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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 218 January – February 2010

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NEW LEGISLATION HAS IMPACT ON THE BLACK LUNG BENEFITS PROGRAM

On March 23, 2010, the President signed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) into law. Section 1556 of the enactment makes two significant changes to the Black Lung Benefits Program: (1) it revives the 15-year presumption at 20 C.F.R. § 718.305 for certain claims; and (2) it provides for automatic entitlement to benefits in certain survivors' claims. Claims that are potentially affected by this legislation must have been filed after January 1, 2005 *and* be pending on or after the date of enactment of the statute. Applicability of this legislation will need to be determined on a case-by-case basis.

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

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

In re Norfolk Southern Railway Co., 592 F.3d 907 (8th Cir. 2010).

The Eighth Circuit held that a railroad switchman who was injured while temporarily working at the Lamberts Point Coal Terminal, a coal-loading facility located in Norfolk, VA, was not working in a maritime status, and thus his injury was not covered by the LHWCA. Accordingly, the court

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

rejected the employer's assertion that the action brought by the worker under the Federal Employers' Liability Act (FELA) was governed by the LHWCA.

The court determined that the job of the switchman's crew was to spot and secure rail cars loaded with coal before other workers rolled them down an incline to the dumpers from which the coal was transported by conveyors to a pier for loading, and, because his duties were completed before the cars were released and began their descent, he was not actually involved in the loading process itself. Under the Supreme Court precedent, in order to be covered, the switchman would have to be engaged, at least some of his time, in the loading process. Thus, in *Caputo*, the Supreme Court stated that "when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity." *Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 273, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). In reaching this conclusion, the Supreme Court discussed the "typical example" of shoreward coverage contained in the Committee Reports. *Id.* at 266-67. In addition, in *Schwalb*, the Supreme Court explained that to meet the status requirement, the job must involve loading or unloading. *Chesapeake & O. Ry. Co. v. Schwalb*, 493 U.S. 40, 46 (1989), citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 (1985).

As the coal-loading process in this case was very similar to that in *Schwalb*, the court looked for guidance to the Supreme Court's explanation as to when the loading process begins. The employer asserted that "[t]he coal loading process is initiated when a permit is issued by Norfolk Southern for the ship describing the tonnage and number of coal cars for the vessel." The court disagreed, citing the Supreme Court's statement in *Schwalb* that "[t]he loading process begins when a hopper car is rolled down an incline to a mechanical dumper which is activated by trunnion rollers and which dumps the coal through the hopper onto conveyor belts." *Schwalb*, 493 U.S. at 42-43. The court further contrasted the present facts with those in a Fourth Circuit case holding that a worker who initiated the descent of railroad cars at Lamberts Point began the loading process and thus had the requisite status. Here, because Demay's duties were completed before the cars were released and began their descent, he was not involved in the loading process. Additionally, even beyond the activity he was engaging in at the time of his injury, there was no indication that he spent "at least some of [his] time in indisputably longshoring operations." *See Caputo*, 432 U.S. at 273.

Employer further argued that Demay's injury was covered by the LHWCA because his actions were "essential or integral" to the loading process because "[s]witching the railroad cars into Barney Yard on to the correct tracks in the correct sequence is 'essential and integral' to the overall loading process." *See, e.g., Schwalb*, 493 U.S. at 46. The Eighth Circuit disagreed, stating that:

> "[T]he activities must also be actually involved in the loading process itself. For example, an individual working within the site who arranges the employee work schedules could be considered 'essential or integral' to the overall loading process because without an organized work schedule no one would know when to come to work and the loading would never occur. However, to conclude that this person meets the 'status' requirement of the Longshore Act is plainly ridiculous. While the Supreme Court did hold that janitors (whose work at times took them elsewhere on Lamberts Point) were covered by the Longshore Act, *see id.* at 48, they were injured while cleaning up coal that had spilled at the dumper location during the loading process. Demay's duties were completed before the loading process began, he did not meet the status requirement of the Longshore Act, and therefore his injury is not covered by the Longshore Act."

Slip. op. at *6.

[Topic 1.7.1 STATUS - "Maritime worker" ("Maritime Employment")]

***Service Employees Int'l, Inc. v. Dir., OWCP [Barrios]*, 595 F.3d 447 (2nd Cir. 2010).**

As a matter of first impression, the Second Circuit held that jurisdiction for direct judicial review of decisions of the Benefits Review Board ("BRB") under the Defense Base Act ("DBA") lies is in the circuit courts of appeals, as opposed to the district courts. Recognizing a split in Circuit authority on this issue, the court sided with the Ninth and Seventh[2] Circuits, and disagreed with the Eleventh, Fourth, Fifth and Sixth Circuits. The court initially concluded that Section 3(b) of the DBA, 42 U.S.C. § 1653(b), is ambiguous because the DBA incorporates the provisions of the LHWCA, and the LHWCA was amended in 1972 to provide for initial judicial review in the courts of

[2] The dissenting Judge in *Barrios* noted that the Seventh Circuit only addressed this issue *in dicta*.

appeals.[3] *See* 33 U.S.C. § 921(c). Next, the court interpreted § 3(b) of the DBA to vest jurisdiction in the courts of appeals in view of the DBA's underlying purpose (i.e., extending the benefits of the LHWCA, governing maritime employees, to those employed at military bases overseas) and the DBA's broader context (i.e., establishing a unified compensation scheme for both classes of employees). Further, the intention that the DBA track the provisions of the LHWCA is manifest in the DBA requirement that the provisions of the LHWCA were to apply in respect to the injury or death of any employee engaged in any covered employment. 42 U.S.C. § 1651(a). Additionally, § 3(b) authorizes "[j]udicial proceedings under ... sections 18 and 21 of the [LHWCA] in respect to a compensation order made pursuant to the [DBA]." The court noted the need to have a review process that is fairly and consistently administered with respect to all claimants, and concluded that a literal reading of the provision at issue is inconsistent with Congressional intent. Pursuant to § 3(b), the pertinent geographical jurisdiction of the appropriate court of appeals is established by the location of the "office of the Deputy Commissioner [now designated the District Director] whose compensation order is involved." 42 U.S.C. § 1653(b).

The court further held that substantial evidence supported the ALJ's finding that the claimant's pterygia, an eye condition, was related to his employment as a trucker for the employer in Iraq. The employer's expert indicated that it normally took years for pterygia to develop from dry environmental conditions, and claimant was only in Iraq for 13 months. However, there was no evidence that Barrios was diagnosed with pterygia prior to commencing work in Iraq. The ALJ rationally inferred that working thirteen hours a day and seven days a week is equivalent to an environmental exposure accumulating over several years of normal work. Furthermore, the reports of two physicians presented substantial evidence linking Barrios' pterygia to his working conditions in Iraq; and the employer's expert acknowledged that there was "some possibility" that the pterygia could have been worsened by the chronic dryness and irritation consequent to employment in Iraq. Further, the ALJ and the Board properly concluded that the claimant's pterygia was disabling notwithstanding the absence of medical evidence that his work was entirely precluded, since employer did not allow claimant to resume driving after he was diagnosed on the basis that this condition jeopardized his co-workers' safety. A claimant seeking compensation under the DBA establishes an inability to perform his usual employment if his job is no longer available to him after his injury.

[3] In a dissenting opinion, Judge Cabranes concluded that the Circuit Court lacks jurisdiction to review the appeal based on his determination that § 3(b) unambiguously requires initial review of compensation decisions in the district courts.

Finally, the court rejected the employer's assertion that the applicable maximum compensation rate was the rate in effect when the injury occurred. The Second Circuit has held that the date of disability onset, rather than the date of injury, is the proper date for determining the applicable maximum compensation rate in occupational disease cases. Employer's reliance on *LeBlanc v. Cooper/T.Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir.1997)(stating that the claimant's compensation rate is based on the time of injury, rather than the onset of disability) was misplaced, as that case related to traumatic injury claims, rather than those arising out of occupational disease.

[Topic 60.2.6 Defense Base Act – Appeals; Topic 20.5.1 Causal Relationship of Injury to Employment; Topic 6.2.1 Maximum Compensation for Disability and Death Benefits]

***Northrop Grumman Shipbuilding Inc. v. Kea*, No. 08-2376, 2010 WL 148349 (4th Cir. 2010)(unpub.).**

The Fourth Circuit, agreeing with the Board, upheld the ALJ's decision to award disability based upon a 24.5% permanent partial disability rating arrived at by averaging the ratings assigned by two physicians who had evaluated claimant.

First, the court rejected Employer's assertion that an impairment rating of 35% assigned to claimant's right leg by his treating physician, Dr. Bryant, was "wholly conclusory" and offered "without explanation." Although Dr. Bryant did not identify the specific source relied upon for determining the percentage of disability (such as the AMA Guides relied upon by Employer's doctor in arriving at an impairment rating of 14%), Dr. Bryant described the injuries and the permanent disabilities resulting therefrom. While the ALJ may have legitimately criticized Dr. Bryant's failure to identify a specific source for his disability assignment, the ALJ did not err in taking note of the medical basis articulated in Dr. Bryant's report.

The court further concluded that, contrary to employer's assertion, the ALJ's decision did not afford weight to Dr. Bryant's impairment rating *solely* because he was claimant's treating physician, nor did the ALJ credit his opinion to the exclusion of all other pertinent evidence. Rather, consistent with pertinent Fourth Circuit precedent, the ALJ gave Dr. Bryant's opinion "additional," but not controlling, weight based upon his long-term treatment of claimant.

Finally, the court disagreed with the employer's contention that the ALJ's averaging of impairment ratings by evaluating and treating physicians

indicated a baseless decision. On the contrary, the ALJ discussed the findings of both physicians, discussed the pros and cons of each, and explained when and why he specially credited one or the other. It is well within the province of an ALJ to assign a disability award that is higher or lower than any disability rating suggested by any party. The ALJ's rating was also consistent with the fact that both physicians indicated that claimant's injuries were exacerbated by non-work-related disease process.

[Topic 8.3.2 Permanent Partial Disability - Balancing or Weighing the Medical Ratings]

B. U.S. District Courts

***Collier v. Ingram Barge Co.*, No. 5:08-CV-37, 2010 WL 145108 (W.D.Ky. 2010)(unpub.).**

In denying employer's motion for a summary judgment, the district court held, *inter alia*, that a genuine issue of material fact existed as to whether the plaintiff qualified as a seaman under the Jones Act. In *Chandris, Inc. v. Latsis,* 515 U.S. 347 (1995), the Supreme Court held that the two essential requirements for seaman status are (1) that "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission,'" and (2) that the employee "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Id.* at 368 (citations omitted). Here, only the second requirement was in dispute. The Supreme Court explained that "[t]he fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.* The Court should look to the totality of the circumstances. *Id.* at 370. "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.* at 371.

The court initially reproduced the defendant's "nice summary" of the relevant precedent. In particular, the court noted that in *Denson v. Ingram Barge Co.,* the Court held that a barge cleaner was not a seaman because "his duties did not expose him to the perils of the sea." 2009 WL 1033817, *3 (W.D.Ky.2009). The hazards Denson faced -- trip-and-fall, falling overboard, walking from barge to barge, etc. --were faced by longshoreman on a regular basis, and not peculiar to seamen. *Id.* Similarly, the plaintiff in

Lara v. Arctic King Ltd. was not a seaman because his vessel was always tied to a pier, thus eliminating the risks faced by seamen. 178 F.Supp.2d 1178, 1182 (W.D.Wash.2001). In *Schultz v. Louisiana Dock Co.,* the plaintiff was not a seaman because his work was not of a seagoing nature. 94 F.Supp.2d 746, 750 (E.D.La.2000). In addition, he "did not have a regular or continuous connection to an identifiable vessel or vessels." *Id.* Likewise, in *Fazio v. Lykes Bros. Steamship Co.,* the plaintiff was not a seaman because he was a shore-based worker. 567 F.2d 301, 302-03 (5th Cir.1978)*; accord Poole v. Kirby Inland Marine, LP,* 2006 WL 2052877, *2 (S.D.Tex.2006). In *Fazio*, the plaintiff failed to have a sufficient permanent connection to a vessel because he worked on many different vessels in his employer's fleet, and his work was transitory in nature. 94 F.Supp.2d at 303; *accord Bouvier v. Krenz,* 702 F.2d 89, 91-92 (5th Cir.1983) (shore-based ship repairman's relationship to vessels "not sufficiently continuous or substantial").

In view of this precedent, the court concluded that a genuine issue of material fact existed as to whether the plaintiff qualified as a seaman under the Jones Act, as the parties disagreed as to his shoreside duties, the amount of time he spent on shore, the frequency and procedures for midstream servicing, the hazards he faced, and the training he received.

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

***DeHart v. BP America, Inc.*, No. 09 CV 0626, 2010 WL 231744 (W.D.La. 2010)(unpub.).**

Plaintiff, a rigger, filed a purported class action lawsuit in a state court on behalf of himself and allegedly similarly situated people, claiming personal injury as a result of exposure to airborne radiation dust/t-norms while engaged in the decommissioning of a fixed oil production platform located on the Outer Continental Shelf, offshore Louisiana. The defendants removed this action to the district court, alleging jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA") and/or the Class Action Fairness Act of 2005. In denying plaintiff's request for a remand to the state court, the district court held, *inter alia*, that, as a matter of law, there was no possibility that the plaintiff could be deemed a Jones Act seaman, as he lacked the requisite connection to a vessel in navigation, or to an identifiable group of such vessels, that is substantial in terms of both duration and nature.

A time-chartered liftboat, the L/B DIXIE PATRIOT, which was supporting the platform decommissioning, was jacked-up adjacent to the platform. Plaintiff and other workers engaged in the decommissioning ate meals and slept aboard the L/B DIXIE PATRIOT while the work was being

performed on the platform to decommission it. The plaintiff did not have sufficient connection to L/B DIXIE PATRIOT, as claimant testified that 99% of his work on this project was performed while he was physically on the fixed platform, and that his sole connection to the L/B DIXIE PATRIOT was for the purpose of eating meals and sleeping. The Fifth Circuit has quantified the duration of time necessary to satisfy the "substantial connection" requirement by using a 30 percent rule of thumb. Here, plaintiff lacked the "permanent-attachment" aspect necessary for crew member status. Furthermore, plaintiff's service on projects for eleven different companies, on different platforms and support vessels, did not qualify as service on a fleet of vessels subject to common control and ownership. Furthermore, even if there was competent evidence that DeHart worked on an identifiable fleet of BP controlled vessels, the 30% rule does not change when an "identifiable group" of vessels in navigation is at issue and would not be met. Moreover, while there is a narrow exception to the 30% rule for those workers who are engaged in "classical seaman's work," plaintiff did not fall within this exception as his work, as a rigger, could not be classified as "classical seaman's work."

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

***Makris v. Spensieri Painting, LLC*, No. 08-1718 (RLA) (D.Puerto Rico Dec. 17, 2009)(unpub.).**

In its earlier published decision,[4] the district court dismissed Cornell University's motion to dismiss statutory tort claims filed by employees of Spensieri Painting, LLC who were injured while carrying out a sandblasting and painting job at the Arecibo Observatory pursuant to Spensieri's contract with Cornell. In its motion, Cornell asserted that, having procured workers' compensation insurance for the contracted work under the Defense Base Act ("DBA"), Cornell was entitled to immunity from tort liability. In denying the motion, the court recognized that immunity provided by the DBA, 42 U.S.C. § 1651(c), is contingent upon the employer obtaining coverage for the injured or deceased employee. 33 U.S.C. § 905(a). In the event that a subcontractor fails to provide such insurance, the contractor is then under an obligation to obtain insurance, 33 U.S.C. § 904(a); having done so, the contractor is then entitled to the statutory employer defense as provided in Section 5(a). Nevertheless, the court declined to resolve the issue of DBA coverage underlying Cornell's immunity defense on the ground that that

[4] *See Makris v. Spensieri Painting, LLC*, __ F.Supp.2d __, 2009 WL 3824368 (D.Puerto Rico Nov. 17, 2009), summarized in *Recent Significant Decisions* for November 2009.

issue was pending a resolution in parallel proceedings before the Department of Labor and the Supreme Court of the State of New York, giving rise to the possibility of inconsistent findings.

In its present decision, the court determined that plaintiffs have been found to be entitled to benefits under the DBA by the Department of Labor and also by the New York Workers' Compensation Board. Accordingly, the court dismissed plaintiffs' tort claims for lack of jurisdiction.

[Topic 60.2.1 Applicability of the LHWCA; Topic 5.1.1 Exclusive Remedy; Topic 5.1.3 Contractor/Subcontractor]

C. Benefits Review Board

***Green v. Ceres Marine Terminals, Inc.*, __ BRBS __ (2010).**

The Board affirmed the ALJ's finding that the claimant has a binaural hearing loss of 1.875 percent determined by averaging the results of two audiograms, revealing 3.75 percent binaural hearing loss and zero percent impairment, respectively, where both audiologists opined that the claimant has a sensorineural bilateral hearing loss and the ALJ rationally found both audiograms credible and probative. The Board rejected the employer's contention that *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), requires a finding that since the ALJ found the audiograms equally probative and one of the audiograms revealed no measurable impairment, the claimant failed to meet his burden of proving he has an impairment. The Board further affirmed the ALJ's finding that the claimant is entitled to hearing aids for both ears.

The Board rejected the claimant's contention that the ALJ improperly allowed the employer to supervise his medical care by awarding the Phonak UNA MAZ behind-the ear hearing aid with open mold fitting, which cost $2,500, as opposed to the Windex Inteo canal hearing aid which cost $6,500 per pair. The ALJ has the authority to determine the necessity of medical care based on the evidence of record. Neither party is entitled to choose which hearing aid is to be procured. The ALJ considered the cost and functionality of the two recommended hearing aids, and noted that both audiologists agreed that claimant would benefit from the Phonak hearing aids. The Act requires only that employer pay for reasonable and necessary treatment, not the more expensive and technologically advanced.

The ALJ erred, however, in awarding the claimant the cost of the hearing aids plus an additional 20% pursuant to the fee schedule used by

the South Carolina Workers' Compensation Commission. Pursuant to Section 702.413, the use of fee schedules is appropriate when there is a dispute about the prevailing community rate of a given medical service or supply. Here, there was no dispute as to the cost.

Addressing next the employer's liability for attorney's fees, the Board agreed with the ALJ and the Director, OWCP, that

> "employer's payment of $1 does not preclude the applicability of Section 28(a), as the administrative law judge rationally found that employer's payment of $1 was merely an attempt to avoid fee liability rather than the payment of compensation for claimant's injury. As employer did not pay claimant any compensation within the meaning of Section 28(a) of the Act and in fact controverted the claim prior to receiving notice of the claim, the [ALJ] properly held employer liable for claimant's attorney's fee pursuant to Section 28(a)."

Slip. op. at 8-9. The Board noted the Director's characterization of the $1 payment as "nothing more than a transparent attempt by the Employer to evade liability for attorney's fees...." *Id.* at 7.

The Board further affirmed the ALJ's award of attorney's fee based on an hourly rate of $300, which the ALJ based on his consideration of the rate awarded in other cases by other ALJs and the Board and of counsel's proficient service in this case. Slip. op. at 9, citing *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, F.3d , Nos. 08-1129,08-1122, 2009 WL 5126220 (4th Cir. Dec. 29, 2009). The Board also rejected employer's contention that time spent by paralegals could not be reimbursed as professional time where credentials were not provided. Nor was it improper to identify counsel's law clerks by initials only, as no regulation requires identification of staff by name. Lastly, the ALJ did not err in not reducing the fee award due to claimant's limited success. Although the claimant had asserted a greater hearing loss and requested a more expensive hearing aid, he successfully established entitled to compensation benefits, interest, and medical benefits.

[Topic 8.13.1 Hearing Loss -- Determining the Extent of Loss; Topic 23.7.1 The "True Doubt" Rule Is Inconsistent with § 7(c) of the Administrative Procedure Act; Topic 28.1.4 Attorney's Fees -- Section 28(b) Employer's Liability -- Decline to Pay; Topic 28.6.1 Attorney's Fees – Hourly Rate; Topic 28.6.4 Attorney's Fees -- **Losing on an Issue; Topic 28.4.1 Attorney's Fees – Application Process -- Content Requirements**]

***Wheeler v. Newport News Shipbuilding and Dry Dock Co.*, __ BRBS __ (2010).**

The Board held that employer's payment of Section 7(a) medical benefits directly to claimant's health care providers does not constitute the payment of "compensation" for purposes of tolling the Section 22 statute of limitations. The claimant sustained a work-related bilateral knee injury, and the employer voluntarily paid scheduled permanent partial disability compensation and some temporary total disability benefits. The claimant then sought, and was awarded, permanent total disability. Subsequently, an ALJ granted the employer's request for modification under § 22, having found that the employer established the availability of suitable alternate employment; and the Board affirmed the ALJ's denial of permanent total disability benefits. After undergoing knee surgeries, the claimant filed her present request for § 22 modification, seeking temporary total disability benefits.

Pursuant to § 22 of the LHWCA, a request for modification of an award must occur within one year of the last payment of compensation; if a claim is denied, time begins to run on the date the decision becomes final. Claimant's present modification request, filed more than one year after the Board's affirmance of the denial of benefits became final, was untimely. The Board rejected claimant's assertion that employer's continuing voluntary payment of claimant's medical expenses constituted the "payment of compensation" pursuant to § 22, thus tolling the one-year statute of limitations for requesting modification.

Section 2(12) of the Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." Medical benefits are not explicitly included in this definition of "compensation." The Board reasoned that the Supreme Court's decision in *Marshall v. Pletz*, 317 U.S. 383 (1943), compels the conclusion that employer's payment of § 7(a) medical benefits directly to claimant's health care providers does not constitute the payment of "compensation" for purposes of tolling the § 22 statute of limitations. In *Pletz*, the Supreme Court held that the employer's provision of § 7 medical care is not payment of "compensation" within the meaning of Section 13(a) of the LHWCA, and therefore does not toll the limitations period for filing a claim. The Supreme Court observed that the term "compensation" used in Sections 2(12), 6, 8, 10 and 14 of the Act, refers to periodic money payments made to the claimant and does not refer to the expense of medical care. The Board found no basis for adopting a different construction of the term "compensation" for purposes of § 22.

After a review of the relevant case law, the Board noted that, consistent with *Pletz*, the Fourth and Ninth Circuits have stated that compensation and medical benefits are distinct terms under the Act. The Board concluded that the Fourth Circuit's decision in *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979)(holding that suspension of compensation pursuant to § 7(d) includes medical benefits) was not controlling because it was based solely on § 4(a), did not cite *Pletz*, and was not cited by the Fourth Circuit in a subsequent decision. Furthermore, in a line of cases construing the term "compensation" as used in several sections of the Act, the Board has held, in accordance with *Pletz*, that medical benefits generally are not considered to be compensation because, in a normal case, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care. Similarly, in *Lazarus v. Chevron USA, Inc.*, the Fifth Circuit emphasized the distinction drawn by the Supreme Court in *Pletz* between the normal case in which the employer voluntarily pays the medical provider directly and the case in which the employer fails to provide medical benefits and the claimant subsequently is awarded reimbursement for expenses he incurred in obtaining treatment. 958 F.2d 1297, 1301, 25 BRBS 145, 148(CRT) (5th Cir. 1992). In *Larazus*, the Fifth Circuit held that an award of reimbursement for medical expenses constitutes "compensation" under § 2(12) and is enforceable under § 18(a), expressly limiting its holding to cases in which the employer refuses or neglects to furnish medical services, and the employee incurs expenses or debt in obtaining such services (additional citations omitted).

[Topic 22.3.2 Modification -- Filing a Timely Request; Topic 2(12) Definitions -- Compensation]

***Phillips v. PMB Safety & Regulatory, Inc.*, __ BRBS __ (2010).**

Reversing the ALJ's determination, the Board held that the claimant, injured by a fellow employee while on a break during his employment on an oil rig, was injured in the course of his employment, where the employer failed to produce substantial evidence to the contrary. The ALJ's conclusion that the claimant was so thoroughly disconnected from the service of his employer that he was no longer in the course of employment had no support in law or in fact.

The claimant worked in the kitchen and cleaned living quarters on the oil rig. Claimant was lying in a bunk taking a break after making the beds when Chase Fruge, a co-worker, came into the room and pulled him off of the bunk by his ankles onto the concrete floor and twisted the claimant's arm behind his back. Mr. Fruge mistakenly believed that the claimant had

previously thrown water on him. The claimant sought treatment for ankle and shoulder injuries. Shortly thereafter, the claimant was involved in a non-work-related car accident, injuring his neck and back, and he has not worked since the accident. He subsequently underwent a shoulder surgery.

The presumption of Section 20(a), that the claim comes within the provisions of the Act, applies to the issue of whether an injury arises in the course of employment. An injury occurs in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment.[5] *See, e.g., Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985). As the employer offered no evidence legally sufficient to rebut the § 20(a) presumption, the incident occurred in the course of claimant's employment as a matter of law.

The ALJ found that the claimant was on an unauthorized break at the time of the injury and thus had "severed the employment nexus." Claimant testified that he was allowed to take rest breaks. Although the ALJ found that the claimant was not a credible witness, the claimant's assertion that he was on a break was undisputed and supported by other witnesses. The ALJ erred in placing the burden on the claimant to establish that the break was authorized, as, pursuant to § 20(a), employer bears the burden of producing substantial evidence that the rest break was unauthorized and subjected claimant to risks unrelated to his employment. *Durrah, supra*. Even assuming, *arguendo,* that the claimant's break was unauthorized, this fact alone does not rebut the § 20(a) presumption. Generally, employees who, within the time and space limits of their employment, act to accommodate personal comforts do not leave the course of employment. *Id.*, 760 F.2d at 326, 17 BRBS at 101(CRT) (additional citations omitted). Claimant's taking a rest break did not remove him from the course of his employment, as the incident occurred in a place where he would reasonably expect to be in the course of his work and not in an "unanticipated path of new risks not inherent in his employment situation." *Id.*, 760 F.2d at 326, 17 BRBS at 99(CRT). Thus, regardless of whether claimant's break was authorized, he was in the course of his employment at the time of the incident with Mr. Fruge.

The ALJ also erred in finding that the claimant's prior history of unsanctioned "horseplay" severed the employment nexus. Based on the

[5] The Board rejected claimant's contention that the "zone of special danger" doctrine is applicable in this OCSLA case, stating that this doctrine has limited application to cases arising under the Defense Base Act and the District of Columbia Workmen's Compensation Act.

evidence that the claimant and Mr. Fruge were asked to leave the platform after the incident, the ALJ concluded that the claimant acted against the employer's express prohibition of horseplay. This conclusion cannot support a finding that the claimant was outside the scope of employment given the evidence that Mr. Fruge's attack on the claimant was unprovoked and employer's disapproval was expressed only after the incident. Moreover, injuries caused by fights between co-workers are compensable where employer presents no evidence that the injured employee had any personal or social contacts with the assailant outside of work.[6] Such injuries, however, do not arise out of employment if the dispute giving rise to the physical altercation has its origins in the employee's domestic or personal life. Both the claimant and Mr. Fruge testified that the incident was based solely on Mr. Fruge's misconception that the claimant had previously thrown water on him at work. Thus, the evidence indicated that the only contact between the claimant and Mr. Fruge occurred at work on the oil rig. Therefore, as this incident occurred at work between co-workers, it occurred in the course of claimant's employment. Any past history of horseplay between claimant and Mr. Fruge does not take this incident out of the course of claimant's employment.

Finally, the ALJ erred in finding that the employer was relieved of liability as claimant's injury occurred as a result of a third party's intentional or negligent conduct. The inquiry into "intentional or negligent" conduct arises only when employer alleges that a *subsequent* event constitutes an intervening cause of claimant's injury. It does not apply to whether the original injury is compensable, as the Act provides that benefits are payable "irrespective of fault as cause for the injury." 33 U.S.C. §904(b). Moreover, the assailant in this case was not a "third party" but was instead a co-worker on the oil rig.[7] Although Mr. Fruge and claimant were "employed" by separate subcontractors, they worked in the confined environment of the oil rig for the same company, Chevron. Chevron retained the right to fire employees on the rig, and did so in this case. An employer is liable under the Act for injuries caused by co-workers.

[Topic 2.2.9 Section 2(2) Injury -- Course of employment]

[6] Injuries are not compensable if occasioned solely by the willful intent of an employee to injure himself or another. 33 U.S.C. §903(c). This section is not applicable under the facts of this case as claimant was not the aggressor in the incident at issue.

[7] The Board noted that injuries are not removed from the course of employment by the mere fact of third party involvement. *See* 33 U.S.C. §933. In addition, under Section 2(2), a compensable injury includes one "caused by the willful act of a third person directed against an employee because of his employment." 33 U.S.C. §902(2).

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In the survivor's claim, *Conley v. National Mines Corp.*, ___ F.3d ___, 2010 WL 481292, Case No. 09-3039 (6th Cir. Feb. 12, 2010) (pub.), the miner suffered from lung cancer, which metastasized to his brain, pancreas, and liver. The Administrative Law Judge determined that the miner suffered from both clinical coal workers' pneumoconiosis as well as chronic obstructive pulmonary disease (COPD) due, in part, to his coal dust exposure. A treating physician testified that, because of his COPD, the miner had "less respiratory reserve, less capacity to deal with these things, and that therefore it does make a difference." From this, the Administrative Law Judge concluded that coal dust-induced COPD hastened the miner's death and benefits were awarded.

Citing to its opinion in *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003), the court reiterated that "[l]egal pneumoconiosis only 'hastens' a death if it does so through a specifically defined process that reduces the miner's life by an estimable time." The court stated that unsupported statements by a physician will not meet this standard. It declined to hold that a "precise number of days" or an estimate of months or years would be required; rather, the court concluded that "context and common sense will govern the resolution of these questions." However, an opinion that pneumoconiosis makes a person generally weaker or more susceptible to "other trauma" is insufficient, according to the court, to meet this standard.

[**hastening death standard at 20 C.F.R. § 718.205**]

B. Benefits Review Board

In *Duncan v. Director, OWCP*, 24 B.L.R. 1-__, BRB No. 09-0391 BLA (Jan. 20, 2010) (pub.), the Board held that it was improper for an Administrative Law Judge to deny the fee petition of Claimant's attorney. Under the facts of the claim, the Black Lung Disability Trust Fund (Trust Fund), and not the operator designated by the District Director, was held liable for the payment of benefits by the Administrative Law Judge. As a result, the Administrative Law Judge noted that the Trust Fund never challenged Claimant's entitlement to benefits, was never in an adversarial relationship with Claimant, and, as a result, the Trust Fund could not be held liable for the payment of attorney's fees.

Adopting the position of the Director on appeal, the Board concluded otherwise and stated:

> [W]hile Section 725.367 does not directly address this issue, the regulations contains no provision that would negate imposing liability on the Trust Fund for the payment of an attorney's fee, when the operator that created an adversarial relationship is later (released) by the administrative law judge.

Id. Consequently, the Board remanded the matter to the Administrative Law Judge for consideration of the fee petition.

[**attorney's fees under 20 C.F.R. § 725.367**]

In *Stover v. Peabody Coal Co.*, 24 B.L.R. 1-__, BRB No. 08-0549 BLA (Jan. 27, 2010) (en banc on recon.) (pub.), Employer argued that the Sixth Circuit's toxic tort opinion in *Best v. Lowe's Home Centers, Inc*., 563 F.3d 171 (6th Cir. 2009) is applicable to black lung claims. Employer maintained, in claims where there are multiple (differential) diagnoses, it is incumbent on the medical expert to use "diagnostic techniques to rule out alternative causes in order to reach a conclusion as to which cause of injury is most likely." As a result, Employer asserts that "this test constitutes a new legal standard that is applicable to black lung claims under general standards for evaluating the credibility of medical opinion evidence.

Under the facts of *Stover,* Drs. Simpao and Baker diagnosed smoking-induced and coal dust-induced lung disease. Employer argued that the Administrative Law Judge failed to apply the *Best* standard to evaluate the physicians' opinions such that the decision awarding benefits must be vacated. The Board disagreed.

Adopting the position of the Director, the Board held that the *Best* standard is not applicable, and it does not "present a new standard for evaluating disability causation opinions in black lung cases." The Director noted that the *Best* decision was premised on the application of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Because the Federal Rules of Evidence do not apply to administrative proceedings, the Board concluded that the Sixth Circuit's decision in *Best* is not controlling in black lung claims. The Board noted:

> In cases involving the evaluation of medical opinions that attributed a miner's disabling respiratory impairment to smoking, or to coal dust exposure, or both, where the physicians

> disagreed as to whether the role of each exposure could be differentiated, the Sixth Circuit has consistently upheld the administrative law judge's credibility determinations, if supported by substantial evidence, where the adjudicator has examined 'the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based.'

Id. As a result, the award of benefits was affirmed.

[**weighing medical opinions; disability causation; differential diagnosis**]

In *Harris v. Shamrock Coal Co.*, BRB No. 09-0164 BLA (Nov. 19, 2009) (unpub.), a medical treatment dispute claim, the Administrative Law Judge properly concluded that Employer failed to rebut the presumption at 20 C.F.R. § 725.701(e). In so holding, the Administrative Law Judge accorded Dr. Caffrey's opinion little weight as he "addressed only whether the miner had pneumoconiosis and not whether the miner's medical bills were related to treatment for pneumoconiosis." Similarly, Dr. Broudy's opinion was of little probative value because he "improperly questioned whether the miner had pneumoconiosis and whether the miner was totally disabled due to pneumoconiosis." Moreover, Dr. Broudy's report "improperly focuse[d] on whether the treatment notes and medical records diagnose[d] pneumoconiosis." Finally, Dr. Fino's report was accorded little weight since it was "based on inadequate information." Notably, Dr. Fino "reviewed only cursory descriptions of [the] miner's medical expenses, which included no explanations for why the tests and procedures were performed."

[**medical treatment dispute at 20 C.F.R. § 725.701(e)**]

By unpublished decision in *Owen v. Midwest Coal Co.*, BRB No. 09-0326 BLA (Jan. 28, 2010) (unpub.), the Administrative Law Judge properly concluded that Employer did not demonstrate "good cause" to exceed the evidentiary limitations at 20 C.F.R. § 725.414. Adopting the Director's position, the Board stated that "employer must make a particularized showing that the evidence submitted in compliance with the evidence-limiting rules was insufficient for determining entitlement to benefits." As Employer failed to meet this standard, the Administrative Law Judge did not "abuse her discretion" in excluding the excess evidence.

[**"good cause" for exceeding evidentiary limitations**]