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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 165
May - June 2003

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

Maher Terminals, Inc. v. Director, OWCP, ___ F.3rd ___ (Third Circuit No. 01-3343) (May 29, 2003).

In this status case, the Third Circuit found coverage by looking at the claimant's overall duties, notwithstanding that he was working at an excluded job the day of injury. The court found that because the claimant spent half of his time as a checker and his overall duties included assignment as a checker, an indisputably longshoring job, he was covered under the LHWCA even though he worked as a delivery clerk on the day of his injury. The court cited to the Supreme Court's test for coverage in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), in stating that "we believe that we must look at the claimant's regular duties to determined whether he is engaged on a regular basis in maritime employment." The Third Circuit noted that, in *Caputo*, the Supreme Court had specifically rejected the "moment of injury" principle in which the coverage analysis depended on the task the employee was engaged in at the time of the injury.

[Topic 1.7.1 Status–"Maritime Worker"]

Ortco Contractors, Inc. v. Charpentier, ___ F.3d ___ (No. 02-60447) (5th Cir. May 21, 2003).

Here the Fifth Circuit held that the Board failed to give proper deference to the ALJ's assessment of evidence by erecting a higher evidentiary standard for rebutting the Section 20(a) presumption than the one specified in the LHWCA (that an employer submit only "substantial evidence to the contrary"). In the instant case the worker's heart attach began at home the night before and progressed at work the following day, culminating in cardiac arrest. The medical evidence was to the effect that the only connection between the death and the employment was the fact that the worker was at work when the heart attach process concluded.

The Board had expressed several different formulations of the requirement imposed by the

LHWCA for proving that an injury is not work-related: (1) “rule out,” (2) “unequivocally state,” and (3) “affirmatively state.” The Fifth Circuit noted that all three of these formulations violated its decision in *Conoco v. Director, OWCP*, 194 F.3d 684 (5th Cir. 1999). It stated that the LHWCA requires a lower evidentiary standard --that the employer must adduce only substantial evidence that the injury was not work-related.

[Topic 20.3 Presumptions–Employer has Burden of Rebuttal with Substantial Evidence]

Becker v. Tidewater, Inc., ___ F.3d ___ (No. 01-31420) (5th Cir. June 19, 2003).

Here the Fifth Circuit overturned a federal district court jury’s finding of Jones Act seaman status. After first addressing the differences between the Jones Act and the LHWCA, the Fifth Circuit addressed the issue at hand, namely, was the plaintiff’s connection to the vessel substantial in duration and nature, and therefore warranting coverage under the Jones Act. It noted that in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995)(Held, temporary workers are not seamen, although such workers may be treated as regular crew members by their peers.), the Supreme Court had evoked a status-based standard wherein the Court rejected a “voyage test. The Fifth Circuit noted that while it has quantified the duration of time necessary to allow submission of the issue of seaman status to a jury by using a 30 percent rule of thumb, the Supreme Court, in *Chandris*, articulated an exception to temporal guidelines such as the Fifth Circuit’s 30 percent rule. The *Chandris* exception states that “[i] a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.” Seaman status does not attach to a worker simply because he is necessary to the vessel’s mission at the time of injury. *Chandris*, 515 U.S. at 358.

Thus, a worker who, over the course of his employment, has worked in the service of a vessel in navigation well under 30 percent of his time may still qualify for seaman status if he has been reassigned to a new position (“substantial change in status”) that meets this temporal requirement. In applying the facts of this particular case to the law, the Fifth Circuit found that the evidence was insufficient for a finder of fact to conclude that the plaintiff had proven his case.

[Topic 1.4.1 LHWCA v. Jones Act]

Holmes v. Director, OWCP, (Unpublished) (No. 01-1761) (4th Cir. June 12, 2003).

The claimant here had filed a claim for an alleged work-related psychological injury which was denied by the ALJ. This was appealed to the Board which "affirmed" the ALJ's decision by operation of law pursuant to Public Law 106-554. However, shortly thereafter the Board issued a decision reversing and remanding the ALJ's decision. Several days after that, the Board issued another order withdrawing its reversal. Claimant next filed a motion for reconsideration which was denied. Claimant then filed an appeal to the Fourth Circuit which found that by the time the appeal to the circuit was filed, it was untimely and therefore the court lacked jurisdiction.

[Topic 21.3 Review By U.S. courts of Appeals]

B. Federal District Courts

[Ed. Note: The Following Black Lung case is included since the Black Lung Act draws on the LHWCA procedural provisions. 30 U.S.C. § 932(a).**]**

Nowlin v. Eastern Associated Coal Corp, ___ F. Supp. 2d ___, (No. 1:02CV51) (N.D. W. Va. May 13, 2003).

In the enforcement issue case, the federal district court addressed the enforceability of awards under both Section 18(a) and Section 21(d). It found that an award order may be enforced under either section. The court noted that while Section 18 requires a supplementary order to declare the amount in default and has an express statute of limitations, a claimant could still utilize Section 21(d) for enforcement. The court noted that while a Ninth Circuit case, *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381 (9th Cir. 1985), concluded that enforcement of a 20 percent penalty under Section 18 is more "logical" and "far better meets the Congressional purpose" than enforcement pursuant to Section 21, it did not expressly foreclose that section as an avenue of recovery for claimants. *See also, Reid v. Universal Maritime Service Corp*., 41 F.3d 200 (4th cir. 1994); *Kinder v. Coleman & Yates Coal Co.*, 974 F. Supp. 868 (W.D. Va. 1997).

The court found that under Section 21, the claimant did not have to secure a supplemental order. Additionally, since Section 21 does not state a statute of limitations time period, the court allowed the adoption of the one used within that state, which happened to be two years.

[Topics 18.1 Default Payments–Generally; 18.2 Supplemental Order Declaring Default; 21.5 Review of Compensation Order–Compliance]

Sobratti v. Tropical Shipping and Const. Co., Ltd., ___ F.Supp. 2d ___ (No. CIV.A.2002/25, 448/1999)(D. Virgin Islands, June 5, 2003), 2003 WL 21418333.

The issue here is whether a trial court correctly granted a borrowing employer summary judgment when a worker injured upon a vessel filed a LHWCA claim and then filed an action in the Virgin Islands Territorial trial court against the borrowing employer. [The Federal District Court of the Virgin Islands serves as the appellate court of the Territorial Court.] Prior to the filing of the trial court action, OWCP had found the claimant to be covered by the LHWCA and the borrowing employer, Tropical Shipping, to be responsible. Claimant received benefits from Tropical Shipping. He then filed a negligence action against Tropical Shipping, claiming he fell into a "twilight zone" status of uncertain LHWCA coverage.

The Virgin Islands Federal District Court concluded the summary judgment against the claimant was proper given the claimant's prior admissions on the issue of borrowed employee. It found that his assertions "conclusively determined the issue of Tropical's employer status thereby removing any genuine dispute on that issue." The court noted that, "The factual basis of appellant's entire negligence claim was that he was working for Tropical at the time he was injured; that Tropical had a duty, as his employer, to provide safe equipment and failed to do so in this instance by providing him with a defective ladder, and that Tropical's safety standards were breached. Additionally, the assertions in the initial pleadings were consistent with Sobratti's claims to the administrative agency, for the purpose of recovering benefits under the LHWCA. Throughout the administrative proceedings following his injury, Sobratti continuously asserted and relied on the fact that he was an employee of Alltempts, performing duties for Tropical." In sum, the court found that the record was replete with admissions and facts which establish that Tropical was the borrowed employer with control over the claimant's work at the time he was injured and that Tropical was protected under Section 5 of the LHWCA.

[Topics 4.1.1 Compensation Liability–Contractor/Subcontractor Liability; 5.1.1 Exclusiveness of Remedy and Third Party Liability–Exclusive Remedy]

Hudson v. Forest Oil Corp., ___ F.Supp. 2d ___ (No. Civ. A. 02-2225)(E.D. La. June 2, 2003).

In this "borrowing employer" case, the insurer of the claimant's formal employer paid compensation benefits and sought reimbursement from the insurer of the borrowing employer. The federal district court rejected this claim for reimbursement. The insurer of the formal employer had first cited *Total Marine Servs., Inc. v. Director, OWCP*, 87 F.3d 774 (5th Cir. 1996), for the proposition that when a formal employer has already paid benefits, it is entitled to reimbursement for the borrowing employer. However, *Total Marine* is distinguishable since its holding was conditioned on the fact that there was no valid and enforceable indemnification agreement. In the instant case there was such an agreement. The formal

employer also argued that any indemnification and waiver of subrogation clauses were invalid under the Louisiana Oilfield Anti-Indemnity Act (LOAIA), La. Rev. Stat. Ann. § 9:2780. The federal district court found the statute inapplicable and thus the indemnification and waiver of subrogation were valid.

[Topics 4.1.1 Compensation Liability–Contractor/Subcontractor Liability; 5.2.2 Exclusiveness of Remedy and Third Party Liability--Indemnification; 5.3 Indemnification in OCSLA Claims]

C. Benefits Review Board

Olsen v. Triple A Machine Shop, Inc., (Unreported) (BRB No. 02-0612) (June 4, 2003).

Here the Board held that a claimant is within his right to act on his own behalf and thus, the ALJ can not suspend a proceeding until such ti8me as the claimant retains a licensed legal representative. The Board further held that if an ALJ believes the claimant should be sanctioned for his conduct, then sanctions must be issued in accordance with the statutory provisions of Section 27(b). OALJ Rules of Practice, such as 20 C.F.R. §§ 18.29(a) and 18.36, do not apply "[t] the extent that [they] may be inconsistent with a rule of special application as provided by statute. The Board found that a distinction can not be drawn between civil and criminal contempt: "We need not decide what type of 'contempt' Section 27(b) contemplates because ...the language of the section demonstrates that the nature of a party's offense, rather than the sanctions available, invokes the applicability of Section 27(b).....We hold that Section 27(b) applies to this case because claimant disobeyed the lawful orders of the ALJ."

[Topic 27.3 Federal District Court Enforcement]

Castro v. General Construction Company, ___ BRBS ___ (BRB No. 02-0783) (May 13, 2003).

In this total disability award case geographically in the Ninth Circuit,, the employer argued that the Board should not have awarded total disability benefits during the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), aff'd 40 F.3d 122, 29 BRBS 22(CRT) (5th cir. 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied *Abbott* both inside and outside the Fifth Circuit and that the Fourth Circuit recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002)(ALJ was entitled to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

In the instant case, the employer challenged the application of *Abbott* on the grounds that there is no specific provision in the LHWCA allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. The Board found that *Abbott* rest, not on any novel legal concept, but on the well-established principle that, once a claimant established a prima facie case of total disability, the employer bears the burden of demonstrating the availability of suitable alternate employment. If the employer makes this showing, the claimant may nevertheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. "The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment." Additionally the Board noted that while Congress enacted a statute that dealt with "total" and "partial" disability, it was left to the courts to develop criteria for demonstrating these concepts, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition.

The Employer here also argued that its due process rights were violated when it was not given a hearing on the question of whether the claimant was entitled to vocational rehabilitation and whether it was liable for total disability benefits for that period. The Board found that "Because Section 39(c)(2) and its implementing regulation grant authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. ...Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits."

The board also rejected the employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. "Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits."

[Topics 8.2.3.2 Disability While Undergoing Vocational Rehabilitation; 39.3 Secretary's Authority to Direct Vocational Rehabilitation; 19.3.1 ALJ Cannot Review Discretionary Acts of District Director; 19.3 Adjudicatory Powers]

Giacalone v. Matson Terminals, Inc., __ BRBS ___ (BRB Nos. 02-0608 and 02-0608A) (May 29, 2003).

In this consolidated hearing loss claim involving two employers, with two separate audiograms, the Board applied the reasoning of the *Ninth Circuit in Stevedoring Services of America v. director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002). The Board found that *Benjamin* does not disturb the basic principles of determining Claimant's entitlement under the aggravation rule, which provides that the employer at the time of the aggravation injury is liable for the entire disability at the average weekly wage (AWW) in effect at the time of the aggravating injury. Thus, each claim against an employer for consecutive hearing loss must be adjudicated. Where a

prior employer is liable for a portion of the claimant's hearing loss, the credit doctrine works with the aggravation rule to provided the most recent employer with a credit for amounts paid by the prior employer for the same injury.

Here, Claimant filed a claim against Matson Terminals for a binaural hearing loss after receipt of an audiogram in 1995. That claim had not been resolved by the time Claimant filed his second claim against Marine Terminals for an increased hearing loss. The Board found that Matson was liable for the binaural hearing loss at Claimant's 1995 AWW as a matter of law, as well as for medical treatment from that date until the date of the 1998 audiogram. Marine Terminals is liable for Claimant's binaural hearing impairment based on claimant's AWW at the time of the 1998 audiogram, and is entitled to a dollar for dollar credit for the amount Claimant receives for his prior hearing loss injuries. Additionally, the Board found that the most recent responsible employer is liable for a claimant's continuing medical treatment.

[Topic 8.13.1 Hearing Loss–General Concepts–Determining the Extent of Loss; 8.13.11 Multiple Hearing Loss Claims and Date of Injury; 8.13.12 Hearing Loss and Average Weekly Wage]

Cunningham v. Bath Iron Works Corp., ___ BRBS ___ (BRB No. 02-0577) (May 16, 2003).

At issue here was whether there was situs at an "adjoining area" since the injury here occurred at a pipe prefabrication site away from the main shipyard. This case takes place within the jurisdiction of the First Circuit. The Board noted that, thus far, the First Circuit has not considered the situs issue where the place of injury was on a facility which was not immediately adjacent fo navigable water. Before the Board analyzed the fact situation of *Cunningham* in relation to three bodies of water, it noted:

> Thus far, the First Circuit has not considered the situs issue where the place of injury was on a facility which was not immediately adjacent to navigable waters. In its insistence, however, that an adjoining area is one which adjoins 'navigable waters.' not a loading area...,'' *Prolerized New England Co.*, 637 F. 2d at 38, 12 BRBS at 818, the First Circuit's approach to the situs issue appears to be consistent with that of the Fourth Circuit in *Sidwell v. Director, OWCP*, 71 F.3d 1134, 1138-39, 29 BRBS 138, 143(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), which held; "that an area is 'adjoining' navigable waters only if it 'adjoins' navigable waters...."
>
> Although the First and Fourth Circuits agree that a covered situs necessarily entails adjoining navigable waters, one cannot reasonably project from the First Circuit statements that it would adopt the Fourth Circuit's test for situs set forth in *Sidwell.*

The Board then noted that in the First Circuit, the Board has consistently applied the Ninth Circuit's standard set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). The Board then found that one body of water did not meet either the Ninth nor Fifth

Circuit's test. As to the second body of water, the Board found it was not navigable since it lacked an "interstate nexus" which allows the body of water to function as a continuous highway for commerce between ports. Accordingly, the Board once again rejected the commerce clause definition of navigability.

As to the third body of water, the Board relied on the *Herron* test again and found that there was no functional relationship; the pipe prefabrication was not, and need not be, done on the water or on a maritime site.

As to the relationship of the pipe pre-fabrication site's relationship with the main shipyard, the Board held as a matter of law that the pre-fab site was not an "adjoining area" solely by its function; rather, as discussed above, the test involved both a functional use and geographic proximity to navigable water." (Later, the Board noted that both the geographical and functional nexus must be with the <u>same</u> body of water.) Although, the prefab area may have been built as close as feasible to the main shipyard, that factor alone, is insufficient to mandate the conclusion that the unit qualifies as an adjoining area.

[Topic 1.6.2 Situs–"Over land"]

Maraney v. Consolidation Coal Co., ___ BRBS ___ (BRB No. 02-0661) (June 19, 2003).

This is a situs/status issue case. At the time of the claimant's injury, he was working in his classified job as a mobile equipment operator assigned to "make the footprint" for phase two of an upstream construction project to prepare the site to serve as a coal impoundment, or depository for coal slurry. The Board held that Pond 4 [where he was working at the time of injury] was separate and apart from the employer's unloading/loading area, was not used for a maritime purpose and was not "an adjoining area," under Section 3(a). Having found no situs, the board did not address the status issue.

The claimant had argued that he met the situs requirement in that the employer's facility was "an adjoining area" as defined by the Fifth Circuit in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981).

In denying situs, the board noted that Pond No. 4 was functionally and geographically separate from the employer's unloading/loading operations, and that Pond No. 4 was not used for any maritime purpose. The pond functioned solely as the final resting point for the employer's coal refuse and did not store products destined for vessels. It was merely a repository for slate and slurry, which are byproducts of the cleaning process of coal. In essence, Pond No. 4 represented the tail end of the employer's coal preparation process and thus had no functional relationship with the navigable water where the employer's unloading/loading operations occurred. From a geographic standpoint, Pond 4 was distinct from the employer's unloading/loading area. It was separated from the processing plant by about .8 miles, was buffered by some woods, and was connected to the unloading/loading area only by a road.

[Topic 1.6.2 Situs–"Over land"]

II. Black Lung Benefits Act

[NOTE: A black lung decision addressing enforcement of awards issued by a district court is summarized under the Longshore section at page 3 because it interprets Sections 18 and 21 of the LHWCA.]

A. Circuit Courts of Appeals

In *Director, OWCP v. Peabody Coal Co.*, ___ F.3d ___, Case No. 01-4358 (6th Cir. June 2, 2003), the Sixth Circuit held that the ALJ has "decision-making authority over the determination of whether a black lung benefits claim exists," but that jurisdiction for the enforcement of agency orders lies in the district courts pursuant to 30 U.S.C. § 934(B)(4)(A).

Under the facts of the case, the miner was overpaid black lung benefits during his lifetime as the result of falsifying his receipt of state benefits. Upon his death, his spouse was automatically entitled to survivor's benefits. The survivor and Employer negotiated an agreement "to the effect that any future survivor's benefits owed (to the spouse) by Peabody Coal would be setoff against the amount of overpayment . . .." The district director subsequently reinstated survivor's benefits and Employer objected to the payment of these benefits.

The district director referred the matter to this Office for adjudication, but the ALJ determined that he was without jurisdiction to decide the matter of "collection and reimbursement." The court agreed stating that Employer did not challenge the survivor's entitlement to benefits; rather, Employer sought enforcement of the negotiated agreement, which provided that survivor's benefits would be offset by the amount of overpaid benefits in the living miner's claim.

[**no jurisdiction over enforcement or collection**]

B. Benefits Review Board

In *Clark v. Barnwell Coal Co.*, 22 B.L.R. ___, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003), the ALJ calculated the length of coal mine employment for purposes of determining the proper responsible operator using three different methods. The Board stated that 20 C.F.R. § 725.493(b) (2000) "contemplates a two-step inquiry into the miner's employment to determine if an employer is the responsible operator." The inquiry is as follows:

> First, the administrative law judge must determine whether the miner worked for an operator for one calendar year or partial periods totaling one calendar year. Then, if the administrative law judge finds that the threshold one-year requirement is met, the administrative law judge must determine whether the miner's employment was regular. (citations omitted). Thus, a mere showing of 125 working days does not

> establish one year of coal mine employment. (citations omitted). In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation. (citation omitted).

Under the first method to calculate length of coal mine employment, the ALJ compared the miner's earnings with Barnwell Coal Company (Barnwell) for 1978 and 1979 against earnings with other coal operators during the same time period. The Board found this method to be "problematic and unexplained" and concluded that "[a] finding that the miner's Barnwell wages exceeded his wages from other coal mine employment of undefined duration during 1978 and 1979 does not establish that he worked a calendar year for Barnwell."

Under the second method, the ALJ utilized a *Bureau of Labor Statistics* (BLS) table to determine that the miner worked for Barnwell for a period of one year. The Board noted that "[u]pon review of the BLS table utilized by the administrative law judge, it is apparent that the 'yearly' figures set forth in column two and relied upon by the administrative law judge are not based on a one-year employment period, but represent only 125 days of earnings." The Board then reiterated that 125 working days "does not establish the threshold one year of coal mine employment." The Board determined that this method of calculating length of coal mine employment was unreasonable.

The third method of calculating length of coal mine employment utilized by the ALJ was under 20 C.F.R. § 725.101(a)(32)(iii). Here, the ALJ determined the total amount of wages earned by Claimant during the year for Barnwell and divided that amount by the coal mine industry's average daily earnings reported at column three of the BLS table which produced the number of days the miner would have worked for the year. The ALJ concluded that the miner worked a total of 206 days for Barnwell using this method of calculation.

The Director asserted on appeal that the ALJ should have then divided the total of 206 days by 125 "to determine the part of the year devoted to coal mine employment." The Director stated that, when 206 days is divided by 125, then it demonstrates that the miner worked 1.64 years for Barnwell. The Board noted the following:

> Although the additional computation suggested by the Director appears nowhere in 20 C.F.R. § 725.101(a)(32)(iii), the Director argues that the need for it is 'obvious,' in order to ascertain the 'fractional year,' where a miner has worked fewer than 125 days. (citation omitted). In support of this interpretation, the Director cross-references 20 C.F.R. § 725.101(a)(32)(i), which provides, in part, that where a calendar year of employment is established but the miner actually 'worked fewer than 125 working days in a year, he or she has worked in a fractional year based on the ratio of the actual number of days worked to 125.'

The Board disagreed with the Director's approach and held the following:

> For purposes of determining the threshold one-year requirement, we conclude that the Director's interpretation of 20 C.F.R. § 725.101(a)(32)(iii) is not reasonable because

it collapses the two-step analysis required by 20 C.F.R. § 725.493(b) (2000) to determine whether one year of employment is established. The suggested formula at 20 C.F.R. § 725.101(a)(32)(iii), as written, yields the number of days actually worked in coal mine employment. That total here is 206 days. In dividing this number by 125, the Director confuses the threshold inquiry of whether the miner had a calendar year of employment with the second-stage inquiry of whether, having actually worked 125 days as a miner, or credited with a fractional year, having working worked fewer than 125 days as a miner during the year. Here, by contrast, the question is whether the threshold calendar year has been established. In this context, dividing the number of days worked by 125 effectively credits the miner with a year of coal mine employment if he or she worked 125 days, contrary to the standard that a mere showing of 125 working days does not establish the threshold one-year of employment.

Based on the ALJ's finding of 206 days of employment as a miner for Barnwell, the Board concluded that the miner did not meet the requirement of working for a cumulative period of one year for the employer.[1]
Consequently, the Board concluded that substantial evidence did not support a finding that Barnwell employed the miner for as least one year as required at 20 C.F.R. § 725.493(a) and (b) (2000).

[**length of coal mine employment; 125-day rule**]

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[1] The Board specifically stated that, although it declined to follow the Director's proposed interpretation of 20 C.F.R. § 725.101(a)(32)(iii), it would not decide whether the revised regulatory provisions at 20 C.F.R. § 725.101(a)(32), defining "year", was applicable to the claim. In essence, the Board has left open the possibility of reconsidering the Director's proposed method of calculating length of coal mine employment under the new regulatory provisions.