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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 315
April - May 2021

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

***Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066 (9th Cir. 2021).**

The Ninth Circuit overruled the ALJ/BRB's award of fees to claimant's attorney, holding that: (1) the attorney satisfied the initial burden of producing satisfactory evidence establishing reasonableness of the requested fee; (2) the ALJ's rejection of petitioner's evidence as outdated was not supported by substantial evidence; (3) the ALJ's rejection of evidence of commercial litigation rates was plain error; (4) substantial evidence did not support the ALJ's rejection of the state bar survey data based on years of experience; (5) vacatur of the ALJ's decision to place attorney in 75th percentile was warranted; (5) substantial evidence did not support the ALJ's decision to include "general" practice area in the hourly rate analysis; (6) substantial evidence did not support the ALJ's decision to reduce hours reported by the attorney; (7) reassignment to a different ALJ was warranted; and (8) the ALJ/BRB erred in concluding that the Act does not permit an award of interest on costs to account for delay in payment.

Attorney Charles Robinowitz ("petitioner") sought fees at the rate of $450/hour in the Portland, Oregon market. The work was done in 2007–2016, and employer conceded that using 2016 rates would account for delay. The ALJ found that the petitioner "has failed to carry his burden of establishing entitlement to the rates claimed in this case." She rejected the Goldsmith declaration, the Markowitz declaration, and the Morones Survey as outdated and pertaining to commercial/business litigation, which the ALJ found is not similar to LHWCA practice. The ALJ gave no weight to the submitted portion of the *2012 Oregon State Bar Survey* ("OSB Survey"), because it was based on years of experience, as opposed to similar practice. She also gave no weight to the BRB and Ninth Circuit decisions awarding petitioner rates of $420 and $425 respectively, because they involved appellate work. The ALJ awarded a rate of $341.92/hour. The Board affirmed, correcting a calculation error to award $349.85 per hour. The Board also agreed with the ALJ that the LHWCA "does not permit the paying of interest on costs" and sustained the other challenged aspects of the fee order.

Attorney's Hourly Rate

The "lodestar method" is the starting point in determining a "reasonable attorney's fee." It requires the court to multiply the number of hours reasonably expended on the

litigation by a reasonable hourly rate. A reasonable attorney's fee is one that is adequate to attract competent counsel. The rates awarded must be in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

The court stated that the evidentiary burdens governing fee motions are well established. The applicant has an initial "burden of production," under which he or she must "produce satisfactory evidence" establishing the reasonableness of the requested fee. *Id.* at 1077 (citations omitted). This evidence must include proof of market rates in the relevant community (often, affidavits from practitioners), and detailed documentation of the hours worked. If the applicant carries this burden, the court then proceeds to a factual determination as to whether the requested fee is reasonable. In the usual case, this will involve considering the evidence submitted by both parties. The ALJ erred in applying these principles.

1. The ALJ erred by concluding that petitioner failed to satisfy his initial burden of producing satisfactory evidence establishing reasonableness of the requested rates. Petitioner presented substantial evidence that his requested rate of $450/hour in 2016 was in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. This evidence included, *inter alia*: affidavits from two experienced practitioners supporting rates of $400 and $404 respectively in 2009; the 2012 OSB Survey reporting that Portland attorneys with over 30 years' experience billed between $350 (median) and $400 (75th percentile) in 2011; a 2014 Ninth Circuit Appellate Commissioner order awarding petitioner $425 for work performed in 2012 and 2013; and a 2014 BRB decision awarding petitioner $413 for work performed in 2013 and $420 for work performed in 2014. The ALJ's concerns at most go to the weight of the evidence, not its sufficiency.

2. The ALJ's rejection of the Goldsmith, Markowitz, and Morones evidence as outdated was not supported by substantial evidence. Fee awards must be based on current market conditions. Evidence of historical market conditions is nevertheless relevant evidence of current market conditions. ALJs, moreover, must treat the parties' evidence evenhandedly. Here, both parties, and the ALJ, relied on dated evidence, including the 2012 OSB Survey. The ALJ relied on the 2012 OSB Survey by appropriately adjusting the 2011 data for inflation. It was error not to make similar adjustments to petitioner's evidence.

3. The ALJ's rejection of the Goldsmith, Markowitz, and Morones evidence of commercial litigation rates was plain error. The ALJ reasoned that LHWCA trial work is more "straightforward" and "informal" (including no jury trials or strict evidentiary rules). It is reasonable to distinguish between complex and non-complex litigation. However, the ALJ apparently conflated commercial litigation and complex litigation. Further, this analysis proves too much, as plaintiff civil litigation work and general litigation can also be distinguished on this basis, and there was no rational basis for the ALJ/BRB's selective concerns. The BRB cited its holding in *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), that a workers' compensation practice and a business litigation practice cannot be viewed as similar. In *Christensen*, the BRB offered a single rationale, *i.e.*, that business litigation involves delegating certain work to paralegals or less experienced attorneys, while claimant's counsel is a solo practitioner who cannot expect a client to pay him $400/hour for all work. Even assuming these distinctions were persuasive in *Christensen*, they did not apply here, as the record showed that petitioner does delegate work.

4. The ALJ's rejection of petitioner's evidence from the 2012 OSB Survey was unsupported by substantial evidence. The OSB reports Portland rates in two ways: one chart is based on years of experience and the other is based on practice areas. The ALJ rejected the former as one dimensional, and relied on the latter. However, both charts rely on a single

factor. Even assuming arguendo that the former rates are *more* probative, the latter rates are at least relevant and their use is supported by Ninth Circuit's past decisions and its past fee award to petitioner.

5. The court vacated the ALJ's decision to place petitioner in the 75th percentile of attorneys in the plaintiff civil litigation and general practice areas under the 2012 OSB Survey. Petitioner argued for the 95th percentile. Given his vast LHWCA experience and expertise, he could have been placed in the 95th percentile (as the BRB and the court had done, albeit for appellate work). On the other hand, the BRB has repeatedly placed him within the 75th percentile for trial-level work. This was a judgment call that the ALJ could reasonably have resolved either way. However, the ALJ's decision appeared to be influenced by an improper factor, *i.e.*, the ALJ's unwarranted irritation with petitioner's brief on remand. The ALJ ordered claimant to brief matters this court had already decided, and expressed anger when petitioner declined to do so. Although the ALJ stated this played no role in the fee award, the record suggested otherwise.

6. The ALJ's decision to include the "general" practice area -- attorneys who devote less than 50 percent of their time to any one practice area -- in her analysis was not supported by substantial evidence. The court agreed with petitioner that he is a specialist, rather than a generalist, and that the ALJ may have included the general practice area in the analysis for the improper purpose of holding down his hourly rate. The court noted the wide disparity between this rate ($268) and the other rates relied on by the ALJ ($350 and $300); the lack of evidence that LHWCA practitioners are similar to general practitioners in skill, experience, and reputation, but dissimilar to commercial litigators; and abundant evidence that petitioner is a specialist. Additionally, 2017 OSB Survey reports that Portland attorneys with more than 30 years' experience charged a median rate of $425 per hour in 2016. For the 75th percentile, the average rate was $495/hour. These updated rates, which should be taken into account on remand, further supported the requested rate.

Paralegal's Hourly Rate

The ALJ awarded petitioner's paralegal a rate of $150/hour rather than the requested rate of $165/hour based on two factors: rates awarded by ALJs in other LHWCA cases; and rates awarded by the federal district court in the District of Oregon. The ALJ erred. First, citing *Chistensen*, the court held that the ALJ erred by relying almost exclusively on the rates awarded by other ALJs. Second, the ALJ's reliance on the district court's awards was flawed because they set paralegal rates based on survey data for the western U.S. as a whole, rather than Portland. Petitioner provided the only evidence of market rates for Portland paralegals, relying on the Goldsmith and Morones evidence (average rate of $154) and his own knowledge. Respondents presented no contrary evidence. Thus, the record supported a rate of $165/hour. This is also the rate the Ninth Circuit awarded to petitioner's paralegal in another case in 2014 for work performed in 2013 (the record did not suggest that tasks performed by a paralegal in appellate work are too dissimilar).

Reasonable Hours

Substantial evidence did not support the ALJ's decision to reduce the reported hours. Despite this court's findings that the ALJ erred in her credibility determination and her finding of no causation, the ALJ ordered claimant to brief these matters on remand. Petitioner instead raised this point in his brief. The ALJ stated that the brief was non-responsive to the order and cut the requested 2.5 hours by half. A tribunal should exclude from the lodestar amount hours that are not reasonably expended because they are excessive, redundant, or otherwise unnecessary. Here, the petitioner properly used her brief to present her interpretation of the scope of the remand. Based on the anger expressed by the ALJ concerning the brief, it

appeared that the ALJ reduced the fees as a sanction. Although the ALJ stated that this played no role in the fee award, the record strongly suggested otherwise.

Interest on Costs

The ALJ/BRB erred by holding that the LHWCA does not permit an award of interest on costs to account for delay in payment. The Supreme Court has made clear that interest is available in limited circumstances under federal fee-shifting statutes. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 555 (2010) ("[A]n enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. ... [T]he amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses."). The Ninth Circuit decision upon which the ALJ relied addressed *post-judgment* interest and thus had no bearing. On remand, it must be determined whether an award of interest on costs is appropriate because of the "exceptionally protracted" period that this case has been pending -- a period of five to fourteen years.

Reassignment

The court stated that the tone of the ALJ's decision and the manner in which the ALJ evaluated the evidence suggested that the ALJ may not be able to provide petitioner with a fair and impartial hearing on remand. Accordingly, the court *sua sponte* directed the Board to reassign this matter to a different ALJ to avoid the appearance of partiality.

The case was remanded for further consideration.

[Section 28 ATTORNEY'S FEES — Hourly Rate, Section 28(d) Costs, Interest; Procedure Before the District Director and Administrative Law Judge – Administrative Law Judge Adjudication]

***Owensby & Kritikos, Inc. v. Director, OWCP* [*Boudreaux*], 997 F.3d 587 (5th Cir. 2021).**

The Fifth Circuit affirmed the ALJ/BRB's determination that claimant, who sustained an onshore injury en route to a rig platform on the OCS, was covered under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*.

Claimant's work for employer involved ensuring safety of storage tanks on rig platforms on the Outer Continental Shelf ("OCS"). He was injured in a car accident on his way to a platform. Based on *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012) (establishing substantial-nexus test), the issue was whether an onshore injury en route to a rig platform on the OCS is covered under the OCSLA. The ALJ found that claimant's injury occurred in the course and scope of his employment; and that his work on the tanks was directly related to OCS operations. On appeal to the Board, employer argued that claimant's injury was not caused by the operations on the OCS, and that the ALJ applied the wrong test. The Board affirmed the ALJ's decision. Employer appealed.

The court noted that, as the facts were not in dispute, the coverage issue was a pure question of law to be reviewed *de novo*, with deference accorded to the Director's interpretation. In determining whether an injury is covered under LHWCA, as extended by OCSLA, the court applies the two-part test adopted in *Valladolid.* OCSLA generally extends coverage under LHWCA to injuries occurring as the result of OCS operations. 43 U.S.C. § 1333(b). By extending LHWCA, any covered injury under OCSLA must first satisfy the limitations imposed by LHWCA. Determining whether claimant sustained a covered injury

required two-step analysis: first, did the injury arise out of, and occur within the scope of, his employment, under § 2(2) of the LHWCA; and, second, was the injury sustained as the result of operations conducted on the OCS, under OCSLA?

Here, all the parties agreed that claimant's injury occurred in the course and scope of employment. Consistent with the trip-payment exception to the coming-and-going rule, claimant spent most of his time offshore and he was compensated for his travel to and from the OCS, including onshore.

With respect to the OCLA coverage test, employer asserted that the Board applied a "but-for" test, which originated in a Third Circuit case involving similar facts and was rejected in *Valladolid*. The court reasoned that although *Valladolid* overruled the "but-for" test, it did not bar coverage of an injury resulting from an onshore accident while traveling onshore to go offshore. On the contrary, *Valladolid* rejected a factual-line-drawing approach and only decided the legal test to be applied: whether an injured employee has established a significant causal link between his injury and his employer's on-OCS extractive operations based on the individual circumstances of each case. It also rejected the situs-of-injury test. Thus, the Court avoided declaring which factual scenarios would be covered.

The court rejected employer's assertion that claimant must establish a substantial nexus between his employer's work performed on the OCS and the accident. This would require an injury to occur as the result of, and in the course and scope of, operations on the OCS, and would improperly read § 2(2) into the operating-on-the-OCS requirement of § 1333(b). Section 1333(b) says nothing about the scope of the employee's job or his employer. The substantial-nexus test requires a link *only* between the employee's injury and extractive operations on the OCS. Given OCLSA's lack of limiting language, claims to narrow the statute fail. Relatedly, as implied in *Valladolid*, OCSLA does not preclude recovery for an injury suffered en route to the OCS. Answering whether an injury is covered will depend on the individual circumstances of each case.

In this case,

> [a]pplying the two-part framework to the facts before us, we hold Boudreaux's injury is covered under OCSLA. Among the facts relevant to our inquiry, we find persuasive Boudreaux's: being compensated by Owensby for both time and onshore mileage while traveling to and from the OCS; being on-the-job when he was injured; necessarily traveling to an intermediary pickup location to be transported from onshore to the OCS; and transporting his testing equipment in his vehicle. And, as noted, Owensby had another employee pick up Boudreaux's testing equipment to take it to the OCS after his accident. Each of these factors supports Boudreaux's injury occurring as the result of operations conducted on the OCS.

Id. at 594 (citation omitted). The court contrasted these facts with a case where employee was held not covered because, *inter alia*, his job did not require him to travel to the OCS.

Addressing remaining issues, the court stated that it does not have jurisdiction to consider claimant's cross-appeal seeking enforcement of the BRB's order, as § 21(d) confers such jurisdiction on the relevant Federal district court. Lastly, the court held that employer was liable for attorney's fees under § 28(b) for work performed on appeal, to be determined following submission of a fee request, a response, and a reply.

[STATUTORY EXTENSIONS of the LHWCA - OCLSA coverage]

***Sanchez v. Smart Fabricators of Texas, LLC*, 997 F.3d 564 (5th Cir. 2021).**

Overruling its prior precedent, the Fifth Circuit held en banc that a welder who performed two discrete, short-term, transient repair jobs on two drilling rigs was not covered by the Jones Act, as he was not substantially connected to a fleet of vessels in terms of the nature of his work. His work on the first vessel was not sea-based, as it was jacked up at the dock and the job did not involve sailing. While the second vessel was on the OCS, plaintiff only worked on it for 13 days and would have no further connection with it when finished.

The district court granted employer's motion for summary judgment on the issue of Jones Act coverage, and plaintiff appealed. A Fifth Circuit panel found that plaintiff qualified as a seaman under controlling Circuit precedent, but urged rehearing en banc. *Sanchez v. Smart Fabricators of Texas, LLC*, 970 F.3d 550 (5th Cir. 2020). Rehearing en banc was granted in order to provide a more definitive test, consistent with Supreme Court case law, to distinguish seamen entitled to benefits under the Jones Act from other maritime workers generally covered under the LHWCA.

The court initially observed that Congress enacted the LHWCA in 1927 to establish a federal compensation remedy for injuries to certain land-based workers occurring on navigable waters. Generally, the LHWCA excluded from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). As such, it limits the definition of "seaman" in the Jones Act so as to confine it to the members of the crew of a vessel plying in navigable waters. The two remedies are mutually exclusive. Because Congress has not defined the term "seaman," courts have struggled to establish workable tests.

The court next discussed the Supreme Court "trilogy" addressing the term "seaman." In *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337 (1991), the Court held that a "master or member of a crew" under the LHWCA, and therefore 'seaman' under the Jones Act, should be defined in terms of the employee's connection to a vessel in navigation. Thereafter, in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court stated that, with the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter who owe their allegiance to a vessel and not solely to a land-based employer, are seamen. Seamen do not include land-based workers. *Latsis* rejected the moment-of-injury test. It also recognized that some workers who confront the perils of the sea are not seamen. Based on these principles, the Court defined the substantial-connection test with two elements: "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. With regard to duration, a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman. Lastly, in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997), which involved facts closely analogous to the present case, the Court stated that the inquiry into the nature of the employee's connection to the vessel must concentrate on whether his duties take him to sea. This gives substance to the inquiry both as to duration and nature of the employee's connection to the vessel and helps distinguishing land-based from sea-based employees. As to the nature element, Papai's actual duty on the vessel did not include any seagoing activity; he was hired for one day to paint the vessel at dockside and he was not going to sail with it. The court rejected Papai's contention that the entire group of vessels he worked on through the union hiring hall constituted an identifiable group of vessels, holding that the vessels must be subject to common ownership or control. Papai also argued that he would satisfy the test if his jobs over the past two and a half months working on employer's vessels were considered. The Court reasoned that he only did maintenance work on the vessel while docked on three or four prior occasions, which did not make the nature of his connection more substantial than the one during which he was injured. And in any event these discrete engagements were separate from the one in question, which was the sort of "transitory or sporadic" connection that *Chandris* explained is insufficient.

This Circuit's past decisions, *In re Endeavor Marine, Inc.,* 234 F.3d 287 (5th Cir. 2000), and *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927 (5th Cir. 2014), incorrectly stated that whether plaintiffs were subject to the "perils of the sea" was the primary test for the nature element. The court overruled this precedent, stating that, while this is one of the considerations, it is not the sole or even the primary test. *Chandris* made clear that seamen and non-seamen maritime workers may face similar risks and perils, and that this is not an adequate test for distinguishing between the two. Distilling the principles from the Supreme Court trilogy, the following additional inquiries should be made:

> (1) Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer?
> (2) Is the work sea-based or involve seagoing activity?
> (3) (a) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or (b) Does the worker's assignment include sailing with the vessel from port to port or location to location?

Id. at 574. The court noted that one can be a seaman while working in a calm bay, with minimal risk from the perils of the sea.

In this case, plaintiff satisfied the first prong of the seaman-status test: The repairs contributed to the function of the two vessels because they were necessary to keep the vessels in condition to drill for oil and gas. He also met the duration prong of substantial connection test, as he spent 90 percent of his total employment time with employer aboard the two vessels.

The remaining question was whether plaintiff spent at least 30 percent of his time aboard the two vessels doing work that satisfies the nature prong. The court concluded that he did not. On the first vessel, his work was not "sea-based." All of his work was performed while the vessel was jacked-up at the dock. It did not include any "seagoing activity" and he was not going to sail with the vessel. *Papai* stated that maintenance work while the tug was docked did not satisfy the nature test. Plaintiff's work on the second vessel also did not meet the nature test. Even though it was located on the OCS, plaintiff worked on a discrete, individual job and, once it was finished, would have no further connection with the vessel. He worked on it for only 13 days, which would be insufficient to meet the duration prong. The court instructed that:

> Our case law reveals generally that two types of workers are found on drilling rigs. First, we have the drilling crew, who conduct the drilling operations (and workers who support that activity) and stay with the vessel when it moves from one drilling location to another. These workers are the members of the crew of the vessel and are seamen. The second group are specialized transient workers, usually employed by contractors. These workers are engaged to do specific discrete short-term jobs. Discrete transient jobs are like the work done by longshoremen when a vessel calls in port. As stated in *Papai*, these workers have only a "transitory or sporadic" connection to a vessel or group of vessels and do not qualify for seaman status. Sanchez, as a transitory worker, falls into the second group, and thus does not satisfy the nature test.

Id. at 576 (citations omitted).

The summary judgment was affirmed.

[SECTION 2(3)—STATUS — Exclusions from Coverage — Section 2(3)(G) Member of a Crew]

***Carswell v. E. Pihl & Sons*, 999 F.3d 18 (1st Cir. 2021).**

The First Circuit affirmed the ALJ/BRB's decision that claimants did not establish that their illnesses were caused by alleged exposure to plutonium radiation while working on a military aircraft crash cleanup site. Agreeing with the Board, the court further held that the Director, Office of Workers' Compensation Programs ("OWCP") had the authority to participate in the hearing.

In 1968, a U.S. military aircraft carrying nuclear weapons crashed near Thule, Greenland, releasing radioactive materials. Claimants participated in the cleanup efforts at the Thule site as civilian employees of the now-defunct Danish Construction Corporation ("DCC"). The U.S. military instituted various precautions for the workers. In 2010, claimants filed claims under the Defense Base Act ("DBA"), an extension of the LHWCA, alleging that they were exposed to plutonium radiation causing various illnesses. Claimants Carsell, Eriksen, and Hansen testified regarding their work duties and various medical conditions they developed. Carswell, a shipping clerk, developed stomach and esophageal issues in 1984, and thyroid issues in 2005. Eriksen, a fireman, and Hansen, a carpenter, developed kidney cancer, removed in 2005 and 2002, respectively. Since DCC was no longer operational, claimants filed their claims against two constituent companies: E. Pihl and Topsoe-Jensen ("respondents"). (The latter refused to participate.) During ALJ hearings, E. Pihl filed for bankruptcy. The ALJ denied the claims, finding that claimants did not establish a causal connection between their illnesses and the alleged plutonium exposure. The Board affirmed.

Standard of Review

The court reviews questions of law *de novo*, and findings of fact for adherence to the "substantial evidence" standard, which is notoriously difficult to overcome. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is "more than a scintilla" and does not approach the preponderance of the evidence standard. Moreover, the court will accept the findings and inferences drawn by the ALJ, unless they are irrational. It is the ALJ's prerogative to draw inferences and make credibility assessments, so long as the findings are adequately anchored in the record.

The Director's Participation in the Proceedings

Claimants argued that Supreme Court precedent as well as both the purpose and text of the LHWCA and regulations prohibit the Director from joining LHWCA and DBA litigation as a party. Affirming the Board, the court rejected these arguments.

The LHWCA was intended to produce fair and efficient resolution of a class of private disputes, managed and arbitered by the Government and is best understood as a compromise between the competing interests of employers and injured workers. In 1941, Congress enacted the DBA, which incorporates much of the LHWCA scheme. The LHWCA assigns a variety of responsibilities to the Secretary of the Department of Labor, one of which includes the authority to make rules and regulations "as may be necessary in the administration of this [Act]." 33 U.S.C. § 939(a). One of those regulations, 20 C.F.R. § 702.333(b), explicitly permits "[t]he Solicitor of Labor or his designee [to] appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party." The Secretary of Labor has also charged the Director of the OWCP with both the administration and enforcement of the LHWCA/DBA and, as a result, the Director often appears as a litigant in LHWCA cases as a representative of the Department of Labor.

The court rejected claimants' argument that *Dir., OWCP v. Newport News Shipbuilding and Dry Dock Co.* ["*Harcum*"], 514 U.S. 122 (1995), held that the LHWCA does not confer

party-litigant standing on the Secretary in ALJ or Board proceedings. *Harcum* held that the Director did not have standing to challenge the ruling before the court of appeals because the Director was not adversely affected or aggrieved by the decision within the meaning of § 21(c) of the LHWCA. It did not involve the Director's ability to join LHWCA litigation before the ALJ or the Board and does not support claimants' argument. Indeed, precedent establishes that the Director may participate as a litigant before the ALJ and the Board. Following *Harcum*, the Supreme Court has explained that the Director plays a significant role before the ALJ and the Board in LHWCA cases, and has also been authorized by the Secretary to appear as a litigant before the ALJs and the Board. This court has also recognized as much.

Nor did the ALJ/BRB err in allowing the Director to participate as an interested party for the specific reason of protecting the Special Fund. Given that the DCC had ceased operations, it was reasonable for the Director to assume that the Special Fund could be implicated if the claims were successful.

The court also rejected claimants' argument that the Director's participation below was *ultra vires* and would result in the Director reviewing the Board's decision. Congress explicitly authorized the Secretary of Labor to make needful rules and regulations and claimants have not explained how Congress or the Secretary went beyond their authority by doing so. Accordingly, this argument was waived. Further, by statute, the Director does not review the decisions of the Board.

The Defense Base Act Claim

Substantial evidence supported the ALJ's conclusion that claimants did not establish a causal nexus between their alleged plutonium exposure and their illnesses.

Claimants, E. Pihl, and the Director offered expert witnesses and reports on the issue of causation. E. Pihl presented the testimony of four experts and one fact witness:

- Dr. Anspaugh, an expert in radiation dosimetry, testified that claimants likely did not receive any dose, or an extremely small dose.
- Dr. Mettle, a physician and professor in Radiology and Nuclear Medicine and an expert in the effects of plutonium radiation on the human body, opined with greater than 99.9% certainty that claimants' illnesses were not caused by the exposure. He explained that there is no association between plutonium and kidney or stomach cancer. He further explained that ingestion of plutonium presented few concerns because it is very insoluble and passes through the stomach quickly. He also opined that a dose of radiation required to make a thyroid non-functional would result in a much higher dose to the lungs, which would prove fatal.
- Dr. Russo, a surgeon and professor specializing in urology and kidney cancer, opined that it was not possible to determine the etiology of claimants' kidney tumors, and that it was equally if not more probable they were sporadic. For Erisken, his history as a heavy smoker could have been a causative factor.
- Dr. Turnbull, a surgical oncologist, explained that Carswell's stomach cancer and esophagus issues were extremely unlikely to be related to the exposure. He explained that the stomach cancer was likely caused by an H. pylori infection or acid reflux. He also explained that plutonium particles pass through the stomach quickly and the cells of the stomach lining are replaced every seven days.
- Dr. Juel, an epidemiologist, conducted epidemiological studies concluding that there was no difference in illness or mortality rates between the DCC workers who were at Thule during the cleanup and the DCC workers who were at Thule at other times.

Claimants produced Drs. Robbins, Edwards, and Barnaby, who opined that claimants' illnesses were caused by their work at Thule.

- Dr. Robbins, a medical doctor who specializes in preventive, occupational and environmental medicine, submitted a report, asserting, without much support, that it was reasonably likely that Hansen's and Eriksen's cancers were associated with the risk of plutonium inhalation.
- Dr. Edwards, a general practitioner and Carswell's treating physician submitted a one-page letter stating that it was reasonably probable his hypothyroidism was due to the long term effects of the exposure.
- Dr. Barnaby, who has a Ph.D. in nuclear physics, provided a report and testimony that work on the Thule crash would have seriously exposed claimants to the risks of plutonium inhalation and the long-term development of cancer.

Further, the Director submitted the reports of Dr. Siegel, a specialist in occupational and internal medicine, and a certified medical examiner ("IME"), who performed a thorough independent medical examination of claimants. He found that they suffered no acute illnesses or health effects from radiation exposure.

The LHWCA provides compensation for certain injuries "arising out of and in the course of employment." 33 U.S.C. § 902 (2). It defines injury, in part, as "such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from [an] accidental injury." *Id.* A claimant must establish a causal nexus between his malady and his employment. Under a burden-shifting framework, the claimant must first make out a *prima facie* case by establishing (1) that he sustained physical harm and (2) that conditions existed at work which *could have* caused the harm. If he succeeds, § 20(a) kicks in, which affords claimants a presumption that the injury was caused by his working conditions. Next, the employer may rebut that presumption by demonstrating with substantial evidence -- that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion -- that the injury was not caused by the working conditions. If the employer severs the causal connection, the presumption falls out of the case. Then, the burden shifts back to the claimant who must show, by a preponderance of the evidence, that the injuries were in fact caused by the working conditions based on the record as a whole.

Here, claimants established a *prima facie* case, triggering the § 20(a) presumption. E. Pihl rebutted that presumption through the testimony of three experts. The ALJ then reviewed the evidence as a whole and found that claimants did not establish a causal connection between their illnesses and the alleged exposure. The ALJ found that claimants' expert witnesses offered vague and conclusory testimony and that in order for the ALJ to have relied on that testimony, she would have to credit it over highly-credentialed physicians and ignore a multitude of medical and epidemiological studies. That finding was rational and supported by substantial evidence.

Claimants further asserted that, since neither the respondents' expert witnesses, nor the IME, subjected them to a urine test to determine whether they were in fact exposed to plutonium radiation, the presumption was not rebutted. The court disagreed, as E. Pihl's medical experts established that even if claimants were exposed to plutonium radiation, it does not cause the types of illnesses that they suffer from. Moreover, claimants were free to conduct urine tests of their own accord and, ultimately, they bore the burden of proof. The ALJ did not abuse her discretion in denying motion to compel Dr. Siegel to conduct a urine test, deferring to his medical expertise. Further, claimants could have sought the opinion of a second IME under 20 C.F.R. § 702.409.

Claimants also attacked the substance of E. Pihl's expert's testimony. They argued that Dr. Mettler improperly relied on a single exposure model, and that Drs. Turnbull and Russo lacked the relevant expertise. They also pointed to a report by the Center for

Environmental Health Studies for the proposition that radiation from plutonium could be shown to cause kidney and stomach cancer and thyroid issues. The court reasoned that, by doing so, claimants invited the court to reweigh the evidence, which it cannot do. In any event, the ALJ's findings were rational and firmly anchored in the record. First, Dr. Mettler did rely on various modes of exposure. Second, he explained that at low doses of radiation, if there is a risk, it is so minuscule that no scientist has been able to identify it. The ALJ further found that the report proffered by claimants did not differentiate between radiation in general and plutonium radiation, and she was free to weigh its probative value in light of the rest of the testimony. Finally, Drs. Turnbull and Russo testified well within the bounds of their expertise, opining on the likely causes of claimants' health conditions.

Nor did the ALJ abuse her discretion in permitting Dr. Juel to testify as a fact witness. His employment by a Danish state university prohibited him from testifying as an expert. His testimony regarding epidemiological studies was relevant, and the ALJ limited it to the facts concerning his work in those studies. Even so, it was not a necessary part of the ALJ's decision. Lastly, the ALJ did not abuse her discretion by refusing to admit evidence regarding the 1988 death of another employee. He was not a party and had different responsibilities, and thus it would have little relevance and probative value.

[Review by U.S. Courts of Appeals – Standard of Review; Procedure Before the District Director and Administrative Law Judge – Administrative Law Judge Adjudication; Section 20 Presumptions – Application of Section 20(a), *Prima Facie* Case; Rebutting the Presumption; Evaluating the Evidence; Admission of Evidence – In General; Procedure – Inadequate Briefing]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals: There were no appellate court decisions in April or May.

B. Benefits Review Board

1. Published decisions: There were no published Board decisions in April or May.

2. Unpublished decisions:

Hurley v. Maranatha Mining & Leasing, BRB No. 20-0242 BLA (Apr. 2021)(unpub.): The widow appealed the denial of her claim for survivor's benefits. Although the ALJ found that the claimant had 18 years of coal mine employment and pneumoconiosis, she found that the claimant did not prove total disability or that the miner's death was due to pneumoconiosis. The Board found that the ALJ erred in her analysis of the evidence of complicated pneumoconiosis.

The evidence in the record included two autopsy pathology reports which the ALJ found were insufficient to establish complicated pneumoconiosis because the reports did not include an equivalency determination. However, the Board held that since a diagnosis of complicated pneumoconiosis was included in the pathology reports, an equivalency determination was not needed. Specifically, it held that Dr. Minami's diagnosis of "progressive massive fibrosis" and Dr. Oesterling's finding of a "mass" of complicated pneumoconiosis met the requirement found at 20 CFR §718.304(b).

[Complicated pneumoconiosis; equivalency determination]

Meade v. Eastover Mining Co., BRB No. 20-0153 BLA (Apr. 2021)(unpub.): The employer (Eastover) appealed the ALJ's finding that it was the responsible operator. The miner's last coal mine employment was with a different employer (Bodie). The ALJ found that Eastover did not submit sufficient evidence to refute its designation by the district director as the responsible operator. The Board pointed out that the district director bears the burden of proving that the named employer is the responsible operator. In addition, the Board stated that if the named employer is not the most recent employer of the miner, the district director must include a statement the OWCP has searched its files and found no record of insurance coverage or self-insurance for the most recent employer per 20 CFR §725.495(d). Here, the district director merely stated that Bodie was "uninsured and incapable of assuming liability." There was no indication that the director searched the OWCP files in determining whether Bodie was insured or capable of paying the claim. On remand, the Board directed the ALJ to reconsider the issue of whether the district director's finding met the requirements of 20 CFR §725.495(d) and whether Eastover was properly designated as the responsible operator.

[Responsible operator designation]

Ratliff v. Bubba Coal Co., BRB Nos. 20-0273 and 20-0274 (May 2021)(unpub.): The employer appealed the ALJ's award of benefits. The ALJ found that the Section 411(c)(4) presumption had been invoked. He further found that the miner was totally disabled from a pulmonary standpoint based upon the medical treatment records. The Board found that the ALJ's reliance upon the miner's description of his coal mine employment to determine the exertional level as medium was permissible. It further found that the ALJ did not err in finding that the miner was totally disabled based upon the medical treatment records. Neither the pulmonary function testing nor the arterial blood gas testing yielded qualifying values. The medical opinion evidence did not address total disability or give sufficient evidence of total disability. However, the ALJ looked at the medical treatment records which indicated that the miner had

severe COPD, end-stage lung disease, shortness of breath, and hypoxemia. The records also detailed the miner's need for breathing medications such as bronchodilators. Although the records did not explicitly address the level of the miner's disability, the Board held that the ALJ permissibly relied upon them to find that the miner was totally disabled from a pulmonary or respiratory standpoint. Citing *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 897 (7th Cir. 1990), the Board stated that treatment records can support a finding of total disability if they provide enough information from which the ALJ could reasonably infer that the miner could not perform his last coal mining job.

[Medical treatment records; total disability]

Johnson v. Gap Fork Fuels, BRB No. 20-0187 BLA (May 2021)(unpub.): The employer's appeal of the ALJ's award of benefits included the argument that its due process rights were violated because it was unable to obtain the records from the claimant's initial claim as they had been destroyed by the Federal Records Center. The Board rejected the employer's claim that the destruction of the prior claim deprived it of the ability to mount a meaningful defense of this refiled claim since the relevant inquiry was whether there was new evidence to support a change in applicable condition.

[Due process; destruction of claim records]

Groves v. Arch On The Green, Inc., BRB No. 20-0170 BLA (May 2021)(unpub.): In its appeal of the ALJ's award of benefits, the employer argued that its due process rights were violated by the ALJ's denial of its request to depose DOL officials. The employer filed a Notice of Rule 30(b)(6) Deposition of a DOL official "concerning the scientific validity of …facts and medical conclusions set forth in the preamble." The Board agreed with the ALJ that depositions were not needed since the medical studies and literature that the preamble is based upon is detailed in the preamble itself. In addition, it agreed that the employer had the ability to develop and submit evidence in response to the medical information contained in the preamble and that it did so. As such, the Board found that the Employer was not deprived of due process.

[Denial of Deposition of DOL Employees; medical studies contained in preamble]