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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 283
July - August 2017

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

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

***Chugach Management Services v. Jetnil*, 863 F.3d 1168 (9th Cir. 2017).**

In a case of first impression, agreeing with the BRB and the OWCP Director, the Ninth Circuit held that the "zone of special danger doctrine" may be applied to local nationals who are employed in their home country under employment contracts covered by the Defense Base Act ("DBA"). Further, substantial evidence supported the ALJ and BRB's decision that claimant, a citizen of the Marshall Islands, was injured in a "zone of special danger" while employed on a remote island other than the one on which he lived.

Claimant, a citizen of the Republic of the Marshall Islands ("RMI"), was employed by employer as a painter. He resided and worked on the islands of the remote Kwajalein Atoll, which houses the U.S. Army's missile defense test site. Claimant was injured while working on one of the smaller islands, Gagan Island, which is uninhabited and accessible only by boat or helicopter, with employer's permission. Employer provided housing (a trailer), food, and transportation to employees working on the island. Claimant cut his foot while reef fishing after work hours. There was no medical care on the island and limited care on other islands. The injury was not treated immediately, became infected, and eventually his leg had to be amputated. The ALJ found coverage under the DBA based on the zone of special danger doctrine, and awarded medical benefits and temporary total disability compensation. The BRB affirmed. Claimant has since passed away.[2]

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at __) pertain to the cases being summarized and, where citations to a reporter are unavailable, refer to the Westlaw identifier (*id.* at *__).

[2] The court rejected the Director's argument that claimant's death rendered this case moot, noting that claimant's survivors had a statutory basis to assert a claim for scheduled disability compensation owed at death, even if, as the Director asserted, this claim ultimately proves to be time-barred.

In *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483 (1951), the Supreme Court created the zone of special danger test to determine whether an injury arises out of and in the course of employment. The Court explained that a causal relationship between the nature of the claimant's employment and his injury is not necessary; instead, "[a]ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." *Id.* at 1173-74 (*quoting O'Leary*, 340 U.S. at 506-07 (internal quotation marks omitted)).

In this case, the Ninth Circuit rejected employer's contention that this doctrine cannot be applied to local nationals who are employed on a DBA-covered contract in their home country. First, the plain language of the DBA does not distinguish between employees sent abroad from their home country and local nationals. Second, Congress implicitly endorsed application of the zone of special danger doctrine to local nationals when it reinstated DBA coverage for local nationals in 1958; it is presumed that Congress was aware of *O'Leary*. Third, case law almost without exception does not distinguish between employees sent abroad from their home country and local nationals when determining whether an injury arose out of the conditions of one's employment.[3] Fourth, almost all of the justifications for the zone of special danger doctrine apply with equal force to local nationals working in remote areas as to employees working away from their home country. In this regard, the court observed that "[t]he zone of special danger doctrine is justified in part because the employment takes the employees to remote, uninhabited, or generally inconvenient places. As this case demonstrates, the conditions of employment for local nationals may very well subject them to remote, uninhabited, and inconvenient locales, even in their home country." *Id.* at 1175 (citations omitted). Fifth, concluding that the zone of special danger doctrine does not apply to local nationals injured in their home country would lead to irrational results and contradictory case law. Thus, individuals domiciled in the U.S. and injured on American soil, though not the continental U.S., could not be covered by the doctrine.

The court further rejected employer's assertion that applying the zone of special danger doctrine to local nationals would result in the imposition of a strict premise liability standard, resulting in twenty-four hour-a-day, seven-day-a-week coverage. Agreeing with the Director, the court pointed out that "the application of the zone of special danger doctrine will necessarily differ for local nationals employed in their home country than for an employee sent from his or her home country to work abroad." *Id.* at 1176. Thus, if claimant had been hurt fishing on a day off on his home island, rather than between shifts during a four-day overnight work assignment on an uninhabited island with restricted access, employer would have a strong argument against application of the zone of special danger doctrine. "Every application of the zone of special danger doctrine is necessarily unique to the factual circumstances of that case." *Id.* (citation omitted). The court also rejected employer's assertion that extending the zone of special danger doctrine to local nationals is inconsistent with the War Hazards Compensation Act ("WHCA"), which provides compensation for civilian employees injured or killed by war-risk hazards, and specifically excludes individuals whose residence is at or in the vicinity of the place of his employment. The court reasoned that the WHCA is a wholly different statute that provides compensation benefits when injury or death results from the hostile act of an enemy force. Moreover, the fact that Congress arguably excluded local nationals from the WHCA but did not include that same exclusion in the DBA suggests that Congress intended to permit DBA coverage for local nationals.

[3] The court noted that the Fifth and First circuits have suggested that the zone of special danger doctrine applies only to employees who were sent abroad from the U.S., but only in dicta and without explicitly identifying the domicile of the claimant.

Next, the court concluded that substantial evidence supported the ALJ and BRB's determination that claimant's injury was compensable because it arose out of the conditions of his employment and occurred while he was engaged in a reasonable and foreseeable activity. He would not have been on Gagan Island but for his employment. The island is remote, accessible only by boat and only with employer's permission. Employer provided transportation to the island, as well as housing and food during claimant's four-day stay on the island. Moreover, claimant was injured while engaging in the traditional Marshallese activity of reef fishing. Given that the activity is common in RMI, it was foreseeable and reasonable that he would reef fish during his time off. The facts of this case are similar to those in *O'Leary* and to court decisions concluding that injuries resulting from reasonable and foreseeable recreational activities in isolated or dangerous locales arise out of a zone of special danger and are therefore compensable. *Id.* at 1177-78 (collecting cases). Given the level of deference the court must apply to the BRB and the ALJ, it could not conclude that the BRB and ALJ decision was contrary to the law, irrational, or unsupported by substantial evidence. Thus, the ALJ/BRB's award of benefits was affirmed.

[DEFENSE BASE ACT - "Zone of Special Danger;" BOARD APPELATE PROCEDURE – Scope of Review]

***Murray v. Southern Route Maritime SA*, __ F.3d __, 2017 WL 3758326 (9th Cir. 2017).**

This case involved a negligence claim brought by plaintiff against a vessel owner under Section 5(b) of the Longshore Act. 33 U.S.C. § 905(b). Plaintiff asserted that the vessel owner breached its duty to turn over the vessel and its equipment in a safe condition. The Ninth Circuit affirmed the district court's judgment, after a jury trial, in favor of the plaintiff.

While working aboard a vessel, the plaintiff, a longshore worker, experienced an electrical shock when a piece of rebar he was holding came into contact with a floodlight provided by the vessel owner. He alleged that the vessel owner had been negligent in turning over the ship with a faulty floodlight.

The Ninth Circuit held that the district court properly instructed the jury that the vessel owner owed a duty to the plaintiff as a longshore worker to turn over the ship and its equipment in a reasonably safe condition, which necessarily required the vessel owner to take reasonable steps to inspect the ship and equipment before turnover.

The court further held that the district court did not abuse its discretion in allowing the plaintiff's key scientific expert to describe his theory of electrical injury because the court adequately assessed the reliability of his theory and fulfilled its gatekeeping function under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The district court also did not err in admitting the testimony of medical experts, who testified that the longshore worker's symptoms were caused by the electrical shock.

Dissenting in part, Judge Bea concurred in the panel majority opinion's conclusions and reasoning regarding the jury instructions, the scope of the defendants' turnover duty, and the admission of the statements by the plaintiff's medical experts. He dissented from the majority's conclusion that the district court properly admitted the scientific expert's testimony. Judge Bea wrote that because the causal mechanism by which low voltage shocks purportedly cause certain injuries is not understood and because the district court did not evaluate the methodologies used by the expert to identify the posited correlation between low voltage shocks and certain injuries, the district court abused its discretion in admitting the expert's testimony.

[Topic 5.2 THIRD PARTY LIABILIYT]

B. Benefits Review Board

***Billman v. Huntington Ingalls Industries, Inc.*, __ BRBS __ (2017).**

The Board held that claimants' medical provider was entitled to employer-paid attorney's fees under § 28(a), where employer declined to pay any compensation within 30 days of receipt of the district director's notice of amounts due to the provider, and the provider used the services of an attorney to obtain the unpaid medical fees.

Claimants in these consolidated cases suffered work-related injuries while working for Huntington Ingalls (employer) and received medical treatment from Wardell Orthopaedics. Employer disputed Wardell's charges.[4] Wardell filed letters with the district director seeking full reimbursement in each case. The district director notified Wardell and employer that, under the OWCP Medical Fee Schedule, employer owed additional amounts for medical services provided to claimants. The dispute was referred to the OALJ, but no hearing was held as employer agreed to pay the additional amounts.[5] Wardell filed fee petitions with the ALJ. Thereafter, employer moved to dismiss the claims, contending that the ALJ does not have jurisdiction to address the medical benefits reimbursement claims, and thus there is no basis for awarding fees to Wardell's counsel. It also asserted that Wardell does not have standing to file the claims. The ALJ denied employer's motions to dismiss. The ALJ further denied Wardell's requests for employer-paid fees under § 28(a), (b). Wardell appealed, and employer cross-appeal.

The Board initially rejected employer's contention that the ALJ does not have jurisdiction to address the medical benefits reimbursement claims because of the series of re-pricing contracts executed under state law. The Board found that the ALJ has subject matter jurisdiction over the issue of Wardell's claims for unpaid medical expenses, citing *Watson v. Huntington Ingalls Industries, Inc.*, __ BRBS __, BRB No. 16-0545 (June 30, 2017)(ALJ has jurisdiction to address a provider's claim for reimbursement of the cost of its medical services at the prevailing rates under the Act; however, the ALJ lacks jurisdiction to address employer's defense based on the private contracts because such issues are not "in respect of a claim."). Thus, the Board affirmed the ALJ's denials of employer's motions to dismiss. Because employer paid the additional medical fees set by the district director, a remand for further consideration of this issue by the ALJ was not needed.

Agreeing with the OWCP Director, the Board further held that the ALJ erred in denying Wardell employer-paid fees under § 28(a) based on her findings that Wardell did not file "claims" as contemplated by that section and that employer did not "decline to pay any compensation" to claimants. The ALJ correctly determined that Wardell is a "person seeking benefits" for purposes of § 28(a). Wardell's claims are derivative of claimants' claims for medical benefits. As there is no dispute that employer is liable for claimants' medical benefits, Wardell is entitled to payment for the medical treatment it provided, pursuant to § 7(d)(3). Section 7(d)(3) requires the "party in interest" to file an "application" to be reimbursed the value of medical treatment. The Board held that

[4] Employer paid Wardell at rates set forth in the United Healthcare Fee Schedule rather than the OWCP Fee Schedule, arguing that a series of private insurance contracts entitles employer to reap the benefits of a medical re-pricing contract between Wardell and United Healthcare.

[5] At this juncture, Wardell sought only to receive the amounts calculated by the district director.

Wardell's written "applications" for payment filed with the district director constituted "claims for compensation" under § 28(a).

Further, the ALJ erred in concluding that employer did not "decline to pay any compensation" because it paid claimants' benefits within 30 days of receiving notices of their claims for compensation. The Board held that the appropriate time period for determining if any compensation was paid was the 30 days after employer received the district director's letters notifying employer that it owed money to Wardell for medical services provided to claimants. During those 30-day periods, employer paid Wardell nothing. In *Taylor v. S.S.A. Cooper, L.L.C.*, __ BRBS __, BRB No. 16-0174 (June 30, 2017), the Board held that the term "compensation" in § 28(a) means "disability and/or medical benefits." Here, employer "declined to pay any compensation" within 30 days of receiving the district director's letters by refusing to reimburse Wardell the amounts calculated by the district director, which represented the amount of "compensation" Wardell sought. Although the claims did not proceed to hearings, employer ultimately agreed to pay the additional amounts while the cases were before the ALJ. Moreover, Wardell's attorney's efforts to obtain payment were not duplicative of any efforts by claimants' attorneys. Thus, Wardell is entitled to have its legal fees paid by employer pursuant to § 28(a).[6]

Accordingly, the Board reversed the ALJ's denials of employer-paid fees and remanded the case to the ALJ for consideration of the fee petitions and objections.

[Section 28(a) ATTORNEY'S FEES; MEDICAL BENEFITS - Section 7(d)(3)]

[6] In light of this finding, the BRB did not address whether employer is liable for a fee under § 28(b).

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Consolidation Coal Co. v. Director, OWCP [Noyes]*, ___ F.3d ___, 2017 WL 3138436 (10th Cir. July 25, 2017), the Tenth Circuit addressed an appeal concerning an award of benefits in a survivor's claim that was filed in 2008 under the Black Lung Benefits Act ("BLBA"). At issue, generally, was application of the 15-year rebuttable presumption of death due to pneumoconiosis arising out of coal mine employment ("CME"). *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b), (c), (d).

On second remand from the Benefits Review Board, the second ALJ to be assigned to the case awarded benefits, finding that the claimant had invoked the 15-year presumption and that the employer had failed to rebut it. The Board then affirmed the appeal, and the employer filed an appeal with the Tenth Circuit.

On appeal, the court first addressed the employer's contention that the rebuttal provisions at Section 718.305(d) represent "an impermissible construction of the BLBA" by requiring an employer to disprove not only clinical, but also legal, pneumoconiosis. Slip op. at 7. Generally, in a survivor's claim, an employer may rebut the presumption by either (1) disproving the existence of legal and clinical pneumoconiosis arising out of CME, or (2) establishing that no part of the miner's death was due to pneumoconiosis. Considering the longstanding statutory, regulatory, and judicial definitions of pneumoconiosis, the court concluded that it "must presume that the BLBA's broad definition of 'pneumoconiosis' also applies to the fifteen-year presumption contained in § 921(c)(4)." *Id.* at 9. Distinguishing this case from an earlier case involving the definition of pneumoconiosis in the context of the 10-year rebuttable presumption that a miner's clinical pneumoconiosis arises out of his or her CME, the court saw no "reason to depart from the general, inclusive definition of pneumoconiosis employed throughout the BLBA." *Id.* at 10; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.203(b). The court also noted that several other Circuits have recognized that legal pneumoconiosis may be established by way of the 15-year presumption. Accordingly, the court held that this presumption applies to clinical and legal pneumoconiosis.

The court next considered the employer's argument that the rebuttal standard contained at Section 718.305(d) violates the Administrative Procedure Act ("APA") because the regulation shifts the burden of persuasion to the employer, the party opposing entitlement. The court noted that, according to the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). Because Section 921(c)(4) of the BLBA shifts the burden of proof to the party opposing entitlement, the court concluded that Section 556(d) of the APA "does not apply."

Third, the court rejected the employer's challenge to the "rule-out" or "no part" standard at Section 718.305(d). In doing so, the court pointed out that the Third and Fourth Circuits have also ruled that this standard is in keeping with the BLBA. Accordingly, the court held that this standard "is consistent with both Congress' intent in enacting the fifteen-year presumption and the broad remedial purposes of the BLBA." Slip op. at 16.

Fourth, the court disagreed with the employer's assertion "that the retroactive application of § 718.305(d)(2) violates its right to due process." *Id.* at 17. Concluding that its decision in a published 2014 decision is controlling, the court held "that § 718.305(d)(2) may be applied retrospectively to benefits claims that were filed before the regulation's effective date." *Id.* at 18; *see Antelope Coal Co./ Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014) (upholding application of the new rebuttal standard applicable to a miner's claim). The court thus also rejected the employer's "related argument that it is

entitled to an opportunity to develop further evidence in light of the revised rebuttal standard." Slip op. at 18 n.4.

Finally, however, the court agreed with the employer that the ALJ erred in his recitation of the applicable rebuttal standard in addressing whether the employer disproved the existence of legal pneumoconiosis pursuant to Section 718.305(d)(2)(i). Specifically, the ALJ used the term "rule-out" on two occasions in analyzing the etiology of two diseases: lung cancer and emphysema. The court concluded that remand was appropriate and that the proceedings on remand "should be very brief" if the ALJ had intended to use the "rule-out" term "in its colloquial sense." *Id.* at 22. If he did not, the court clarified that "the ALJ will be required to reconsider the existing evidence under the proper standard." *Id.*

The court therefore remanded the matter for further proceedings consistent with its opinion.

[Apply rebuttal standards at 20 C.F.R. § 727.203(b)(3) and (b)(4): Tenth Circuit]

In an unpublished decision, *Jim Walter Resources, Inc., v. Brantley*, ___ Fed. Appx. ___, 2017 WL 2954591, *4 (11th Cir. July 11, 2017), the Eleventh Circuit denied the employer's petition for review, concluding that the decisions by the ALJ and the Board that the claimant is entitled to "benefits are in accordance with the law and are supported by substantial evidence in light of the entire record."

In an unpublished opinion, *McVey v. S.S. Joe Buford, Inc.*, __ Fed.Appx. ___, 2017 WL 3587959 (4th Cir. Aug. 21, 2017), the Fourth Circuit dismissed the claimant's petition for review as untimely filed.

B. Benefits Review Board

In *Boyd v. Island Creek Coal Co.*, ___ BLR ___, BRB No. 16-0524 BLA (July 28, 2017), the Board addressed the issue of the Director's attempts to submit a supplemental report from Dr. Forehand, who had conducted the DOL-sponsored complete pulmonary evaluation in the case. Specifically, 7 weeks before the hearing, the Director filed a motion with the ALJ in which he sought leave to submit this supplemental report, as he believed that submission of the report would be untimely under Section 725.456(b) of the regulations. In this motion, the Director noted that the case met the requirements of the DOL pilot program concerning supplemental reports prepared by DOL-sponsored examining physicians. The Director also argued that good cause existed for the late submission of the supplemental report. The employer opposed the motion, arguing that (1) good cause for the supplemental report did not exist, (2) the supplemental report pilot program is authorized by neither the BLBA nor the regulations, and (3) the case did not meet the program's criteria in any event. In the alternative, if the ALJ were to admit the supplemental report, the employer asked that it be provided an opportunity to develop responsive evidence.

The ALJ informed the parties at the hearing that, should she receive the supplemental report, she would consider their positions. Two weeks later, the Director submitted the supplemental report in question and asked that it be admitted. In the supplemental report, Dr. Forehand took into account the opinions of the employer's physicians, Drs. Fino and Dahhan, in opining that he still believed the claimant to be totally disabled due to pneumoconiosis. Thereafter, the employer renewed its objections to admission of the supplemental report.

In her D&O on the merits, the ALJ admitted the supplemental report, finding good cause established. In addition, she denied as "vague" the employer's request for an

opportunity to respond to the supplemental report. She then awarded benefits pursuant to Section 411(c)(4).

On appeal and at the outset, the Board affirmed the ALJ's finding that the claimant invoked the 15-year rebuttable Section 411(c)(4) presumption as unchallenged on appeal. It then decided, however, that she had abused her discretion in admitting the supplemental report. First, the Board concluded that the ALJ's stated reason for admitting the supplemental report – that "it 'w[ould] assist' her 'in assessing Dr. Forehand's opinion in the absence of a deposition'" – amounted to a finding of good case based on relevancy. Slip op. at 6, quoting D&O at 3 n.6. Citing to, *inter alia*, its decision in *Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-982 (1984), in which it held that "mere reference to the relevance of the evidence" does not establish good cause under Section 725.456(b) of the regulations, the Board held that the ALJ "erred in finding good cause established merely because Dr. Forehand's supplemental report was relevant." Slip op. at 6.

Second, the Board determined that the ALJ "further erred in denying employer's request to respond to Dr. Forehand's supplemental report." *Id.* The Board noted that Section 725.456(b)(4) requires that a medical report that is not timely exchanged "shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(4). Accordingly, "having admitted Dr. Forehand's supplemental report, the [ALJ] should have allowed employer the opportunity to respond." Slip op. at 6.

Third, the Board concluded that the ALJ erred in not resolving this evidentiary issue prior to issuing her D&O. *Id.*, citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57 (2008) (en banc). Her failure to do so prevented the employer from having the opportunity to respond to the supplemental report and "from being able to properly address the evidence and the [ALJ's] evidentiary ruling in its post-hearing brief, since it neither knew that the evidence was admitted nor the grounds on which it was admitted." Slip op. at 6.

In light of the above, the Board vacated the ALJ's decision to admit the supplemental report and noted its agreement with the employer and the Director that the above errors were not harmless, as the ALJ relied on the supplemental report to find that the employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the Board also vacated the rebuttal finding. The Board further agreed with the employer that the ALJ erred in finding that it did not establish the absence of clinical pneumoconiosis at the first prong of rebuttal. The Board specifically directed the ALJ to reconsider this issue on remand.

Finally, the Board provided detailed instructions for the ALJ on remand. *Id.* at 8-9. Of note, the Board directed the ALJ, if she finds good cause established for the admission of the supplemental report, to "address employer's arguments that Dr. Forehand's supplemental report should not be admitted because the pilot program under which it was developed is not authorized and because this claim does not meet the program criteria." *Id.* at 8. In so directing, the Board "decline[d] to address, as premature, the arguments the parties have raised on appeal concerning the pilot program under which Dr. Forehand's supplemental report was developed." *Id.* at 9 n.11. The Board noted that the issue may be moot if the ALJ excludes the supplemental report on remand and that, despite the parties having raised the issue of the pilot program below, the ALJ had not rendered a ruling addressing the issue. *Id.*

Accordingly, the Board affirmed the ALJ's D&O in part and vacated it in part, and it remanded the matter for further proceedings consistent with its opinion.

[Submission of post-hearing evidence and leaving the record open: Curing a violation of the 20-day rule; Evidence rulings must be made prior to issuance of decision on the merits]

In *Ferguson v. Oak Grove Resources, LLC*, ___ BLR ___, BRB No. 16-0570 BLA (Aug. 7, 2017), the Benefits Review Board further clarified surviving spouses' entitlement to benefits pursuant to the automatic entitlement provision at 30 U.S.C. §932(*l*). Specifically, the decision addresses the question of whether Section 932(*l*) covers only those cases in which miners were awarded benefits before their death, or if in fact the amendment also covers a claim awarded after a miner dies. The Board in *Ferguson* noted that the Black Lung Benefits Act ("Act") requires that the miner was simply "'determined to be eligible to receive benefits . . . at the time of his or her death . . . .'" Slip op. at 4, quoting 30 U.S.C. §932(*l*). Furthermore, the Board stated that its "decision in [*Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014),] made clear that, for purposes of determining eligibility for derivative benefits under Section 932(*l*), there is no requirement that the miner have been awarded benefits prior to his death." Slip op. at 5. The Board also noted its agreement with the Director, Office of Workers' Compensation Programs ("Director"), that the current regulation at 20 C.F.R. §725.212(a)(3)(i), (ii) (2015) is consistent with a reading of Section 932(*l*) and that, "like the prior regulations, the current regulation provides no basis for distinguishing between survivors of miners who were awarded benefits prior to their deaths and survivors of miners who were awarded benefits posthumously." *Id*. Finally, the Board rejected the employer's contention that an award pursuant to Section 932(*l*) in the instant case would be contrary to binding Eleventh Circuit precedent.

In light of the above, the Board affirmed the administrative law judge's decision granting the claimant's request for summary decision and thus affirmed her award of benefits pursuant to Section 932(*l*).

[Introduction to Survivors' Claims: Revival of automatic entitlement for survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, where the miner was finally awarded benefits in a lifetime claim]

In *Clay v. Armco Inc./AK Steel Corp.*, BRB No. 16-0656 BLA (Aug. 30, 2017) (unpub.), the Board addressed the employer's appeal of the administrative law judge's award of survivor's benefits pursuant to Section 30 U.S.C. §932(*l*).

After addressing and rejecting the employer's contention that its due process rights had been violated due to the administrative law judge's application of Section 932(*l*) to the instant survivor's claim, the Board then addressed and rejected its argument that any such award was inappropriate because the miner's claim was not final and effective. The Board also declined the employer's request that it reconsider its holding in *Rothwell v. Heritage Coal Co*., 25 BLR 1-141 (2014).

However, the Board noted that, while the administrative law judge correctly found that an award had been entered in the underlying miner's claim at the time of her decision, the Board had recently vacated the award in the miner's claim and remanded that case. In light of the remand in the miner's claim, the Board vacated "the administrative law judge's award of benefits in the survivor's claim and remand[ed] the case for further consideration." Slip op. at 5. Noting that broad discretion in resolving procedural matters is afforded to administrative law judges, the Board observed that the administrative law judge on remand may, for example, "consolidate the miner's and survivor's claims, *or hold the survivor's claim in abeyance until the miner's claim is adjudicated*.' *Id.* n.7 (emphasis added).

In her concurrence, Judge Boggs stated that, in light of the binding authority of *Rothwell*, she concurred "in the majority's decision to reject employer's argument that the

administrative law judge erred in determining that claimant was entitled to automatic survivor's benefits pursuant to Section 932(*l*) at the time she issued her Decision and Order." *Id.* at 6. Furthermore, in light of the Board's decision to vacate and remand the award in the underlying miner's claim, she concurred "in vacating the administrative law judge's award of derivative benefits in the survivor's claim and remanding this case for further consideration." *Id.*

[Introduction to Survivors' Claims: Revival of automatic entitlement for survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, where the miner was finally awarded benefits in a lifetime claim]

Stiltner v. A&K Transportation, Inc., BRB No. 16-0081 BLA (Aug. 31, 2017) (unpub.), concerned an administrative law judge's decision, on remand, addressing a modification request of a denial of a claim filed in July of 2008. Of note, in *Stiltner* the Board considered the issue of the claimant's coal truck driving work in the context of whether the work was coal mine employment and, if so, the extent to which it was qualifying employment for purposes of the Section 411(c)(4) 15-year rebuttable presumption.

As to the first issue, the Board agreed with the Director that the claimant's job, which entailed "loading coal at the tipples and hauling it from the mines[,]" represented the work of a miner under the Act. Slip op. at 9. The Board noted that "[i]t is undisputed that claimant loaded coal from the tipples at mine sites, thus meeting the situs requirement of work as a miner." *Id.* Furthermore, the "claimant testified that he hauled coal from the mines, most often loading it himself outside the cab, before taking it away." *Id.* Accordingly, the Board concluded that, based on the facts as determined by the administrative law judge, the "claimant also met the function test in that he worked in the final step of the preparation of coal by loading it and removing it from the mine site." *Id.* The Board thus vacated the finding that the claimant's coal trucking work was not coal mine employment and remanded the matter "for the administrative law judge to determine the length of claimant's coal mine employment, to include the time he worked in trucking as a coal hauler."

The Board also rejected an alternative finding by the administrative law judge based upon the amount of time the claimant loaded coal at the tipple on any given day. In agreeing with the Director, and in considering the definition of a "working day" to be "any day or part of a day for which a miner received pay for work as a miner," the Board concluded that "the administrative law judge erred in crediting claimant with coal mine employment for only the part of each day in which the administrative law judge found that claimant was engaged in coal mine employment." *Id.* at 10. The Board thus "instruct[ed] the administrative law judge to determine the length of claimant's coal mine employment in coal trucking in accordance with the definition of 'working day'" on remand. *Id.*

Finally, the Board addressed the second issue, namely, the extent to which the claimant's employment in coal trucking was qualifying employment for purposes of the 15-year rebuttable presumption. In addressing this issue, the Board again agreed with the Director. Specifically, it concluded that the claimant's testimony, credited by the administrative law judge, "indisputably establishes that claimant was 'regularly exposed to coal-mine dust' while working as a coal truck driver." *Id.* at 12. The Board noted that the administrative law judge credited the claimant's testimony that, for about 15-minute increments several times a day, he was exposed to coal mine dust while loading coal outside of his truck. *Id.* According to uncontradicted testimony, he was exposed to coal dust even when inside of his truck, and "many times" he loaded coal outside of his truck for longer than 15 minutes. *Id.* at 12-13. The claimant "testified that he worked under these conditions every day over the course of approximately twenty years." *Id.* at 13. Because this "unrebutted testimony . . . meets the standard of establishing 'regular exposure' to coal

mine dust under 20 C.F.R. §718.305(b)(2)," the Board reversed the administrative law judge's finding that the claimant's trucking work was not qualifying employment and held, "as a matter of law, that applying the "regularly exposed" standard to claimant's "credible," uncontradicted testimony establishes that claimant was regularly exposed to coal mine dust during his years of coal trucking work." *Id.*

In its remand instructions, the Board recognized that the administrative law judge must still make a finding as to the length of the claimant's coal mine employment overall and his trucking work specifically, though it noted that the claimant will establish at least 15 years of qualifying coal mine employment. Therefore, the Board directed the administrative law judge to consider whether the claimant is able to invoke the 15-year rebuttable presumption, by establishing total disability, upon rendering a finding as to the length of the claimant's coal mine employment.

[Coal miner defined under 20 C.F.R. Parts 718 and 727; Revival of 15-year presumption in certain survivors' claims: General structure]