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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 183
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SPECIAL NOTE: On January 30, 2007, the Department of Labor amended the black lung provisions at 20 C.F.R. § 725.477(b) to remove the requirement that parties' names be included in black lung decisions:

> A decision and order shall contain a statement of the basis of the order, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance . . ..

72 Fed. Reg. 4204 (Jan. 30, 2007). The amendment is primarily designed to protect the privacy interests of black lung claimants whose decisions are published to the Department's web site. In its comments, the Department further noted that existing regulations implementing the Longshore and Harbor Workers' Compensation Act at 20 C.F.R. Part 702 do not contain any requirement that the parties' names be included in decisions.

I. Longshore Act

Announcements

Tulane Maritime Law Journal has just issued "The Seaman Status Situation: Historical Perspectives and Modern Movements in the U.S. Remedial Regime," by Shailendra U. Kulkarni, Vol. 31 Tul. M. L. Jr. 121 (Winter 2006).

A. United States Supreme Court

Operators & Consulting Servs. Inc. v. Director, OWCP, ___ **U.S.** ___ (U.S. S.Ct. No. 06-250*)(cert. denied* Jan. 8, 2007).

The **Fifth Circuit** had previously ruled that the company employing an oil platform mechanic when he was first injured is liable under the LHWCA rather than the later employer for whom the claimant had only worked for five months when his

deteriorating back rendered him disabled. The first employer argued that the "last employer" rule should govern and that the **Fifth Circuit's** position is counter to that of the **Ninth** and the **Third**. The **Fifth Circuit** had focused on whether or not the claimant had experienced a traumatic event while working for the second employer whereas the first employer argued that the focus should have been on whether his five-month employment aggravated, accelerated, exacerbated, contributed to, or combined with his original injury incurred with the first employer.

[Topics 2.2.6 Section 2—Definitions—Injury—Aggravation/Combination; 2.2.7 Definitions—Injury—Natural Progression; 2.2.8 Definitions—Injury—Intervening Event/Causation Vis-à-vis Natural Progression]

B. Federal Circuit Courts

James Wards Cove Packing Co., Inc., (Unpublished)(No. 05-35337)(**9th Cir.** December 1, 2006).

The circuit court held that the district court had improperly dismissed the Jones Act claim since the employee had shown sufficient evidence to raise a factual issue as to whether his essential duties had changed between his employment in Seattle and Alaska. The record contained evidence of material issues of fact as to whether the employee was a seaman for purposes of the Jones Act. The court noted that when assessing a maritime worker's seaman status, the relevant time period in assessing "the substantiality of his vessel-related work" is the period of time the worker spent in the position he occupied at the time of the accident.

The circuit court did, however, find that the federal district court had correctly concluded that Section 905(b), by its plain meaning, barred the employee from asserting a claim against the corporation. The corporation was the owner of the vessel on which the employee was injured.

[Topics 1.4 Jurisdiction/Coverage—LHWCA v. Jones Act; 5.2.1 Third Party Liability--Generally]

Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, ___ F.3d ___ (No. 05-1495 and 05-2168)(**4th Cir.** December 13, 2006).

The claimant suffered two injuries with employer. First, in 1999 he injured his left knee but did not claim compensation. Then, in 2001 he injured his right knee while crawling in a tank. As a result of that injury, he underwent arthroscopic surgery and collected temporary total disability for a while. Several months after returning to work, he reported pain in his left knee during an office visit to his orthopedic specialist. His doctor found that he needed surgery in the left knee and explained that the problem was

the result of putting extra pressure and stress on his left knee following his right knee injury and surgery. The employer contested his right to compensation.

The court upheld a finding that a disabling left knee injury was the consequence of a 2001 right knee injury. It further upheld a finding that the factual predicate to determine medical causation did fully exist when the ALJ and BRB decided the issue. The employer had argued that there "could be no disability until the claimant submitted to surgery and that the agency adjudicators "could not possibly decide the issue of [disability] causation ahead of time."

However, the **Fourth Circuit** found that the issue of medical causation was ripe for determination by the agency adjudicators:

> The prospect of hardship to [the claimant] supports the decision of the agency judges to determine the cause of his left knee ailment prior to surgery. The record at the time suggested that if the condition had been attributed to [his] 1999 left knee injury, the company would have asserted the statute of limitations as a defense against a request for disability compensation. The perceived risk of receiving no compensation if he was required to miss work during recuperation could have impacted [his] decision about whether to undergo surgery. The timely determination of medical causation afforded [him] the latitude to make this decision with certain knowledge of his compensation prospects during any period of temporary disability.

[Topic 20.2.1 Presumptions—Prima facie case]

Charpentier v. ORTCO Contractors, ___ F.3d ___ (No. 06-60217)(**5th Cir.** Feb. 28, 2007).

Employer must keep paying benefits until a circuit court issues its final mandate. Here a widow was awarded benefits by the ALJ and the Board. The **Fifth Circuit** ultimately vacated those awards. The widow then claimed that she was entitled to benefits from the time the circuit court vacated the award until the time the **Supreme Court** denied cert., or alternatively, until the time the circuit court denied her petition for rehearing. The Board found that her entitlement ended on the date the court issued its opinion vacating the award. The circuit court now reverses the Board's holding. It cites to a portion of Section 21 which provides that "The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court." Calling this an issue of first impression, the court distinguished between a final award and a final decision. The court noted that it retains control over an appeal until it issues a final mandate. "Before our mandate issues, we have the power to alter or modify our judgment. Accordingly, our decision is not final until we issue a mandate." Therefore, the court found that the employer was required to continue paying benefits

until the court issued a stay order or reached a final decision "affirming, modifying or setting aside" the Board's order.

[Topic 21.3 Review of Compensation Order—Review By U.S. Courts of Appeals]

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*Pittsburgh & Conneaut Dock Co. v. Director, OWCP***,** ___ F.3d ___ (No. 05-3425)(**6th Cir.** Jan. 4, 2007).

The Sixth Circuit chose to follow the Fourth and Fifth Circuits in this attorney fee matter, rather than that of the **Ninth Circuit**, and held that attorney fees are not payable by the employer unless all requisites enumerated in Section 28(b) are met. In the instant case the claims examiner specifically did not make a recommendation because the parties were considering settlement. Even though the employer paid some temporary total disability, it had controverted the permanent nature of the disability. Siding with the other circuits, the court noted that requesting an informal hearing is not a "claim for compensation" within the meaning of subsection 28(a). Furthermore, the court noted that there was no written recommendation of a disposition of the controversy over whether the claimant's disability was permanent and total.

[Topic 28.3 Attorney Fees—Employer's Liability]

ITT Federal Services Corp v. Montano, 473 F.3d 32 (**1st Cir.** 2007).

The LHWCA does not provide a covered employer and its carrier with a statutory right to seek damages against an injured employee's attorneys for legal malpractice for not pursuing a claim against a responsible third party. Section 33(b) does not support a claim of a "subrogation lien" on any legal malpractice claim that an employee sustained in the course of employment. The LHWCA only addresses the harm an employee sustains in the course of employment. (Here the harm was caused by a Navy pilot's errant bombing of the claimant's position in a control tower in Puerto Rico.) The alleged "legal injury" did not occur in the course of the employee's employment. Likewise, the defendant's purported misfeasance did not entitle the employee to compensation under the LHWCA. Section 33(b) is a limited assignment of rights and does not encompass legal malpractice.

[Topic 33.2 Compensation For Injuries Where Third Persons Are Liable—Assignment of Rights]

Goldman v. Halliburton Energy Services, (Unpublished)(No. 06-60431 Summary Calendar) (**5th Cir.** March 12, 2007).

Here the claimant sustained injuries while working aboard an oil rig in the Gulf of Mexico and filed an LHWCA claim. The ALJ granted summary judgment to Halliburton

because the worker was excluded from coverage under the LHWCA as a member of a vessel's crew. The claimant argued that the employer was judicially estopped from claiming that he was a member of the crew. The Board upheld the ALJ's grant of summary judgment. The circuit court noted that judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. "For a party to be judicially estopped from arguing a position, the position must be clearly inconsistent with the party's previous one, and the party must have clearly convinced the court to accept that previous position." The court found that the claimant failed to show that Halliburton convinced a court in any judicial proceeding to accept the position that he was not a member of a crew, so Halliburton was not judicially estopped from claiming that the claimant was a member of a crew.

[Topics 1.4.1 Jurisdiction/coverage—LHWCA v. Jones Act; 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies—Introduction and General Concepts]

Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP, ___ F. 3d ___ (No. 05-2406)(**4th Cir.** Feb. 7, 2007).

The court found that the claimant was entitled to a payment of attorney fees under Section 28(b) although the district director did not recommend anymore compensation than the employer was voluntarily paying, since the employer had attached a condition to its proposed stipulations and the district director had stated that the claimant did not need to sign the stipulation. "Newport News refused to adopt the written recommendation and continued to condition its offer of payment on [claimant's] signing a stipulation he was not required to sign. Thus, Newport News failed to make a valid tender because its offer was conditional." Therefore, a controversy arose over the inclusion of the language.

The court also found that letters between the parties and the district director may serve as the functional equivalent of an informal conference. "In fact, 20 C.F.R. § 702.311 provides that some cases may be handled by written correspondence. Thus, in [claimant's] case, the letters constitute an informal conference."

[Topic 28.3 Attorney Fees—Employer's Liability]

Anaya v. Traylor Brothers, ___ F.3d ___ (No. 05-41872)(**5th Cir.** Jan. 10, 2007).

At issue here was whether the deceased worker, as a bridge builder, was covered under the LHWCA or under the Texas state compensation statute where the dependents could also recover exemplary damages. (The Texas statute prohibits benefits to workers covered by analogous federal laws.) The court found LHWCA coverage.

[Topic 1.7.3 Jurisdiction/coverage—Status--Bridge builder]

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*Scheuring v. Traylor Brothers, Inc., ___ F.3d ___ (No. 04-56844)(**9th Cir.** Feb. 14, 2007).*

Here the court overturned the district court's grant of summary judgment. The district court had found that the worker was not a seaman. The circuit court found that genuine issues of fact existed as to whether the plaintiff's employment was land-based or sea-based: "We examine the vessel's movements in light of the plaintiff's duties in order to assess whether the plaintiff has presented evidence that would allow a jury to find a substantial connection to the vessel both in terms of duration and nature. … .The evidence supporting the plaintiff's Jones Act claim may be somewhat limited. Nonetheless, the movements of the vessel, albeit relatively minor, and the sea-based duties of the plaintiff, although ancillary to his core responsibility as a crane operator, raise genuine issues of material fact which warrant jury consideration."

As to an alternative 905(b) claim, the court noted that the Supreme Court has not considered a case involving a non-longshoring harbor worker, like the plaintiff in the present case. "Although there may be important differences between the two types of workers, the basic holding of the Supreme Court and the Ninth Circuit with respect to the vessel owner's duties as to longshore workers pursuant to the LHWCA applies with equal force to that owed to harbor workers. In other words, the vessel owner owes a standard of care to a harbor worker, 'mindful of the dangers he should reasonably expect to encounter,' as opposed to a standard of care that might be owed to someone unfamiliar with the dangers of a ship, i.e., a guest of the boat."

[Topics 1.4.1 Jurisdiction/coverage—LHWCA v. Jones Act; 5.2.1 Exclusiveness of Remedy And Third Party Liability--Third Party Liability--Generally]

C. Federal District Courts and Bankruptcy Courts

Wainwright v. District Director, OWCP, ___ F. Supp. 2 ___ (Case No. 3:06-cv-134-J-32MMH)(M. Dist. Fla. Jan. 28, 2007).

The district court found that it lacked jurisdiction to enforce a compensation order because all of the four requirements needed to seek enforcement had not been met: 1) the employer must default in the payment of compensation due under an award for a period of at least 30 days; 2) the claimant must make application to the District Director for an order of default; 3) the District Director must investigate, find the employer in default and issue an order declaring the amount of the default; and 4) the applicant must file a certified copy of the default order with the district court.

[Topic 18.1 Default Payments--Generally]

D. Benefits Review Board

Lopez v. Navy Exchange Service Command, (Unpublished)(BRB No. 06-0322)(Dec. 14, 2006).

Here the claimant suffered from "pemphigus erythematosus," a rare and chronic autoimmune skin disease. Previously at the Board, the worker was not successful in his allegation that his work environment caused the condition. However, the Board had remanded for further fact finding since there was evidence that the condition was aggravated by work-related sun exposure. On remand, the employer alleged that the claim for aggravation was untimely. However, the ALJ found that a document entitled "Claimant's Proposed Statement of Contested Issues" had previously and sufficiently raised the issue. The ALJ specifically noted that when this statement was filed with him, the employer opted not to file objections. The Board found that the ALJ reasonably inferred from the statement and other evidence that a claim for aggravation had been made.

The Board also disagreed with the employer's assertion that a claim for aggravation must be considered a new claim. Furthermore, the Board stated:

> Moreover, we reject employer's argument that the Statement was not admitted into evidence and, therefore, cannot be used to support a finding that the original claim was amended. Section 23 of the Act states that an [ALJ] is not bound by common law or statutory or formal rules of evidence or procedure and that he must make his inquiry so as to best ascertain the rights of the parties. 33 U.S.C. §923; 20 C.F.R. §702.339. Sections 556(d) of the Administrative Procedure Act and Section 18.57 of the OALJ Rules provide that the decision of the [ALJ] must be based on the "whole record." 5 U.S.C. §556(d); 29 C.F.R. §18.57; *see Pacific Shores Subdivision v. United States Army Corps of Engineers*, 448 F. Supp. 2d 1 (D.D.C. 2006) ("whole record" interpreted to include "all documents and materials that the agency 'directly or indirectly' considered"). Section 556(e) provides in pertinent part:
>
> > The transcript of testimony and exhibits, *together with all papers and requests filed in the proceeding*, constitutes the exclusive record for decision in accordance with Section 557 of this title…
>
> 5 U.S.C. §556(e)(emphasis added). Although pleadings are not part of the formal record of "evidence," i.e., proof of the facts alleged, they are statements and arguments regarding those facts, and they are properly considered a part of the "whole record." Thus, the 2002 Statement is part of the "whole record" before the [ALJ], and he committed no error in relying on it.

[Topics 2.2.18 Definitions—Representative Injuries/Diseases; 23.1 Evidence—Administrative Procedure Act—Generally; 23.2 Evidence—Admission of Evidence

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Rainey v. Electric Boat Corp., (Unpublished)(BRB No. 06-0438)(Dec. 15, 2006).

At issue here was whether there was a causal connection of the claimant's work-place exposure to asbestos to his development of lung cancer. In upholding the ALJ, the Board noted, "Due to the opposing views [of doctors], and given the 'lack of any objective evidence reflecting a physiologic lung change as a result' of claimant's asbestos exposure, the [ALJ] found that claimant failed to establish a causal or contributory nexus by a preponderance of the evidence. Thus, she found that claimant's lung cancer is not work-related and denied benefits."

One doctor opined that claimant's asbestos exposure had contributed to his tobacco-related lung cancer. Although the ALJ found this doctor's qualifications superior and his opinion well-reasoned, she was troubled by the lack of objective findings of asbestos-related changes in the claimant's lungs. Because the claimant had no diagnosis of an asbestos-related disease, one doctor had concluded that the claimant's lung cancer was related solely to his tobacco abuse. Another doctor opined that because of the claimant's history of heavy cigarette smoking, he did not consider the reduction in pulmonary function to be related to his occupation in any way.

[Topics 20.4 Presumptions—If [Rebuttal] Successful, Presumption No Longer Affects Outcome; 23.5 Evidence—ALJ Can Accept or Reject Medical Testimony]

Phillips v. Kinder Morgan Bulk Terminals, (Unpublished)(BRB Nos. 06-0408 and 06-0408A).

[Ed. Note: This is an attorney fee matter which, although "unpublished," is significant since it reflects a change in the Board's longshore jurisprudence on attorney fees.**]**

The ALJ stated that the employer is liable for pre-controversion legal work that was reasonable and necessary to the successful prosecution of the claim, pursuant to *Liggett v. Crescent City Marine Ways & Drydock, Inc*., 31 BRBS 135 (1997)(*en banc*)(Smith & Dolder, JJ., dissenting). Here the Board now states that the ALJ's reliance on *Liggett* to award the claimant's counsel an attorney fee under Section 28(a) for pre-controversion legal work is "in error as that case has been effectively overruled." The Board then cites *Childers v. Drummond Co., Inc*, 22 BLR 1-148 (2002)(*en banc*)(McGranery and Hall, JJ., dissenting).

[Topic 28.1.3 Attorney Fees—When Employer's Liability Accrues]

Ridley v. Mantech International Corp., (Unpublished)(BRB No. 06-0496)(Jan. 31, 2007).

In this Defense Base Act case, the Board noted that there is no requirement that a health care provider be a physician in order to give a credible opinion.

[Topic 23.5 Evidence—ALJ Can Accept or Reject Medical Testimony]

Bellows v. C&C Marine Maintenance Co., (Unpublished)(BRB No. 06-0434)(Jan. 31, 2007).

In this matter the claimant suffered second to third degree **lime burns** to the mid-calf area of his legs after stepping in lime.

[Topic 2.2.18 Definitions—Representative Injuries/Diseases]

Andrepont v. Murphy Exploration & Production Co., ___ BRBS ___ (BRB No. 06-0393)(Feb. 12, 2007).

The Board found that the employer was not liable for attorney fees pursuant to Sections 28(a) and (b) since it had voluntarily paid benefits and since it had not refused the district director's recommendation that no additional benefits were due, even though the ALJ subsequently awarded additional benefits. In a strong dissent, Judge Hall stated: "Where claimant successfully litigates his claim before the [ALJ], the district director's recommendation should have no further bearing on the case; yet under the decision reached by the majority, that recommendation becomes the determinative factor in assessing liability under Section 28(b)." Judge Hall also noted the dilemma claimants in similar situations will face: "Claimant can either do nothing and cut his losses, or have the case referred to an [ALJ] and if he succeeds in obtaining greater benefits than the employer paid or tendered, have his benefits reduced by the amount of his attorney's fee."

[Ed. Note: A claimant's attorney will be obligated to explain this dilemma to his/her client. Query—will there be an increase in pro se claims post-*Andrepont*?**]**

[Topic 28.2 Attorney Fees—Employer's Liability]

E. ALJ Opinions

F. Other Jurisdictions

II. Black Lung Benefits Act

A. United States Supreme Court

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4th Cir. 2006), the Fourth Circuit held that a medical determination received by the miner before the denial of benefits in his or her first claim is legally insufficient to begin the three-year statute of limitations period to bar the filing of a second claim under 20 C.F.R. § 725.308. Employer petitioned for *writ of certiorari* on December 6, 2006 on grounds that the pre-denial medical determination should commence the limitations period to run and bar the filing of the miner's second claim. The Department filed an opposition to *certiorari* on January 12, 2007.

[**limitations of action period under § 725.308**]

B. Circuit courts of appeals

In *Elm Grove Coal Co. v. Director, OWCP [Blake]*, ___ F.3d ___, Case No. 05-1108 (4th Cir. Mar. 7, 2007), the court upheld the evidentiary limitations at 20 C.F.R. § 725.414 as a valid exercise of the Secretary's regulatory authority pursuant to 30 U.S.C. § 936. *See also* 30 U.S.C. § 923(b) (incorporating 42 U.S.C. § 405(a) of the Social Security Act). Critical to the court's holding were the provisions at § 725.456(b)(1), which provide, "Medical evidence in excess of the limitations contained at § 725.414 shall not be admitted into the hearing record in the absence of good cause." Notably, the court held that its pre-amendment decision in *Underwood v. Elkay Mining, Inc.* 105 F.3d 946 (4th Cir. 1997) (the fact-finder considers all relevant evidence) was not controlling. Rather, the court concluded that it "must accord the Evidence-Limiting Rules (at § 724.414) the deference owed to an 'executive department's construction of a statutory scheme it is entrusted to administer.'"

Next, the court addressed the rebuttal provisions at §§ 725.414(a)(2)(ii) and (a)(3)(ii) for chest x-ray evidence. The court noted that, where a party submits two interpretations of one x-ray study as part of its affirmative case, then the opposing party is entitled to submit "one piece of evidence on rebuttal for each piece of affirmative evidence submitted by the other party," *i.e.* two rebuttal interpretations of the same study.

Finally, the court addressed disclosure of certain information conveyed by counsel to a "testifying" expert. Under the facts of the case, Claimant's medical expert testified during a deposition that "he had not written 'every word' of his report and that (Claimant's) attorneys had provided him with certain documents." Therefore, Employer argued that "materials provided by counsel to a testifying expert witness concerning the relevant facts and an expert's opinions and reports are discoverable . . .." The court agreed and held that the amended version of Fed.R.Civ.P. 26(b)(3) (1993) applied and required "the disclosure of certain information (even when provided by counsel)

considered by testifying experts in forming their opinions." The court reasoned as follows:

> . . . it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

Slip op. at 33. The court stressed, however, that a lawyer's participation in the preparation of an expert's testimony "does not bar the use of the expert's opinion, or necessarily even impeach the expert's reliability," but it may "potentially impact on the weight to be accorded such opinion evidence." The court concluded that "[t]he interplay between testifying experts and the lawyers who retained them should . . . be fair game for cross-examination."

[**upholding validity of § 725.414; rebuttal of x-ray interpretations; application of FRCP 26(b)(3)**]

In *Old Ben Coal Co. v. Director, OWCP [Melvin]*, ___ F.3d ___, Case No. 06-2189 (7th Cir. Jan. 25, 2007), a case involving the bankrupt Old Ben Coal Company and its parent, Horizon Natural Resources Company, the Seventh Circuit held that an insurance company or surety should be permitted to intervene on behalf of the defunct company in order to protect its interests. The court reasoned that "[a]ny entity, such as an insurance company or a surety that would be prejudiced by an award of black lung benefits, is entitled to intervene in an administrative proceeding with the rights of a party." The court further noted that the insurance company or surety would have to intervene as "[i]t could not protect (its) interest by directing its lawyer to represent a named party (Old Ben Coal Company) that was not a real party in interest."

[**intervention by carrier/surety of bankrupt employer**]

In *Perry v. Mynu Coals Inc.*, 469 F.3d 360 (4th Cir. 2006), the Board upheld the administrative law judge's finding that the miner did not suffer from complicated pneumoconiosis based on autopsy evidence of record. However, the Fourth Circuit concluded that the denial should be vacated and it remanded the case "to the Board which will see to the entry of an appropriate order awarding benefits."

In sum, the administrative law judge rejected a finding of complicated pneumoconiosis on three grounds: (1) the prosector's statements with regard to what size the four and six centimeter nodules would be on x-ray were "equivocal"; (2) the prosector was unfamiliar with the miner's smoking history; and (3) the prosector failed to identify pneumoconiosis as a cause of death. The prosector testified that, although he "was not a hundred percent sure," he opined that the four and six centimeter lesions would appear

greater than one centimeter on an x-ray and they were related to coal dust exposure and cancer. The court held that this was sufficient to invoke the irrebuttable presumption at § 718.304 of the regulations and that the bases for the administrative law judge's rejection of the prosector's opinion were erroneous.

[**complicated pneumoconiosis on autopsy**]

In *Stalcup v. Peabody Coal Co.*, ___ F.3d ___, Case No. 06-1250 (7th Cir. Feb. 15, 2007), the court vacated the administrative law judge's denial of benefits on grounds that it was not sufficiently reasoned. In particular, the judge concluded that the qualifications and expertise of the physicians offering opinions were equal and held:

> Drs. Castle, Tuteur and Dahhan found no pneumoconiosis, while Drs. Cohen and Koenig found the existence of the disease. Because these opinions are entitled to equal weight, I now find that [the miner] has not established the existence of pneumoconiosis.

The court noted that black lung claims "often turn on science and involve conflicting medical opinions" such that a "scientific dispute must be resolved on scientific grounds." In this vein, the court held that "when an ALJ is faced with conflicting evidence from medical experts, he cannot avoid the scientific controversy by basing his decision on which side has more medical opinions in its favor." The court stated that "[t]his unreasoned approach, which amounts to nothing more than a 'mechanical nose count of witnesses,' . . . would promote a quantity-over-quality approach to expert retention, requiring parties to engage in a race to hire experts to insure victory."

[**use of numerical superiority, held improper**]

In *Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, ___ F.3d ___, Case No. 05-4188 (6th Cir. Feb. 16, 2007) (J. Rogers, concurring), the administrative law judge's award of black lung benefits was affirmed. In the case, both Drs. Baker and Dahhan concluded that the miner suffered from a respiratory impairment. They disagreed, however, on whether the impairment "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." Dr. Baker concluded that coal dust exposure "probably contributes to some extent in an undefinable portion" to the miner's pulmonary impairment. After invoking the rebuttable presumption that the miner's legal pneumoconiosis arose out of coal dust exposure at 20 C.F.R. § 718.203(b), the court held that Dr. Baker's opinion was sufficient to support a finding that the miner suffered from the disease and was not too equivocal. The court further noted:

> In rejecting Dr. Dahhan's opinion, the ALJ found that Dahhan had not adequately explained why Barrett's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis,

> and had not adequately explained 'why he believes that coal dust exposure did not exacerbate (the miner's) allegedly smoking-related impairments.'

The court agreed with the judge's analysis and affirmed the award of benefits.

[**weighing medical opinions**]

In *Cumberland River Coal Co. v. Caudill*, 2006 WL 3345416, Case No. 05-3680 (6th Cir. Nov. 17, 2006) (unpub.), the court held that Employer is not entitled to "de novo" discovery, including requiring Claimant to submit to an Employer-sponsored pulmonary evaluation, simply because it files a petition for modification under § 725.310 of the regulations.

With regard to the submission of evidence on modification, the court noted that § 725.310(b) limits each party's submission of initial evidence "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414" (emphasis in original). The court concluded that "[t]he portions of § 725.414 that are specifically incorporated into modification proceedings by § 725.310(b) apply only to *rebuttal* evidence, ..." (emphasis in original).

[**petition for modification under § 725.310**]

In *Clonch v. Southern Ohio Coal Co.*, 2006 WL 3409880, Case No. 05-3133 (6th Cir. Nov. 27, 2006) (unpub.), a physician's opinion that the miner suffered from a moderately severe respiratory impairment under § 718.204(b)(2)(iv) could not be discredited on grounds that the pulmonary function study underlying the opinion yielded non-qualifying results. The court reasoned that the purpose of subsection (b)(2)(iv) (addressing medical opinions) is "clear" and is designed "to provide a more flexible approach than is otherwise allowed under paragraphs (b)(2)(i)-(iii)" (addressing blood gas and pulmonary function studies).

[**finding of total disability through medical opinion; non-qualifying testing**]

In *Ken Lick Coal Co. v. Director, OWCP [Lacy]*, Case No. 06-4512 (appeal pending before the Sixth Circuit Court of Appeals), the administrative law judge and Board refused to find the miner's claim time-barred under 20 C.F.R. § 725.308(a) on grounds that a physician's opinion of total disability due to pneumoconiosis was communicated to the miner's *attorney* more than three years before the miner filed his claim for benefits. The Director is arguing on appeal that the administrative law judge was correct in finding the claim timely filed as Employer failed to demonstrate that the physician's opinion was communicated to the miner or a party responsible for the care of the miner as required by the regulations.

The Director's brief is due on March 22, 2007.

[**statute of limitations issue on appeal in the Sixth Circuit**]

C. Benefits Review Board

In *Keener v. Peerless Eagle Coal Co.*, ___ B.L.R. ___, BRB No. 05-1008 BLA (Jan. 26, 2007) (en banc), the Board rendered holdings on a number of important issues.

"Report of autopsy" defined. The Board adopted the Director's position that "a report by a pathologist who has reviewed the autopsy tissue slides is in substantial compliance with the Section 718.106 quality standards and . . . can constitute a report of an autopsy for the purposes of Section 725.414(a)(2)(i) and (a)(3)(i)." The Board agreed with the Director that "since only claimant is likely to produce an autopsy prosector's report, this interpretation of the regulations is the most practical approach to satisfying the inclusive nature of Section 725.414(a)(2)(i), (a)(3)(i), which allows for both parties to submit an affirmative report of an autopsy.[1]

"Rebuttal" of a report of autopsy. The Board again adopted the position of the Director and held that "rebuttal" of a report of autopsy must be limited to consideration of the pathological evidence (autopsy report and slides). The "rebuttal" opinion cannot take into consideration clinical evidence, such as medical opinions and CT-scan interpretations.

Notably, in defining "rebuttal" evidence, the Board cited to the Department's comments to the regulations at 65 Fed. Reg. 79990 (Dec. 20, 2000) to state that the "regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive." In this vein, the Board held that any portion of Dr. Bush's "rebuttal" autopsy opinion that is based on "materials beyond the scope of Dr. Plata's autopsy," should be redacted. Thus, on remand, the Board directed that the Administrative Law Judge review the "rebuttal opinion and address those portions of his opinion that exceed the scope of the autopsy submitted by claimant."[2]

Effect of consolidating living miner's and survivor's claims. The Board determined that, while miners' and survivors' claims may be consolidated for purposes of a hearing under

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[1] This represents a departure from the Board's unpublished decision in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.), wherein the Board adopted the Director's position at the time to hold that only the prosector's report constitutes a "report of autopsy" under the regulations.

[2] It is unclear how the holding in this opinion can be reconciled with the Board's unpublished decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) wherein the Board held that "rebuttal" evidence need only refute "the case" presented by the opposing party as opposed to refuting a particular piece of evidence. In particular, the Board held that the Administrative Law Judge should have allowed Claimant's positive x-ray rereading to "rebut" a positive x-ray interpretation underlying the § 725.406 pulmonary evaluation. The Board reasoned that such evidence constituted "rebuttal" as it was "responsive" to "the case presented by the opposing party."

§ 725.460, evidence must be specifically designated in each claim in compliance with the limitations at 20 C.F.R. § 725.414. In so holding, the Board agreed "with the Director's reasonable position . . . that the parties must designate the claim that each piece of evidence supports, and the administrative law judge should consider this evidence on the specific issues of entitlement in each claim." The only exception to this limitation is the admission of treatment or hospitalization records pertaining to the miner's pulmonary or respiratory disease. The Board stated that these records are not limited under 20 C.F.R. § 724.414(a)(4) and may be considered in both claims. The Board also noted that § 725.456(b)(1) permits the admission of evidence in excess of the limitations for "good cause." *See also Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.) (holding that evidence admitted in a living miner's claim is not automatically admitted in the survivor's claim).

Physician's consideration of inadmissible evidence; effect of. The Board emphasized that a medical opinion must be based on evidence that is "properly admitted" in a claim. If a report is based on evidence not admitted in the claim, then the administrative law judge must "address the impact of Section 725.414(a)(2)(i), (a)(3)(i)." The Board noted that the administrative law judge has several options in handling a report based, in part or in whole, on evidence not admitted in the claim such as excluding the report, redacting the objectionable content, asking the physician to submit a new report, or "factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled." The Board specifically stated, however, that "exclusion is not a favored option, because it may result in the loss of probative evidence developed in compliance with the evidentiary limitations."

Claimant's motion to compel discovery. The Board upheld the administrative law judge's denial of Claimant's motion to compel discovery from Employer. In particular, Claimant sought certain medical evidence generated by Employer in the claim. The administrative law judge applied 29 C.F.R. § 18.14 to find that, while the information sought by Claimant was not "privileged," Claimant had not demonstrated "substantial need of the materials" or that s/he would be "unable without undue hardship to obtain a substantial equivalent of the materials by other means" as required by § 18.14 of the regulations. It was noted that Claimant "had well-prosecuted his claim" and the evidence sought would not be "admissible given the evidentiary limitations and the quantity of evidence already submitted." *See also Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-71 (1997).

The Board further held that the administrative law judge properly declined to grant Claimant's motion to compel under FRCP 35(b). The Board agreed that FRCP 35(b) provides that evidence related to a physical examination of the miner is discoverable without the need to establish "undue hardship" or "substantial need." However, the Board noted that Employer "has asserted that all documents resulting from the physical examination of the miner (had) already been duly exchanged" such that FRCP 35(B) was inapplicable. As a result, the Board affirmed the administrative law judge's denial of Claimant's motion to compel on this ground as well.

[**"autopsy" report defined; "rebuttal" of autopsy report defined; consolidation of miner's and survivor's claims; physician's consideration of inadmissible evidence; motion to compel**]

In a petition for modification, *Rose v. Buffalo Mining Co.*, ___ B.L.R. ___, BRB No. 06-0207 BLA (Jan. 31, 2007), the Board adopted the Director's position that the § 725.310(b) evidentiary limitations "supplement," rather than "supplant," the § 725.414 limitations. The Board reasoned:

> [W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

Slip op. at pp. 6-7.

[**limitations on submission of evidence on modification**]

In *Lemon v. Zeigler Coal Co.*, BRB No. 06-0305 BLA (Oct. 31, 2006) (unpub.) (Hall, dissenting), a case involving a subsidiary of the bankrupt Horizon Natural Resources Company (HNRC), the administrative law judge denied an attorney's appearance on behalf of Employer on grounds that "it failed to submit any documentation authorizing such representation and its client, St. Paul Travelers Companies, Incorporated (St. Paul), failed to intervene as a party in accordance with 20 C.F.R. § 725.360." Employer argued on appeal that St. Paul was not required to petition to become a party under 29 C.F.R. § 18.10(c) in order to represent Employer and 20 C.F.R. § 725.360 does not require intervention by St. Paul in order to defend Employer.

A majority of the Board panel disagreed with the administrative law judge and held the following:

> [C]ontrary to the administrative law judge's finding, the pertinent regulation does not require an attorney to file a document that authorizes his or her representation of a party. In her August 17, 2005 *Order*, the administrative law judge noted, '[b]y letter of May 13, 2005, [the law firm] entered a 'Limited Appearance of Counsel' on behalf of the defunct Employer for the limited purpose of contesting the eligibility of the Claimant.' August 17, 2005 Order at 2. Consequently, since the law firm has satisfied the criteria set forth in Section 725.362(a) for representing employer, we hold that the administrative law judge erred in denying the

> law firm's appearance of counsel, on the ground that the law firm failed to submit any documentation authorizing its representation of employer.

Slip op. at 5-6.[3]

[**entering an appearance on behalf of bankrupt employer**]

In *Deel v. Buchanan Production Co.*, BRB No. 06-0188 BLA (Nov. 30, 2006) (unpub.), the Board held that, where a radiologist concludes that abnormalities on a chest x-ray are consistent with tuberculosis or other diseases, the administrative law judge may not discredit the opinion solely on the basis that there is no other medical data of record demonstrating that the miner suffered from tuberculosis. In this vein, the Board concluded that "[t]he fact that the record does not reveal that claimant suffered from tuberculosis does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with that disease." Slip op. at 8, n. 6.

[**cause of opacities on chest x-ray**]

In *Looney v. Shady Lane Coal Corp.*, BRB No. 06-0508 BLA (Feb. 28, 2007)(unpub.), a case arising in the Fourth Circuit, the Board held that the following:

> In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis, including evidence of simple pneumoconiosis and of no pneumoconiosis.

Moreover, the Board held that "the relevant question," in weighing physicians' opinions regarding the existence of complicated pneumoconiosis:

> . . . is not whether (the physicians) definitively found the changes in claimant's lungs to be due to other diseases, but whether these physicians definitively excluded complicated pneumoconiosis as a diagnosis. (citation omitted).

Slip op. at 10.

[**complicated pneumoconiosis**]

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[3] However, see the summary of *Old Ben Coal Co. v. Director, OWCP [Melvin]*, ___ F.3d ___, Case No. 06-2189 (7th Cir. Jan. 25, 2007), *supra.*