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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 177
May –June 2005

John M. Vittone
Chief Judge (Longshore)

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

B. Circuit Court Cases

Operators & Consulting Services, Inc v. Director, OWCP [Morrison], (Unreported)(No. 04-60598)(**5th Cir.** May 12, 2005).

Here the issue was causation (whether the claimant's condition was aggravated while he worked for a second marine contractor). The **Fifth Circuit** found that the ALJ had properly applied the aggravation rule and that the evidence supported a finding that the disability resulted solely from the injury the claimant suffered during his employment with the first contractor. Contrary to the first contractor's assertion, the fact that the claimant passed the second contractor's pre-employment agility test did not necessarily indicate that his initial back injury was resolved by the time he began working for the second contractor. The physical therapist who conducted the agility test, testified that the test was designed to test capabilities, not the amount of stress the back could sustain. He explained that the successful completion of the test demonstrates that an employee is capable of performing most of his job duties for a limited amount of time.

Thus, passing a pre-employment agility test does not necessarily indicate that the claimant's initial back injury was resolved by the time he began working for the second contractor. The claimant had testified that his job with the second contractor was neither more nor less strenuous than his work with the first, and he did not testify that he suffered a subsequent injury. Although the claimant testified that the doctor released him to return to work for the first contractor, substantial evidence indicated that he was not symptom-free at that time and that his pain progressively increased throughout the time he worked for the first contractor.

[Topic 2.2.6 Definitions—Injury—Aggravation/Combination; 70.3 Responsible Employer--Successive Injuries and the Aggravation Rule]

Mariano v. Navy Exchange Service, (Unreported)(No. 04-70198)(**9th Cir.** May 16, 2005).

In this claim for discrimination and psychological injury, the **Ninth Circuit** upheld the ALJ's determination that adverse credibility determinations (as to the claimant) were supported by substantial evidence due to his inconsistent testimony and demeanor.

[Topic 19.3.5 Procedure: ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon]]

Dawson v. Ceres Marine Terminals, Inc., (Unreported) (No. 04-2316)(**4th Cir.** May 18, 2005).

While the claimant did have a lumbosacaral sprain, the **Fourth Circuit** upheld the ALJ's opinion that when it came to alleged psychological injuries and foot problems, the claimant was malingering or exaggerating his symptoms and was not entitled to further benefits because of inconsistency and a lack of credibility.

[Topic 19.3.5 Procedure: ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon]

Universal Maritime Service Corp. v. Director, OWCP [Lewis]. (Unreported)(No. 04-16719)(11th Cir. June 10, 2005).

Here the circuit court upheld the ALJ's determination of facts and handling of the evidence. The claimant was driving a "mule," a small tractor or electric engine used to tow boats along a canal, pulling a chassis. A mechanical failure (the landing gear of the chassis was in the down position and got caught on a gantry track) caused the mule to stop abruptly, throwing the claimant about the cab of the mule and causing his head to crash into the ceiling of the cab and his knees to strike the steering wheel and dashboard. The claimant sustained injuries to his head, neck, left wrist, back and knees. Additionally the claimant alleged that the accident aggravated his pre-existing visual impairment and paranoid schizophrenia and further resulted in post-traumatic stress syndrome and dysthymia.

The court found that the ALJ had properly weighed the evidence, including 22 medical opinions. Only on psychiatrist hired by employer had testified that the accident may have been a figment of the claimant's condition, an hallucination or an imagined event. Even that doctor could not definitively state that the accident did not occur. The greater weight of evidence revealed that the accident occurred and that the claimant's injuries were a result of the accident. The court also upheld the ALJ's rejection of the employer's vocational expert since the recommendations of that vocational expert did not

account for the claimant's psychological injuries and because the medical testimony indicated that the claimant suffered extensive psychological disability that precluded him from engaging in work requiring interpersonal skills. Finally, the court rejected the employer's argument that the ALJ had not considered their "supervening cause" argument in which they argued that the record established the claimant's psychiatric, opthomological and orthopedic injuries continued to degenerate after the accident and independent of the accident. The court noted that while the ALJ did not use the phrase "supervening and independent cause," the ALJ did in fact make extensive findings regarding the cause of the claimant's injuries as well as the aggravation of his pre-existing injuries.

[Topics 19.1 Procedure—The Claim: Generally; 20.2.3 Presumptions—Occurrence of Accident or Existence of Working conditions Which could Have Caused the Accident]

[ED. Note: *While the following case is not a longshore case, it may ultimately have an affect on LHWCA matters.**]***

Karraker v. Rent-A-Center, Inc., ___ F.3d ___ (No 04-2881)(**7th Cir.** June 14, 2005).

An employer's policy of requiring employees seeking management positions to take psychological tests and placing the test results in personnel files violated the ADA. The employer administered the Minnesota Multiphasic Personality Inventory (MMPI) as part of a management test. The court found that this was a "medical examination" and violated the ADA even though the test results were not interpreted by a psychologist. The court noted that the test was designed to reveal mental illness and likely could have a negative effect on promotion prospects of employees with mental disabilities.

The court noted that in Title I, Congress enacted three provisions which explicitly limit the ability of employers to use "medical examinations and inquires" as a condition of employment: a prohibition against using pre-employment medical tests; a prohibition against the use of medical tests that lack job-relatedness and business necessity; and a prohibition against the use of test which screen out (or tend to screen out people with disabilities. The court then went through an analysis as to whether the MMPI fits the ADA's definition of a "medical examination" and found in the affirmative.

Lockheed Martin corporation v. Morganti, ___ F.3d ___, (No. 04-0500-ag)(**2nd Cir.** June 24, 2005).

The **Second Circuit** agreed with the Board and found a worker to have situs and status under the LHWCA and not to be excluded because he participated in data processing. First, using a test for navigability that depended on the physical rather than economic characteristics of the waterway in question, the court found a lake to be navigable. Second, the court found that a moored barge was not a kin to a fixed platform

and therefore, any work on the barge was to be considered work on navigable waters. Next the court found that the now-deceased worker was performing his job over these waters when he fell off the water taxi and drowned. Finally, the court found that he was not excluded under the Section 2(3)(A) exclusion since, as an engineer, he analyzed data as well as processed it.

[Topics 1.4.3 Jurisdiction/coverage—"Vessel;" 1.5.2 Jurisdiction/Coverage—Development of Jurisdiction/Coverage—Navigable waters; 1.6 Jurisdiction/coverage—Situs—"Over water;" 1.7.1 Jurisdiction/Coverage—Status—"Maritime Worker"(Maritime Employment"); 1.11.7 Jurisdiction/Coverage—Exclusions to Coverage—clerical/secretarial/security/data processing employees]

C. Federal District Court Decisions/Bankruptcy Court

D. Benefits Review Board Decisions

Weeks v. U.S. Elevator Corp., ___ BRBS ___ (BRB No. 04-0814)(June 29 2005).

In this District of Columbia Workers Compensation Act case, the Board held that the ALJ had properly found that under the 1972 LHWCA, benefits due to the survivors are not capped by the decendent's average weekly wage when Section 10(f) adjustments cause the award to exceed the AWW.

[Topics 6.2.1 Commencement of Compensation--Minimum and Maximum Limits—Maximum Compensation for Disability and Death Benefits; 10.7.2 Determination of Pay--Computation Under Section 10(f)]

Boyd v. Hodges & Bryant, ___ BRBS ___ (BRB No. 04-0740)(June 16, 2005).

In this matter the decedent worker, a pipe fitter, sustained asbestosis and lung cancer. The claimant, his survivor, filed an LHWCA claim against Hodges & Bryant (H&B) as well as Newport News Ship Building (NNSB). The worker had worked on a building construction project at the time he was allegedly exposed to asbestos. First at issue was whether NNSB had subcontracted with H&B. The Board found that the ALJ had properly determined that Newport News Ship Building had not subcontracted with H&B to renovate a building. Rather, H&B, the claimant's employer (who did not have longshore coverage) was an independent contractor.

Next, the Board determined that the ALJ was correct in finding that the decedent was not engaged in maritime employment at the building construction site. Although the building was an existing shipyard building that had been used for building ship components, at the time of the decedent's employment it was undergoing a total

renovation, and was not in use for shipbuilding. The Board further noted that the decedent's work involved plumbing, heating and air conditioning which is not inherently maritime employment. Further more, the Board noted that it could not be said that the decedent's failure to perform his job would eventually impede the shipbuilding process. Moreover, the decedent was on the premises only temporarily and it was clear that not everyone at a shipyard is intended to be covered under the LHWCA.

[Topics 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability; 1.7.1 Jurisdiction/Coverage—Status—"Maritime Worker"("Maritime Employment")]

Wimbush v. Universal Maritime Service Corp., (Unreported) (BRB No. 04-0667)(May 25, 2005).

In this repetitive trauma case, the ALJ found that the claimant had not established a prima facie case that he suffered a work-related injury. In remanding, the Board noted that an injury need not be traceable to a definite time and place, but can occur gradually, over a period of time. "Claimant alleged a repetitive trauma to his knee during the course of his employment as a hustler driver, and therefore it is not significant that claimant failed to allege a specific date of injury." The Board also noted that the ALJ had found the claimant's credibility to be undermined because the claimant originally sought treatment for what he thought was arthritis pain rather than for a work-related injury. "[T]here is no requirement that a claimant accurately diagnose the source of his pain prior to his being examined by a physician, and in fact, the claimant is not required to pursue a claim until he is aware of the relationship between his injury and his employment, even in the case of misdiagnosis."

[Topic 20.2.1 Presumptions—Prima Facie Case]

Long v. Washington Group International, (Unpublished)(BRB No. 04-0701)(May 9, 2005).

In this coverage issue matter, the claimant was employed as a carpenter building scaffolding to fix a leak that had occurred in a pipe in the coker port, situated approximately 1.25 miles form the dock. While he was building the scaffolding, the patch that had been put on the pipe the night before blew out, causing the claimant to jump out of the way, injuring his right arm and shoulder. Employer argued that the claimant lacked status in that his work erecting scaffolding was "tangential" to the loading process and not deserving of maritime status. However, the ALJ and the Board found that there was creditable evidence that dock repair was a regular part of the claimant's duties. "Although claimant did not actually repair the pipelines or the loading arm or pour the concrete to reinforce the breakwall to protect the dock, his work was

essential to these covered activities, as the workers performing the actual repair work could not do their jobs if claimant did not construct the scaffolding or the forms. Had claimant not performed his job, the loading and unloading process would have been impeded." Thus, the claimant satisfied the Section 2(3) status requirement.

[Topic 1.7 Jurisdiction/Coverage—Status—"Maritime Worker"(Maritime Employment")]

Lopez v. Navy Exchange Service Command, (Unreported)(BRB No. 04-0664)(May 16, 2005).

For this Section 20(a) claim, determining how the causation issue was framed had serious consequences. Here the claimant worked as a maintenance carpenter at a naval base. While dismantling a freezer containing rotten and decomposing meat, meat juices spilled onto his face. Additionally, while removing an air conditioning unit from a ceiling, he was exposed to unspecified chemicals from the unit. The claimant was diagnosed with pemphigus erythematosus, a rare and chronic autoimmune disease wherein antibodies attack and destroy the superficial skin cells and not the deep tissue cells. The ALJ found that the claimant suffered from an occupational disease. On the issue of causation, the ALJ found that while both dermatologists who testified agreed that pemphigus erythematosus was an autoimmune disease of unknown origin, not caused by alleged exposures to meat juices and air conditioning chemicals, they both stated that the claimant's exposure to sun exacerbated his condition. The claimant's treating physician described his condition as an autoimmune inflammatory condition of unknown origin that erodes the external layers of skin and causes lesions. The doctor went on the state that the claimant must use sun block, wear protective clothing and be aware that climate, sun, and heat can make the condition worse.

At the ALJ hearing in this matter, the parties did not frame any specific causation issues. The claimant had testified that as a carpenter he worked in the sun, and the sun aggravated his condition. He also testified that the doctor told him he could not work in the sun and that he needed to wear sun block for protection. In post hearing depositions, two doctors testified that the sun aggravates the claimant's skin condition. The Board noted that the **Supreme Court** has held that the Section 20(a) presumption attaches only to the claim asserted by the claimant. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 **U.S.** 608, 14 BRBS 631 (1982). The Board noted that in *U.S. Industries*, the **Court** discussed the requirements for a claim under the LHWCA, specifically addressing the fact that the claim may be amended, noting that "'considerable liberality is usually shown in allowing the amendment of pleadings to correct…defects, unless the effect is one of undue surprise or prejudice to the opposing party.'" (455 U.S. at 613-614 n. 7, 14 BRBS at 633 n. 7 (quoting 3 A. Larson, *The Law of Workmen's Compensation*, §78.11 (1976), currently 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[3] (2004). In this regard, the Larson treatise states that a wide variance is permitted between pleading and proof, unless the employer is prejudiced by having to defend at the hearing an injury completely different than the one

pleaded. 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[5] (2004).

In the instant case, the Board found that the ALJ had not addressed whether the claimant had amended his claim to include the issue of whether his work-related exposure to the sun aggravated his autoimmune skin condition. Consequently, the ALJ's conclusion that the claimant's condition was work-related was vacated and the case remanded for consideration as to whether the claimant raised an aggravation theory. "Because we have held that claimant's skin condition is not related to the work incidents involving exposure to air conditioning chemicals and rotten meat, on remand, the [ALJ] must determine whether claimant amended his claim to include the issue of aggravation by sun exposure with sufficient notice to employer."

[Topics 2.2.6 Definitions—Injury—Aggravation/Combination; 2.2.18 Definitions—Representative Injuries/Diseases; 20.1 Presumptions—Generally]

Taylor v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 04-0732)(McGranery, J., concurring)(Hall, J., dissenting)(June 16, 2005).

In a split decision the Board held that a welder trainee who had never worked as a welder, was not covered under the LHWCA, as his duties were not essential or integral to shipbuilding or ship repair. This **basically overturns the Board's prior holding on the issue of coverage for trainees**, *see Hemminger v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 1099 (1981)(Miller, J., concurring)(Smith, CJ., dissenting). The Board simply stated "Based on this intervening case law [*Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT)(**4th Cir.** 1994), *cert. denied*, 514 **U.S.** 1063 (1995); *Sea-land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT)(**3d Cir.** 1992)(Not every employee on a covered situs like a shipyard is covered), *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 **U.S.** 40, 23 BRBS 96(CRT)(1989); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002)(Work must have an actual impact upon longshoring or shipbuilding in order to be "essential" or "integral" to such maritime work.)] we conclude that *Hemminger* is not persuasive authority."

Here the claimant was hired as a welder at employer's shipyard where the majority of the work is performed pursuant to contracts with the U.S. Navy. These contracts require that the workers be certified in their respective fields. Therefore, the employer runs a training and certification school for all employees. The claimant was assigned to the training program because he had no formal training as a welder and was injured while in the program. He was never actively involved in building, repairing, or breaking a ship, or engaged in loading or unloading ships.

In a strong dissent, Judge Hall noted that in *Hemminger*, the majority had stated that the claimant's occupation should be the focus of the status inquiry, including the period of training for that occupation. She noted that in the instant case, the claimant was hired by the shipyard as a welding trainee, which is a paid entry level position for a

shipyard welder, a covered occupation under the LHWCA. Additionally, Judge Hall noted that a claimant need not be directly involved in a production activity at the time of his injury, as the "moment of injury" test has been rejected in favor of an occupational focus. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). She finally observed, "[T]raining is a recognized fact of any employment, as employees entering new employment all receive training to some degree whether in a new skill, for advancement in already acquired skills, or in the particular employer's work procedures, operations and safety practices. As such, a training period must be considered to be simply an aspect of an occupation, and where that occupation is covered under the LHWCA, the training period is also covered."

[Topic 1.7 Jurisdiction/coverage—Status—"Maritime Worker"(Maritime Employment")]

Wheeler v. Newport News Shipbuilding & Dry Dock Co., (Unpublished)(BRB No. 04-0742)(June 21, 2005).

Although this matter was vacated and remanded on other issues, it is included here because the Board upheld the ALJ's finding that a claimant who was a senior engineering analyst was not excluded under Section 2(3)(A). The ALJ noted that the claimant's duties were not performed exclusively in an office, and that those duties involved the exercise of judgment and the expertise beyond that exhibited by clerical workers. The claimant's duties entailed taking technical information from design engineers and design drawings, or military and ship specifications to create, monitor and modify a catalog item or part to support ship construction. This included reading and interpreting stacks of paperwork, drawings and data and thereafter determining what should go on a part so that the correct material would support the ultimate construction.

The Board concluded that the ALJ rationally found that as a senior engineering analyst, the claimant did not work exclusively in an office setting but was required on occasion to leave his work station in order to either meet with the employer's engineers or inspect parts. The Board also noted that the ALJ had found that the job required the exercise of judgment and expertise of a kind that goes beyond the simple record making or record storage typical of clerical work. The Board disagreed with the employer's argument that the claimant's work was essentially that of cataloguing parts. Using a computer did not convert the claimant's position as a senior engineering analyst into clerical work. The Board declined to expand Section 2(3)(A)'s four specific job classifications to include all work performed within an administrative setting.

The Board distinguished the instant case from those of *Ladd v. Tampa Shipyards, Inc*., 32 BRBS 228 (1998)(production clerk held excluded under § 2(3)(A)), and *Stone v. Ingalls Shipbuilding, Inc*., 30 BRBS 209 (1996)(joiner helper whose sporadic trips outside of an office were only incidental to her office work held excluded by § 2(3)(A)). Unlike the claimants in *Ladd* and *Stone*, the claimant here, engaged when necessary, in the decision-making process in conjunction with the employer's engineers. Although it

was undisputed that the engineers were ultimately responsible for the final decision regarding what part was appropriate for the use intended, the record established that the employer's senior engineering analysts rendered their expertise when required and their duties were not clerical in nature.

[Topic 1.11.7 Jurisdiction/Coverage—Exclusions to Coverage—Clerical/secretarial/security/data processing employees]

Jones v. Tidewater Marine Services, Inc., (Unpublished) (BRB No. 04-0781)(June 22, 2005).

In this matter the claimant, without the assistance of counsel, appealed the ALJ's decision. In his decision the ALJ initially concluded that the claimant was barred by virtue of the doctrine of collateral estoppel, from re-litigating the issue of his status as a seaman as that identical issue was fully addressed and completely resolved in a prior state claim. (The state court concluded, and its decision was affirmed on appeal, that the claimant was a seaman.). Nevertheless, out of an abundance of caution, the ALJ independently reviewed the claimant's status aboard the vessel and likewise concluded that the claimant's status as a seaman precluded his claim for benefits. The Board upheld the ALJ's findings in this matter where the "Claimant has no specific recollection of the accident; rather, he relies on a dream he had…" as to the state of affairs.

The claimant also alleged a Section 48(a) claim. However, the record established that the employer terminated the claimant on July 3, 1979, as he "cannot be contacted for work," and that the claimant did not file his claim for benefits under the LHWCA until October 3, 1998. Thus the employer's alleged discriminatory action preceded the claimant's filing of his claim under the LHWCA by over 19 years. The Boar found that the claimant did not establish the requisite nexus between his claim for benefits and the alleged wrongful termination before.

[Topic 85.2 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies—Effect of Prior State Proceeding on a Subsequent Federal Claim; 48a.1—Discrimination Against Employees Who Bring Proceedings—Generally]

Oubre v. Avondale Industries, Inc., (Unpublished) (BRB No. 04-0776)(June 27, 2005).

Here the claimant, a pipe welder, injured his back at work and returned to light-duty work. He sought to hold the employer liable for a weight-reduction program recommended by his treating physician. In the first decision, the ALJ denied the claimant's claim for this treatment, concluding that the claimant's obesity is not work-related and that the weight-reduction program is not reasonable and necessary for the treatment of his work-related back condition.

On appeal, the Board held that the ALJ erred in framing the issue as whether claimant's obesity is work-related, and in finding that the claimant had returned to his pre-accident condition as the claimant returned only to light-duty work. Accordingly, the case was remanded to the ALJ to address whether the claimant's obesity slowed his recovery from his work-related back injury and, if so, the reasonableness and necessity of a weight reduction program. The Board also ordered the ALJ to address whether the claimant's work-related back injury combined with his pre-existing obesity under the aggravation rule such that the employer was liable for medical benefits for a weight-reduction program.

On remand, the ALJ found that the claimant's obesity was not a pre-existing impairment to which the aggravation/combination rule applies, and that the weight-reduction program was not necessary to insure the claimant's recovery from the back injury. Accordingly, the ALJ again denied medical benefits for the requested weight-reduction program. On its second appeal, the Board found that the ALJ's findings that the requested treatment was not necessary for the treatment of the claimant's condition was rational and supported by substantial evidence. The Board then found it unnecessary to address the aggravation issue.

[Topic 7.3.2 Medical Benefits--Treatment Required by Injury]

Paynter v. Newport News Shipbuilding and Dry Dock Co., (Unpublished)(BRB no. 04-0854)(June 27, 2005).

In this Section 8(f) issue case, the claimant was diagnosed with asbestosis and the parties agreed that he had a 55 percent permanent pulmonary impairment. The ALJ found that the claimant suffered from a manifest pre-existing permanent partial disability, i.e., hypertensive cardiovascular disease,, but that the employer did not establish that this condition materially and substantially contributed to the claimant's present disability. Thus Section 8(f) relief was denied. In upholding the ALJ's finding, the Board noted that the ALJ had determined that none of the medical opinions submitted by the employer provided an adequate quantification of the level of impairment resulting from the claimant's work-related injury alone, i.e., his asbestosis. The Board stated that, as determined by the ALJ, the medical evidence presented by the employer did not quantify the extent of the claimant's permanent impairment from his work-related asbestosis alone. "It therefore was not possible for the [ALJ] to make a determination as to whether claimant's pre-existing disability combined with the asbestosis to form a permanent partial disability materially and substantially greater than that which would have occurred due to the asbestosis alone." Therefore, the Board affirmed the ALJ's conclusions.

[Topic 8.7.6 Special Fund Relief--In Cases of Permanent Partial Disability, the disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone]

E. ALJ Decisions and Orders

F. Other Jurisdictions

Pittsburg & Conneaut Dock Co. v. Industrial Commission of Ohio, ___ Ohio App. ___ (No. 04-AP-616)(May 5, 2005).

At issue here was whether a worker who received benefits under the LHWCA could also receive state workers' compensation benefits. After noting that LHWCA jurisdiction supplements, rather than supplants state compensation law, the court looked to Ohio's statutory law. Ohio law credits the state with any amount awarded or recovered "under the laws of another state." Ohio Revised Code 1.59 defines "state" applies to a part of the United States, including any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legislative authority of the United States. The court found this last clause broad enough to include the LHWCA. However, the court went on to note other reasons (i.e., a "just and reasonable result," the overall legislative purpose of workers compensation and the "obvious intent of the limiting language to prevent excessive compensation") why the state should receive a credit for what was paid under the LHWCA.

[Topics 3.4 Coverage--Credit For Prior Awards; 85.4.1 Acceptance of Payments Under State Act—Credit for Sums Paid Under State Act]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Boyd and Stevenson Coal Co. v. Director, OWCP [Slone]*, ___ F.3d ___, Case No. 02-1088 (4th Cir. May 13, 2005), the named responsible operator was "automatically terminated for failing to file annual reports with the Commonwealth of Virginia" and the responsible carrier was later declared insolvent. As a result, the Director sought payment of survivor's black lung benefits from the Virginia Property and Casualty Insurance Guarantee Association (VPCIGA). VPCIGA is statutorily liable for unpaid "covered claims" filed against insolvent insurers in the Commonwealth. Va. Code Ann. §§ 38.2-1603 and 38.2-1606(A)(1). Although VPCIGA asserted that it was not liable for the payment of benefits in this case, the court disagreed.

In particular, VPCIGA argued that, pursuant to Va. Code Ann. § 38.2-1606-A.1.b, the claim was untimely because:

> . . . a covered claim shall not include any claim filed with the Guaranty Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

From this, VPCIGA noted that the bankruptcy notice for the insolvent carrier provided that a Proof of Claim must be filed "not later than" August 26, 1992. Consequently, because the survivor's claim was filed in April 1999, VPCIGA posited that it could not be held liable for the payment of benefits.

The court held that, although the survivor is required to independently establish entitlement to benefits, her claim was "derivative of her husband's claim which was filed before the August 26, 1992 deadline" for purposes of the VPCIGA statutory provisions. In particular, the court found that the survivor's claim arose "out of the same injury as the miner's claim and therefore both VPCIGA and (the responsible carrier) knew that once the miner died, the payments would not necessarily cease, but instead that the claim would continue if the miner had a surviving spouse or dependent." The court concluded that the survivor claim "should be considered timely if the miner's original claim is timely filed."

The court cited to a contrary result in *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997) where the miner did not file his claim until after the deadline for making claims to the insolvent carrier had passed. As a result, the Virginia appellate court concluded that VPCIGA could not be held liable for the payment of benefits.

[**liability of guaranty association where carrier insolvent**]

B. Benefits Review Board

In *Polly v. D & K Coal Co.*, 23 B.L.R. 1-__, BRB No. 04-0737 BLA (May 27, 2005), the Board held that offensive collateral estoppel, where the plaintiff seeks to prevent a defendant from re-litigating issues decided against the defendant in an action brought by a different plaintiff, may be applied in a survivor's claim to establish coal workers' pneumoconiosis based on an award of benefits in the miner's claim.[1] However, in agreement with the Director's position on appeal, the Board remanded the claim and directed that the ALJ must consider the employer's argument that "there had been no financial incentive for employer to vigorously litigate the miner's claim" since his federal award was fully offset by the state award received by the miner.

Citing to *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 4 (1979), the Board held that application of offensive non-mutual collateral estoppel "may be unfair in certain circumstances" even though the technical requirements of collateral estoppel have been met. The Board noted that the fact-finder is vested with "broad discretion" in determining whether application of the doctrine is "fair." As a result, the claim was remanded to the ALJ to consider whether use of offensive collateral estoppel would be "fair."

[**application of offensive non-mutual collateral estoppel**]

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the Board affirmed the ALJ's application of the evidentiary limitations at 20 C.F.R. § 725.414 (2001).

Admissibility of deposition testimony

First, the ALJ properly excluded the deposition testimony of Dr. Jerome Wiot, a radiologist, based on the provisions at § 725.414(c), which provide that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." Because Dr. Wiot offered only chest x-ray interpretations and did not provide a medical opinion, then his deposition testimony was not admissible.

CT-scans

In addition, the ALJ did not abuse his discretion in excluding CT-scan evidence proffered by the employer based on the employer's failure to demonstrate that the test was (1) medically acceptable, and (2) relevant to establishing or refuting the claimant's entitlement to benefits. In accepting the Director's position on this issue, the Board held

[1] In previous decisions, the Board has made clear that collateral estoppel may be applied where (1) no autopsy evidence is offered in the survivor's claim, *Collins v. Pond Creek Mining Co.*, 23 B.L.R. 1-__, BRB No. 02-0329 BLA (Jan. 28, 2003), and (2) the legal standard for establishing coal workers' pneumoconiosis in the miner's claim is the same as that required for the survivor's claim, *Sturgill v. Old Ben Coal Co.*, 23 B.L.R. 1-__, BRB No. 02-0874 BLA (Aug. 28, 2003).

that, because CT-scans are not covered by specific quality standards under the regulations, the proffering party bears the burden of demonstrating that the CT-scans were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." *See* 20 C.F.R. § 718.107(b) (2004).

"Substantially contributing cause" standard

Turning to the merits of the claim, the ALJ properly found that a physician's opinion that coal workers' pneumoconiosis constituted one of two causes of Claimant's totally disabling respiratory impairment satisfied the causation standard at 20 C.F.R. § 718.204(c)(1). Citing to *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8, 1-17 to 1-19 (2004), the Board noted that a medical opinion that pneumoconiosis "was one of two causes" of the miner's total disability met the "substantially contributing cause" standard.

Biopsy report

Moreover, where Employer offered the opinion of Dr. Bush under 20 C.F.R. § 725.414(a)(3)(i) as a "biopsy" report, the ALJ properly admitted the report only to the extent that Dr. Bush did not refer to inadmissible evidence and the report was considered only to the extent that it offered "an assessment of claimant's biopsy tissue for the existence of pneumoconiosis." The report could not be considered as a medical opinion under § 725.414(a)(1) because Employer had designated the reports of two other physicians under this category. As a result, Dr. Bush's opinion on disability causation was inadmissible.

Disability causation

In weighing the two medical opinions designated by Employer, the Board held that it was proper for the ALJ to discredit the opinions of Drs. Crisalli and Zaldivar with regard to disability causation where these physicians concluded that the miner did not suffer from either legal or clinical pneumoconiosis contrary to the ALJ findings.

[**deposition testimony; CT-scans; biopsy; medical opinions**]

In *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA and 04-0672 BLA-A (May 31, 2005) (unpub.), the Board held that the evidentiary limitations set forth at 20 C.F.R. § 725.414 are mandatory and, absent a finding of "good cause," it was proper for the ALJ to exclude the deposition testimony offered by Employer of Claimant's treating physician, Dr. Altmeyer. First, Employer already had medical opinions from two other physicians offered as evidence. Second, the Board rejected Employer's argument that Claimant waived his right to object to admissibility of the deposition because he participated in the deposition. The Board noted that § 725.456(b)(1) did not "include a waiver provision for evidence submitted under Section 725.414." Finally, although Dr. Altmeyer's treatment records were admitted as evidence under § 725.414(a)(4), the

record did not contain a "medical report prepared by Dr. Altmeyer pursuant to 20 C.F.R. § 725.414(a)(3)(i)" such that his deposition was inadmissible under these provisions as well.

[**deposition testimony**]

In *Hawker v. Zeigler Coal Co.*, BRB Nos. 99-0434 BLA and 04-0398 BLA (June 14, 2005) (unpub.), Employer challenged an award of interest on attorney's fees under 20 C.F.R. § 725.608(c) (2004) stating that the Department "lacks the authority to increase an award of attorney fees by assessing interest through a regulation." Employer noted that the claims at issue were filed before the effective date of the amended regulations and "the previous regulations did not provide for mandatory interest payable from the date of the award of attorney fees. Citing to *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board held that "no new burden was imposed upon employer by application of Section 725.608, as attorney's fees paid by responsible operators were subject to enhancement for delay before the regulation's effective date of January 19, 2001."

[**attorney's fees—enhancement for delay under § 725.608**]