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# *RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 211 June 2009*

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

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

**_Villaverde v. Director, OWCP_, 2009 WL 1532331 (2nd Cir. 2009)(Unreported).**

In affirming the Board's decision, the Second Circuit rejected Claimant's contention that the situs requirement under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Longshore Act") was met because his injury occurred on a bulkhead, which he argued qualified as a "wharf" under the Act and was akin to the area that was deemed a covered situs in *Fleischmann v. Director*, *OWCP,* 137 F.3d 131, 135 (2d Cir. 1998). The Court noted that Claimant relied on an obsolete definition found in the American Heritage Dictionary defining wharf as a "shore or river bank." Additionally, even assuming that the structure at issue in *Fleischmann* was similar to the one here, which appeared not to be the case, unlike Fleischmann, who "was on top of the bulkhead and moving the barge by pulling on a tow line" when "he slipped on the top of the bulkhead and fell over the landward side," *Fleischmann,* 137 F.3d at 133, Claimant was not injured on the bulkhead. Rather, he was injured eighty-five to ninety feet landward of the bulkhead, close to a highway and no maritime activity occurred at the site where he was injured.

**[Topic 1.6.2 Situs – "Over land"]**

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

***Turner v. Dir., OWCP*, 2009 WL 1809855, No. 08-60751 (5th Cir. 2009)(Unreported).**

The Fifth Circuit held that to invoke the Section 20(a) presumption, Claimant bore the burden to prove -- not merely allege -- that he suffered a back injury and that the back injury could have resulted from his fall at work. The ALJ properly found that Claimant failed to establish that he suffered a back injury stemming from the fall, based largely on discrediting the testimony of Claimant and his medical experts. Accordingly, it was not necessary for the ALJ to determine the sufficiency of Employer's contrary evidence to rebut Claimant's claim of a work-related injury.

The Court noted, however, that even assuming that the ALJ should have applied the presumption of causation in this case, Employer presented substantial evidence to rebut the presumption and support the ALJ's determination based on a weighing of all of the evidence. The ALJ addressed in detail all of the relevant testimony and medical evidence and provided cogent reasoning for his determination that Claimant did not prove he suffered a back injury. A reasonable person could accept this finding based on the surveillance video alone, which showed Claimant's ability to perform heavy lifting while working at a seafood market after his fall. Additionally, Claimant's admissions of lies and his diagnosis as a malingerer presented far more than a scintilla of evidence to support the ALJ's conclusion that Claimant did not suffer a back injury from his fall at work.

**[Topic 20.2.1 Presumptions -- 20(a) Claim Comes Within Provisions of the LHWCA – "Prima Facie Case"]**

***Harvey v. Louisiana Ins. Guar. Ass'n.*, No. 08-31164 (5th Cir. 2009)(Unreported).**

The Fifth Circuit held that a supplemental order of default issued against Louisiana Insurance Guaranty Association ("LIGA") pursuant to § 918(a) of the LHWCA was "in accordance with law." The Court relied on the standard for determining if a supplemental default order is in accordance with law as set forth in *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626 (5th Cir. 1989). In making this determination, it is not within the Court's purview to determine "the procedural or substantive correctness of the underlying compensation orders." *Abbott*, 889 F.2d at 630. Here, LIGA presented no argument that the supplemental default order was not in accordance with law under the applicable criteria. LIGA's challenge to the correctness of the underlying compensation order was on appeal with the

Benefits Review Board ("BRB") and thus was not properly raised before the Court.

The Court also rejected LIGA's contention that enforcing the judgment against it while its appeal before the BRB is pending violated its due process rights. Under § 921(b)(3), the BRB can issue a stay as to the payment of an award amount if "irreparable injury" can be demonstrated by the payor. LIGA did not file a motion for stay, and argued that the irreparable injury standard is impossibly high. The Court rejected this argument, stating that the "comprehensive system of review" provided for by the LHWCA, which "includ[es] the opportunity to petition for a stay" protects a payor's due process rights. *Abbott*, 889 F.2d at 632.

**[Topic 18.2 Supplemental Order Declaring Default]**

## B. U.S. District Courts

### *Alex v. Wild Well Control, Inc.*, 2009 WL 1507359, No. 07-9183 (E.D.La. 2009)

The District Court held that a plaintiff is eligible for seaman status where at least 30 percent of his time is spent on vessels under the common ownership or control of an entity that is not his employer. The Court acknowledged arguably contrary language in *Roberts v. Cardinal Servs., Inc.,* 266 F.3d 368, 377 (5th Cir. 2001)("when a group of vessels is at issue, a worker who aspires to seaman status must show that at least 30 percent of his time was spent on vessels, every one of which was under his *defendant-employer's* common ownership or control"(emphasis added)), but ultimately indicated its agreement with the construction of *Roberts* and the holding in *Jenkins v. Aries Marine Corp.,* 554 F.Supp.2d 635 (E.D.La.2008).

**[Topic 1.4.2 Master/member of the crew (seaman); Topic 1.4.3 Vessel – "Fleet of vessels"]**

### *Alfred v. Superior Energy Servs., Inc.*, 2009 WL 1792436, No. 08-4047 (E.D.La. 2009).

The District Court held that a painter and sandblaster who worked temporary land and sea based jobs was not a Jones Act seaman. When the incident occurred, the worker was not employed by Superior Services, the ship's owner. This was his first offshore job and he had never worked as a seaman before. Consequently, he was not a seaman, but a worker with only

a transitory or sporadic connection to the vessel. *Chandris, Inc. v. Latis*, 515 U.S. 347, 371 (1995). As such, his recovery was limited to that which is available pursuant to general maritime law.

**[Topic 1.4.2 Master/member of the Crew (seaman)]**

***George v. Apache Corp*., 2009 WL 1649734, No. 08-4005 (E.D.La. 2009).**

In granting Employer's motion for summary judgment, the Court held that Plaintiff was bound by his admission, in response to a request for admission, that he was not a Jones Act seaman, where Plaintiff failed to move for withdrawal or amendment of the admission. In the alternative, the Court noted that Plaintiff failed to raise a genuine issue of material fact as to his seaman status. As to the first prong for seaman status, namely furthering the work of the vessel, there was no evidence that Plaintiff was injured on a "vessel." In the Fifth Circuit, "fixed platforms" are not vessels and "workers injured on them are covered under the [Longshoremen's Act], not the Jones Act." *Becker v. Tidewater, Inc.,* 335 F.3d 376, 391 (5th Cir. 2003); *see also Demette v. Falcon Drilling Co.,* 280 F.3d 492, 498 at n. 18 (5th Cir. 2002). Plaintiff argued, without providing any sworn testimony, that he was injured on a "vessel" "equipped with a rake bow, lifesaving equipment, and bilge pumps." Neither party has provided sufficient evidence regarding the second prong for determining Plaintiff's seaman status. In particular, while Plaintiff's work tickets appeared to list different job locations, the Court lacked both an explanation as to the codes used in these tickets and sworn assurance that the tickets are complete.

**[Topic 1.4.3 Vessel – "Fixed Platforms"]**

## C. Benefits Review Board

***S.T. v. California United Terminals*, __ BRBS __, BRB No. 08-0713 (June 19, 2009).**

In a case arising in the Ninth Circuit, the Board affirmed an ALJ's application of the last employer rule in that case to his determination regarding liability for an attorney's fee, and thus, affirmed the ALJ's conclusion that Employer was liable for all attorney's fees, including those incurred prior to its controversion of the claim, without regard to the date Employer was notified of its potential liability through joinder. The Board

further affirmed the ALJ's determination that all prerequisites for such liability under § 28(a) were met and the fees were reasonable.

The ALJ ordered the joinder of Claimant's most recent Employer, California United Terminals ("CUT"), to her claims against three former employers, based on a medical opinion that her ongoing employment aggravated her wrist condition. The Board affirmed the ALJ's determination that, as the last employer for which Claimant performed work which contributed to her overall condition, CUT was liable for the attorney's fees accrued in her claims against all four employers, including those fees accrued prior to the time CUT was joined in this case. The Board relied on its prior decision in *Lopez v. Stevedering Servs. of America*, 39 BRBS 85 (2005), *appeal pending*, No. 08-72267 (9th Cir.)(holding that an employer liable for benefits under the last employer rule is also liable for an attorney's fee under § 28(a) in a multiple employer case regardless of the date it was joined).

The Board rejected Employer's argument that under § 28(a), it could only be held liable for services performed 30 days after it was notified of a claim through joinder, as § 28(a) authorizes employer fee liability only where such notice is provided and claimant "thereafter" obtains counsel. The conclusion that the responsible employer was liable for all reasonable fees was supported by the Ninth Circuit's determination in *Dyer* that § 28(a) lacks a temporal limitation.[2] *Dyer v. Cenex Harvest State Coop.*, 563 F.3d 1044, 1049 (9th Cir. 2009)(holding that once liability under § 28(a) is established, employer is liable for a reasonable attorney's fee including both pre- and post-controversion services). The decision in *Dyer* is also consistent with the Board's holding in *Lopez*, and with the last employer rule, *see Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), as it supports holding a responsible employer liable for services performed prior to its controversion of a claim where the prerequisites for such liability are met and the fees in question are reasonable, regardless of the date it was notified of its potential liability.

Here, the ALJ had determined that just as the claim in *Lopez* against multiple employers was united in a common core of facts, the joinder and participation of all four employers in this case was necessary to identify CUT as the last responsible employer. Claimant's counsel's tasks were all part of Claimant's combined claim against all four employers. The informal conference, which occurred prior to CUT's joinder, yielded only an

[2] The Board noted the contrary interpretation adopted by the Sixth, Fifth, and Fourth Circuits, but stated that the Ninth Circuit's holding in *Dyer* was controlling.

ambiguous conclusion that the last employer would be determined when Claimant stopped working and had a surgery. Moreover, substantial evidence supported the ALJ's finding that all of the prerequisites for CUT's liability under § 28(a), as articulated by the Ninth Circuit in *Dyer*, 563 F.3d at 1048, have been met. Specifically, CUT received notice of the claim at the time it was joined, and its failure to accept liability within 30 days of its joinder triggered liability for an attorney's fee under § 28(a), as Claimant successfully prosecuted her claim. *Id.* Substantial evidence also supported the ALJ's determination that the work performed in association with the requested fee was reasonable.

**[Topic 28.1.3 Attorney's Fees – 28(a) – When Employer's Liability Accrues]**

***R.C. v. Caleb Brett, L.L.C.*, __ BRBS __, BRB No. 08-0741 (Apr. 16, 2009).[3]**

Reversing an ALJ's denial of medical benefits, the Board held that massage therapy prescribed by a chiropractor, chosen by Claimant as his treating physician, and performed by a massage therapist was compensable under the Act and the applicable regulations where such therapy was reasonable and necessary for the treatment of a subluxation of the spine. 33 U.S.C. §907(a); 20 C.F.R. §702.404; 20 C.F.R. §702.401(a).

Dr. Viets, a chiropractor chosen by Claimant as his treating physician, employed Ms. Oliver as his in-house licensed massage therapist, and he referred Claimant to Ms. Oliver for massage therapy, which involved myofascial release and ultrasound treatment.[4] Because Dr. Viets provided treatment for a subluxation of the spine, he was a physician under Section 702.404, and Employer was liable for treatment he provided or prescribed that was reasonable and necessary for treatment of Claimant's subluxation. Dr. Viets testified that the massage therapy facilitated his adjustments to Claimant's spine, and the ALJ found that this treatment was reasonable and necessary for Claimant's work injury.

[3] This decision was not available for inclusion in the April 2009 issue of Recent Significant Decisions.

[4] The ALJ also found that massage therapy administered by Dr. Viets was not reimbursable under Section 702.404. However, Claimant limited his appeal to the compensability of the services rendered by Ms. Oliver.

Given this finding, the ALJ erred in denying payment for this treatment. The ALJ erred in relying on *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998), as the claimant in *Bang* was referred to a chiropractor for biofeedback and physical therapy by his treating physician although he did not have a subluxation, and thus, those chiropractic services were not compensable under § 702.404. Here, however, Claimant's chiropractor was his treating physician, Claimant has been diagnosed with and treated for a subluxation, and Dr. Viets has prescribed massage therapy to make his manual manipulations more effective.

Moreover, contrary to the test created by the ALJ here, previous cases have not required that prescribed treatment be "integral to and inseparable from" the manual manipulation performed for the safety of the claimant in order to be reimbursable. Rather, Section 702.401(a) specifically provides that medical treatment which is recognized as appropriate by the medical profession is covered. The test, as set forth in Section 7 and Section 702.401(a), is whether the medical care is reasonable, necessary and appropriate for treatment of the injury. If treatment is "integral" to spinal manipulation, then it is certainly reasonable and necessary, *see Hatcher v. Dynaelectric Co.*, BRB Nos. 99-0499/A (2000) (unpub.); however, this does not mean the converse is also true. It is sufficient that the therapy makes the spinal manipulation work better, and Claimant is not required to show he would be in excruciating pain without it.

Additionally, the ALJ denied reimbursement for the massage treatment on the theory that Dr. Viets "provided" the treatments, even though he did not perform them, and is the party seeking reimbursement. As the treatments did not constitute "manual manipulations of the spine," the ALJ found that the additional services prescribed by Dr. Viets and performed in his office were not reimbursable under Section 702.404. This interpretation confuses the applicable regulations. Section 702.404 defines the term "physician" and Dr. Viets is claimant's "physician" under this section as he performed manual manipulation to correct a subluxation. As such, he may prescribe additional treatment under § 702.401(a) so long as it is reasonable and necessary for the spinal subluxation. Ms. Oliver is a massage therapist and not a "physician;" thus, her services are included under those which may be prescribed under § 702.401(a). It is irrelevant that she worked in Dr. Viets' office — Dr. Viets could properly prescribe the necessary treatment from any source.

**[Topic 7.3.4 Chiropractic Treatment]**

***S.K. v. ITT Indus., Inc.*, __ BRBS __, No. 08-0823 (May 13, 2009).[5]**

In affirming the ALJ's determination that Claimant suffered from a work-related psychological condition, the Board held that, contrary to Employer's argument, the Longshore Act does not require use of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM") in assessing whether a claimant has suffered a psychological injury either in establishing a *prima facie* case or in proving the work-relatedness of an injury based on the record as a whole. Rather, the ALJ must base his decision on the evidence of record, assessing it in terms of weight and credibility; and may not substitute his judgment for those of the physicians involved. The Board rejected Employer's contention that the ALJ erred in crediting opinions of physicians who, according to Employer, did not properly utilize the DSM in diagnosing a work-related psychiatric condition over the opinion of Employer's expert, Dr. Mercier, who did utilize the DSM.

Claimant, who was born in Lebanon but later became a naturalized U.S. citizen, worked for Employer as a mechanic in Kuwait. Claimant testified that for over two years his co-workers subjected him to name-calling because of his Arabic heritage and that his supervisors took no corrective action and sometimes were involved in the harassment.
The Board affirmed the ALJ's finding that Claimant established the harm element of his *prima facie* case based on his testimony (which the ALJ determined to be credible and consistent with his reports to the doctors) and based on doctors' reports, all of whom agreed that Claimant suffered some form of psychological harm. The Board also affirmed the ALJ's finding that harassment occurred which could have caused or contributed to Claimant's psychological injury. The ALJ further found that the opinion of Dr. Mercier that Claimant had schizophrenia unrelated to his work, rebutted the presumption; and this finding was not challenged on appeal.

Substantial evidence supported the ALJ's finding that, on the record as a whole, Claimant suffered from depression, anxiety and PTSD related to the harassment by his co-workers. The ALJ based this finding on the opinions of four physicians. The ALJ gave less weight to Dr. Mecier because he dismissed harassment as a cause of Claimant's problems, failed to indicate why Claimant's symptoms were inconsistent with depression, and failed to explain why schizophrenia was an appropriate diagnosis when there was no personal or familial history of such condition. To the contrary, the ALJ found that Dr. Salameh gave a well-reasoned opinion as to why Claimant was not

[5] This decision was not available for inclusion in the May 2009 issue of Recent Significant Decisions.

schizophrenic and why his symptoms were consistent with the diagnoses of depression and PTSD.

**[Topic 2.2.18 Representative Injuries/Diseases – Psychological Problems]**

***J.R. v. NGSS/INGALLS Operations*, __ BRBS __, BRB No. 09-0656 (June 29, 2009).**

The Board held that it does not have authority to convene an informal conference, notwithstanding the language of Section 28(b) of the Longshore Act.[6]

Claimant requested that the Board convene an informal conference, pursuant to § 28(b), asserting that there were questions of fact which were beyond the scope of the district director's authority to resolve. In denying the request, the Board reasoned that its grant of authority is derived from § 21(b) of the Act. 33 U.S.C. §921(b)(3); *see also* 20 C.F.R. §802.201. Citing pertinent case law, the Board stated that it is not empowered to engage in fact-finding or to review evidence *de novo*. Rather, the Board's role is to review appealed decisions in order to ascertain if the findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law. It is clear from this statutory scheme that the reference in § 28(b) to the Board cannot confer on the Board the authority to conduct the initial informal steps in claims processing, as the 1972 Act reflects the "neatly legislated procedural separation of informal settlement conferences and formal adjudications." *Shell v. Teledyne Movible Offshore, Inc.*, 14 BEES 585, 589 (1984); *see also* 33 U.S.C. §919(d); *Cooper v. Todd*

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[6] Section 28(b) states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, *the* deputy commissioner *or Board shall set the matter for an informal conference and following such conference the* deputy commissioner or *Board shall recommend in writing a disposition of the controversy*."

33 U.S.C. §928(b) (emphasis added). The Board noted that no cases address the meaning of this language in § 28(b) or to other references to the Board which do not fit neatly with its role as defined in § 21. *See also* 33 U.S.C. § 923, 927 referring to "hearings" before the Board. Nonetheless, the foundation of its authority lies in § 21 and that section must control.

*Pacific Shipyards Corp.*, 22 BEES 37 (1989). Indeed, the regulations at 20 C.F.R. §702.301-702.319 govern the informal processing of cases at the district director level. There are no corresponding regulations permitting the Board to convene an informal conference. The Board solely performs a review function which prior to the 1972 amendments was performed by the district courts.

The Board acknowledged that Claimant's conundrum is apparent from the recent case precedent concerning § 28(b). If the district director issues a written recommendation with which employer complies, claimant is not entitled to an attorney's fee payable by employer even if that recommendation is legally and/or factually erroneous. *See, e.g., Andrepont v. Murphy Exploration & Prod. Co.*, __ F.3d __, 2009 WL 1124246 (5th Cir. March 17, 2009). Moreover, the district director's memorandum of informal conference is not appealable to the Board. Nonetheless, these concerns can be addressed only by Congress. *Andrepont*, 2009 WL 1124246 at *6-7.

**[Topic 28.2.3 District Director's Recommendation; Topic 21.1.2 Benefits Review Board -- Grant of Authority]**

## II. Black Lung Benefits Act

### Benefits Review Board

By published decision in *J.O. v. Helen Mining Co.*, 24 B.L.R. 1-__, BRB No. 08-0671 BLA (June 24, 2009), the Board adopted the Director's position and overruled its holdings in *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990) and *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990) to conclude that the three year statute of limitations implemented at 20 C.F.R. § 725.308(a) applies to original *and* subsequent claims under 20 C.F.R. § 725.309. The Board further stated:

> We . . . agree with the Director, and hold that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a misdiagnosis and thus, cannot trigger the statute of limitations for filing a subsequent claim.

*Slip op.* at 4.

Turning to the issue of legal pneumoconiosis, the administrative law judge accorded less weight to a physician who concluded that the miner's emphysema was not coal dust related based on a lack of radiographic findings of pneumoconiosis. The Board agreed and concluded that the premise of the physician's opinion "is inconsistent with both the definition of legal pneumoconiosis and the preamble to the revised regulations." The Board further concluded that the judge "permissibly evaluated (the physician's) opinion in conjunction with the Department's discussion of prevailing medical science in the preamble to the revised regulations." Notably, the Board stated that "[t]he preamble sets forth how the Department of Labor has chosen to resolve questions of scientific fact." Thus, it concluded that "[a] determination of whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor, is a valid criterion in deciding whether to credit the opinion." In this case, the judge "correctly noted that the Department of Labor, in the preamble to the revised regulations, recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis."

[ **statute of limitations applicable to subsequent claims; use of the Department's preamble in weighing medical opinion evidence** ]

In *M.A.S. v. Westmoreland Coal Co.*, BRB No. 08-0563 BLA (June 17, 2009) (J. Smith, dissenting) (unpub.), the Fourth Circuit had remanded the claim to the administrative law judge for a determination of (1) whether Employer's petition for modification of the award of benefits in the miner's claim should be denied on grounds of improper motive, lack of diligence, or futility, and (2) whether Employer was collaterally estopped from re-litigating the issue of complicated pneumoconiosis in the survivor's claim based on a finding of the disease in the successful miner's claim.

On remand, the administrative law judge concluded that Employer's petition for modification of the award of benefits in the miner's claim could properly be considered. Moreover, the administrative law judge held that Employer was not collaterally estopped from re-litigating the existence of complicated pneumoconiosis in the survivor's claim. The Board has disagreed.

In a split panel decision, the administrative law judge's decision was reversed and the miner's and survivor's claims were remanded to the district director for the payment of benefits.

Starting with the propriety of Employer's modification petition in the miner's claim, the Board noted that the Fourth Circuit set forth, *inter alia*, the following questions:

> Why did Employer wait to seek modification for a period of time two months after the miner's death and nearly seven years after the Benefits Review Board affirmed the award of benefits in the miner's claim and no further appeal was taken?
>
> Should Employer's motive in seeking modification be deemed suspect?
>
> Is the modification petition futile or moot, in that no overpayment made to the now deceased miner could be recovered?
>
> Is the modification petition akin to a request for an advisory opinion since its favorable resolution will have no impact on the living miner's claim?

In determining whether Employer's modification petition was proper, the Board noted that Employer "acknowledges that its purpose in requesting modification of the miner's claim was to preclude application of the

irrebuttable presumption (of complicated pneumoconiosis) in the survivor's claim." The Board further stated that Employer's modification petition in the miner's claim was filed less than one month after the district director applied collateral estoppel to bar re-litigation of the issue of complicated pneumoconiosis in the survivor's claim, thus awarding benefits in that claim. The Board concluded the following:

> The timing of employer's request for modification, and the nature of the supporting evidence it initially proffered, establish that employer's motive in seeking to set aside the award of benefits in the miner's claim was to evade application of the irrebuttable presumption of death due to pneumoconiosis in the survivor's claim.
>
> . . .
>
> Granting modification when the moving party's motive is to circumvent the law does not render justice under the Act.

*Slip op.* at 7-8.

To this end, the Board found the administrative law judge's analysis "fundamentally flawed" where he concluded that it "was in the interest of justice to grant modification of the decision in the miner's claim in order to preclude claimant's reliance on collateral estoppel in the survivor's claim . . . when employer proffered evidence that the miner had not suffered from complicated pneumoconiosis." The Board held, to the contrary, that Employer on modification submitted "the same sort" of evidence that "was available during the miner's life" and that "[u]nder these circumstances, it is proper to grant survivor's benefits based on the finding made during the miner's life."

With regard to the issue of "futility," the Board noted that "employer has conceded that it is not attempting to recoup any overpayment from the miner's estate, and such recovery is precluded, as the miner had no estate when he died and the time for filing a claim had elapsed as of the date of filing of the request for modification."

Finally, citing to *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 334 (7th Cir. 2002), the Board held that "there is no point in re-adjudicating the question of whether a given miner had pneumoconiosis unless it is possible to adduce highly reliable evidence—which as a practical matter means autopsy results. Otherwise the possibility that the initial decision was incorrect is no reason to disturb it." *Slip op.* at 11. The Board

concluded, with regard to Employer's petition for modification, the administrative law judge is required "to consider only factors relevant to a determination of whether reopening the (miner's) claim would render justice in the (miner's claim), not (the survivor's) claim."

Upon reinstating the award of benefits in the miner's claim, the Board underwent analysis of factors set forth in *Parlane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006) to conclude that Employer was collaterally estopped from re-litigating the issue of the existence of complicated pneumoconiosis in the survivor's claim. As a result, the Board vacated the administrative law judge's finding "as a matter of law" and remanded the survivor's claim to the district director for the payment of benefits.

[ **petition for modification-motive, diligence, accuracy; application of collateral estoppel to bar re-litigation of issue of complicated pneumoconiosis in the survivor's claim** ]

Under the facts of *M.B. v. Island Creek Coal Co.*, BRB No. 08-0627 BLA (May 29, 2009) (unpub.), Employer accepted liability in the miner's claim and withdrew its request for a formal hearing by the administrative law judge. As a result, the miner's claim was remanded to the district director for the payment of benefits.

Subsequently, a survivor's claim was filed. In adjudicating the survivor's claim, the judge cited to *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996) and found that Employer had stipulated to the presence of complicated pneumoconiosis based on its actions in the miner's claim and it was, therefore, collaterally estopped from re-litigating the issue in the survivor's claim. [7]

Citing to *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-137 (1999) (en banc), the Board noted that collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which may have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." Here, the Board stated:

[7] In the miner's claim, the district director had found the presence of complicated pneumoconiosis established and benefits were awarded. Employer then requested a hearing.

> In finding that the doctrine of collateral estoppel applied to this case, the administrative law judge found that, because employer vigorously contested the miner's entitlement to benefits up until shortly before the scheduled hearing, employer had actually litigated the issue of complicated pneumoconiosis in the miner's claim.

*Slip op.* at 6.

The Board disagreed with the judge's decision and noted that "Employer's letter asking that the hearing in the miner's claim be cancelled was short and general, and neither referenced, nor agreed with, the district director's finding of the existence of complicated pneumoconiosis." From this, the Board concluded that it was "impossible to determine whether employer intended any action beyond the general withdrawal of its controversion to the miner's claim for benefits." Further, the Board reasoned that "because the miner's entitlement to benefits was established by employer's concession, no finding was rendered by the administrative law judge as to the existence of complicated pneumoconiosis" and, as a result, the requirement that an issue be "actually litigated and determined" was not satisfied. Accordingly, the Board concluded that collateral estoppel was inapplicable in the survivor's claim.

It is noted that counsel for the Director, OWCP argued that Employer's actions in the miner's claim were akin to "default," *i.e.* giving up the opportunity to defend the case. As such, the Director maintained that "if a party actively participated in prior litigation before defaulting, the default judgment may serve to preclude relitigation of the issue in a subsequent proceeding." The Board was not persuaded and summarily concluded that cases cited by the Director were "distinguishable."

[ **withdrawal of controversion in miner's claim, no collateral estoppel effect in survivor's claim** ]

By unpublished decision in *D.R. v. Jewell Ridge Mining Corp.*, BRB 08-0661 BLA (May 27, 2009) (unpub.), a case arising in the Fourth Circuit, the Board held:

> . . . where a claimant worked as a mine inspector for the state of Virginia, since Virginia cannot be a responsible operator, the length of claimant's tenure with the state should be subtracted from the length of coal mine employment to be credited to him by the administrative law judge.

*Slip op.* at 7.

Turning to the issue of applicability of stipulations in a subsequent claim, counsel for the Director, OWCP argued that 20 C.F.R. § 725.309(d)(4) "applies only to the prior claim that *immediately precedes* the pending subsequent claim." *Slip op*. at 4, n. 4 (italics added). Thus, in the miner's third claim, the Director maintained that, because no stipulations were made in the miner's second claim, the administrative law judge could not incorporate stipulations made in the miner's first claim. However, the Board declined to rule on the merits of this position based on its finding that the administrative law judge erred in finding that Employer had stipulated to the existence of pneumoconiosis in the first claim.

[ **state mine inspector and length of coal mine employment; stipulations under 20 C.F.R. § 725.309(d)(4) defined** ]