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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 182
July 2006 – November 2006

John M. Vittone
Chief Judge for Longshore

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I. Longshore Act

Announcements

Pacific Maritime Association (PMA) and a class of approximately 12,000 "casual" longshore workers have settled a dispute over travel time, docked work time and the deduction of fees. The workers who filed the class action had alleged that PMA and its member companies had policies of not paying casuals for travel time between dispatch halls and assigned worksites, altering their timecards by rounding down the time worked by 15 to 45 minutes per day, and collecting fees used by the companies to defray their costs. The $12.9 million settlement also included a provision forbidding PMA and its member companies from retaliating against the named plaintiffs.

A. United States Supreme Court

B. Federal Circuit Courts

[Ed. Note: The following non-longshore case is included for general reference only.**]**

Dal Pozzo v. Basic Mach. Co., Inc., ___ F.3d ___ (No. 04-4277)(**7th Cir.** September 6, 2006).

In this workers' compensation claim, the claimant's attorney failed to show up in court. Opposing counsel was awarded costs and fees as sanction for obstructing the enforcement of a settlement agreement. The court had found that the attorney's conduct unquestionably satisfied the standard for objective bad faith, and double sanctions were

awarded since the appeal was frivolous. The trial court summed up the situation thusly: "We've got a rule around here. If you start the fight you have to come to the fight."

Newport News Shipbuilding & Dry Dock Co. v. Young, ___ F.3d ___ (No. 05-1781)(**4th Cir.** September 8, 2006).

After a hand injury, claimant sought treatment and was diagnosed with a ganglion mass on his wrist. Eventually his doctor released him to "full-duty" work, but still left restrictions on his left hand. (After his right wrist injury, but before surgery for it, the claimant had sustained a left elbow contusion.). While still working for Newport News, claimant was diagnosed with thoracic outlet syndrome (TOS), a nerve damage syndrome that affected the claimant in both arms. Eventually the claimant underwent surgeries on both his left and right sides. And his physician found him to be permanently restricted.

Newport News had argued that the claimant was not entitled to compensation for his TOS or herniated cervical disc injuries since a formal claim was never filed. However, the circuit court upheld the ALJ and Board. ("The record clearly shows that [Newport News], through the various physicians to whom it referred [Young], subsumed under either of the…claims all treatment and surgeries related to [Young's] TOS and cervical spine condition.") The court reasoned: Moreover, the ALJ found that Young was unaware at the time that his treatment, including the surgeries, was not related to the two injuries for which he filed formal claims. It was clear that Young sought benefits for his pain, which merely originated with the wrist and elbow injuries claimed and which subsequently was diagnosed as other conditions. Thus, the ALJ rationally determined that Newport News was aware of claims for these conditions. In fact, the claimant's TOS and cervical disc injuries were covered under the paperwork of his wrist and elbow injuries. Furthermore, the court noted that Newport News failed to provide substantial evidence to overcome the Section 20(a) presumption that the injuries were work-related.

[Topic 2.2.5 Injury—Multiple Injuries]

Pittsburgh & Conneaut Dock Co. v. Director, OWCP, ___ F.3d ___ (No. 04-483 BRB)(**6th Cir.** August 2, 2006).

At issue here was the claimant's refusal to participate in a recommended course of psychotherapy. The court explained that an inquiry into a Section 7(d)(4) issue requires a dual inquiry: 1) the employer first has the burden of establishing that the claimant's refusal to undergo treatment is objectively unreasonable; 2) if the employer carries that burden, the claimant has an opportunity to establish that his or her refusal was justified by the circumstances. The reasonableness inquiry essentially boils down to the question: "What course would an ordinary person in the claimant's condition pursue after weighing the risks and rewards of the procedure with the alternatives of continued pain and restriction?" Here the court found that a reasonable mind could conclude that an ordinary person who did not feel depressed would decide not to pursue a course of treatment

directed at resolving depression when such treatment would involve taking antidepressant medications towards which he had previously demonstrated considerable intolerance.

Also at issue here were attorney fees. Before the formal hearing, an informal conference was held. The only evidence in the record regarding the content of the informal conference was a memorandum of informal conference completed by the claims review officer. According to that memo, the claimant asserted that his disability was permanent and total, but the employer's position was that there was insufficient medical information to address permanent and total disability. In the section of the form marked "Recommendation" the claims review officer explicitly stated that he was not making any recommendation at the current time because the parties were considering settlement. After reviewing the positions of all circuits, as well as the Board, the **Sixth Circuit** found that the claimant was not entitled to an attorney fee. "The language of subsection (b) plainly states that in order for fees to be assessed under its terms there must be a written recommendation containing a suggested disposition of the controversy.

In a strong dissent, Circuit Judge Moore stated that denying fees in this matter based on rigid formalities that are not expressly mandated by the statue is contrary to two of the primary concerns under the LHWCA: the availability of quick recovery for valid workplace-injury claims without resort to the courts, and when this fails, claimant's full recovery of statutory benefits without reduction by the cost of legal services.

[Topics 7.7 Medical Benefits--Unreasonable Refusal To Submit To Treatment; 28.2 Attorney Fees—Employer's Liability]

Newport News Shipbuilding & Dry Dock Co. v. Davis, ___ F.3d ___ (No. 05-1967)(**4th Cir.** October 31, 2006).

The ALJ has the discretion to credit the opinion of a treating physician who had treated the claimant for several years over the opinions of other physicians who had treated the claimant on a limited basis. In upholding the ALJ's decision, the court noted that while the matter was before the Board, the Board specifically noted that the ALJ had discussed the medical evidence in detail, noted the qualifications and bases of all physicians' opinions, and acted within his discretion in relying on one opinion as that of the treating physician. The court found that the ALJ had provided a sufficient explanation for his rationale in crediting the evidence upon which he relied.

[Topic 23.5 Evidence--ALJ Can Accept or Reject Medical Testimony]

Leevac Shipyards v. Oaks, (Unpublished)(No. 06-60091)(**5th Cir.** Oct. 11, 2006).

The court found that the ALJ's findings of fact were supported by substantial evidence. The ALJ had found that the claimant's back injury and headaches were causally related to an accident that he suffered at work. "The ALJ's finding of causation

is supported by substantial evidence, even without reference to the Section 20(a) presumption. Both the claimant and his wife testified that his headaches were different, and more severe, after his work accident. Their testimony was corroborated by his treating physician,…, who testified that the herniated disc at C5-6 was caused by the claimant's work accident and was not aggravated by a subsequent automobile accident."

[Topic 20.2.5 Presumptions—Failure to Properly Apply Section 20(a)]

Chevron USA, Inc. v. Heavin, (Unpublished) (No. 05-61083 Summary Calendar)(**5th Cir.** Oct. 26, 2006).

The court upheld the ALJ's finding that the employer did not successfully prove its Section 8(f) claim. While working as a facility operator, the claimant fell approximately 40 feet from an offshore drilling platform, suffering a bruised heart, punctured lungs and diaphragm, an injured liver, a laceration to his left kidney, and fractures to his ribs, back, hip, and right femur. The ALJ found the claimant was permanently and totally disabled. The ALJ additionally found that the employer had proved the first two elements of its Section 8(f) claim, but not the third contribution element (current disability is not due solely to the employment injury).

In finding that there was no contribution, the ALJ noted one medical opinion which noted that the claimant's back pain resulted from kidney problems and another medical opinion that suggested that his back problem really arose from his kidney problems or possibly a sciatic nerve problem. The court found that these medical opinions provided substantial evidence to sustain the ALJ's determination. Furthermore, the court noted that the ALJ found substantial evidence in the record to conclude that the claimant's pre-existing kidney problems did not contribute to his present disability. Only having one kidney does not limit someone from the labor market. Additionally, there was a medical opinion that the work related accident was so traumatic that it alone would have been sufficient to render the claimant permanently totally disabled.

[Topic 8.7 Special Fund Relief--The Disability Must Not Be Due Solely to the New Injury]

Rogers v. Director, OWCP, (Unpublished)(No. 04-73572)(**9th Cir.** August 10, 2006).

The **Ninth Circuit** upheld the Board's determination that although an attorney successfully represented his client in annulling a settlement agreement, the attorney has not successfully prosecuted any particular claim for benefits or otherwise exposed the employer to liability under the LHWCA. On remand, the ALJ had conducted a full evidentiary hearing and determined that the claimant was not entitled to any additional indemnity or medical benefits than he had already received .

[Topic 28.1.2 Attorney Fees—Successful Prosecution]

M. Cutter Company, Inc. v. Carroll, 458 F.3d 991, (**9th Cir.** August 15, 2006).

The circuit court held that as a matter of law, Section 7(a) answers the question of who pays for 24-hour attendant care and does not leave any additional relevant questions of fact for decision. Here there was no doubt that the claimant was permanently and totally disabled. He had fallen 30 feet, suffering a closed head injury; fractures of his skull, left eye socket, and cheekbone; a ruptured and avulsed spleen; and cognitive impairment. His physician prescribed 24-hour attendant care. The ALJ found he needed the 24-hour care but that the employer was responsible for only part-time attendant care, "as the wife could meet the claimant's remaining care needs without substantial disruption to her quality of life." On appeal the Board overturned this finding and awarded 24 hour attendant care. The Board, *en banc*, upheld the Board's panel decision. On appeal, the circuit court found that the Board had correctly resolved the issue as a matter of law.

[Topic 7.3.1 Medical Benefits--Medical Treatment Provided By Employer—Necessary Treatment]

In Re: Blackwater Security Consulting, LLC, 460 F.3d 576 (**4th Cir.** August 24, 2006).

This matter involves the appeal of an action by the administrator of the estates of several individuals who served as independent contractor workers in Iraq. The workers had entered into independent contractor service agreements with Blackwater Security Consulting and Blackwater Lodge and Training Center to provide services in support of Blckwater's contracts with third parties in need of security or logistical support. Blackwater assigned the decedents to support its venture with Regency Hotel and Hospital Company to provide security to ESS Support Services Worldwide. ESS had an agreement to provide catering, build, and design support to the defense contractor firm Kellogg, Brown & Root, which, in turn, had arranged with the United States Armed Forces to provide services in support of its operations in Iraq.

According to the complaint, at the time the decedents entered into the independent contractor service agreements on or about March 25, 2004, Blackwater represented that certain precautionary measures would be taken with respect to the performance of their security functions in Iraq. For example, they were told that each mission would be handled by a team of no fewer than six members, including a driver, navigator, and rear gunner, and would be performed in armored vehicles; they would have at least twenty-one days prior to the start of a mission to become familiar with the area and routes to be traveled; and they would have an opportunity to do a pre-trip inspection of their anticipated route.

Instead, the complaint alleges, Blackwater failed to provide the decedents with the armored vehicles, equipment, personnel, weapons, maps, and other information that it had promised, or with the necessary lead time in which to familiarize themselves with the area. The court noted that the workers were directed to escort three ESS flatbed trucks carrying food supplies to a United States Army base. "Lacking the necessary personnel and logistical support, the decedents ultimately became lost in the city of Fallujah. Armed insurgents ambushed the convoy; murdered the decedents; and beat, burned, and dismembered their remains. Two of the mutilated bodies were hung from a bridge."

The administrator of their estates sued Blackwater alleging causes of action for wrongful death and fraud under state tort law. Blackwater removed the action to federal district court, alleging the Defense Base Act preempted the state-law claims, and because the issues in the case presented unique federal interests sufficient to create a federal question. Once in federal court, Blackwater moved to dismiss the case, arguing that the district court lacked subject matter jurisdiction because the DBA covered the administrator's claims and, therefore, that the administrator could litigate his claims only before the Department of Labor, which decides DBA claims in the first instance.

The district court concluded that Blackwater had not met its burden of establishing federal removal jurisdiction. The court reasoned that because the DBA grants the Secretary of Labor exclusive original jurisdiction over DBA claims, the statute does not completely preempt state-law claims; the hallmark of complete preemption, the district court concluded, is the presence of original jurisdiction over the matter in federal district court. Further, the court determined that Blackwater's assertion of removal jurisdiction by way of a unique federal interest in the adjudication of the administrator's claims "assume[d] the very conclusion which [the] court lack[ed] jurisdiction to reach, namely that the decedents in this case are covered as employees under the DBA." Finding no basis for removal, the district court concluded that it lacked subject matter jurisdiction and determined that it must remand the case. Although Blackwater encouraged the district court to remedy its lack of jurisdiction by dismissing the case rather than remanding it, the district court further concluded that it lacked the authority to dismiss. The court reasoned that federal district courts play no role in the adjudication or review of DBA claims and therefore, that it had no jurisdiction to decide whether the DBA applied to the administrator's claims. **[Ed. Note:** The circuit court noted that the district court was wrong on this issue, although it was harmless error. Federal district courts in some circuits do play a role in the review process of DBA claims. *See* Topic 60.2.6 "Appeals of Cases Determined Under DBA" in the Benchbook.**]** The district court thus remanded the case to state court without reaching the merits of Blackwater's motion to dismiss.

As to the authority to review this matter, the circuit court noted that Blackwater faced a formidable hurdle in this regard since Congress "has severely circumscribed federal appellate review of certain orders remanding a case to the state court from which it was removed." Ultimately, the circuit court found itself to be without authority to review.

[Topic 60.2.1 Longshore Act Extensions--Defense Base Act—Applicability of the LHWCA]

C. Federal District Courts and Bankruptcy Courts

Lopez v. Magnlia Industrial Fabricators, Inc., ___ F. Supp. 2d ___ (Civ. Act. No. 05-0371)(E. D. La. August 18, 2006)

This case is a typical summary judgment dismissal of a Jones Act claim.

Insurance Company of North America v. San Juan Excursions, Inc., ___ F.Supp. 2d ___ (No. C05-20172)(W. D. Wash July 25, 2006).

At issue here is which forum has jurisdiction to decide an employer/carrier insurance matter. Here the federal district court agreed with the Director that federal district court does not have jurisdiction of this matter: "[O]ut-of-circuit case law supports the proposition that an ALJ has subject matter jurisdiction over contractual disputes that are integral to the determination of compensation liability." The contract dispute in the instant case was who, under the LHWCA, is responsible for paying benefits. Therefore, the court reasoned that this dispute was essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the relevant statutory law. The court further noted that the absence of statutory language granting administrative tribunals the specific power to decide LHWCA-related contractual issues that are necessary to resolve a claim for benefits does not automatically mean that such power lies with the district courts.

[Topic 2.5 Definitions—Carrier; 70.1 Responsible Employer—Generally; 70.12 Responsible Carrier]

Nicholson v. Grieg International, A.S., ___ F. Supp. 2d ___ (Civ. Act. No. 1:05-CV-665-KD-B)(S. D. Ala. October 27, 2006).

Federal district court allowed a longshore carrier to intervene in a third party action in order to protect its rights of subrogation. The carrier, who had made voluntary payments of compensation and medical benefits, successfully argued that it was entitled to receive reimbursement from any recovery by the plaintiff against the named defendants for the benefits it paid under the LHWCA. Furthermore, the court recognized the carrier's right to intervene on a limited basis in order to protect its interests by asserting its lien.

[Topic 33.1 Compensation For Injuries Where Third Persons Are Liable—Section 33(a): Claimant's Ability To Bring Suit Against A Potentially Negligent Third Party; 33.2 Assignment of Rights]

Cohen v. Pragma Corp., ___ F. Supp. 2d ___ (Misc. Case No. 04-269 (RJL))(Dist of Columbia Aug. 18, 2006).

In a matter of first impression in this Defense Base Act case, the District of Columbia district court found that the District Director is in a better position to evaluate the claimant's claims for additional medical expenses, penalties pursuant to Section 14(f) and pre-judgment and post-judgment interest.

This matter involves a claimant who had worked on a United States Development Project in Almaty, Kazakhstan and suffered pulmonary fibrosis as a result of exposure to a toxic environmental pollutant in Almaty. An ALJ had previously awarded her benefits and that opinion was upheld by the Board. In 2005 the District of Columbia district court denied the employer's Motion to Dismiss and granted in part the claimant's Motion to Enforce the Final Administrative Award of the Board. Additionally the district court allowed the defendants to show cause why the calculations contained in the claimant's Motion for Enforcement relating to additional medical expenses, pre-judgment interest, and post-judgment interest were inaccurate, inappropriate, or both. The employer subsequently filed a Motion to Stay and Motion for Reconsideration, which was denied. Presently before the court are the claimant's Motion to Set Aside the Stay of Proceedings, Motion to Enforce Obedience to the Benefits Review Board Final Order, and Motion for Entry of Final Judgment. After due consideration, the court granted the claimant's motions in part.

Employer now argues that the district court lacks subject matter jurisdiction to award benefits beyond those specifically enumerated by the ALJ, because the ALJ's award of future medical benefits in and of itself was not a final compensation order capable of being enforced in district court. The court noted that whether the district court has the authority to determine and award additional benefits, appropriate penalties, and applicable interest, as opposed to the District Director, has never been considered by this court. After reviewing various **Fifth Circuit** opinions, this district court remanded these issues to the District Director.

[Topics 21.3.5 Review By U.S. Courts of Appeals--Finality/Interlocutoryy Appeal; 60.2.1 Longshore Act Extensions—Defense Base Act]

Ladd v. Research Triangle Institute, ___F. Supp. 2d ___, (Civ. Case No. 05-cv-02122-LTB-OES)(D. Colo. September 18, 2006; *recon. denied, Ladd v. Research Triangle Inst.*, 2006 U.S. Dist. LEXIS 39272 (D. Colo., June 12, 2006).

This civilian contract worker in Iraq filed suit in federal district court in Colorado against his general contractor. He had been recruited to work in Iraq by the general contractor's subcontractor/recruiter. The general contractor had a contract with a third

entity, the United States Agency for International Development, for civilian reconstruction in Iraq.

The district court noted that the liability of an employer under the Defense Base Act is exclusive and in place of liability for any state law claim for injury or death. However, the court noted that an exception to this liability shield applies to general contractors who do not provided workers compensation to the employees of their subcontractors, where the subcontractors do provide compensation. General contractors in this situation are not statutory employers under the DBA and are not protected from common law suits.

Here the general contractor alleged that the plaintiff's claim is subject to the exclusive provisions of the Colorado Workers Compensation Act (CWCA). The CWCA provides that an employee's sole remedy for personal injury is through the workers compensation system; employees may not bring other causes of action against their employer for work related injuries.

The federal district court noted that simply because the general contractor does not enjoy DBA immunity does not mean that it loses its state law liability shield. The DBA and state compensation systems operate concurrently: "I am not aware of any [authority] stating that the LHWCA, by providing a general contractor limited immunity from suit, somehow operates to override an employer's immunity under state law." Thus, the district court judge concluded, "[T]he DBA/LHWCA, while not barring [plaintiff's] suit, also does not pre-empt the immunity created by the CWCA." The court went on to discuss whether or not Colorado workers compensation law should govern the outcome of this matter.

[Topics 5.1.2 Exclusiveness of Remedy and Third Party Liability--Right to Sue Employer If No Coverage; 60.2.1 Longshore Act Extensions—Defense Base Act—Applicability of the LHWCA]

D. Benefits Review Board

Brunetti v. A.G. Ship Maintenance Corp., (Unpublished) (BRB Nos. 05-0999 and 05-0999A)(Aug. 30, 2006).

In this case the claimant sustained a neuron-ophthalmic condition (eye movement/neurological disorder). The Board upheld the ALJ's finding of causation. After lifting 50-60 pounds of material, the claimant had suffered a nosebleed with accompanying dizziness, light-headedness, and an overall feeling of disorientation.

[Topics 2.2.18 Definitions—Representative Injuries/Diseases; 20.2.1 Presumptions—Prima Facie Case]

Wilson v. Virginia International Terminals, ___ BRBS ___ (BRB No. 05-0966)(Aug. 25, 2006).

Here the ALJ found the claimant's efforts to find suitable alternate employment were less than diligent. First, the claimant routinely applied for jobs for which he was not qualified, such as administrative positions in medical and legal offices. Second, most of the claimant's contacts were made via "cold calls" and not to employers who advertised actual, available positions. Third, the ALJ found it likely that the claimant exaggerated his weaknesses, i.e., the use of crutches when none were required, and de-emphasized or failed to mention his strong points, i.e., two years of college and some computer skills. Fourth, the claimant limited his employability by refusing to work weekends or mornings. Fifth, the claimant failed to follow up on his applications with any prospective employers.

The Board found that the ALJ's finding (that the claimant's evidence of his efforts to secure alternative employment is insufficient to establish that he diligently sought appropriate work) is rational and supported by substantial evidence.

The Board also upheld the ALJ's reliance on *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (**4th Cir.** 2003), *cert. denied*, 126 **S.Ct.** 478 (2005) in determining that the claimant was not entitled to an attorney fee under Section 28(b). *Edwards* had listed four criteria needed in order to award an attorney fee under Section 28(b). One of those criteria was missing in the instant case. The claimant had argued that since the missing criteria in the instant case was not directly at issue in the Edwards case (and not necessary to its holding), *Edwards* should be distinquished. However, the Board stated that until such time as the **Fourth Circuit** changes the four criteria needed for a fee award, the Board will continue to follow *Edwards*.

[Topics 8.2.4.1 Extent of Disability--Partial Disability/Suitable Alternate Employment--Burdens of Proof; 28.2 Attorney Fees—Employer's Liability]

Sears v. Norquest Seafoods, Inc. ___ BRBS ___ (BRB No. 05-0964)(Aug. 28, 2006).

Here the claimant settled with his statutory employer but pursued his borrowing employer. The Board found that the ALJ correctly held that the borrowing employer was not a party to the settlement within the meaning of Section 8(i) and that its liability to claimant was not extinguished by the settlement.

In a borrowing employee situation, the borrowing employer and the nominal employer are not jointly liable if an employee suffers a work-related injury while working for the borrowing employer. The borrowing employer, as the claimant's statutory employer, is solely liable for any compensation benefits due to the claimant.

[Topics 4.1.1 Compensation Liability—Employer Liability—Borrowed Employee Doctrine; 8.10.1 Section 8(i) Settlements--Generally]

Proffitt v. Service Employers International, Inc. ___ BRBS ___ (BRB No. 06-0306)(Aug. 14, 2006).

In this Defense Base Act claim, the claimant injured his right knee running for cover during a mortar attack. Here the employer contended that the ALJ erred in finding that the claimant's job in Iraq was not comparable to his stateside employment. The Board noted that *Mulcare v. E.C. Ernst, Inc*., 18 BRBS 158 (1986), does not dictate the result it seeks as the case does not mandate the use of all of the claimant's wages in the year prior to the injury. Rather, the inquiry under Section 10(a) is whether the jobs for multiple employers in the year preceding the injury were comparable.

The Board reasoned that the ALJ rationally inferred, in the absence of contrary evidence, that the claimant's job title of labor foreman denoted managerial responsibilities which the claimant did not have in his two stateside positions as a laborer and maintenance worker, respectively, as described in the claimant's resume. "Moreover, the [ALJ] rationally found that claimant's work in a combat zone is inherently different than his work in the United States by virtue of the dangerous locations and the fact that his job required him to fulfill safety and security requirements that would not have been required of him, in his work in the United States."

The Board noted that *Mulcare* does not preclude consideration of the nature of the claimant's differing work locations as a factor affecting the comparability of the claimant's employment circumstances. Significantly, the claimant's injury in the instant case occurred in the overseas location and affected his ability to continue to work in Iraq, whereas in *Mulcare*, a case arising under the District of Columbia Workmen's Compensation Act, the work injury occurred in the United States, after the period of overseas employment had ended. "The [ALJ] therefore acted within his discretion in considering the extrinsic circumstances of claimant's employment when discussing the comparability of claimant's overseas and stateside employment."

The Board went on to note that "The [ALJ]'s finding that claimant's employment in Iraq was not comparable to his employment in the United States is rational and supported by substantial evidence." The employer asserted that relying on a 'snapshot' of the claimant's wages in Iraq unreasonably focuses on employment that is temporary in nature, limited in overall duration, and not representative of claimant's actual wage-earning capacity. In rejecting that contention, the Board explained, "Use of only the wages claimant earned from employer appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq… which the [ALJ] found represented a 322 percent increase over his salary in the United States." The Board further noted that while the claimant's employment in Iraq was not necessarily intended to be long-term, the claimant's injury cost him the ability and opportunity to earn higher wages for at least the rest of his contract term.

In making its argument for a lower average weekly wage, the employer had also relied on the wording of Section 10©. The Board stated that "Although Section 10© permits the use of wages from the claimant's other prior employment in an average weekly wage calculation, it does not require such use, as the [ALJ] is afforded wide discretion in arriving at a Section 10© calculation.

[Topic 10.2.1 Determination of Pay--Section 10(a)—Generally; 60.2.9 Longshore act Extensions—Defense Base Act—"Wages" Includes Overseas Allowances and Wage Additives]

Larosa v. King and Company, ___ BRBS ___ (BRB No. 05-0864)(July 19, 2006).

In this Section 22 modification case, the Board found that the ALJ correctly awarded a credit for the overpayment of benefits paid under the schedule against the permanent total disability benefits due. On modification, the ALJ awarded the claimant additional permanent total disability benefits; however, he awarded a reduced amount of permanent partial disability benefits. The Board found that the decision in *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (**2d Cir.** 2000), *cert. denied*, 532 **U.S.** 1007 (2001), supported the ALJ's award of a credit for the "excess" five percentage points of permanent partial disability benefits it paid against the unpaid award of permanent total disability benefits.

[Topic 22.1.1 Modification--Section 22 allows credit but no retroactive termination]

Reed v. Holcim, (US) Inc., ___ BRBS ___ (BRB No. 05-0850).

The deceased worker drowned in a work-related accident. Subsequently both his widow (from whom he was separated at the time of his death) and his girl friend (with whom he had been sharing his domicile for two years at the time of death) filed claims for benefits. Both filed claims for death benefits as the widow under Section 9(a) and (b). Alternatively, the girl friend sought benefits as the decedent's dependent pursuant to Section 9(d).

The Board held that the ALJ's award of benefits to both the widow and the girl friend was not per se in contravention of the LHWCA as the employer had contended. "The Act specifically provides for benefits of 50 percent of the decedent's average weekly wage for a surviving spouse … and if the amount payable to a surviving spouse and children is less than 66 2/3 percent of the deceased's average weekly wage, another 'dependent' who meets the definition thereof under Section 152 of the Tax Code may be awarded benefits of up to 20 percent of the decedent's average weekly wage. 33 U.S.C. §909(d). However, the aggregate of survivor benefits cannot exceed 66 2/3 percent of the decedent's average weekly wage. The [ALJ] properly accounted for these provisions by awarding [the widow] benefits at the rate of 50 percent of decedent's average weekly

wage and [the girl friend] benefits at the rate of 16 2/3 percent of decedent's average weekly wage."

In interpreting the Tax Code, the courts have deferred to state law to determine if the parties' relationship is in violation of local law. Employer had argued that since Louisiana state law (The decedent and claimants lived in Louisiana.) provided that "Married persons owe each other fidelity, support, and assistance." La. CIV. CODE ANN. Art 98 (West 2003), the girl friend should not be entitle to benefits. "[A]s claimant and the decedent, who was married to someone else, lived together in an adulterous relationship, employer contends that their relationship was in violation of local law within the meaning of Section 152(b)(5). We reject this contention as the [ALJ] properly found that while Louisiana law imposes on spouses a 'positive duty' of fidelity, infidelity does not violate state law. Indeed, the Louisiana Court of Appeal has observed that 'there is no civil nor criminal prohibition against [adultery] between adults in the state of Louisiana."

The Board further stated that it rejected the employer's contention that the girl friend forfeited her right to claim benefits as an "other dependent," as she first sought benefits as decedent's widow. "The Act does not forbid a claimant from pleading alternate grounds for entitlement to benefits, and the ALJ was authorized to adjudicate an issue raised for the first time at the hearing. 20 C.F.R. §702.336(a).

Here the Board noted that the ALJ had correctly found that the girl friend was the decedent's dependent because she received over one-half of her support from the decedent, was a member of his household, and had her principal place of abode in the decedent's house. The Board also rejected the employer's contention that the claimant failed to establish dependency as she did not show that she was unable to earn her own income during the time the decedent provided her support. "Neither the Act nor the Tax Code requires a person to establish an inability to independently support herself." Additionally, the Board noted that Section 152(a)(9) did not require a familial relationship in order to be a dependent.

[Topic 9.3.1 Compensation for Death—Survivors—Spouse and Child; 9.3.6 Compensation for Death—Survivors--Payments to Other Dependents]

Hudson v. Coastal Production Services, Inc./Forest Oil Corporation, ___ BRBS ___ (BRB No. 05-0779)(June 22, 2006).

This is a jurisdiction issue claim involving a claimant who was injured on a fixed oil and gas platform. The claimant was employed by Coastal Production Services and was subcontracted to Forest Oil to work on the platform. The platform, which was accessible only by boat, helicopter, or sea plane, consisted of oil tanks, saltwater tanks, living quarters, pipelines attaching it to a number of satellite wells, and a holding barge. The holding barge which was surrounded by pilings, also acted as a docking area for

crew and supply boats, and tug-drawn barges that collected and transported crude oil from the holding barge tanks.

The claimant's duties required him to perform daily inspections of and maintenance to the platform and the holding barge, including checking gauges, inspecting pipelines for leaks, and cranking motors. He also would inspect and maintain a sunken production barge, the MAGNOLIA, and the satellite wells, which required him to travel by boat, and he would facilitate the 'dropping' of oil from the platform tanks to the holding barge tanks. Additionally, if the holding barge tanks were full, the claimant or his partner would call for the transport barge to carry the crude oil away from the platform. When the barge arrived, the claimant testified that he would perform, assist with, or witness the following: placing the walk-board between the transport barge and the holding barge, monitoring the tank levels, filling out paperwork, hooking up pipelines and hoses to transfer the oil, manning the emergency shut-off switch, disconnecting and reconnecting the pipelines as the holding tanks emptied, recording the amount transferred, and unhooking the hoses and pipelines when the transfer was complete.

Of the 19 transfers between January 2001 and August 2001, four were signed by the claimant. However, the claimant testified that he took part in many, if not all, of the transfers that occurred while he was working. Regardless of whether a transfer was to occur, the claimant testified that he spent some time every day on the holding barge inspecting the pipeline, hoses, and other equipment, and making repairs as needed.

The ALJ found that the fixed platform herein satisfies the LHWCA's situs requirement because it has a docking area which is customarily used to load transport barges with oil, which is a maritime activity. With regard to the claimant's status as a maritime employee, the ALJ found that the claimant's duties included the upkeep of the holding barge tanks and docking facility, which were essential to the loading process, and the loading of crude oil onto transport barges. The Board affirmed the ALJ's findings and further noted that under the laws of the **Fifth Circuit**, wherein whose jurisdiction this case arises, a claimant may also satisfy the status requirement on the basis that he was performing maritime work at the moment of injury.

[Topics 1.6.1 Jurisdiction/Coverage—Situs—"Over water," 1.7.1 Jurisdiction/Coverage—Status—"Maritime Worker"(Maritime Employment")]

Anderson v. Associated Naval Architects, ___ BRBS ___ (BRB No. 05-1014)(Sept. 15, 2006).

In this case the Board addresses what is necessary to fulfill the informal conference and written recommendation criteria for conferring fee liability on an employer under Section 28(b).

[Topic 28.2 Attorney Fees—Employer's Liability]

Reposky v. International Transportation Services, ___ BRBS ___ (BRB Nos. 06-0148)(Oct. 20 2006).

Sections 12 and 13 do not begin to run against subsequent employers until a previous employer (who the claimant filed a claimant against) is found to be not liable for benefits. A claimant need not give notice of her injury or file her claim against subsequent employers until the responsible employer is identified. The Board further noted that when a party is joined as the potentially responsible employer, the documents surrounding the joinder to the claim are sufficient to fulfill the notice and claim requirements.

This case also addressed the meaning of the term "newly awarded compensation during" in reference to section 6©. The Board held that the claimant was not entitled to the new maximum compensation rate in effect each fiscal year during her period of temporary total disability.

The Board further stated that "[T]he plain language of Section 6© states that the Section 6(b) statutory maximum applies to "employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period. We conclude that under this provision in cases where claimant's temporary total disability changes to permanent total disability during the fiscal year, the compensation rate for permanent total disability remains the same at the date of maximum medical improvement as the rate in effect for the preceding period of temporary total disability. The date of maximum medical improvement changes the nature of claimant's disability, but as she was continuously receiving benefits, she was not 'newly awarded' compensation at that time. Accordingly, we hold that the statutory maximum rate in effect during the fiscal year that claimant reached maximum medical improvement is inapplicable to increase claimant's compensation rate for permanent total disability. Claimant is entitled to the new statutory maximum on October 1, as she was 'currently receiving' permanent total disability benefits at that time."

[Topics 6.2 Commencement of Compensation-- Minimum and Maximum Limits; 70.1 Responsible Employer--Generally]

Allen v. Agrifos, L.P., ___ BRBS ___ (BRB No. 06-0299)(Oct. 31, 2006).

Status is the major issue here. The claimant worked as an outside operator in the acid unit of a plant. Employer argued that his involvement with the loading and unloading was minimal and that unloaded acid was not "cargo." The claimant testified that his work as an outside operator in the acid plant involved monitoring and controlling the steam pipes, the sulfur pit and furnace, the soft water tanks/water clarification system, the thio reactor, and acid transfers.

Within the category of "acid transfers," the claimant testified that, if a ship or barge were docking, he would have to adjust the valves so that acid could be discharged from the vessel and pumped to the proper tanks. He was required to set the valves and monitor the flow to check for leaks and prevent overflows. If a storage tank became full, he would re-set the valves to divert the acid into another tank. Communication between the claimant at the tanks and the dockworkers at the vessel was via two-way radio. Although the dockworkers could indicate their readiness, no transfer could commence until the claimant, as the outside operator, gave approval. At times he would need to climb to the catwalks at the tops of the tanks to measure how fast a tank was filling. Once during the year preceding his injury the claimant participated in loading acid from tanks to vessels, and it required him to perform similar duties. The claimant was responsible for monitoring the tanks and the lines to check for leaks and prevent overflow.

The Board noted that cargo can be liquid in nature and that historically, loading liquid cargo onto a vessel via pipeline constitutes covered employment. The Board further found the claimant's work to be part of the unloading process and that the transfer of cargo via pipeline was similar to the transfer via conveyor belt, as there is a continuous flow of the cargo to or from the vessel. "[C]laimant's job required him to control the flow of the acid from the vessel to the storage tanks, and the loading process did not end until the vessel's acid flowed into the storage tanks." The acid remained in the stream of maritime commerce while it was being unloaded and until the entire process was complete.

The ALJ found that 11 percent of the claimant's time was spent in unloading activities. Thus the Board agreed with the ALJ that claimant's activities constituted maritime employment as they were more than monetary or incidental. Moreover, the Board noted that the claimant was injured during a Hazmat drill and that his team's coverage for emergencies included coverage of the employer's docks.

Also at issue here was the ALJ's inclusion into the record of the depositional testimony of a co-worker of claimant's who had previously filed his own claim and who had the same duties as that of the instant claimant. The Board noted that the Supreme Court has held that hearsay is permitted in administrative cases if it is reliable. Noting that the ALJ is not bound by formal rules of evidence and the evidence was relevant to the issue before him, the Board found that the ALJ's decision to admit the transcript was rational. "While a judge may not take judicial notice of findings of fact in one cause of action to supply facts in another cause,…, the transcript does not contain findings of fact; it contains statement the [ALJ] may admit and credit or accept, as is within his discretion."

[Topics 1.7.1 Jurisdiction/coverage—Status—"Maritime worker" ("Maritime Employment"); 23.4 Evidence—Admission of Hearsay Evidence]

II. Black Lung Benefits Act

A. Circuit courts of appeals

In *Island Creek Coal Co. v. Henline*, ___ F.3d ___, Case No. 05-2176 (4th Cir. Aug. 8, 2006), Employer sought to bar the miner's claim on the basis of his testimony at the hearing that physicians told him he was totally disabled due to pneumoconiosis more than three years prior to the date he filed a claim for benefits. Rather than considering the Administrative Law Judge's reasons for finding that the miner's testimony was not sufficiently reliable to trigger the limitations period at § 725.308, the Board cited to *Adkins v. Donaldson Mine Co.*, BRB No. 89-2902, 1993 WL 13021683 (May 27, 1993) and held that Employer did not demonstrate that Claimant was provided *written* communication of total disability due to pneumoconiosis more than three years before he filed his claim for benefits and, as a result, the claim was not barred by 20 C.F.R. § 725.308. The Fourth Circuit disagreed with the Board's reasoning and adopted the Director's position that the plain language of § 725.308(a) does not require *written* communication to the miner for the limitations period to commence to run. The court then remanded the claim to the Board for consideration of the bases for the Administrative Law Judge's dismissal of Employer's statute of limitations defense, *to wit*: (1) Claimant admitted that his memory was poor due to the fact that he suffered from a stroke; (2) the miner's testimony was inconsistent; and (3) the testimony "'primarily entailed a series of short responses of 'Yes, ma'am.'"

[**application of the statute of limitations**]

In *Andersen v. Director, OWCP*, ___ F.3d ___, Case No. 05-9550 (10th Cir. July 25, 2006), the court held that the ten year rebuttable presumption at 20 C.F.R. § 718.203 applies only to determine whether the miner's *clinical* pneumoconiosis is coal dust related. On the other hand, with regard to *legal* pneumoconiosis, the miner must demonstrate that his respiratory ailment, *i.e.* chronic obstructive pulmonary disease, was caused by coal dust exposure without use of the ten year presumption.

[**ten year presumption at 20 C.F.R. § 718.203**]

In the survivor's claim of *Collins v. Pond Creek Mining Co.*, ___ F.3d ___, Case No. 05-1832 (4th Cir. Nov. 8, 2006), the widow sought to rely on collateral estoppel to establish the presence of coal workers' pneumoconiosis in her claim based on the fact that the miner was awarded benefits under the Act in his claim. No autopsy evidence was offered in the survivor's claim. The Fourth Circuit cited to *Ziegler Coal Co. v. Director, OWCP*, 312 F.3d 332, 334 (7th Cir. 2002) and held that it agreed "with the Seventh Circuit that a coal miner's widow seeking survivor's benefits under the Black Lung Act may generally rely on the doctrine of offensive nonmutual collateral estoppel to establish that, as a result of his work in the mines, her deceased husband had developed pneumoconiosis."

Previously in the case, the Benefits Review Board cited to its unpublished decision in *Howard v. Valley Camp Coal Co.*, BRB No. 00-1034 (Aug. 22, 2001 (unpub.), *aff'd.*, 94 F.d App'x. 170 (4th Cir. 2004) (per curiam) to hold that collateral estoppel could not be applied in the survivor's claim because the miner's claim had been adjudicated prior to issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000)—when the miner could establish presence of the disease through any one of four methods at § 718.202(a) without weighing all the evidence together. Under *Compton*, however, the court required that all evidence be weighed together to determine whether pneumoconiosis is present. The Board held that this change in the legal standard for establishing the presence of pneumoconiosis was significant enough that the survivor could not use collateral estoppel to preclude re-litigation of the issue in her post-*Compton* claim.

On further consideration of *Howard*, the Fourth Circuit concluded that it was incorrect. The court reasoned that, in *Compton*, it "left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the statutory requirement that a claimant must prove that the coal miner developed pneumoconiosis by a preponderance of the evidence." As a result, the court concluded that the legal standard had not been changed and collateral estoppel could be applied in the survivor's claim to preclude re-litigation of the issue of the existence of coal workers' pneumoconiosis.

Having determined that the requirements for applying collateral estoppel in the survivor's claim were met, the court held that it must also determine whether application of the doctrine would be "unfair" to Employer. Citing to the Supreme Court's opinion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the court noted that the factors to be considered are: (1) whether the survivor could easily have joined in the earlier proceeding; (2) whether the employer "had an incentive in the prior action to have defended the action fully and vigorously"; (3) whether the employer has ever obtained a ruling that the miner did not suffer from pneumoconiosis; and (4) whether procedural opportunities are available to the employer in the survivor's claim and that were unavailable to the employer in the proceeding involving the living miner's claim.

In analyzing the factors, the court determined that the survivor could not have joined the proceeding involving her husband's claim because "spouses of living miners with pneumoconiosis are not entitled to seek benefits under the Act." The court further held that Employer had an incentive to present a vigorous defense in the miner's claim and that there was no finding subsequent to the award of benefits in the miner's claim that the miner did not suffer from pneumoconiosis. Finally, the court held that no procedural opportunities were available to Employer in the survivor's claim, which were not available to it in the miner's claim. Consequently, application of offensive nonmutual collateral estoppel to preclude re-litigation of the existence of coal workers' pneumoconiosis in the survivor's claim would not be "unfair" to Employer.

[**application of offensive nonmutual collateral estoppel in a survivor's claim**]

B. U.S. District Court

In *Doe v. Chao*, 2006 WL 2038442 (W.D. Va. July 19, 2006), the district court awarded $15,000.00 to Buck Doe in attorney's fees under the Privacy Act of 1974 and the Equal Access to Justice Act against the Department of Labor "for its practice of listing social security numbers on black lung multi-captioned hearing notices."

[**privacy of information in black lung claims**]

C. Benefits Review Board

In *Varney v. Steven Lee Enterprises, Inc.*, 23 B.L.R. 1-__, BRB No. 05-0440 BLA (Jan. 31, 2006)[1], the Board held that, in determining issues of paternity, the law of the state where the miner is domiciled at the time of adjudication controls the issue of determining whether paternity is established. Here, DNA testing demonstrated that the miner's son was the father of the child and, although the miner was listed as the child's father on the birth certificate as well as in a subsequent divorce decree, the Board held that the child was not entitled to benefits under the Act as:

> Applicable Kentucky statutory law and precedent . . . establish that genetic testing with statistical probability equal to or exceeding 99% for paternity, which is present here, . . . is dispositive of the paternity issue where, as in the instant case, claimant has proffered no evidence tending to rebut the presumption of paternity in favor of the miner's son, Darrell Varney. (state citations omitted). Consequently, the administrative law judge erred in finding that claimant is a 'child' of the deceased miner, Danny Varney, notwithstanding the uncontroverted genetic testing evidence of record showing Darrell Varney to be claimant's father, because 'the courts have no discretion in these instances.'

[**child—relationship to miner; determination of paternity**]

By unpublished decision in *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (July 26, 2006) (unpub.), the Board upheld the ALJ's finding that Dr. Baker's October 2000 report was a "supplemental opinion, in that it simply expounds on Dr. Baker's May 29, 1997 examination and report, which was admitted as one of claimant's affirmative medical reports pursuant to 20 C.F.R. § 725.414(a)(2)(i)." However, the Board held that it was error to consider a particular physician's letter to be a treatment note such that it was admissible under § 725.414(a)(4) and it reasoned as follows:

> Dr. Ducu's letter summarizes claimant's condition as it has developed since she began treating the miner in 1999, it contains her rationale for her

[1] This decision was originally issued as "unpublished." However, by *Order* dated July 28, 2006, the Board determined that it would be published.

> diagnosis of black lung disease, and attempts to explain to the reader why she believes claimant is 100% totally and permanently disabled due to pneumoconiosis. As such, Dr. Ducu's letter constitutes a 'physician's written assessment of the miner's respiratory and pulmonary condition,' and not a simple record of the miner's 'medical treatment for a respiratory or pulmonary or related disease' as contemplated by 20 C.F.R. § 725.414(a)(4).

Finally, in a footnote, the Board cited to *Bailey v. Dominion Coal Corp*., 23 B.L.R. 1-85 (2005) and 20 C.F.R. § 725.306(b) to state that, if a prior claim is withdrawn, "[t]he effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim."

[**supplemental opinion; treatment record; evidence in withdrawn claim**]

By unpublished decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006), the Board concluded that Claimant should be allowed to submit a positive x-ray interpretation to "rebut" the positive x-ray interpretation provided in conjunction with the Department-sponsored pulmonary evaluation. In so holding, the Board rejected Employer's argument that admitting Claimant's positive re-reading of the x-ray study "would be to ignore the plain meaning of the word 'rebut,' which is to contradict or refute." As summarized by the Board, the Director argued that:

> . . . the language of the regulation does not limit a party to rebutting a particular item of evidence, rather, it permits a party to respond to a particular item of evidence in order to rebut '*the case presented by the party opposing entitlement.*' (citation omitted) [emphasis added].

The Board stated that the Director's interpretation, as summarized above, was reasonable and persuasive. However, without explanation, the Board then held that "rebuttal evidence submitted by a party pursuant to 20 C.F.R. § 725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute 'the case' presented by the *opposing party*." (emphasis added). Thus, while the Director proposed that rebuttal evidence constitutes evidence that is responsive to "the case presented by the *party opposing entitlement*," the Board held rebuttal evidence may be used to respond to "'the case' presented by the *opposing party*." (emphasis added).

[**"rebuttal" to the DOL-sponsored chest x-ray interpretation, defined**]