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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 317
September - December 2021

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

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

***Martin v. Sundial Marine Tug and Barge Works, Inc.*, 12 F.4th 915 (9th Cir. 2021).**

The Ninth Circuit held that claimant was not bound by his initial stipulation that § 10(a) applied in determining his average weekly wage ("AWW"). Further, addressing an issue of first impression for the court, it held that using the § 10(a) formula to determine the AWW at the time of injury for claimant, a five-day worker who worked 264 days during the relevant year, did not violate the statutory scheme.

The LHWCA sets forth three different formulas for determining a claimant's AWW in subsections 10(a), (b) and (c). Under § 10(a), the AWW is calculated by: 1) dividing the total earnings of the claimant during the fifty-two weeks preceding the injury by the number of days actually worked; 2) multiplying that figure by either 260 or 300, depending on whether the claimant worked a five- or six-day week; and 3) dividing that figure by fifty-two. In contrast, § 10(c) does not prescribe a fixed formula. It requires the ALJ to consider the employee's ability, willingness, and opportunity to work, with regard to (1) the previous earnings of the injured employee in the job at which the employee was injured, and (2) previous earnings of similar employees, or (3) other employment of the injured employee.

In this case, claimant generally worked five days per week but worked overtime on weekends when possible. The parties initially stipulated to the use of § 10(a) before the

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

ALJ. But, in a reply brief filed after the record closed, claimant's counsel sought a wage determination under § 10(c) to account for days worked in excess of 260. The ALJ found that in the 52 weeks before his injury, claimant had earned $47,498.41 and had worked 264 days (including four days of overtime). The ALJ used § 10(a) to calculate claimant's AWW, citing the stipulation and noting that there is no requirement that a five-day worker work exactly 260 days in the preceding year. The Board affirmed, stating that the ALJ properly held claimant to his stipulation, as that stipulation is not contrary to law.

The Ninth Circuit initially rejected employer's contention that claimant was bound by his initial stipulation that § 10(a) applied. It reasoned that, because whether § 10(a) or (c) applies is a legal question, claimant was not bound by the stipulation. The policies underlying the exhaustion doctrine were satisfied here; the Board determined that the stipulation was "not contrary to law" only after concluding on the merits that § 10(c) did not apply.

Next, the court rejected claimant's contention that using § 10(a) to determine the AWW of a five-day worker who worked 264 days during the relevant year violates the statutory scheme. The court rejected the parties' contentions that its prior decisions resolved this question. This court previously held that § 10(a) presumptively applies when a claimant works more than 75 percent of the 260-day measuring year for five-day workers. However, it has not addressed whether a five-day worker who worked more than 260 days should have his AWW calculated under § 10(a).

This court previously held that the § 10(a) formula presumptively applies in calculating a five-day worker's AWW. Being a five-day worker is not the end of the inquiry; it must still be determined whether use of § 10(a) would be unreasonable or unfair under the circumstances of the case. However, there is a high threshold that must be met to overcome the statutory presumption. In this case, the statutory presumption was not rebutted as a matter of law simply because § 10(a) would slightly underestimate earning capacity because the claimant worked in excess of 260 days. The statute contemplates some inaccuracy in calculating the AWW. And it does not provide that § 10(a) is inapplicable if more than 260 days were worked. Nor does the fact that claimant worked 264 days by itself make use of the § 10(a) formula unreasonable or unfair. The court rejected claimant's assertion that the § 10(a) formula failed to account for his increased earnings, noting that the starting point for the § 10(a) calculation is the total amount of compensation earned in the previous year.

The court further concluded that the legislative history of the Act suggests that Congress did not envision application of § 10(c) under these circumstances. Congress also appears not to have envisioned application of § 10(c) to a claimant who worked full-time for a single employer during the previous year. Claimant emphasized this court's prior statement that it should construe broadly the Act's provisions so as to favor claimants. But that does not mean that the claimant always wins. As the Supreme Court has noted, the Act is not a simple remedial statute intended for the benefit of the workers, but was instead designed to strike a balance between the concerns of the longshoremen and harborworkers on the one hand, and their employers on the other. The Court has also stressed that the maxim that the statute at hand should be liberally construed to achieve its purposes does not provide courts the freedom to add features that will achieve the statutory purposes more effectively.

The court additionally observed that the Act was designed to provide for efficient resolution of disputes. The presumption that § 10(a)—whose fixed multiplier serves

administrative convenience—applies is a critical statutory element. Thus, the ALJ and BRB did not err in using the § 10(a) formula to calculate claimant's AWW.

The court noted that it did not address whether the use of § 10(a) would be unreasonable if a nominal five-day worker worked substantially more days than 260 or whether such a worker effectively becomes a six-day worker.

[Section 10 — Determination of Pay – Section 10(a), Section 10(c); Administrative Law Judge Adjudication — Stipulations]

***Rivera v. Director, OWCP*, 22 F.4th 460 (5th Cir. 2021).**

Reversing the Board's *en banc* decision, the Fifth Circuit held that claimant was entitled to employer-paid attorney's fees under § 28(b) of the LHWCA.

Claimant filed a hearing-loss claim against employer. Employer paid for two weeks of disability benefits, but disputed that it was the last responsible employer. A claims examiner ("CE") held an informal conference on July 26, 2016. On July 28, 2016, the CE issued a memorandum recommending that the named employer was the last responsible maritime employer. On August 5, 2016, employer responded by letter that it accepted its designation as the responsible employer. Employer also stated that it organized an additional medical evaluation with Dr. Seidemann, a doctor of its choosing, and wished to submit a report of the examination "before any final recommendations are made." Two weeks later, employer wrote to the CE arguing that claimant's AWW should not include his *per diem* payments. On August 24, 2016, a newly assigned CE issued a written recommendation declaring that employer was responsible for 35.31% hearing loss and claimant's hearing aids, and that the average weekly wage ("AWW") calculation should include claimant's *per diem* payments. Employer did not accept that recommendation. Instead, employer asked the CE to reconsider and withhold the recommendation until it provided findings of the additional medical evaluation; it then submitted Dr. Seidermann's evaluation finding of 21% hearing loss. On September 7, the CE issued a "Supplemental Informal Conference Recommendation," which purported to supplement both the July 28 and August 24 recommendations. In it, the CE recommended that claimant suffered a 28.16% hearing loss, representing an average of the rates proposed by the parties. On September 12 and 13, 2016, employer extended a settlement offer to claimant. Claimant rejected the offer, and employer paid benefits in accordance with the September 7 recommendation. Two weeks later, the CE issued another supplemental recommendation concluding that employer in fact owed benefits based on a 28.61% hearing loss, and employer paid the difference.

Claimant filed a petition for attorney's fees, and the district director concluded that he was entitled to the fees under § 28(b) because employer did not timely pay claimant in accordance with the August 24 recommendation and claimant ultimately obtained a greater award than employer was initially willing to pay after that recommendation. Employer appealed. The Board reversed, holding that the August 24 recommendation was rendered moot by the September 7 recommendation. Claimant moved for reconsideration, and, and on October 24, 2018, the Board granted the request only to remand for the district director to consider whether claimant was entitled to fees under § 28(a). It rejected claimant's request with respect to its determination under § 28(b). Employer challenged the Board's decision as to § 28(a), and on February 28, 2020 the Board agreed and reversed its prior decision by *en banc* vote. But it granted a remand to the district director to consider the availability of attorney's fees under § 28(c). Claimant petitioned the Fifth Circuit for review of the Board's reversal of the district director's award of fees under § 28(b).

The court initially rejected employer's contention that claimant's petition for review of the Board's § 28(b) determination was untimely because it was not filed within sixty days of the Board's October 24, 2018 order that first addressed the § 28(b) issue. It held that timeliness was to be determined in relation to the Board's February 28, 2020 *en banc* order. In its October 24, 2018 order, the Board remanded for the director to consider the applicability of § 28(a), but in doing so it remanded the *case.* Although the Board had already resolved the § 28(b) portion of the fee request, it did not issue a final resolution of the fee request, which included the § 28(a) request, until February 28, 2020.

The court further held that claimant was entitled to employer-paid fees under § 28(b). For § 28(b) to apply, the following criteria must be met: (1) an informal conference is held; (2) the BRB or a deputy commissioner issues a written recommendation; (3) the employer refuses to adopt the recommendation within fourteen days; and (4) the employee procures a lawyer's services to achieve an award greater than that which the employer was willing to pay after the written recommendation was issued. Here, a conference was held on July 26, 2016; a written recommendation was issued by the new CE on August 24, 2016; employer refused to adopt it; and, with counsel's assistance, claimant ultimately obtained an award greater than that which employer was initially willing to pay after the recommendation. The Board rejected employer's assertion that it did not "reject" the August 24 recommendation. Under § 28(b), employer can avoid fees by either (1) accepting the recommendation or (2) refusing those recommendations but tendering a payment that is accepted by the claimant. It did neither.

The Board erred when it concluded that the August 24 recommendation did not apply for the purposes of attorney's fees under § 28(b) because the CE's September 7 recommendation rendered it moot. Employer asserted that requiring it to accept the "moot" August 24 recommendation would lead to absurd and unjust results similar to requiring a party to obey a moot order. The court disagreed. It reasoned that employer provided no legal authority showing that a subsequent recommendation renders a prior one moot. The plain language of § 28(b) suggests no such thing. It merely states that after a recommendation is issued, employer may open itself up to attorney's fees liability if it refuses to accept the recommendation within fourteen days. It says nothing about the effect of follow-up recommendations, so such recommendations do not undo the direct consequences of the statute's plain terms.

The court also rejected employer's analogy to a moot order. A party *must* follow a court order, and may be held in contempt of court if it does not. So, if a later order contradicts an earlier one, a party can only follow one of them. By contrast, parties have no legal duty to follow a CE's recommendation. So, whereas two conflicting orders cannot operate simultaneously without forcing a party into contempt, two active recommendations can overlap without creating a Catch-22.

Nor may the August 24 recommendation be ignored on the ground that it was issued in a manner inconsistent with a party's expectations. If a CE issues a recommendation, then a recommendation has been issued for the purposes of § 28(b). That does not change just because the parties may have expected otherwise. The relevant regulations at 30 C.F.R. §§ 702.316, 702.134(b) confirm this. While they do not specifically contemplate a CE issuing subsequent *recommendation* without a new conference, they make clear that if an employer wishes to seek reconsideration of an initial recommendation by way of a new conference, it may do so but may be liable for attorney's fees depending on the result. The regulations indicate that an employer must accept a recommendation within fourteen days *even if* the employer anticipates additional proceedings and determinations by the CE.

Section 28(b) does identify an exception, not applicable here. It provides that attorney's fees are not due if: (1) the employer agrees to a medical examination by a physician employed or selected by the Secretary (an Independent Medical Examiner, or "IME"); and (2) the employer agrees to pay compensation in accordance with the IME's findings. In this case, however, employer asked for the CE to reconsider the August 24 recommendation because of an anticipated report from a medical examiner *arranged by employer* -- not an IME. Employer's use of the IME label was incorrect. This was simply an objection to the recommendation. Employer is entitled to submit its own evidence, but under the statute it cannot avoid attorney's fees liability by delaying the CE's recommendation simply because it thinks the CE got it wrong.

Lastly, the court rejected employer's argument that the CE's August 24 recommendation was not a "recommendation" at all for the purposes of § 28(b) because it did not include a specific dollar amount due for AWW or total compensation. It held that the recommended-disposition requirement is satisfied if the CE issues in writing a proposed resolution of any matter central to the determination of compensation owed. Here, the CE's August 24 recommendation addressed a central issue; indeed, it addressed several determinative issues. While it also asked employer to submit documentation of claimant's yearly earnings, they were not in dispute. Moreover, it gave employer everything necessary to determine the total compensation owed. As the District Director found, the employer had the necessary wage records in its possession. Thus, the recommendation provided all the remaining items necessary to determine the total compensation value, and it described the equation by which to calculate it. Relatedly, as a matter of statutory interpretation, under the applicable Black's Law Dictionary definition, "disposition of the controversy" may be interpreted to apply to situations in which the CE recommends a manner in which a dispute between parties could be resolved.

Claimant additionally asserted that he is entitled to a fee award under § 28(b) based on the CE's July 28, 2016 recommendation, on the ground that employer continued litigating the responsible employer issue. Because claimant did not present this argument to the Board, the court did not consider it.

Circuit Judge Engelhardt concurred in part and dissented in part. Had the CE not issued the September 7, 2016 "Supplemental Informal Conference Recommendation" until *after* the expiration of the fourteen-day period following employer's August 29 receipt of the August 24 recommendation, he would have agreed with the majority. In his view, the September 7 recommendation superseded the August 24 recommendation and triggered a new fourteen-day period for purposes of § 28(b). Employer timely paid the resulting amount, as well as the additional amount set forth in the September 30, 2016 supplemental recommendation.

[Employer's Liability—Section 28(b) -- Informal Conference, Recommendation and Acceptance]

B. U.S. District Courts

[Ed. Note: The following district court decision is included for informational purposes.]

***Cloyd v. KBR, Inc.*, 571 F.Supp.3d 671, 2021 WL 5494685 (S.D. Tex. 2021).**

The district court granted KBR, Inc.'s ("KBR") motion for summary decision on the grounds that the Defense Base Act ("DBA") and the combatant-activities exemptions preempted plaintiffs' state-law tort claims against KBR.

In 2020, plaintiffs, three civilian contract employees, were working under a government contract on an Army base in Al Asad, Iraq. In January 2020, Iran launched a massive ballistic missile attack on the Al Asad Army base. The attack was in retaliation for the Army's killing of a senior Iranian general five days before. Ballistic missiles fired from Iran hit the base and injured the plaintiffs. The plaintiffs were working under the LOGCAP IV Contract when the attack occurred. Plaintiffs sought damages under Texas law from KBR, the parent of both the subsidiary entity that contracted with the government and of another subsidiary entity that employed the plaintiffs. They alleged that KBR was negligent in not evacuated them and other contract employees working on the base before the attack occurred. KBR moved for summary judgment on two grounds: first, that the DBA's exclusive remedy provision barred the claims against KBR because it was plaintiffs' employer under the DBA; and second, that the combatant activities exception to the Federal Tort Claims Act ("FTCA") preempted plaintiffs' claims.

In ruling on the motion, the court first had to determine whether Services Employees, International, Inc. ("SEII"), KBR's wholly-owned subsidiary, was the plaintiffs' only employer, or whether KBR was also their employer for DBA purposes. Plaintiffs were employed by SEII to carry out services under the U.S. Army Logistics Civil Augmentation Program ("LOGCAP IV") Contract. KBR is the parent company of a number of subsidiaries. KBR owns a holding company, KBR Holdings, LLC, which in turn owns KBR Services, LLC ("KBRS"), and SEII. Another KBR subsidiary, Kellogg Brown & Root Services, Inc., which later became KBRS LLC, signed the U.S. Army Logistics Civil Augmentation Program ("LOGCAP IV") Contract with the United States. KBRS is what KBR calls a "project entity." SEII is what KBR calls a "payroll company." SEII issued paychecks and assigned employees to KBRS to work on international contracts, including the LOGCAP IV Contract. Yet another "payroll company," KBR Technical Services, Inc. ("KBRTSI"), provided paychecks to supervisors and other personnel working in support of the LOGCAP IV Contract. In sum, KBR is the parent company that wholly owns the various subsidiaries at issue here. Each plaintiff signed an Employment Agreement with SEII. Those Agreements defined SEII as "Employer," but in each Agreement, the plaintiffs agreed that their "sole recourse for any injury . . . against Employer and/or any other parent or affiliate of Employer arising out of or in the course of employment under this Agreement shall be determined under the provisions of the [DBA]."

To determine whether an entity is an employer under the DBA, the Fifth Circuit applies the "relative nature of the work" test, which focuses on "the nature of the claimant's work and the relation of that work to the alleged employer's regular business." *Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 1253 (5th Cir. 1980). Under the "relative nature of the work" test,

> [i]n evaluating the character of a claimant's work, a court should focus on various factors, including the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. In analyzing the relationship of the claimant's work to the employer's business the factors to be examined include, among others, whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and whether the duration of claimant's

> work is sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job.

Id. An employee with multiple employers may hold the employers "jointly and severally liable for compensable injuries incurred by employees." *Id.* at 1256.

In this case, the district court rejected plaintiffs' contention that KBR, as the parent company of SEII, is not their employer for purposes of the DBA. It noted that, although the precedents are scant, they are helpful to KBR. Further, the "relative nature of the work" test was satisfied on this summary judgment record. Plaintiffs acknowledged that KBR provides a number of professional services to defense, space, and other governmental agencies including program management, consulting, research and development, logistics, training and security. This description is consistent with the job descriptions and employment letters for the plaintiffs' work under the LOGCAP IV Contract to work in fire prevention and protection, security, and food services. And even if KBR was responsible primarily for setting the policies and rules that the plaintiffs were required to follow in performing the military-support services, the execution of those rules and policies was a regular part of the plaintiffs' work and "a regular part of the employer's regular work." Plaintiffs signed numerous documents acknowledging KBR as their employer. They also acknowledged that KBR is the parent company of the entities that issued their paychecks and gave them daily work directions; and they were aware of the interconnectedness of the KBR entities in providing the military support services for the LOGCAP IV Contract that the plaintiffs worked under. Based on undisputed facts in the record, under the Fifth Circuit precedent, as a matter of law, the relationship of the plaintiffs' work to the regular business of KBR made KBR the plaintiffs' employer for DBA purposes. Plaintiffs' work was not a "separate calling or enterprise" from KBR's regular work of providing mission-critical support to the military.

The court further determined that the combatant activities exception to the FTCA applied and barred the negligence claims because the plaintiffs were integrated into combatant activities and KBR was subject to the military's control.

[Employer-Employee Relationship]

C. Benefits Review Board

***Rodriguez v. Triple Canopy, Inc.*, 55 BRBS 17 (2021).**[2]

In a case arising under the Defense Base Act ("the Act"), the Board agreed with the Director and reversed the ALJ's determination that claimant's Post-Traumatic Stress Disorder ("PTSD") claim was untimely.

Claimant, a citizen of Peru, worked for employer in Iraq from 2006 to 2010, performing security duties at U.S. military bases. In 2010, employer declined to renew his contract. In 2008, an explosion damaged claimant's hearing and killed two persons next to him, and a mortar attack hit his bunker and rendered him unconscious. He sought medical treatment following the mortar attack and later when his ears started bleeding. Claimant also testified at his deposition that he could hear mortars, rockets, bullets, and car bombs throughout 2009. He stated he had work-related bilateral hearing loss, vision problems, and psychological symptoms. Specifically, claimant testified he has trouble sleeping,

[2] This decision was initially issued on May 27, 2021, and was subsequently designated as a published decision by the Board in September 2021.

isolates, is easily irritated, constantly wants to get in fights, and feels like killing people when he sees blood. Claimant first sought psychological treatment in 2016 and treatment for his hearing loss in 2018. In March 2018, he filed a claim for benefits under the Act for his hearing loss and psychological condition.

The ALJ found employer did not rebut the § 20(a) presumption that claimant's hearing loss is work-related. He determined claimant did not provide timely notice to employer of his work injuries under § 12, but employer was not prejudiced by the delay. The ALJ found claimant timely filed a claim for his hearing loss on March 13, 2018, since he did not receive an audiogram documenting his hearing loss until January 22, 2018. *See* 33 U.S.C. §§ 908(c)(13)(D), 913(a). The ALJ denied claimant compensation for his hearing loss because he did not establish the extent of his loss, but he did award medical benefits for this injury. This determination was not challenged on appeal. In this regard, the Board observed that the Act provides that hearing loss determinations must be made in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment*. 33 U.S.C. § 908(c)(13)(E).

The ALJ further concluded that employer rebutted the § 20(a) presumption with respect to the psychological injury claim, and after considering all the evidence concluded that claimant established he has work-related PTSD. However, the ALJ found that claimant's PTSD claim, also filed on March 13, 2018, was not timely because he should have known in 2014 that he had work-related PTSD. The ALJ agreed with employer that claimant's PTSD is an occupational disease and therefore he had two years to file a claim under § 13(b)(2). He determined claimant was first diagnosed with work-related PTSD on October 21, 2016. The ALJ determined claimant was unaware of the connection between his PTSD and his employment until after he stopped working for employer in 2010. He further found claimant was denied employment in 2010 on the basis of having worked in Iraq and in 2014 because he failed a prospective employer's psychological examination. The ALJ found claimant should have filed his PTSD claim no later than some point in 2016 because, by 2014, claimant was aware or should have been aware that he had a loss in WEC due to a work-related psychological condition. The ALJ found claimant entitled to past and future medical treatment for his work injuries.

The ALJ next denied claimant's motion for reconsideration, reiterating his finding that the claim was untimely and noting claimant's unemployed status since 2010 as further evidence of awareness. Claimant testified he has not applied for other jobs, but worked at his mother's grocery store when it was open two to three days per week and washed his father's commercial vehicle. The ALJ rejected claimant's contention that employer should be estopped from contending his PTSD claim was untimely filed because employer misrepresented the availability of benefits under the DBA. Although claimant alleged employer knew of the 2008 mortar attack when it occurred, the ALJ found claimant cannot rely on the 2008 mortar attack to trigger the requirement under § 30(a) that employer file a notice of injury because there was no evidence employer was aware of any injury to claimant at that time. Based on the ALJ's determination (unchallenged on appeal) that employer could not have known claimant was injured before he filed his claim, the time for filing a claim was not tolled under § 30(f). *See* 33 U.S.C. § 930(a), (f). In his second decision on reconsideration, the ALJ again found claimant failed to establish employer deliberately misled him concerning his entitlement to claim compensation; he also found that claimant never testified employer deliberately misled him. Claimant appealed, and the Director filed a brief.

The Board initially stated that § 20(b) provides a presumption that the claim was timely filed. Thus, the burden was on employer to produce substantial evidence that the

claim was untimely filed. The Board noted that "an employer's burden to rebut the Section 20(b) presumption that the claimant was aware of a disabling work-related injury can, by their nature, be especially problematic in psychological injury cases. *See generally Blankenship v. Bowens*, 874 F.2d 1116 (6th Cir. 1989); *see also DynCorp Int'l,* 658 F.3d at 139, 45 BRBS at 65(CRT) (denial of symptoms often associated with PTSD)." *Id.* at 20 n.9.

Turning to the facts of this case, the Board found that:

> We cannot affirm the [ALJ's] determination that Claimant's PTSD claim was not timely filed. Employer has not produced substantial evidence to rebut the Section 20(b) presumption that Claimant was aware of the relationship between his employment, his PTSD, and his disability more than two years prior to filing his claim on March 2018. The [ALJ] erred in finding Claimant was aware of his work-related disabling injury after being rejected for jobs in 2010 and 2014 due to his working in Iraq and failing a psychological examination, respectively. The rejection in 2010 was not based on a diagnosis of an actual work-related psychological condition, but merely due to his prospective employer's perception of former overseas workers. Claimant was not provided a copy of the 2014 psychological examination and thus, even assuming it did contain a diagnosis, "awareness" within the meaning of the Act could not be imputed to Claimant. The [ALJ's] finding Claimant should have been aware of a psychological injury related to his employment by 2014 based on a prospective employer telling him in 2010 that contractors in Iraq were "crazy" and his failing the psychological examination in 2014 is not substantial evidence of a work-related psychological injury sufficient to rebut the Section 20(b) presumption that his March 2018 PTSD claim was timely filed.

55 BRBS at 19 (footnotes and citation omitted). The Board further concluded that "[t]he record supports only the conclusion that the earliest date claimant could have been aware of a work-related psychological injury was on October 21, 2016, when Ms. Carmen Ciuffardi Montoya, a psychologist, diagnosed claimant with PTSD related to his employment in Iraq." *Id.* at 20. Claimant testified that he sought a psychological examination in October 2016 because he was sick. The Board reasoned that:

> This is the first medical opinion diagnosing a psychological injury related to Claimant's employment. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996) (claimant not aware of work-related asbestosis until diagnosed by physician); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 87-89 (1995) (awareness of injury insufficient to rebut Section 20(b) presumption; claimant must be aware of its relation to his employment). There is no evidence prior to Ms. Montoya's report which linked Claimant's psychological injury to his employment in Iraq. *Bezanson*[,13 BRBS 928] (medical diagnosis irrelevant when diagnosis does not link the injury to the employment). While a medical diagnosis is not a statutory prerequisite to "awareness" for Section 13 purposes . . ., in this case there is not substantial evidence of the "full character, extent, and impact" of Claimant's work-related injury prior to his PTSD diagnosis in October 2016.

Id. at 19-20 (additional citations omitted). The Board noted that, in October 2016, claimant arguably had a loss in WEC due to his PTSD. Accordingly, the claim was timely as a matter of law.

Based on this finding, the Board noted that it did not have to address claimant's contention that employer is estopped from contesting the timeliness of his claim because of its alleged misrepresentations to employees about their employee status and lack of posted notice regarding the right to file a claim for a work-related injury. *See* 33 U.S.C. § 934; 20 C.F.R. § 702.211.

The case was remanded for the ALJ to address the remaining contested issues.

[Section 13 Timely Claim -- "Awareness," Occupational Diseases and Hearing Loss]

***Jefferson v. Marine Terminals Corp.*, __ BRBS __ (2021).**

The Board reversed the ALJ's finding that claimant's refusal to attend physical therapy ("PT") appointments was justified. It further held that claimant does not have a right to select a PT provider under the LHWCA.

Claimant sustained an ankle injury at work and underwent surgery. She was later diagnosed with back pain due in part to her altered gait from the ankle surgery. Employer's spine expert, Dr. Stovall, recommended a course of PT for the back condition. Employer apparently approved Dr. Stovall's recommendation for PT, but made the appointment at Roper Physical Therapy ("RSF-ATI") where claimant had previously received PT for her ankle injury. The original PT appointment was scheduled for June 2018, which she changed to July 5, 2018, but did not attend. Claimant then saw several providers at Southeastern Spine Institute ("SSI"), including Dr. Forrest. She was prescribed injections and a course of PT, and employer scheduled a PT appointment at RSF-ATI. When Claimant did not attend this appointment, employer suspended benefits, and sought an order from the district director validating its action. The district director, however, recommended continuation of benefits. The case was referred to OALJ, and employer filed a motion for summary decision ("M/SD") seeking approval of its termination of temporary total disability benefits ("TTD") for the finite period during which claimant refused to attend prescribed and authorized PT. The ALJ found that the suspension of benefits was not warranted. He found that employer showed claimant's refusal was objectively unreasonable (because it accommodated claimant's request to change physicians and provided all recommended treatment), but claimant's refusal to participate in PT at RSF-ATI was reasonable and justified.

Suspension of Benefits

Section 7(d)(4) of the LHWCA gives the ALJ the discretion to suspend compensation during any period in which a claimant unreasonably refuses to submit to medical or surgical treatment or to an employer's or the Secretary's expert's examination. Determining whether a claimant's refusal is "unreasonable" involves a two-prong inquiry: whether the refusal is objectively "unreasonable" and, if so, whether it is nevertheless subjectively "justified." The "reasonableness" of a refusal is an objective inquiry that examines whether an ordinary person in the claimant's position would object to the treatment. "Justification" is a subjective inquiry that evaluates the individual claimant's particular reasons for refusing to submit to treatment. The employer bears the burden of proof of showing the employee's refusal was unreasonable; if carried, the burden shifts to the employee to show circumstances justified her refusal. Only if the refusal is found to be both unreasonable and unjustified may compensation be suspended, but even then it is still at the ALJ's discretion. Here, only the ALJ's consideration of the second prong was challenged on appeal.

The Board concluded that the ALJ applied incorrect and inconsistent language in concluding claimant's refusal was reasonable and justified. The ALJ has not adequately explained this finding, particularly in light of his determination that it was reasonable for employer to require her to attend PT at the location she had used for her ankle. The ALJ's logic is therefore suspect.

First, the ALJ credited claimant's testimony concerning her migraine headaches and confusion regarding the June and July appointments. While it is within his discretion to credit claimant's testimony, the record demonstrated her testimony on this matter was conflicting and confusing, which the ALJ neglected to adequately address prior to crediting her testimony. Claimant could not say she was aware of her PT appointments, could not recall the dates, and seemingly confused the timing of the June/July PT appointments with her later "understanding" that all of her treatment would be done at SSI. The parties stipulated that claimant, herself, rescheduled her June 2018 appointment. Finally, because claimant specifically testified that she did not attribute her June appointment change to the migraines she had, the ALJ erred in making such an inference. The contemporaneous records give no reason for her changing and missing appointments. They do indicate she could not be reached afterward. Claimant gave no justification for refusing to attend authorized treatment, even treatment which employer's expert initially authorized and which was consistent with a treating physician's recommendation.

Second, the ALJ stated employer permitted treatment to be done at SSI "shortly" after the June/July appointment issues. While this is true, the ALJ incorrectly stated that Dr. Forrest at SSI wanted her to attend PT at SSI. This misrepresents Dr. Forrest's actual statement, which recommended PT but stated there was no reason it had to be done at SSI. Finally, when asked why she did not attend the November 2018 appointment at RSF-ATI despite her doctor indicating it did not matter where her PT was done, claimant stated than an agreement had been reached about getting all her treatment at SSI. But the agreement was not reached until May 2019. So, even if there was sufficient evidence to support the ALJ's statement about claimant's confusion, only her testimony "supports" her "understanding" of her treatment being done at SSI as of June, July, or November 2018. There was no evidence to support the ALJ's inference that Dr. Forrest required PT to be done at SSI or that he conveyed such an understanding to claimant.

Third, while there was evidence to support the ALJ's finding that Dr. Forrest delayed claimant's PT in October 2018 until her pain subsided, this recommendation did not justify claimant's failing to attend her earlier June and July PT appointments.

Lastly, the ALJ improperly relied on the claims examiner's recommendation as support for his conclusion. An ALJ should not rely on the claims examiner's memorandum in making findings (collecting cases). In addition, the informal conference occurred, and the memorandum resulting from it was issued, in December 2018, and thus could not have affected claimant's decisions to avoid her scheduled PT sessions in June, July, and November 2018.

Accordingly, the Board concluded that the ALJ's analysis of the issue of claimant's justification for her refusing to attend her scheduled PT appointments was primarily focused on claimant's testimony and, at most, two medical reports, and therefore did not include a consideration of the whole record. While the justification prong addresses a subjective issue which relies heavily on an individual claimant's thoughts and perspective, the ALJ did not consider other relevant evidence, *i.e.*, evidence produced contemporaneously with the period when claimant refused to attend her scheduled PT appointments, to determine whether claimant's testimony and thoughts matched what was actually happening, or what

she was aware of, at the time. As the ALJ did not consider all the relevant evidence and mischaracterized other evidence, the ALJ's decision was vacated and the case remanded for further consideration. On remand, the ALJ was instructed to address the justification prong in terms of all of the relevant evidence discussed herein, keeping in mind that claimant does not get to choose a particular PT facility.

Choice of Physical Therapy Facility

Section 7(a) of the LHWCA provides employers shall furnish "medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require. Section 7(b) states the "employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided." The Act's definition of "physician" is found at 20 C.F.R. § 702.404:

> The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. . . . Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term "physician" as used in this part.

In this case, the ALJ correctly found claimants do not have a right to choose their own physical therapist or PT facility under the Act. The statute is silent as to the definition of "physician," and the regulation does not list physical therapists as being considered physicians. Consequently, we hold the Act does not give claimant the choice of selecting her own physical therapist or PT facility.

Accordingly, the ALJ's decision was vacated and the case remanded for further consideration.

[Section 7 Medical Benefits -- Section 7(d)(4) -- Unreasonable Refusal; Section 7(b), (c) -- Choice of Physician and Physician Defined]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals:

1. Published decisions:

2. Unpublished decisions:

Cummings v. Island Creek Coal Co., Case No. 21-3032 U.S. App. (6th Cir. Dec. 13, 2021): Benefits were denied by the ALJ who found that Miner did not have complicated pneumoconiosis and could not invoke the 15-year presumption as he was not totally disabled. The Board affirmed the denial of benefits, and Miner appealed to the Court of Appeals. On appeal, Miner argued that the ALJ misunderstood the evidence on the issue of complicated pneumoconiosis. The court agreed. Specifically, the court pointed to the ALJ's reliance on a statement from Dr. Vuskovich, who performed a medical records review, that Miner did not have complicated pneumoconiosis because the opacity was not growing and that Dr. Crum had indicated that the size of the opacity was regressing. According to the court, the ALJ found Dr. Vuskovich's statement convincing since he was under the mistaken impression that Dr. Crum did not explain why the opacity was more difficult to see on the last x-ray. However, as the court pointed out, Dr. Crum testified at his deposition that the opacity was "not well seen because of the rib." In addition, the court noted that, despite Dr. Vuskovich's statement otherwise, it could not locate any evidence in the record where Dr. Crum said the spot was regressing. The court went on to reject Miner's argument that just one well-reasoned diagnosis of complicated pneumoconiosis is enough to invoke the irrebuttable presumption of entitlement under 30 USC § 921(c)(3).

[Complicated pneumoconiosis; weighing evidence as a whole]

B. Benefits Review Board

1. Published decisions:

2. Unpublished decisions:

Miller v. Sea "B" Mining Company, BRB No. 20-0380 (4th Cir. Sept. 2021)(unpub.): The ALJ found that the x-ray evidence established complicated to pneumoconiosis. Employer argued that this finding was made in error since the two of the physicians he relied upon gave equivocal opinions regarding the existence of complicated pneumoconiosis. The Board agreed. It found that, although the physicians--Drs. Crum and Alexander--indicated that the x-ray was positive for Category A pneumoconiosis on the ILO form, both included additional comments regarding the potential existence of complicated pneumoconiosis. For instance, Dr. Crum indicated that a follow up CT scan should be performed to verify that the opacity was complicated pneumoconiosis and to exclude neoplasm. Dr. Alexander indicated on his report that the nodule may be Category A complicated coal worker's pneumoconiosis, lung cancer, or another disease and that he recommended further evaluation. As these comments rendered their findings equivocal, the Board vacated the ALJ's finding that the x-rays established complicated pneumoconiosis. The Board also vacated the ALJ's weighing of the medical opinion evidence as it was affected by his determination that the miner had x-ray evidence of complicated pneumoconiosis.

[Complicated pneumoconiosis; weighing of x-ray evidence; equivocal medical opinions.]

Meade v. Dominion Coal Corporation, BRB No. 20-0367 BLA (4th Cir. Sept. 2021)(unpub.): The ALJ found that Claimant did not have complicated pneumoconiosis based on the X-ray interpretations, CT scan evidence, or medical opinion evidence. As he did not have any evidence of total disability, benefits were denied. Claimant appealed to the Board without the assistance of counsel.

On appeal, the Board affirmed the ALJ's conclusion that the x-ray evidence did not support a finding of complicated pneumoconiosis as it was supported by substantial evidence. However, the Board vacated the ALJ's finding that Claimant did not have complicated pneumoconiosis based on the CT scan and medical opinion evidence. The CTs in the record indicated that Claimant had a 1.7 cm nodule near the azygos fissure as well as other nodules that could possibly represent complicated pneumoconiosis. The opinions of Dr. DePonte and Dr. Adcock were filed by the parties on the issue of whether these nodules were indicative of complicated pneumoconiosis. Dr. DePonte found that the nodule near the azygos fissure was complicated pneumoconiosis. In addition, she noted the presence of other nodules and identified them as complicated pneumoconiosis. Dr. Adcock, on the other hand, found that nodule near the azygos fissure as well as the "other similarly sized and oriented nodules" were pleural pseudo plaques of simple pneumoconiosis rather than complicated pneumoconiosis. The Board rejected the ALJ's finding that the CT scan evidence was in equipoise. On remand, the Board instructed the ALJ to address the basis for Dr. DePonte and Dr. Adcock's opinions and the validity of their reasoning. In addition, it stated that the ALJ should address whether the nodules Dr. Adkins referred to in his report correspond with the nodules referenced in Dr. DePonte's report and determine whether complicated pneumoconiosis is present. Lastly, it instructed the ALJ to reconsider the medical opinion evidence in light of his determination of the CT scan evidence.

[Complicated pneumoconiosis; weighing CT scan evidence]

Brinegar v. Kentucky Processing Co. Inc., BRB No. 21-0029 BLA (6th Cir. Sept. 2021)(unpub.): The ALJ awarded benefits with a commencement date of February 2015, the date when the claim was filed. The ALJ found in his opinion that medical evidence dated April 1, 2015 and December 28, 2017 did not establish total disability. Employer appealed, stating that the commencement date should be later since the ALJ did not find evidence of total disability until 2018. On appeal, the Board agreed with Employer. It stated that since the ALJ found in his decision that Claimant was not totally disabled per medical evidence subsequent to the date of filing, the ALJ was precluded from using the filing date as the commencement date.

[Commencement date]

Coker v. Big Laurel Mining Corp., BRB No. 20-0568 BLA (4th Cir. Sept. 2021)(unpub.): The District Director (DD) found that Miner did not have a year of employment with the most recent coal mine employer, Mill Branch Coal Corporation (Mill Branch) as an insured of Brickstreet Insurance Company (Brickstreet), and named Big Laurel Mining Company (Big Laurel) as an insured of American International South Insurance Company (AI) as the RO in the PDO. Before the ALJ, Big Laurel moved to be dismissed and argued that, since Mill Branch was a successor to Big Laurel, Miner had a

cumulative year of employment there. At the hearing, the ALJ found that DD failed to resolve the successor operator issue and remanded the claim back to the DD. She issued an order of remand. Big Laurel's motion for reconsideration was denied. On appeal, the Board found that the ALJ's order remanding the claim to the DD was in contravention of 20 CFR §725.407(d) as this regulation only allows the DD to notify an incorrectly dismissed or previously unidentified operator of their potential liability before the claim is referred to OALJ. Once a claim is referred to OALJ, the named RO has the burden of proving it was incorrectly named. If the named RO satisfies this burden, the Trust Fund must assume liability for the payment of the claim. The claim cannot be remanded to DD in order to name another employer as the RO.

[Remand to DD for new RO designation is impermissible]

Turner v. Whitaker Coal Corp., BRB No. 20-00478 BLA (6th Cir. Dec. 2021)(unpub.): ALJ awarded benefits finding that Employer did not rebut the 15-year presumption of total disability due to pneumoconiosis. Employer appealed arguing that the Section 411(c)(4) presumption is unconstitutional or, in the alternative, that the ALJ erred in finding that Miner is totally disabled and in finding that he had invoked the presumption.

The Board did away with the argument regarding the constitutionality of the 15-year presumption under the PPACA since Employer relied upon the *Texas v. United States*, 340 F. Supp. 3d 579 and 352 F. Supp. 3d 655, 690 (N.D. Tex. 2018) decisions. The Board held that Employer's argument was moot given the Supreme Court's decision in *California v. Texas*, 593 U.S. 141 S. Ct. 2104, 2120 (2021).[3]

The Board went to reject Employer's argument that the ALJ erred in finding Miner totally disabled based on the pulmonary function testing and the medical opinion evidence. Specifically, the Board addressed Employer's argument that the June 6, 2019 study was invalid due to poor effort and was not entitled to any weight. Employer's argument was based on the opinion of Dr. Vuskovich, who said that the flow volume loops and volume time tracings showed a lack of effort. The ALJ found that the study was in compliance with quality standards since the variance between the two largest FEV1 curves was within five percent. In addition, he found that the technician's report of great effort and the ATS reproducibility also persuaded him that the study was reliable. The Board found that this was not a substitution of the ALJ's opinion over that of medical experts and affirmed the award of benefits.

[Constitutionality of PPACA; weighing PFT evidence]

[3] The Court held that the Plaintiffs—including Texas and several other states—did not have standing to challenge the constitutionality of the PPACA.