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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 202 September 2008

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A. U.S. Circuit Courts of Appeals

***Holcim (U.S.) Inc. v. Reed et al.,* (Unreported) 2008 WL 4155352 (5th Cir. 2008).**

The Court vacated the Board's decision affirming an ALJ's award of death benefits to the mistress of a decedent employee as a "dependent" under §9(d) of the LHWCA. The ALJ awarded 50 percent of the decedent employee's average weekly wage ("AWW") to his estranged wife and 16 2/3 percent to his live-in girlfriend of about two years.

The Court observed that §9(d) of the LHWCA entitles "any [] persons who satisfy the definition of the term 'dependent' in section 152 of Title 26 of the United States Code" (which is part of the Internal Revenue Code) to receive a portion of the deceased employee's AWW (16 2/3 percent in this case) "during such dependency." At the same time, §9(f) of the LHWCA provides that "dependency shall be determined as of the time of the injury." Thus, "based on the plain language of the statute, to receive death benefits as a dependent under the LHWCA, an individual must satisfy two conditions: (1) qualify as a dependent under 26 U.S.C. §152 at the time of the employee's death; and (2) remain as a dependent after the employee's death" (citing *Standard Dredging Corp. v. Henderson*, 150 F.2d 78, 81 (5th Cir. 1945)(death benefits to dependent parents continue only "during such dependency")).

The Court noted that the provision of the Internal Revenue Code in effect at the time of the employee's death had to be applied, as §9(f) of the LHWCA provides that "[a]ll questions of dependency shall be determined as of the time of the injury." The applicable version of 26 U.S.C. §152 provides that an adult who bears no legal or familial relationship to the taxpayer may be considered the taxpayer's dependent if two requirements are met. First, the taxpayer must provide over half of the individual's support during the taxable year. Second, the individual must have "as [her] principal place of abode the home of the taxpayer and [be] a member of the taxpayer's household." It further provides that "[a]n individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer, the relationship between such individual and the taxpayer is in violation of local law."

In the present case, because neither the ALJ nor the BRB made any findings as to whether the employee's girlfriend continued to qualify as his dependent after his death, the Court remanded the matter to the ALJ for such a determination. The Court noted that this ruling is "compelled by *Henderson*, which, though time-worn, has never been overruled, distinguished, or otherwise limited in any manner." The Court deemed it unnecessary, for purposes of its limited ruling, to address the employer's challenge to the BRB's determination of dependency at the time of the employee's death.

Finally, the Court noted that the OWCP filed a brief in this case, contending that despite the prospective element of §9(d), the proper method for contesting a death benefits award that featured no finding of continued dependency is through an *ex post* petition for modification under §22 of the LHWCA based on a "change in condition." Under this interpretation, the ALJ was only required to conclude that dependency existed at the time of the employee's death in order to properly award benefits under §9(d). The Court concluded that, while ordinarily the OWCP's interpretation of the LHWCA is entitled to some level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), no deference was warranted in this case, as the OWCP's interpretation was deemed "wholly unsupported by regulations, rulings, or administrative practice" (quoting *Total Marine Servs., Inc v. Dir. OWCP*, 87 F.3d 774, 777 n.2 (5th Cir. 1996); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996)).

[Topic 9.1 Application of section 9; Topic 8.5 Death benefits for survivors]

***Grand Isle Shipyard Inc. v. Seacor Marine, LLC*, ___ F.3d _____, 2008 WL 4292752 (5th Cir. 2008).**

A company responsible for repairing and maintaining offshore platforms (Grand Isle) brought action against a company responsible for transporting offshore workers (Seacor) seeking declaration that it was not obligated to indemnify Seacor in a lawsuit related to an injury sustained by Grand Isle's employee aboard a Seacor vessel. The district court held that Louisiana law applied as a surrogate federal law under the Outer Continental Shelf Lands Act ("OCSLA") to invalidate the underlying indemnity agreement. Concluding that general maritime law applied instead, the Fifth Circuit vacated and remanded.

For Louisiana law to apply as a surrogate federal law under OCSLA, three conditions must be met: (1) the controversy must arise on a situs covered by OCSLA; (2) federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with federal law. 43 U.S.C.A. §1331 *et seq.* The Court reached only the first prong.

The Fifth Circuit held that the situs requirement under OCSLA was not met where a platform worker was injured aboard a vessel while being transported on the high seas from an offshore platform to a residential platform, where nothing indicated that the worker was in actual physical contact with the platform at the time of the accident.

Noting "inconsistency" of the Fifth Circuit case law under OCSLA, the Court proceeded to reconcile the relevant precedent. The Court applied the OCSLA situs test developed in *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002), which specifically excludes "a ship or vessel" used for "transport[ing] resources from the OCS." The Court also deemed controlling the Supreme Court's analysis in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986) where two platform workers were killed in a crash on the high seas of a helicopter which had been transporting them from the offshore drilling platform to their home base inland. Finding no OCSLA situs, the Supreme Court stated that "admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity," namely "the ferrying of passengers." The Circuit Court concluded that because the vessel in the present case was similarly engaged in the "ferrying of passengers," this case "falls squarely within the scope of *Tallentire*." Significantly, the Supreme Court rejected the notion that the status of the decedents as platform workers should render OCSLA applicable to what was otherwise a maritime accident.

The fact that (unlike in *Tallentire*) the accident in this case occurred in close proximity to an offshore platform was "irrelevant," as the worker was not in actual physical contact with the platform at the time of the accident. The Court, accordingly, distinguished the Fifth Circuit precedent "indicating that an accident involving a plaintiff on a vessel who was nevertheless in physical contact with a platform may be deemed to have occurred on an OCSLA situs," citing *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992) (involving a platform worker killed while stepping from a stationary crew boat to an offshore platform) and *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1527 (5th Cir. 1996) (involving a plaintiff on a vessel who was, at the time of his accident, in physical contact with a rope connected to an offshore platform). The Court cautioned that when it stated in *Hodgen* that the Fifth Circuit "does not apply any physical contact rule with the rigidity that [Defendant] would impose," it was merely stressing that it "would not carry any physical contact requirement to extreme or absurd lengths" (in response to an argument that the worker in that case had actually suffered his injuries after he had let go of the rope connecting him to the platform). The Court additionally noted a summary judgment ruling in *Fuselier v. Sea Boat Rentals, Inc.*, No. 06-4488, 2007 WL 2713278 (E.D.La. Sept. 14, 2007), which concluded that the OCSLA situs requirement was not met where a platform worker was injured aboard a vessel on the high seas while en route to an OCSLA situs.

The Court also distinguished *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) (relied upon by the district court), a breach of contract case which held that OCSLA applied to a dispute involving work on an undersea gathering line, in spite of the fact that the work was performed by vessels and divers in the ocean, not on a platform. The Court stressed that several factors supported the finding of situs in that case (e.g., the gathering line fit the statutory definition under 1333(a)(1), was buried beneath the ocean floor, and was connected to a platform) and concluded that the district court in the present case placed excessive weight upon one of the factors listed in *PLT Engineering*, namely that the "locations where the substantial work was done were covered situses." The fact that *PLT Engineering* involved a contractual dispute also distinguished it from *Tallentire* and the case at hand.

[Topic 60.3.2 OCSLA Coverage; Topic 60.3.4 OCSLA v. Admiralty v. State Jurisdiction]

B. Benefits Review Board

E.M. v. Dyncorp Int'l, __ BRBS __, BRB No. 08-0208 (July 30, 2008).

The Board reversed an ALJ's finding that a claim filed under the Defense Base Act was untimely under section 13(a) of the LHWCA. In April 2004, Claimant was injured during a shooting incident in the course of her employment with Employer in Kosovo. Claimant received treatment for resulting physical and psychological injuries. After a period of light duty, she resumed her former duties with Employer until she was sent back to the United States in May 2005. Claimant averred that her claim filed in April 2006 was timely because she did not realize that her work-related conditions would result in a loss of wage-earning capacity until she unsuccessfully attempted to resume her pre-deployment duties as a special enforcement officer with the state of Kansas in June 2005 (as she could no longer carry a firearm). Employer asserted that Claimant was aware of such a loss as of the date of the injury.

The Board observed that the courts of appeals have uniformly held that the one-year statute of limitations under §13(a) begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the work-related injury. This inquiry encompasses the claimant's awareness that she sustained a permanent work-related injury that causes a loss in earning capacity (citations omitted).

Here, the statute of limitations commenced only when Claimant knew or should have known that she had a permanent work-related psychological condition that impaired her earning capacity. The ALJ erred by not applying the section 20(b) presumption, which places the burden on the employer to produce substantial evidence that the claim was untimely. The ALJ relied instead on mere inferences after concluding that the record did not clearly establish the date of Claimant's awareness. The ALJ further erred by relying on Claimant's loss of sick time, as any such loss was temporary and unrelated to the psychological condition that forms the basis for her claim. A temporary inability to work does not put an employee on notice that her earning power has been permanently impaired, particularly when she returns to work (citations omitted). The ALJ further erred in concluding that Claimant was put on notice in October 2004 when she received a "disabling" diagnosis of acute and chronic post-traumatic stress disorder and major depression, as the same physician subsequently opined that she was functioning adequately in her job. Significantly, there was no evidence that Claimant lost any work time due to her psychological condition or was informed by a medical professional or her Employer prior to her dismissal in May 2005 that this condition would likely cause a loss of employment or

reduction in earning capacity. The mere diagnosis of a work-related condition and treatment therefore does not trigger the statute of limitations (citations omitted).

[Topic 13.1 Starting the statute of limitations]

***D.S. v. Consolidation Coal Co.*, __ BRBS __, BRB No. 08-0287 (Sept. 29, 2008).**

The Board affirmed an ALJ's finding of coverage under the LHWCA in this case arising in the Third Circuit. Claimant was injured in the course of his employment with Employer, which is in the business of processing coal. Claimant worked as a mechanic repairing and servicing heavy equipment. He was injured while working in a garage within the Employer's Robena facility, which receives coal from barges.

Generally, a claimant satisfies the "status" requirement if he is engaged in work which is integral to the loading, unloading, construction, or repairing of vessels. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT)(1989); *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT)(3rd Cir. 1992). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Maher Terminals, Inc. v. Dir., OWCP [Riggio]*, 330 F.3d 162, 37 BRBS 42(CRT) (3rd Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The Supreme Court has stated that coverage "is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo," and held that "it has been clearly decided that, aside from the specified occupations [in §2(3)], land-based activity … will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Schwalb*, 493 U.S. at 45; *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Caputo*, 432 U.S. at 272-74. Similarly, the Third Circuit has held that land-based activity not enumerated in §2(3) should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel. *Rock*, 953 F.2d at 67.

In cases involving mechanics and repairmen, the Board has considered whether, consistent with *Schwalb*, the employee's functions were integral to the loading/unloading process. *See, e .g.*, *Jones v. Aluminum Co. of America*, 31BRBS 130 (1997) (decedent's maintenance and repair work on conveyor belts furthered the unloading process); *Fergusen v. Southern States Coop.*, 27 BRBS 16 (1993) (although longshore activities made up

about two percent of the worker's overall duties, these tasks were not too episodic or irregular under *Caputo* to deny status under the Act).

Here, the Board upheld the ALJ's determination that Claimant was a maritime employee. Claimant's work repairing the Terex machine was integral to the loading process, as such machines were used, at times, to load coal into the de-stock hopper from which it went into the river tipple and directly onto barges. Moreover, Claimant spent "at least some of his time" in indisputably maritime work as this repair work was "a regular non-discretionary part" of his job (citing *Riggio*). Pursuant to *Schwalb*, Claimant's contribution to the loading process need not be constant. The possibility that the loading process might not immediately come to a halt if the Terex is out of service is irrelevant because the lack of a functioning Terex would eventually halt the loading (citations omitted).

The Board further upheld the ALJ's finding that the garage in which Claimant performed his job duties, and where he was injured, is an "adjoining area" under §3(a). The Board noted the Third Circuit's holding in *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3rd Cir. 1998), that the dispositive question is whether at least one employer customarily used the area for loading and/or unloading. However, the Third Circuit has not addressed whether a mixed-use situs such as the garage where Employer maintains the Terex machines along with equipment not used in its loading operations, is an "adjoining area." The Board observed that it is well established that manufacturing facilities can be apportioned into covered and non-covered areas. In *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003), the Board had held that the entire Robena facility is not a covered situs since it contains distinct areas for loading and unloading of coal, and for non-maritime coal processing. *See also Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999).

In this case, unlike in *Maraney*, the garage where Claimant was injured had both a functional relationship to the loading process (as repairs undertaken there were essential to the loading/unloading of coal), as well as a geographical nexus to the loading site on the river (as it was located 100 yards from navigable waters, 50 yards from the de-stock hopper used for loading, and next to Quonset huts that store steel cable used in the unloading/loading).

There is no requirement that the site of an injury be used specifically (or directly) and exclusively for the functions enumerated in §3(a). In *Nelson*, the Third Circuit has held that the term "adjoining area" should be broadly construed and rejected the Forth Circuit's narrow construction of that term in *Sidwell v. Express Container Servs, Inc.*, 71 F.3d 1134, 1139,

29 BRBS 138, 143(CRT)(4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996) (holding that situs must be a discrete structure or facility whose *raison d'etre* is its use in connection with navigable waters). Indeed, other circuit courts and the Board have held that a facility used for the repair and maintenance of equipment employed in the loading/unloading process may be an "adjoining area" (citations omitted). The holding in *Nelson* is also consistent with the precedent from other circuits holding that situs "need not be exclusively used for maritime purposes but must customarily be used for some maritime activity" (citations omitted).

[Topic 1.6 Situs; Topic 1.7 Status]

***D.G. v. Cascade Gen. Inc.*, __ BRBS __, BRB No. 08-0238 (Sept. 18, 2008).**

As a matter of first impression, the Board held that the LHWCA allows parties to agree to a waiver by the claimant of a §14(f) assessment on overdue compensation payments through an approved §8(i) settlement. The Board reasoned that the §14(f) assessment is considered "additional compensation," and the Act permits a claimant to waive his right to compensation through an approved §8(i) settlement (citations omitted). It follows that the parties may negotiate conditions upon which the claimant would waive his right to the §14(f) assessment, subject to administrative approval.

In this case, under the terms of the settlement agreement, Claimant waived the §14(f) assessment in the event that "the street address he has provided below is not valid or if claimant fails to provide a street address." While Employer promptly mailed the settlement proceeds to Claimant, the check was not delivered to Claimant until 15 days after the compensation order was filed. Employer argued that Claimant violated the clause by not providing a mail receptacle where settlement proceeds could be delivered. Claimant responded that he was not asked to provide his "mailing address."

The Board noted that the absence of a mail receptacle does not fall within the physical impossibility exception hinted at by the Ninth Circuit in *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT)(9th Cir. 2002). The Board vacated the district director's order of default imposing §14(f) assessment, and remanded the case to the OALJ for a determination of whether Claimant violated the pertinent contract clause.

[Topic 8.10.1 Section 8(i) settlements, generally; Topic 14(f) Compensation paid under award]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Westmoreland Coal Co. v. Amick*, Case No. 06-2171 (4th Cir. Aug. 18, 2008) (unpub.), the court upheld the administrative law judge's award of benefits based on a finding that the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33 year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposure. In affirming the administrative law judge's weighing of the medical opinions, the court concluded that it was proper for the judge to accord greater weight to physicians who recognized and discussed the latent and progressive nature of pneumoconiosis.

The court held that, while the regulations do not require that a physician discuss the latent and progressive nature of pneumoconiosis:

> . . . considering that both the black lung regulations as well as numerous, long-standing decisions of the courts of appeals recognize the progressivity of pneumoconiosis, the ALJ was not precluded from considering as more persuasive the opinions of those doctors who took that characteristic of pneumoconiosis into account. This is especially true in this case, given that the worsening of (the miner's) symptoms did not occur until eight years after he retired from his coal mining employment.

In resolving conflicting medical literature cited by the medical experts, the court held that the judge properly noted that "the Department of Labor already reviewed the medical and scientific literature before promulgating its revised regulations." As a result, the court concluded:

> The ALJ's decision to credit Drs. Cohen and Koenig for their thorough discussion of the medical literature was therefore valid, in that it was, as the ALJ and BRB made clear, more consistent with the Department of Labor's findings that pneumoconiosis is latent and progressive and that an obstructive impairment may be 'legal pneumoconiosis.'

In line with this reasoning, the court held that the judge properly discredited the opinions of two of Employer's physicians who concluded that the miner's impairment could not have been caused by coal dust exposure because the miner stopped working in 1983 and his condition began to deteriorate in 1991.

The court also held it was proper to accord less weight to physicians who did not take into account both cigarette smoking and coal mine dust exposure as potential causes of the miner's chronic obstructive pulmonary disease. Specifically, the judge found that Employer's experts failed to explain "why no part of (the miner's) disability was due to thirty-three of coal dust exposure." The court held that this did not improperly shift the burden to Employer as Claimant's medical experts "supported their conclusions that (the miner's) disability impairment was due, at least in part, to thirty-three years of coal mine dust exposure."

[**etiology of chronic obstructive pulmonary disease; use of the Department of Labor's preamble in weighing conflicting medical opinions**]

B. Benefits Review Board

Under the facts of *W.L. v. Director, OWCP*, 24 B.L.R. 1-___, BRB No. 08-0122 BLA (Sept. 30, 2008) (pub.), the district director's service sheet stated that his proposed decision and order denying benefits was mailed to the parties on October 14, 2005. However, the envelope containing the proposed decision was postmarked October 19, 2005 and Claimant filed a hearing request on November 18, 2005. Before the administrative law judge, counsel for the Director, OWCP argued that Claimant's hearing request was untimely. However, the Board noted that the Director changed positions on appeal:

> The Director notes that he took a contrary position before the administrative law judge as to the timeliness of the hearing request 'without fully considering the ramifications of the district director's late service of the proposed decision and order . . . which renders the hearing request timely.

Slip op. at 4.

Citing to 20 C.F.R. § 725.419(a), the Board noted that a hearing must be requested within 30 days of the "date of issuance of a proposed decision and order . . .." 20 C.F.R. § 725.419(a) (2008). Here, although the service

sheet of the *Proposed Decision and Order* indicated that it was mailed on October 14, 2005, the postmark date on the envelope was October 19, 2005. The Board concluded that the postmark date was controlling and, therefore, Claimant's November 18, 2005 hearing request was timely.

[**timeliness of request for hearing**]

In a case arising under the pre-amendment regulations, *J.P.L. v. Shady Lane Coal Corp.*, BRB No. 07-0941 BLA (Aug. 28, 2008) (unpub.), the Board held that in "considering a request for modification of the denial of a duplicate claim, which was denied based upon a failure to establish a material change in conditions, the administrative law judge must determine whether the evidence developed in the duplicate claim, including any evidence submitted with the request for modification, establishes a material change in conditions."

On the merits of the claim involving complicated pneumoconiosis, the Board upheld the administrative law judge's award of benefits. In reviewing the chest x-ray evidence, Dr. Sargent noted the presence of Category A opacities on the ILO classification form, but provided additional notations on the form of the need to rule out granulomatous disease. Employer argued that Dr. Sargent's interpretation did not support a finding of complicated pneumoconiosis. However, the Board agreed with the administrative law judge's conclusion that, because Dr. Sargent specifically marked a box supporting the presence of a Category A opacity, his comments about ruling out 'associated granulomatous disease' did not indicate that he was questioning the existence of large opacities consistent with pneumoconiosis . . .."

Under § 718.304(c), the Board upheld the judge's conclusion that Dr. Forehand's diagnosis of complicated pneumoconiosis was more probative than the contrary opinions of Drs. Castle and Hippensteel. While noting that underlying CT-scan evidence was not probative of the presence or absence of complicated pneumoconiosis, the Board affirmed Dr. Forehand's finding of complicated pneumoconiosis where his opinion was based on CT-scan evidence as well as "claimant's work history, smoking history, and negative TB test results." The Board cited, with approval, to the judge's discussion as follows:

> [M]y determination to credit Dr. Forehand as the treating physician [does] not rest upon his status alone, but rather upon the unique circumstances of this case, where a number of speculative possibilities have been suggested to explain the

> [c]laimant's x-ray and CT-scan abnormalities. In the course of Dr. Forehand's treatment of [c]laimant, he did not find the [c]laimant to have any malignancy, tuberculosis, sarcoidosis, or other form of granulomatous disease, and he ran appropriate tests to exclude these other possibilities. I find Dr. Forehand's opinion that the [c]laimant suffers from complicated coal workers' pneumoconiosis to be entitled to significant weight.

The Board agreed with the judge's weighing of the evidence and affirmed a finding of complicated pneumoconiosis.

[**standard of review – petition for modification of denial of subsequent claim; complicated pneumoconiosis, weighing medical opinion evidence of**]

In *W.C. v. Aberry Coal Co.*, BRB No. 07-0974 BLA (Sept. 8, 2008) (unpub.), the Board affirmed an administrative law judge's use of the preamble to the December 20, 2000 regulatory amendments in weighing the medical opinion evidence of record. Notably, in a footnote, the Board stated the following:

> Employer . . . objects to the administrative law judge's citation to 65 Fed. Reg. 79937-79945, asserting that, in quoting from comment (f) to 65 Fed. Reg. 79938, she omitted comments (d) and (k) respecting claimant's affirmative burden of proof. Decision and Order at 20-21. However, employer does not assert that the administrative law judge either misquoted or misinterpreted any specific regulation or comment. Rather, the administrative law judge related the Department of Labor's position that '[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis . . . . [t]he risk is additive with smoking,' and that medical literature 'supports the theory that dust-related emphysema and smoke-induced emphysema occur through similar mechanisms. *See* Decision and Order at 20-21, citing 65 Fed. Reg. 79940, 79943 (Dec. 21, 2000). She further remarked that 'medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is not clinically significant, are, therefore, contrary to the premises underlying the regulations.' (citation omitted). In discussing the regulatory framework of the Act in the context of evaluating the conflicting

> medical evidence of record, the administrative law judge's remarks were entirely proper.

Slip op. at 7 (fn. 8).

[**use of Department of Labor's preamble to December 20, 2000 regulatory amendments in weighing conflicting medical opinions**]