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***RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 187***
***June 2007***

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## I. Longshore

### Announcements

### A. United States Supreme Court

*Isenhour v. Harvey's Casino*, ___ **U.S.** ___ (Docket No. 06-1353)(Denied *writ of certiorari*) (June 11, 2007).

Here the **U.S. Supreme Court** denied writs in an Iowa State Supreme Court case wherein that court had upheld a ruling finding seaman status for a slot machine attendant, banker and floor host on a riverboat casino in the post-*Stewart v. Dutra* world.

**[Topic 1.4.3.1 Jurisdiction/coverage—Floating Dockside Casinos]**

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### B. Federal Circuit Courts

*Jarrett v. Director, OWCP*, (Unpublished)(No. 05-71677)(**9th Cir.** June 21, 2007).

Here, although both the ALJ and the Board found that the worker qualified as a Jones Act seaman, the **Ninth Circuit** reversed. This the **Ninth Circuit** did while it found that the worker had spent "large percentage of his time at sea" directly prior to his injury and while it also found that "he would eventually transition to a position as a deck hand or assistant engineer on board a vessel." What is more astonishing is the **Ninth Circuit's** use of terminology when discussing longshore status under the LHWCA versus Jones Act status. The **Ninth Circuit** referred to the Jones Act as providing "no-fault workers' compensation to injured 'seamen.'" The Jones Act, in actuality, is a tort action.

**[Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act]**

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*American River Transportation Co. v. US Maritime Services. Inc.*, (Unpublished) (No. 05-30878)(**5th Cir.** June 19, 2007).

Without specifically referring to the LHWCA, the circuit court upheld a finding by the federal district court that non-dependent parents of a longshoreman are not entitled to recover damages. The deceased son jumped from a barge on which he was employed while attempting to rescue a co-worker. He had been incarcerated for approximately five years immediately prior to this employment and therefore had not provided any financial support to his parents. **[Ed. Note:** The district court decision grew out of a Limitation of Liability maritime action filed by the owner of the barge.**]**

**[Topics 2.15 Definitions—Parent; 8.5 Disability—Death Benefits For Survivors]**

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*Kea v. Newport News Shipbuilding & Dry Dock Co.*, ___ F.3d ___ (No. 06-1320)(**4th Cir**. June 18, 2007).

Here the **Fourth Circuit** overturned the Board and ALJ's findings that a Section 22 modification request was untimely. Days after a compensation order for temporary disability benefits was issued, the claimant filed a letter with OWCP, along with a Form LS-203, "Employee's Claim for Compensation," alleging that he had also "sustained a permanent loss of wage earning capacity as a result of this injury." He requested that the letter be considered "a request for additional compensation in modification of the previous award and not a request for the scheduling of an informal conference."

Subsequently the employer alleged that the letter was not a request for a modification, but rather was a mere protective filing for future disability. The circuit court found that the letter was a valid request for additional compensation in modification of an award. "The letter clearly provided a 'basis for a reasonable person to conclude that a modification request had been made" and "an actual intention to seek compensation for a particular loss."

Furthermore, the court felt that too much emphasis was being placed on the claimant's request that an informal conference not be scheduled on the modification request, and upon the view that this failure to request an informal conference evidenced an intent to preserve the claimant's right to recover for an anticipated disability yet to occur. The court found that the filing conveyed no intent to indefinitely preserve the right to obtain compensation for a disability that might occur in the future, nor would the claimant ultimately obtain compensation for a permanent disability that did not exist when he filed his modification request.

**[Topics 22.3.1 Modification—Determining What constitutes a Valid Request; 22.3.3 Modification—*De Minimis* Awards]**

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*Peru v. Sharpshooter Spectrum Venture LLC*, ___ F. 3d ___ (No. 05-75337)(**9th Cir.** June 27, 2007).

At issue here was whether an employee of a company that shoots, processes, and sells photographs to tourists on a historic naval ship is entitled to collect benefits under the LHWCA, or is barred from recovery by the LHWCA's express exclusion of "individuals employed by a …museum or retail outlet." The court held that in determining the applicability of Section 2(3)(B), it must look not only at the nature of a claimant's employer but also at the nature of the claimant's particular workplace and duties. Here the court felt that the claimant fell within the scope of the "retail outlet" exclusion" because both her employer's business and her own employment activities focused, in substantial part, on retail sales and, moreover, had little connection to traditional maritime activities. However, in this particular case, the court remanded the matter for a determination as to whether the claimant was eligible for benefits under Hawaii law since an employee may be excluded from LHWCA benefits under Section 2(3)(B) only if he or she is covered by state workers' compensation.

**[Topic 1.11.8 Jurisdiction/Coverage—Exclusions to coverage--Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet]**

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## C. Federal District Courts and Bankruptcy Courts

*Lacount v. Southport Enterprises*, ___ F. Supp.2 ___ (Civ. No. 05-5761 (JBS) Docket Item 10) (D.C. N.J. June 29, 2007).

District court denied the employer's motion for a summary judgment that the worker was not a Jones Act seaman although the worker had only worked three days on a barge installing mooring pilings and had stated that the third day of work would be his last. The court found that there was a genuine issue of material fact as to whether he was a seaman. "[A] short period of employment could qualify as substantial in duration if the employee spent a high proportion of [his maritime employment] on the vessel."

Interestingly, the court noted that the **Third Circuit** has put a gloss on the duration of employment inquiry: If the employment was intended to be of very short duration, that fact, is relevant to whether the relationship is 'substantial in duration.' Thus, the federal district court found that it must consider the worker's intended relationship, as if he had completed his mission uninjured. *See Foulk v. Donjon Marine Co., Inc*., 144 F.3d 252 (**3d Cir.** 1998). (It is not the actual duration of employment but the intended duration of employment that determines its substantiality."). According to the district court, one must inquire as to the worker's intent when he began his employment, not simply note that after beginning the employment he found the job not to his liking and decided to quit.

**[Topic 1.4 Jurisdiction/Coverage—LHWCA v. Jones Act]**

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*Ashton v. Superior Energy Services, Inc*., ___ F. Supp 2 ___(Docket No. CV04-1418)(W. D. La. June 4, 2007).

At issue here was whether or not a worker was covered under the Jones Act, or more succinctly, whether he was sufficiently attached to a vessel or fleet of vessels owned by one entity. The district court denied the employer's motion for a summary judgment for stating:

> "In the instant matter, defendant's affidavit (which provides the crucial evidence in support of defendant's position that plaintiff spent less than 30% of his time in the service of SES's vessels) does not comply with F.R.C.P. 56(e). Affiant purports to rely upon 'company records kept in the regular course of business' to reach his conclusion. However, neither sworn nor certified copies of the records relied upon and referred to in the affidavit have been attached to the affidavit or served therewith. Due to the lack of compliance with Rule 56(e), defendant has failed to provide either the Court or plaintiff with the evidence upon which defendant relies in support of its position. As movant has failed to support its motion as provided in Rule 56(e), thus failing to carry its burden of proof, defendant's motion for Summary Judgment must be DENIED."

**[Topic 1.4 Jurisdiction/Coverage—LHWCA v. Jones Act; 23.1 Evidence--Generally]**

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## D. Benefits Review Board

*Potter v. Electric Boat Corp*., ___ BRBS ___ (BRB Nos. 06-0874, 06-0875, 06-0876, 06-0877, 06-0878, 06-0879, 06-0880,06-0881, 06-0882, 06-0883, 06-0884)(June 28, 2007).

At issue in this consolidated case was who has the right to select a pharmacy for medication prescribed by a physician. The claimants wanted to select a different mail-order provider than the employer. The claimants did not contend that the employer or its mail-order pharmacy had denied them appropriate services. They disputed the employer's "factual" assertion that it is under a fiduciary duty to the Department of the Navy to choose the lowest cost pharmaceutical provider and that employer's provider is such. Furthermore, they alleged that the provider was not "claimant friendly." Before the ALJ, the claimants sought an order requiring the employer to pay for prescriptions obtained from the claimants' choice of pharmacy. The ALJ granted the Director's Motion to Remand stating that the Director correctly asserted the authority of the district director to address medical benefits issues when no issues of fact are raised. The ALJ deferred to the Director's interpretation that the issues raised are properly left to the district director in the first instance, with the right of direct appeal to the Board.

The Board found that contrary to the claimants' contention, neither Section 7(b) nor its implementing regulation 20 C.F.R. §702.404, provides the claimants with a right to select a pharmacy or provider of prescription medication. Claimants do not have a statutory right to select their prescription provider.

Further, the Board stated, "As claimants are not afforded their choice of pharmacy as a matter of right and as the district director supervises claimants' medical care, we hold that the issues raised by claimants in these cases are properly addressed by the district director, with the right of direct appeal to the Board." The Board explained that in these cases, the claimants have not raised issues of fact concerning authorization or refusal thereof, or the necessity of medical care that require adjudication by an ALJ. Rather, the issues raised fall within the district director's supervision of claimants' medical care, as they concern the "character and sufficiency of any medical care furnished or to be furnished the employee."

**[Topics 7.3 Medical Benefits—Medical Treatment Provided By Employer; 7.4 Medical Benefits—Free Choice of Physician; 21.2.8 Review of Compensation Order—Direct Appeals from District Director to Board]**

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*Davis v. Eller & Co.*, ___ BRBS ___ (BRB No. 06-0670)(June 4, 2007).

**With this Section 28(b) attorney fee case arising out of the Eleventh** Circuit, the Board has now realigned itself with the majority of circuits (**Fourth, Fifth and Sixth**) which hold that in order for a claimant to obtain an attorney fee under Section 28(b), there must have been an informal conference. It noted that the **Eleventh Circuit** has no position on this issue and further noted that previously, where there was no circuit position, the Board had followed the position of the **Ninth Circuit** (Claimant is entitled to a fee where the extent of liability is controverted and claimant successfully obtains increased compensation regardless of whether employer specifically rejected an administrative recommendation.)

**[Topic 28.2 Attorney Fees-Employer's Liability]**

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*Tucker v. Thames Valley Steel*, ___ BRBS ___ (BRB No. 06-0816)(June 22, 2007).

The instant case primarily concerns procedural and jurisdictional issues before the Board. Originally the ALJ found the employer responsible for the claimant's disability benefits beginning in 1985. In its decision on the employer's appeal, the Board addressed numerous issues and ultimately, as it relates to the current appeal, the Board reversed the ALJ's finding that the claimant was an involuntary retiree, holding that he was a voluntary retiree. The Board vacated the award of permanent total disability benefits, as a voluntary retiree is limited to a permanent partial disability award. The Board then

remanded the case to the ALJ for reconsideration of the onset date of the claimant's partial disability and the amount of benefits to which he is entitled. The Board affirmed the ALJ's findings on the remaining issues.

On remand, the ALJ found the claimant to be entitled to permanent partial disability benefits on a 25 percent impairment to his lungs commencing in 1993 at the rate of $60.10 per week. The claimant moved for reconsideration. The ALJ granted the motion in part and adjusted the comp rate to reflect the national average weekly wage in effect in 1999 rather than 1993. Thus, he modified his decision to reflect that the claimant was entitled to $72.65 per week in compensation. The ALJ, however, denied the claimant's motion regarding the onset date, reaffirming his finding that disability began in 1993. The claimant appealed these decisions.

The claimant first contended that the Board did not have jurisdiction to render its earlier 2004 decision. Specifically, the claimant argued that the Board dismissed the employer's November 2003 notice of appeal as premature pursuant to 20 C.F.R. §802.206(f), and that the employer's December 2003 notice of appeal sought review of only the ALJ's decision on a second motion for reconsideration. That is, the claimant argues that the employer did not file a notice of appeal following the ALJ final decision that included a request for review of all the ALJ's decisions, and that the Board erred in interpreting the December 2003 notice of appeal as such. The claimant also contends that the December 2003 appeal was not timely as successive motions for reconsideration do not toll the period for appeal.

However, the Board found that considering both notices of appeal in conjunction with the cover letter, all of which are "written communications," it is clear that the employer was seeking review of all of the ALJ's decisions in this case.

> "As the regulations give the Board the discretion to ascertain the decisions being appealed, and the parties are not bound by a single written document, it was reasonable for the Board to have considered the December 2003 notice of appeal as being an inclusive notice of appeal of all of the ALJ's decisions. Indeed, this construction is consistent with Section 802.206(f) of the regulations, which requires the Board to dismiss an appeal where a motion for reconsideration has been filed and thereafter permits appeal of the entire case once the order addressing the motion for reconsideration has been issued. As the purpose of Section 802.206(f) is to have only one appeal before the Board of all administrative decisions and decisions on reconsideration, we reject claimant's argument that the Board erred in addressing employer's arguments relating to all of the [ALJ's] decisions in this case."

The claimant also argued that the employer's appeal was untimely in that successive motions for reconsideration should not toll the time for filing an appeal of the original Board decision. However, the Board found that "The applicable regulations place no limit on the number of times a party may seek reconsideration from the [ALJ], and under Section 802.206(f), the mere filing of a motion renders an appeal premature

until the [ALJ] acts on the motion." The time for filing an appeal to the Board was tolled until after the ALJ filed his decision denying the employer's second motion for reconsideration.

**[Topic 21.2.9 Review of Compensation Order—Scope of Review]**

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*Kohlbeck v. Bristol Environmental & Engineering Services Corp*., (Unpublished)(BRB No. 06-0852)(June 25, 2007).

This case is noted because it involved complex regional pain syndrome (CRPS) or reflex sympathetic dystrophy (RSD). **[Ed. Note:** It will be added to the Topic 2 list of injuries/diseases encountered in LHWCA cases.**]**

**[Topic 2.2.18 Definitions—Representative Injuries/Disease]**

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**E. ALJ Opinions**

**F. Other Jurisdictions**

*Notaro v. Power Authority of the State of New York*, 2007 NY Slip Op 5087; 2007 N.Y. App. Div. LEXIS 7077 (June 8, 2007).

The Supreme Court of New York, Appellate Division, affirmed a summary judgment dismissing the defendant and finding that the defendant, for purposes of the LHWCA, is a subdivision of the state in as much as the statute creating the defendant defines it as "a body corporate and politic, a political subdivision of the state." Furthermore, the court noted that contrary to the plaintiff's contention, the defendant was not equitably estopped from denying coverage under the LHWCA under the circumstances of this case. The plaintiff attempted to invoke the doctrine of equitable estoppel to avoid the mandatory consequences of Section 3(B), but the doctrine "cannot be invoked to relieve a party from the mandatory operation of a statute."

**[Topic 2.8 Definitions--State]**

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

By decision in *Sharpe v. Director, OWCP*, ___ F.3d ___, Case No. 05-1896 (4th Cir. July 17, 2007), the court noted that, "[i]mportantly, the modification of a black lung claim does not necessarily flow from a finding that a mistake was made on an earlier determination of fact." Under the facts of the case, Employer filed a petition for modification on a living miner's claim two months after the miner died and nearly seven years after a decision of the Benefits Review Board (Board) affirming that the miner was entitled to benefits on the basis that he suffered from complicated pneumoconiosis. In the meantime, the widow also filed a claim. Upon consolidating the claims, the administrative law judge initially concluded that Employer had failed to present new evidence sufficient to establish that the miner did not suffer from complicated pneumoconiosis. As a result, Employer's petition for modification of the miner's claim was denied and benefits were awarded in the survivor's claim.

On appeal, the Board held that the administrative law judge erred in relying on findings of fact rendered by the previous judge and the Board directed that, on remand, the miner's claim must be reviewed *de novo*. On remand, the judge modified the miner's claim (more than four years after his death) and denied the miner's and survivor's claim. In so doing, the court noted that the judge applied the misguided remand instructions of the Board and "only assessed the factual accuracy of the complicated pneumoconiosis finding and failed to evaluate the other pertinent factors." The court stated that the administrative law judge and Board mistakenly assumed that Employer "had a right to modification of the living miner's claim upon simply establishing a mistake of fact." The court observed:

> [N]one of the decisions on the Modification Request addressed the fact that Westmoreland waited nearly seven years to file the Request, none questioned Westmoreland's motive in filing its apparent response to the survivor's claim, and none otherwise addressed whether a reopening of the matter would render justice.

Here, the court focused on the discretionary language at 20 C.F.R. § 725.310(a) (2000) that, "[u]pon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director *may* . . . reconsider the terms of an award or denial of benefits." (emphasis added). The court noted that the administrative law judge's denial of benefits on remand only addressed one of the "factors relevant to an exercise of sound discretion"; *to wit*, whether a mistake of fact was made in the original decision on the miner's claim.

Citing to *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 547 (7th Cir. 2002), the Fourth Circuit noted the Seventh Circuit has "recognized that the diligence of a party seeking modification should be considered in a modification determination." *See also McCord v. Cephas*, 532 F.2d 1377, 1378 (D.C. Cir. 1976) (remanding for assessment of

whether reopening would "render justice under the act" in light of the employer's four-plus years delay in pursuing modification).

The Fourth Circuit held that, in addition to diligence, the adjudicator must consider a party's motive in seeking modification and whether the modification petition is futile or moot (*i.e.* in this case the miner had no estate and any overpayment could not be recovered by the employer). In this vein, the court posed the following questions for the administrative law judge to consider on remand:

> Why did Westmoreland wait to seek modification under § 725.310(a) until June 2000, two months after (the miner's) death and nearly seven years after the BRB had affirmed his living miner's award (a decision that Westmoreland never appealed)?
>
> Should Westmoreland's motive in seeking modification be deemed suspect?
>
> Was the Modification Request part and parcel of Westmoreland's defense to (the survivor's) claim for . . . benefits, which had been filed less than two months earlier?
>
> Is the Modification Request futile or moot, in that no overpayments made to (the miner) could be recovered?
>
> Is the Modification Request akin to a request for an advisory opinion, in that a favorable resolution thereof will have no impact on the living miner's claim?

Accordingly, the court remanded the claims for further consideration.

[ **petitions for modification, consideration of** ]

In *United States v. Davis*, ___ F.3d ___, Case Nos. 06-5073 and 06-5074 (6th Cir. June 22, 2007), the court upheld the criminal convictions of Carolyn Sue and Otis Davis for aiding and abetting in Medicare fraud and obstructing a criminal investigation. The court noted that the charges "stemmed from the Davis's orchestration of and participation in a scheme to supply oxygen to coal miners suffering from black lung disease." The court noted that Ms. Davis "was instrumental in the founding of the Kentucky Black Lung Association . . ., an organization designed to help miners obtain black lung benefits, as well as other goods and services they might need in order to live with the disease."

[ **Carolyn Sue and Otis Davis, criminal convictions upheld** ]

## B. Benefits Review Board

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-__, BRB No. 04-0812 BLA (June 29, 2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc), the Board affirmed its prior decision and reiterated certain holdings. First, the Board held that interpretations of digital x-rays must be considered under 20 C.F.R. § 718.107 and "an administrative law judge must consider whether the readings of the digital x-ray that a party seeks to admit are 'medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' pursuant to Section 718.107(b)." The Board declined to modify this holding despite Claimant's argument that "the digital x-ray was recorded on film." The Board also rejected Employer's argument that "digital film technology is not in dispute" such that a fact-finder need not be required to determine its reliability on a case-by-case basis. The Board found Employer's argument unpersuasive:

> . . . in light of the fact that the National Institute of Occupational Safety and Health has not approved the use of digital x-rays to diagnose pneumoconiosis, as quality standards applicable to this technology have not yet been developed by the International Labor Organization.

Slip op. at 4. The Board also noted that, with regard to evidence developed under § 718.107, section 725.414 "permits the parties to submit one reading of each CT scan undergone by claimant in support of a party's affirmative case and that reading need not be the original or first reading." Slip op. at 6.

Second, the Board declined to apply the Seventh Circuit's holding in *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7th Cir. 1999) to a claim filed after January 19, 2001. In *Durbin*, the circuit court applied Federal Rule of Evidence 703 to allow consideration of a medical expert's opinion that was based, in part, on evidence not admitted into the record. The Board noted that "[r]equiring an administrative law judge to fully credit an expert opinion based on inadmissible evidence could allow the parties to evade the limitations set forth in the new regulations (at § 725.414), by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations."

[ **digital x-rays, medical opinion based on inadmissible evidence, limitations of evidence under § 718.107** ]

In *W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA (June 26, 2007) (unpub.), the Board cited to *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007) stating that, if it is determined that the miner suffers from complicated pneumoconiosis under 20 C.F.R. § 718.304, then the fact-finder must assess whether the large opacities were caused by exposure to coal dust. In this vein, the Board held that the provisions at 20 C.F.R. § 718.203 apply and a miner with ten or more years of coal mine

employment is entitled to a rebuttable presumption that his complicated pneumoconiosis arose from such employment.

[ **complicated pneumoconiosis, cause of** ]