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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 208 March 2009

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

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

***Christensen v. Stevedoring Servs. of America*, __ F.3d __, 2009 WL 499540 (9th Cir. 2009).**

The Ninth Circuit vacated awards of attorney fees by the Benefits Review Board ("BRB") in two cases involving the same attorney. Both awards involved application of § 28(a) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") and 20 C.F.R. § 802.203, which implements § 28(a) as it relates to the BRB. The Court's rationale is also applicable to 20 C.F.R. § 702.132(a), which pertains to all entities that award attorney's fees under the LHWCA, *see Van Skike* (summarized below).[2]

Claimant's attorney, Charles Robinowitz of Portland, Oregon, sought fees at the rate of $350 per hour. In support of this rate, he relied on the

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

[2] As the Court observed, 20 C.F.R. § 802.203(e)-(f) is specific to the BRB but mirrors, with one exception, 20 C.F .R. § 702.132(a), which pertains to all entities that award attorney's fees under the LHWCA. The difference between § 802.203(e)-(f) and § 702.132(a) is an additional sentence specific to § 802.203(e), which states that "[a] fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate." Here, in both cases, the BRB computed the reasonable fee by multiplying the hours submitted by an hourly rate, consistent with the so-called "lodestar method."

Morones Survey of 2004 showing the average hourly rates at that time for commercial litigation attorneys in Portland; the *Laffey* Matrix[3] supporting an hourly rate of $405-425; and federal personnel pay rates for Washington, D.C. and Portland, to be used in interpreting the *Laffey* Matrix. The Board awarded fees at the rate of $250 per hour.

The Court observed that the definition of a "reasonable attorney's fee" pursuant to § 28(a) of the LHWCA has evolved toward the definition of "reasonable" used in all federal fee-shifting statutes. The "lodestar method" (number of hours reasonably expended multiplied by reasonable hourly rate) is the fundamental starting point in determining a "reasonable attorney's fee," *see City of Burlington v. Dague,* 505 U.S. 557, 562 (1992), and this holds true in applying § 28(a). *See Tahara v. Matson Terminals, Inc.,* 511 F.3d 950, 955 (9th Cir. 2007). Various other factors have been held relevant to the setting of appropriate attorney's fees. *See Van Gerwen v. Guarantee Mut. Life Co.,* 214 F.3d 1041, 1045 n. 2 (9th Cir. 2000).

In *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891, 895 (1984), the Supreme Court held that "reasonable fees" in 42 U.S.C. § 1988 claims "are to be calculated according to the prevailing market rates in the relevant community." *Id.* at 895. The Court further held that "the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." 465 U.S. at 896 n. 11; *see also Bell v. Clackamas County,* 341 F.3d 858, 868 (9th Cir. 2003). *Dague*, *supra*, states that the Supreme Court's caselaw concerning what constitutes a reasonable fee applies to all federal fee-shifting statutes, including the LHWCA.

Based on the foregoing, the Ninth Circuit held that the definition of a "relevant community" for use in calculating the lodestar hourly rate for LHWCA attorney fee awards should not be confined to the consideration of other LHWCA cases in the same geographic region, but rather must include consideration of what counsel could obtain by taking other types of cases. The Court noted that the relevant community is generally defined as the forum in which the district court sits. The Court rejected the Fourth Circuit's approach in *Newport News Shipbuilding & Dry Dock Co. v. Brown,* 376 F.3d 245, 251 (4th Cir. 2004), stating that the Fourth Circuit defined "relevant community" by looking solely to what other ALJs and the BRB awarded in other LHWCA cases in the same geographic region. Such a limited definition

[3] This matrix derives from the hourly rates allowed by the district court in *Laffey v. Northwest Airlines, Inc.,* 572 F.Supp. 354 (D.D.C.1983).

is problematic, as there is no private market for attorney's fees under the LHWCA.[4] In order to encourage able counsel to undertake LHWCA cases, counsel must be awarded fees commensurate with those which they could obtain by taking other types of cases.

Similarly, the Court held that the determination of "prevailing market rate" also should not be limited to LHWCA cases. The BRB may not define "prevailing market rate" in such a way as to define the "market" only in terms of what has been awarded by ALJs and the BRB under the LHWCA. Borrowing the Third Circuit's rationale in the context of public interest work fees, the Court characterized this approach as a "tautological, self-referential enterprise," which "perpetuate[s] a court-established rate as a 'market' when that rate in fact bears no necessary relationship to the underlying purpose of relying on the marketplace: to calculate a reasonable fee sufficient to attract competent counsel," citing *Student Pub. Interest Research Group of N.J. v. AT & T Bell Laboratories,* 842 F.2d 1436, 1446 (3d Cir.1988). *Blum*, *supra*, requires the BRB to consider the relevant market rate.[5] Also, in *Moreno v. City of Sacramento,* 534 F.3d 1106, 1115 (9th Cir.2008), the Ninth Circuit rejected what appeared to be a de facto policy of awarding a rate of $250 per hour in civil rights cases.

Here, the BRB's fee awards were not adequately justified. The Court instructed:

> "To satisfy the concerns expressed in *Student Public Interest Research Group,* the BRB must define the relevant community more broadly than simply fee awards under the LHWCA, and it has not done so. We do not here attempt to dictate to the BRB either what that relevant community should be or what a reasonable hourly rate in that community should be. Nor do we insist that in every fee award decision the BRB must make new

[4] LHWCA attorneys face criminal penalties for negotiating or entering into private fee agreements with their clients. *See* 33 U.S.C. § 928(e).

[5] The Court noted that it did not need to reach the issue regarding the extent to which §§ 702.132 and 802.203 are entitled to *Chevron* deference by the Court. *See United States v. Mead Corp.,* 533 U.S. 218, 227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (acknowledging that when Congress expressly delegates authority to an agency, any "ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute" (citing *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))). The Court noted, however, that neither regulation is inconsistent with the lodestar/multiplier methodology set forth in cases such as *Van Gerwen;* noting that both regulations set forth at least four of the eleven factors listed in *Van Gerwen* and neither regulation forbids consideration of other factors.

> determinations of the relevant community and the reasonable hourly rate. But the BRB must make such determinations with sufficient frequency that it can be confident-and we can be confident in reviewing its decisions-that its fee awards are based on current rather than merely historical market conditions."

Blum places the burden on the fee applicant to produce evidence of the relevant market and the corresponding rate. The Court further instructed that "[i]n cases in which the applicant has failed to carry this burden, it may be reasonable for the BRB to look at what ALJs and the BRB had awarded in other LHWCA cases in order to ascertain a reasonable fee," citing *Brown,* 376 F.3d at 251. If the BRB believes that an applicant has failed to carry its burden, it should say why the applicant has failed to do so, and "[i]f the reasons given by the BRB would not have been anticipated by a reasonable fee applicant, it may be appropriate for the BRB to allow an applicant to cure its failure to carry the burden."

The Court further held that the BRB did not abuse its discretion by declining to add a delay enhancement to attorney fee awards since a two-year delay was not egregious or extraordinary.

[Topic 28 Attorney's Fees – Generally]

***Van Skike v. Dir., OWCP*, __ F.3d __, 2009 WL 499532 (9th Cir. 2009).**

The Ninth Circuit vacated awards of attorney fees by an ALJ and Office of Workers' Compensation Programs' District Director, affirmed by the BRB. Attorney Charles Robinowitz of Portland, Oregon argued that a market rate of $350 per hour was appropriate based on his general experience, his consultation with an attorney's fee expert, prior fee awards of his own and of other attorneys, his non-contingent fee agreements, and the *Laffey* Matrix. After considering and rejecting each of the proposed grounds,[6] the ALJ concluded that counsel failed to establish a "normal billing rate" under 20 C.F.R. § 702.132(a) and that the "best proxy" was the rate of $250 per hour, based upon recent fee awards in LHWCA cases. In his motion for reconsideration, counsel quantified his non-contingent billing and included the Morones Survey of 2004 showing the average fees charged by commercial litigators in Portland; the ALJ denied the motion.

The Ninth Circuit held that in calculating an attorney fee award under the LHWCA, exclusive reliance on contemporaneous LHWCA cases does not

[6] The Court reproduced the ALJ's detailed analysis of the evidence in a footnote.

constitute an appropriate determination of market rate, despite lack of private LHWCA market. Rather, relevant community must be defined "more broadly than simply fee awards under the LHWCA." *Christensen, supra* at 9. In so holding, the Court reiterated its rationale in *Christensen* (summarized above). The Court noted that in *Christensen* it rejected the Fourth Circuit's "overly circumscribed" definition of "relevant community" in *Brown*, *supra*, relied upon by the BRB in the instant case in affirming the awards.[7]

Here, vacation of attorney fee awards and remand were warranted where the fee applicant provided detailed justification to establish the relevant market rate, but the ALJ and District Director based their determinations of relevant hourly rates exclusively on contemporaneous LHWCA cases. The Court reiterated its instruction in *Christensen* that, if the court finds that the relevant market has not been established for reasons which "would not have been anticipated by a reasonable fee applicant," "it may be appropriate ... to allow an applicant to cure its failure to carry the burden." *Christensen, supra* at 10.

The Ninth Circuit further held that reducing an hourly rate based upon a lack of complexity and the routine nature of the work is inconsistent with other fee-shifting regimes Congress has adopted or the Supreme Court has approved. While 20 C.F.R. § 702.132(a) does not expressly mandate the use of the traditional lodestar method, it does permit the consideration of lodestar factors not explicitly listed, and it also sets forth at least four of the eleven factors to be considered. *See Van Gerwen v. Guarantee Mutual Life Co.,* 214 F.3d 1041, 1045 n. 2 (9th Cir. 2000) (listing the lodestar factors). The regulation does not expressly require that the reasonable *rate* determination turn upon the complexity of the issues, so the prevailing lodestar methodology must be applied. In applying the lodestar method, the reasonable hourly rate is generally determined based upon the prevailing rate in the relevant community, while complexity and novelty should be reflected in the reasonable number of hours. *See Blum*, 465 U.S. at 895. Here, as in *Blum*, the novelty and complexity were presumably reflected in the number of hours recorded by counsel, and, as such, are not appropriate factors "in determining whether to [decrease] the basic fee award." *Id.* at 898-99.

Finally, the claim for enhancement of the fee award for delay in payment was not properly raised, and thus not reviewable, where applicant never raised it either in his initial application for fees or in his motion for

[7] The Board cited *Brown* for the proposition that "[e]vidence of fee awards in comparable cases is generally sufficient to establish the prevailing market rates in the relevant community." (internal quotation marks and citations omitted).

reconsideration, and the BRB declined to consider it as having been raised for the first time on appeal.

[Topic 28 Attorney's Fees –Generally; Topic 28.6 Factors considered in award; Topic 28.6.1 Hourly Rate]

***Andrepont v. Murphy Exploration and Production Co.*, No. 08-60251, 2009 WL 689679 (5th Cir. Mar. 17, 2009)(Unreported).**

Claimant filed a claim for permanent total disability compensation under the LHWCA, and Employer voluntarily paid compensation for permanent partial disability. Following an informal conference, Employer accepted the District Director's recommendation that it did not owe any further compensation. An ALJ, however, awarded an additional period of permanent total disability and Claimant's counsels sought attorney's fees pursuant to §§ 28(a)-(b) of the LHWCA. The ALJ held Employer liable for the fees. The BRB, in a split decision, denied any attorneys' fees.

The Court first held that where an employer tenders *any* compensation within thirty days after the filing of the written claim, regardless of the type of compensation requested, § 28(a) does not apply. Interpreting § 28(b), the Fifth Circuit joined the Sixth and Fourth Circuits in holding that attorneys' fees may be awarded under § 28(b) only if the employer rejects recommendations that emerge form an informal conference. In so holding, the Court relied on the plain statutory language and prior precedent setting forth prerequisites to employer's liability for attorneys' fees under § 28(b). *FMC v. Perez*, 128 F.3d 908, 910 (5th Cir. 1997); *Staftex Staffing v. Dir., OWCP*, 237 F.3d 409, 410 (5th Cir. 2000).[8]

The Court declined to follow the Ninth Circuit's contrary authority that would permit the award of attorneys' fees whether or not the employer accepted or rejected the recommendations from the informal conference. The Court stated that the Ninth Circuit looked beyond the plain language of the statute and relied on the statutory intent to justify this conclusion. The Fifth Circuit refused to take this approach, citing its earlier holdings that the presumptive and generally applicable American Rule bars fee-shifting in the absence of some specific and explicit statutory exception.

The Court noted "parenthetically" that "requiring this element might seem odd when the informal recommendation was completely favorable to

[8] Although in this case the Fifth Circuit did stress the requirement of a written recommendation, it noted this requirement as part of its holding in *Staftex Staffing v. Dir., OWCP*, 404, 409 (5th Cir.), *opinion modified on reh'g on other grounds*, 237 F.3d 409 (2000).

the employer" and that "it is unclear what an employer could do to refuse to accept a favorable recommendation."[9] Thus, a claimant who chooses to seek greater compensation before an ALJ will suffer a reduction in benefits due to attorney's fees, "which seems to be adverse to the purpose of the statute." While acknowledging this "seeming anomaly" and observing that Congress may not have intended this result, the Court nevertheless refused to "elevate the purposes of the statute above the plain text reading" and noted that "Andrepont's policy arguments are therefore best addressed to Congress, not the courts."

[Topic 28.2.3 28(b) Employer's Liability – District Director's Recommendation]

***Wheaton v. Golden Gate Bridge, Highway & Transp. Dist.*, __ F.3d __, 2009 WL 653041 (9th Cir. 2009).**

The Ninth Circuit affirmed the Board's denial of benefits under the LHWCA to a ferry worker employed by the Golden Gate Bridge, Highway, and Transportation District. The Court held that the District was a "subdivision of the state" of California, within the meaning of § 3(b) of the LHWCA, which excludes such subdivisions from obligation to pay compensation under the LHWCA.

The parties agreed that, under California law, the District has the status of a local public agency such as a county or municipality. The Court concluded that the plain language of § 3(b) -- "a State … or any subdivision thereof" -- should be read as including municipalities, not just arms of a state as Claimant contended. This interpretation was consistent with prior decisions construing the term "subdivision" under the LHWCA and with historical use of that term when the Act was first enacted. The Court found no legislative history supporting Claimant's view. Furthermore, as this interpretation was urged by the BRB and Director of OWCP and was reasonable, it was entitled to deference. It follows that the Board did not err in applying a multifactor test for determining whether a public entity is a subdivision of a state within the meaning of § 3(b).

Applying the test to the facts of this case, the Court agreed with the Board's determination that the District is a subdivision of the state: the District was created pursuant to state law; it managed public transportation by bus and ferry; District officials were appointed by local elected officials; the District's board meetings were open to the public; the District was required to follow state competitive bidding requirements; the District could

[9] The Board was split as to this portion of the decision.

issue bonds to finance its functions; it had the power of eminent domain; and it was considered a local public agency with the same status as a county or municipality under California law.

[Topic 3.1 Coverage – Government Employees]

***Del Monte Fresh Produce v. Dir., OWCP*, __ F.3d __, 2009 WL 806639 (11th Cir. 2009).**

Claimant sought modification of a prior award of benefits under the LHWCA on the theory that his wage-earning capacity had been reduced when his post-injury employer, Sizemore Security, transferred him to a lower-paying position and, for a period of four months, reduced his hours. The Court upheld the Board's decision affirming an ALJ's award of increased benefits.

The ALJ properly rejected Employer's argument that Sizemore's transfer of Claimant was due to his own misconduct. A wage loss due to misconduct is not compensable. Here, reports of misconduct predated Claimant's transfer by several months; testimony of a Sizemore employee that the transfer was due to Claimant's insubordination was unsupported by personnel records; and Employer failed to reconcile its assertion with Claimant's promotion within a week of his transfer.

Absent a binding precedent defining the burden of proof when an employee seeks a modification based on a change in condition, the Court adopted the burden-shifting approach announced by the Board in *Vasquez v. Con'l Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990). The Board held that a worker had the initial burden of demonstrating a change in condition; he could satisfy that burden by showing that "he was laid off from the job which previously was found to constitute suitable alternate employment for reasons unrelated to any actions on his part and by demonstrating that he remains physically unable to perform his pre-injury job." *Id.* at 410-31. After the worker made those showings, "the burden shifted to the employer to show the availability of a new suitable alternate job." *Id.* at 431. Here, Claimant met his burden, as the ALJ found that the reduction in wages and hours did not result from any actions on his part; and it was undisputed that he remained physically unable to perform his pre-injury job. Employer could not point to any suitable jobs that were available to Claimant at the relevant time; the ALJ properly rejected testimony of the Sizemore employee about future openings. Citing a 1933 decision by the Ninth Circuit, the Court noted that, in some situations, an employer may be able to show that there is no suitable alternate employment because of circumstances unrelated to the claimant's disability -- such as a global economic downturn. *See McCormick*

Steamship Co. v. U.S. Employee's Comp. Comm'n, 64 F.2d 84, 86 (9th Cir. 1933) (enjoining modification award where worker's decrease in wages was the result of a decrease in stevedoring work caused by depressed economic conditions). Here, Employer made no such allegation.

The Court rejected Employer's argument that the ALJ should have considered various factors other than Claimant's actual wages in determining his wage-earning capacity, such as his physical condition, age, education, industrial history, and the availability of suitable jobs. These factors had been considered in the initial proceedings and the only variable that led to the modification was the reduction of actual wages. The only relevant evidence was the Sizemore employee's testimony that other jobs may be available; the ALJ, however, did not find such jobs to be available. Employer did not carry its burden of showing that other factors resulted in a higher wage-earning capacity. *See Grage v. J.M. Martinac Shipbuilding,* 21 BRBS 66, 69 (1988). The ALJ was not required to hunt for other factors or, absent such a showing, to reconsider the determination made during the initial award proceedings.

Finally, the ALJ was not required to address Employer's request for credit for an alleged overpayment of benefits, which was first raised in a post-hearing brief to the ALJ. Although an ALJ may consider a new issue at any time before filing the compensation order in a case, he is not required to do so. *See* 20 C.F.R. § 702.336(b). The Board has upheld an ALJ's refusal to consider a new issue raised in a post-hearing brief where, as here, the party "fail[ed] to exercise diligence in developing [the] issue, which should have been anticipated prior to the hearing." *See Pimpinella v. Universal Maritime Serv.,* 27 BRBS , 154, 158 (1993). Nor did the Board abuse its discretion in refusing to consider this argument raised for the first time on appeal.

[Topic 22.3.4 Change in Economic Condition; Topic 19.3.6.1 Issues at hearing]

***Arsenault v. BAE Sys. Norfolk Ship Repair*, No. 07-2031, 2009 WL 693354 (4th Cir. Mar. 18, 2009)(Unreported).**

The Court upheld the Board's decision reversing an ALJ's award of compensation under the LHWCA on the ground that Claimant failed to carry his burden of proving that his 2.5% increase in hearing loss was work-related. The Board upheld the ALJ's determination that the § 20(a) presumption had been invoked and rebutted, but reversed his conclusion that evidence as a whole established causation.

Pursuant to § 8(c)(13)(E) of the LHWCA, "[d]eterminations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association [the "AMA Guides"]." The AMA Guides (5th ed. 2001) direct that air-conduction studies shall be used when evaluating hearing loss (as does the Longshore Procedure Manual). Claimant asserted that Dr. Deutsch's opinion, proffered by Employer and relied upon by the Board, was in conflict with the AMA Guides in that he based his conclusions as to the cause of hearing loss on bone-conduction studies**.** The Fourth Circuit agreed with the Board's interpretation that "determination," as used in § 8(c)(13)(E), refers to the extent of a claimant's hearing impairment, not the *cause* thereof. The AMA Guides provide the methods for measuring hearing loss, while the statute provides the formula for determining how such losses shall be compensated.

The absence of evidence of work-relatedness of Claimant's increased hearing loss from Dr. Deutsch's opinion was not sufficient to meet Claimant's burden of persuasion as to causation. While Claimant argued that the evidence showed the existence of work conditions that could have caused his increased hearing loss, Dr. Deutsch, the only medical expert to opine on causation, concluded that the increased hearing loss was not due to noise exposure in the workplace.

[Topic 8.13.1 Hearing Loss – Determining the Extent of Loss; Topic 20.4.1 Evidence Based on Record as a Whole]

***Bollinger Shipyards Inc. v. Dir, OWCP*, No. 08-60348, 2009 WL 631608 (5th Cir. Mar. 12, 2009)(Unreported).**

The Fifth Circuit upheld the Board's decision affirming an ALJ's award of benefits and attorneys' fees to Claimant under the LHWCA. The Court noted that "there is an extremely high hurdle to overcome" for a claimant seeking to reverse a Board order.

Claimant alleged that he was injured when a wave rocked the barge causing him to fall. Employer contended that he was never injured at work. The ALJ found that the § 20(a) presumption applied, that Employer had not rebutted it, and that, even if it did, the totality of the evidence favored Claimant. The ALJ found that although Claimant's testimony regarding his accident was unpersuasive and unreliable, this was due to his confusion and not to an intent to deceive. The ALJ also determined that Claimant had been consistent in his description of his accident to his supervisors and doctors.

Despite the credibility concerns, and based largely on medical expert testimony that Claimant's condition was consistent with having been injured in a fall at work, the ALJ found sufficient evidence that Claimant was injured at work. In concluding that the evidence favored Claimant, the ALJ took into consideration Employer's arguments that Claimant and his witnesses were not credible and that the injury could not have happened on the date and time that Claimant alleged. The Court stated that medical testimony can form the basis for a successful claim for benefits regardless of whether the claimant is deemed credible. *See Conoco, Inc. v. Dir., OWCP,* 194 F.3d 684, 691 (5th Cir.1999). Notably, the Court observed that doubts regarding the evidence are resolved in favor of the employee in accordance with the remedial purposes of the Longshore Act, citing *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 822 (5th Cir.1991).

Substantial evidence supported the ALJ's determination that Employer failed to establish the availability of suitable alternate employment under the standard adopted by the Fifth Circuit. The ALJ weighed the evidence, including the fact that some sedentary work was available to Claimant. However, based largely on the opinion of Employer's medical expert, the ALJ held that, without treatment, there was no suitable alternative employment for Claimant. Employer offered no evidence to the contrary.

The Fifth Circuit further concluded that the ALJ's determination of Claimant's average weekly wage based on the pay he had received during his eight weeks working for Employer was within the ALJ's range of discretion. The parties agreed that § 10(c) applied. The Court observed that the purpose of § 10(c) is to determine a sum that reasonably represents a claimant's annual earning capacity at the time of the injury, and that earning capacity is defined as the amount the employee would have the potential and opportunity of earning absent the injury. The Court observed that an ALJ has broad discretion in determining the earning capacity of a claimant at the time of the injury. Here, Employer contended that Claimant's average weekly wage should have been determined using his highest yearly wages in any prior year as reflected in his social security earnings. The Court stated that a change in circumstances, such as a recent change in work, could provide a reason for finding annual earnings at the time of the accident greater than the claimant's actual annual earnings in the immediately preceding years. *New Thoughts Finishing Co. v. Chilton,* 118 F.3d 1028, 1031 (5th Cir. 1997). Claimant had recently secured a new, steadier, higher paying job with Employer. He held that job for eight weeks before his alleged injury.

[Topic 20.5.1 Causal Relationship of Injury to Employment; Topic 20.4.2 Doubts Resolved in Employee's Favor; Topic 10.4.3 Section

10(c) -- Actual Earnings Immediately Preceding the Injury Are Not Controlling]

***Levingston Ship Building Co. v. Pelaez*, No. 07-60616, 2009 WL 577736 (5th Cir. Mar. 6, 2009)(Unreported).**

Claimant sought death benefits under the LHWCA based on her husband's death due to industrial asbestos exposure. Levingston's insurer, the Texas Property and Casualty Insurance Guaranty Association ("TPCIGA"), a state-created association which pays claims for insolvent insurers, impleaded decedent's other former employer, Gulf Copper & Manufacturing Corp., contending it was the last maritime employer.

Although Claimant established her *prima facie* case against Levingston, TPCIGA nevertheless contended, without citation to authority, that Gulf Copper had the *initial burden* to prove it was not the last responsible employer. This contention was foreclosed by *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza,* 293 F.3d 741 (5th Cir.2002). "There is no requirement that the employee prove that the employer in question was the last employer. It is the employer's burden to rebut the presumption that rises after the employee presents a *prima facie* case." *Id.* at 750. An employer rebuts this presumption either by establishing: exposure during the employment "did not cause the harm or *that the employee was exposed to injurious stimuli during subsequent employment covered by the LHWCA* ". *Id.* at 749 (emphasis added).

TPCIGA further asserted that it could not be held liable under the LHWCA for penalties, attorney's fees, and interest, as it was not a LHWCA "carrier" and its liability was controlled exclusively by the Texas Property and Casualty Insurance Guaranty Act. The Court held that, having repeatedly referred to itself as the carrier and not contested that designation before the BRB, TPCIGA was estopped from contesting that designation. The Court further rejected TPCIGA's challenge to the DOL's jurisdiction to impose such liability. Based on the foregoing analysis, the Court additionally rejected TPCIGA's challenge to venue, and further noted that any venue challenge has been waived because TPCIGA did *not* present it to the BRB.

[Topic 70.5 Responsible Employer – Burdens of Proof; Topic 2.5 Definitions – Carrier]

***Dillingham Ship Repair v. U.S. Dep't of Labor*, No. 07-73611, 2009 WL 784267 (9th Cir. Mar. 25, 2009)(Unreported).**

This case concerned which employer was liable for causing an asbestos-related disease and the ultimate death of Claimant's husband. The Ninth Circuit has adopted the "last employer rule," whereby "the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, [is] liable for the full amount of the award."

Dillingham raised two distinct issues concerning the burden of proof. First, it argued that the Board's decision in *McAllister v. Lockheed Shipbuilding,* 41 BRBS 28, 2007 WL 1289932 (2007) (per curiam), erred in imposing the burden of proof "simultaneously" on all potentially liable employers because that procedure is unworkable. The Court reasoned that here, the ALJ in fact applied the burden of proof *sequentially,* beginning with the last employer and working backwards in time. As the Board has made clear, that procedure is not erroneous. Thus, any error in the Board's formulation in *McAllister* was harmless.[10]

The Court further held that the Board did not err in holding that each employer has the burden of proving that it was not the responsible employer (or, alternatively, that a later-in-time employer was responsible), as this standard is consistent with the Ninth Circuit precedent and does not contravene the requirement that there must be a "rational connection" between the employment and the injury.

Finally, the ALJ's conclusion that the decedent's other employer met its burden of proving that it did not expose him to injurious levels of asbestos was supported by substantial evidence. The ALJ properly determined that Dillingham's contrary evidence was "highly attenuated and conjectural" and was outweighed by the affirmative evidence offered by the other employer.

[Topic 70.2 Occupational Disease Cases and the *Cardillo* Rule; Topic 70.5 Responsible Employer – Burdens of Proof]

A. U.S. District Courts

***Eysselinck v. Dir., OWCP*, No. H-07-4589, 2009 WL 677137 (S.D.Tex. Mar. 11, 2009).**

[10] In a concurring opinion, Circuit Judge Fisher declined to opine on whether imposing the burden of proof on each employer is appropriate, deeming it immaterial to this case.

The Court affirmed the Board's decision upholding an ALJ's denial of death benefits to employee's widow under the LHWCA, as extended by the Defense Base Act, pursuant to § 3(c), which excludes, *inter alia*, injuries "occasioned … by the willful intention of the employee to injure or kill himself "

Claimant contended that her husband's suicide was not a willful act, but rather was the result of undiagnosed post traumatic stress disorder ("PTSD") caused by his work in Iraq. The Court stated that the burden rested on Claimant to show that the suicide was the result of an irresistible impulse to kill oneself. In order to show an irresistible impulse, Claimant had to produce expert opinion that decedent suffered from a mental disease or impairment which created the impulse leading to the suicide. *Voris v. Texas Employers Ins. Assoc.,* 190 F.2d 929, 931 (5th Cir.1951), *cert. denied,* 342 U.S. 932, 72 S.Ct. 376, 96 L.Ed. 694 (1952).

Here, substantial evidence supported the Board's decision, and the Court lacked authority to reweigh or reappraise the evidence. Even though Claimant's expert, Dr. Sieberhagen opined that the decedent suffered from PTSD directly due to the pressures of his work in Iraq, and that this created the "irresistible impulse" which caused him to commit suicide, this testimony was controverted by that of Dr. Brodsky and other witnesses. Dr. Brodsky's testimony, properly credited by the ALJ, provides substantial evidence to support the decision. Despite the strain that being in Iraq had on decedent with respect to his family and friends in Namibia opposed to the United States' involvement in the war, the ALJ, nonetheless, found that while conditions in Iraq were not ideal, the decedent had not been exposed to life threatening or perceived life threatening dangers. The thoroughness of the ALJ's decision showed that he carefully considered the entire record. Because there was more than a scintilla of evidence for a reasonable person to conclude that the decedent's suicide was an impulse type action, under § 3(c) Claimant was not entitled to benefits.

The Court rejected Claimant's request for a remand so that depression could be considered as a cause of the suicide, because depression was considered by Claimant's own expert, Dr. Sieberhagen, who ultimately opined that the only possible explanation for decedent's suicide was PTSD.

[Topic 3.2.2 Willful Intention]

B. Benefits Review Board

***K.S. v. Serv. Employees Int'l, Inc.*, __ BRBS __, BRB No. 08-0583 (Mar. 13 2009).**

Claimant worked for Employer as a truck driver in Kuwait and Iraq under a one-year contract. Two months into his contract, Claimant injured his left hand, returned to the U.S., and was diagnosed with reflex sympathetic dystrophy (RSD). An ALJ awarded Claimant temporary total disability compensation. Applying § 10(c), the ALJ accepted Employer's average weekly wage ("AWW") calculation based on the combination of Claimant's domestic and overseas earnings during the 52 weeks prior to his injury.

The Board stated that the object of § 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. In *Proffitt v. Serv. Employers Int'l, Inc*., 40 BRBS 41(2006), the Board upheld the ALJ's calculation of the AWW based solely on claimant's overseas earnings; all unpublished Board decisions addressing this issue have reached the same result (citations omitted). In so doing, the Board concluded that the ALJ properly considered the extrinsic circumstances of employment in Iraq, and rejected employer's contention that this approach unreasonably focused on employment that was temporary in nature and was not representative of claimant's actual wage-earning capacity.

In the present case, the Board held that "as the facts in this case are not distinguishable from those in *Proffitt*, and as the analysis in that case fully accounts for the circumstances of employment in Iraq in a contemporaneous time period, we hold that the calculation of claimant's average weekly wage under Section 10(c) must be based solely on his overseas earnings in Iraq." As in *Proffitt*, Claimant was injured a few months into his one-year contract which paid him a higher wage than his stateside employment to compensate for working under the exacting and dangerous conditions existing in Iraq. Also as in *Proffitt*, Claimant was hired to work full-time under a contract with an expected duration of 12 months, and there was no evidence that he did not intend to fulfill his contractual obligation.

The Board reasoned as follows:

> "Where, as here, claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be

> calculated based upon the full amount of the earnings lost due to the injury. While the administrative law judge is afforded discretion in determining an employee's annual earning capacity, Section 10(c) directs the administrative law judge to do so "having regard to the previous earnings of the injured employee in the employment in which he was injured." The goal of Section 10(c) in this regard is intended to result in a sum that reflects the *potential* of claimant to earn absent injury. …. Moreover, while claimant's job was not everlasting, he had a one-year contract, there is no evidence to suggest he would not have fulfilled this term absent injury, and claimant expressed his intent to continue working in Iraq for a longer period. The one-year contract term is consistent with the Act's focus on annual earning capacity, and his earnings under this contract thus provide the best evidence of claimant's capacity to earn absent injury.
>
> Under these circumstances, claimant's average weekly wage must be based exclusively on the higher wages earned in the job in which he was injured in Iraq, particularly since these wages were the primary reason for his accepting employment under the dangerous working conditions that existed there."

K.S., slip. op. at 5-6 (citations to caselaw and record omitted; emphasis in original). To compensate Claimant at a lesser rate would distort his earning capacity by reducing it to a lower level than Employer agreed to pay him to work under the conditions in Iraq.

Employer's reliance on cases in which the claimant's work is cyclical or intermittent was unsupported by the record. The Board noted that "if the record contained credible evidence that a claimant's employment overseas was in fact, or was intended to be, short term, i.e., for less than a one-year contractual term, the result herein would not necessarily control. We reject adoption of the 'blended approach' in cases involving a one-year contract because it treats similarly situated employees differently, as the amount of each average weekly wage computation would depend upon how long into the contractual year a claimant's injury occurred."

[Topic 60.2.1 Defense Base Act; Topic 10.4.4 Calculation of Actual Earning Capacity Under Section 10(c)]

***L.W. v. Northrop Grumman Ship Sys., Inc.*, BRB No. 08-0497 (Mar. 27, 2009).**

In vacating several of the ALJ's findings, the Board made the following determinations.[11] The Board held that where a collective bargaining agreement ("CBA") provides for a claimant's termination if she accepts outside employment, such work is unavailable during the time the claimant is on leave of absence status pursuant to the CBA and the potential exists for her to resume suitable work for employer, and therefore may not be used by Employer as evidence of suitable alternate employment.[12] Alternate employment with other employers is not available to Claimant where doing so would result in the termination of her employment with employer. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 128, 29 BRBS 22, 26-27(CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). To hold otherwise would be incongruous. Under these circumstances, Employer must bear responsibility for a contractual agreement into which it entered with Claimant's union. By retaining her employment status with Employer, Claimant had a higher wage-earning capacity than if she were to accept one of the lower-paying jobs in the labor market survey. Thus, this holding is consistent with the underlying statutory principles of enabling injured workers to resume productive employment to the greatest possible extent and reducing employer's long-term compensation liability. *See Abbott*, *supra.*

The Board further determined that the ALJ erred in not making specific findings on the issue of the suitability of the modified job offered by Employer in light of all the medical evidence regarding Claimant's restrictions. Additionally, as interest on a disability award is mandatory, the ALJ erred by not addressing Claimant's entitlement to interest on a late payment of compensation.

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[11] The Board noted Claimant's contention that the ALJ's decision failed to comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), and agreed that the ALJ did not provide a sufficient explanation of several of his findings on material issues.

[12] The Board stated that while neither the Board nor the courts have previously addressed this issue, it did note two earlier ALJ decisions which it found persuasive. The Board distinguished *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986)(claimant not entitled to reject suitable jobs because they paid less than his former wage), relied upon by the ALJ. The claimant in *Dove* was no longer employed by the employer and, thus, had no opportunity to perform modified work within the employer's facility at his previous rate of pay. Most importantly, unlike in *Dove*, the present case involved a limitation on employability created by Employer, rather than by Claimant.

Claimant had been receiving benefits for a lower-back injury sustained in 2003. The ALJ erred in summarily denying additional benefits for any injuries Claimant allegedly sustained during a 2005 incident on the basis that it resulted only in a temporary aggravation of her back condition which has fully resolved.[13] On remand, the Board instructed the ALJ to provide a reasoned discussion, consistent with the § 20(a) presumption and the aggravation rule, as to whether the 2005 incident caused any aggravation or new injuries, and whether it resulted in any disability (with a corresponding AWW determination). The Board noted that if Claimant sustained a temporary aggravation, she may be entitled to benefits at a higher rate during such period.

The ALJ further erred in denying medical benefits in connection with the 2005 injury on the ground that Claimant failed to show good cause for a change of physician. As the ALJ found that Claimant sustained a second injury in 2005, Claimant was entitled to a new choice of attending physician pursuant to § 7(b) for this injury. *See* 20 C.F.R. §702.418.

Lastly, the Board vacated the denial of a *de minimis* award for both of Claimant's injuries, on the ground that the ALJ did not cite any evidence in support of his finding that Claimant failed to show a significant likelihood of diminished wage-earning capacity in the future due to either unstable post-injury employment or a worsening medical condition.

[Topic 8.2.4.7 Factors affecting/not affecting employer's burden; Topic 2.2.6 Aggravation/Combination; Topic 7.4 Free Choice of Physician; Topic 8.2.2 *De Minimis* Awards; Topic 65.1 Interest – Generally]

***C.H. v. Chevron USA, Inc.*, __ BRBS __, BRB No. 08-0531 (Mar. 13, 2009).**

The Board held that Employer could not be held liable for a § 14(f) assessment, as the underlying ALJ award provided for credit to employer for compensation previously paid and the amount of such credit could not be determined without resort to extra-record facts which were the subject of a genuine dispute. *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990). An employer cannot be held in default for amounts that

[13] The Board noted that the aggravation rule applies not only where the underlying condition itself is affected but also where the injury aggravates the symptoms of the process. The severity of a claimant's injury is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing condition and impair a claimant's ability to work. (Citations omitted).

have not been specifically awarded by an ALJ or calculated by the district director pursuant to the ALJ's directive. Here, the District Director attempted to calculate the amount of the award, but the parties continued to disagree as to the amount of undercompensation. Thus, resolution of this issue required additional fact finding by an ALJ.

The Board further held that Employer was not liable for additional compensation pursuant to § 14(f) for untimely paying a § 14(e) assessment, as the Board had previously reversed the ALJ's § 14(e) assessment. Additional compensation pursuant to § 14(f) cannot be assessed when the underlying award is vacated.

Claimant was entitled to a § 14(f) assessment on his out-of-pocket medical expenses, should the district director find on remand that Employer's reimbursement of this expense was untimely. The Board relied on precedent holding that the definition of "compensation" in § 2(12) of the LHWCA can constitute money payable to claimant as reimbursement for medical expenses (as contrasted with direct payments by employer to a health care provider).

By virtue of a 2003 ALJ decision, Claimant received an award of temporary total disability benefits commencing in 1986, and permanent total disability benefits from 1988 and continuing. The Board held that the maximum rate of compensation for Claimant's temporary total disability had to be determined under § 6(b) as of the date his temporary total disability benefits commenced in 1986, rather than the date of the ALJ's 2003 award, citing *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006) (holding that the maximum compensation rate for temporary total disability benefits pursuant to § 6(b) remained at the maximum in effect at the time the disability commenced; when Claimant's disability became permanent and total, she became entitled to the new maximum rate as of the date corresponding benefits commenced, subject to annual § 10(f) adjustments).

The Board rejected Claimant's contention that *Wilkerson v. Ingails Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 1 50(CRT) (5th Cir. 1997), dictated a contrary result. In rejecting a similar argument in *Reposky*, the Board observed that, in *Wilkerson*,[14] the claimant's award was entered after the effective date of the 1972 Amendments and the prior maximum compensation rate thus was not applicable as a matter of law. In that

[14] In *Wilkerson*, a claimant who retired in 1972 sought benefits for a scheduled hearing loss under the 1984 Amendments which expanded the rights of retirees to receive compensation for hearing loss. The issue before the court concerned the applicability of the maximum weekly compensation rate of $70 under the pre-1972 Act to an award entered in 1993 based on a binaural impairment revealed in 1992.

context, the court held the claimant entitled to his full compensation rate which was well below the statutory maximum in effect at the time of the ALJ's decision. The court did not analyze § 6(c) or discuss its application to a case like the present one, involving a claimant who received an award of temporary total disability benefits commencing in 1986, and permanent total disability benefits from 1988 onward by virtue of a 2003 ALJ's decision.

Claimant's condition reached maximum medical improvement on July 6, 1988. Thus, as claimant was "currently receiving" permanent total disability benefits on October 1, 1988, he became entitled to the maximum rate in effect on that date, with annual adjustments thereafter. *Reposky*, 40 BRBS at 77.

For reasons stated in its recent decision in *B.C. v. Stevedoring Servs. of America*, 41 BRBS 107, 110-112 (2007), the Board rejected Claimant's contention that he was entitled to compound, rather than simple, interest on past-due compensation. Claimant was entitled to interest from the date benefits were due under §§ 14(a), (b); *Wilkerson*, 125 F.3d at 906, 31 BRBS at 153(CRT).

[Topic 7.2 Medical Benefits – Interest and Penalties on Late Payments; Topic 6.2.1 Maximum Compensation for Disability and Death Benefits; Topic 14.4 Compensation Paid Under Award; Topic 65.1 Interest – Generally]

***R.V. v. Friede Goldman Halter*, __ BRBS __, BRB No. 08-0605 (Mar. 13, 2009).**

The Board held that modification under § 22 of the LHWCA may not be denied on the basis that Employer failed to produce evidence of suitable alternate employment at the initial hearing, thus overruling its contrary holdings in *Feld v. Gen. Dynamics Corp.*, 34 BRBS 131(2000), and *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83 (1998).

The Board concluded that Supreme Court and Circuit Court precedent supported this holding. The Supreme Court's decisions support a broad construction of change in condition and mistake in fact, the statutory bases for modification. *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT)(1995); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968)(modification allowed despite the fact that the evidence in support of the petition could have been discovered prior to the hearing). Recent appellate decisions have similarly recognized the broad scope of § 22. *Jensen v. Weeks Marine, Inc.*, 346 F.3d

273, 277, 37 BRBS 99, 101(CRT) (2d Cir. 2003) (employer was not required to show the evidence was not available before the first hearing in order to secure a modification hearing); *Old Ben Coal Co. v. Dir., OWCP*, 292 F.3d 533, 546-547, 36 BRBS 35, 44-45(CRT)(7th Cir. 2002)(holding that § 22 reflects a statutory preference for accuracy over finality and that the fact that evidence was not presented earlier is not a sufficient basis to deny a petition for modification).[15] The present holding is also consistent with its recent decision in *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). In *Wheeler*, the Board relied on *Old Ben Coal* regarding the need to consider many factors in addressing whether modification will render justice, and noted that the court held that "something less than sanctionable conduct may justify a refusal to reopen, but the fact that evidence may have been available at an earlier stage in the proceedings is not enough." *Id.*, 37 BRBS at 110.

The Board stated that:

> "As *Lombardi* and *Feld* relied on employer's failure to produce evidence of suitable alternate employment at the initial hearing as the basis for denying modification, it is apparent that those cases are at odds with *Jensen* and *Old Ben Coal*. Neither *Lombardi* nor *Feld* gave any weight to the need for an accurate determination of claimant's disability. Upon further consideration, we agree that Section 22 reflects the Act's preference for accuracy, as by its very terms the section permits the alteration of awards based on claimant's current physical or economic condition or to correct an award resting on a mistake in fact. Thus, the limitations on evidence imposed in *Lombardi* and *Feld* cannot stand."

Here, the ALJ properly granted employer's request for modification. The ALJ rationally found that Employer's evidence of suitable alternate employment, if credited, would demonstrate that either his initial decision was factually mistaken, or that conditions have changed to the point that claimant is no longer totally disabled. Relatedly, the Board rejected Claimant's contention that the employment positions identified by Employer's vocational expert in 2007 could not be relied upon to modify the earlier decision because such positions existed at the time of the initial hearing.

[Topic 22.1 Modification – Generally]

[15] The Board noted the Court's discussion of the line of Longshore Act decisions relied on in *Lombardi* and *Feld* which held that reopening a case under § 22 was not in the interests of justice.

***M.R. v. Elec. Boat Corp.*, __ BRBS __, BRB No. 08-0653 (Mar. 30, 2009).**

The Board held that Employer's assertion of a pre-existing § 3(e) credit provided a basis for a § 22 modification of a prior ALJ award based on a mistake in fact.

The Board reasoned that § 3(e) contains mandatory language. Moreover, there is no time frame, per se, in which an employer must claim the credit. The facts of *Barscz v. Dir., OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007) support the inference that a credit may be asserted at any time, subject only to the statute of limitations contained in § 22. As Employer unilaterally suspended benefits due under the terms of a compensation order, its actions in seeking a § 3(e) credit must be viewed in the context of § 22. Under § 22, an ALJ has broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. The scope of § 22 extends to mixed questions of law and fact. The amount of compensation due a claimant is the "ultimate fact" which is subject to modification pursuant to § 22. Moreover, there is no statutory or regulatory impediment to raising entitlement to a § 3(e) credit on modification.

The ALJ erred in relying on general civil law principles that a defense is waived unless it is raised in the initial hearing, since credit is not a "defense" to a claim. Furthermore, Employer's failure to raise its entitlement to a credit in the initial proceedings also is not a basis for declining to modify, as modification is not defeated merely on the ground of finality.[16] *Jensen v. Weeks Marine, Inc.,* 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003) (prior litigation strategy not a bar to modification); *see also Old Ben Coal Co. v. Dir., OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *R. V. v. Friede Goldman Halter*, __ BRBS __, BRB No. 08-0605 (Mar. 13, 2009)[summarized above].

In order to obtain a § 3(e) credit, Employer must establish that there was a mistake in fact in the prior decision and that it is entitled to modification of the prior ALJ award. On the facts of this case, the ALJ erred in finding that Claimant would be prejudiced by the belated grant of a § 3(e) credit because he compromised his position in the original proceedings. In considering whether to grant § 22 modification, the relevant inquiry is

[16] The Board noted that the failure to raise the applicability of § 8(f) at the initial hearing cannot be remedied through § 22. *Cf. Dir., OWCP v. Edward Minte Co.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. l986)(§ 8(f) can be raised in modification proceeding if issue not waived and grounds did not exist for its application in the prior proceeding).

whether re-opening would render "justice under the Act." The Seventh Circuit stated this inquiry should focus on a party's actions and intent in seeking modification. In determining whether a party's actions in a particular case overcome the statutory preference for accuracy over finality, relevant factors include the diligence of the parties, the number of times that the party has sought modification, and the quality of the new evidence which the party wishes to submit. *Old Ben Coal*, 292 F.3d 533, 36 BRBS 35(CRT); *see also Sharpe v. Dir., OWCP*, 495 F.3d 125 (4th Cir. 2007).

Here, the ALJ's finding of prejudice was based on Claimant's representation that he stipulated to a lower average weekly wage ("AWW") in the original proceedings in order to quickly resolve the claim and that he would not have done so had Employer asserted its credit at that time. This representation is insufficient to preclude modification as the ALJ did not address factors that can mitigate any prejudice. Claimant's ability to seek modification on the issue of AWW may obviate any prejudice resulting from a compromise on the wage issue and the belated application of a § 3(e) credit.

As the ALJ's order was vacated, the Board also vacated the § 14(f) assessment; it noted that a claim for a § 14(f) assessment must first be made in default proceedings before the district director.

[Topic 22.3.5 Modification – Mistake of Fact; Topic 14.4 Compensation Paid Under Award]

II. Black Lung Benefits Act

B. Benefits Review Board

In *R.D.O. v. Peabody Coal Co.*, BRB No. 08-0402 BLA (Feb. 24, 2009)(unpub.), one of the issues addressed by the Board was proper consideration of medical literature. The Board stated:

> With respect to the conflict among the medical opinions regarding the medical literature cited by Dr. James, the administrative law judge is permitted to review the medical literature admitted into the record for the purposes of determining whether Dr. James has accurately characterized the literature and whether the criticisms that employer's experts have raised have merit. (citation omitted). As the administrative law judge indicated, however, he cannot interpret the clinical data set forth in the medical literature.

Slip op. at 5-6. In a footnote, the Board stated that, because the judge's findings were vacated under 20 C.F.R. § 718.202(a)(4), it "need not reach claimant's argument that the administrative law judge was required to consider the extent to which the views of the medical literature conform to the position adopted by the Department of Labor when promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. § 718.201(a)."

[**consideration of medical literature**]

In *C.S. v. Koch Carbon Raven Division VA*, BRB No. 08-0340 BLA (Feb. 27, 2009)(unpub.), the Board reiterated its holding in *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008) that each party is entitled to submit one interpretation of the Department-sponsored x-ray study as "rebuttal" to the opposing party's case. In a footnote, the Board further stated:

> Because the evidentiary regulations provide for only one rebuttal reading each by claimant and employer of the Department of Labor x-ray, we reject employer's assertion that the administrative law judge erred in not permitting employer to submit a reading in rebuttal of Dr. Alexander's positive reading, which was submitted in rebuttal (to the Department-sponsored x-ray) by claimant.

Slip op. at 4, n. 4.

Moreover, the Board held that the administrative law judge must render all evidentiary rulings prior to the close of the record. To that end, the Board noted that "[p]rocedural due process requires that interested parties be notified of the evidence contained in the record and that they be afforded the opportunity to present objections to that evidence." *See* 20 C.F.R. § 725.456(a)(2). As a result, the Board vacated the judge's *sua sponte* admission of Claimant's Exhibit 9 after the close of the hearing.

The records at Claimant's Exhibit 9 were originally offered by Claimant's counsel at the hearing and then withdrawn when the exhibits could not be located in the record. In his decision on the claim, the judge advised that he had located the treatment records at issue and found that they had been exchanged between the parties. Thus, *sua sponte*, the judge proceeded to admit the treatment records in his decision. The Board noted:

> On remand, the administrative law judge has discretion, upon motion by claimant's counsel, to admit Claimant's Exhibit 9 into the record, if that evidence is properly identified and employer's counsel is afforded the opportunity to object to its admission in accordance with 20 C.F.R. § 725.456(a)(2).

Slip op. at 5-6.

[**rebuttal of the Department-sponsored x-ray; evidentiary rulings must be made prior to close of record**]