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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 176
March - April 2005

John M. Vittone
Chief Judge (Longshore)

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

SSA Gulf, Inc. v. Magee, ___ S.Ct.___, ___**U.S.** ___, Cert. denied (S.Ct. Docket No. 04-740)(March 7, 2005)(Issue: Does the LHWCA wholly displace and preempt state tort damage claims by longshore workers against their stevedore employers so as to trigger federal question jurisdiction).

[Topic 5.1.1 Exclusiveness of Remedy And Third Party Liability]

Tarver v. Bo-Mac Contractors, Inc., ___ S.Ct. ___, ___ **U.S.** ___, Cert. denied (S.Ct. Docket No. 04-837)(March 28, 2005)(Issue: Did the **Fifth Circuit** misconstrue § 3(a) by applying a "moment of injury" test to enumerated situs).

[Topics 1.5.3 Development of Jurisdiction/Coverage--1972 Amendments; 1.6.2 Jurisdiction/Coverage—Situs—"Over land"]

Stevedoring Servs. Of America v. Price, ___ S.Ct. ___, ___ **U.S.** ___, Cert. denied (S.Ct. No. 04-723)(Issues: [1] Whether the **Ninth Circuit's** "75 percent rule, " which uses § 10(a) to compute an average weekly wage in claims filed improperly restricts the application of § 10(c), which must be used when § 10(a) "cannot reasonably and fairly be applied." [2] Whether §§ 6(b)(1) and 8(a) limit the aggregate compensation payable for the disability to a sum not greater than the amount that would be payable if the employee who becomes permanently and totally disabled by a subsequent injury receives concurrent awards of compensation) .

[Topics 6.2.1 Commencement of Compensation—Maximum Compensation For Disability and Death Benefits; 10.2.1 Determination of Pay—10(a); 10.4.1 Determination of Pay—Section 10(c)—Application of Section 10(c); 10.2.4 Determination of Pay --"Substantially the Whole of the Year"]

B. Circuit Court Cases

Davis v. Director, OWCP, (Unpublished)(No. 04-1025)(**D.C. Circuit** March 1, 2005).

In this District of Columbia Workmen's Compensation Act (DCWCA) claim for medical benefits, the claimant-petitioner requested the ALJ and Board's denial of further benefits to be overturned. The petitioner also asked the **District of Columbia Circuit** to determine that the district court has exclusive jurisdiction to review the Board's decision on medical benefit entitlement under the LHWCA, as extended by the previously-codified DCWCA of 1928. However, the **D.C. Circuit Court** stated that "Under the applicable statutory scheme, …, the Board adjudicates the entitlement to a specific medical benefit award and judicial review is in the Court of Appeals. The district court has jurisdiction only to process and enforce such an award. This court has no authority to alter this review structure." ***[ED. NOTE:*** *Although the DCWCA was repealed in 1982, it remains in effect for pre-1982 injuries and incorporates the version of the LHWCA that was in effect when the DCWCA was repealed.****]***

In 1982, the claimant's entitlement to certain medical benefits was determined by the Board. Later that year, the claimant filed an enforcement action in district court. In 1982, that court established procedures for the claimant to obtain payment from the employer's carrier. In 2001, the district court modified those procedures and directed, among other things, that the parties try to resolve any medical billing disputes with the help of a designated "settlement judge."

Subsequently the parties were unable to resolve their disputes and resumed the proceedings at the ALJ level. Based on the claimant's failure to seek prior authorization for exercise equipment he purchased, which was fancier and more expensive than the equipment which had been approved in advance by the carrier, and the claimant's failure to demonstrate an emergency which justified purchasing the equipment without prior approval, the ALJ rejected the claim for the difference between the authorized amount and the amount ultimately paid. Both the Board and now the circuit court have upheld the ALJ's ruling.

Additionally, the ALJ denied the claimant's claim for authorization to purchase a powered wheelchair and van lift because the claimant had failed to demonstrate that either apparatus was medically necessary or reasonably related to his work-related injury. In upholding the ALJ and Board, the circuit court noted that under the LHWCA, a claimant seeking an award of medical benefits bears the burden of persuasion that his request is medically reasonable and necessary.

The claimant also asked the circuit court to apply the contempt provisions of Section 27(b) to hold the insurer in contempt for failure to comply with the district court's 2001 modified order. In declining to get involved, the circuit court noted that Section 27(b) applies only when an agency adjudicator has made a finding of contempt and "certifies the facts to the district court having jurisdiction in the place in which he is

sitting (or to the United States District Court for the District of Columbia if he is sitting in such District)…" The court observed that the ALJ here had not made any finding of contempt and had not submitted a certification of facts to the district court.

The claimant also asked the circuit court to impose sanctions on the insurer for misstatements made and alleged attorney misconduct occurring during the 2003 district court proceedings. "Because the district court proceedings are entirely separate and distinct from the proceedings under review here, and because the issues arising from those proceedings are not before this court, the request for sanctions need not be considered."

[Topics 7.6 Medical Benefits—Reimbursement; 27.3 Powers of Administrative Law Judges--Federal District Court Enforcement; 60.1 Longshore Act Extensions—District of Columbia Workers' Compensation Act]

Universal Maritime Services v. Perry, (Unpublished)(No. 04-1542)(**4th Cir.** March 18, 2005).

The **Fourth Circuit** upheld the ALJ's finding that the third audiogram was determinative. The first audiogram was conducted on October 26, 2000. This baseline audiogram was conducted four to five and one-half hours after the claimant had finished his work day while working for Ceres. He testified that he had been exposed to loud noise while working. The test administrator (who was neither an audiologist nor an otolaryngologist) did not conduct other reliability tests for hearing loss, such as bone-conduction or speech reception. This audiogram indicated an 8% binaural hearing loss.

On December 26, 2000, while working for Universal, the claimant underwent audiometric testing. The claimant had not worked for five days preceding the test and the test administrator was a board certified audiologist who conducted both bone-conduction and speech reception tests. This audiogram revealed a 6.3% binaural hearing impairment. The ALJ found this audiogram to meet the requirements of a presumptive audiogram and the October 26, 2000 audiogram to be less reliable. The ALJ accorded no weight to a third audiogram conducted on December 27, 1999 because internal inconsistencies rendered it invalid.

The Board and the circuit court accepting the ALJ's assessment, finding that it was reasonable.

[Topic 8.13.1 Hearing Loss—Section 8(c)(13) Introduction and General concepts—Determining the extent of loss; Section 8(c)(13) Introduction and General concepts—Responsible Employer and Injurious Stimuli; 8.13.8 Section 8(c)(13) Introduction and General concepts—Hearing loss and Proving Disability at Last Exposure]

General Construction Co. v. Castro, 401 F.3d 963 (**9th Cir.** March 2, 2005).

Here the **Ninth Circuit** adopted the **Fifth Circuit's** "Abbott Doctrine." (Although the LHWCA does not explicitly provide for total disability during rehabilitation training, such an interpretation is consistent with the LHWCA's goal of promoting the rehabilitation of injured employees to enable them to resume their places to the greatest extent possible as productive members of the work force.) *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122 (**5th Cir.** 1994). In *Castro*, the **Ninth Circuit** stated:

> [T]he LHWCA defines 'disability' as the 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment.' (Citations omitted.) The Abbott rule, consistent with this definition, simply clarifies that it is possible for a claimant to be entitled to benefits for 'total disability' when the claimant is physically capable of performing certain work but unable to because that work for some other reason….[T]he Abbott rule requires a fact-finder to consider on a case-by-case basis an injured worker's participation in a rehabilitation program as one factor in determining whether suitable alternative employment is available to that worker.

The employer also argued that even if *Abbott* is a valid interpretation of the LHWCA, it should not be applied in *Castro*. In addressing this argument, the **Ninth Circuit** stated:

> We agree with the **Fourth Circuit** in *Newport News [Shipbuilding & Dry Dock Co. v. Dir., OWCP, 315 F.3d 286 (**4th Cir.** 2002),* that *Abbott* did not set forth a rigid rule and that a number of factors enumerated by the [Board] may be relevant to determining whether an individual may receive benefits while enrolled in a rehabilitation program. These include whether enrollment in the rehabilitation program precludes any employment; whether the employer agreed to the rehabilitation plan and continuing payment of temporary total disability benefits; whether completion of the program would benefit the claimant by increasing his wage-earning capacity; and whether the claimant showed full diligence in completing the program.

The **Ninth Circuit** dismissed all of the employer's arguments as to why *Abbott* should not apply. Most notably, the court dismissed the argument that Abbott should not apply because the claimant's rehabilitation program was not designed to improve his earning capacity. The court stated that the ALJ noted that, although hotel management starting salaries were comparable to the salaries in the jobs the employer had identified, the vocational advisors reasonably determined that training in hotel management would give the claimant the best long-term earning potential. The court found that the ALJ was correct in focusing on the long-term wage-earning prospects in assessing the rehabilitation program.

The **Ninth Circuit** also refused to over-rule its 75 percent rule in relation to Section 10(a). Section 10(a) does not require that the claimant worked 100% of the potential working days during the year immediately preceding the injury; it presumptively applies when a claimant works more than 75% of the work days of the measuring year. It may even apply when the claimant has worked less than 75% of these days, if the reduction in working days is atypical of the worker's actual earning capacity.

Additionally, the court found that the employer's argument that Section 8(g) limits compensation during rehabilitation to $25.00 ignores the plain language of the statute. The court noted that the statute gives additional compensation, and does not mean "in place of other appropriate compensation."

Finally, the employer had argued that it was improperly denied a hearing before an ALJ to determine the necessity of a vocational rehabilitation program for the claimant before that plan was implemented. The employer also contended that OWCP violated its Fifth Amendment due process rights when OWCP imposed compensation liability on the employer for the duration of a rehabilitation plan into which it had no input.

The court found that Section 19(c) does not necessarily require an evidentiary hearing before an ALJ on all contested issues and that ALJs lack jurisdiction over certain disputes, in particular those involving strictly legal issues and matters within the discretion of a District Director turning on assessments of "reasonableness" and not involving factual questions reasonable by an ALJ. "Thus, the existence of a dispute does not in itself trigger a right to a hearing under the LHWCA." In the instant case, the initial reasonableness of the vocational rehabilitation plan undertaken by the claimant and approved by OWCP, while not entirely a legal issue, turned on a "reasonableness" decision and did not require any factual determinations of disputed issues by an ALJ. Moreover, the court pointed out, the LHWCA and its accompanying regulations commit the direction and therefore also the approval of such rehabilitation programs to the discretion of the Director.

As to the employer's claims that failure to afford it a hearing violated the APA, the court found that Section 19(d) merely requires that any hearings ordered by the Director be conducted in accordance with the APA. "If no hearing is required, no question as to whether the APA has been violated can arise."

Finally, the court found that due process rights were not violated because there was a sufficient predeprivation hearing (the opportunity to be heard at a meaningful time and in a meaningful manner). Implementation of the rehabilitation plan did not, in itself, deprive the employer of its property, since that implementation did not automatically trigger payment of permanent benefits to the claimant. When the issue of disability compensation arose with the claimant's filing of a claim for benefits, the District Director properly forwarded the matter to OALJ for further handling, and an ALJ held a full hearing on the merits of the claim for benefits. The employer received notice and an opportunity to submit evidence and argument before the ALJ's decision awarding compensation and before it was required to pay anything.

[Topics 8.2.3.2 Extent of Disability--Disability While Undergoing Vocational; 8.8 Maintenance For Vocational Rehabilitation; Rehabilitation; 10.2.4 Determination of Pay—Section 10(a)—"Substantially the Whole of the Year;" 19.01 Practice and Procedure—Generally; 19.02 Due Process—Formal Hearings; 19.3.1 Procedure—Adjudicatory Powers--ALJ Cannot Review Discretionary Acts of District Director; 19.4 Procedure—Formal Hearings Comply with APA]

Johnson v. Seacor Marine Corp. ___ F.3d ___, (Nos. 03-31005, 03-31038 and 03-31161)(**5th Cir.** March 23, 2005).

This is a consolidated appeal wherein the **Fifth Circuit** found that a labor contractor's contract to hold harmless and indemnify a vessel operator for injuries sustained by that contractor's employees while riding on the operator's vessel was supported by consideration when the vessel operator owed a pre-existing duty to oil companies to transport those same employees. Without the contract, if the vessel operator chose to prevent the labor contractor's employees from boarding its vessels, only the oil companies had a remedy against the vessel. With the creation of the contract, the labor contractor had a distinct, legally enforceable right to board the vessels. The court found that this is sufficient consideration to form a contract.

The labor contractor also argued that the contract's indemnity terms were not enforceable under the Louisiana Oilfield Anti-Indemnity Act. However, since the **Fifth Circuit** found that the contract was maritime in nature, the Louisiana statute had no application. *See Laredo Offshore constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (**5th Cir.** 1985)("An agreement to transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract.").

[Topic 5.2.2 Exclusiveness of Remedy and Third Party Liability--Third Party Liability—Indemnification; 5.3 Exclusiveness of Remedy and Third Party Liability-- Indemnification in OCSLA Claims; 70.1 Responsible Employer—Generally]

Coastal Cargo v. Flowers, (Unpublished)(04-60879)(**5th Cir.** March 16, 2005).

In this unpublished summary decision, the **Fifth Circuit** upheld an attorney fee award wherein the ALJ had ordered the parties to conduct additional employer medical examinations. Previously the ALJ had awarded the claimant compensation and medical treatment. Subsequently a controversy arose as to whether treatment for chronic pain and depression was included in the original award of medical treatment. After an informal conference the District Director found that the employer's refusal to provide pain management and treatment for depression was not in default of the original ALJ Order. The District Director found that a change of condition had occurred and recommended that the claimant be examined by employer's doctor. The claimant refused and the matter

was referred to OALJ for a hearing. The ALJ agreed that the prior decision did not order treatment for pain management or depression and that the employer had a right to challenge the reasonableness and necessity of the requested treatment. The parties stipulated that they would conduct additional employer exams. Subsequently the claimant filed an attorney fee application and was awarded fees. The employer challenged the application, claiming that the claimant had initiated needless litigation following the refusal to submit to a medical examination by the employer's doctor.

[Topics 7.1 Medical Benefits—Medical Treatment Never Time Barred; 28.1.2 Attorney's Fees—Successful Prosecution; 28.2.4 Attorney's Fees--Additional Compensation]

C. Federal District Court Decisions/Bankruptcy Court

Saienni v. Capital Marine Supply, Inc., ___ Fed. Supp 2d ___ (Civ. Act. No. 03-2509 Section I/2)(E Dist. La. April 18, 2005)

At issue here was whether the worker was a Jones Act seaman or was a repairman covered under the LHWCA. After going through the jurisprudence, the court addressed the facts and noted that none of the facts taken alone would automatically preclude seaman status, but rather the aggregate of the circumstances of the worker's employment supported only the conclusion that the worker was a land-based maintenance and repair coordinator and worker who happened to be on a vessel when he was injured.

The court noted that whether or not the worker could prove that his temporal connection to the vessels passed the 30 percent threshold, he failed to come forward with any specific facts demonstrating that the nature of his work was anything other than land-based repair of vessels.

The undisputed facts in this case were: (1) at the time of the alleged accident, the worker was employed by the defendants as a shore side mechanic operating out of a land-based fleeting facility and mechanic shop; (2) while performing his job duties, his time was split between working at the fleeting facility in one area and traveling by car to service vessels at other locations; (3) of the 40 percent of his total work time which was spent at the fleeting facility, half of that time (20 percent overall) was spent in the mechanic's shop; (4) when his work duties were performed aboard vessels, the vessels were generally moored at a dock, shipyard or other stationary location; (5) while performing his work at off-site locations, when an overnight stay was required, he would spend his nights at motels and could only recall one occasion when he slept on one of the vessels; (6) while aboard the vessels, he did not serve as a deckhand, pilot or captain because the vessels had their own crews; (7) in his capacity as a shore side mechanic, he reported directly to a shore-based port engineer; and (8) he performed repairs aboard a vessel while it was underway only four times a year.

[Topic 1.4.1 Jurisdiction/coverage--LHWCA v. Jones Act]

In Re Muma Services, Inc, (f/k/a Murphy Marine Services, Inc.) et al., Debtors, 322 B.R. 541; 2005 Bankr. LEXIS 494 (March 30, 2005).

In this bankruptcy matter, the court noted that maritime personal injury matters, such as 905(b) actions outrank preferred ship mortgages:

> A maritime lien is grounded in 'the legal fiction that the ship itself caused the loss and may be called into court to make good.' *Ventura Packers, Zinc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 919 (**9th Cir.** 2002). This 'personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner,' giving the maritime lien claimant the right to seize the vessel and have it sold to satisfy the debt owed. *Equilease*, 793 F.2d at 602 (citations omitted). *See generally*, Robert Force & Martin Norris, 1 The Law of Seamen § 20:3 (5th ed. 2004).
>
> When a maritime lien attaches to a vessel, it accompanies the ship everywhere and through all the transfers of ownership, even into the hands of a bona fide purchaser without notice, unless the transferee has acquired title through an in rem judicial proceeding that extinguishes the lien. *See* Michael J. Ende, Adrift on a Sea of Red Ink: The Status of Maritime Liens in Bankruptcy, 11 Fordham Int'l L.J. 573, 588 (1988)(arguing that bankruptcy courts, as courts with in rem jurisdiction over the debtor's assets, should have the power to sell vessels free and clear of maritime liens).

[Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Generally]

Ross v. Dyncorp, ___ F. Supp 2d ___ (Civ. Act. No. 02-2404)(D.C. Dist. March 31, 2005).

At issue in this summary judgment matter was whether all remedies in relation to a worker's death, were under the Defense Base Act (DBA). The decedent had worked for DynCorp who had a contract with the State Department for counter-narcotics efforts in Central America. Ross worked in refueling and maintenance of aircraft, and in fact, died as the result of a propeller injury suffered during "hot refueling." The plaintiffs, Ross's family, filed suit in federal district court alleging negligence in the conduct of an ultrahazardous activity, negligence per se for violating company internal regulations and policies, or those of the State Department Operation Directives for Columbia, and negligent supervision concerning the return of Ross's remains to his family and causing intentional infliction of emotional distress.

The federal district court found that the plaintiffs failed to create any genuine factual dispute concerning the applicability of the DBA to the plaintiff's negligence-based claims. The court's reasoning is noteworthy. First, the court noted that the DBA makes the exclusive remedy of an employee of a covered government contractor against the contractor a compensation remedy under the LHWCA. Thus the court had to first

consider whether the contract between Dyncorp and the State Department fell within the ambit of § 1651(a)(5) of the DBA. This subsection covered contracts that were "to be performed outside the continental United States" that are financed under the "Mutual Security Act of 1954," which was repealed and superseded by the Foreign Assistance Act of 1961. Since the plaintiffs conceded that the contract was "to be performed outside the continental United States," and that it contained the workers-compensation-insurance related provisions required by § 1651(a)(5), the only issue left regarding the applicability of § 1651(a)(5) was whether the contract was "financed" in the manner required by that subsection.

The plaintiffs noted that DynCorp received a small amount of funding (app. 1.6 %) from the budget of the Department of Defense for a single aspect of performance of the contract, and, according to the plaintiffs, this created a genuine issue of material fact regarding the statutory sources of all financing for DynCorp's performance under the contract, precluding summary judgment on the question of whether the contract satisfies the funding-source required of § 1651(a)(5). However, the court found sufficient reason to credit the testimony of the Director and Comptroller for the State Department's Bureau of International Narcotics and Law Enforcement Affairs as to the manner in which the contract was financed.

According to the court, "At most, then, the plaintiffs have created a genuine issue of fact regarding whether the Contract was funded exclusively through the mechanism of the Foreign Assistance Act." Next, the court asked whether this fact issue is material in the sense required to preclude summary judgment. "Whether or not the funding for the Contract came exclusively through the Foreign Assistance Act will only be a material fact issue if § 1651(a)(5) requires such exclusivity of funding as a criterion of applicability. The court finds no reason to think that this is the case." After which the court goes into a lengthy explanation and review of the DBA's history summing it up as follows:

> The history of congressional modification of the DBA, then, is a history of continuous expansion of coverage, persuading the Court that if, as the plaintiffs claim, Congress had intended that a DBA provision apply more narrowly than might otherwise be though, it would have expressed that intent clearly in the text of the statue itself…Put differently, Congress certainly could have drafted § 1651 (a)(5) to apply only to contracts "exclusively financed" under the Foreign Assistance Act, but instead chose to employ broader language.

The court also specifically noted that as regards § 1651 (a)(4) determinations regarding which federal policies qualify as "national defense" policies are best left to the representative branches of government.

The court also addressed the plaintiffs' infliction of emotional distress claim, noting that under District of Columbia law, a *prima facie* case of intentional infliction of emotional distress requires the plaintiff to demonstrate: (1) extreme or outrageous

conduct that (2) intentionally or recklessly (3) causes severe emotional distress to another. The court concluded that the plaintiffs had not made a *prima facie* showing.

[**Topics 60.2.1 Longshore Act Extensions--Defense Base Act—Applicability of the LHWCA; 60.2.4 Longshore Act Extensions--Defense Base Act—Substantive Rights Determined Under Provisions of LHWCA as Incorporated into the DBA]**

D. Benefits Review Board Decisions

Feider v. Pomeroy Grain Growers, (Unpublished)(BRB No. 04-0639)(March 8, 2005).

It is the location of a claimant's injury that controls which portion of Section 8(f)(1) is applicable. In the instant case, there was a single, discrete injury to an ankle which set off a chain reaction leading to the claimant's permanent total disability.

Prior to his April 30, 1999 right ankle sprain, the claimant had a degenerative condition in his left knee resulting from a torn meniscus and chondromalacia. He also had a surgically fused right ankle with severe arthritis. On April 30, 1999 he was treated for his right ankle sprain and released, but returned on May 4, 1999, because he had developed a staph infection. Aggressive antibiotic treatment failed, and on May 12, 1999, his right leg was amputated below his knee. On May 22, 1999, his left leg was amputated above his knee. Doctors believed that bacteria settled in the claimant's right ankle and left knee where the irregular surfaces of the joints, due to the previous injuries, provided "nidi," or breeding grounds, for the bacteria to develop and avoid antibiotic treatment. The staph infection was eradicated by the amputations.

The ALJ found that the employer was entitled to Section 8(f) relief, noting that the pre-existing ankle and knee conditions contributed to the claimant's ultimate permanent total disability, regardless of the source of the infection. (Doctors' opinions differed on whether the infection was present before the ankle sprain and became active or developed as a result of it. The ALJ found that the source of the infection did not matter, as she concluded from the doctors' opinions that the infection would have been eradicated by the antibiotic treatment had it not been for the nidi in the two previously injured joints.)

At issue on appeal was which method should be utilized to determine how much relief to grant the employer, i.e., how much is the Special Fund's liability—how many weeks of permanent disability benefits must the employer pay to the claimant before the Special Fund becomes liable. Arguing that it is the claimant's "injury" and not his "disability" that determines which part of Section 8(f)(1) applies, the Director contended the employer must pay 205 weeks (the period of benefits due for the loss of a foot according to Section 8(c)(4)) of benefits. The Director asserted that as the claimant's injury, the below-the-knee amputation precipitated by the ankle sprain and the infection, falls within the schedule, the employer should be liable for 205 weeks of permanent disability. The employer argued that, as the claimant was totally disabled, his benefits

should be paid pursuant to Section 8(a) and thus, they were not payable pursuant to the schedule, and therefore, liability should be limited to 104 weeks.

The Board, noting the third sentence of Section 8(f)(1) ("In all other cases…") found that "Although claimant also subsequently lost the use of his other leg, and loss of both limbs establishes a presumption that claimant is totally disabled,…, it is the location of claimant's injury that controls which portion of Section 8(f)(1) is applicable."

[Topic 8.7.7.1 Special Fund Relief--Multiple Disability Periods and Multiple Injuries]

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Davis v. Delaware River Stevedores, Inc., ___ BRBS ___, (BRB No. 04-0489)(March 7, 2005).

The instant case addresses the question of whether an employer's request for Section 8(f) relief was filed in a timely manner. The employer had contended that: (1) the ALJ erred in finding that the deadline for submitting the application for Section 8(f) relief was reasonable, (2) the ALJ erred in failing to excuse the late filing based on the employer's reliance on past practices at that district director's office, on the application of the mailbox rule," and (3) that the ALJ erred or for other equitable reasons. The Board, after addressing all of these arguments, rejected the employer's arguments and affirmed the ALJ's denial of Section 8(f) relief.

Section 702.321(b)(3) states that an employer's failure to submit a fully documents application by the date established by the district director shall be an absolute defense to the liability of the Special Fund. Such failure may be excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the consideration of the claim by the District Director. The present District Director testified that she considered the factors recommended in both the OWCP Procedure Manual and the regulation noted above, in setting a 30-day deadline for employer's application for Section 8(f) relief. She stated that the employer gave no indication at the informal conference that 30 days was insufficient, and she received no request for an extension of time to file the application. The former District Director testified that he would start with the minimum time of 30 days as a deadline for filing a Section 8(f) application, but if the claimant was being paid, he might give the employer whatever time it sought because there was no harm to the claimant.

The ALJ found that the present District Director considered the factors set forth in Section 702.321(b) when setting her deadline and that employer did not seek an extension of time to file its application. The ALJ also found that the permanency of the claimant's disability was put in issue by the claimant's request for an informal conference, and, thus, the employer was aware that permanency would be addressed. As the employer was aware prior to the informal conference that permanency would be at issue, the ALJ determined that the additional 30-day period following the informal conference gave the

employer a reasonable amount of time to file its application for Section 8(f) relief. The Board found the ALJ's finding to be rational and affirmed it.

Next, the employer asserted that the former District Director had adopted an informal "mailbox rule" such that the employer's application, received five days after the deadline, would have been accepted as timely by the former District Director. The Board noted that there is no provision in either the applicable regulations or the District Director's procedure manual regarding the filing of documents by mail. 20 C.F.R. §702.321; DLHWC Procedure Manual. "there is also no provision for applying either the OALJ or Board rules to documents filed with the district director." 20 C.F.R. §802.207; 29 C.F.R. §18.4(c).

Moreover, the Board found that regardless of how the former District Director processed applications for Section 8(f) relief in general, or how he would have processed this particular application, the present District Director stated in her memorandum of informal conference that the employer's application will be considered timely if [it] is received in this office on or before December 13, 2002." [The employer's application was mailed on the due date, December 13, 2002, and received on December 18.] The Board found the present District Director's language to be unambiguous. Furthermore, it noted that while the former District Director's testimony indicated that he may have been lenient regarding setting deadlines for receiving applications for Section 8(f) relief, he made no reference to a "mailbox rule" or to a specific "policy" of accepting applications mailed on the date they were due. "Rather, [the former District Director] stated that, 'in practice,' the deadline he set was the date by which he expected to receive the application."

The employer also alleged that it was unreasonable for the present District Director to adhere so strictly to the application deadline when she herself did not comply exactly with the other policies pertaining to the Section 8(f) application process. The employer's contentions were based on its allegation that the District Director selectively chose which regulations and policies to follow in processing the application for Section 8(f) relief and the claimant's claim for permanent total disability benefits. The ALJ noted the District Director's failure to meet certain policy deadlines, but stated; "While I recognize the equities invoked by Employer, I am not willing to accept such an argument without authority for doing so." The Board agreed with the ALJ.

[Topics 8.7.9.2 Special Fund Relief--Timeliness of Employer's Claim for Relief; 8.7.9.3 Special Fund Relief—Filing for Section 8(f) Relief]

Bailey v. Newport News Shipbuilding & Dry Dock Co., ___ BRBR ___ (BRB No. 04-0603)(March 30, 2005).

The Board upheld the ALJ's finding that a letter sent to OWCP within one year of the last payment of benefits was a timely motion for modification. Previously the parties had stipulated as to temporary partial disability. Pursuant to the stipulations, the ALJ

issued a Decision and Order. In the claimant's letter she asked that the correspondence be considered a request for permanent partial disability. Subsequent to this request, she saw a certified hand specialist who found a five percent impairment of the right upper extremity. The employer argued that the filing was anticipatory and invalid since she was not claiming benefits for a specific disability at the time she filed the letter and because by the time she obtained evidence of a permanent impairment, it was more than one year after the last payment of compensation.

In addressing this argument, the Board noted that the **Fourth Circuit**, within whose jurisdiction this case arose, has stated that the modification application "must manifest an actual intention to seek compensation for a particular loss, and filings anticipating future losses are not sufficient to initiate a § 22 review." The Board found that the ALJ discussed all relevant cases in detail and summarized the inquiry as follows: (1) looking at the context of the letter, does claimant exhibit a clear intent to request modification; (2) has claimant requested a claim for a specific type of benefits for a particular loss; (3) is the disability for which benefits are sought in existence at the time the request for modification is made; and (4) would a reasonable person conclude that the claimant is making a modification request.

The ALJ found that since the stipulated compensation order was for a closed period of temporary partial disability, the employer could reasonably expect a claim for additional compensation. He further found that the letter evinced an actual intent to seek benefits. In upholding the ALJ, the Board found that the ALJ had rationally found that the context of this case demonstrated that the claimant's claim was not anticipatory. "Although claimant had not yet received an impairment rating at the time she sought modification, the [ALJ] correctly relied on the fact that her schedule award runs from the date of maximum medical improvement given the circumstances in this case, i.e., where claimant is working or suitable alternate employment has been identified." "[The] claimant herein had an additional disability under the Act, which pre-dated the filing for modification. The fact that the impairment was not yet quantified when claimant filed for modification therefore does not establish the invalidity of her modification request." The full extent of the loss need not be quantified in the pleading, it is sufficient that the claimant references a current claim for permanent partial disability benefits, which, in the context of this case, is a claim under the schedule. The Board found that the content of the filing clearly stated a present claim that in context, was for a disability purportedly, and in fact, in existence at the time of the timely filing.

The Board, however, did disallow Section 14(e) penalties, noting that "As a request for modification is a new claim based upon an existing injury, it follows from this precedent that a new notice of controversion is not required upon the filing of the modification request."

[Topics 14.2.2 Payment of Compensation—Failure to Controvert; 22.3.1 Modification—Requesting Modification—Determining What Constitutes a Valid Request; 22.3.2 Modification—Requesting Modification--Filing a Timely Request; 22.3.4 Modification—Requesting Modification--Change in Condition]

Games v. Todd Shipyards Corp., (Unpublished)(BRB Nos. 04-0622 and 04-0622A)(April 27, 2005).

Here the Board rejected the application of equitable estoppel where the claimant alleged that he had relied, to his detriment, on the representations of the carrier's representative that his wife was not allowed to receive reimbursement for home health care services because she was the claimant's wife.

The claimant had contended that no claim had been made for attendant care until his wife learned that the carrier's alleged statement was erroneous, at which time the claimant immediately retained counsel and requested benefits for said services. After reviewing the doctrine of equitable estoppel, the Board found that all four necessary elements were not present and therefore, the doctrine could not be applied.

[Topic 7.3.7 Medical Benefits—Medical Treatment Provided By Employer—Attendants]

E. ALJ Decisions and Orders

F. Other Jurisdictions

FCCI Ins. Co. v. Cayce's Excavation, Inc., ___ So. 2d ___ (Case No. 2D03-4594) (April 27, 2005)(Fla. 2005).

Here the state appellate court reversed an order on summary judgment and remanded for further consideration a claim by an employer against its insurance company for not covering a work-related injury which took place when a worker, working on a barge installing pilings as part of the construction of a residential dock on a navigable waterway, was injured. The employer was involved in seawall and jetty work, septic tank work and excavation work. Through its insurance broker it contracted with FCCI to provide workers compensation insurance. Subsequent to providing coverage, by letter, the insurer informed the employer that the policy would not cover any employee who was working on navigable waters because coverage for those workers had to be obtained pursuant to the LHWCA and could not be provided by FCCI. Attached to the letter was a document entitled "Longshore and Harbor Workers' Compensation Act Exclusion Endorsement."

The employer sued under the theories of promissory estoppel, fraud in the inducement, and negligence. The trial court granted summary judgment as to promissory estoppel. In overturning the trial court, the appellate court noted, "To state a cause of action for promissory estoppel, a plaintiff must establish the following three elements: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the

party claiming estoppel caused by the representation and reliance thereon." For the trial court to properly grant summary judgment on promissory estoppel, there must be an absence of disputed fact as to all three elements. Since the court found no absence, it over turned the summary judgment.

[Topics 2.5 Definitions—Section 2(5) Carrier; 5.1.2 Exclusiveness of Remedy and Third Party Liability—Right to Sue Employer If No Coverage; 70.12 Responsible Employer—Responsible Carrier]

ERATAS

In Digest 175 [January—February 2005], the last paragraph of *Gulley v. Director, OWCP*, ___ F.3d ___ (Nos. 04-1427 & 04-1645)(**7th Cir.** Feb. 8, 2005) should have read "**Seventh Circuit**" instead of "**Fifth Circuit**."

Also in Digest 175,the first paragraph of *Virginia International Terminals, Inc. v. Edwards*, ___ F.3d ___ (No. 04-1338)(**4th Cir.** Feb. 16, 2005) should have read "**Fourth Circuit**" instead of "**Ninth Circuit**."

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, ___ F.3d ___, Case No. 04-2030 (7th Cir. Mar. 14, 2005), the circuit court rejected Employer's argument that the miner's claim was time-barred under 20 C.F.R. § 725.308 where physicians in the earlier claim diagnosed emphysema and chronic obstructive pulmonary disease, but they failed to attribute the respiratory ailments to coal dust exposure. The court noted that, in the miner's subsequent claim, a physician concluded that the miner's respiratory ailment was coal dust related and this opinion was communicated to the miner. As a result, the court determined that the requirements of § 725.308 were met and the statute of limitations commenced to run with the newly generated physician's report.

In weighing the medical opinion evidence, the court upheld the administrative law judge's finding that the miner suffered from coal workers' pneumoconiosis notwithstanding the preponderantly negative chest x-ray evidence of record. Moreover, the court determined that it was proper to accord less weight to a medical opinion that is "influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.'" In particular, the court agreed that Dr. Shelby's view that coal mine employment had "preserved" the miner's lung function and had a "positive effect" on his health was contrary to the provisions at 20 C.F.R. § 718.201(c) that pneumoconiosis can be latent and progressive.

[**statute of limitations applicable to a subsequent claim in Seventh Circuit; weighing medical opinions**]

B. Benefits Review Board

In *Cooper v. Westmoreland Coal Co.*, BRB No. 04-0589 BLA (Mar. 28, 2005) (unpub.), the administrative law judge properly acted within his discretion in finding that "Dr. Wheeler's and Dr. Gaziano's equivocal identification of TB as the disease process that accounts for the markings that other physicians have identified as complicated pneumoconiosis diminishes their credibility." Citing to *Lester v. Director, OWCP*, 993 F.2d 1143 (4th Cir. 1993), the Board stated that Claimant "bears the burden of establishing that the large opacities are caused by dust exposure in coal mine employment rather than the employer being required to prove that the opacities are due to a specific non-coal dust related source." However, the Board concluded that, under *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000), "in order to resolve conflicting x-ray interpretations regarding the presence of complicated pneumoconiosis, the administrative law judge must assess the probative value of the x-ray readings in their entirety, rather than accepting them at face value." In this vein, the Board agreed with the administrative law judge that equivocal statements regarding

etiology was not sufficient to outweigh the opinion of other physicians who concluded that the large opacity was coal dust related.

[**complicated pneumoconiosis; equivocal statement regarding etiology**]

In *Sizemore v. LEECO, Inc.*, BRB No. 04-0515 BLA n. 3 (Feb. 7, 2005) (unpub.), the Board held that evidence submitted in conjunction with a claim withdrawn under 20 C.F.R. § 725.306 cannot be considered in a claim filed under the amended regulations absent a finding that the evidence complies with the limitations set forth at 20 C.F.R. § 725.414 (2004). The Board noted that, unlike the provisions at 20 C.F.R. § 725.309(d)91) (2004), which permit evidence submitted in conjunction with a prior claim to be made part of the record in a subsequent claim, there is no comparable regulatory provision that exempts evidence submitted in a withdrawn claim from the limitations at § 725.414.

[**evidence submitted in withdrawn claim not automatically admissible in claim filed under amended regulations**]

In an unpublished decision, *Bowling v. Whitaker Coal Corp.*, BRB Nos. 04-0651 BLA and 04-0651 BLA-A (Apr. 14, 2005) (unpub.), the Board reiterated that the three year statute of limitations is applicable to subsequent claims filed under 20 C.F.R. § 725.309 in the Sixth Circuit. In so holding, the Board concluded that the circuit court's published decision in *Tennessee Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001) was controlling, not the contrary unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, Case No. 01-3043 (6th Cir. Oct. 2, 2002) (unpub.). *See also Furgerson v. Jericol Mining, Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) (unpub.) (this case is already cited in the supplement to the *Judges' Benchbook*).

[**statute of limitations applicable to subsequent claims in Sixth Circuit**]

In *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.), the Board cited to 20 C.F.R. § 718.106(a) and adopted the Director's position that only the original prosector's report is considered a "report of autopsy" for purposes of the evidentiary limitations at 20 C.F.R. § 725.414 (2004). In so holding, the Board noted that the Director argued that "[w]hile highly unlikely, . . . it is possible that more than one physician may conduct an examination of the body *post mortem*; therefore, it is possible that more than one report of an autopsy may be prepared." As a result, the Board held that the prosector's report would be admitted as the "autopsy" report of record by Claimant and an additional report reviewing the prosector's report and slides was admitted by Claimant as one of her two medical opinion reports.

[**"report of autopsy" defined under amended regulations**]

In *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.), the Board held that medical evidence submitted in a living miner's claim is not automatically admissible in a survivor's claim filed after January 19, 2001 and stated the following:

> As noted by the Director, when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. § 725.309(d). Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. As this case involves a survivor's claim, the medical evidence from the prior living miner's claim must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivor's claim.

The Board concluded that the medical evidence from the living miner's claim must meet the limitations under 20 C.F.R. § 725.414 to be considered in the survivor's claim and medical opinion evidence in the survivor's claim should consider only evidence that is properly admitted. However, the Board concluded that it was "harmless error" for the administrative law judge to consider medical opinions in the survivor's claim that improperly reviewed medical evidence submitted with the living miner's claim because the conclusions reached by the physicians were not dependent on the evidence generated in conjunction with the living miner's claim, which predated evidence in the survivor's claim by 20 years.

[**evidence in living miner's claim cannot be considered in survivor's claim unless complies with limitations at 20 C.F.R. § 725.414**]