district in which the District Director whose order is at issue is located. Since the order upon which the claimant sought relief was filed in the New York OWCP district, Pragma, relying on *Hice v. Director, OWCP*, 332 U.S. App. D.C. 213, 156 F.3d 214 (D.C. Cir. 1998), contended that the enforcement action falls within the jurisdiction of the federal district court in the Southern District of New York.

However, the district court judge for the District of Columbia distinguished the *Hice* decision in several respects. First, it noted that *Hice* involved an appeal of the Board's decision whereas the instant case involved a motion to enforce a final order affirmed by the Board, which was not appealed. Next, in *Hice*, the claimant was seeking benefits for injuries that manifest themselves while he was working on a U.S. military base in Australia, but in the instant case the claimant was seeking relief for injuries that arose after her return to the United States. The federal district judge stated, "While the Defense Base Act applies to workers' compensation benefits for injuries occurring outside of the United States, the provisions of the LHWC Act apply to injuries occurring within the United States….Thus, since the benefits award is for injuries that occurred after [the claimant's] return to the United States, the provisions of the LHWC Act apply and [the claimant] may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred…."

[Topic 60.2.1 Longshore Act Extensions—Defense Base Act—Applicability of the LHWCA]

McAllister v. G & S Investors, ___ F. Supp. 2d ___ (CV 03-3364)(E.D. N.Y. Feb. 17, 2005).

In this summary motion matter, a dock builder set forth claims under both state and federal law for common law negligence and also alleged a "Section 240" New York Labor Law claim and a claim pursuant to the LHWCA. A Section 240 claim is a claim under the current enactment of the New York state statutory laws aimed at protecting workers from the dangers of elevation-related risks. (Claimant fell from a ladder on a float stage at the Port Chester Project.) A Section 240 claim is a strict liability statute and imposes liability on contractors as well as owners and their agents without regard to notice of any defective condition.

Defendants allege that the LHWCA preempts the Section 240 claim. Preemption doctrines are based upon the principles that the Supremacy Clause of the Constitution invalidates state laws that interfere with, or are contrary to, those of the federal government. Preemption may be express or implied. Express preemption exists where a federal statute expressly states the intent to preempt state law. Implied preemption is found where a statute's scope indicates an intent to wholly occupy a field or where there is an actual conflict between the federal and state laws. Implied preemption is found, for example, where it is impossible to comply simultaneously with both federal and state regulatory standards or where state law poses an obstacle to Congressional intent.

In the instant case, the court found that there was no concern requiring preemption. There is no express language in the LHWCA. The LHWCA and Section 240 share the same objective—the protection of workers and placement of financial responsibility on those most likely to be able to prevent injury. There was no direct conflict between the LHWCA and Section 240. The court found that while the statutes require different findings for Liability to be imposed, these different theories can be

presented to a jury by use of a special verdict form. Thus, the court reasoned, Section 240 is not preempted by the LHWCA.

[Topic 85.3 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies--Federal/State Conflicts]

Birchfield v. B.P. America, Inc., ___ F. Supp. 2d ___ (No. Civ. A. 04-499)(E.D. La. Jan. 31, 2005).

In this summary judgment matter, the plaintiff contends that he is covered by the LHWCA rather than the Louisiana State Workers Compensation Act. In making this claim he pointed to historical facts of his employment to support his claim that he was a longshoremen covered by the LHWCA. He alleged that while working for the employer for several years, he had occasionally worked on barges and immediately adjacent to navigable waters, and that thus, a genuine issue of fact exists with respect to the nature of his past work with the employer which was maritime in nature. However, the court noted that the only evidence he produced was his affidavit stating that he worked as a fitter on various construction projects, that he worked in close proximity to navigable waters, and that he "occasionally loaded and unloaded barges. "A single statement by the plaintiff that at some time during employment he 'occasionally' worked on barges, without identifying any specific incidents of such work, is insufficient to create a genuine issue of material fact. Again, to withstand summary judgment, Birchfield had to produce more than a scintilla of evidence."

[Topic 1.7.1 Jurisdiction/Coverage—Status—"Maritime Worker"(Maritime Employment")]

Arnold v. Luedtke Engineering, Co., ___ F.Supp 2d ___ (No. 1:04-CV-69)(W. D. Mich. February 24, 2005).

In this summary judgment matter the issue was whether an employee was a seaman under the Jones Act. The employer is a maritime construction and dredging company involved in maintenance dredging, marina construction and breakwall construction. Over the past 23 years the employee was employed there in various capacities including runner, deckhand, tugboat pilot, and project foreman. The project at the time of injury was seawall reconstruction along the shore of the Erie Canal. The worker was the project foreman.

After noting *Chandris, Inc. v. Latsis*, 515 **U.S.** 347 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 **U.S.** 548 (1997); and *Stewart v. Dutra Construction Co*., 543 **U.S.** ___, 2005 WL 405475 (February 22, 2005), the court determined that a summary judgment was proper and that the worker did not satisfy the requirements for seaman status under the Jones Act.

Due to the seawall's location near the canal, the project required the use of a tug boat, derrick boat, and floating work raft. The worker would pilot the tug boat when the derrick boat needed to be moved. According to the worker, at a maximum he piloted the tug three to four times per day for an estimated 15 to 20 minutes per tug. He estimated that the longest tow he was required to make on the project was three to four hundred feet. His workday shifts ran 10 to 12 hours. At the time of injury he was working on the "wedge plate phase" of the project, engaged in welding one-hundred pound steel plates to the new seawall. In order to maneuver the plate into place along the seawall, he would carry a plate by hand a short distance from the beach to the seawall, place the plate on top of the seawall, step on to the seawall, attach the plate to a cable jack which lowered the plate into position on the waterside of the seawall, then lower himself to the work raft where he would weld the plate into place. He eventually began experiencing back pain and after several weeks could not get out of bed.

The court noted that in order to be a seaman, an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, and that a seaman must have a connection to a vessel in navigation (or identifiable fleet) that is substantial in terms of both its duration and its nature. The court specifically noted that according to *Chandris,* in analyzing this requirement, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon. *Chandris* at 370 (quoting *Wallace v. Oceaneering Int'l,* 727 F.2d 427, 432 (**5th Cir.** 1984).

The court noted that in evaluating the employment-related connection of a maritime worker to a vessel, it should neither take a "snapshot" test on the one hand, nor too broad a view when the nature of assignments has changed. "although [the worker's] previous employment with [employer] is not relevant to this case, the Court must not narrow its focus to such a degree that only the moment of [his] injury is evaluated in determining his seaman status." Here the court found that the worker did not have a substantial connection to a vessel during the wedge plate attachment phase and that this was a new assignment.

The court stated that there was no evidence that the worker's duties during the wedge plate attachment process contributed to the function of a vessel or were substantially connected to a vessel. The court also found that even in light of *Stewart's* definition of vessel, the work raft could not be considered a vessel for Jones Act purposes because it was not "practically capable" of transporting anything. The worker's incidental on-water activity does not transform him into a seaman for Jones Act purposes, even though he was welding the plates to the seawall while standing on the work raft floating upon the water.

Further more, the court noted that the worker failed the *Chandris* "30 percent test" since only about one hour per day of his time was spent in service of a vessel (the tug) in navigation. In sum, the court concluded that the worker was assigned to a land-based project in which water was incidentally involved, by reason of the seawall's proximity to the canal.

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

D. Benefits Review Board Decisions

Stalinski v. Electric Boat Corp. ___ BRBS ___ (BRB No. 04-0424)(Jan. 14, 2005).

In upholding the ALJ, the Board found that, although the claimant may have performed work that was integral to the employer's shipbuilding process, she was employed in an office setting performing clerical and data-processing activities and on the rare occasions when she left the office, she continued to perform clerical work. Thus, as a worker processing paperwork who even, out of the office, performed clerical tasks, the claimant's job was distinguishable from that of a worker who is primarily performing office clerical work but is subject to regular assignments performing other tasks.

As the ALJ noted, the claimant's primary duties involved overseeing the computer documentation and recording of the pipe hangers and pipe joints installed by employer's employees for the United States Navy submarines. She performed the majority of her employment duties in an office setting and described them as involving mostly typing and filing. The claimant testified that on a couple of occasions she took cards onto a submarine, although she could not recall the exact number of times that she had done so. She further testified that she went to a vessel "a couple of times with the carpenter" when she was assigned to the employer's tile program. This program required the use of a hand-held computer to read the bar codes which were attached to soundproofing tiles installed on the hulls of submarines; the claimant testified that she had made "maybe" three such visits when a problem had arisen with the bar codes.

The ALJ had found that the claimant exclusively performed traditional office clerical and data entry work for the employer, and that the claimant's occasional visits to the employer's production areas were incidental to her clerical/data-entry duties, and that her occasional non-clerical duties were too sporadic to warrant coverage under the LHWCA. The Board also noted that in the claimant's brief, she stated without citation to the record that she "went on board submarines at times to troubleshoot with the

inspections," that she assisted analysts on the submarine, and that she trained carpenters and was thus "essentially doing the carpenter's jobs." The record, however, including the claimant's own testimony, contained no evidence that would support this statement.

[Topic 1.11.7 Jurisdiction/Coverage—Exclusions to Coverage -- Clerical/secretarial/security/data processing employees]

Manente v. Sea-Land Service, Inc., ___ BRBS ___ (BRB No. 04-0360)(Feb. 18, 2005).

[ED. NOTE: *This matter was originally issued as an "Not Published" Decision on December 7, 2004; its status was changed on February 18, 2005.**]***

Citing to *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (**7th Cir.** 2002)(An employer's right to modification under Section 22 displaces the notions of finality inherent in the law of the case doctrine and evinces the Act's preference for accuracy unless modifying the earlier decision would not render "justice under the Act."), the Board held that the "law of the case" doctrine did not preclude the ALJ's admission of new evidence as well as finding on remand that the employer established rebuttal of the Section 20(a) presumption. The Board went on to state that under Section 22, the fact finder may admit new evidence and reconsider an issue on his own motion or that of any party.

This is the second remand (and third Board action) of this causation issue/modification claim. The claimant was originally awarded temporary total disability for a finite period but found to have no continuing permanent disability. The Board affirmed the finding that a back injury had resolved and that the claimant had fully recovered from his shoulder contusion. After undergoing surgery for a torn rotator cuff, the claimant filed a petition for modification under Section 22 alleging that his shoulder condition worsened.. The ALJ found that the claimant was not entitled to modification as there was no mistake in fact nor change in the claimant's shoulder contusion. The ALJ found that although the claimant's shoulder tear had worsened, the claimant did not establish a mistake in the finding that the tear was not causally related to the claimant's work-related accident. Thus, further benefits were denied..

On the next appeal, the Board held that as to the modification request, the newly submitted opinion of the claimant's treating physician (attributing the rotator cuff tear to work trauma) was sufficient evidence to support a conclusion that there was a mistake in fact in the prior decision regarding the cause of the claimant's shoulder condition. The Board then also held that the opinion established that the claimant has a torn rotator cuff that could have been caused by the claimant's injury, the Section 20(a) presumption was invoked as a matter of law. Further, the Board held that the employer did not establish rebuttal of the Section 20(a) presumption and that the claimant's right rotator cuff tear was therefore work-related as a matter of law. The Board therefore held that the ALJ erred in denying modification and remanded.

On remand, the ALJ addressed a follow-up report of the employer's doctor and concluded that there was sufficient rebuttal of the Section 20(a) presumption. [Originally the employer's doctor testified that while the rotator cuff tear was the result of a natural progression of degenerative changes and not causally related to the workplace fall, he nevertheless also testified that the claimant's tendon could have reached a point of degeneration such that a relatively minor insult could cause a tear and that if the claimant had no symptoms prior to the workplace accident and had symptoms subsequent to the accident, it increased the likelihood that the trauma played some part in the progression of his condition.] In the follow up report, the doctor stated that the rotator cuff surgery was neither caused nor aggravated by the workplace accident. The ALJ thus found that the claimant did not establish a sufficient basis for modification, i.e., that there was a mistake in the earlier determination as to the cause of the claimant's shoulder tear, and therefore the ALJ again denied the petition for modification.

On the next appeal, the Board rejected the claimant's assertion that the "law of the case" doctrine precluded the ALJ's admission of new evidence and finding on remand that the employer established rebuttal of the Section 20(a) presumption. The Board went on to state that under Section 22, the fact finder may admit new evidence and reconsider an issue on his own motion or that of any party.

[Topics 20.3 Presumptions—Employer Has Burden of Rebuttal with Substantial Evidence; 22. 1.2 Modification—Scope of modification; 22.3.1 Modification—Requesting Modification—Determining What Constitutes a Valid Request; 22.3.5 Modification—Requesting Modification—Mistake of Fact]

E. ALJ Decisions and Orders

Voytovich v. C & C Marine Maintenance Co., (Unpublished) (OALJ No. 2004-LHC-788)(January 28, 2005).

This matter discusses the procedure for making determinations as to whether medical charges are excessive. The ALJ found that the issue of whether the medical provider's bills are in accord with the prevailing community rate should be remanded to the District Director for a Section 702.413 finding and if necessary, a Section 702.414 investigation.

Under the LHWCA, the medical care of an injured employee is supervised by the Director under Subpart D, and the Director's authority is specifically outlined in Section 702.407. The Director's supervisory functions include periodic medical reporting; determining the necessity, sufficiency, and character of medical care furnished; whether change in service providers is necessary; and the evaluation of medical questions regarding the nature and extent of the covered injury and medical care required. 20 C.F.R. §§ 702.408-417.

Section 702.413 provides that when "a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 C.F.R. 10.411) to the extent appropriate and where not appropriate, may use other state or federal fee schedules." Section 20 C.F.R. § 702.413. The reasonableness of the amount of the medical bills is only in dispute if the bills are recoverable as a matter of law under the LHWCA.

[Topics 7.9 Medical Benefits—Medical Fee Limits; 19.3 Procedure--Adjudicatory Powers]

F. Other Jurisdictions

Osborne v. JAG Construction Services, Inc., (Unpublished) (2004 CA 0437)(1st Cir. February 16, 2005).

In this Louisiana case, the trial court had granted the defendant's motion for summary judgment, which the appellate court now affirms. The plaintiff, a borrowed employee, argued that he was entitled to sue in tort and not workers' compensation because the 1984 amendments to the LHWCA abrogated the borrowed-employee doctrine. The First Circuit noted that it is well settled that the LHWCA did not abrogate the doctrine of workers' compensation with the 1984 amendments. The **Fifth Circuit** made it clear that the LHWCA did not abolish the borrowed-employer doctrine. *West v. Kerr-McGee Corporation*, 765 F.2d 526 (**5th Cir.** 1985). The court additionally noted that in *Brown v. Union Oil Company of California*, 984 F.2d 674 (**5th Cir.** 1993) the circuit court had enumerated nine factors to assess in determining whether an employee will be considered a borrowed employee of another.

[Topics 2.2.16 Definitions—Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee doctrine; 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability—Borrowed Employee Doctrine]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Gulley v. Director, OWCP*, ___ F.3d ___, Case Nos. 04-1427 and 04-1645 (7th Cir. Feb. 8, 2005), the court held that black lung benefits were precluded where the miner was totally disabled due to blindness. The court noted that, under 20 C.F.R. § 727.203(b)(3), a miner "cannot recover benefits if he was totally disabled by an unrelated, non-pulmonary condition notwithstanding his probable pneumoconiosis." The Seventh Circuit did state that, if the amended regulatory provisions at 20 C.F.R. § 718.204(a) (2004) had been applicable, then Claimant's blindness would not have precluded an award of black lung benefits. *See also* the summary of this decision in the Longshore section of this digest.

[**non-respiratory impairment precludes entitlement under Part 727 in Seventh Circuit**]

In *Martin v. Ligon Preparation Co.*, ___ F.3d ___, Case No. 03-4646 (6th Cir. Mar. 4, 2005), the Sixth Circuit held that the ALJ's crediting of Drs. Broudy's and Fino's opinions over the opinion of Dr. Rasmussen to deny benefits was not supported by substantial evidence. Initially, the ALJ accorded less weight to Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis because it was based on a positive x-ray interpretation, where the ALJ found that a preponderance of the chest x-ray evidence was negative for the disease. The court held that this was error because, although Dr. Rasmussen's finding of *clinical* pneumoconiosis was not supported by the record, he also diagnosed *legal* pneumoconiosis based on a physical examination of the miner as well as a diffusing capacity test, arterial blood gas studies, and Claimant's personal and occupational histories. The court further stated the following:

> [E]ven if Dr. Rasmussen had diagnosed 'only' clinical pneumoconiosis, as the BRB concluded, such a diagnosis would not disqualify Martin from receiving benefits under the BLBA. '[C]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act.' (citation omitted). Thus, an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well. (citation omitted).

Slip op. at pp. 3-4.

The court then stated that the ALJ's reliance on Dr. Broudy's opinion was "perhaps the most perplexing aspect of this case." Dr. Broudy opined that a drop in the miner's oxygen level during exercise on blood gas testing would be indicative of an interstitial lung disease such as pneumoconiosis and, as noted by the court, Claimant's blood gas testing demonstrated "exactly the drop in oxygen level as described by Dr. Broudy." Similarly, the court found that Dr. Fino's opinion was lacking because he did

not consider the miner's qualifying blood gas testing values after exercise even though he also concluded that such values would be required to assess the miner's impairment.

Finally, the court questioned the ALJ's crediting of Dr. Fino's opinion based on his "excellent qualifications." The court noted that Dr. Fino's qualifications were not necessarily superior to Dr. Rasmussen's qualifications. In this vein, it was noted that, although Dr. Fino is board-certified in internal medicine and pulmonary diseases and Dr. Rasmussen is board-certified in internal medicine only, "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis."

[**weighing medical opinions; existence of pneumoconiosis**]

B. Benefits Review Board

In *Smith v. Martin County Coal Corp.*, 23 B.L.R. 1-__, BRB No. 04-126 BLA (Oct. 27, 2004), the Board held that the evidentiary limitations at 20 C.F.R. § 725.414 (2004) are mandatory. As a result, it was error for the administrative law judge to admit evidence in excess of the limitations based solely on the parties' agreement to waive the regulatory requirements; rather, the Board concluded that, under 20 C.F.R. § 725.456(b)(1) (2004), the administrative law judge must make a finding of "good cause" prior to admitting such evidence.

[**requiring "good cause" to exceed evidentiary limitations at § 725.414**]

In *Blake v. Elm Grove Coal Co.*, BRB Nos. 04-0186 BLA and 04-0186 BLA-S (Dec. 28, 2004) (unpub.), the Board held that it is proper for the ALJ to "discredit a medical opinion which is premised upon a view inconsistent with the regulations." In *Blake*, a physician opined that "only clinical pneumoconiosis is progressive," which the Board concluded was inconsistent with 20 C.F.R. § 718.201(c)." As a result, the medical opinion was not well-reasoned based on the following comments to the amended regulations as noted by the Board:

> [I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is significant.
>
> 65 Fed. Reg. 79971 (Dec. 20, 2000).

Slip op. at 9.

[**medical opinion based on premise contrary to amended regulations not probative**]

By unpublished decision in *Sizemore v. LEECO, Inc.*, BRB No. 04-0514 BLA (Feb. 7, 2005) (unpub.), the Board held that evidence underlying withdrawn claims is not automatically admitted in a subsequent claim:

> The Director, Office of Workers' Compensation Programs notes that 20 C.F.R. § 725.309(d)(1) provides that '[a]ny evidence submitted in conjunction with any prior claim shall be made part of the record in the subsequent claim . . ..' However, the Director also correctly points out that in situations such as the instant case where the earlier claim was withdrawn, the provision would not be applicable as the earlier claim is considered 'not to have been filed.' 20 C.F.R. § 725.306(b)(2000); *see Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183, 1-188 (2002) (en banc).

Slip op. at pp. 2-3.

[**evidence underlying withdrawn claim**]