TOPIC 85 RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, ELECTION OF REMEDIES

85.1 INTRODUCTION AND GENERAL CONCEPTS

It is well-settled that mere acceptance of payments under a state act does not constitute an election of remedies barring a subsequent claim under the LHWCA. Calbeck v. Travelers Ins. Co., 370 **U.S.** 114 (1962); Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369 (**5th Cir.** 1962). The employer must be given credit, however, for sums paid under the state act. Calbeck, 370 **U.S.** 114.

When an employee files claims in more than one forum, the employer may raise defenses such as *res judicata*, full faith and credit, and election of remedies. Full faith and credit is mandated by Article IV, Section I, of the United States Constitution. Director, OWCP v. National Van Lines, Inc., 613 F.2d 972, 981, 11 BRBS 298, 308-09 (**D.C. Cir.** 1979), cert. denied, 448 **U.S.** 907 (1980).

The doctrine of *res judicata* requires that the determination made in an earlier proceeding occur after a full and fair adjudication of its legal and evidentiary factors in order to be binding. United States v. Utah Constr. & Mining Co., 384 **U.S.** 394 (1966) (review of the record had made it clear to the court that proceedings afforded the claimant in Virginia and the proof adduced before the state agency abundantly met this criterion, i.e., whether or not the claimant had full and ample opportunity to present his case before the state agency).

In Wilson v. Norfolk & Western Railway Co., 32 BRBS 57 (1998), the Board noted that the application of res judicata requires a showing of the following three elements: (1) a final judgement on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. Keith v. Aldridge, 900 F.2d 736, 739 (**4th Cir.** 1989), cert. denied, 498 **U.S.** 900 (1990), citing Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (**4th Cir.** 1980), cert. denied, 454 **U.S.** 878 (1981).

The doctrine of election of remedies relates to the liberty or the act of choosing one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An "election of remedies" arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event he loses the right to thereafter exercise the other. Melby v. Hawkins Pontiac, Inc., 537 P.2d 807, 810 (**Wash. Ct. App.** 1975). In Wilson v. Norfolk & Western Railway Co., 32 BRBS 57 (1998), the Board stated:

> The election of remedies doctrine precludes a litigant from pursuing a remedy which, in a prior action, he rejected in favor of a simultaneously available alternative remedy. Landry v. Carlson Mooring Service, 643 F.2d 1080, 1087, 13 BRBS 301, 306-307 (**5th Cir.** 1981). The doctrine of election of remedies "refers to situations

> where an individual pursues remedies that are legally or factually inconsistent." Dionne v. Mayor and City Council of Baltimore, 40 F.3d 677, 681 (**4th Cir.** 1994), citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974). Generally, the doctrine will not apply where there is no risk of double recovery. See Dionne, 40 F.3d at 681; St. Paul Fire & Marine Insurance Co. v. Vaughn, 779 F.2d 1003, 1010 (**4th Cir.** 1985). Specifically, election of remedies does not apply to bar pursuit of simultaneous remedies under the [LHWCA] and under other statutes, such as state compensation statutes, because the [LHWCA] does not preempt such laws. Sun Ship, Inc. v. Commonwealth of Pennsylvania, 447 **U.S.** 715, 12 BRBS 890 (1980). Rather, the [LHWCA] is structured so that amounts received under another system are credited against the amount obtained under the [LHWCA]. See 33 U.S.C. § 903(e); see, e.g., Jenkins, 30 BRBS at 110-111; see generally Mungia v. Chevron U.S.A., Inc., 23 BRBS 180 at 182 (1990).

32 BRBS at 61.

The general rule of collateral estoppel is that when an issue of **ultimate fact** has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. Chavez v. Todd Shipyards Corp., 28 BRBS 185 (1994) (en banc), aff'g 27 BRBS 80 (1993), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 139 F.3d 1309 (**9th Cir.** 1998) (Prerequisite to the invocation of collateral estoppel is that the issue must previously have been necessarily and actually litigated.); Ortiz v. Todd Shipyards Corp., 25 BRBS 228 (1991); City of St. Joseph v. Johnson, 539 S.W.2d 784, 785 (**Mo. Ct. App.** 1976). In Kendall v. Bethlehem Steel Corp., 16 BRBS 3 (1983), the Board applied collateral estoppel to vacate a judge's findings regarding the same claimant and covering the same period of time which the Board had affirmed.

Res judicata (claim preclusion) and collateral estoppel (issue preclusion) apply only after entry of a final order that terminates the litigation between the parties on the merits of the case. Firestone Tire & Rubber Co. v. Risjord, 449 **U.S.** 368, 373 (1981); St. Louis Iron Mountain & S. Ry. Co. v. Southern Express Co., 108 **U.S.** 24, 28-29 (1883). Res judicata and collateral estoppel can only be given effect when the legal standards are the same in both the previous and current jurisdictions. Wilson v. Norfolk & Western Railway Co., 32 BRBS 57 (1998). See also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 8 BRBS 723 (**4th Cir.** 1978), cert. denied, 440 **U.S.** 915 (1979); Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

In Wilson, the claimant was a railroad brakeman who was injured and sought benefits under the Federal Employee's Liability Act. The Board affirmed the ALJ's findings that the claimant's request for LHWCA benefits for the same injury was not barred under the doctrines of res judicata, full faith and credit, or election of remedies. Wilson, in part, stated:

> ...It is axiomatic that the standards for establishing recovery under the FELA, which provides a negligence cause of action for railroad employees, and the [LHWCA], a workers' compensation scheme, are distinct. See 33 U.S.C. § 901 et seq.; 45 U.S.C.

§§ 51-60; see, e.g., Barlow, 20 BRBS at 181. In addition, it is well-established that relitigation of an issue or claim will only be precluded in a second case where the parties or their privies had a full and fair opportunity to litigate the claim or issue. See In re Raynor, 922 F.2d 1146 (**4th Cir.** 1991); Chavez v. Todd Shipyards Corp. v. Director, OWCP, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP, 139 F.3d 1309 (**9th Cir.** 1998)); Ortiz v. Todd Shipyards Corp., 25 BRBS 228 (1991); Kollias v. D & G Marine Maintenance, 22 BRBS 367 (1989), rev'd on other grounds, 29 F.3d 67, 28 BRBS 70 (CRT) (**2d Cir.** 1994), cert. denied, 513 **U.S.** 1146 (1995). In the instant case, the parties never actually litigated the FELA action, but, rather, settled the case before it came to trial. Even if the FELA case had been litigated, however, as the standards for establishing entitlement under FELA and the [LHWCA] are different, the issues regarding entitlement to benefits under the [LHWCA], such as causation and nature and extent of disability, could not have been litigated in the prior case. See, e.g. Figueroa v. Campbell Industries, 45 F. 3d 311 (**9th Cir.** 1995) (recovery under Act failed to bar Jones Act action under collateral estoppel doctrine where jurisdictional issue not previously litigated). Thus, as employer has failed to establish an identity of the two causes of action, the second element in establishing res judicata, the doctrine of res judicata does not bar claimant from bringing his claim under the [LHWCA].

32 BRBS 59-60.

[ED. NOTE: *For a discussion/explanation of res judicata as to non-pending (final) cases involving the 33(g) issue and the meaning of the citation to Pittston Coal Group v. Sebben, 488* ***U.S.*** *105 (1988), in Estate of Cowart v. Nicklos Drilling Co., 505* ***U.S.*** *469, 26 BRBS 49 (CRT) (1992), see Kaye v. California Stevedore & Ballast, 26 BRBS 606 (ALJ) (1993).**]***

Moreover, *res judicata* and collateral estoppel apply to an administrative agency acting in a judicial capacity resolving disputed issues of fact properly before it, which issues the parties have had an adequate opportunity to litigate. United States v. Utah Constr. & Mining Co., 384 **U.S.** 394 (1966).

Although a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction in a subsequent claim, Shea v. Texas Employers' Insurance Association, 383 F.2d 16 (**5th Cir.** 1967), the question of state court jurisdiction is simply not relevant in a subsequent claim pursued under the LHWCA. See generally A. Larson Workmen's Compensation Law §§ 89.53(b) and (c) (1990); Simpson v. Director, OWCP, 681 F.2d 81, 14 BRBS 900 (**1st Cir.** 1982), vac'g and remanding Simpson v. Bath Iron Works Corp., 13 BRBS 970 (1981), cert. denied, 459 **U.S.** 1127 (1983).

An employer is not estopped from raising the jurisdictional issue by virtue of its voluntary payment of benefits. Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990). The

Board in Hall reasoned that an employer may institute the voluntary payment of benefits even if it does not believe the claim is compensable, and thereby eliminate its liability for a Section 14(e) assessment, 33 U.S.C. § 914(e), and attorney's fees, 33 U.S.C. § 928, in the event that the claimant is found to be entitled to benefits.

[ED. NOTE: *An employer could easily eliminate its liability for a Section 14(e) assessment by timely controverting the claim.****]***

In Kelaita v. Triple A Machine Shop, 17 BRBS 10 (1984), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (**9th Cir.** 1986), the Board held that the ALJ's original finding that the later employer was not responsible for the claimant's injury was not *res judicata* because it was based on an erroneous application of law. On remand, however, the judge may consider intervening changes in the law in complying with the Board's mandate. See generally White v. Murtha, 377 F.2d 428, 431-32 (**5th Cir.** 1967); Thornton v. Brown & Root, Inc., 23 BRBS 75, 77 (1989).

In Thomas v. Washington Gas Light Co., 448 **U.S.** 261, 12 BRBS 828 (1980), a four-member plurality of the **United States Supreme Court** held that the full faith and credit clause does not preclude successive compensation awards. The **Court** considered the different interests affected by the potential conflicts between the two jurisdictions from which the claimant sought compensation and concluded that Virginia had no legitimate interest in preventing the District of Columbia from granting a supplemental award to a claimant who had been granted a Virginia award, where the District would have had the power to apply its workers' compensation law in the first instance.

Three justices concurred in the result of the plurality, but relied on the rationale of Industrial Commission of Wisconsin v. McCartin, 330 **U.S.** 622 (1947). The rule of McCartin permitted a state, by drafting its statute in "unmistakable language," to preclude an award in another state. The concurrence found that the Virginia statute lacked the "unmistakable language" required to preclude a subsequent award in the District of Columbia.

In Sun Ship, Inc. v. Pennsylvania, 447 **U.S.** 715 (1980), the **Supreme Court** held that state and LHWCA jurisdiction may run concurrently in areas where state law constitutionally may apply.

Following Thomas, the Board held that an award of compensation under the Virginia Workers' Compensation Act did not operate as a bar to a supplemental award based on the same injury under the District of Columbia Workmen's Compensation Act (DCW). Murphy v. Honeywell, Inc., 12 BRBS 856 (1980). See also Dixon v. John J. McMullen & Assocs., Inc., 13 BRBS 707 (1981) (three-opinion decision holding that neither the full faith and credit clause nor the doctrines of collateral estoppel and election of remedies barred a longshore claim brought subsequent to a settlement agreement under a state workers' compensation statute).

In Landry v. Carlson Mooring Service, 643 F.2d 1080, 13 BRBS 301 (**5th Cir.** 1981), rev'g 9 BRBS 518 (1978), cert. denied, 454 **U.S.** 1123 (1981), the court, citing Thomas and McCartin, held that the full faith and credit clause did not prevent a claimant, who had a judicially-approved

settlement under the Texas workers' compensation statute, from asserting a claim under the LHWCA. The claimant would, however, have to credit his state benefits against any recovery under the LHWCA. Election of remedies was held inapplicable in the absence of an indisputable state declaration precluding pursuit of a subsequent longshore claim.

Similarly, in Simpson v. Director, OWCP, 681 F.2d 81, 14 BRBS 900 (**1st Cir.** 1982), rev'g on other grounds Simpson v. Bath Iron Works Corp., 13 BRBS 970 (1981), cert. denied, 459 **U.S.** 1127 (1983), the court held that a state court award did not collaterally estop the claimant from bringing a claim under the LHWCA. The court held that although a state court opinion could collaterally estop a litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was not relevant under the federal act. That Congress authorized federal compensation for all injuries to employees on navigable waters was to be accepted regardless of what a particular claimant recovered under state law. The court held further that *res judicata* was inapplicable since claims under the LHWCA may not be pressed in state court.

In Jenkins v. McDermott, Inc., 734 F.2d 229, 16 BRBS 102 (CRT), on reh'g, vacated, in part, 742 F.2d 191 (**5th Cir.** 1984), a tort suit, the court held that where the LHWCA and the state workers' compensation law were concurrently applicable, but nothing in the record indicated that claimant had elected his state benefits over the federal remedy, the district court could not grant summary judgment to a third party defendant on the basis of a provision of the state statute barring claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the LHWCA's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs state, was the only jurisdiction whose workers' compensation law barred recovery against employer's principals.

On rehearing, the court vacated its earlier opinion insofar as it reversed the district court's summary dismissal of the claimant's negligence and strict liability claims against the employer's principal. The court noted that the **United States Supreme Court's** decision in Washington Metropolitan Area Transit Authority v. Johnson, 467 **U.S.** 925 (1984), cast doubt on its previous holding that under the LHWCA, the principal had no immunity from a tort suit by an employee of its contractor. Jenkins v. McDermott, Inc., 742 F.2d 191, 16 BRBS 140 (CRT) (**5th Cir.** 1984) (On Petitions for Rehearing and Suggestions for Rehearing En Banc).

[ED. NOTE: *In view of the foregoing discussion, it is apparent that the doctrine of election of remedies is without much force in LHWCA cases. The* ***Supreme Court*** *in McCartin and Thomas left no doubt that in the absence of some explicit language in a state statute prohibiting subsequent recoveries, the claimant may seek benefits under the LHWCA subject to credit for benefits paid under the state statute. The Board expanded this concept in the Dixon decision indicating election of remedies did not apply when the remedies available were concurrent and consistent. The* ***full faith and credit clause*** *of the Constitution seems to have received the same treatment. The* ***Supreme Court*** *in the Thomas decision stated the full faith and credit clause does not require a state to subordinate its own compensation policies to those of another state.****]***

Section 22 Modification Proceedings

Traditional notions of res judicata do not govern Section 22 modification proceedings, which may be brought whenever changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the LHWCA. Bath Iron Works Corp. v. Director, OWCP [Hutchins], 244 F.3d 222 (**1st Cir.** 2001). The ALJ in considering the record of a claimant's medical and employment history, thus has broad discretion to revisit issues already decided and, if appropriate, to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

85.2 EFFECT OF PRIOR STATE PROCEEDING ON A SUBSEQUENT FEDERAL CLAIM

The **general rule** is that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties to the litigation and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. For the rule to be applicable, there must be identity in the thing sued for, as well as identity of the cause of action, of persons and parties to the action, and of quality in persons for or against whom the claim is made. In summary, the rule is that "a matter once judicially decided is finally decided." Massie v. Paul, 263 Ky. 183, 92 S.W.2d 11, 14 (**Ky.** 1936).

As indicated in the preceding section, the doctrine of collateral estoppel, a corollary of the general principle of *res judicata* (which applies when a second suit between the same parties is on the same cause of action), is applicable where the second action between the same parties is upon a different claim or demand. Cromwell v. County of Sac, 94 **U.S.** 351 (1877). As the **United States Supreme Court** explained in Commissioner of Internal Revenue v. Sunnen, 333 **U.S.** 591, 598 (1948), "In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

In Chicago, R. I. & P. Ry. Co. v. Schendel, 270 **U.S.** 611 (1926), the **Supreme Court** held that an Iowa state compensation award, grounded in a contested factual finding that the deceased railroad employee was engaged in **intrastate** commerce, precluded a subsequent claim under the Federal Employer's Liability Act (FELA) brought in the Minnesota courts (the FELA requiring a finding that the employee was engaged in interstate commerce). The **Supreme Court** in Thomas observed that Schendel involved the "unexceptional full faith and credit principle that resolutions of factual matters underlying a judgment must be given the same ***Res Judicata*** effect in the forum state as they have in the rendering state." Thomas, 448 **U.S.** at 261.

In Campbell Industries v. Benefits Review Board, 33 BRBS 129 (CRT) (**9th Cir.** 1998) (Unpublished), the court held that collateral estoppel prevented a claimant from relitigating disability where the same issue had already been addressed at the State of California Workers' Compensation Appeals Board (WCAB). The court first questioned whether the California proceeding was final since the WCAB has a five-year continuing jurisdiction over its decisions. While the claimant's motion to reopen in the state proceedings came one month before the five years had elapsed, the court found the WCAB matter to be final since there is no duty on the part of the state agency to process a motion to reopen until the claimant files a Declaration of Readiness that the claimant is ready to proceed. "Therefore, we cannot assume that the motion to reopen is actively pending before the state board by virtue of the mere filing of the motion, in the absence of any indication that the claimant wishes to pursue the claim." 33 BRBS at 130 (CRT). See also Azadigian v. W.C.A.B. (1992) 7 Cal. App. 4th 372 [8 Cal. Rptr. 2d 643, 57 Cal. Comp. Cases 391] (Holds, a WCAB decision is final unless the claimant both files a motion for reopening and shows good cause for the reopening to the board within the five-year period.).

Where there is substantial variance between the burdens of proof required of claimant in two separate proceedings for the same injuries, application of collateral estoppel is precluded. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 8 BRBS 723 (**4th Cir.** 1978), cert. denied, 440 **U.S.** 915 (1979); Young & Co. v. Shea, 397 F.2d 185 (**5th Cir.** 1968), cert. denied, 395 **U.S.** 920 (1969); Casey v. Georgetown University Medical Center, 31 BRBS 147(1997)(A district court's rejection of a wrongful death claim did not collaterally estop a claim under the LHWCA; although the parties involved and burdens of production and persuasion were the same in the two cases, the ALJ "has greater latitude in admitting expert evidence than did the district court" such that collateral estoppel was inapplicable.).

Where the state and federal tribunals differed as to extent of disability and commencement of benefits and where claimant did not show that the standards for establishing extent of impairment and commencement of benefits under the state tribunal were identical to those under the LHWCA, the Board held that the judge was not bound by the doctrines of full faith and credit and collateral estoppel. Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

In Barlow, the claimant, an asbestos insulator for several years, subsequently developed respiratory problems and in 1985 was awarded benefits by the state board "for permanent 100 percent disability due to asbestos-related lung disease commencing on January 1, 1972." The claimant filed a claim under the LHWCA and argued before the judge "that the proceedings were controlled by the findings of the California Board under the doctrines of collateral estoppel and full faith and credit." The judge, rejecting the claimant's thesis, found claimant to be suffering from a permanent 50 percent respiratory impairment due to work-related asbestosis commencing on March 30, 1984.

The Board, in Barlow, stated as follows:

> In rejecting the application of the doctrines of collateral estoppel and full faith and credit in this case, the administrative law judge concluded that there was 'no authority for the principle that a decision of compensability under a State Act compels a similar finding before this federal tribunal.' Decision and Order at 2 n.2. Contrary to the administrative law judge's conclusion, **factual** findings of a state administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals. Thomas v. Washington Gas Light Co., 448 **U.S.** 261, 12 BRBS 828 (1980); Smith v. ITT Continental Baking Co., 20 BRBS 142 (1987). The administrative law judge's error is harmless, however, as extent of disability and commencement of benefits are mixed questions of fact and law, and collateral estoppel effect can only be given to such questions when the legal standards are the same in the two jurisdictions. See Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP, 583 F.2d

1273, 8 BRBS 723 (**4th Cir.** 1978), cert. denied, 440 **U.S.** 915 (1979).

Barlow, 20 BRBS at 180-81. The Board affirmed the award of benefits and the commencement date as "there are no earlier diagnoses or findings of permanent pulmonary impairment to support an earlier onset date." Id. at 183.

In Kollias v. D & G Marine Maintenance, 22 BRBS 367 (1989), the Board held that the claimant's Jones Act suit did not include litigation of the situs issue at the district court trial, nor was a finding of situs necessary to the district court's judgment and its affirmation by the court of appeals. Accordingly, employer was not collaterally estopped from contesting coverage before the judge. The claimant, who was hired to repair the starboard anchor windlass, was injured on board the T.T. WILLIAMSBURGH while the vessel was in the Yucatan Channel, approximately 1500 miles from the United States mainland. The Jones Act claim was denied as the "jury returned a special verdict that claimant was not entitled to benefits under the Jones Act because he was a maritime repairman rather than a seaman and that the ship owners were not negligent. The **Second Circuit** affirmed without opinion. Spyridon Kollias v. Bay Tankers, Inc., 742 F.2d 1441 (**2d Cir.**), cert. denied, 469 **U.S.** 1073 (1984).

The claimant then filed a timely claim under the LHWCA and the sole issue at the hearing was situs, as the parties stipulated that claimant was entitled to appropriate compensation either under the LHWCA, if he satisfied the situs test, or under New York law, if his claim under the LHWCA was denied. The judge denied benefits as the situs requirement of Section 3(a) was not satisfied.

On appeal to the Board, the claimant argued that the judge erred in addressing the situs issue as the **Second Circuit** found coverage under the LHWCA in affirming the district court's decision that claimant did not have a remedy under the Jones Act because he was a maritime repairman.

The Board, in affirming denial of the claim, held:

> Collateral estoppel may be applicable when a prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the prior action. See Parklane Hosiery Co., Inc. v. Shore, 439 **U.S.** 322, 326 n.5 (1979). The claimant's Jones Act suit necessarily raised the issue of his employment status as either a seaman or member of a crew within the coverage of the Jones Act, or as a ship repairman potentially covered under the LHWCA. See 33 U.S.C. § 902(3). Coverage under the LHWCA, however, requires a finding of both status as a covered employee and situs. See also 33 U.S.C. § 903(a). **Situs was never litigated at the district court trial**, nor was a finding of situs necessary to the district court's judgment and its

> affirmance by the **Second Circuit**. Accordingly, employer was not collaterally estopped from contesting coverage before the judge.

Kollias, 22 BRBS at 369-70 (emphasis added).

In Bath Iron Works Corp. v. Director, OWCP, 125 F.3d 18 (**1st. Cir.** 1997), the **First Circuit** held that the ALJ should have given collateral estoppel effect to an earlier determination by the State of Maine workers' compensation commission that a June 1987 injury had no lasting effect on claimant's condition. The **First Circuit** noted that, although "federal and Maine law deal somewhat differently with cases where a later job-related injury aggravates an earlier one," the difference "has no apparent logical bearing on the factual question of whether the June 1987 event caused permanent injury."

However, compare the above case with Plourde v. Bath Iron Works Corp., 34 BRBS 45 (2000) where the Board denied collateral estoppel in a disability/residual working capacity case. In Plourde, a worker filed a LHWCA claim after his benefits under the Maine workers' Compensation Act were reduced. Under the Maine scheme, either the employer or the worker may petition for a review of incapacity (i.e. total disability) previously determined by degree or agreement, on the ground that the claimant's incapacity has subsequently been increased, diminished or eliminated. Under the Maine scheme, the employer-movant must establish through medical evidence that the employer has regained the physical capacity to perform some work. The state law required that the employer show initially only that the claimant is no longer physically totally disabled and has acquired an earning capacity based, in most cases, solely on medical evidence.

The Board found that this burden under the state law is not comparable to the employer's burden under the LHWCA. Once a claimant has shown his inability to return to his usual work under the LHWCA, the burden shifts to the employer to establish the availability of suitable alternate employment. It is manifestly insufficient under the LHWCA for the employer to show merely that the claimant has some capacity to work or that the claimant can perform certain tasks. The employer must show the realistic availability of suitable alternate employment under the LHWCA. The employer's initial burden under the Maine Act, that of coming forward with nothing more than medical evidence evincing an ability to work, therefore is significantly lighter than that required under the LHWCA (to meet its burden of establishing suitable alternate employment under the LHWCA, employer must provide evidence of actual positions, either at its facility or on the open market, that the claimant can perform, given his age, education, vocational background and physical restrictions).

In addition, in Plourde, the Board found that the state burden on a claimant is greater than that required under the LHWCA. Under the Maine law, once the employer establishes a claimant's physical capacity to work, the claimant must show that work is unavailable to him within his restrictions in order to retain total disability benefits or to obtain a large partial disability award. Although a claimant under the LHWCA bears a complementary burden of establishing reasonable diligence in attempting to secure alternate employment, this burden does not arise until employer's

burden of establishing suitable alternate employment is satisfied. In Plourde, the Maine authorities found that the claimant did not meet his burden of production on the work search issue. Under the LHWCA, however, this burden would not arise in the absence of credited evidence of suitable alternate employment.

In Neely v. Benefits Review Board, 139 F.3d 276 (**1st Cir.** 1998), 32 BRBS 73 (CRT) (1998), the claimant had been fully compensated for temporary disability as well as medical benefits under the Maine workers' compensation laws. The claimant, however, sought a declaratory ruling from an ALJ that there was LHWCA coverage. The First Circuit held that there was a "live" controversy under Article III of the Constitution and that the ALJ could issue a declaratory ruling. The court particularly noted that, on remand, the claimant should make a showing of significant possibility of further disability or need for medical treatment before obtaining such a ruling.

85.3 FEDERAL/STATE CONFLICTS

It is well-settled that federal **pre-emption** in a given area "may be either express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 **U.S.** 519, 525 (1977), and "absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta, 458 **U.S.** 141, 153 (1982).

"Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises ... when state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Id. In order to find such an actual conflict for this latter purpose, it is not necessary that compliance with both state and federal law be impossible. Id. Federal regulations have no less pre-emptive effect than federal statutes. Id.

In Atkinson v. Gates, McDonald & Co., 838 F.2d 808, 812 (**5th Cir.** 1988), the **Fifth Circuit** held that state law claims are pre-empted because of the "pervasiveness of the LHWCA treatment of the payment of compensation due, and the conflict therewith which necessarily flows from any state penalty scheme respecting failure to pay LHWCA benefits which differs from the scheme of the LHWCA itself." Moreover, "when the LHWCA provides that there shall be a ten percent penalty on all required pre-award payments not made when due, except where circumstances beyond the employer's control precluded payment, it likewise inferentially, but nonetheless plainly, also provides that the penalty shall not be any different amount. ..." Id. at 812.

Thus, as the LHWCA provides for a 10 percent penalty on all required pre-award payments not made when due, any state statute or regulation providing that the employer or carrier shall not be liable for any penalties or interest conflicts with the federal act and is pre-empted by the LHWCA.

In Thibodeaux v. Thibodeaux, 454 S.2d 813, 16 BRBS 142 (CRT) (**La.** 1984), the Supreme Court of Louisiana reversed the ruling of the civil District Court of the Parish of Orleans and held that a wife could not have her husband's LHWCA payments garnished for past-due child support since it was Congress' intent that the disability benefits should go to the disabled worker directly without any attachments. The Court held that to have allowed the wife to garnish these benefits would have required carving out a jurisprudential exception to Congress' anti-attachment clause of Section 16 which the strong language of the LHWCA does not permit.

The Louisiana Court further pointed out, "Notwithstanding the limited application of federal law in the field of domestic relations generally, the Supremacy Clause protects rights and expectancies established by federal law and prevents the frustration and erosion of the congressional policy embodied in the federal rights." Thibodeaux, 16 BRBS at 143 (CRT) (citing Ridgway v. Ridgway, 454 **U.S.** 46 (1981)).

Thus, in Thibodeaux, a state divorce decree, like other laws governing the economic aspects of domestic relations, gave way to clearly conflicting federal enactments. Id. at 143 (CRT). See also Ridgway, 454 **U.S.** 46 (servicemen's life insurance).

[ED. NOTE: Benefits received under the LHWCA and paid by the United States government, i.e., the Longshore Trust Fund, appear to be garnishable for purposes of child support and alimony. *See 5 C.F.R. §§ 581.101-103, especially 5 C.F.R. § 581.103(c)(5) which specifically lists "Benefits received under the Longshoremen's and Harbor Workers' Compensation Act." Section 5 C.F.R. § 581.101 et seq. was enacted to implement the objectives of 42 U.S.C. 659 and 666(a)(1) and (b), to make the United States or the District of Columbia subject to legal process brought for the enforcement of an individual's legal obligations to provide child support and/or to make alimony payments.*

This regulation seemingly carves out an ***exception to Section 16*** *of the LHWCA. Thus, a distinction can be drawn between compensation benefits payable by an employer/carrier and compensation benefits payable by the Trust Fund. Only the latter benefits would be garnishable. There are currently no reported cases on this issue.**]***

In Jenkins v. McDermott, Inc., 734 F.2d 229, 16 BRBS 102 (CRT) (**5th Cir.** 1984), where the LHWCA and the state workers' compensation law were concurrently applicable, but nothing in the record indicated that the claimant had elected his state benefits over the federal remedy, the **Fifth Circuit** held that it was error for the district court to grant summary judgment to a third party defendant on the basis of a provision of the state statute barring claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the LHWCA's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs state, was the only jurisdiction whose workers' compensation law barred recovery against statutory employers.

Shortly thereafter, the **Fifth Circuit** granted petitions for panel rehearing and vacated its earlier panel opinion insofar as it reversed the summary judgment dismissing the plaintiff's negligence and strict liability claims against the employer. The court also vacated the district court's summary judgment in this regard and remanded to the district court for further proceedings on these claims. Jenkins v. McDermott, Inc., 742 F.2d 191, 16 BRBS 140 (CRT) (**5th Cir.** 1984) (On Petitions for Rehearing and Suggestions for Rehearing En Banc).

In Harmon v. Baltimore & Ohio Railroad, 741 F.2d 1398, 16 BRBS 125 (CRT) (**D.C. Cir.** 1984), aff'g 560 F. Supp. 914 (1983), the claimant was employed by the employer at its coal pier in Baltimore. He was injured while repairing a hopper, or funnel, through which coal passes as it moves from railroad cars to the holds of barges and ships. Subsequently, the claimant applied for, and received, benefits under the LHWCA.

Thereafter, the claimant also brought suit under the Federal Employer's Liability Act (FELA), contending that his injuries resulted from the employer's negligence. The sole dispute is whether the

LHWCA provides the exclusive remedy for claimant's injury. The district court, answering the question in the affirmative, granted employer's motion for summary judgment. The **District of Columbia Circuit**, in affirming the lower court, agreed that the LHWCA was the claimant's exclusive remedy where the claimant, at the time of his injury, was repairing and maintaining equipment used in the loading of ships, an indisputable maritime activity. The court therefore found that he satisfied the status test of the LHWCA. The fact that the claimant also performed some railroad tasks did not preclude his work from constituting maritime employment.

Moreover, the court rejected the claimant's contention that only an express repeal by Congress of the pre-existing FELA coverage could deprive claimant of FELA coverage, since the authority of Congress to change such coverage, whether by direct amendment of FELA or by expanding coverage under the LHWCA, was beyond the challenge the claimant sought to make. Furthermore, the court found no tension between the holdings that overlap is permissible between the LHWCA and state compensation schemes, and the district court's holding that coverage under the LHWCA precludes coverage under the FELA. Harmon, 16 BRBS at 133-35 (CRT).

In Artis v. Norfolk & Western Railway, 204 F.3d 141 (**4th Cir.** 2000), the **Fourth Circuit** held that a brakeman, who moved marine railcars, was barred under the doctrine of election of remedies from bringing an action under the LHECA when he had already settled a state claim against his employer under the FELA. Following his injuries, the breakman filed an action in Virginia state court under the FELA against his employer, and subsequently settled the matter. At the time of the settlement, the law of the **Fourth Circuit** had been that a brakeman's exclusive remedy against his employer was under the FELA and not the LHWCA. See Conti v. Norfolk & Western Ry. Co., 566 F.2d 890 (**4th Cir.** 1977). However, after the settlement, the law changed. The **U.S. Supreme Court** held that a brakeman was acting in a fashion that was integral or essential to the loading or unloading of a vessel and was thus covered under the LHWCA. See Chesapeake & Ohio Ry. Co. v. Schwalb, 493 **U.S.** 40 (1989). Subsequently, the breakman filed a claim for the same injuries under the LHWCA. The ALJ held that the claim was within the jurisdiction of the LHWCA and implicitly found that the FELA settlement previously entered into was not a jurisdictional bar. The ALJ gave the employer a credit for the settlement sum. The Board administratively affirmed the ALJ's opinion.

The **Fourth Circuit** held that the doctrine of election of remedies barred the breakman's LHWCA claim. The court noted that the "clearest remedial dimension of election doctrine is found in decisions that simply seek to prevent double recovery for a single injury." (Quoting 18 Wright & Miller, *Federal Practice & Procedure* § 4476 at 775 (1981)). The court concluded that "[w]hile the text cited state that the doctrine of election of remedies is not favored, in this case we are of the opinion to apply it. Because the injury in question is the same and the claims arising from the same facts; because recovery under the FELA and LHWCA rest on different substantive theories, the first on negligence, the second on a workers' compensation statute based on liability without fault; because [the breakman] proceeded entirely consistent with circuit precedent under the FELA to sue the railway and collect ... the settlement; because the later Schwalb decision was entirely fortuitous; and because, in this case, permitting first, a suit for complete recovery under the FELA, and second,

a claim under the LHWCA, would permit a double recovery for the same injuries; we are of opinion that [the breakman] elected his remedy when he prosecuted his FELA suit to judgement and the doctrine of election of remedies would bar his LHWCA claim."

In a *prior* Board case (involving the FELA) within the jurisdiction of the **Fourth Circuit**, the Board had previously held that res judicata, collateral estoppel, election of remedies and claim preclusion did not apply because these devices can only be given effect when the legal standards are the same in both the previous and current jurisdictions. Wilson v. Norfolk & Western RR Co., 32 BRBS 57 (1998). In Wilson, the Board found that the Full Faith and Credit Act does not bar the LHWCA claim since it applies only to judicial proceedings and "the Virginia dismissal order in the instant case does not appear to constitute a final judgment for purposes of the full faith and credit doctrine since the court never specifically adopted the terms of the settlement as its findings. The Board also concluded that the doctrine of election of remedies does not bar the claim since there is no risk of double recovery in that the LHWCA does not preempt state acts; rather, it is structured so that amount received under another system are credited against the amount obtained under the LHWCA.

Also noteworthy in Wilson was the Board's conclusion that since the **Fourth Circuit** has stated that one must look to the intent of the parties when a party invokes a previous consent judgment as preclusion, the Board will also scrutinize intent. In Wilson, the Board stated, "[w]hile the terms of the settlement indicate that claimant released employer from all claims which he may for personal injuries, know or unknown (sic), as a result of the November 13, 1985 (sic)...there is no evidence in the record of intent to preclude a claim under the Act.: The Board further stated that "assuming such an intent existed, the settlement could not preclude the claimant's claim under the Act, as Section 15(b) of the Act, 33 U.S.C. § 915(b), invalidates any agreement which waives a claimant's right to compensation under the Act."

***[ED. NOTE:** While it is clear that as to FELA cases, the Board will follow Artis in the **Fourth Circuit**, it remains to be seen what position the Board will take elsewhere.]*

Where a case involved a claim under a state act and a subsequent claim under the LHWCA, the Board held that the sole responsibility for the claimant's injury rested upon the employer, pursuant to the LHWCA, since the state statute excluded from coverage workers covered under the LHWCA. McDougall v. E.P. Paup Co., 21 BRBS 204 (1988). Thus, there was no conflict between Section 3(e) of the LHWCA and the state statute since concurrent state and federal jurisdiction did not exist. Furthermore, double recovery was precluded because the state statute required reimbursement of any state benefits paid to a claimant prior to the final determination of coverage under the LHWCA. Accordingly, the Board affirmed the judge's order that the employer reimburse the state for all compensation paid to the claimant by the state on the employer's behalf. McDougall, 21 BRBS at 209-10.

The actions of a state department of labor and industries administrator in rejecting state coverage based on alleged LHWCA jurisdiction, cannot be imputed to the employer in a LHWCA

claim. Mellin v. Marine World-Wide Services, 32 BRBS 271(1998). In Mellin, a claimant sought workers' compensation under both the state system and the LHWCA. He was denied state coverage, but on the advice of his parent, did not appeal the denial because he thought it would be covered under the LHWCA. The LHWCA claim was subsequently denied for lack of jurisdiction. The Board agreed with the ALJ, that the actions of the state administrator could not be imputed to the employer since the employer has no private "state carrier" and its participation in the state fund is mandatory. State worker's compensation benefits are paid by a fund, rather than under an insurance policy. The Board found that the state department of labor and industries is not an insurer, and has no identity of interest with the employer.

The Board noted that the employer had not taken any action tantamount to stipulating to coverage and that federal courts are courts of limited jurisdiction, jurisdiction that is otherwise lacking cannot be conferred by consent, collusion, laches, waiver, or estoppel. The Board went further to note that, even if it were possible to confer jurisdiction based on equitable principles, the doctrine of collateral estoppel would not be applicable on the facts presented because the issue of jurisdiction under the LHWCA was not actually litigated at the state level in this case. Equitable estoppel was similarly unavailable sine the claimant's own testimony established that it was his parent, rather than employer, who advised him incorrectly not to appeal or pursue the state decision.

In Smith v. Sealand Terminal, Inc., 14 BRBS 844 (1982), the Board resolved the issue of a claimant's status as decedent's widow according to state domestic relations law, contrary to prior Board holdings, since Smith arose within the jurisdiction of the **Fifth Circuit**, where the Board's "conjugal nexus" test for receiving death benefits under the LHWCA has been expressly rejected in Ryan-Walsh Stevedoring Co., Inc. v. Trainer, 601 F.2d 1306, 10 BRBS 852 (**5th Cir.** 1979), aff'g and rev'g in part 8 BRBS 59 (1978). In Smith, the Board held that since the employer failed to rebut the state law presumption of the termination of the claimant's prior marriage and the validity of the claimant's subsequent marriage to the decedent, the judge properly found that the claimant was a "widow" within the meaning of Section 2(16) of the LHWCA.

85.4 ACCEPTANCE OF PAYMENTS UNDER STATE ACT

In Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46, 55 (1990), the Board held that the judge was bound to honor the contractual agreements of the third-party settlement regarding apportionment which were approved by a judge of the California Workers' Compensation Appeals Board and that his failure to do so violated the full faith and credit clause of the United States Constitution. See generally Thomas v. Washington Gas Light Co., 448 **U.S.** 261, 12 BRBS 828 (1980).

In Hartman v. Avondale Shipyard, Inc., 23 BRBS 201 (1990), the Board reversed the judge's finding that the claimant's settlement of his 1980 state claim precludes his claim for **that injury** under the LHWCA.

Moreover, in Munguia v. Chevron U.S.A., Inc., 23 BRBS 180 (1990), the Board rejected the employer's argument that the claimant's claim is barred by the doctrine of election of remedies based on the claimant's award under the Louisiana statute. According to the Board, "the election of remedies doctrine precludes a litigant from pursuing a remedy which, in a prior action, he rejected in favor of a simultaneously available alternative remedy." Landry v. Carlson Mooring Serv., 643 F.2d 1080, 1087, 13 BRBS 301, 306-07 (**5th Cir.**), cert. denied, 454 **U.S.** 1123 (1981).

Generally, the doctrine does not apply to bar the pursuit of simultaneous remedies under the LHWCA and under state compensation statutes because the LHWCA does not preempt state compensation laws. Sun Ship, Inc. v. Pennsylvania, 447 **U.S.** 715, 12 BRBS 890 (1980). Rather, the LHWCA and state compensation statutes are structured so that amounts received under one system are credited against the amount obtained under the other. Id. at 719-26, 12 BRBS at 891-94; see also 33 U.S.C. § 903(e).

The Board rejected the employer's reliance "on a line of cases which hold that if a state compensation statute contains "unmistakable language" making its remedy exclusive, full faith and credit precludes another state from granting a successive award based on the same injury under its own compensation statute. See Thomas v. Washington Gas Light Co., 448 **U.S.** 261, 12 BRBS 828 (1980); Industrial Comm'n v. McCartin, 330 **U.S.** 622 (1947); Magnolia Petroleum Co. v. Hunt, 320 **U.S.** 430 (1943), overruled by Thomas v. Washington Gas Light Co., 448 **U.S.** 261 (1980); Landry, 643 F.2d at 1085, 13 BRBS at 304-05. The employer contended that Section 23:1225(D) of the Louisiana compensation statute, La. Rev. Stat. § 23:1225(D), contains just such language, and that the claimant, having elected the state remedy, is not entitled to benefits under the LHWCA. Munguia, 23 BRBS at 183.

The Board, in rejecting the employer's thesis, held:

> Employer's reliance on Section 23:1225(D) is misplaced. Even assuming, arguendo, that the provision contains the requisite 'unmistakable language,' it cannot be read so as to preclude claimant's recourse to the Act, as federal preclusion preempts the state

> exclusivity clause. See Sun Ship, Inc., 447 **U.S.** at 724 n.6, 12 BRBS at 893 n.6. Thus, we hold that claimant's receipt of a final award under the Louisiana statute does not bar his right to recovery under the Act. Our holding is buttressed by the fact that Congress amended the Act in 1972 to assure a certain federal standard of benefits in the face of the paucity of state benefits and concurrent jurisdiction promotes rather than hinders that objective. Id. 447 **U.S.** at 723, 12 BRBS at 893-894. In addition, in 1984 Congress amended the Act to provide explicitly for the crediting of amounts received under a state compensation statute against an award under the Act. See 33 U.S.C. § 903(e) (Supp. V 1987). This clearly indicates that Congress contemplated simultaneous recoveries under the Act and state compensation statutes. Accordingly, employer's motion to dismiss is denied.

Munguia, 23 BRBS at 184 (footnotes omitted) (emphasis added).

Where an employer failed to establish that a claimant had the same burden of proof under the state and federal statutes for establishing causation and where the state's finding was stated in summary fashion, without any indication whether its determination represented a legal conclusion or factual findings, the state's summary conclusion did not bar a subsequent claim and a finding of causation under the LHWCA. Thus, the Board held that the judge did not err by failing to give full faith and credit to the state commissioner's findings in Smith v. ITT Continental Baking Co., 20 BRBS 142 (1987).

In Smith, the state claim had been denied because "claimant did not sustain an accident arising out of or from the course of his employment." In the subsequent claim, filed timely under the LHWCA, the Board rejected the employer's argument that the denial by the state commission was *res judicata* and entitled to full faith and credit in the District of Columbia workers' compensation proceeding.

In Dixon v. John J. McMullen & Associates, 13 BRBS 707 (1981), the claimant had settled his claim under the state act and the settlement was approved by the state commission. Thereafter, the employer argued that the subsequent claim filed by claimant under the LHWCA was barred by *res judicata*, election of remedies, collateral estoppel and the full faith and credit clause of Article IV of the United States Constitution.

The Board, relying upon Sun Ship, Inc. v. Pennsylvania, 447 **U.S.** 715 (1980), and Thomas v. Washington Gas Light Co., 448 **U.S.** 261 (1980), held that the claim was not barred because although the approved settlement agreement had the force of a final adjudication under state law, it was effective only to the extent of the facts agreed upon by the parties and the conditions considered which formed the basis for the compensation agreement. Thus, the Board held that collateral

estoppel does not apply to an agreement where matters were not **actually** litigated or adjudicated before the state commission.

Moreover, the Board held that where the remedies available under the state statute and the LHWCA were not inconsistent, the claim was not barred under the LHWCA, the Board noting that in Sun Ship the **Supreme Court** held that a state may apply its workers' compensation scheme to land-based injuries also covered by the LHWCA, i.e., that state and federal jurisdiction is concurrent in such cases. Dixon, 13 BRBS at 710-11.

Furthermore, in Thomas, the **Court** held that even a state award under an act with a clause excluding any other recovery "at common law or otherwise" did not preclude an award under the federal District of Columbia Workmen's Compensation Act (DCW). In Thomas, the plurality opinion reasoned that a state has no legitimate interest, within the context of the federal system, in preventing another state from granting a supplemental award when the second state would have had the power to apply its worker's compensation law in the first instance, as long as a credit is given for the prior payments to prevent double recovery. Dixon, 13 BRBS at 711.

85.4.1 Credit for Sums Paid Under State Act (See also Topic 3.4 [Credit for Prior Awards], supra)

Section 3(e) of the LHWCA provides:

> **Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.**

33 U.S.C. § 903(e).

85.4.2 Employer Credit

It is now well-established that the claimant can obtain concurrent state and Federal awards payable by the same employer for the same injury, so long as the employer receives a credit to avoid double payment to the claimant. See generally Sun Ship, Inc. v. Pennsylvania, 447 **U.S.** 715, 12 BRBS 890 (1980); see also Landry v. Carlson Mooring Serv., 643 F.2d 1080, 13 BRBS 301 (**5th Cir.** 1981), rev'g 9 BRBS 518 (1978), cert. denied, 454 **U.S.** 1123 (1981). This proposition was codified in Section 3(e) of the LHWCA. 33 U.S.C. § 903(e); see Vanover v. Foundation Constructors, Inc., 22 BRBS 453 (1989), aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT) (**9th Cir.** 1991).

The LHWCA and state compensation statutes are structured so that amounts received for a work-related injury under one system are credited against the amount obtained for the same injury under the other. Munguia v. Chevron U.S.A., Inc., 23 BRBS 180, 182 (1990). Cf. Bouchard v. General Dynamics Corp., 25 BRBS 152 (CRT) (**2d Cir.** 1992) (amount paid in settlement of a petitioner's claim under a state statute was credited against her prior award under the LHWCA on the ground that the LHWCA requires that state workers' compensation awards be credited against LHWCA awards; employer was self-insured under the LHWCA but had insurance coverage for state workers' compensation claims.)

The amount of the credit shall be the actual dollar amount of the payment that was previously made to the claimant and not an amount based on the percentage of injury for which the claimant was previously compensated. Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1987), on recon., 20 BRBS 26 (1987), aff'd in pertinent part and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989).

The ALJ must issue a compensation award before the employer is entitled to a credit. Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). Moreover, the employer is entitled to a credit for all payments made to the claimant, pursuant to a state act, for the same injury for which benefits are also sought under the LHWCA, **regardless of the type of disability involved**. Garcia v. National Steel & Shipbuilding Co., 21 BRBS 314, 317 (1988).

For example, even though a claimant's award under the state act for scarring resulting from leg or hand surgery, necessitated by a work-related injury, could not be compensated under the LHWCA, as not constituting a serious facial disfigurement or as not likely to handicap claimant in seeking or retaining employment, the employer is entitled to a credit for that state scarring award against its obligation under the LHWCA as long as the scar resulted from the **same injury** being pursued under the LHWCA. Shafer v. General Dynamics Corp., 23 BRBS 212 (1990).

There is **no credit for veterans' disability benefits** received by claimant, however, since those benefits were not included in any workers' compensation law. Clark v. Todd Shipyards Corp., 20 BRBS 30 (1987). Furthermore, the credit doctrine does not apply to benefits received by a claimant under the Black Lung Benefits Act for his pneumoconiosis. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT) (**9th Cir.** 1991), aff'g Vanover v. Foundation Constructors, Inc., 22 BRBS 453 (1989).

Where a case involved a claim under a state act and a subsequent claim under the LHWCA, the Board held that the sole responsibility for the claimant's injury rested upon the employer, pursuant to the LHWCA, since the state statute excluded from coverage workers covered under the LHWCA. McDougall v. E.P. Paup Co., 21 BRBS 204 (1988). Thus, there was no conflict between Section 3(e) of the LHWCA and the state statute since concurrent state and federal jurisdiction did not exist. Furthermore, double recovery was precluded because the state statute required reimbursement of any state benefits paid to claimant prior to the final determination of coverage under the LHWCA. Accordingly, the Board affirmed the judge's order that the employer reimburse

the state for all compensation paid to claimant by the state on the employer's behalf. McDougall, 21 BRBS at 209-10.

In Bouchard, 25 BRBS 152 (CRT), the claimant first was awarded benefits under the LHWCA. Subsequently, she filed a claim under the Connecticut Workers' Compensation Act. (Connecticut provides for more generous widows' benefits than the LHWCA, see Conn. Gen. Stat § 31-306(b)(2); and also makes larger annual cost of living adjustments to those benefits.) The claimant eventually settled her widow's claim for a lump sum.

The Compensation Commissioner of Connecticut signed an order which in part reads as follows:

> Whereon, it is Ordered, Adjudged and Awarded that compliance with the Agreement shall constitute a full, final and complete settlement, accord and satisfaction of any and all claims of the claimant herein against the respondents, for benefits due the claimants under the Connecticut Workers' Compensation Act over and above the benefits being paid under the Longshore and Harbor Workers' Compensation Act, and is hereby ratified.

Bouchard, 25 BRBS at 155 (CRT). The order thus essentially stated that the widow/claimant was entitled to a state award greater than the LHWCA award and that the settlement amount was to be paid in addition to the LHWCA award.

According to the **Second Circuit**, however, the settlement stated neither of these propositions. The **Second Circuit** held that the amount paid in settlement of the widow's claim under the state statute should be credited against her prior LHWCA awards. It is noteworthy that the employer in Bouchard was self-insured under the LHWCA, but had insurance coverage for state workers' compensation claims. The court noted that this settlement could have been the result of a failure to realize the ramifications of the dual coverage. Although the issue of crediting the federal award against a state award was not at issue, the court noted that it has engaged in an **"exegesis only to alert future claimants to the pitfall"** encountered by the claimant. 25 BRBS at 160 (CRT).

85.4.3 Special Fund Credit

The Trust Fund is entitled to a Section 3(e) credit for an employer's payment of benefits under a state award and can thereby reduce its liability for compensation pursuant to Section 8(f). Stewart v. Bath Iron Works Corp., 25 BRBS 151 (1991). When an employer is paying compensation pursuant to a state award and the employer is entitled to Section 8(f) relief under the LHWCA, the plain language of Section 3(e) allows the Special Fund to credit the employer's state payments against its liability under Section 8(f). Section 3(e) provides that compensation paid pursuant to another workers' compensation statute shall be credited against "any liability" imposed by the LHWCA, not merely the employer's liability under the LHWCA.

Further support for applying the Section 3(e) credit to offset the Special Fund's liability under Section 8(f) is found in the legislative history to the 1984 Amendments to the LHWCA. Speaking in support of the Conference Report on the 1984 Amendments to the LHWCA, Congressman Erlenborn commented on congressional intent that the scope of Section 3(e) be read broadly, and he specifically stated that "[t]he offset applies, as well, to cases paid by the special fund for any purpose for which the fund is authorized to make payment under the Act." 130 Cong. Rec. H9733 (daily ed. Sept. 18, 1984) (statement of Rep. Erlenborn).

The plain language of the statute and its legislative history, therefore, clearly establish congressional intent that the Special Fund may claim a Section 3(e) credit for payments made by an employer to a claimant pursuant to a state award. Stewart, 25 BRBS 151.

85.5 "LAW OF THE CASE" DOCTRINE

The doctrine of law of the case is a matter of judicial practice:

> [T]he federal doctrine of law of the case merely expresses the practice of federal courts generally to refuse to reopen what has been decided, not a limit to their power. The doctrine embodies a salutary rule of practice that when a federal appellate court has established a rule of law for the case at bar it will not, on a successive appeal, depart therefrom in deciding the same issues, except for cogent reasons. In brief, the doctrine does not rigidly bind the appellate court, but is addressed to its good sense, and the court will depart from its prior legal pronouncements when the circumstances of the case warrant.

IB J. Moore, Federal Practice § 0.404[10], at 573-74 (2d ed. 1980).

This has long been the **Supreme Court's** view on the subject:

> In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 **U.S.** 92 100, 54 L.ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co., 198 **U.S.** 95, 99, 100, 49 L.ed. 959, 963, 25 Sup. Ct. Rep. 577; Great Western Tel. Co. v. Burnham, 162 **U.S.** 339, 343, 40 L.ed 991, 993, 16 Sup. Ct. Rep. 850.

Messenger v. Anderson, 225 **U.S.** 436, 444 (1912).

The doctrine of law of the case "does not rigidly bind a court to its former decisions, but is only addressed to its good sense." Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (**2d Cir.** 1924). See also United States v. Horton, 622 F.2d 144 (**5th Cir.** 1980); Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301 (**2d Cir.**), cert. denied, 449 **U.S.** 981 (1980). The doctrine includes consideration of the strong public policy that there be an end to litigation. United States v. United States Smelting Refining & Mining Co., 339 **U.S.** 186 (1950).

Therefore, only in exceptional circumstances will a court override its prior decision in the same case. Such "exceptional circumstances" may include substantially different evidence raised on subsequent trial, a subsequent contrary view of the law by the controlling authority, or a clearly erroneous decision which would work a manifest injustice. White v. Murtha, 377 F.2d 428 (**5th Cir.** 1967). See also Southern Ry. Co. v. Clift, 260 **U.S.** 316 (1922); Zichy v. City of Philadelphia, 590 F.2d 503 (**3d Cir.** 1979); Petition of United States Steel Corp., 479 F.2d 489 (**6th Cir.**), cert. denied,

414 **U.S.** 859 (1973); American Surety Co. of New York v. Bankers' Sav. & Loan Ass'n of Omaha, Neb., 67 F.2d 803 (**8th Cir.** 1933), cert. denied, 291 **U.S.** 678 (1934); Johnson v. Cadillac Motor Car Co., 261 F. 878 (**2d Cir.** 1919).

Because the issue of whether an employer's facility constituted a covered situs was fully considered and resolved by the Board in the prior appeal by the employer, the Board held that their decision on this issue constitutes the "Law of the Case," and therefore declined to consider this issue again. Bruce v. Bath Iron Works Corp., 25 BRBS 157 (1991); Doe v. Jarka Corp. of New England, 21 BRBS 142 (1988); Ries v. Harry Kane, Inc., 15 BRBS 460, 462 (1983); Dean v. Marine Terminals Corp., 15 BRBS 394, 399 (1983); Whitlock v. Lockheed Shipbuilding & Constr. Co., 15 BRBS 332 (1983); Morgan v. Marine Corps Exch., 14 BRBS 784, 788 (1982); McNeil v. Prolerized New England Co., 11 BRBS 576 (1979), aff'd sub nom. Prolerized New England Co. v. Benefits Review Bd., 637 F.2d 30, 12 BRBS 808 (**1st Cir.** 1980), cert. denied, 452 **U.S.** 938 (1981).

In Alexander v. Triple A Machine Shop, 34 BRBS 34(2000), the ALJ used the doctrine to give credit to an employer for settlement monies paid to the claimant by other longshore employers. Alexander had been appealed to the Board and circuit court on numerous times. In agreeing with the ALJ, the Board found the doctrine to be in effect and thus, the Board's prior determination that the employer is entitled to a credit for settlement monies paid to the claimant by other longshore employers for the same disability, as a matter of law, constitutes the law of the case.

Although the doctrine expresses the practice of courts generally to refuse to reopen what has been decided and the rule that a final judgment of the highest court is the final determination of the parties' rights, the doctrine is one of policy only and will be disregarded when compelling circumstances call for a redetermination of the determination of point of law on prior appeal, particularly where an intervening or contemporaneous change in law has occurred by overruling former decisions or establishment of new precedent by controlling authority. Ryan v. Mike-Ron Corp., 66 Cal. Rptr. 224 (**Cal. Ct. App.** 1968).

Moreover, the doctrine is merely a rule of procedure and does not go to the power of the court, and will not be adhered to where its application will result in an unjust decision. People v. Medina, 492 P.2d 686 (**Cal. Ct. App.** 1972).

Stark v. Bethlehem Steel Corp., 6 BRBS 600 (1977) involved a claim which has been the subject of at least three published decisions by the Board. The judge, in resolving a claim for benefits for work-related asbestosis, had determined decedent's average weekly wage based on decedent's last exposure to asbestos, i.e., November 1945, and not on the basis of the wages as of the date on which the disease became manifest. Stark v. Bethlehem Steel Corp., 4 BRBS 20 (ALJ) (1976). The Board, in its first decision on the appeal by the employer, reversed the judge, holding that the decedent's average weekly wage is properly determined based on the earnings for the 52-week period prior to August 1972, at which time decedent learned that his maritime employment had caused his occupational disease.

In Stark, the Board stated:

> [O]ne of the principal purposes of the Act is to replace wages lost as a result of death or disability caused by a work related injury. Normally, a worker who suffers a traumatic injury and consequent economic disability will receive compensation based upon his prior year's earnings. 33 U.S.C. § 910(a). But occupational diseases present a unique problem because of the time lag between exposure to the deleterious substance and the onset of symptoms and disability. For example, there was medical testimony in this case that it is not unusual for asbestosis to manifest itself twenty years after the date of exposure. Thus, if we were to conclude that the date of exposure is the date of injury, many occupational disease claimants would suffer a diminution in compensation rate proportionate to the rate of inflation from the date of exposure to the date of manifestation, or disability. The resulting benefits might have little relation to the claimant's lost wages and would not be sufficient to meet the current cost of living. We agree with Professor Larson that to read the word 'injury' in § 10, 33 U.S.C. § 910, to mean date of exposure is an exaltation of medieval word-worship over fairness. A. Larson's Workmen's Compensation Law, § 60.11 (1976 ed.). Furthermore, such a construction is not consonant with prior Board and Court holdings under Section 13(a), that the injury occurs when the disability becomes manifest. Urie v. Thompson, 337 **U.S.** 163 (1949); Stark v. Lockheed Shipbuilding and Construction Co., 5 BRBS 186 (1976). For those reasons we conclude that for purposes of Section 10, 33 U.S.C. § 910, the date of 'injury' is the date when the disease becomes manifest, not the date of exposure as found by the administrative law judge.

6 BRBS at 602-03.

The claim was remanded to the Office of Administrative Law Judges for further proceedings and reassigned to the original judge. The judge did not, however, follow the Board's mandate, apparently in view of the passage of the 1972 Amendments, as decedent's maritime employment ended in November 1945. The judge determined that the date of injury for a claim under the LHWCA for work-related asbestosis based on exposure to asbestos over navigable waters **prior** to the 1972 Amendments must be the date of the last exposure to the injurious stimuli and not the later date of manifestation of the disease **when** decedent no longer worked over water, or else the widow's death claim would not be within coverage of the Act.

As can be expected, the Board reversed the decision because "(t)he Board's decision (at 6 BRBS 600) thus clearly required on remand the determination of an award of compensation to

claimant based on decedent's average weekly wage at the time when his occupational disease became manifest. ..." Stark v. Bethlehem Steel Corp., 10 BRBS 350, 351-52 (1979).

The claim was remanded to the Office of Administrative Law Judges and reassigned to another judge as the original judge was no longer assigned to the Office of Administrative Law Judges. The Board revisited the claim for the third time in Stark v. Bethlehem Steel Corp., 15 BRBS 288 (1983). The judge had followed the Board's mandate and determined average weekly wage as of July 31, 1972, the date upon which the judge found the disease became manifest. The employer appealed, contending that in accordance with the Board's recent decision in Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981), decedent's average weekly wage should be determined as of the date of his last exposure to injurious stimuli.

The Board, in its third opinion in Stark, 15 BRBS 288, and in considering the effects of its decision in Dunn, stated as follows:

> We turn first to employer's contention that decedent's average weekly wage should be determined as of the date of decedent's last exposure to injurious stimuli. Both prior times that this case was considered by the Board, employer made this argument. Employer now, however, in a supplement to its Petition for Review, asks us to apply Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981). In Dunn, the Board reconsidered the holdings of Stark I and II, that average weekly wage in occupational disease cases is to be determined as of the date that the disease became manifest. The Board overruled Stark I and II, and held that in such cases average weekly wage should be determined as of the date of last exposure to injurious stimuli.
>
> We reject employer's argument that Dunn should be applied to the instant case. In our view the two prior decisions of the Board in this case constitute the law of the case on this issue. See, i.e., Burbank v. K.G.S., Inc., 13 BRBS 467 (1981); Walker v. Universal Terminal & Stevedoring Corp., 12 BRBS 509 (1980), aff'd on other grounds, [645 F.2d 170] (**3d Cir.** April 10, 1981); McNeil v. Prolerized New England Co., 11 BRBS 576 (1979), aff'd on other grounds sub. nom. Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 12 BRBS 808 (**1st Cir.** 1980), cert. denied, 452 **U.S.** 938 (1981). They are thus controlling in the present appeal. We conclude that the administrative law judge properly computed decedent's average weekly wage as of the date when his disease became manifest. We have carefully considered the arguments of our dissenting colleague advocating that the law of the case should not be dispositive here. However, it appears that courts are to depart from the law of the case only where there are either statutory changes, or intervening changes

> in decisional law by superior courts in the federal judiciary. Hawkes v. Internal Revenue Service, 507 F.2d 481, 482 n.1 (**6th Cir.** 1974) ("Except for the intervention of new statutory or **Supreme Court** decisional law, our mandate to the District Court and the accompanying opinion constitute 'the law of the case,' and we will not review the correctness of our prior decision."). Equally unpersuasive is our colleague's argument that because a majority of the Board in Dunn overruled the Board's earlier decisions in Stark I and II, the Board's earlier legal holdings are, *ipso facto*, 'clearly erroneous,' so as to preclude the application of the holdings in Stark I and II as the law of this case. The mere fact that a decision has been overruled does not establish that the decision is so clearly erroneous that it can not continue to be applied for the limited purpose of establishing the law in that case. 'The mere contention that the prior decision was incorrect, or that **if the court considered the issue anew, it probably would come out the other way**, is not 'good reason' for permitting relitigation of an issue decided in a prior appeal.' United States v. Turtle Mountain Band of Chippewa Indians, 612 F.2d 517, 521 (**Ct. Cl.** 1979) (emphasis added). Similarly, the fact that this Board would apply the law in Dunn, reversing Stark I and II, if the case at bar had not been previously appealed to the Board is not good reason for permitting relitigation of the average weekly wage standard in this case.

15 BRBS 288, 290-91 (1983) (emphasis added).

[ED. NOTE: *Stark I, II, and III show the effects of a rigid adherence to the "Law of the Case" Doctrine, especially by an intermediate reviewing body, when faced with a change in the law.**]***

More recently, however, the Board, in establishing its mandate in remanding a claim to the judge in Thornton v. Brown & Root, Inc., 23 BRBS 75, 77 n.2, pointed out:

> [t]he administrative law judge determined that the **Supreme Court's** ruling in Herb's Welding, Inc. v. Gray, 470 **U.S.** 414 (1985) constituted intervening law releasing him from the mandate, on remand, to simply address the amount of benefits due claimant. We hold that the administrative law judge could properly consider, on remand, the effect, if any of the **Supreme Court's intervening decision** in Herb's Welding on the case at bar. See generally White v. Murtha, 377 F.2d 428, 431-32 (**5th Cir.** 1967) (emphasis added).