# JUDGES' BENCHBOOK:
# LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

# APRIL 2003 SUPPLEMENT

PREPARED BY THE U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC

**[ED. NOTE:** This supplement to the January 2002 edition of the Longshore Benchbook is a compilation of Digests. It is current through April 2003. For the most recent case law that has developed since April of 2003, see the Significant Case Digests beginning in May 2003.**]**

**TOPIC 1**

**Topic 1.3 No Section 20(a) Presumption of Coverage**

*Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

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**Topic 1.4 Jurisdiction-LHWCA v. Jones Act**

*Nunez v. B & B Dredging, Inc.*, 288 F.3d 271 (5th Cir. 2002)(rehearing denied May 21, 2002).

Worker was not a "seaman" under the Jones Act, even though he was permanently assigned to a dredge, since he spent only approximately 10 per cent of his work time aboard the dredge. The circuit court noted the Supreme Court's analysis in *Chandris v. Latsis* resolved this issue and quoted the Supreme Court :

> "The Court stated a maritime worker who spends only a small fraction of his working time onboard a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are.' The Court stated further that generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30% of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."

The circuit court also said, "The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea."

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**Topic 1.4.1 LHWCA v. Jones Act**

*Lorimer v. Great Lakes Dredge & Dock Co.*, (Unpublished) (No. 01-70849) (June 3, 2002) (9th Cir. 2002).

At issue here was whether the claimant was excluded from coverage under the LHWCA because he was a "seaman." The Board and the Ninth Circuit found that, although the claimant worked 12 hour shifts, came ashore to sleep, and had no seaman papers, he was nevertheless a seaman. The court noted that the claimant's duties as a deckhand included tying up barges alongside the dredge where he was stationed, taking depth readings, greasing the dredge's clamshell bucket, painting, cleaning, and other general maintenance, all of which contributed to the accomplishment of the vessel's mission of dredging in Los Angeles and Long Beach Harbors.

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**Topics 1.4.1 LHWCA v. Jones Act**

*Soloman v. Blue Chip Casino, Inc.*, 772 N.E.2d 515, (2002 WL 1763935) (Ind. App. July 31, 2002)

This is a consolidation of casino boat cases where the court of appeals court upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870); *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, (3d Cir. 1994(A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition

under admiralty jurisdiction or the Jones Act.

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**Topic 1.4.1 LHWCA v. Jones Act–Generally**

*Uzdavines v. Weeks Marine, Inc.*, ___ BRBS ___ (BRB No. 02-0512) (April 18, 2003).

In determining whether the worker had status under the LHWCA or was covered under the Jones Act, the Board deferred to the ALJ's rational, factual interpretation that a barge used to dredge navigational channels (either pulled by a tug or moving on spuds) was a "vessel in navigation." Thus the worker was a member of the crew covered by the Jones Act. In determining that the barge was a vessel, the ALJ had relied upon *Bernard v. Binnings Constr. Co., Inc*, 741 F.2d 824 (5th Cir. 1984) and *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (2d Cir. 1996). In *Bernard*, the Fifth Circuit had considered three factors in determining whether a floating work platform is a vessel: 1) if the structure involved was constructed and used primarily as a work platform; 2) if the structure was moored or otherwise secured at the time of the accident; and 3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. In *Tonnesen*, the Second Circuit applied the second and third *Bernard* factors but disagreed with regard to the first factor (focus on the original purpose for the structure). Instead, the Second Circuit concluded that the inquiry should look to whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident.

The Board also noted the Tonnesen court's conclusion that "[c]ourts considering the question of whether a particular structure is a 'vessel in navigation' typically find that the term is incapable of precise definition," and that except in rare cases, only the trier of facts can determine its application in the circumstances of a particular case.

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**Topic 1.4.2 Master/member of the Crew (seaman)**

*Lorimer v. Great Lakes Dredge & Dock Co.*, (Unpublished) (No. 01-70849) (June 3, 2002) (9th Cir. 2002).

At issue here was whether the claimant was excluded from coverage under the LHWCA because he was a "seaman." The Board and the Ninth Circuit found that, although the claimant worked 12 hour shifts, came ashore to sleep, and had no seaman papers, he was nevertheless a seaman. The court noted that the claimant's duties as a deckhand included tying up barges alongside the dredge where he was stationed, taking depth readings, greasing the dredge's clamshell bucket, painting, cleaning, and other general maintenance, all of which contributed to the accomplishment of the vessel's mission of dredging in Los Angeles and Long Beach Harbors.

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**Topic 1.4.3 "Vessel"**

*Martinez v. Signature Seafoods Inc; Lucky Buck F/V, Official #567411, her machinery, appurtenances, equipment and cargo, in rem*, 303 F.3d 1132 (9th Cir. 2002).

The Ninth Circuit held that a seaworthy fish processing barge that is towed across navigable waters twice a year can qualify as a "vessel in navigation" for certain purposes of the Jones Act. This barge is a documented vessel with the United States Coast Guard and has no means of self-propulsion The Lucky Buck has a shaped raked bow, a flat main deck, a flat bottom, flat sides, a square raised stern, and is equipped with a bilge pump. It also has living quarters used by fish processors and administrators while it is moored in Alaska. Pursuant to coast Guard requirements for vessels, the Lucky Buck is equipped with navigational lights. Other that these lights, however, it has no navigational equipment—specifically, the Lucky Buck has no rudder, keel or propeller. Nor is it equipped with lift rafts. In Alaska, it is moored by four anchors and a cable affixed to shore. It floats 200 feet off shore and is accessible to land via a floating walkway. It receives water from a pipe connected to the shore.

The court distinguished this case from *Kathriner v. Unisea*, 975 F.2d 657 (9th Cir. 1992) (Floating fish processing plant permanently anchored to a dock and which had not moved for 7 years and had a large opening cut into its hull to allow for dock traffic, was not a "vessel in navigation" since floating structures should not be classified as vessels in navigation if they are "incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate.") The court noted that the Lucky Buck is actually seaworthy and has a transportation function (carrying the fish processing plant, crew quarters, and incidental supplies between Seattle and Alaska twice each year. "Even if the transportation function of the Lucky Buck is incidental to its primary purpose of serving as a floating fish processing factory, that fact does not preclude a finding that it was a vessel in navigation." Additionally the court noted that the fact that it was designed to be transported among various fish processing sites raises a substantial factual issue about its status.

The court refused to adopt a test established by the Fifth Circuit to determine whether a work platform qualifies as a vessel in navigation. *See Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 831 (5th Cir. 1984).

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**Topic 1.4.3 "Vessel"**

*Haire v. Destiny Drilling (USA.) Inc.*, ___ BRBS ___ (BRB No. 02-0106) (Sept. 25, 2002), *aff'g* 35 BRBS 738 (ALJ)(2002)..

Board affirmed ALJ's finding that the marshy area upon which an air boat "got stuck" was not "navigable in fact." The ALJ noted that only air boats could navigate the area, and even such boats got stuck. (Claimant injured his back while attempting to free the air boat.) The Board noted that the ALJ, based on the limited evidence in the record, determined that only air boats could navigate the shallow bayou where claimant was injured and that the floating vegetation rendered the navigational

capability of even such boats doubtful. The ALJ found that this hindrance to navigation was evident from the fact that the boats were equipped with lubricants to free the vessels from the vegetation.

It should be noted that the Board stated, "Although the fact of navigational capability by air boats alone may, in a given case, render a waterway navigable in fact within the meaning of admiralty jurisdiction, the evidence in the instant case regarding the vegetation's impediment to navigation and the lack of any other evidence of navigable capability support the [ALJ's] finding that claimant was not injured on navigable waters pursuant to Section 3(a) of the Act.." Furthermore, it should be noted that the marsh was separated from the main waterway by a levee.

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**Topic 1.4.3 "Vessel"**

**[ED. NOTE:** The following federal district court cases are included for informational purposes only.**]**

*Ayers v. C&D General Contractors*, 2002 WL 31761235, 237 F.Supp. 2d 764) (W.D. Ky. Dec. 6, 2002)

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "water craft exclusion" excluded this claim since the worker had been working underneath a barge. The court concluded that the claim should not be excluded since the barge was not used for transportation but merely aided the work under the dock.

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**Topic 1.4.3 "Vessel"**

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**Topic 1.4.3 "Vessel"**

*Uzdavines v. Weeks Marine, Inc.*, ___ BRBS ___ (BRB No. 02-0512) (April 18, 2003).

In determining whether the worker had status under the LHWCA or was covered under the Jones Act, the Board deferred to the ALJ's rational, factual interpretation that a barge used to dredge navigational channels (either pulled by a tug or moving on spuds) was a "vessel in navigation." Thus the worker was a member of the crew covered by the Jones Act. In determining that the barge was a vessel, the ALJ had relied upon *Bernard v. Binnings Constr. Co., Inc*, 741 F.2d 824 (5th Cir. 1984) and *Tonnesen v. Yonkers Contracting Co., Inc*., 82 F.3d 30 (2d Cir. 1996). In *Bernard*, the Fifth Circuit had considered three factors in determining whether a floating work platform is a vessel: 1) if the structure involved was constructed and used primarily as a work platform; 2) if the structure was moored or otherwise secured at the time of the accident; and 3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. In *Tonnesen*, the Second Circuit applied the second and third *Bernard* factors but disagreed with regard to the first factor (focus on the original purpose for the structure). Instead, the Second Circuit concluded that the inquiry should look to whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident.

The Board also noted the Tonnesen court's conclusion that "[c]ourts considering the question of whether a particular structure is a 'vessel in navigation' typically find that the term is incapable of precise definition," and that except in rare cases, only the trier of facts can determine its application in the circumstances of a particular case.

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**Topic 1.4.3.1 Floating Dockside Casinos**

*Boomtown Belle Casino v. Bazor*, 313 F.3d 300(5th Cir. 2002).

In denying status to the claimant, the Fifth Circuit held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ''individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The Fifth Circuit further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time

of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

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**Topic 1.4.3.1 Floating Dockside Casinos**

*Soloman v. Blue Chip Casino, Inc.*, 772 N.E.2d 515, (2002 WL 1763935) (Ind. App. July 31, 2002).

This is a consolidation of casino boat cases where the court of appeals court upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870); *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247,(3d Cir. 1994(A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition under admiralty jurisdiction or the Jones Act.

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**Topic 1.5.2 Development of Jurisdiction/Coverage--Navigable Waters**

*United States of America v. Angell*, 292 F.3d 333 (2nd Cir. 2002).

This non-LHWCA case addresses the issue of navigability. Here the Army Corps of Engineers upheld an injunction issued in federal district court requiring the defendant to remove floats attached to his pier in a tidal canal. The court found that the defendant had violated the Rivers and Harbors Appropriation Act. 33 U.S.C. §§ 403 (2000). The circuit court noted that Army Corps regulations define "navigable waters" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. §§ 329.4 (2001).

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**Topic 1.5.2 Navigable Waters**

*Soloman v. Blue Chip Casino, Inc.*, 772 N.E.2d 515, (2002 WL 1763935) (Ind. App. July 31, 2002).

This is a consolidation of casino boat cases where the court of appeals court upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870); *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247,(3d Cir. 1994(A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition under admiralty jurisdiction or the Jones Act.

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**Topic 1.5.2 Jurisdiction"Navigable Water**

*Weber v. S.C. Loveland Co. (Weber III)*, 35 BRBS 190 (2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92 (CRT) (5th Cir. 2001) (Contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure

LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

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**Topic 1.6 Jurisdiction--Situs**

*Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on

appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under *contracts with the United States, or an agency thereof*, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

Finally the Board rejected coverage directly under the LHWCA. The rock where the tunnel was being drilled rose above the surface of the water at the point where the claimant was injured. The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway. Thus, the Board found that the injury did not occur on navigable water. As to the claimant's contention that he was injured on a "marine railway," the Board rejected this allegation after examining the definition of "marine railway" and noting that the claimant did not contend that the railway used in the tunnel played any part in removing ships from the water for repair.

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**Topic 1.6.1 Jurisdiction–Situs–"Over Water"**

*Ezell v. Direct Labor Inc.*, ___ BRBS ___ (BRB No. 00-0478)(March 17, 2003).

In this status issue case, the Board held that a claimant's travel by boat to and from his work sites on 53 percent of his days prior to his injury is sufficient to establish that his presence on navigable waters was not transient or fortuitous.

Here, the claimant, by virtue of his employment, was transported by boat for 18 of the 34 days (53 percent) he worked pre-injury and performed more than eight percent of his total work from barges located on navigable water. Most of his work was performed on a fixed platform replacing creosote boards and in pipe threading. The claimant was required to regularly travel by boat, 45 minutes each way, to specific jobs assignments during the course of his day and as part of his overall work The claimant maintained that the Fifth Circuit in *Bienvenu v. Texaco*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*), did not intend to exclude from coverage a worker, like himself, who was routinely transported to a work site over water and was injured during such transport.

In reaching its holding the Board distinguished this case from *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), where that claimant was using water transportation to commute to his job. In contrast, the claimant in the instant

case was already at work when required by his employer to travel by water to his work assignment. He was given this assignment on a regular basis, and thus his presence on the water was not merely incidental to his employment. Rather, claimant's presence on the boat involved a significant portion of his day and was a necessary part of his overall employment. Unlike *Brockington*, claimant was not merely commuting to work. In addressing *Bienvenu*, the Board relied on its opinion in *Ezell v. Direct Labor Inc.*, 33 BRBS 19 (1999)("While *Bienvenu* rules out coverage for employees who are transiently and fortuitously on navigable water at the time of injury, it does not hold that a worker injured on navigable water during the course of his employment should be denied coverage under the Act if he is regularly required by his employment to travel by boat over navigable water, as well as where he performs some work on a vessel.").

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**Topic 1.6.2 Situs "Over land"**

*Sowers v. Metro Machine Corp.*, 35 BRBS 181(2002) (*en banc*) upholding 35 BRBS 154 (2001).

In this *en banc* situs issue case the Board upheld its original panel opinion affirming the ALJ's finding that the claimant was not injured on a covered situs. The claimant was injured at one of the employer's two facilities adjacent to navigable water. The claimant was injured at the Mid-Atlantic facility used for prefabricating steel components and painting items for Navy ships that are under repair at the employer's other facility, the Imperial Docks, where there are wet and dry docks. Ninety-five percent of the items sent to Mid-Atlantic for repair, or returned to the main shipyard after completion, are sent over land by truck. The remaining five percent are too large or too heavy to be trucked and are sent by barge.

The ALJ found that the Mid-Atlantic facility was not a covered situs pursuant to *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998). The ALJ noted that the claimant was engaged in fabrication of ship components that had to be shipped elsewhere before they were installed on the vessels and that the workers at the Mid-Atlantic facility did not engage in ship repair at the water's edge, and thus the work could be done at any site. The fact that the large components occasionally had to be shipped by barge was deemed insufficient to cover the site under the LHWCA, as this was not the customary method of transportation.

The Board, first in a panel opinion, and now *en banc*, held that the ALJ properly applied *Brickhouse*. Although the employer's facility was contiguous with navigable waters, and thus had a geographic nexus to navigable waters, the facility did not have the functional nexus with navigable waters required by the Fourth Circuit's *Brickhouse* decision. The Board noted that this facility was used to fabricate vessel components for ships undergoing repair at the employer's other facility, but this activity did not require more than the rare use of the navigable river.

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**Topic 1.6.2 Situs–"Over land"**

*Charles v. Universal Ogden Services*, ___ BRBS ___ (BRB No. 02-0511) (April 17, 2003).

Whether a warehouse could be considered an "adjoining area" was the primary issue in this situs determination case. Here a claimant would load boxes of groceries onto a truck at his employer's warehouse adjacent to the Mississippi river in Harahan, Louisiana, then truck the groceries to the Mississippi Gulf Coast some 70 miles away where he would then unload the boxes into containers so that they could be taken to offshore locations. While on the Gulf Coast, he would empty containers of "spoiled" groceries, from containers, back onto his truck and drive the 70 miles back to his employer's warehouse location. While unloading the returns at his employer's warehouse, the claimant injured his back. In denying coverage, the Board found that there was no coverage since the claimant lacked "situs." The Board found that the employer's warehouse was not an "adjoining area" since its location had no functional relationship to the Mississippi River and was too far away from the Gulf coast docks to be considered part of that general area. "The facility functioned as a warehouse from which trucks, not vessels, were loaded. Although near navigable waters, neither employer's business nor surrounding properties had facilities on the water for loading, unloading, building or repairing vessels." In reaching its decision, the Board cited both *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th cir. 2002)(Whether a site is an "adjoining area" is determined not only by geographic proximity to navigable waters, but also by the nature of the work performed there at the time of the injury.) and *Bennett v. Matson Terminals, Inc*., 14 BRBS 526 (1981), *aff'd sub nom*. *Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982) (Facility was not a covered situs as it was not particularly suited to maritime uses, the site was not as close as feasible to employer's terminal and it was chosen on the basis of economic factors considered by businesses generally.).

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**Topic 1.6.2 Situs—Over land**

*Boomtown Belle Casino v. Bazor*, 313 F.3d 300(5th Cir. 2002).

In denying status to the claimant, the Fifth Circuit held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ''individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The Fifth Circuit further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

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**Topic 1.6.2 Situs—Over land**

*Bianco v. Georgia Pacific Corp*., 304 F.3d 1053 (11th Cir. 2002).

The Eleventh Circuit found that a worker in a sheetrock production plant did not have situs under the LHWCA. "Even if GPC's sheet-rock production plant "adjoins" navigable waters, it is not an ‘‘area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel.' " The area was used solely to manufacture sheetrock. Simply because maritime activity occurred in other areas of the GPC facility (namely where raw gypsum was unloaded from vessels), the entire GPC facility did not become an "area customarily used.... " The court reasoned: "Indeed, were we to conclude that GPC's entire facility (irrespective of what GPC does at different areas therein) is an ‘‘adjoining area' simply because certain areas of the GPC facility engage in maritime activity, we would effectively be writing out of the statue the requirement that the adjoining area ‘‘be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

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**Topic 1.6.2 Situs–“Over land**

*Dickerson v. Mississippi Phosphates Corp*., ___ BRBS ___ (BRB No. 02-0547) (April 29, 2003).

In this case involving situs and status, the claimant fell off of a ladder while welding in employer’s phosphoric acid plant located about 100 feet from the water’s edge. Employer’s chemical plant manufactures fertilizer and is on a navigable waterway. The plant takes in phosphoric rock by vessel, converts it into sulfuric acid and then phosphoric acid, and the phosphoric acid is made into a fertilizer. The fertilizer leaves the plant by rail, truck or barge. The claimant described his job as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. His supervisor stated that the claimant’s work required him to perform a lot of steel fabrication work, some expansion work in the plant, some pipefitting, and foundation work for machinery. The claimant conceded that he never loaded or unloaded vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. For two weeks during his employment, the claimant did remove wood pilings from the water’s edge.

The Board affirmed the ALJ’s finding that the piling removal work was not covered employment as there was no evidence establishing that the removing of the pilings from the water’s edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a
harbor facility used for such activity. Moreover, the Board found that this case was distinguishable from other cases involving “covered” employees working in loading operations at fertilizer plants, as the claimant’s work herein was not integral to the loading and unloading. Thus, the Board upheld the ALJ’s determination that the claimant was not an employee covered under the LHWCA.

Turning to situs, the Board determined that the ALJ had correctly found that there was not

a covered situs. The Board noted that for coverage, one must look to the nature of the place of work at the moment of injury and that to be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. The Board noted that an "adjoining area" must therefore have a maritime use. It upheld the ALJ's determination that this phosphoric acid plant was solely used in the fertilizer manufacturing process and had no relation to any customary maritime activity. The Board further rejected the claimant's contention that his injury occurred on a covered situs merely because employer's entire facility abuts navigable waters and has a dock area on the property.
The Board noted prior case law distinguishing a plant from its docks when a worker worked solely in the plant.

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**Topic 1.7 Status**

*Boomtown Belle Casino v. Bazor*, 313 F.3d 300(5th Cir. 2002).

In denying status to the claimant, the Fifth Circuit held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ''individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The Fifth Circuit further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

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**Topic 1.7.1 Status-"Maritime Worker**

*Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the

ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

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**Topic 1.7.1 Status**

*McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41(2002).

Here the Board held that the case law defining "maritime employment" is not so broad as to include a trucker engaged in the land-based movement of cargo outside of the employer's terminal to locations in a port and to the rail head nearby. In other words, this status case turned on determining the point at which cargo moves from the stream of maritime commerce and longshoring operations to the land-based portion of its ultimate destination.

Specifically, the claimant testified that his job duties as a truck driver at the time of his accident consisted of transporting containers and/or trailers between the maritime yard at the port and the U.S. Customs facility, also located within the port but not within the maritime yard and/or the railroad yard which is located outside the port. He also stated that about 5-10 percent of the time he would transport containers to areas away from the port, such as to Miami. The claimant stated that usually his deliveries would originate or end at a holding yard in the maritime yard, although occasionally he would be required to make deliveries and/or pick-ups alongside the dock, termed "hot loads." He stated that at no time did he ever board any ships, as the containers at the dockside were loaded onto and unloaded from ships. The manager of intermodal transportation and trucking operations concurred with the claimant's description of his work. Specifically, he stated that there were other drivers hired by another entity that transported cargo inside the port facility, while cargo moved into or out of the port facility.

In reaching its decision, the Board noted that the claimant's primary job duties, which involved the transport of cargo between a holding yard at the port and a rail yard outside the port, are not covered activities. "[C]laimant drove a truck not to move cargo as part of a loading process, but to start it on its overland journey." The Board also noted that the fact that the claimant may have made stops inside the port does not alter the fact that he was an overland truck driver. The evidence established that on the occasions that the claimant drove to customs, he continued on to his destination beyond the port.

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**Topic 1.7.1 Status—"Maritime Worker" ("Maritime Employment")**

*Sumler v. Newport News Shipbuilding & Dry Dock Company*, ___ BRBS ___ (2002) (BRB No. 02-0318) (Oct. 9, 2002), *aff'g* 35 BRBS 968(ALJ), 34 BRBS 213(ALJ).

Here the Board affirmed the ALJ's finding that the Section 2(3) status requirement was satisfied as the uncontroverted evidence of record supported his conclusion that the claimant's work, changing air conditioning filters in the fabrication shops in the employer's shipyard, was integral to the operation of those shops. In the course of the claimant's work in the employer's air conditioning department, the claimant cut, delivered, and helped to change air conditioning filters used in the employer's buildings throughout the shipyard. The Board found it significant that the claimant delivered filters to buildings where ship construction work was being performed. The air conditioning filters with which the claimant worked were used for the ventilation of the employer's shipyard buildings which were all inside the shipyard and where the ships were actually constructed. Filters needed to be changed more frequently in buildings in which actual ship construction activity was performed than in other shipyard buildings.

The employer argued that there was no evidence to suggest that ventilation in its fabrication facilities would be impeded without the claimant to occasionally change the filters and that air conditioning itself was merely a comfort measure, incidental to the shipbuilding process. However, the Board noted evidence that claimant's duties included the continuous changing of filters in the shipyard buildings where ship fabrication and construction was performed, and that those filters where fabrication occurred were changed on a frequent basis. The Board reasoned that the evidence supported the ALJ's conclusion that the claimant's work was integral.

As to the argument that air conditioning is "merely a comfort measure" the Board stated, "[I]t defies common sense to suggest that employer would have incurred the considerable expense of installing and maintaining an air-conditioning system for the past fifty years if such a system were not required in order for employer to operate a competitive shipbuilding operation in the Commonwealth of Virginia.

Employer also argued that the claimant's duties have no traditional maritime characteristics, but rather, are typical of "support services" performed in any industrial setting. However, the Board noted that reliance on this reasoning regarding support services is misplaced, as this rationale has previously been rejected as a test for coverage. Moreover, the Board, in its earlier decision in this case, expressly stated that the standard for coverage does not concern whether the claimant's duties were more maritime specific than those conducted in non-maritime settings.

Next, the Board rejected the employer's contention that the evidence does not establish that ventilation in the fabrication shop would be impeded without the claimant's work changing the filters in those areas. "It would be inconsistent with the Supreme Court's decision in *Schwalb* [*Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989)] to require claimant to demonstrate with specific evidence, such as the level of particulates in the air in the shipyard fabrication shops or the frequency with which air conditioning filters require changing, the effects of claimant's failure to perform her job.... Moreover, claimant is not required to demonstrate that the effect on the air conditioning system would be immediate were she not to replace the filter rather, her

work is considered essential if her failure to replace the filters would eventually impede the operation of the air conditioning system."

As the only evidence of record supports the conclusion that the claimant's work was essential to the continued functioning of the employer's shipyard's air conditioning system, and that this system was integral to the employer's shipyard operations, the [ALJ's] finding of Section 2(3) coverage was affirmed.

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**Topics 1.7.1 Status"Maritime Worker" ("Maritime Employment")**

*Christensen v. Georgia-Pacific Corp*, 279 F.3d 807 (9th Cir.2002).

**[ED. NOTE:** While the forum for "905(b) negligence claims is federal district court, the Ninth Circuit's general language as to "coverage" under the LHWCA is noteworthy here.**]**

At issue in this "905(b)" claim [33 U.S.C. 905(b)] was whether the district court had properly granted a motion for summary judgment when it held that, as a matter of law, the injury was not a foreseeable result of the appellee's acts. The Ninth Circuit reversed, finding that genuine issues of material fact existed as to breach of duty and proximate cause that must be resolved at trial.

Under Section 905(b), a claimant can sue a vessel for negligence under the LHWCA. However the Supreme Court has limited the duties that a vessel owner owes to the stevedores working for him or her. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, (1981) (A vessel owes three duties to its stevedores: the turnover duty, the active control duty, and the intervention duty.).

In *Christensen*, the Ninth Circuit noted that "Coverage does not depend upon the task which the employee was performing at the moment of injury." [Ninth Circuit cites *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978); H. Rep. No. 98-570, at 3-4 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2736-37.] The court found that claimant "was engaged as a stevedore and routinely worked at loading and unloading cargo from ships. Therefore, he is covered by the LHWCA."

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**Topics 1.7.1 Status-"Maritime Worker**

*Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and

dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

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**Topic 1.7.1 STATUS–"Maritime Worker"**

*Buck v. General Dynamics Corp/Electric Boat Corp.*, ___ BRBS ___ (BRB No. 02-0534) (April 24, 2003); *Rondeau v. General Dynamics Corp/Electric Boat Corp.*, ___ BRBS ___ (BRB No. 02-0535) (April 24, 2003).

At issue in these companion cases was whether the employer was entitled to summary decision as a matter of law where the ALJs concluded that the claimants' work was not integral to the shipbuilding and repair process. The relevant facts concerning the claimants' job duties, as alleged by the employer and accepted by the ALJs are: 1) the only relationship between the claimants' duties and the shipbuilding process was to administer workers' compensation claims for all Electric Boat employees; and 2) the responsibilities of a workers' compensation adjuster at Electric Boat include adjusting workers' compensation claims, using a new computer system, setting up payment schedules, organizing files, and reporting to supervisors. Further, the motions for summary decision averred that claimant Buck did not enter the shipyard to fulfill his job duties, and that Claimant Rondeau entered the shipyard four times to interview supervisors in connection with weekly safety meetings with department

and yard supervisors and superintendents.

The claimants contend that their responsibilities resulted in injured employees' being returned to the work force as soon as possible, and thus that their work was integral to the shipbuilding process. The Board noted pertinent case law. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988), *rev'g* 20 BRBS 104 (1987)(*Held*, labor relations assistant was covered under § 2(3)); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT)(1989)(Held, it has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity...will be deemed maritime only if it is an integral or essential part of loading or unloading [or building or repairing] a vessel." Coverage "is not limited to employees who are denominated 'longshore' or who physically handle the cargo."); *American Stevedoring, Ltd.*

*v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), *aff'g* 34 BRBS 112 (2000)(Union shop steward covered.). [However, subsequently the Eleventh Circuit observed that the "significant relationship" test for coverage used in Sanders was rejected by the Supreme Court in *Schwalb*.]

The Board found that the claimants' attempt to establish that they interacted with employees and supervisors to the extent the claimants did in *Sanders* and *Marinelli* was not borne out by the portion of their depositions attached to the employer's motions for summary decision. Based on the evidence, the Board found that the ALJs had rationally concluded that they could not infer that the claimants' failure to perform their jobs would eventually lead to work stoppages or otherwise interrupt the shipbuilding and repair activities at the employer's shipyard.

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**Topic 1.7.1 Status–"Maritime Worker"**

*Dickerson v. Mississippi Phosphates Corp*., ___ BRBS ___ (BRB No. 02-0547) (April 29, 2003).

In this case involving situs and status, the claimant fell off of a ladder while welding in employer's phosphoric acid plant located about 100 feet from the water's edge. Employer's chemical plant manufactures fertilizer and is on a navigable waterway. The plant takes in phosphoric rock by vessel, converts it into sulfuric acid and then phosphoric acid, and the phosphoric acid is made into a fertilizer. The fertilizer leaves the plant by rail, truck or barge. The claimant described his job as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. His supervisor stated that the claimant's work required him to perform a lot of steel fabrication work, some expansion work in the plant, some pipefitting, and foundation work for machinery. The claimant conceded that he never loaded or unloaded vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. For two weeks during his employment, the claimant did remove wood pilings from the water's edge.

The Board affirmed the ALJ's finding that the piling removal work was not covered employment as there was no evidence establishing that the removing of the pilings from the water's edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a

harbor facility used for such activity. Moreover, the Board found that this case was distinguishable from other cases involving "covered" employees working in loading operations at fertilizer plants, as the claimant's work herein was not integral to the loading and unloading. Thus, the Board upheld the ALJ's determination that the claimant was not an employee covered under the LHWCA.

Turning to situs, the Board determined that the ALJ had correctly found that there was not a covered situs. The Board noted that for coverage, one must look to the nature of the place of work at the moment of injury and that to be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. The Board noted that an "adjoining area" must therefore have a maritime use. It upheld the ALJ's determination that this

phosphoric acid plant was solely used in the fertilizer manufacturing process and had no relation to any customary maritime activity. The Board further rejected the claimant's contention that his injury occurred on a covered situs merely because employer's entire facility abuts navigable waters and has a dock area on the property.

The Board noted prior case law distinguishing a plant from its docks when a worker worked solely in the plant.

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**Topic 1.11.7 Jurisdiction–Exclusions to Coverage: Clerical/secretarial/security/data processing employees**

*Boone v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___ (BRB Nos. 02-0414 and 02-0414A) (March 5, 2003).

In this coverage case, the employer alleges that the ALJ used an overly narrow definition of the term "office" to determine that the claimant was not excluded from coverage pursuant to Section 2(3)(A) of the LHWCA. The Board noted that in Williams v. Newport News Shipbuilding & Dry Dock co., 47 F.3d 1166, 29 BRBS 75(CRT)(4th Cir. 1995)(table), vacating 28 BRBS 42 (1994), the Fourth Circuit held that the ALJ failed to consider "the ultimate questions whether Petitioner's duties were exclusively clerical and performed exclusively in a business office." In its previous decision on reconsideration in the present case, the Board agreed with the Director's position that the legislative history regarding Section 2(3)(A) indicated that the term "office" modified the term "clerical," and that only clerical work performed exclusively in a business office was intended to be excluded. On remand, the ALJ had found that while the term "business office" was not defined by statute or pertinent case law, it was generally understood to be an enclosed or semi-enclosed area which was likely to be characterized by the presence of desks, chairs, telephones, computer terminals, copy machines, and perhaps book shelves. The ALJ found that this contrasted with a warehouse, which is a large open area where supplies are received, stored and dispensed. In the instant case, the Board found that these determinations by the ALJ were rational.

The ALJ next found that the claimant's main work area in the instant case was in a warehouse and that computer work, telephoning, copying and other traditional business office functions would not have been performed in that area. Thus, the ALJ concluded that the claimant did not work exclusively in a business office. The ALJ based this finding on the photographs submitted by employer, claimant's affidavit, and claimant's testimony at the hearing, all of which he found were uncontradicted. The employer contended that the claimant's work area should be characterized as a "rolling business office." However, the Board further noted that the legislative history of Section 2(3)(a) reveals the intent to exclude employees who are "confined physically and by function to the administrative areas of the employer's operations." See 1984 U.S.C.C.A.N. 2734, 2737. The Board noted that the ALJ considered the function of the claimant's work area and concluded that it was a warehouse floor and not a "business office," and found that this finding was rational and supported by substantial evidence.

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**Topic 1.11.8 Exclusions—Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet**

*Boomtown Belle Casino v. Bazor*, 313 F.3d 300(5th Cir. 2002).

In denying status to the claimant, the Fifth Circuit held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The Fifth Circuit further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

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**TOPIC 2**

**Topic 2.2.13 Occupational Diseases: General Concepts**

**[ED. NOTE:** The following is included for informational value only.**]**

*Stavenjord v. Montana State Fund, Mont.*, ___ Mont. ___(Mont. S. Ct. No. 01-630)(April 1, 2003).

Citing equal protection arguments, the Montana Supreme Court ruled that it is unconstitutional for workers' compensation rules to treat occupational diseases differently from other job related injuries.

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**Topic 2.2.13 Occupational Disease: General Concepts**

*Norfolk & Western Railway Co. v. Ayers*, ___ U.S.___ (March 10, 2003)(No. 01-963).

The Court held that former employees can recover damages for mental anguish caused by the "genuine and serious" fear of developing cancer where they had already been diagnosed with asbestosis caused by work-related exposure to asbestos. This adheres to the line of cases previously set in motion by the Court. *See Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997)(When the fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear.) The Court noted that the railroad's expert acknowledged that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the claimants' expert that some ten percent of asbestosis suffers have died of mesothelioma. Thus, the Court found that claimants such as these would have good cause for

increased apprehension about their vulnerability. The Court further noted that the claimants must still prove that their asserted cancer fears are genuine and serious.

**[ED. NOTE:** Mesothelioma is not necessarily preceded by asbestosis.**]**

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**Topic 2.2.4 Injury–Physical Harm as an Injury**

*Jones v. CSX Transportation*, 287 F.3d 1341 (11th Cir. 2002).

**[ED. NOTE:** This case is included for informational purposes only.**]**

This is a claim under the Federal Employers' Liability Act (FELA) for emotional distress damages based on the fear of contracting cancer. The district court dismissed that claim because the plaintiffs made no showing of any objective manifestations of their emotional distress. In upholding that dismissal, the circuit court found that by requiring an objective manifestation it could avoid "unpredictable and nearly infinite liability." It noted that several other circuits also require objective manifestations, and that this includes some that have dealt with Jones Act claims. The plaintiffs had based their claims for emotional distress on Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (Held, a worker exposed to asbestos could not recover for negligently inflicted emotional distress based on his fear of contracting cancer until he exhibited symptoms of a disease.) The plaintiffs in Jones argued that they had exhibited symptoms of an asbestos-related disease, i.e. asbestosis. However, because the sole ground of CSX's motion was the plaintiffs' failure to show objective manifestations of their emotional distress, and because the district court granted partial summary judgment on this basis alone, the circuit court did not address the question of whether Buckley permits recovery for the plaintiffs' fear of contracting cancer when they have exhibited symptoms of an asbestos-related disease but not of cancer specifically.

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**Topic 2.2.4 Definitions–Physical Harm as an Injury**

**[ED. NOTE:** The following FECA case is included for informational value only.**]**

*Moe v. United States of America*, ___ F.3d ___ (No. 02-35198) (Ninth Circuit April 18, 2003).

Here the Ninth circuit held that psychological injury accompanied by physical injury, regardless of the order in which they occur, is within the scope of the Federal Employee's compensation Act (FECA). In the instant case, the federal employee suffered from Post=Traumatic Stress Disorder (PTSD) after someone went on a shooting rampage at a medical facility. The employee's PTSD aggravated her preexisting ulcerative colitis, requiring the removal of her colon. The Ninth Circuit saw no reason for the chronological order of physical and psychological injuries to impact FECA's scope.

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**Topic 2.2.7 Natural Progression**

Delaware River Stevedores, Inc. v. Director, OWCP, 279 F.3d 233 (3rd Cir. 2002).

At issue here was whether the claimant's condition was a natural progression of an original injury or the result of an aggravation or acceleration. In addressing the issue, the court agreed with the Board's assessment that "[i]f the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act" and that "where claimant's work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for the resulting temporary total disability." The court then cited approvingly the last responsible employer rule as applied by *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986) ("If on the other hand, the [subsequent] injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the [subsequent] injury is the compensable injury, and [the subsequent employer] is...responsible..."). Lastly, the court agreed with the Board that "[t]he fact that the earlier injury was the precipitant event' is not determinative." The determinative question is whether the claimant's subsequent work aggravated or exacerbated the claimant's condition first manifested earlier.

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**Topic 2.2.10 Employee's Intentional Conduct/Willful Act of 3rd Person**

**[ED. NOTE:** The following Michigan case is included for informational value only.**]**

*Daniel v. Department of Corr.*, Mich.(No. 120460)(Mich. Supreme Court)(March 26, 2003).

The Michigan Supreme Court ruled that a worker disciplined for sexual harassment is not eligible for depression-related compensation benefits since the injury was caused by intentional and willful action. The court distinguished intentional and willful misconduct of a quasi-criminal nature from that of gross negligence where a worker can recover despite his responsibility for an injury. Here a probation officer had propositioned several female attorneys and later alleged that he had felt "harassed." by his accusers as well as by his supervisor who had suspended him.

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**Topic 2.13 Wages**

*Custom Ship Interiors v. Roberts*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 1255 (2003).

Regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were includable as "wages" under the LHWCA.

The claimant was injured while remodeling a Carnival Cruise Line Ship for Custom Ship Interiors. Custom Ship's employment contract entitled the claimant to per diem payments without any restrictions. Carnival provided free room and board to its remodelers and Custom Ship knew this. Custom Ship argued that the per diem was a non-taxable advantage.

The court noted Custom Ship's argument that payments must be subject to withholding to be viewed as wages, but did not accept it: "However Custom Ship misconstrues the Act's definition of a ‘‘wage.' Whether or not a payment is subject to withholding is not the exclusive test of a ‘‘wage." Monetary compensation paid pursuant to an employment contract is most often subject to tax withholding, but the LHWCA does not make tax withholding an absolute prerequisite of wage treatment.

The court explained that because the payments were included as wages under the first clause of §§ 2(13), Custom Ship's invocation of the second clause of §§ 2(13) is unavailing. "This second clause enlarges the definition of ‘‘wages' to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the case payments in this case fall." Finally, the two member plurality summed up, "The so-called per diem in this case was nothing more than a disguised wage."

The Dissent noted that the definition of "wages" found at Section 2(13) requires that a wage be compensation for "service," not a reimbursement for expenses. *See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 (4th Cir. 1998).

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**Topic 2.14 "Child"**

*Duck v. Fluid Crane & Construction*, ___ BRBS ___ (BRB No. 02-0335)(Oct. 22, 2002).

Here the Board upheld the ALJ's finding that Sections 2(14) and 9 of the LHWCA provide that a legitimate or adopted child is eligible for benefits without requiring proof of dependency but that an illegitimate child is eligible for death benefits only if she is acknowledged and dependent on the decedent.

The Board first noted that it has held that it possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction. *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984).

The Board found that the instant case was akin to *Mathews v. Lucas*, 427 U.S. 495 (1976).

In *Lucas*, the Supreme court sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. Although the Social Security Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court held that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Lucas*, 427 U.S. at 513. The presumption of dependency, observed the Court, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the Court relied predominantly on the Congressional purpose in adopting the statutory presumptions of dependency, i.e., to serve administrative convenience.

Applying the court's holding in *Lucas*, Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but rather is "carefully tuned to alternative considerations" by withholding a presumption of dependency to illegitimate children "only in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 U.S. at 513. The Board found that the LHWCA's distinction between legitimate and illegitimate children is reasonable, for as the Court stated in *Lucas*, "[i]t is clearly rational to presume [that] the overwhelming number of legitimate children are actually dependent upon their parents for support, " *Lucas*, 427 U.S. at 513, while, in contrast, illegitimate children are not generally expected to be actually dependent on their fathers for support.

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**Topic 2.2.16 Definitions–Occupational Diseases and the Responsible Employer/Carrier**

*Stevedoring Services of America v. Director*, OWCP, 297 F.3d 797 (9th Cir. 2002).

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate *reliable* audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The Ninth Circuit, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The Ninth Circuit explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the ‘‘last employer doctrine' is a rule of convenience and involves a certain amount of arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public

policy principles. n hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted--something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury--the first employer can simply point to the later audiogram as ‘‘determinative' and hand off the burden of primary liability."

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**Topic 2.2.16 Occupational Diseases and the Responsible Employer/Carrier**

*New Orleans Stevedores v. Ibos*, 317 F.3d 480 (5th Cir. 2003).

In this matter, where the worker had mesothelioma, the Fifth Circuit followed the Second Circuit's rule annunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure. Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the Fifth Circuit found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The Fifth Circuit has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (5th Cir. 1992).

The Fifth Circuit also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

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**Topic 2.5 "Carrier"**

*Weber v. S.C. Loveland Co. (Weber III)*, 35 BRBS 190 (2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92 (CRT) (5th Cir. 2001) (Contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

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**Topic 2.13 Wages**

*Custom Ship Interiors v. Roberts*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 1255 (2003)..

Regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were includable as "wages" under the LHWCA.

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The court noted Custom Ship's argument that payments must be subject to withholding to be viewed as wages, but did not accept it: "However Custom Ship misconstrues the Act's definition of a ‘‘wage.' Whether or not a payment is subject to withholding is not the exclusive test of a ‘‘wage."

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The court explained that because the payments were included as wages under the first clause of §§ 2(13), Custom Ship's invocation of the second clause of §§ 2(13) is unavailing. "This second clause enlarges the definition of ‘‘wages' to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the case payments in this case fall." Finally, the two member plurality summed up, "The so-called per diem in this case was nothing more than a disguised wage."

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The Board found that the instant case was akin to *Mathews v. Lucas*, 427 U.S. 495 (1976). In *Lucas*, the Supreme court sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. Although the Social Security Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court held that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Lucas*, 427 U.S. at 513. The presumption of dependency, observed the Court, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the Court relied predominantly on the Congressional purpose in adopting the statutory presumptions of

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**Topic 2.21 "Vessel"**

**[ED. NOTE:** The following federal district court cases are included for informational purposes only.**]**

*Ayers v. C&D General Contractors*, 2002 WL 31761235, 237 F.Supp. 2d 764 (W.D. Ky. Dec. 6, 2002)

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "water craft exclusion" excluded this claim since the worker had been working underneath a barge. The court concluded that the claim should not be excluded since the barge was not used for transportation but merely aided the work under the dock.

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**TOPIC 3**

**Topic 3.2.2 Other Exclusions–Willful Intention**

**[ED. NOTE:** The following Michigan case is included for informational value only.**]**

*Daniel v. Department of Corr.*, Mich.(No. 120460)(Mich. Supreme Court)(March 26, 2003).

The Michigan Supreme Court ruled that a worker disciplined for sexual harassment is not eligible for depression-related compensation benefits since the injury was caused by intentional and willful action. The court distinguished intentional and willful misconduct of a quasi-criminal nature from that of gross negligence where a worker can recover despite his responsibility for an injury. Here a probation officer had propositioned several female attorneys and later alleged that he had felt "harassed." by his accusers as well as by his supervisor who had suspended him.

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**Topic 3.4.1 LHWCA, Jones Act, and State Compensation**

**[ED. NOTE:** The following Social Security Disability offset case is included for informational value.**]**

*Sanfilippo v. Jo Anne B. Barnhart, Commissioner of Social Security*, ___ F.3d ___ (No. 02-2170)(3rd Cir. April 10, 2003).

At issue here is how a lump sum workers' compensation settlement will offset the worker's social security disability payments. Here the claimant's Social Security disability insurance benefit was reduced by his workers' compensation benefit. Subsequently the worker settled his workers' compensation claim for a lump sum. The Social Security Administration chose to offset this lump sum by continuing to make the same monthly setoffs until the lump sum amount is reached (a period of 4.3 years). The worker argued that the setoff of the lump sum award should have been prorated over his life expectancy (1,487 weeks). The Third Circuit noted that when an individual's workers' compensation benefits are paid in a lump sum, the Social Security Act requires the Commissioner to prorate the lump sum payment and "approximate as nearly as practicable" the rate at which the award would have been paid on a monthly basis. "In sum, we find nothing irrational about applying a periodic rate received prior to a lump-sum settlement to determine the offset rate that will approximate as nearly as practicable the hypothetical, future period rate of the lump-sum settlement."

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**TOPIC 4**

**TOPIC 5**

**Topic 5 Generally**

*In Re: Kirby Inland Marine*, 2002 WL 31746725, 237 F.Supp. 2d 753 (S.D. Tex. Dec. 2, 2002).

This matter involves a third party action commenced after a longshoreman was injured when he fell from the deck of a vessel onto the hopper. After the longshoreman filed his 905(b) Action in state court, the vessel owner filed under the Limitation of Vessel Owners Liability Act, 46 U.S.C. 181 et seq. to stay the state court action pending the Limitation proceeding. The longshoreman stipulated that the federal court had exclusive jurisdiction over the limitation action and that he would not try to enforce a 905(b) judgment in excess of the declared value of the vessel until the Limitation action had been determined. However, since the 905(b) Action included claims by other corporate entities for indemnification and contribution, the federal district court would not lift the stay since there was no assurance by these "other plaintiffs" that they would not seek enforcement prior to the determination of the Limitation action.

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**Topic 5.1 Exclusiveness of Remedy and Third Party Liability**

*Riley v. F A Richard & Associates Inc; Ingalls Shipbuilding; and Hyland*, (Unreported) (No. 01-60337) (August 1, 2002) (5th Cir. 2002).

At issue here was whether a claim filed against an employer, a self-insured administrator, and an individual of that administrator, was properly removed from state court to federal court and then ultimately dismissed by the federal district court. The longshore claimant (Riley) asserted that Hyland, a nurse employee/agent of F A Richard, posed as Riley's medical case manager and that Hyland, while purporting to assist Riley in obtaining appropriate medical care, engaged in ex parte communications with Riley's doctor. According to Riley, these communications caused the doctor to reverse his opinion regarding the nature and causation of Riley's back condition. After contact with Hyland, the doctor concluded that a natural progression of Riley's congenital spondylolisthesis caused Riley's back pain rather than the work-related accident. In a suit filed in Mississippi state court, Riley alleged that Ingalls and FA Richard established a close working relationship with the Orthopaedic Group, where numerous injured Ingalls employees are sent for treatment.

According to Riley, this close relationship allowed Ingalls and F A Richard to exert inappropriate influence over the Orthopaedic Group's physicians so as to interfere with the medical treatment of injured Ingalls employees. Specifically, Riley asserted the following nine state law claims: (1) intentional interference with contract, (2) breach of fiduciary duty, (3) intentional interference with prospective advantage, (4) medical malpractice by Hyland, as nurse, (5) fraud and misrepresentation, (6) negligence, (7) intentional infliction of emotional distress, (8) intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege, and (9) intentional interference with medical care by ex parte communication.

The Fifth Circuit found that Riley did not fraudulently join Ingalls in order to avoid federal diversity and found that Riley's claim against Ingalls was not for wages, compensation benefits or bad faith refusal to pay benefits; but rather was "for damages that are completely independent of the

employer/employee relationship."

The court concluded that the federal district court lacked both federal question jurisdiction and diversity jurisdiction over this matter. The court noted that the LHWCA is nothing more than a ‘‘statutory defense' to a state-court cause of action and that the LHWCA does not create federal subject matter jurisdiction supporting removal.

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**Topic 5.2 Third Party Liability**

*Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002)[PDF].

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

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**Topic 5.2.1. Exclusiveness of Remedy in Third Party Liability Generally**

*Christensen v. Georgia-Pacific Corp*, 279 F.3d 807 (9th Cir. 2002).

**[ED. NOTE:** While the forum for "905(b) negligence claims is federal district court, the Ninth Circuit's general language as to "coverage" under the LHWCA is noteworthy here.**]**

At issue in this "905(b)" claim [33 U.S.C. 905(b)] was whether the district court had properly granted a motion for summary judgment when it held that, as a matter of law, the injury was not a foreseeable result of the appellee's acts. The Ninth Circuit reversed, finding that genuine issues of material fact existed as to breach of duty and proximate cause that must be resolved at trial.

Under Section 905(b), a claimant can sue a vessel for negligence under the LHWCA. However the Supreme Court has limited the duties that a vessel owner owes to the stevedores working for him or her. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, (1981) (A vessel owes three duties to its stevedores: the turnover duty, the active control duty, and the intervention duty.).

In *Christensen*, the Ninth Circuit noted that "Coverage does not depend upon the task which the employee was performing at the moment of injury." [Ninth Circuit cites *Brady-Hamilton*

*Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978); H. Rep. No. 98-570, at 3-4 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2736-37.] The court found that claimant "was engaged as a stevedore and routinely worked at loading and unloading cargo from ships. Therefore, he is covered by the LHWCA."

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**Topic 5.2.1 Third Party Liability--Generally**

*Mayberry v. Daybrook Fisheries, Inc.*, Unpublished) (2002 WL 1798771) (E.D. La. Aug 5, 2002).

A "905(b) action" is not available where it was dock-side, land-based equipment that caused an injury. For there to be a 905(b) action against the vessel owner, there must be vessel negligence. Therefore, the vessel owner is not liable for breaching the "turnover duty" (failing to warn a stevedore when turning over the ship hidden defects of which the owner should know) since the faulty equipment was not part of the vessel.

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**Topic 5.2.1 Third Party Liability—Generally**

*In the Matter of The Complaint of Kirby Inland Marine*, 241 F. Supp. 2d 721 (S.D. Texas Jan. 15, 2003), 2003 WL 168673.

This proceeding under the Limitation of Vessel Owners Liability Act was filed in connection with a 905(b) action. The district court held that where a seaman performing longshore duties could have avoided an accident by watching his step more carefully, the vessel owner was not liable for injuries sustained when the seaman fell from the main deck into a hopper.

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**Topic 5.2.2 Indemnification**

*Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002)

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

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**Topic 5.3 Indemnification in OCSLA Claims**

*Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002)

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

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**TOPIC 6**

**TOPIC 7**

**Topic 7.1 Medical Treatment Never Time Barred**

*Alexander v. Avondale Industries, Inc.*, ___ BRBS ___ (BRB No. 02-0292) (Dec. 23, 2002).

At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the Employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

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**Topic 7.1 Medical Treatment Never Time Barred**

*Loew's L'Enfant Plaza v. Director (Baudendistel)*, (Unpublished) 2003 WL 471917 (D.C. Cir).

Circuit Court upheld Board and ALJ's rulings that where an employer gives a blanket authorization to a claimant to seek proper medical treatment for "any problems" resulting from the 1977 incident, the claimant was entitled to medical compensation for his later discovered ailments.

Here the employer gave the broad authorization in 1977 for an electrical shock. In 1988 the claimant suffered from venous stasis ulcerations and sought medical treatment.

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**Topic 7.3.1 Medical Treatment-Necessary Treatment**

*Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

The requirements of Section 8 of the LHWCA do not apply to a claim for medical benefits under Section 7 of the LHWCA. The Board held that a claimant need not have a minimum level of hearing loss (i.e., a ratable loss pursuant to the AMA Guides) to be entitled to medical benefits.

The Board also reject the employer's assertion that this case was controlled by *Metro-North commuter Railroad v. Buckley*, 521 U.S. 424 (1997). *Buckley* involved a railroad employee who had been exposed to asbestos and sought to recover under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (FELA), medical monitoring costs he may incur as a result of his exposure. Because *Buckley* had not been diagnosed with any asbestos-related disease and was not experiencing any symptoms, the Supreme Court held that he was not entitled to medical monitoring. Besides coming under another act, the Board specifically noted that in the instant longshore case, the ALJ specifically found that the claimant has trouble hearing and distinguishing sounds and, thus, has symptoms of hearing loss.

Next the Board addressed the ALJ's delegation to the district director the issue as to whether hearing aids were a necessity in this matter. While noting that there are several instances where the district director has authority over certain medical matters, the Board stated that it has "declined to interpret the provisions of Section 7(b) of the [LHWCA], or Section 702.407 of the regulations,..., in such a manner as to exclude the [ALJ] from the administrative process when questions of fact are raised." Thus, the Board found, "the issue of whether treatment is necessary and reasonable, where the parties disagree, is a question of fact for the [ALJ]."

The Board also stated that, "Contrary to employer's contention, the absence of a prescription for hearing aids from a medical doctor, as required by Virginia law, does not make claimant ineligible for hearing aids, or medical benefits, under the [LHWCA]. While claimant must comply with specific provisions under Virginia law before he is able to obtain hearing aids, claimant's compliance or non-compliance with state requirements does not affect the authority of the [ALJ] to adjudicate claimant's entitlement to medical benefits under the [LHWCA]."

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**Topic 7.3.1 Medical Treatment–Necessary Treatment**

**[ED. NOTE:** The following is for informational purposes only.**]**

*Stone Container Corp. v. Castle*, Iowa Supreme Court No. 02/01-1291 (February 26, 2003).

The state supreme court found that a lap top computer is a reasonable and necessary appliance that must be provided to a double amputee who must stay in a temperature-controlled environment. In so holding, the court rejected the employer's argument that a covered appliance had to be necessary for medical care. The court ruled that an appliance is covered when it "replaces a function lost by the employee as a result of the employee's work-related injury. The court reasoned that the lap top provided the employee with access to the outside world.

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**Topic 7.7 Unreasonable Refusal to Submit to Treatment**

*Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

This remand involved both a traumatic as well as psychological injury. Although finding the claimant to be entitled to total disability benefits, the ALJ ordered the benefits suspended pursuant to Section 7(d)(4), on the ground that the claimant unreasonably refused to submit to medical treatment, i.e., an examination which the ALJ ordered and the employer scheduled. The Board noted that Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that the claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to the claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant.

Here the Board supported the ALJ's finding that the claimant's refusal to undergo an evaluation was unreasonable and unjustified, citing the pro se claimant's erroneous belief that he has the right to determine the alleged independence and choice of any physician the employer chooses to conduct its examination or can refuse to undergo the examination because the employer did not present him with a list of doctors in a timely manner, and the claimant's abuse of the ALJ by yelling and insulting the integrity of other parties. (The Board described the telephone conference the ALJ had with the parties as "contentious.") The Board held that the ALJ did not abuse his discretion by finding that the claimant's refusal to undergo the employer's scheduled examination was unreasonable and unjustified given the circumstances of this case. However, the Board noted that compensation cannot be suspended retroactively and thus the ALJ was ordered to make a finding as to when the claimant refused to undergo the examination.

The Board further upheld the ALJ's denial of the claimant's request for reimbursement for expenses related to his treatment for pain management. The ALJ rejected the claimant's evidence in support of his request for reimbursement for pain management treatment pursuant to 29 C.F.R. §§ 18.6(d). That section provides that where a party fails to comply with an order of the ALJ, the ALJ, "for the purpose of permitting resolution of the relevant issues may take such action thereto as is just," including,

> (iii) Rule that the non-complying party may not introduce into evidence...documents or other evidence...in support of... any claim....
>
> (v) Rule...that a decision of the proceeding be rendered against the non-complying party.

In a footnote, the Board noted that medical benefits cannot be denied under Section 7(d)(4) for any other reason than to undergo an examination. However, the Board went on to note, "The Act also provides for imposition of sanctions for failure to comply with an order. Under Section 27(b), the [ALJ] may certify the facts to a district court if a person resists any lawful order. 33 U.S.C. §§ 927(b). As these provisions are not inconsistent with the regulation at 29 C.F.R. §§18.6(d)(2), the [ALJ] did not err in applying it in this case."

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**TOPIC 8.1**

**TOPIC 8.2**

**Topic 8.2.3.1 Total disability while working–Beneficent employer/ sheltered employment and extraordinary effort**

**[ED. NOTE:** Although the following ADA decision is not a LHWCA case, it is nevertheless noteworthy for LHWCA purposes. In this case the Court sets a new rebutable presumption standard that an accommodation requested by a disabled employee under the ADA is unreasonable if it conflicts with seniority rules for job assignments. This was a 5-4 decision by J. Breyer, with two concurrences (J. Stevens and J. O'Connor) and two dissents (J. Scalia with J. Thomas joining, and J. Souter with J. Ginsburg joining).**]**

*U.S. Airways, Inc., v. Barnett*, ___ U.S. ___ (No. 001250); 122 S.Ct. 1516 (April 29, 2002).

Held, an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an accommodation is not reasonable. However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case. The Court took a middle ground here rejecting both the positions of the airline and its employee. The airline had argued that a proposed accommodation that conflicts with an employer-established seniority system should be automatically unreasonable. The employee had argued that the employer should have the burden to show the accommodation's conflict with seniority rules constitutes an undue hardship.

Justice Breyer noted that various courts have properly reconciled "reasonable accommodation" and "undue hardship" in a practical way that does not create a dilemma for employees. The justice explained that those courts have held that an employee "need only show that an accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases," while the employer "then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." He went on to state that the "the seniority system will prevail in the run of cases" because "the typical seniority system provides important employee benefits by creating, and fulfilling employee expectations of fair, uniform treatment."

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**Topic 8.2.3.1 Extent of Disability--Total disability while working–Beneficent employer/sheltered employment and extraordinary effort**

*Chevron U.S.A, Inc. v. Echazabal*, 536 U.S. 73; 122 S.Ct. 2045 (2002).

**[ED. NOTE:** While this ADA disability case is not a longshore case, it is included in the materials for general information.**]**

In a 9-0 ruling, the Court held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the Supreme Court stated that on remand the Ninth Circuit could consider whether the employer engaged in the type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

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**Topic 8.2.3.1 Extent of Disability--Total disability while working--Extraordinary Effort**

*Newport News Shipbuilding & Dry Dock Co. v. Vinson*, (Unpublished) (4th Cir. No. 00-1204) (June 20, 2002).

Here the employer challenged the ALJ's finding that the claimant was entitled to disability benefits for the period during which he returned to his employment as a welder despite his injury. In upholding the ALJ and the Board, the Fourth Circuit noted that the claimant's return to work after his injury did not preclude a disability award as a matter of law. The statutory standard for disability "turns on the claimant's capacity for work, not actual employment. Thus, when a claimant, as here, continues employment after an injury only through "extraordinary effort to keep working" and despite the attendant "excruciating pain" and substantial risk of further injury, he may nevertheless qualify for a disability award. The court noted that a disability award under the LHWCA is predicated on an employee's diminished capacity for work due to injury rather than actual wage-loss.

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**Topic 8.2.3.1 Extent of Disability--Total disability while working-Beneficent employer/sheltered employment and extraordinary effort**

*Ward v. Holt Cargo Systems*, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

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**Topic 8.2.3.2 Disability While Undergoing Vocational Rehabilitation**

*Newport News Shipbuilding & Dry Dock v. Director, OWCP, (Brickhouse)*, 315 F.3d 286 (4th Cir. 2002).

Here the Fourth Circuit adopted the Fifth Circuit's rationale in *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122 (5th Cir. 1994), that suitable alternate employment is reasonably unavailable due to the claimant's participation in an approved rehabilitation program even though the employer's offer of alternate employment would have resulted in an immediate increase in wage earning capacity. In the instant case, after OWCP approved a vocational rehab program for the claimant, and placed a two year completion timetable on it, Newport News sought to hire the claimant in a newly created desk position. At the time of the offer, the claimant lacked completing the program by two classes and it was doubtful as to whether he could enroll in night school to timely complete the program. Additionally, the job offer from Newport News came with the condition that the claimant could be "terminated with or without notice, at any time at the option of the Company or yourself."

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**Topic 8.2.4.3 Suitable alternate employment: location of jobs**

*Patterson v. Omniplex world Services*, ___ BRBS ____ (BRB No. 02-0332) (Jan. 21, 2003).

This Defense Base Act case has issues concerning the admission of evidence and the scope of the relevant labor market for suitable employment purposes. Here, the claimant from Missouri was injured while employed as a security guard in Moscow as an embassy construction site. He had previously worked for this same employer for approximately six years before this injury in various locations.

After the close of the record in this matter, the employer requested that the record be reopened for the submission of "new and material" evidence which became available only after the close of the record. Specifically, the employer asserted that in a state court filing dated subsequent to the LHWCA record closing, the claimant stated that he had previously been offered and had accepted a security guard job in Tanzania.

The claimant argued that this evidence should not be admitted as it was outside the relevent Trenton, Missouria, labor market. The ALJ issued an Order Denying Motion to Reopen Record, stating that his decision would be based upon the existing record "due to the fact that the record was complete as of the date of the hearing together with the permitted post-hearing submissions, the complexity of the matters being raised post-hearing, the delays that would be encountered if further evidence is admitted, and the provisions of Section 22 of the Act which provide for modification of the award, if any."

In overturning the ALJ on this issue, the Board found the evidence to be relevant and material, and not readily available prior to the closing of the record. The evidence was found to be "properly admissible under Section 18.54(c) of the general rules of practice for the Office of Administrative Law Judges, as well as under the specific regulations applicable to proceedings under the Act. 20 C.F.R. 702.338, 702.339. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

The Board further noted that Sections 18.54(a) of the Rules of Practice and 20 C.F.R. 702.338 explicitly permit an ALJ to reopen the record, at any time prior to the filing of the compensation order in order to receive newly discovered relevant and material evidence.

While the Board affirmed the ALJ's conclusion that Missouri is the claimant's permanent residence, and thus his local labor market in the case, the Board opined that the ALJ should have considered the significance of the claimant's overseas employment in evaluating the relevant labor market. The Board concluded that, given the claimant's employment history, the labor market cannot be limited solely to the Trenton, Missouri, area. Additionally, the Board noted that, in fact, the claimant has continued to perform post-injury security guard work in the worldwide market.

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**Topic 8.2.4 Extent of Disability--Partial Disability/Suitable Alternate Employment**

*Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73; 122 S.Ct. 2045 (2002).

**[ED. NOTE:** While this ADA disability case is not a longshore case, it is included in the materials for general information.**]**

In a 9-0 ruling, the Court held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the Supreme Court stated that on remand the Ninth Circuit could consider whether the employer engaged in the type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

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**Topic 8.2.4 Extent of Disability--Partial disability/Suitable Alternate Employment**
*Ward v. Holt Cargo Systems*, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

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**TOPIC 8.3**

**TOPIC 8.4**

**Topic 8.4.4 Multiple Scheduled Injuries/Successive Injuries**
*Matson Terminals, Inc. v. Berg*, 279 F.3d 694 (9th Cir. 2002).

When both of a claimant's knees are injured in one accident, Section 8(c)(22) indicates that there should be two liability periods. Since the claimant's two knees were discrete injuries under Section 8(f), the Ninth Circuit found that the Board and ALJ were correct in imposing two 104-week liability periods on the employer. "It is irrelevant that the injuries arose from the same working conditions or that they arose from a single cause or trauma. What is relevant is that the working conditions caused two injuries, each separately compensable under Section 8(f)."

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**TOPIC 8.5**

**TOPIC 8.6**

**TOPIC 8.7**

**Topic 8.7.1 Applicability and Purpose of Section 8(f)**
*Weber v. S.C. Loveland Co. (Weber III)*, 35 BRBS 190 (2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92 (CRT) (5th Cir. 2001) (Contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

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**Topic 8.7.6 Special Fund Relief–In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone**

*Newport News Shipbuilding & Dry Dock Co. v. Ward*, ___ F.3d ___ (No. 00-1978) (4th cir. April 14, 2003).

*Newport News Shipbuilding & Dry Dock Co. v. Winn*, ___ F.3d ___ (No. 00-1815) (4th Cir. April 14, 2003).

*Newport News Shipbuilding & Dry Dock Co. v. Pounders*, ___ F.3d ___ (No. 00-1321) (4th Cir. April 14, 2003).

*Newport News Shipbuilding & Dry Dock Co. v. Cherry*, ___ F.3d ___ (No. 00-1279) (4th Cir. April 14, 2003).

In these Section 8(f) claims, the employer failed to satisfy the contribution element and, therefore, the employer was not entitled to Section 8(f) relief.

In *Ward*, the Fourth Circuit defined the "contribution element" of Section 8(f) criteria as follows:

> "...Third, [the employer must affirmatively establish] that the ultimate permanent partial disability materially and substantially exceeded the disability that would have resulted from the work-related injury alone in the absence of the pre-existing condition."

The Fourth Circuit noted that an employer can satisfy the contribution element only if it can quantify the type and extent of disability the employee would have suffered absent the pre-existing disability. (In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury.) "The quantification aspect of the contribution element provides an ALJ with 'a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater' than the disability the employee would have suffered from the second injury alone. *Citing Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Harcum)* 8 F.3d 175 at 185-86 (4th Cir. 1993), aff'd on other grounds, 514 U.S. 122 (1995)..

The court noted, "Importantly, in assessing whether the contribution element has been met, an ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Citing Direcotr, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Carmines)* 138 F.3d 134 at 140 (4th Cir. 1998).

In Ward, the doctor's assertions were generalized and his overall conclusions lacked any supporting explanation. The court found that in particular, his statement that the claimant would have been able to "return to light duty Shipyard work" if he had suffered only one of his back injuries, "is conclusory and lacks evidentiary support." Simply noting that an earlier injury rates a minimum 5%

permanent disability rating under the AMA Guides, fails to assess the level of the claimant's disability that would have resulted from the later injury alone.

In *Winn*, the Fourth Circuit again found that merely subtracting the extent of disability from the extent of the current disability is "legally insufficient under *Carmines* to establish that a claimant's preexisting disability is materially and substantially greater than the disability due to the final injury alone. (The Fourth Circuit took a similar tact in *Cherry*.) Also, the Fourth Circuit noted that another medical opinion which merely states that if the claimant had not been a smoker, his disability would have been "much less" is also legally insufficient since this opinion does not attempt to quantify the level of impairment that would result from the work-related injury alone, as is required by *Harcum*.

In *Ponders*, the Fourth Circuit noted that the competing policy goals problem of Section 8(f) "is exacerbated by the fact that the adversarial system breaks down to a degree with regard to Section 8(f) claims." The court noted that, "The evidentiary hearing in such cases may involve only the employer and the claimant...It is only after the initial hearing is concluded that the Director,...--the person with the interest in protecting the integrity of the special fund–enters the picture. The record made at the original hearing may as a consequence be tilted in favor of Section 8(f) relief." In *Ponders*, the court acknowledged the difficulty which confronts a doctor called upon to make the assessment required by *Carmines* in a case involving successive lung diseases."The difficulty of making the assessment in isolated cases, however, does not compel us to adopt a different rule." n. 2.

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**Topic 8.7.9.1 Section 8(f)--Procedural Issues--Standing**

*Terrell v. Washington Metropolitan Area Transit Authority (WMATA)*, 36 BRBS 69 (2002).

The issue here is whether an employer who is granted Section 8(f) relief, is dismissed from a subsequent modification proceeding by the ALJ on the claimant's motion, and who did not participate in the appeal of the modification before the Board, is responsible for the claimant's attorney fee at the Board level. (The employer did not participate in the Director's appeal before the Board, and the claimant argued in response to the Director's appeal for the employer's continued exclusion from the case.) The Board found that such an employer is not liable for an attorney fee. Furthermore, the Board found that, "The fact that employer had an economic interest in the outcome (due to the increased assessment under Section 44... .), is not sufficient for employer to be held for claimant's attorney's fee for work performed before the Board under the facts of this case." Thus, the Board found that since the claimant's attorney obtained an award of permanent total disability, an attorney's fee for his counsel can be made a lien on the claimant's compensation.

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**TOPIC 8.8**

**TOPIC 8.9**

**Topic 8.9 Wage-Earning Capacity**
*Chevron U.S.A. Inc., v. Echazbal*, 536 U.S. 73; 122 S.Ct. 2045 (2002).

**[ED. NOTE:** While this ADA disability case is not a longshore case, it is included in the materials for general information.**]**

In a 9-0 ruling, the Court held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the Supreme Court stated that on remand the Ninth Circuit could consider whether the employer engaged in the type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

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**Topic 8.9 Wage-Earning Capacity**
*Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 (9th Cir. 2002) (2002).

Where a longshoreman's post-injury "wage-earning capacity" exceeds his pre-injury "average weekly wages," he is not entitled to benefits under the LHWCA. Specifically, the court held that an employee is not entitled to a loss of earnings capacity benefits where his actual post-injury earnings adjusted for inflation exceeded his pre-injury wages, absent evidence that the employee's actual post-injury earnings did not fairly represent employee's earnings capacity in his injured condition.

Here the employee contended that he had lost "wage-earning capacity," within the meaning of the LHWCA, to the extent that he could not earn what he would have been able to earn absent his injury, and that he should have been awarded benefits equal to two-thirds of that loss. His contention is that, but for, his industrial accident, he would be earning about $134,000 annually as a crane operator, about $25,000 more than his current annual earnings of about $109,000 as a marine clerk. This contention rests in part on the factual assumption that, absent his back injury, he would be able to obtain certification as a crane operator and to find sufficient work in that job to earn about $134,000. The court also noted that his contention additionally rests in part on a legal assumption that compensation under the LHWCA is based on the method of calculation employed for ordinary torts.

Assuming that claimant's factual contentions were correct, the court found his legal conclusions to be wrong:

> Benefits under the Act are not calculated in the same way as compensation under the tort system. The Act provides benefits based on "disability," which is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.... That is, disability is not defined, as it would be under the tort system, as the inability to earn hypothetical future wages that the worker could have earned if he had not been injured. Rather, disability is defined under the Act as the difference between the employee's pre-injury "average weekly wages" and his post-injury "wage-earning capacity."

The claimant additionally argued that the proviso of Section 8(h) instructs the ALJ to allow benefits equal to the difference between his actual earnings and the wage-earning capacity he would have had if he had not been injured. However, the Ninth Circuit found that this argument is based on a misreading of Section 8(h) and that the section, including its proviso, is designed only to specify the method by which to determine post-injury "wage-earning capacity" within the meaning of the LHWCA. Once "wage-earning capacity" is determined, §§ 908(c)(21) instructs the ALJ to compare "wage-earning capacity" with pre-injury "average weekly wages" to determine the level of benefits, according to the court.

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**Topic 8.9.1 Wage-earning Capacity Generally**

*Johnston v. Director, OWCP*, 280 F.3d. 1272 (9th Cir. 2002).

In this case interpreting Section 8(c)(21), the court considered whether, in a situation where actual wages have remained constant, a claimant's post-injury earnings must be adjusted for inflation in order to be considered on equal footing with wages at the time of injury. The Ninth Circuit held that the actual wages without adjustments for inflation "fairly and reasonably represent [the claimant's] wage-earning capacity" as required by Section 8(h). The court agreed with the Board that "the fact that the wages claimant earned in his post-injury job may not have kept pace with inflation is not due in any part to claimant's injury." Here the claimant had resumed the same job he had prior to the injury, albeit in a part-time capacity. As a result of a collective bargaining agreement, claimant's wage rate as a dock supervisor remained unchanged between the time of his injury and the period during which he worked part-time.

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**Topic 8.9.2 Wage-Earning Capacity--Factors for Calculation**

*Ward v. Holt Cargo Systems*, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent

partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

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**TOPIC 8.10**

**Topic 8.10.1 Settlements-Generally**

*Jeschke v. Jones Stevedoring Co.*, ___ BRBS ___ (BRB No. 01-0553) (March 21, 2002).

Here the claimant was prescribed bi-neural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a hearing-loss claim against two employers and entered into a Section 8(i) settlement with one who accepted responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA..

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**Topic 8.10.2 Settlements-Persons Authorized**

*O'Neil v. Bunge Corp.*, 36 BRBS 25 (2002).

For this matter geographically within the Ninth Circuit (but without pertinent Ninth Circuit case law), the Board relied on *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609, 34 BRBS 15 (CRT) (5th Cir. 2000), *aff'g* 32 BRBS 29 (1998). To hold that where a decedent dies without having signed a proposed settlement agreement, and the agreement had not been submitted for administrative approval prior to death, it is not an enforceable settlement agreement under Section 8(i).

Additionally, the Board noted that the ALJ had not erred in refusing to enforce the proposed agreement under common law contract principles since Section 8(i) provides the only basis for settlement of claims under the LHWCA and Sections 15(b) and 16 of the LHWCA prohibit the settlement of claims except in accordance with Section 8(i) and its implementing regulations.

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**Topic 8.10.3 Structure of Settlement; Withdrawal of Claim/Settlement Agreement**

*O'Neil v. Bunge Corp.*, 36 BRBS 25 (2002).

For this matter geographically within the Ninth Circuit (but without pertinent Ninth Circuit case law), the Board relied on *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609, 34 BRBS 15 (CRT) (5th Cir. 2000), *aff'g* 32 BRBS 29 (1998). To hold that where a decedent dies without having signed a proposed settlement agreement, and the agreement had not been submitted for administrative approval prior to death, it is not an enforceable settlement agreement under Section 8(i).

Additionally, the Board noted that the ALJ had not erred in refusing to enforce the proposed agreement under common law contract principles since Section 8(i) provides the only basis for settlement of claims under the LHWCA and Sections 15(b) and 16 of the LHWCA prohibit the settlement of claims except in accordance with Section 8(i) and its implementing regulations.

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**Topic 8.10.4 Settlements--Time Frame**

*Jenkins v. Puerto Rico Marine, Inc.*, 36 BRBS 1(2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the Eleventh Circuit and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. §§ 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

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**Topic 8.10.6 Settlements–Withdrawal of Claim/Settlement Agreement**

*Thomas v. Raytheon Range Systems*, (Unpublished) (BRB No. 01-0891) (August 13, 2002).

The claimant herein, without aide of counsel, now challenges a Section 8(i) settlement on the grounds that: (1) she signed the agreement because she would otherwise have to wait to have her claim adjudicated and (2) she did not know that by signing the agreement she would not get to testify about her post injury employment and termination. In upholding the settlement, the Board stated that waiting for a hearing is not duress and reflects no more than a choice faced by any claimant in deciding whether to proceed with, or settle, a pending case. "Moreover, the fact that claimant did not get to testify before the [ALJ] concerning her post-injury employment and termination does not establish grounds for negating or modifying the settlement."

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**Topic 8.10.6 Withdrawal of Claim/Settlement Agreement**

*Hansen v. Matson Terminals, Inc.*, ___ BRBS ___ (BRB No. 02-0606) (April 17, 2003).

This is the "Appeal of the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement." Prior to the submission of the settlement agreement to the claimant and his counsel, the employer received a "rumor" that the claimant was being considered for longshore employment. The employer subsequently contacted the claimant's counsel who, after consulting with the claimant, informed the employer that the claimant might return to longshore employment upon a release from his physician. ( The claimant did return to longshore employment on March 25, 2002 as a wharf gang member.) The settlement agreement was thereafter faxed to the claimant's counsel, was signed and returned to employer. The employer's Human Resources Department was unable to verify the claimant's employment status. Subsequently, the employer's two carriers executed the settlement agreement and forwarded it along with the appropriate attachments to the ALJ who issued an Order approving the executed settlement agreement on April 23, 2002..

Later the employer asserted that it became aware, on April 25, 2002, of the claimant's re-employment and on April 26, 2002, filed a "Motion to Disapprove Settlement Agreement and/or to Reconsider Approval of Settlement." The ALJ denied relief. On appeal, the employer challenged the ALJ's approval of the parties' executed settlement agreement, asserting that the settlement should be set aside as the claimant returned to longshore employment in violation of a term of the agreement.

However, as the Board pointed out, the parties' settlement agreement addresses only the remedy available to the employer should the claimant "return to work as a laborer in the longshore industry after the settlement is approved," and the remedy it provides is not rescission of the agreement but a credit to be applied to any future claim for benefits. The Board noted that "Contrary to employer's position on appeal, the presence of an express right of rescission in a settlement agreement is required in order for employer to protect its interest should a specific contingency arise....The settlement agreement in this case, however, does not specifically provide employer with a right of rescission should some specific event occur prior to approval by the [ALJ]." *Citing*

*Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987). The Board further stated, "Accordingly, as the executed settlement agreement sets forth no express right of rescission for employer and contains no express provision allowing employer to escape from its agreement to pay if claimant were to return to work, we reject employer's contention that the [ALJ] erred in not setting aside the agreement." However, the reader is cautioned that this last statement by the Board may be somewhat misleading. *Nordahl*, which the Board repeatedly cited as authority in this area of the law, specifically addressed an employer's ability to include a provision allowing its escape from an agreement during the *pre-approval period*, not post approval. The Board even notes this distinction in its footnote 6. There is no case law which holds that the parties can contract to
rescind a settlement agreement if an event occurs after the settlement has become effective.

Employer also argued that the claimant's return to work was a material breach of the agreement since he represented that he could not return to work as a laborer. However, the Board noted that the agreement provided additional reasons for settlement. Furthermore, the Board noted that the claimant returned to work as a member of a wharf gang, not as a laborer and the employer knew of the claimant's intention to return to work prior to its execution of the agreement. "Finally, employer's argument that claimant's return to work denied it the benefit of the bargain is misplaced since, as noted by the Fifth Circuit in *Nordahl*, settlements are essentially a gamble: claimants gamble, *inter alia*, that the injury will not be as debilitating as the carrier expects, while the carrier gambles, *inter alia*, that claimant will have less earning capacity on the open labor market than they expect or that claimant has applied an overly optimistic discount rate in evaluating his future rights."

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**Topic 8.10.6 Withdrawal of Claim/Settlement Agreement**

*Rogers v. Hawaii Stevedores, Inc.*, ___ BRBS ___ (BRB No. 02-0816) (April 10, 2003).

In an issue of first impression, the Board held that a claimant may withdraw from a settlement agreement prior to its approval. Citing *Oceanic Butler, Inc., v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), the Board noted that while the LHWCA and the regulations do not explicitly state that the claimant may rescind a settlement agreement prior to its approval, the reasoning of the Fifth Circuit in *Nordahl* that a claimant has such a right is compelling. "The holding that a claimant's agreement to waive his compensation is not binding upon him unless it is administratively approved, either through the settlement process or pursuant to a withdrawal under Section 702.225, is supported by the structure of the Act. Consistent with Sections 15(b) and 16, no agreement by a claimant to waive or compromise his right to compensation is valid until it is administratively approved pursuant to Section 8(i). Thus, claimant may withdraw his agreement at any time prior to approval of the agreement by the [ALJ]."

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**Topic 8.10.7 Settlements--Attorney Fees**

*Jenkins v. Puerto Rico Marine, Inc.*, 36 BRBS 1(2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the Eleventh Circuit and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. §§ 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

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**Topic 8.10.8.2 Settlements–Setting Aside Settlements**

*Thomas v. Raytheon Range Systems*, (Unpublished) (BRB No. 01-0891) (August 13, 2002).

The claimant herein, without aide of counsel, now challenges a Section 8(i) settlement on the grounds that: (1) she signed the agreement because she would otherwise have to wait to have her claim adjudicated and (2) she did not know that by signing the agreement she would not get to testify about her post injury employment and termination. In upholding the settlement, the Board stated that waiting for a hearing is not duress and reflects no more than a choice faced by any claimant in deciding whether to proceed with, or settle, a pending case. "Moreover, the fact that claimant did not get to testify before the [ALJ] concerning her post-injury employment and termination does not establish grounds for negating or modifying the settlement."

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**8.10.8.2 Setting Aside Settlements]**

*Hansen v. Matson Terminals, Inc.*, ___ BRBS ___ (BRB No. 02-0606) (April 17, 2003).

This is the "Appeal of the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement." Prior to the submission of the settlement agreement to the claimant and his counsel, the employer received a "rumor" that the claimant was being considered for longshore employment. The employer subsequently contacted the claimant's counsel who, after consulting with the claimant, informed the employer that the claimant might return to longshore employment upon a release from his physician. ( The claimant did return to longshore employment on March 25, 2002 as a wharf gang member.) The settlement agreement was thereafter faxed to the claimant's counsel, was signed and returned to employer. The employer's Human Resources Department was unable to verify the claimant's employment status. Subsequently, the employer's two carriers executed the settlement agreement and forwarded it along with the appropriate attachments to the ALJ who issued an Order approving the executed settlement agreement on April 23, 2002..

Later the employer asserted that it became aware, on April 25, 2002, of the claimant's re-employment and on April 26, 2002, filed a "Motion to Disapprove Settlement Agreement and/or to Reconsider Approval of Settlement." The ALJ denied relief. On appeal, the employer challenged the ALJ's approval of the parties' executed settlement agreement, asserting that the settlement should be
set aside as the claimant returned to longshore employment in violation of a term of the agreement.

However, as the Board pointed out, the parties' settlement agreement addresses only the remedy available to the employer should the claimant "return to work as a laborer in the longshore industry after the settlement is approved," and the remedy it provides is not rescission of the agreement but a credit to be applied to any future claim for benefits. The Board noted that "Contrary to employer's position on appeal, the presence of an express right of rescission in a settlement agreement is required in order for employer to protect its interest should a specific contingency arise....The settlement agreement in this case, however, does not specifically provide employer with a right of rescission should some specific event occur prior to approval by the [ALJ]." *Citing Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987). The Board further stated, "Accordingly, as the executed settlement agreement sets forth no express right of rescission for employer and contains no express provision allowing employer to escape from its agreement to pay if claimant were to return to work, we reject employer's contention that the [ALJ] erred in not setting aside the agreement." However, the reader is cautioned that this last statement by the Board may be somewhat misleading. *Nordahl*, which the Board repeatedly cited as authority in this area of the law, specifically addressed an employer's ability to include a provision allowing its escape from an agreement during the *pre-approval period*, not post approval. The Board even notes this distinction in its footnote 6. There is no case law which holds that the parties can contract to
rescind a settlement agreement if an event occurs after the settlement has become effective.

Employer also argued that the claimant's return to work was a material breach of the agreement since he represented that he could not return to work as a laborer. However, the Board noted that the agreement provided additional reasons for settlement. Furthermore, the Board noted

that the claimant returned to work as a member of a wharf gang, not as a laborer and the employer knew of the claimant's intention to return to work prior to its execution of the agreement. "Finally, employer's argument that claimant's return to work denied it the benefit of the bargain is misplaced since, as noted by the Fifth Circuit in *Nordahl*, settlements are essentially a gamble: claimants gamble, *inter alia*, that the injury will not be as debilitating as the carrier expects, while the carrier gambles, *inter alia*, that claimant will have less earning capacity on the open labor market than they expect or that claimant has applied an overly optimistic discount rate in evaluating his future rights."

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**TOPIC 8.11**

**TOPIC 8.12**

**TOPIC 8.13**

**Topic 8.13.1 Hearing Loss-Introduction and General Concepts**

*Jeschke v. Jones Stevedoring Co.*, ___ BRBS ___ (BRB No. 01-0553) (March 21, 2002).

Here the claimant was prescribed bi-neural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a hearing-loss claim against two employers and entered into a Section 8(i) settlement with one who accepted responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA..

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**Topic 8.13.1 Hearing Loss-Introduction and General Concepts**

*Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

The requirements of Section 8 of the LHWCA do not apply to a claim for medical benefits under Section 7 of the LHWCA. The Board held that a claimant need not have a minimum level of

hearing loss (i.e., a ratable loss pursuant to the AMA Guides) to be entitled to medical benefits.

The Board also reject the employer's assertion that this case was controlled by *Metro-North commuter Railroad v. Buckley*, 521 U.S. 424 (1997). *Buckley* involved a railroad employee who had been exposed to asbestos and sought to recover under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (FELA), medical monitoring costs he may incur as a result of his exposure. Because *Buckley* had not been diagnosed with any asbestos-related disease and was not experiencing any symptoms, the Supreme Court held that he was not entitled to medical monitoring. Besides coming under another act, the Board specifically noted that in the instant longshore case, the ALJ specifically found that the claimant has trouble hearing and distinguishing sounds and, thus, has symptoms of hearing loss.

Next the Board addressed the ALJ's delegation to the district director the issue as to whether hearing aids were a necessity in this matter. While noting that there are several instances where the district director has authority over certain medical matters, the Board stated that it has "declined to interpret the provisions of Section 7(b) of the [LHWCA], or Section 702.407 of the regulations,..., in such a manner as to exclude the [ALJ] from the administrative process when questions of fact are raised." Thus, the Board found, "the issue of whether treatment is necessary and reasonable, where the parties disagree, is a question of fact for the [ALJ]."

The Board also stated that, "Contrary to employer's contention, the absence of a prescription for hearing aids from a medical doctor, as required by Virginia law, does not make claimant ineligible for hearing aids, or medical benefits, under the [LHWCA]. While claimant must comply with specific provisions under Virginia law before he is able to obtain hearing aids, claimant's compliance or non-compliance with state requirements does not affect the authority of the [ALJ] to adjudicate claimant's entitlement to medical benefits under the [LHWCA]."

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**Topic 8.13.4 Hearing Loss-Responsible Employer and Injurious Stimuli**

*Jeschke v. Jones Stevedoring Co.*, ___ BRBS ___ (BRB No. 01-0553) (March 21, 2002).

Here the claimant was prescribed bi-neural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a hearing-loss claim against two employers and entered into a Section 8(i) settlement with one who accepted responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA..

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**Topic 8.13.5 Hearing Loss–Sections 8(c)(13) and 8(f)(1)**

*Nival v. Electric Boat Corp.*, (Unreported)(Case Nos. 2002-LHC-362; 2002-LHC-1720) (July 25, 2002) [PDF | HTML ]

This is a Section 8(f) hearing loss claim. At issue is who receives the credit (Employer or Special Fund) for a previously paid compensation award. Previously the claimant was awarded benefits for a 53.75 percent hearing loss. As the employee demonstrated a pre-existing hearing loss of 42.50 percent, the employer was awarded the limiting provision of Section 8(f) and was only responsible for 11.25 percent of the hearing loss. The claimant was retained in employment and continued to be exposed to loud noises. In the present case, the parties stipulated that the claimant presently suffers from a 68.92 percent binaural hearing loss. The ALJ found that the employer was responsible to the claimant for his 68.92 percent hearing loss to the extent of 15.17 (68.92 - 53.75). As noted, the sole remaining issue was whether the Employer or the Special Fund is entitled to take a credit for all or a portion of the money that the claimant had already received as a result of the prior compensation award. Section 8(c)(13)(B).

The jurisprudence notes both an "Employer-First" rule, *Krotis v. General Dynamics Corp*., 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp*., 900 F.2d 506 (2d Cir. 1990), and a "Fund-First" rule, *Blanchette v. OWCP, United States Dept. of Labor*, 998 F. 2d 109, 27 BRBS (CRT) (2d Cir. 1993). Under both rules the credit offsets the compensation due to the claimant for the second injury so that a double recovery does not occur. These cases, and others, note varying fact situations (i.e. voluntary payments; no pre-existing, pre-employment hearing loss).

While noting that *Krotis* applied an "Employer-First" rule, the ALJ judged it inequitable to apply *Krotis* since the employer herein "clearly has caused most of Claimant's current hearing loss during his maritime employment" and "would escape any liability herein." Agreeing with the District Director, the ALJ found *Blanchette* (Congress intended the employer to compensate the disabled employee for the entire second (work-related) injury.) to be controlling. Thus, the ALJ concluded that the "Special Fund-First" rule applied and the Special Fund was entitled to take a credit for the money paid to the claimant as a result of his first hearing loss claim.

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**Topic 8.13.6 Hearing Loss–Duplicative Claims and Section 8(f)**

*Nival v. Electric Boat Corp.*, (Unreported)(Case Nos. 2002-LHC-362; 2002-LHC-1720) (July 25, 2002)

This is a Section 8(f) hearing loss claim. At issue is who receives the credit (Employer or Special Fund) for a previously paid compensation award. Previously the claimant was awarded benefits for a 53.75 percent hearing loss. As the employee demonstrated a pre-existing hearing loss of 42.50 percent, the employer was awarded the limiting provision of Section 8(f) and was only responsible for 11.25 percent of the hearing loss. The claimant was retained in employment and

continued to be exposed to loud noises. In the present case, the parties stipulated that the claimant presently suffers from a 68.92 percent binaural hearing loss. The ALJ found that the employer was responsible to the claimant for his 68.92 percent hearing loss to the extent of 15.17 (68.92 - 53.75). As noted, the sole remaining issue was whether the Employer or the Special Fund is entitled to take a credit for all or a portion of the money that the claimant had already received as a result of the prior compensation award. Section 8(c)(13)(B).

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## TOPIC 9

### Topic 9.1 Compensation for Death–Application of Section 9

*Cooper/T. Smith Stevedoring Co. v. Liuzza*, 293 F.3d 741 (5th Cir. 2002).

The Fifth Circuit held that in view of the language of Section 14 and Congressional intent, the court's precedent addressing similar issues, and the deference owed the Director's interpretation, Section 14(j) does not provide a basis for an employer to be reimbursed for its overpayment of a deceased employee's disability payments by collecting out of unpaid installments of the widow's death benefits. In reaching this holding, the court referenced *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773 (5th Cir. 1988) (An employer and insurer were not entitled to offset the disability settlement amount against liability to the employee's widow for death benefits.)

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### Topic 8.13.11 Multiple Hearing Loss Claims and Date of Injury

*Stevedoring Services of America v. Director*, OWCP, 297 F.3d 797 (9th Cir. 2002)

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate *reliable* audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The

Ninth Circuit, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The Ninth Circuit explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the "last employer doctrine' is a rule of convenience and involves a certain amount of arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public policy principles. n hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted--something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury--the first employer can simply point to the later audiogram as ''determinative' and hand off the burden of primary liability."

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**Topic 9.3 Death Benefits--Survivors—Spouse and Child**

*Duck v. Fluid Crane & Construction*, ___ BRBS ___ (BRB No. 02-0335)(Oct. 22, 2002).

Here the Board upheld the ALJ's finding that Sections 2(14) and 9 of the LHWCA provide that a legitimate or adopted child is eligible for benefits without requiring proof of dependency but that an illegitimate child is eligible for death benefits only if she is acknowledged and dependent on the decedent.

The Board first noted that it has held that it possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction. *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984).

The Board found that the instant case was akin to *Mathews v. Lucas*, 427 U.S. 495 (1976). In *Lucas*, the Supreme court sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. Although the Social Security Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court held that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Lucas*, 427 U.S. at 513. The presumption of dependency, observed the Court, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the Court relied predominantly on the Congressional purpose in adopting the statutory presumptions of

dependency, i.e., to serve administrative convenience.

Applying the court's holding in *Lucas*, Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but rather is "carefully tuned to alternative considerations" by withholding a presumption of dependency to illegitimate children "only in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 U.S. at 513. The Board found that the LHWCA's distinction between legitimate and illegitimate children is reasonable, for as the Court stated in *Lucas*, "[i]t is clearly rational to presume [that] the overwhelming number of legitimate children are actually dependent upon their parents for support, " *Lucas*, 427 U.S. at 513, while, in contrast, illegitimate children are not generally expected to be actually dependent on their fathers for support.

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## TOPIC 10

### Topic 10.1.3 Definition of Wages

*Custom Ship Interiors v. Roberts*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 1255 (2003).

Regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were includable as "wages" under the LHWCA.

The claimant was injured while remodeling a Carnival Cruise Line Ship for Custom Ship Interiors. Custom Ship's employment contract entitled the claimant to per diem payments without any restrictions. Carnival provided free room and board to its remodelers and Custom Ship knew this. Custom Ship argued that the per diem was a non-taxable advantage.

The court noted Custom Ship's argument that payments must be subject to withholding to be viewed as wages, but did not accept it: "However Custom Ship misconstrues the Act's definition of a ‘‘wage.' Whether or not a payment is subject to withholding is not the exclusive test of a ‘‘wage." Monetary compensation paid pursuant to an employment contract is most often subject to tax withholding, but the LHWCA does not make tax withholding an absolute prerequisite of wage treatment.

The court explained that because the payments were included as wages under the first clause of §§ 2(13), Custom Ship's invocation of the second clause of §§ 2(13) is unavailing. "This second clause enlarges the definition of ‘‘wages' to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the case payments in this case fall." Finally, the two member plurality summed up, "The so-called per diem in this case was nothing more than a disguised wage."

The Dissent noted that the definition of "wages" found at Section 2(13) requires that a wage be compensation for "service," not a reimbursement for expenses. *See Universal Maritime Service*

*Corp. v. Wright*, 155 F.3d 311, 319 (4th Cir. 1998).

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**TOPIC 12**

**TOPIC 13**

**Topic 13.1 Time for Filing of Claims--Starting the Statute of Limitations; Modification--De Minimis Awards**

*Hodges v. Caliper, Inc.*, (Unpublished) (BRB No. 01-0742) (June 17, 2002).

At issue here was whether the claimant timely filed his claim under Section 13(a) in lieu of *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997). In 1995 the claimant's right eye was injured by a welding spark. Upon medical examination the claimant exhibited mild inflamation of the eye with an area of superficial corneal scar tissue of unknown etiology and was diagnosed with post-traumatic iritis. Subsequently a few months later the claimant's vision tested at 20/20. He continued working and in 1999 noticed a cloud in his field of vision while welding. Upon examination the doctor attributed the claimant's vision problem to a corneal scar that could be removed or reduced by laser surgery and this procedure was authorized by the employer.

The Board upheld the ALJ's finding that the claimant had not been aware that his eye injury would affect his wage-earning capacity until the onset of his vision clouding in 1999 and therefore, the claim was timely filed. At the OALJ hearing, the employer had also contended that *Rambo II* required that the claimant file a claim for a de minimis award within one year from the 1995 date of the claimant's eye accident. The ALJ had found it to be unclear whether *Rambo II* imposes such a requirement and that, in any case, the claimant had no reason to believe before 1999 that his eye injury had a significant potential to diminish his future wage-earning capacity.

The Board noted that in *Rambo II*, the Court had declined to determine how high the potential for disability needed to be to qualify as "nominal," since that issue was not addressed by the parties and that instead, the Court had adopted the standard of the circuit courts which had addressed this issue by requiring the claimant to establish a "significant possibility" of a future loss of wage-earning capacity in order to be entitled to a de minimis award. The Board further noted that pertinent to the employer's argument in the instant case, the Court in *Rambo II* relied in part on the limitations period for traumatic injuries in Section 13(a) as grounds for its approving de minimis awards. The Court had stated that Section 13(a) "bars an injured worker from waiting for adverse economic effects to occur in the future before bringing his disability claim, which generally must be filed within a year of injury." *Rambo II*, 521 U.S. at 129, 31 BRBS at 57 (CRT). However, the Board found that "statements by the *Rambo II* Court regarding Section 13(a) were not directly material to the actual Section 22 issue before the Court and, consequently are dicta. Accordingly, the [ALJ] was not required to apply *Rambo II* to determine whether the claim herein was time-barred.

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### 13.1.2 Section 13(b) Occupational Diseases

*Norfolk & Western Railway Co. v. Ayers*, ___ U.S.___ (March 10, 2003)(No. 01-963).

The Court held that former employees can recover damages for mental anguish caused by the "genuine and serious" fear of developing cancer where they had already been diagnosed with asbestosis caused by work-related exposure to asbestos. This adheres to the line of cases previously set in motion by the Court. *See Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997)(When the fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear.) The Court noted that the railroad's expert acknowledged that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the claimants' expert that some ten percent of asbestosis suffers have died of mesothelioma. Thus, the Court found that claimants such as these would have good cause for increased apprehension about their vulnerability. The Court further noted that the claimants must still prove that their asserted cancer fears are genuine and serious.

**[ED. NOTE:** Mesothelioma is not necessarily preceded by asbestosis.**]**

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### Topic 13.2 Defining a Claim

*Stevedoring Services of America v. Director*, OWCP, 297 F.3d 797 (9th Cir. 2002)

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate *reliable* audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The Ninth Circuit, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The Ninth Circuit explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the ''last employer doctrine' is a rule of convenience and involves a certain amount of arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public policy principles. n hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted--something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury--the first employer can simply point to the later audiogram as ''determinative' and hand off the burden of primary liability."

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**Topic 13.3 Time for Filing of Claims--Awareness Standard**

*Newport News Shipbuilding & Dry Dock Co. v. Williams*, (Unpublished) (No. 01-2072) (2002 WL 1579570) (July 11, 2002) (4th Cir.2002).

In this matter the ALJ found that the claimant's filing a claim four years after an injury was not timely. The Board reversed, finding that the claimant had no reason to be aware of a likely impairment of his earning power until almost four years after the injury when he underwent a nerve block. The employer appealed contending that the Board had substituted its own finding of fact for that of the ALJ. The Fourth Circuit upheld the Board, noting that *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991) was controlling. The court held that the question of whether the claim was timely filed related to when the claimant knew, or had reason to know, that his injury was likely to impair his earning capacity and that seeking ongoing treatment, experiencing pain, or knowing of a possible future need for surgery, are legally insufficient to trigger the running of the one-year limitations period.

**Topic 13.3.1 Effect of Diagnosis/Report**

*Newport News Shipbuilding & Dry Dock Co. v. Williams*, (Unpublished) (No. 01-2072) (2002 WL1579570) (July 11, 2002) (4th Cir.2002).

In this matter the ALJ found that the claimant's filing a claim four years after an injury was not timely. The Board reversed, finding that the claimant had no reason to be aware of a likely impairment of his earning power until almost four years after the injury when he underwent a nerve block. The employer appealed contending that the Board had substituted its own finding of fact for that of the ALJ. The Fourth Circuit upheld the Board, noting that *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991) was controlling. The court held that the question of whether the claim was timely filed related to when the claimant knew, or had reason to know, that his injury was likely to impair his earning capacity and that seeking ongoing treatment, experiencing pain, or knowing of a possible future need for surgery, are legally insufficient to trigger the running of the one-year limitations period.

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**TOPIC 14**

**Topic 14.4 Compensation Paid Under Award**

*Hanson v. Marine Terminals Corporation*, 307 F.3d 1139 (9th Cir. 2002).

The Ninth Circuit reversed federal district court decision which had denied Section 14(f) relief for overdue compensation on "equitable grounds." (Claimant had provided incorrect addresses on two occasions—at time of filing claim and when he submitted settlement for approval.) Agreeing with

other circuits, the Ninth concluded that equitable factors have no place in the district court's consideration of a Section 14(f) penalty. The court noted that it need not decide whether fraud or physical impossibility would constitute a defense to a Section 14(f) penalty because neither fraud nor physical impossibility were at issue. The court simply stated that the statute limits the district court's inquiry solely to the question of whether the order was in accordance with law.

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**Topic 14.5 Employer Credit for Prior Payments**

*Cooper/T. Smith Stevedoring Co. v. Liuzza*, 293 F.3d 741 (5th Cir. 2002).

The Fifth Circuit held that in view of the language of Section 14 and Congressional intent, the court's precedent addressing similar issues, and the deference owed the Director's interpretation, Section 14(j) does not provide a basis for an employer to be reimbursed for its overpayment of a deceased employee's disability payments by collecting out of unpaid installments of the widow's death benefits. In reaching this holding, the court referenced *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773 (5th Cir. 1988) (An employer and insurer were not entitled to offset the disability settlement amount against liability to the employee's widow for death benefits.)

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**TOPIC 15**

**Topic 15.2 Agreement to Waive Compensation Invalid**

*In Re Kellog Brown & Root*, Tex. Ct. App., No. 01-01-01177-CV (April 25, 2002).

**[ED .NOTE:** While not a LHWCA case, this matter is nevertheless of interest due to its wrongful discharge issue.**]**

The Texas Court of Appeals held that a pipefitter helper must arbitrate his claim that he was wrongfully discharge by Kellogg, Brown & Root for filing a workers' compensation claim. Here the worker had signed two documents acknowledging "in consideration of my employment" that he was an at-will employee and that he was bound by the terms of the "Haliburton Dispute Resolution Program." That program required binding arbitration of all employment claims, including workers compensation retaliation claims. The Federal Arbitration Act applied to arbitrations held under the program. When the worker brought suit for wrongful discharge, the trial court denied employer's motion to compel arbitration, finding that there was no consideration and thus, no contract to arbitrate. However, the appellant court found that both sides to the agreement were bound to perform certain requirements, and thus the agreement to arbitrate was binding and enforceable.

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## TOPIC 16

### Topic 16.1 Assignment and Exemption from Claims of Creditors—Generally

*CIGNA Property & Casualty v. Ruiz*, 834 So. 2d 234 (Fla. App. 3 Dist. 2002), 2002 WL 31373875 (Fla. App. 3rd Cir. October 23, 2002); ___ F.Supp. 2d ___ (S.D. Fla. 2003); 2003 WL 1571898 (Jan. 21, 2003)(Interpleader Complaint Dismissed without prejudice).

**[ED. NOTE:** As of October 30, 2002 this opinion had not yet been released for publication in the permanent law reports and until released, it is subject to revision or withdrawal.**]**

Here the Florida State Appeals Court upheld a state district court which held that an ex-wife's claim for on-going child support was neither a claim of a creditor nor an attachment or execution for the collection of a debt; and thus, the anti-alienation provision of the LHWCA [33 U.S.C. 916] did not apply so as to preclude the longshore insurer from withholding certain sums from the ex-husband's benefits and paying this for on-going child support. In reaching this conclusion, the Florida Court of Appeals noted prior state case law. Previous case law in Florida had found that a claim for child support is not the claim of a creditor. *Department of Revenue v. Springer*, 800 So. 2d 700 (Fla. 5th DCA 2001). The exemption of worker's compensation claims from claims of creditors does not extend to a claim based on an award of child support. *Bryant v. Bryant*, 621 So. 2d 574 (Fla.2d DCA 1993). Moreover, a child support obligation is not a debt. *Gibson v. Bennett*, 561 So. 2d 565 (Fla. 1990). The Florida Court of Appeals also acknowledged the 1996 amendment to the non-alienation provisions of the Social Security Act (*see* 42 U.S.C. 659) which, it noted, had been held to have impliedly repealed the non-alienation provision of the LHWCA with regard to delinquent support obligations. *See Moyle v. Director, OWCP*, 147 F.3d 1116 (9th Cir. 1998), 32 BRBS 107(CRT).

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### Topic 16.2 Compensation Cannot be Assigned

*CIGNA Property & Casualty v. Ruiz*, ___ So. 2d ___ (Fla. App. 3 Dist. 2002), 2002 WL 31373875 (Fla. App. 3rd Cir. October 23, 2002).

**[ED. NOTE:** As of October 30, 2002 this opinion had not yet been released for publication in the permanent law reports and until released, it is subject to revision or withdrawal.**]**

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extend to a claim based on an award of child support. *Bryant v. Bryant*, 621 So. 2d 574 (Fla.2d DCA 1993). Moreover, a child support obligation is not a debt. *Gibson v. Bennett*, 561 So. 2d 565 (Fla. 1990). The Florida Court of Appeals also acknowledged the 1996 amendment to the non-alienation provisions of the Social Security Act (*see* 42 U.S.C. 659) which, it noted, had been held to have impliedly repealed the non-alienation provision of the LHWCA with regard to delinquent support obligations. *See Moyle v. Director, OWCP*, 147 F.3d 1116 (9th Cir. 1998), 32 BRBS 107(CRT).

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**Topic 16.3 Compensation is Exempt from Creditor Claims**

*CIGNA Property & Casualty v. Ruiz*, ___ So. 2d ___ (Fla. App. 3 Dist. 2002), 2002 WL 31373875 (Fla. App. 3rd Cir. October 23, 2002).

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**Topic 16.4 Garnishment**

*CIGNA Property & Casualty v. Ruiz*, ___ So. 2d ___ (Fla. App. 3 Dist. 2002), 2002 WL 31373875 (Fla. App. 3rd Cir. October 23, 2002).

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**TOPIC 17**

**TOPIC 18**

**Topics 18.1 Default Payments—Generally**

*Millet v. Avondale Industries*, ___ F.Supp. 2d ___ (E.D. La. 2003),2003 WL 548879 (Feb. 24,2003).

Federal District court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the compensation order. District Court Judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences. That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If Millet must bear the cost of enforcement of that final fee award then he cannot receive ‘‘the full value of the fees to which [he is] entitled under the Act.'"

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**TOPIC 19.01**

**TOPIC 19.02**

**TOPIC 19**

**Topic 19.3 Adjudicatory Powers**

*Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. §§ 702.338 ("...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

> Moreover, given the importance of the excluded evidence in this case and the **administrative law judge's use of permissive rather than mandatory language in his pre-hearing order**, employer's pre-hearing submission of its labor market survey to claimant ...does not warrant the extreme sanction of exclusion.

(Emphasis added.)

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the permissive rather than mandatory language ("Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.")

In ruling in favor of the employer on this issue, the Board distinguished this case from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros.*, 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that Durham did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished *Smith* as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in Burley, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

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**Topic 19.3 Adjudicatory Powers**

*McCracken v. Spearin, Preston and Burrows, Inc.*, ___ BRBS ___ (BRB No. 02-0256)(Dec. 12, 2002).

This matter involves a bankrupt carrier wherein the ALJ allowed the Carrier/Employer's attorney to withdraw and found that the Employer's motion for a stay of proceedings had been withdrawn since no one was present to argue the motion to withdraw. Employer's motion for a continuance was also denied and Employer was declared in default. The ALJ issued a default judgment against the Employer, ordering it to pay Claimant permanent total disability benefits, medical benefits and an attorney's fee. Employer, now represented, moves for reconsideration.

The Board noted that the ALJ had based his declaration of default and his award of permanent total disability benefits solely on Employer's absence from the proceedings. In vacating the award, the Board stated that "Without any evidence, it is impossible to determine whether claimant is entitled to permanent total disability benefits."

Noting the similarities between 29 C.F.R. 18.39(b) and Rule 55(c) of the Federal Rules of Civil Procedure (FRCP), the Board agreed with the Employer that the failure to send a company representative to the hearing on the facts presented was insufficient to warrant a declaration of default against Employer and was "a overly harsh sanction" in light of the circumstances presented. The Board noted that 29 C.F.R. 18.39(b) has a "good cause" standard similar to FRCP 55(c) and applied the good faith standard articulated in *Enron Oil Corp. v. Diakuhara* 10 F.3d 90 (2d Cir. 1993).

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**Topic 19.3 Adjudicatory Powers**

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**Topic 19.3 Procedure–Adjudicatory Powers**

*Stevens v. General Container Services,* (Unpublished) (BRB No. 01-0677A)(April 30, 2003).

Here the ALJ's authority to obtain answers to his own interrogatories and thereby discredit the claimant was upheld by the Board. At the hearing, the ALJ had observed that the claimant's demeanor while testifying on direct for an hour indicated severe back pain. However, after a 30 minute break and upon resuming the witness stand, the claimant acted as though he were free of pain. The ALJ later sent the claimant interrogatories to elicit whether he had taken pain medication during the break. The claimant answered that he had taken pain medication six hours earlier. From this response the ALJ concluded, in part because of the changed demeanor on the stand that the claimant was not credible about having severe back pain. The ALJ had concluded that the claimant had "simply forgot to resume the demeanor he had earlier employed for the purpose of conveying that he was in severe back pain." The Board found that the claimant's disagreement with the ALJ's weighing of the evidence is not sufficient reason for the Board to overturn it.

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**Topic 19.3.3 Procedure–Adjudicatory Powers–Dismissal of Claim**

*Goicochea v. Wards cove Packing Co.*, ___ BRBS ___ (BRB No. 02-0439)(March 13, 2003).

The Board held that an ALJ cannot rely upon the Federal Rules of Civil Procedure to dismiss a claim based upon the claimant's failure to comply with the multiple orders issued by an ALJ. The ALJ must consider the applicability of Section 27(b) to the facts before him/her. "As claimant's failure to execute and deliver an authorization releasing his INS records to employer was in direct noncompliance with [the judge's] orders, it constitutes conduct which should be addressed under the procedural mechanism of Section 27(b). Rather than dismissing claimant's claim, the [ALJ] must follow the procedures provided for in Section 27(b) of the Act." The employer had cited Section 18.29(a)(8) of the OALJ regulations, 29 C.F.R. § 18.29(a)(8), as a source of authority for the ALJ's decision to dismiss the claimant's claim. An ALJ's authority in general to dismiss a claim with prejudice stems from 29 C.F.R. § 18.29(a), which affords the ALJ all necessary powers to conduct fair and impartial hearings and to take appropriate action authorized by the Federal Rules of Civil Procedure. See Taylor v. B. Frank Joy Co., 22 BRBS 408 (1989). "As Section 27(b) of the Act is a 'rule of special application' which addresses the issue presented on appeal, however, the OALJ regulations do not apply." 29 C.F.R. §18.1(a).

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**Topic 19.3.6.2 Discovery**

**[ED. NOTE:** Since the following Black Lung case involves the OALJ regulation, 29 C.F.R. 18.20, it is mentioned here. For a thorough discussion of this case, see the Black Lung Act portion of this Digest.**]**

*Johnson v. Royal Coal Co.*, ___ F.3d ___ (No. 02-1400)(4th Cir. April 8, 2003).

In this matter, the Fourth Circuit found that the Board incorrectly upheld the ALJ's failure to address admissions and erred in finding that 29 C.F.R. 18.20 (Failure to respond appropriately to an outstanding admission request constitutes admissions) does not apply to the Black Lung Act. The Fourth Circuit further found that, based on a consideration of the analogous Fed. R.Civ. P. 36, an opposing party's introduction of evidence on a matter admitted [via failure to respond to requests for admissions] does not constitute either a waiver by the party possessing the admissions, nor as a constructive motion for withdrawal or amendment of admissions.

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**Topic 19.4.2 Summary Decision**

*Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

There is no provision under the LHWCA or the regulations for a "voluntary order" unless the parties agreement is embodied in a formal order issued by the district director or ALJ. Moreover, voluntary payments by an employer do not equate to a final order.

In the original claim in the instant case, the parties stipulated to all issues, including permanent disability, with the exception of Section 8(f) Trust Fund relief. In the original Decision and Order, the ALJ noted the parties stipulations, but did not incorporate an award of benefits to the claimant into his order. He stated that the only disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

Subsequently, the employer filed a Motion for Modification alleging that claimant had become capable of suitable alternate employment and the employer also filed a Motion for Partial Summary Decision, seeking a ruling that there was no final compensation award contained in the original Decision and Order. A second ALJ granted the partial Motion for Summary Decision, holding that there was no compensation award in place. The employer then stopped making payments. A third ALJ heard the employer's request for modification and found that there had been a "voluntary compensation order." Both the second and third ALJ decisions are the subject of this appeal.

On appeal, the Board found that the original Decision did not constitute a final compensation order and thus, Section 22 was not applicable as the initial claim for benefits had never been the subject of a final formal compensation order prior to the adjudication by the third ALJ hearing the modification. Therefor, the claim before the third ALJ must be viewed as an initial claim for compensation.

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**Topic 19.6 Formal Order Filed with District Director**

*Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

There is no provision under the LHWCA or the regulations for a "voluntary order" unless the parties agreement is embodied in a formal order issued by the district director or ALJ. Moreover, voluntary payments by an employer do not equate to a final order.

In the original claim in the instant case, the parties stipulated to all issues, including permanent disability, with the exception of Section 8(f) Trust Fund relief. In the original Decision and Order, the ALJ noted the parties stipulations, but did not incorporate an award of benefits to the claimant into his order. He stated that the only disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

Subsequently, the employer filed a Motion for Modification alleging that claimant had become capable of suitable alternate employment and the employer also filed a Motion for Partial Summary Decision, seeking a ruling that there was no final compensation award contained in the original Decision and Order. A second ALJ granted the partial Motion for Summary Decision, holding that there was no compensation award in place. The employer then stopped making payments. A third ALJ heard the employer's request for modification and found that there had been a "voluntary compensation order." Both the second and third ALJ decisions are the subject of this appeal.

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**Topic 19.10 Bankruptcy**

*McCracken v. Spearin, Preston and Burrows, Inc.*, ___ BRBS ___ (BRB No. 02-0256)(Dec. 12, 2002).

This matter involves a bankrupt carrier wherein the ALJ allowed the Carrier/Employer's attorney to withdraw and found that the Employer's motion for a stay of proceedings had been withdrawn since no one was present to argue the motion to withdraw. Employer's motion for a continuance was also denied and Employer was declared in default. The ALJ issued a default judgment against the Employer, ordering it to pay Claimant permanent total disability benefits, medical benefits and an attorney's fee. Employer, now represented, moves for reconsideration.

The Board noted that the ALJ had based his declaration of default and his award of permanent total disability benefits solely on Employer's absence from the proceedings. In vacating the award,

the Board stated that "Without any evidence, it is impossible to determine whether claimant is entitled to permanent total disability benefits."

Noting the similarities between 29 C.F.R. 18.39(b) and Rule 55(c) of the Federal Rules of Civil Procedure (FRCP), the Board agreed with the Employer that the failure to send a company representative to the hearing on the facts presented was insufficient to warrant a declaration of default against Employer and was "a overly harsh sanction" in light of the circumstances presented. The Board noted that 29 C.F.R. 18.39(b) has a "good cause" standard similar to FRCP 55(c) and applied the good faith standard articulated in *Enron Oil Corp. v. Diakuhara* 10 F.3d 90 (2d Cir. 1993).

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## TOPIC 20

### Topic 20.2.1 Presumptions–Prima Facie Case

*Haynes v. Vinnell Corporation*, (Unreported) (BRB No. 01-0741) (June 17, 2002).

In this Gulf War Illness case (Defense Base Act) the ALJ referenced the causation burden/scheme of the Persian Gulf War Veterans' Act of 1998, 38 U.S.C. §§ 1117 et seq., Public Law 105-277, which provides a legal presumption for veterans of the United States military that they were exposed to various toxic substances. While the ALJ acknowledged that statute was not applicable to the instant claimant, who was a civilian employee, the ALJ found that the statute could be considered persuasive in establishing a claimant's prima facie case. The ALJ summarily concluded that the evidence (article submitted stated detrimental effects from exposure were dependent on frequency and level of exposure) was not sufficient to invoke the public law presumption. However, the Board noted that the issue for purposes of the LHWCA is whether the claimant established exposure which could potentially cause the harm alleged. The Board noted that both the claimant and employer were in agreement that the claimant was employed by the employer during the period of time that the employer's base camp experienced both the effects of the oil well fires which burned in Kuwait and the application of pesticides throughout the camp.

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### Topic 20.2.3 Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident

*Haynes v. Vinnell Corporation*, (Unreported) (BRB No. 01-0741) (June 17, 2002).

In this Gulf War Illness case (Defense Base Act) the ALJ referenced the causation burden/scheme of the Persian Gulf War Veterans' Act of 1998, 38 U.S.C. §§ 1117 et seq., Public Law 105-277, which provides a legal presumption for veterans of the United States military that they were exposed to various toxic substances. While the ALJ acknowledged that statute was not applicable to the instant claimant, who was a civilian employee, the ALJ found that the statute could be considered persuasive in establishing a claimant's prima facie case. The ALJ summarily concluded that the

evidence (article submitted stated detrimental effects from exposure were dependent on frequency and level of exposure) was not sufficient to invoke the public law presumption. However, the Board noted that the issue for purposes of the LHWCA is whether the claimant established exposure which could potentially cause the harm alleged. The Board noted that both the claimant and employer were in agreement that the claimant was employed by the employer during the period of time that the employer's base camp experienced both the effects of the oil well fires which burned in Kuwait and the application of pesticides throughout the camp.

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**Topic 20.2.4 ALJ's Proper Invocation of Section 20(a)**

*Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. §§ 702.338 ("...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

> Moreover, given the importance of the excluded evidence in this case and the **administrative law judge's use of permissive rather than mandatory language in his pre-hearing order**, employer's pre-hearing submission of its labor market survey to claimant ...does not warrant the extreme sanction of exclusion.

(Emphasis added.)

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the permissive rather than mandatory language ("Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.")

In ruling in favor of the employer on this issue, the Board distinguished this case from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros*., 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that Durham did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished *Smith* as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in Burley, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an

aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

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**Topic 20.6.2 Section 20(a) Presumption-Does Not Apply to Jurisdiction**

*Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

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## TOPIC 21

**Topics 21 Generally**

*Olsen v. Triple A Machine Shop, Inc.*, (No. C01-3354 BZ (ADR)) (N. Dist. of CA.) (Dec. 14, 2001)(Unpublished) (Order Granting Defendant Triple A Machine Shop's Motion To Dismiss)(Final Judgment entered December 17, 2001).

In *Olsen*, the Northern District of California ruled that it does not have jurisdiction over a LHWCA Modification Request. The district court, citing *Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (**9th Cir.** 1987), noted that it only has jurisdiction to enforce orders in relation to LHWCA matters.

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**Topic 21.2.2 Review of Compensation Order—New Issue Raised on Appeal**

*Ravalli v. Pasha Maritime Services*, ___ BRBS ___ (2002) (BRB No. 01-0572) (September 12, 2002); previously reported at 36 BRBS 47 (2002)..

This is a denial of a Motion for Reconsideration. Previously the Board adopted the construction of Section 22 given by the Second Circuit in *Spitalieri v. Universal Maritime Services*, 226 F.3d 167 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (Termination of benefits is a "decrease" of benefits; *held*, effective date of termination could be date of change in condition.). The Board found Motion for Reconsideration of several issues not properly before it as these issues had not been addressed at most recent appeal and there was settled "law of the case."

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**Topic 21.2.12 Review of Compensation Order—Law of the Case**

*Ravalli v. Pasha Maritime Services*, ___ BRBS ___ (2002) (BRB No. 01-0572) (September 12, 2002).

This is a denial of a Motion for Reconsideration. Previously the Board adopted the construction of Section 22 given by the Second Circuit in *Spitalieri v. Universal Maritime Services*, 226 F.3d 167 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (Termination of benefits is a "decrease" of benefits; *held*, effective date of termination could be date of change in condition.). The Board found Motion for Reconsideration of several issues not properly before it as these issues had not been addressed at most recent appeal and there was settled "law of the case."

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**Topic 21.3 Review by U.S. Courts of Appeals**

*Newport News Shipbuilding & Dry Dock Co. v. Rowsey*, (No. 01-1995) (4th Cir. February 12, 2002) (Unpublished.).

Here the claimant was denied benefits by the ALJ and appealed to the Board. Noting that the official record had not been forwarded to its office, the Board stated that it could not consider the merits of the appeal without the record. The Board therefore dismissed the appeal and remanded it to OWCP for reconstruction of the record. Employer filed a petition for judicial review arguing that the ALJ's decision was automatically affirmed pursuant to the Omnibus Consolidated Recisions and Appropriations Act. The Director moved that Employer's appeal should be dismissed as Newport News is not an aggrieved party under the LHWCA. The Fourth Circuit agreed, noting that "Because the ALJ denied [Claimant's] claim for workers' compensation benefits and Newport News has not been required to pay benefits, Newport News has made no showing that it has suffered an injury in fact."

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**Topic 21.3 Review By U.S. Courts of Appeals**

*Norfolk Shipbuilding & Drydock Corp. v. Campbell*, (Unpublished) (No. 02-1701)(4th Cir. January 30, 2003).

After the last opinion was issued Norfolk filed a notice of appeal to the Board seeking a final order so that it could file a petition for review with the Fourth Circuit. Without waiting for a final order, Norfolk then filed a petition for review with the circuit court. Noting that the petition for review predated the Board's final order, the Fourth Circuit found that it had no jurisdiction and dismissed the petition. "[A]dministrative decisions under the LHWCA are only reviewable by this court if they constitute a final order of the Board." 33 U.S.C. 921(c) (2000).

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**Topic 21.5 Review of Compensation Order–Compliance**

*Millet v. Avondale Industries*, ___ F.Supp. 2d ___ (E.D. La. 2003),2003 WL 548879 (Feb. 24,2003).

Federal District court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the compensation order. District Court Judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences. That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If Millet must bear the cost of enforcement of that final fee award then he cannot receive ' 'the full value of the fees to which [he is] entitled under the Act.'"

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**TOPIC 22**

**Topic 22 Generally**

*Olsen v. Triple A Machine Shop, Inc.*, (No. C01-3354 BZ (ADR)) (N. Dist. of CA.) (Dec. 14, 2001)(Unpublished) (Order Granting Defendant Triple A Machine Shop's Motion To Dismiss)(Final Judgment entered December 17, 2001).

In *Olsen*, the Northern District of California ruled that it does not have jurisdiction over a LHWCA Modification Request. The district court, citing *Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (**9th Cir.** 1987), noted that it only has jurisdiction to enforce orders in relation to LHWCA matters.

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**Topic 22.1 Modification-Generally**

*Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

There is no provision under the LHWCA or the regulations for a "voluntary order" unless the parties agreement is embodied in a formal order issued by the district director or ALJ. Moreover, voluntary payments by an employer do not equate to a final order.

In the original claim in the instant case, the parties stipulated to all issues, including permanent disability, with the exception of Section 8(f) Trust Fund relief. In the original Decision and Order, the ALJ noted the parties stipulations, but did not incorporate an award of benefits to the claimant into his order. He stated that the only disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

Subsequently, the employer filed a Motion for Modification alleging that claimant had become capable of suitable alternate employment and the employer also filed a Motion for Partial Summary Decision, seeking a ruling that there was no final compensation award contained in the original Decision and Order. A second ALJ granted the partial Motion for Summary Decision, holding that there was no compensation award in place. The employer then stopped making payments. A third ALJ heard the employer's request for modification and found that there had been a "voluntary compensation order." Both the second and third ALJ decisions are the subject of this appeal.

On appeal, the Board found that the original Decision did not constitute a final compensation order and thus, Section 22 was not applicable as the initial claim for benefits had never been the subject of a final formal compensation order prior to the adjudication by the third ALJ hearing the modification. Therefor, the claim before the third ALJ must be viewed as an initial claim for compensation.

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**Topic 22.1 Modification-Generally**

*Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002).

A modifying order terminating compensation based on a change in the claimant's physical and/or economic condition may be effective from the date of the change in condition. Having no Ninth Circuit precedent, the Board adopted the Second Circuit's position in *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2nd Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001). The Board now finds it logical to hold that a termination of benefits is a "decrease" within the meaning of Section 22 in all circumstances, with the statutory caveat that a credit is available for a decrease where benefits are still owing. To the extent that the instant case is inconsistent with the Board's decision in *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993) ("the Act does not provide for retroactive termination."), it is overruled.

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**Topic 22.1 Modification––Generally**

*Alexander v. Avondale Industries, Inc.*, ___ BRBS ___ (BRB No. 02-0292) (Dec. 23, 2002).

At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the Employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

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**Topics 22.1 Modification–Generally**

*Norfolk Shipbuilding & Drydock Corp. v. Campbell*, (Unpublished)(4th Cir. No. 02-1701)(March 11, 2002).

A modification request was properly raised and reviewed were the basis of the request was an allegedly mistaken finding as to the extent of disability. The claim was based on medical reports already in the record, as well as medical reports created after the initial decision. The court found that this claim of mistake was clearly factual in nature–there was disagreement as to the interpretation of the medical evidence.

Additionally, the employer contended that the Board's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings (that a doctor's opinion was inconsistent). However, the Fourth Circuit found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor's changing opinions reflected the progression of the claimant's condition.

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**Topic 22.3 Requesting Modification**

**[ED. NOTE:** Since the Black Lung Act's Section 22 Modification statute was derived from the LHWCA Section 22 statute, the followings case law is noteworthy in a longshore context as well.**]**

*Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533 (7th Cir. 2002) (May 31, 2002) (J. Wood, dissenting).

Here the Seventh Circuit held that, "given the unique command of [the Black Lung Act]; a

modification request cannot be denied solely because it contains argument or evidence that could have been presented at any earlier stage in the proceedings; such a concern for finality simply cannot be given the same weight that it would be given in a regular civil proceeding in a federal district court."

In a strongly worded dissent, Judge Wood framed the question at issue as one about the standard the DOL must use in drawing the balance between accuracy (which at the extreme would call for reopening any time someone had new evidence or arguments) and finality (which at the extreme would forbid modification for any reason whatsoever). While noting the majority's acceptance of a standard where accuracy trumps unless the party seeking modification has intentionally abused the process, Judge Wood prefers a more flexible "interest of justice" determination to be made. "The 'interest of justice' standard would certainly permit consideration of intentional misuse, but it would also allow the responsible official to take into account factors such as the diligence of the party seeking modification, the number of times modification has been sought, and the quality of the new evidence or new arguments the party seeking modification wishes to present. A reviewing court would then decide whether a decision to reconsider, or a decision not to reconsider, an earlier award represented an abuse of discretion under familiar principles of administrative law."

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**Topic 22.3.1 Requesting Modification–Determining what constitutes a Valid Request**

*Norfolk Shipbuilding & Drydock Corp. v. Campbell*, (Unpublished)(4th Cir. No. 02-1701)(March 11, 2002).

A modification request was properly raised and reviewed were the basis of the request was an allegedly mistaken finding as to the extent of disability. The claim was based on medical reports already in the record, as well as medical reports created after the initial decision. The court found that this claim of mistake was clearly factual in nature–there was disagreement as to the interpretation of the medical evidence.

Additionally, the employer contended that the Board's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings (that a doctor's opinion was inconsistent). However, the Fourth Circuit found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor's changing opinions reflected the progression of the claimant's condition.

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**Topic 22.3.2 Modification—Filing a Timely Request**

*Jones v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___ (BRB No. 02-0227) (Oct. 18. 2002).

At issue here is whether a timely Motion for Modification had been filed. More succinctly, at issue is whether a Motion for Modification may be based on a request for nominal benefits. In this case, the claimant was awarded benefits under the schedule for his work-related injury. Ten months

after final payment of benefits under the schedule, but after the development of a hip condition (non-schedule), the claimant sent a letter to OWCP requesting nominal benefits. The ALJ found that this letter constituted a valid and timely motion for modification. Subsequently, the claimant filed a Motion for Modification over one year after the final payment of benefits.

Employer initially argued that the claimant's request for a de minimis award was not sufficient under Section 22 as an actual award is required in order to toll the statute of limitations and as the letter is a prohibited anticipatory filing which does not allege a change of condition or a mistake of fact.

However, the Board found that following the analysis of *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), if a nominal award is a present award under Section 8(c)(21)(h), then a claim for nominal benefits is a viable, present claim for benefits under Section 8(c)(21)(h). Since a compensation order may be reopened pursuant to Section 22 based on a claim of increased disability, the ability to reopen a case necessarily includes the filing of claims for nominal awards under Section 8(c)(21). "It would be irrational to hold, in accordance with employer's argument, that the relief was appropriate in modification proceedings but a request for the appropriate relief was insufficient to initiate modification proceedings."

Thus, the Board rejected the employer's argument that a petition for a nominal award cannot hold open a claim. Furthermore, the Board found that a claim for a nominal award is a present claim which gives rise to a present ongoing award if the claimant ultimately proves his case, a claim for a nominal award is not a prohibited anticipatory claim. "Accordingly, a motion for modification requesting nominal benefits is not an invalid anticipatory filing as a matter of law."

The Board next examined the content and context of the letter/claim. The Board found that, on its face, the letter requested a specific type of compensation which the claimant would be immediately able to receive if he could prove entitlement. As to content, there must be a determination made as to whether the claimant had the intent to pursue an actual claim for benefits or it was filed solely with the purpose of attempting to keep the claimant's claim open. The Board, reasoned, "If the purpose of claimant's [letter] request was merely to hold open the claim until some future time when he became disabled, then the 1999 claim would not be a valid modification request." The Board upheld the ALJ's finding that the claimant had a legitimate non-frivolous, claim for benefits for a hip condition at the time he filed the letter.

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**Topic 22.3.2 Filing a Timely Request**

*Alexander v. Avondale Industries, Inc.*, ___ BRBS ___ (BRB No. 02-0292) (Dec. 23, 2002).

At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the Employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not

a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

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**Topic 22.3.3 Modification—De Minimis Awards**

*Jones v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___ (BRB No. 02-0227) (Oct. 18. 2002).

At issue here is whether a timely Motion for Modification had been filed. More succinctly, at issue is whether a Motion for Modification may be based on a request for nominal benefits. In this case, the claimant was awarded benefits under the schedule for his work-related injury. Ten months after final payment of benefits under the schedule, but after the development of a hip condition (non-schedule), the claimant sent a letter to OWCP requesting nominal benefits. The ALJ found that this letter constituted a valid and timely motion for modification. Subsequently, the claimant filed a Motion for Modification over one year after the final payment of benefits.

Employer initially argued that the claimant's request for a de minimis award was not sufficient under Section 22 as an actual award is required in order to toll the statute of limitations and as the letter is a prohibited anticipatory filing which does not allege a change of condition or a mistake of fact.

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The Board upheld the ALJ's finding that the claimant had a legitimate non-frivolous, claim for benefits for a hip condition at the time he filed the letter.

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**Topic 22.3.2 Modification—Filing a Timely Request**

*Porter v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___ (BRB Nos. 02-0287 and 02-0287A)(Oct. 18, 2002).

In contrast to the facts in *Jones v. Newport News Shipbuilding & Dry Dock Company*, ___ BRBS ___ (BRB No. 02-0227)(Oct. 18, 2002), supra, the Board here notes that "[E]ven where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time."

Here, unlike in Jones, the Board found that the context of the filing established that the claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification. The Board noted that the claimant's August 12, 1999 letter was filed only 18 days after the last payment of benefits and that while "it is conceivable claimant's condition could have changed in that short period of time, providing a basis for her assertion that she anticipated future economic harm, there is no evidence of record to support such a conclusion." It went on to note that the 1999 letter was filed well in advance of the December 2000 evidence of any deterioration of her condition and, thus, constituted an anticipatory filing.

The Board found further evidence of an anticipatory filing in the claimant's actions. After receiving the 1999 letter, OWCP sought clarification of its purpose, asking the claimant whether the letter was to be considered "a request for an informal conference and/or Section 22 Modification so that we can [determine] what additional action needs to be taken by the office." The claimant responded stating that she did not want OWCP to schedule an informal conference, and , in so responding, she deliberately halted the administrative process.

The Board found that because the claimant intentionally acted in a manner contrary to the pursuit of her claim, her actions were merely an effort at keeping the option of seeking modification open until she had a loss to claim. "[S]he did not have the requisite intent to pursue a claim for nominal benefits, but rather was attempting to file a document which would hold her claim open indefinitely." The total circumstances surrounding the filing of the 1999 letter establish that the application did not manifest an actual intent to seek compensation for the loss alleged. Because the 1999 motion was thus an anticipatory filing, it was not a valid motion for modification.

While the Board found moot the claimant's argument that the ALJ erred in applying the doctrine of equitable estoppel, it nevertheless addressed it "for the sake of judicial efficiency." The Board found that, "Although, it was reasonable for employer to have relied on the statement that claimant did not wish to proceed to informal conference at that time, there was no detrimental reliance by employer. While employer may have thought the issue was abandoned or resolved in some manner it suffered no injury because of the letter: it took no action in reliance on the letter and it did

not pay any benefits or place itself in a position of harm.

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**Topic 22.3.3 Modification—De Minimus Awards**

*Porter v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___ (BRB Nos. 02-0287 and 02-0287A)(Oct. 18, 2002).

In contrast to the facts in Jones v. Newport News Shipbuilding & Dry Dock Company, ___ BRBS ___ (BRB No. 02-0227)(Oct. 18, 2002), supra, the Board here notes that "[E]ven where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time."

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**Topic 22.3.5 Mistake of Fact**

*Norfolk Shipbuilding & Drydock Corp. v. Campbell*, (Unpublished)(4th Cir. No. 02-1701)(March 11, 2002).

A modification request was properly raised and reviewed were the basis of the request was an allegedly mistaken finding as to the extent of disability. The claim was based on medical reports already in the record, as well as medical reports created after the initial decision. The court found that this claim of mistake was clearly factual in nature–there was disagreement as to the interpretation of the medical evidence.

Additionally, the employer contended that the Board's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings (that a doctor's opinion was inconsistent). However, the Fourth Circuit found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor's changing opinions reflected the progression of the claimant's condition.

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**TOPIC 23**

**Topic 23.1 Evidence ADA**

*Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. §§ 702.338 ("...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

> Moreover, given the importance of the excluded evidence in this case and the **administrative law judge's use of permissive rather than mandatory language in his pre-hearing order**, employer's pre-hearing submission of its labor market survey to claimant ... does not warrant the extreme sanction of exclusion.

(Emphasis added.)

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the permissive rather than mandatory language ("Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.")

In ruling in favor of the employer on this issue, the Board distinguished this case from

*Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros*., 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that Durham did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished *Smith* as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in Burley, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

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**Topic 23.2 Admission of Evidence**

*Patterson v. Omniplex world Services*, ___ BRBS ____ (BRB No. 02-0332) (Jan. 21, 2003).

This Defense Base Act case has issues concerning the admission of evidence and the scope of the relevant labor market for suitable employment purposes. Here, the claimant from Missouri was injured while employed as a security guard in Moscow as an embassy construction site. He had previously worked for this same employer for approximately six years before this injury in various locations.

After the close of the record in this matter, the employer requested that the record be reopened for the submission of "new and material" evidence which became available only after the close of the record. Specifically, the employer asserted that in a state court filing dated subsequent to the LHWCA record closing, the claimant stated that he had previously been offered and had accepted a security guard job in Tanzania.

The claimant argued that this evidence should not be admitted as it was outside the relevant Trenton, Missouri, labor market. The ALJ issued an Order Denying Motion to Reopen Record, stating that his decision would be based upon the existing record "due to the fact that the record was complete as of the date of the hearing together with the permitted post-hearing submissions, the complexity of the matters being raised post-hearing, the delays that would be encountered if further evidence is admitted, and the provisions of Section 22 of the Act which provide for modification of the award, if any."

In overturning the ALJ on this issue, the Board found the evidence to be relevant and material, and not readily available prior to the closing of the record. The evidence was found to be "properly admissible under Section 18.54(c) of the general rules of practice for the Office of Administrative Law Judges, as well as under the specific regulations applicable to proceedings under the Act. 20

C.F.R. 702.338, 702.339. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

The Board further noted that Sections 18.54(a) of the Rules of Practice and 20 C.F.R. 702.338 explicitly permit an ALJ to reopen the record, at any time prior to the filing of the compensation order in order to receive newly discovered relevant and material evidence.

While the Board affirmed the ALJ's conclusion that Missouri is the claimant's permanent residence, and thus his local labor market in the case, the Board opined that the ALJ should have considered the significance of the claimant's overseas employment in evaluating the relevant labor market. The Board concluded that, given the claimant's employment history, the labor market cannot be limited solely to the Trenton, Missouri, area. Additionally, the Board noted that, in fact, the claimant has continued to perform post-injury security guard work in the worldwide market.

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**Topic 23.2 Admission of Evidence**

**[ED. NOTE:** Since the following Black Lung case involves the OALJ regulation, 29 C.F.R. 18.20, it is mentioned here.**]**

*Johnson v. Royal Coal Co.*, ___ F.3d ___ (No. 02-1400)(4th Cir. April 8, 2003).

In this matter, the Fourth Circuit found that the Board incorrectly upheld the ALJ's failure to address admissions and erred in finding that 29 C.F.R. 18.20 (Failure to respond appropriately to an outstanding admission request constitutes admissions) does not apply to the Black Lung Act. The Fourth Circuit further found that, based on a consideration of the analogous Fed. R.Civ. P. 36, an opposing party's introduction of evidence on a matter admitted [via failure to respond to requests for admissions] does not constitute either a waiver by the party possessing the admissions, nor as a constructive motion for withdrawal or amendment of admissions.

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**Topic 23.6 ALJ Determines Credibility of Witnesses**

*Stevens v. General Container Services,* (Unpublished) (BRB No. 01-0677A)(April 30, 2003).

Here the ALJ's authority to obtain answers to his own interrogatories and thereby discredit the claimant was upheld by the Board. At the hearing, the ALJ had observed that the claimant's demeanor while testifying on direct for an hour indicated severe back pain. However, after a 30 minute break and upon resuming the witness stand, the claimant acted as though he were free of pain. The ALJ later sent the claimant interrogatories to elicit whether he had taken pain medication during the break. The claimant answered that he had taken pain medication six hours earlier. From this response the ALJ concluded, in part because of the changed demeanor on the stand that the claimant was not credible about having severe back pain. The ALJ had concluded that the claimant had "simply forgot to resume the demeanor he had earlier employed for the purpose of conveying that he was in severe back pain." The Board found that the claimant's disagreement with the ALJ's weighing of the evidence is not sufficient reason for the Board to overturn it.

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**Topic 23.7 ALJ May Draw Inferences Based On Evidence Presented**

**[ED. NOTE:** Since the following Black Lung case involves the OALJ regulation, 29 C.F.R. 18.20, it is mentioned here.**]**

*Johnson v. Royal Coal Co.*, ___ F.3d ___ (No. 02-1400)(4th Cir. April 8, 2003).

In this matter, the Fourth Circuit found that the Board incorrectly upheld the ALJ's failure to address admissions and erred in finding that 29 C.F.R. 18.20 (Failure to respond appropriately to an outstanding admission request constitutes admissions) does not apply to the Black Lung Act. The Fourth Circuit further found that, based on a consideration of the analogous Fed. R.Civ. P. 36, an opposing party's introduction of evidence on a matter admitted [via failure to respond to requests for admissions] does not constitute either a waiver by the party possessing the admissions, nor as a constructive motion for withdrawal or amendment of admissions.

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**Topic 23.7 ALJ May Draw Inference Based on Evidence Presented**

*Stevens v. General Container Services,* (Unpublished) (BRB No. 01-0677A)(April 30, 2003).

Here the ALJ's authority to obtain answers to his own interrogatories and thereby discredit the claimant was upheld by the Board. At the hearing, the ALJ had observed that the claimant's demeanor while testifying on direct for an hour indicated severe back pain. However, after a 30 minute break and upon resuming the witness stand, the claimant acted as though he were free of pain. The ALJ later sent the claimant interrogatories to elicit whether he had taken pain medication during the break. The claimant answered that he had taken pain medication six hours earlier. From this response the ALJ concluded, in part because of the changed demeanor on the stand that the claimant was not credible about having severe back pain. The ALJ had concluded that the claimant had "simply forgot to resume the demeanor he had earlier employed for the purpose of conveying that he was in severe back pain." The Board found that the claimant's disagreement with the ALJ's weighing of the evidence is not sufficient reason for the Board to overturn it.

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**TOPIC 24**

**TOPIC 26**

## TOPIC 27

### Topic 27.1 Powers of ALJs–Procedural Powers Generally

*Macktal v. Chao, Secretary of Labor,* 286 F.3d 822 (5th Cir. 2002).

**[ED. NOTE:** This whistle blower case is included for informational purposes only.**]**

The de novo issue here for the court was whether the (Administrative Review Board) ARB has inherent authority to reconsider its decisions when the Energy Reorganization Act does not mention reconsideration by the ARB of its orders. The court noted that while it has never expressly held so, it has generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions. It went on to note that the reasonableness of an agency's reconsideration implicates two opposing policies: "the desirability of finality on one hand and the public's interest in reaching what, ultimately, appears to be the right result on the other." After weighing these policies, the court found that in this instance, the ARB had the inherent authority to reconsider its decision.

### Topic 27.1.1 Powers of the ALJ–ALJ Can Exclude Evidence Offered in Violation of Order

*Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

This remand involved both a traumatic as well as psychological injury. Although finding the claimant to be entitled to total disability benefits, the ALJ ordered the benefits suspended pursuant to Section 7(d)(4), on the ground that the claimant unreasonably refused to submit to medical treatment, i.e., an examination which the ALJ ordered and the employer scheduled. The Board noted that Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that the claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to the claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant.

Here the Board supported the ALJ's finding that the claimant's refusal to undergo an evaluation was unreasonable and unjustified, citing the pro se claimant's erroneous belief that he has the right to determine the alleged independence and choice of any physician the employer chooses to conduct its examination or can refuse to undergo the examination because the employer did not present him with a list of doctors in a timely manner, and the claimant's abuse of the ALJ by yelling and insulting the integrity of other parties. (The Board described the telephone conference the ALJ had with the parties as "contentious.") The Board held that the ALJ did not abuse his discretion by finding that the claimant's refusal to undergo the employer's scheduled examination was unreasonable and unjustified given the circumstances of this case. However, the Board noted that compensation

cannot be suspended retroactively and thus the ALJ was ordered to make a finding as to when the claimant refused to undergo the examination.

The Board further upheld the ALJ's denial of the claimant's request for reimbursement for expenses related to his treatment for pain management. The ALJ rejected the claimant's evidence in support of his request for reimbursement for pain management treatment pursuant to 29 C.F.R. §§ 18.6(d). That section provides that where a party fails to comply with an order of the ALJ, the ALJ, "for the purpose of permitting resolution of the relevant issues may take such action thereto as is just," including,

> (iii) Rule that the non-complying party may not introduce into evidence...documents or other evidence...in support of... any claim....
>
> (v) Rule...that a decision of the proceeding be rendered against the non-complying party.

In a footnote, the Board noted that medical benefits cannot be denied under Section 7(d)(4) for any other reason than to undergo an examination. However, the Board went on to note, "The Act also provides for imposition of sanctions for failure to comply with an order. Under Section 27(b), the [ALJ] may certify the facts to a district court if a person resists any lawful order. 33 U.S.C. §§ 927(b). As these provisions are not inconsistent with the regulation at 29 C.F.R. §§18.6(d)(2), the [ALJ] did not err in applying it in this case."

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**Topic 27.3 Federal District Court Enforcement**

*A-Z International v. Phillips*, ___ F.3d ___ (No. 01-56689) (9th Cir. March 21, 2003).

Section 27(b) of the LHWCA does not authorize a federal district court to sanction a claimant for contempt for filing a false claim for benefits under the LHWCA. The term "lawful process" is not broad enough to include the filing of a complaint that misrepresents the jurisdictional facts. The Ninth Circuit found that in enacting the LHWCA, Congress expressly provided mechanisms other than contempt sanctions to deal with fraudulent claims before an ALJ. "In interpreting a statute, courts must consider Congress's words in context "with a view to their place in the overall statutory scheme." *Citing Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit went on to note, "The LHWCA has specific provisions that deal with fraud before the ALJ, such as 33 U.S.C. 931(a) and 948.

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**Topic 27.3 Federal District Court Enforcement**

*Goicochea v. Wards cove Packing Co.*, ___ BRBS ___ (BRB No. 02-0439)(March 13, 2003).

The Board held that an ALJ cannot rely upon the Federal Rules of Civil Procedure to dismiss a claim based upon the claimant's failure to comply with the multiple orders issued by an ALJ. The

ALJ must consider the applicability of Section 27(b) to the facts before him/her. "As claimant's failure to execute and deliver an authorization releasing his INS records to employer was in direct noncompliance with [the judge's] orders, it constitutes conduct which should be addressed under the procedural mechanism of Section 27(b). Rather than dismissing claimant's claim, the [ALJ] must follow the procedures provided for in Section 27(b) of the Act." The employer had cited Section 18.29(a)(8) of the OALJ regulations, 29 C.F.R. § 18.29(a)(8), as a source of authority for the ALJ's decision to dismiss the claimant's claim. An ALJ's authority in general to dismiss a claim with prejudice stems from 29 C.F.R. § 18.29(a), which affords the ALJ all necessary powers to conduct fair and impartial hearings and to take appropriate action authorized by the Federal Rules of Civil Procedure. See Taylor v. B. Frank Joy Co., 22 BRBS 408 (1989). "As Section 27(b) of the Act is a 'rule of special application' which addresses the issue presented on appeal, however, the OALJ regulations do not apply." 29 C.F.R. §18.1(a).

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## TOPIC 28

### Topic 28.1 Attorney's Fees–Generally

*Craig v. Avondale Industries, Inc.*, 36 BRBS 65(2002).

This is an Order on Reconsideration of the Board's *Decision and Order on Reconsideration En Banc, Craig, et al. V. Avondale Industries, Inc.*, 35 BRBS 164 (2001). Once again the Board has upheld its prior decision in this matter holding that initial claim forms filed by claimants, standing alone, trigger the 30-day time period (following notice of a claim from the district director) in which employer is required to pay benefits or decline to pay for purposes of attorney's fee liability under Section 28(a). Neither the LHWCA nor the regulations require that a claimant submit evidence with his claim before the requirements of Section 28(a) are triggered. A claimant need not establish a *prima facie* case under Section 20(a) before the requirements of Section 28(a) are triggered. In these consolidated hearing loss claims, the Board specifically found that "there is no reason to treat hearing loss claims differently, merely because a hearing loss must be ratable under the [AMA] Guides to the Evaluation of Permanent Impairment in order to be compensable."

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### Topic 28.1.1 Attorney's Fees–Generally–Introduction

*Kuhn v. Kenley Mining Co.*, (No. 01-2255) (4th Cir. April 4, 2002) (Unpublished).

This Black Lung Benefits Act fee case is noted here because the attorney fee section of the Black Lung Act and regulations are derived from the LHWCA. The Fourth Circuit, citing 33 U.S.C. §§ 928(a) and 20 C.F.R. §§ 725.367(a), held that "the statute does not permit the fees of a lay representative to be shifted to an employer."

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**Topic 28.1.2 Attorney Fees—Successful Prosecution**

*Terrell v. Washington Metropolitan Area Transit Authority*, ___ BRBS ___ (BRB No. 99-0509)(Dec. 6, 2002).

This is a Reconsideration of the Board's previous holding in this matter found at 36 BRBS 69 (2002). That Order held that the employer could not be held liable for the claimant's attorney's fee for the work counsel performed and that the claimant was liable for a reduced fee that was made a lien on his total disability compensation award. In a plurality decision on reconsideration, counsel successfully sought to hold the claimant liable for the entire fee he had requested.

This matters stems from a modification request brought by the director. Previously the claimant contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. The Board rejected those contentions. In the appeal on the merits, the claimant opposed the Director's contention that the employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the ALJ's decision excluding the employer from the proceedings. Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Board then held that counsel for the claimant was not entitled to a fee for the work performed on research, motions or briefs, as the claimant was unsuccessful in maintaining the status quo.

Now the Board holds that *Hensley* does not apply since *Hensley* is only applicable to fee shifting statutes such as Sections 28(a) and (b) and not to Section 28(c) where attorney's fee entitlement is determined by the necessary work performed in securing n award. Citing 20 C.F.R. 802,203(e), the Board found the work counsel performed to be "necessary" in that he advocated a position protective of his client's interest. Noting that, on remand, the claimant had been awarded ongoing permanent total disability benefits and the entitlement to cost-of-living adjustments, the Board found that the claimant was financially able to pay the $4,100.00 attorney fee.

In a concurring opinion, Judge McGranery agreed that the claimant should be responsible for the attorney fee under Section 28(c), but took issue with the plurality's interpretation of *Hensley* (that fee shifting does not apply to the instant case because fee liability had not shifted to the employer.). "I think that the *Hensley* analysis provides guidance whenever a judicial tribunal is responsible for directing an attorney's fee award." She went on to note; "The flaw in the majority's analysis is that it fails to distinguish between substantive and procedural issues. Although claimant was unsuccessful in opposing employer's participation in the modification proceeding, this was purely a procedural issue. The prohibition against compensating attorneys for work on unsuccessful issues concerns substantive issues, i.e., claims."

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**Topic 28.1.2 Attorney Fees—Successful Prosecution**

*Woods v. Director, OWCP*, (Unpublished) 2003 U.S. App. LEXIS 3590 (Ninth Cir. No. 01-71920) (February 25, 2003).

Where an employer makes voluntary payments and a claimant does not receive greater compensation from an ALJ Decision and Order, the claimant is not entitled to an attorney fee. The Ninth Circuit found that, "The record contains no evidence that the employer's advance payment made before [the claimant] filed her claim was conditional or contingent in nature. Because the [ALJ's] award did not exceed the amount of the advance payment, [the claimant] is not entitled to attorney's fees under the LHWCA."

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**Topic 28.1.3 Attorney Fees–When Employer's Liability Accrues**

*Weaver v. Director, OWCP*, 282 F.3d 357 (5th Cir. 2002).

This case interprets the fee-shifting provision of the LHWCA found at Section 28(a). Citing *Watkins v. Ingalls Shipbuilding, Inc.*, (No. 93-4367) (5th Cir. Dec. 9, 1993) (Unpublished), the court held that an attorney could recover only those fees incurred after the 30th day following the receipt of formal notice from the district director. [*Watkins* has precedential status because it was decided before the Fifth Circuit changed its rules.] The court further ruled that, as to fees accrued between the formal notice and controversion of the claim (the 30th day following receipt of notice), these fees may be assessed against the employer if the employer controverts a claim within the 30 day window and other triggers have been satisfied. These other triggers are: (1)there is formal notice, (2) there is a successful prosecution by the claimant, and the claimant uses an attorney to prosecute the claim.

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**Topic 28.2 Attorney Fees–Employer's Liability**

*Boatwright v. Logisitec of Connecticut, Inc.*, (Unpublished) (BRB No. 01-0804) (July 12, 2002).

In this attorney fee issue case which arose within the jurisdiction of the Second Circuit, the Board rejected the employer's contention that Section 28(b) is not applicable as no informal conference was held in this matter. The Board noted that the Second Circuit has not addressed the issue of whether the absence of an informal conference is an absolute bar to the imposition of fee liability under Section 28(b). Thus, the Board has not seen fit to apply the Fifth Circuit holding beyond that circuit. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that informal conference is prerequisite to fee liability under Section 28(b)). *See also*, *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105 (CRT) (5th Cir. 2000), *modifying on reh'g* 237 F.3d 407, 34 BRBS 44 (CRT) (5th Cir. 2000).

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**Topic 28.2.2 Attorney Fees—Tender of Compensation**

*Woods v. Director, OWCP*, (Unpublished) 2003 U.S. App. LEXIS 3590 (Ninth Cir. No. 01-71920)

(February 25, 2003).

Where an employer makes voluntary payments and a claimant does not receive greater compensation from an ALJ Decision and Order, the claimant is not entitled to an attorney fee. The Ninth Circuit found that, "The record contains no evidence that the employer's advance payment made before [the claimant] filed her claim was conditional or contingent in nature. Because the [ALJ's] award did not exceed the amount of the advance payment, [the claimant] is not entitled to attorney's fees under the LHWCA."

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**Topic 28.3 Attorney's Fees–Claimant's Liability**

*Terrell v. Washington Metropolitan Area Transit Authority (WMATA)*, ___ BRBS ___ (BRB No. 99-0509) (June 11, 2002).

The issue here is whether an employer who is granted Section 8(f) relief, is dismissed from a subsequent modification proceeding by the ALJ on the claimant's motion, and who did not participate in the appeal of the modification before the Board, is responsible for the claimant's attorney fee at the Board level. (The employer did not participate in the Director's appeal before the Board, and the claimant argued in response to the Director's appeal for the employer's continued exclusion from the case.) The Board found that such an employer is not liable for an attorney fee. Furthermore, the Board found that, "The fact that employer had an economic interest in the outcome (due to the increased assessment under Section 44... .), is not sufficient for employer to be held for claimant's attorney's fee for work performed before the Board under the facts of this case." Thus, the Board found that since the claimant's attorney obtained an award of permanent total disability, an attorney's fee for his counsel can be made a lien on the claimant's compensation.

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**Topic 28.3 Attorney's Fees–Claimant's Liability**

*Terrell v. Washington Metropolitan Area Transit Authority*, ___ BRBS ___ (BRB No. 99-0509)(Dec. 6, 2002).

This is a Reconsideration of the Board's previous holding in this matter found at 36 BRBS 69 (2002). That Order held that the employer could not be held liable for the claimant's attorney's fee for the work counsel performed and that the claimant was liable for a reduced fee that was made a lien on his total disability compensation award. In a plurality decision on reconsideration, counsel successfully sought to hold the claimant liable for the entire fee he had requested.

This matters stems from a modification request brought by the director. Previously the claimant contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. The Board rejected those contentions. In the appeal on the merits, the claimant opposed the Director's contention that the employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the ALJ's decision excluding the

employer from the proceedings. Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Board then held that counsel for the claimant was not entitled to a fee for the work performed on research, motions or briefs, as the claimant was unsuccessful in maintaining the status quo.

Now the Board holds that *Hensley* does not apply since *Hensley* is only applicable to fee shifting statutes such as Sections 28(a) and (b) and not to Section 28(c) where attorney's fee entitlement is determined by the necessary work performed in securing n award. Citing 20 C.F.R. 802,203(e), the Board found the work counsel performed to be "necessary" in that he advocated a position protective of his client's interest. Noting that, on remand, the claimant had been awarded ongoing permanent total disability benefits and the entitlement to cost-of-living adjustments, the Board found that the claimant was financially able to pay the $4,100.00 attorney fee.

In a concurring opinion, Judge McGranery agreed that the claimant should be responsible for the attorney fee under Section 28(c), but took issue with the plurality's interpretation of *Hensley* (that fee shifting does not apply to the instant case because fee liability had not shifted to the employer.). "I think that the *Hensley* analysis provides guidance whenever a judicial tribunal is responsible for directing an attorney's fee award." She went on to note; "The flaw in the majority's analysis is that it fails to distinguish between substantive and procedural issues. Although claimant was unsuccessful in opposing employer's participation in the modification proceeding, this was purely a procedural issue. The prohibition against compensating attorneys for work on unsuccessful issues concerns substantive issues, i.e., claims."

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**Topic 28.3.1 Liability of Special Fund**

*Terrell v. Washington Metropolitan Area Transit Authority (WMATA)*, ___ BRBS ___ (BRB No. 99-0509) (June 11, 2002).

The issue here is whether an employer who is granted Section 8(f) relief, is dismissed from a subsequent modification proceeding by the ALJ on the claimant's motion, and who did not participate in the appeal of the modification before the Board, is responsible for the claimant's attorney fee at the Board level. (The employer did not participate in the Director's appeal before the Board, and the claimant argued in response to the Director's appeal for the employer's continued exclusion from the case.) The Board found that such an employer is not liable for an attorney fee. Furthermore, the Board found that, "The fact that employer had an economic interest in the outcome (due to the increased assessment under Section 44.. . .), is not sufficient for employer to be held for claimant's attorney's fee for work performed before the Board under the facts of this case." Thus, the Board found that since the claimant's attorney obtained an award of permanent total disability, an attorney's fee for his counsel can be made a lien on the claimant's compensation.

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**Topic 28.4 Attorney Fees Application Process**

*Furguson v. Newport News Shipbuilding and Dry Dock Co.*, ___ BRBS ___ (BRB No. 01-0504)

February 14, 2002).

In this matter, claimant's prior counsel filed a fee petition documenting services rendered on claimant's behalf. The district director refused to impose liability for a fee on the claimant, stating that he was unable to determine if the claimant understood his counsel's representation, including its necessity and reasonableness, whether or not there had been a successful prosecution, and claimant's ability to pay the fee. The Board found that the district director erred in declining to consider his fee petition listing services allegedly rendered while the case was before the district director. Citing 20 C.F.R. §§ 702.132, the Board found that counsel was in conformance with the regulations. Furthermore, the Board stated, " [W]hile the district director chastises Mr. Donaldson for his failure to create a record before an administrative law judge supportive of his position regarding the payment of a fee, the applicable regulations implementing the Act provide for the compilation of an administrative file which give the district director the requisite information needed for the consideration of counsel's fee petition.....Thus, the administrative file in the district director's possession should contain all of the information needed for that official to adequately consider the fee proposed by claimant's former counsel."

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### 28.6.3 Fee Petition

Whether attorney fees are recoverable for time spent doing a fee petition is in controversy. The Board's *en banc* position is at variance from the Ninth Circuit's position, as well as from two Board three judge panel positions.

In *Sproull v. Stevedoring Services of America*, 28 BRBS 271(1994) (*Decision on Recon.*) (*en banc*), the Board held that this was an activity that was not reasonably necessary to protect claimant's interests. *See also*, *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984). The Board felt that each attorney should keep a running, accurate, total of the hours expended on the case so that the preparation of the fee request "should be, for the most part, a clerical function included in overhead expenses." *Sproull*, 28 BRBS 271, 277; *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 383 (1979).

The Board distinguished its position from that taken in the two non-longshore cases of *Hensley v. Eckerhart*, 461 **U.S**. 424 (1988) and *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (**5th Cir**. 1980). *Hensley*, a civil rights case, involved significantly more hours and people that needed to be accounted for in the fee motion than in most LHWCA claims. The *Rose Pass Mines, Inc*. case was a bankruptcy proceeding which by statute demands exhaustive detail in the fee petition.

In the **Ninth Circuit it is acceptable to award fees for the time spent preparing the attorney's fee application**. *Anderson v. Director*, OWCP, 91F.3d 1322 (9th Cir. 1996). *In re Nucorp Energy, Inc*., 764 F.2d 655 (9th Cir. 1985), like the *Rose Pass Mines, Inc.* case, was a bankruptcy case and the Ninth Circuit eventually followed the holding of the Fifth Circuit in awarding attorney's fees including the time it took to prepare the motion. However, before following the *Rose Pass Mines,*

*Inc*. holding, the Ninth Circuit in *In re Nucorp Energy, Inc*. exhaustingly discussed how other statutory fee cases have dealt with the issue. In looking mainly to section 1988 civil rights cases, the Ninth Circuit finds the support for their position in bankruptcy proceedings.

Another application of the Ninth Circuit's rule, granting compensation for the time needed to prepare the fee application, is seen in *Clark v. City of Los Angeles*, 803 F.2d 987 (9th Cir. 1986). *Clark* is a civil rights case which follows the rational of *In re Nucorp Energy*, *Inc* without providing any expansion on the line of reasoning. *Anderson*, which applies the fee application rule to LHWCA cases in the Ninth Circuit, relies rigidly on the wording of 42 U.S.C. §§ 1988.487 and *Clark*. *Anderson v. Director*, OWCP, 91 F.3d 1322,1325 (9th Cir. 1996). After citing these two items the *Anderson* court uses the holding in *City of Burlington v. Dague*, 505 U.S. 557 (1992)(A 'reasonable" fee should mean the same thing under all federal fee-shifting statutes.) saying that "a reasonable fee applies uniformly to all federal fee-shifting statutes," to extend the civil rights holdings on the issue to LHWCA. *Id.* **Compare this rational to the holding in *Sproull* where the Board sitting *en banc* held that the "activity" was not necessary to the protection of the claimant's entitlement, and hence it is a clerical function.** *Sproull*, 28 BRBS 271, 277 (*en banc*)**.**

In *Sproull*, the Board noted that in most longshore cases, unlike other fee-shifting statutes, the fee request is "quite small in comparison" to cases where the litigation is often complex and lengthy. "Thus, the fee petitions will necessarily be shorter and less complex." *Sproull*, at 278. The *en banc* Board saw no reason to depart from its longstanding position that time spent preparing a fee petition is not compensable. *See e.g., Verderane v. Jacksonville Shipyards, Inc*., 14 BRBS 220.15 (1981); *Keith v. General Dynamics Corp*., 13 BRBS 404 (1981); *Staffile v. International Terminal Operating Co.*, Inc., 12 BRBS 895 (1980).

In *Sproull*, the Board noted that the Black Lung regulations provide that no fee approval shall include payment for time spent in preparation of a fee application. 20 C.F.R. 725.366(b). However, it should be noted that the regulations pertaining to longshore fees are silent on the issue. 20 C.F.R. 702.132. It should also be noted that three judge panels of the Board have followed the *Anderson* decision in *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996) (Ninth Circuit) and *Hill v. Avondale Industries, Inc*., 32 BRBS 186 (1998) (Fifth Circuit).

The claimant's attorney may be awarded fees for time spent defending the fee petition. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *Jarrell v. Newport News Shipbuilding & Dry Dock co., 14 BRBS 833 (1982); Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982); *Morris v. California Stevedore & Ballast Co*., 10 BRBS 375 (1979).

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**Topic 28.6.7.2 Attorney's Fees–Claimant's Costs–Medical Reports and Testimony**

*Zeigler Coal co. v. Director, OWCP*., ___ F.3d ___ (No. 01-3211/3998) (7th Cir. April 18, 2003).

The Seventh circuit found that Section 28(d) of the LHWCA could be used to award fees for

medical experts who submitted reports but did not testify. "[T]he text of section 28(d) of the Longshoremen's Act addresses 'the reasonableness of the fees of the *expert* witness' within the context of assessing 'as costs, fees and mileage for necessary witnesses' to an employer against whom attorneys' fees also were assessed." The court rejected the employer's argument that the claimant should only be able to recover the fees of his medical experts if they appear at the ALJ hearing. The court held that, if the medical reports are submitted as evidence before the ALJ, they are recoverable as costs.

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**Topic 28.9 Attorney Fees--Settlements**

*Jenkins v. Puerto Rico Marine, Inc.*, 36 BRBS 1 (2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the Eleventh Circuit and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. §§ 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

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**Topic 28.10.2 Attorney Fees–Timely Appeal/Finality**

*Millet v. Avondale Industries*, ___ F.Supp. 2d ___ (E.D. La. 2003), 2003 WL 548879 (Feb. 24, 2003).

Federal District court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the

compensation order. District Court Judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences. That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If Millet must bear the cost of enforcement of that final fee award then he cannot receive ''the full value of the fees to which [he is] entitled under the Act.'"

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**TOPIC 30**

**TOPIC 31**

**Topic 31 Generally**

**[ED. NOTE:** The following is provided for informational value only.**]**

*St. Bernard Parish Police Jury and Travelers Property Casualty Corp. v. Duplessis*, 831 So. 2d 955 (La. Supreme Ct. 4, 2002).

The Louisiana State Supreme Court held that a claimant's wilful misrepresentation of mileage reimbursement subjected him to the forfeiture of his workers' compensation benefits, pursuant to LSA-R.S. 23:1208. The statute, in pertinent parts, states that it is unlawful for any person, for the purpose of obtaining or defeating any workers' compensation benefit or payment, to willfully make a false statement or representation. "Any employee violating this Section shall, upon determination by workers' compensation judge, forfeit any right to compensation benefits under this Chapter." Claimant had submitted a request for reimbursement for 4,354 miles when he was only entitled to 1,114.2 miles for doctors' visits.

Although noting that the claimant was"not a workers' compensation neophyte," the hearing officer, found that the forfeiture of all benefits was "too harsh" and ordered the forfeiture of the requested mileage and referral of the matter to the Fraud Section. On appeal the court affirmed the ruling. Noting the intent of the state legislature, the Louisiana State Supreme Court has now overturned the prior rulings and denied all future benefits.

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**31.2 Penalty For Misrepresentation–Prosecution of Claims–Claimant's Conduct**

*A-Z International v. Phillips*, ___ F.3d ___ (No. 01-56689) (9th Cir. March 21, 2003).

Section 27(b) of the LHWCA does not authorize a federal district court to sanction a claimant for contempt for filing a false claim for benefits under the LHWCA. The term "lawful process" is not broad enough to include the filing of a complaint that misrepresents the jurisdictional facts. The Ninth Circuit found that in enacting the LHWCA, Congress expressly provided mechanisms other than contempt sanctions to deal with fraudulent claims before an ALJ. "In interpreting a statute, courts must consider Congress's words in context "with a view to their place in the overall statutory scheme." *Citing Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit went on to note, "The LHWCA has specific provisions that deal with fraud before the ALJ, such as 33 U.S.C. 931(a) and 948.

## TOPIC 33

### Topic 33 Generally

**[ED.. NOTE:** The following federal district court cases are included for informational purposes only.**]**

*Ayers v. C&D General Contractors*, 2002 WL 31761235, 237 F.Supp 2d 764 (W.D. Ky. Dec. 6, 2002)

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "water craft exclusion" excluded this claim since the worker had been working underneath a barge. The court concluded that the claim should not be excluded since the barge was not used for transportation but merely aided the work under the dock.

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### Topic 33.6 Employer Credit For Net Recovery By "Person Entitled To Compensation"

*New Orleans Stevedores v. Ibos*, 317 F.3d 480 (5th Cir. 2003).

In this matter, where the worker had mesothelioma, the Fifth Circuit followed the Second Circuit's rule annunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure. Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the Fifth Circuit found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The Fifth Circuit has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to

prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (5th Cir. 1992).

The Fifth Circuit also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

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**Topic 33.7 Third-Party Settlements Ensuring Employer's Rights Written Approval of Settlement**

*Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002).

Here the Board rejected the claimant's assertions that the employer's actions amounted to a constructive approval of a third-party settlement. The Board found that the employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. The Board noted the very limited participation of the employer and found that it was less than in some other cases where the Board had previously held that Section 33(g)(1) applied. Employer here was a named defendant in the tort suit; thus, it did not appear in the case on the claimant's side. Second, the employer was dismissed from the case nearly one and one-half years before the trial and settlement, and the employer's attorney remained active only for discovery purposes. The Board further noted that "While there is conflicting evidence as to whether [employer's attorney] was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the ...settlement, the [ALJ] found that [employer's attorney] was not involved in the negotiations themselves, and he did not sign or consent to the general release." The Board found that employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement and render Section 33(g)(1) inapplicable.

Next the Board addressed an issue of first impression, namely whether Section 33(g)(2) provides claimants with a means for retaining their entitlement to medical benefits despite having lost their entitlement to compensation. Referencing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 , 26 BRBS 49 (CRT) (1992); the language of Section 33(g) itself; and the implementing regulation, 20 C.F.R. §§ 702.281, the Board concluded that a claimant must obtain the prior written approval of a settlement for an amount less than his entitlement under the LHWCA.

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**Topic 33.7 Ensuring Employer's Rights–Written Approval of Settlements**

*Dilts v. Todd Shipyard Corp.*, (Unpublished)(BRB No. 02-0434)(March 12, 2003).

The Board found that a claimant can not dodge the Section 33(g) requirement of written approval from the employer by alleging that the third-party settlements were de minimis and therefore could not prejudice the employer.

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**Topic 33.7.4 Third-Party Settlements--Medical Benefits**

*Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002).

Here the Board rejected the claimant's assertions that the employer's actions amounted to a constructive approval of a third-party settlement. The Board found that the employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. The Board noted the very limited participation of the employer and found that it was less than in some other cases where the Board had previously held that Section 33(g)(1) applied. Employer here was a named defendant in the tort suit; thus, it did not appear in the case on the claimant's side. Second, the employer was dismissed from the case nearly one and one-half years before the trial and settlement, and the employer's attorney remained active only for discovery purposes. The Board further noted that "While there is conflicting evidence as to whether [employer's attorney] was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the ...settlement, the [ALJ] found that [employer's attorney] was not involved in the negotiations themselves, and he did not sign or consent to the general release." The Board found that employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement and render Section 33(g)(1) inapplicable.

Next the Board addressed an issue of first impression, namely whether Section 33(g)(2) provides claimants with a means for retaining their entitlement to medical benefits despite having lost their entitlement to compensation. Referencing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 , 26 BRBS 49 (CRT) (1992); the language of Section 33(g) itself; and the implementing regulation, 20 C.F.R. §§ 702.281, the Board concluded that a claimant must obtain the prior written approval of a settlement for an amount less than his entitlement under the LHWCA.

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**Topic 33.10 Miscellaneous Areas Within Section 33**

**[ED. NOTE:** While not a LHWCA case, the following may be noteworthy in a Section 33 context for its discussion of "prevailing parties" and "consent decree."**]**

*American Disability Association, Inc. v. Chmielarz*, 289 F.3d 1315 (11th Cir. 2002).

In this ADA case, prior to trial, the parties entered into a settlement which was "approved, adopted and ratified" by the district court in a final order of dismissal, and over which the district court expressly retained jurisdiction to enforce its terms. Subsequently, the Association sought attorneys' fees and costs but the district court found that it was not a "prevailing party" as that term was defined in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 523 U.S. 598, 121 S.Ct. 1835 (2001) (Court specifically invalidated the "catalyst theory."). However, the circuit court found that the Association plainly was a "prevailing party" because the district court's approval of the terms of the settlement coupled with its explicit retention of jurisdiction are the

functional equivalent of a consent decree.

The circuit court noted that in *Buckhannon*, the Supreme Court had invalidated the catalyst theory because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." The Court said that a plaintiff could be a "prevailing party" only if it was "awarded some relief" by the court and achieved an "alteration in the legal relationship of the parties." *Buckhannon*, 523 U.S. at 603-605. While the Court had stated specifically that a plaintiff achieved such prevailing party status if it (1) received at least some relief--including nominal damages--on the merits, or (2) signed a settlement agreement "enforced through a consent decree,." the circuit court found that this did not mean that these were the only two resolutions to form a sufficient basis upon which a plaintiff could be found to be a prevailing party.

The circuit court stated: "Thus, it is clear that, even absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties" agreement. Its authority to do so clearly establishes a 'judicially sanctioned change in the legal relationship of the parties,' as required by *Buckhannon*, because the plaintiff thereafter may return to court to have the settlement enforced. A formal consent decree is unnecessary in these circumstances because the explicit retention of jurisdiction or the court's order specifically approving the terms of the settlement are, for these purposes, the functional equivalent of the entry of a consent decree."

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**TOPIC 39**

**TOPIC 48a**

**TOPIC 60**

**Topic 60.2 Longshore Act Extensions--Defense Base Act**

*Ilaszczat v. Kalama Services*, 36 BRBS 78 (2002).

Whether the "zone of special danger" applied to this Defense Base Act case was the main issue here. The claimant was injured during the time he worked as the manager of the "Self-Help Store" on the Johnston Atoll, a two mile long island located in the South Pacific. The claimant initially sustained a work-related injury to his left leg. Subsequently he sustained an injury to his left hip while engaging in post-work recreational activity. The "recreational" injury is the focus of this litigation.

After work, the claimant went for drinks to the "Tiki Bar," where he remained until closing and then went on to the AMVETS where he bought drinks for a group of soldiers. He entered into a $100 wager with a military police officer wherein the claimant bet the officer that the officer could not, in a karate demonstration, "put [his] leg over [the claimant's] head without touching [claimant]." At this point there are two versions as to how the claimant actually injured his hip, but he was taken to the clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. While recovering, the claimant received notice from the base military commander that he was expelled from the atoll and was precluded from ever returning. The employer thereafter discharged the claimant based on the fact that the debarment order prohibited his return to Johnston Atoll.

The ALJ found that the claimant did fall within the "zone of special danger" and that his conduct, although perhaps unauthorized and/or prohibited, was not so egregious as to sever the relationship between his employment and the injury under the doctrine. The employer on appeal challenges this finding and further argues that the ALJ ignored the legal "reasonable recreation" standard, wherein only those incidents in which the claimant's conduct was reasonable are accepted as falling within the "zone of special danger" doctrine.

The Board found that the ALJ properly applied the "zone of special danger" doctrine here. The Board noted that the ALJ had found that the claimant and the other employees on the atoll had limited choices and opportunities for recreation, and that this is, presumably, the reason why the military authorized the operation of "social clubs" on the atoll. The ALJ had further found that with the existence of clubs serving alcohol to employees, in combination with the employees' lengthy periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and the employer that "risky horseplay" or scuffles such as that which occurred, would occur from time to time. As such, he determined that the claimant's conduct was not "so far from his employment" and was not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment."

The ALJ also found, assuming arguendo, that while the claimant was engaged in "unauthorized" or prohibited behavior (i.e., assuming that the employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that the claimant's behavior was unforeseeable. Specifically, the ALJ found that the incident was "foreseeable, if not foreseen" by the employer and thus the mere fact that fighting was prohibited does not necessarily preclude the claimant's recovery even if fighting constituted grounds for expulsion from the atoll.

The Board found that the issue as to whether the claimant should be barred of benefits because he was discharge and could not return to pot-injury work due to his own misfeasance became moot since the claimant was never offered any position by the employer post-injury, nor did the employer establish that suitable alternate employment would have been available to the claimant at pre-injury wages, but for, his discharge.

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**Topic 60.2.1 Extension Acts--Defense Base Act--Applicability of the LHWCA**

*Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under *contracts with the United States, or an agency thereof*, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

Finally the Board rejected coverage directly under the LHWCA. The rock where the tunnel was being drilled rose above the surface of the water at the point where the claimant was injured. The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway. Thus, the Board found that the injury did not occur on navigable water. As to the claimant's contention that he was injured on a "marine railway," the Board rejected this allegation after examining the definition of "marine railway" and noting that the claimant did not

contend that the railway used in the tunnel played any part in removing ships from the water for repair.

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**Topic 60.2.2 Extension Acts--Defense Base Act--Claim Must Stem From a "Contract" For "Public Work" Overseas**

*Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 ( 2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

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**Topic 60.2.7 Extension Acts-Defense Base Act, Course and Scope of Employment, "Zone of Special Danger"**

*Edmonds v. Al Salam Aircraft Co.*, Ltd., (BRB No. 01-0602) (April 5, 2002) (Unpublished).

In this Defense Base Act case the issue was the extent of the "zone of special danger" concept. Claimant was hit by a car while attempting to cross a highway in order to go to the supermarket Saudi Arabia. The ALJ found that claimant, although not injured while performing the duties of his employment, was nevertheless in the "zone of special danger" created by his overseas job. The employer here appealed, arguing first, that driving in Saudi Arabia is no more dangerous than driving in the United States. Second, the employer urged the Board to reconsider the "zone of special danger" doctrine "in light of the 21st Century, since applicability of this doctrine, as exemplified by past case precedent, is premised on an antiquated view of the world outside of the United States."

After noting Supreme court jurisprudence on the "zone of special danger" doctrine, the Board declined to address the employer's invitation to reconsider the doctrine "in light of the 21st Century, since the Board's use and application of the zone of special danger' doctrine stems directly from the binding precedent of the Supreme Court's decisions. . . ." Next the Board noted that the instant case was no one in which the claimant was "so thoroughly disconnected" from work for the employer that it is unreasonable for his injuries to be covered, as the ALJ found that claimant's injuries were related to his living and working conditions in Saudi Arabia. The Board noted that the ALJ had determined that the employer did not provided the claimant with on-base housing, convenient transportation to and from the base, or fresh food at the commissary on the housing compound, and it was reasonable for him to buy food off-base. The ALJ had also found that the claimant was always on call and his hours of work were not consistent; thus it was reasonable for him to drive his own car. Lastly, the ALJ determined, based in part on the claimant's credible testimony and a pamphlet distributed by the employer's predecessor that driving in Saudi Arabia presented hazards not found in the United States.

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**Topic 60.2.7 Defense Base Act--Course and Scope of Employment, "Zone of Special Danger"**

*Ilaszczat v. Kalama Services*, ___ BRBS ___ (BRB No. 01-0774) (June 19, 2002).

Whether the "zone of special danger" applied to this Defense Base Act case was the main issue here. The claimant was injured during the time he worked as the manager of the "Self-Help Store" on the Johnston Atoll, a two mile long island located in the South Pacific. The claimant initially sustained a work-related injury to his left leg. Subsequently he sustained an injury to his left hip while engaging in post-work recreational activity. The "recreational" injury is the focus of this litigation. After work, the claimant went for drinks to the "Tiki Bar," where he remained until closing and then went on to the AMVETS where he bought drinks for a group of soldiers. He entered into a $100 wager with a military police officer wherein the claimant bet the officer that the officer could not, in a karate demonstration, "put [his] leg over [the claimant's] head without touching [claimant]." At this point there are two versions as to how the claimant actually injured his hip, but he was taken to the clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. While recovering, the claimant received notice from the base military commander that he was expelled from the atoll and was precluded from ever returning. The employer thereafter discharged the claimant based on the fact that the debarment order prohibited his return to Johnston Atoll.

The ALJ found that the claimant did fall within the "zone of special danger" and that his conduct, although perhaps unauthorized and/or prohibited, was not so egregious as to sever the relationship between his employment and the injury under the doctrine. The employer on appeal challenges this finding and further argues that the ALJ ignored the legal "reasonable recreation" standard, wherein only those incidents in which the claimant's conduct was reasonable are accepted as falling within the "zone of special danger" doctrine.

The Board found that the ALJ properly applied the "zone of special danger" doctrine here. The Board noted that the ALJ had found that the claimant and the other employees on the atoll had limited choices and opportunities for recreation, and that this is, presumably, the reason why the military authorized the operation of "social clubs" on the atoll. The ALJ had further found that with the existence of clubs serving alcohol to employees, in combination with the employees' lengthy periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and the employer that "risky horseplay" or scuffles such as that which occurred, would occur from time to time. As such, he determined that the claimant's conduct was not "so far from his employment" and was not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment."

The ALJ also found, assuming arguendo, that while the claimant was engaged in "unauthorized" or prohibited behavior (i.e., assuming that the employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that the claimant's behavior was unforeseeable. Specifically, the ALJ found that the incident was "foreseeable, if not foreseen" by the employer and thus the mere fact that fighting was prohibited does not necessarily preclude the claimant's recovery even if fighting constituted grounds for expulsion from the atoll.

The Board found that the issue as to whether the claimant should be barred of benefits because he

was discharge and could not return to pot-injury work due to his own misfeasance became moot since the claimant was never offered any position by the employer post-injury, nor did the employer establish that suitable alternate employment would have been available to the claimant at pre-injury wages, but for, his discharge.

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**Topic 60.3.1 Extension Acts--Outer Continental Shelf Lands Act Applicability**

*Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under *contracts with the United States, or an agency thereof*, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

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**Topic 60.3.1 Outer Continental Shelf Lands Act–Applicability of the LHWCA**

*Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. Jan. 16, 2002)[En Banc Petition Pending].

**[ED. NOTE:** This opinion was substituted for a previous one styled the same and reported at 253 F.3d 840 (5th Cir. 2001).**]**

In determining that an OCSLA case was covered by the LHWCA and that the LHWCA did not invalidate an indemnity agreement, the Fifth Circuit, for the first time, specified the "exact contours of the situs test" established by Section 1333 of the OCSLA.

The Fifth Circuit formulated a specific rule:

> The OCSLA applies to all of the following locations:
> (1) the subsoil and seabed of the OCS;
> (2) any artificial island, installation, or other device if
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
> (b) it has been erected on the seabed of the OCS, and
> (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
> (3) any artificial island, installation, or other device if
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
> (b) it is not a ship or vessel, and
> (c) its presence on the OCS is to transport resources from the OCS.

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**Topic 60.3.1 OCSLA–Applicability of the LHWCA**

*Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002)

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's

employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

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**Topic 60.3.2 OCSLA–Coverage**

*Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

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**Topic 60.4.1 Nonappropriated Fund Instrumentalities Act–Applicability of the LHWCA**

*Hargrove v. Coast Guard Exchange System*, ___ BRBS ___ (BRB No. 02-0757) (March 28, 2003).

Here the Board held that active duty military personnel are excluded from coverage under the Nonappropriated Fund Instrumentalities Act (NFIA). The claimant, while on active duty in the United States Coast Guard, sustained a low back injury during the course of his part time, off-duty, employment as a sales clerk at the Coast Guard Exchange Mini Mart.

The claimant had argued that nowhere in the statute are active military personnel in their off-duty hours excluded from the definition of "employee" under the NFIA. Further, the claimant also argued that the dropping of the word "civilian" from 5 U.S.C. §8171(a) is indicative of Congressional intent to include military personnel who work for nonappropriated fund instrumentalities in their off-duty hours. However, the Board found that the deletion of the word "civilian" was not intended to include military personnel within the coverage of NFIA. Rather, the annotation to Section 8171 states that the word "civilian" was dropped from Section 8171(a) as it was determined to be unnecessary, since "the definition of 'employee' in Section 2105 includes only civilians." See Annotation to 5 U.S.C.A. §8171 (West 1986); see also 5 U.S.C. §2105(a). The Board also noted that "the implementing regulations of the various branches of the military, as well as the lone-standing position of DOL, explicitly speak to this issue and cannot be ignored."

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**TOPIC 65**

**TOPIC 70**

**Topic 70.2 Responsible Employer–Occupational Disease and the *Cardillo* Rule**

*New Orleans Stevedores v. Ibos*, 317 F.3d 480 (5th Cir. 2003).

In this matter, where the worker had mesothelioma, the Fifth Circuit followed the Second Circuit's rule annunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure. Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the Fifth Circuit found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The Fifth Circuit has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (5th Cir. 1992).

The Fifth Circuit also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

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**TOPIC 75**

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**TOPIC 85**

**Topic 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies**

*Porter v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___ (BRB Nos. 02-0287 and 02-

0287A)(Oct. 18, 2002).

In contrast to the facts in Jones v. Newport News Shipbuilding & Dry Dock Company, ___ BRBS ___ (BRB No. 02-0227)(Oct. 18, 2002), supra, the Board here notes that "[E]ven where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time."

Here, unlike in Jones, the Board found that the context of the filing established that the claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification. The Board noted that the claimant's August 12, 1999 letter was filed only 18 days after the last payment of benefits and that while "it is conceivable claimant's condition could have changed in that short period of time, providing a basis for her assertion that she anticipated future economic harm, there is no evidence of record to support such a conclusion." It went on to note that the 1999 letter was filed well in advance of the December 2000 evidence of any deterioration of her condition and, thus, constituted an anticipatory filing.

The Board found further evidence of an anticipatory filing in the claimant's actions. After receiving the 1999 letter, OWCP sought clarification of its purpose, asking the claimant whether the letter was to be considered "a request for an informal conference and/or Section 22 Modification so that we can [determine] what additional action needs to be taken by the office." The claimant responded stating that she did not want OWCP to schedule an informal conference, and , in so responding, she deliberately halted the administrative process.

The Board found that because the claimant intentionally acted in a manner contrary to the pursuit of her claim, her actions were merely an effort at keeping the option of seeking modification open until she had a loss to claim. "[S]he did not have the requisite intent to pursue a claim for nominal benefits, but rather was attempting to file a document which would hold her claim open indefinitely." The total circumstances surrounding the filing of the 1999 letter establish that the application did not manifest an actual intent to seek compensation for the loss alleged. Because the 1999 motion was thus an anticipatory filing, it was not a valid motion for modification.

While the Board found moot the claimant's argument that the ALJ erred in applying the doctrine of equitable estoppel, it nevertheless addressed it "for the sake of judicial efficiency." The Board found that, "Although, it was reasonable for employer to have relied on the statement that claimant did not wish to proceed to informal conference at that time, there was no detrimental reliance by employer. While employer may have thought the issue was abandoned or resolved in some manner it suffered no injury because of the letter: it took no action in reliance on the letter and it did not pay any benefits or place itself in a position of harm.

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**Topic 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies–Generally Concepts**

*Holmes v. Shell Offshore, Inc.*, ___ BRBS ___ (BRB No.02-0499) (March 31, 2003).

The Board held that a claimant was not in privity with her stepmother and was not bound by

the prior finding that her father's death was not compensable. Although the two claims arose out of the same death, raising the same question of compensability, and the same attorney prosecuted both claims, under the law of the circuit, the claimant was not adequately or virtually represented in the prior claim and was free to bring her own claim.

Here, a widow's claim for benefits after the apparent suicide of her husband was summarily dismissed when the ALJ found that the decedent did not suffer any work-related injury or illness prior to taking his own life. The ALJ had found that the widow had failed to invoke the Section 20(a) presumption and that the decedent had willfully intended to take his own life, and therefore Section 3(c) barred the claim for compensation. The widow had failed to respond to the employer's motion for summary decision and to the ALJ's motion to show cause. Thus, the ALJ deemed such failure as a waiver of rights and denied the widow's motion for reconsideration. One year later the decedent's daughter by his first marriage filed a claim for death benefits and the employer filed a motion to dismiss based on the principle of collateral estoppel. Finding the now adult child to stand in privity with her stepmother, the same ALJ dismissed the claim.

On appeal, the Board noted that, in order to determine whether collateral estoppel and res judicata applied, the Board had to determine whether the claimant stood in privity with her stepmother, the decedent worker's widow. The Board found that according to the Fifth Circuit and Louisiana law (case arises within Louisiana), "privity," exists only in three narrowly-defined circumstances. The Board found that of the three concepts of privity, only "virtual representation" would be applicable in the instant case. The Board noted the, according to the jurisprudence, to be "closely aligned," so as to be one's virtual representative, it is not enough to merely show that the party and the nonparty have common or parallel interests in the factual and legal issues presented in the respective actions. It further noted that both the state courts and the Fifth Circuit have narrowly interpreted virtual representation, and that even close familial relationships, without something more, are insufficient to invoke virtual representation.

The Board stated that the concept of privity attempts to define how one party stands, legally, with respect to another. As the concept of virtual representation in the Fifth Circuit requires either express or implied consent to legal representation, and as there was no evidence of either in the instant case, the Board found that virtual representation could not apply, and thus, the claimant could not be held to be in privity with her stepmother.

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**Topic 85.2 Effect of Prior State Proceeding on a Subsequent Federal Claim**

*Hennessey v. Bath Iron Works Corp.*, (Unpublished) (BRB No. 01-0872) (Aug. 7, 2002).

Here the worker filed claims under both the LHWCA and the Maine Workers' Compensation

Act. The Board affirmed the ALJ's determination that the doctrine of collateral estoppel does not bar his reaching the merits of the case since the state board's decision regarding the extent of disability was not final at the time the ALJ issued his decision. (The state board decision had been appealed and thus was not a final decision.)

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**Topic 85.5 "Law of the Case" Doctrine**

*Ravalli v. Pasha Maritime Services*, ___ BRBS ___ (2002) (BRB No. 01-0572) (September 12, 2002).

This is a denial of a Motion for Reconsideration. Previously the Board adopted the construction of Section 22 given by the Second Circuit in *Spitalieri v. Universal Maritime Services*, 226 F.3d 167 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (Termination of benefits is a "decrease" of benefits; *held*, effective date of termination could be date of change in condition.). The Board found Motion for Reconsideration of several issues not properly before it as these issues had not been addressed at most recent appeal and there was settled "law of the case."

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**TOPIC 90**