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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 168
November-December 2003

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

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

Norfolk Shipbuilding & Dry Dock Corp. v. Campbell, ___ U.S. ___ (No. 03-290)(Cert. denied)(December 1, 2003).

The Supreme Court let stand the Fourth Circuit's previous holding, *Norfolk Shipbuilding & Drydock Corp. v. Campbell*, (Unpublished)(No. 02-1701)(4th Cir. January 30, 2003), that a modification request was properly raised and reviewed where the basis of the request was an allegedly mistaken finding as to the extent of disability. The claim was based on medical reports already in the record, as well as medical reports created after the initial decision. The circuit court had found that this claim of mistake was clearly factual in nature—there was disagreement as to the interpretation of the medical evidence. Additionally, at the circuit level, the employer had contended that the Board's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings (that a doctor's opinion was inconsistent). However, the Fourth circuit found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor's changing opinions reflected the progression of the claimant's condition.

[Topic 22.3.1 **Requesting Modification--Determining what constitutes a Valid Request]**

Charpentier v. Ortco Contractors, Inc., ___ U.S. ___ (No.03-6632)(Cert. denied)(December 1, 2003).

The Supreme Court refused certiorari in the Fifth Circuit's holding, *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (No. 02-60447)(5th Cir. May 21, 2003), that the Board failed to give proper deference to the ALJ's assessment of evidence by erecting a higher evidentiary standard for rebutting the Section 20(a) presumption than the one specified in the LHWCA (that an employer submit only "substantial evidence to

the contrary"). In this case the worker's heart attack began at home the night before and progressed at work the following day, culminating in cardiac arrest. The medical evidence was to the effect that the only connection between the death and the employment was the fact that the worker was at work when the heart attack process concluded. The Board had expressed several different formulations of the requirement imposed by the LHWCA for proving that an injury is not work-related: (1) "rule out," (2) "unequivocally state," and (3) "affirmatively state." The Fifth Circuit noted that all three of these formulations violated its decision in *Conoco v.Director, OWCP*, 194 F.3d 684 (5th Cir. 1999). It stated that the LHWCA requires a lower evidentiary standard—that the employer must adduce only substantial evidence that the injury was not work-related.

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

Maher Terminals Inc. v. Director, OWCP, ___ U.S. ___ (No. 03-312) (Cert. denied) (December 15, 2003).

The Supreme Court let stand the Third Circuit's holding, *Maher Terminals, Inc. v Riggio*, 330 F.3d 162 (3d Cir. May 29, 2003), that a worker who spent half his time as a checker and half his time doing office work, was covered by the LHWCA even though he was assigned as a delivery clerk on the day of his injury (injured his arm when he fell off of a chair). Both jobs involved paperwork for cargo. The LHWCA specifically excludes workers who are engaged "exclusively" to perform office clerical, secretarial, security or data processing work.

[Topics 1.7.1 **Status—"Maritime Employment;"** 1.11.7 **Exclusions—Clerical/secretarial/security/data processing employees**]

B. Circuit Courts of Appeal

Avondale Industries v. Craig, ___ Fd. 3rd ___ (5th Cir. No. 02-60470) (5th Cir. Dec. 1, 2003); 2003 U.S. App. LEXIS 24187. **[ED. Note:** However, since the *Craig* case has been removed on Dec. 29, 2003 (*see below*) from the trio of consolidated cases that the Fifth Circuit addressed in this litigation, the holdings noted below should be cited as *Avondale Indus., Inc. v. Alario*, ___ F.3d ___ (02-60470)(5th Cir. Dec. 29, 2003).**]**

For attorney's fee purposes, a hearing loss case is to be treated like any other case. There is not requirement that there be presumptive evidence before a hearing loss claim can be considered filed under Section 28(a). "Section 28(a) makes it clear that the operative date for avoiding the potential shifting of attorney's fees is thirty days after the employer receives formal notice of the claim' section 28(a) makes no mention of the term 'evidence,' let alone require that certain evidence be provided when a claim is filed."

"Although section 8(c)(13)(C) states that an audiogram accompanied by an interpretive report is 'presumptive evidence of the amount of hearing loss,' the Act nowhere states that such evidence is required for a claim to be considered filed for the purposes of section 28(a)." Thus, it is significant that the Fifth Circuit is holding that a hearing loss claim can be made without a presumptive audiogram.

[Ed. Note: On December 29, 2003, the Fifth Circuit issued *Avondale Indus., Inc. v. Alario*, ___ F.3d ___ (02-60470)(5th Cir. Dec. 29, 2003). In a footnote, the Fifth Circuit noted that Avondale also challenged the Board's decision awarding attorney's fees to Eugene Craig (*see above*). The Fifth Circuit notes that the instant opinion was originally issued referencing Craig's case along with the cases of Alario and Howard. "But the BRB's decision of these three consolidated cases actually remanded Craig's case to the district director for further proceedings. Thus, there was no final order of the Board with respect to *Craig*, and *Craig* was dismissed from this appeal on September 18, 2002. The Director of the office of Workers' compensation Programs filed a motion to amend the judgment requesting that the original opinion be revised to remove the references to Craig's case. The Director's motion is granted, and this opinion has been revised to reflect that only the cases of *Alario* and *Howard* are before this court."**]**

[Topics 8.13.1 **Hearing loss—Section 8(c)(13) Introduction and General Concepts**; 28.1.3 **Attorney Fees—When Employer's Liability Accrues]**

[ED. Note: The following case is included for informational value only.**]**

Cranfield v. Commissioner of Social Security, (Unpublished), 79 Fed. Appx. 852; 2003 U.S. App. LEXIS 22696 (6th Cir. Nov. 3, 2003).

In this Social Security disability case wherein the claimant filed a claim for disability benefits based on back, foot, hand and leg problems, the claimant appealed arguing that the ALJ had failed to consider the claimant's obesity. In her appeal, the claimant cited the LHWCA case of *Morehead Marine Services v. Washnock*, 135 F.3d 366 (6th Cir. 1998) where the circuit court had held that the APA required an ALJ's decision to "include a discussion of 'findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record.'" In the instant case, the court found that the ALJ had included specific and accurate references to evidence that supported his decision and that he addressed all of the issues that the claimant relied on in her claim for benefits—back, foot, hand, and leg problems. "The ALJ did nothing more than mention [the claimant's] obesity because neither [the claimant] nor her doctors offered any evidence to suggest that her weight was a significant impairment. Since [the claimant's] claims did not indicate that obesity was a significant impairment, the ALJ was not required to give the issue any more attention than he did." (The claimant was five foot four and a half inches tall and has weighed between 214 and 276 ½ pounds.)

[Topic 8.2 **Extent of Disability]**

[ED. Note: The following case is included for informational value only.]

United States of America v. Somsamouth, ___ F.3d ___ (Nos. 02-50453 and 02-50461)(9th Cir. Dec. 18, 2003).

This is an unsuccessful appeal of a husband and wife's convictions for making false representations of material facts to the Social Security Administration for the purpose of retaining Supplemental Security Income benefits. The couple challenged the convictions on the grounds that the term "work" was not defined for the jury in the jury instructions. They also argue that their statements about working were not materially false.

The Ninth Circuit found that the "simple word" "work" needed no jury instruction definition: "We start with the obvious, almost banal proposition that the district court cannot be expected to define the common words of everyday life for the jury." "[W]ork is not an arcane concept in this context, and there was no need for the district court to define it further. If the court had defined it and done so correctly, that would not have been helpful to [the couple]." They had argued that the average person might believe that "work" does not necessarily require substantial gainful activity of the sort that generates wages or other economic benefits." The Ninth Circuit found that if the average person believed this, the average person was correct. The court noted that during the interview process, the couple was asked if they did any work, including volunteer work.

Next the couple argued that their falsehoods about work cannot have been material because it has not been shown that their working was also substantial gainful activity. The Ninth Circuit stated that "In so arguing, they ask us to take an overly crabbed view of materiality." The court noted that it has previously addressed the meaning of the general statute covering false statements of 'material fact' to government agencies and have defined the concept as follows-- "A statement is considered material if it has the propensity to influence agency action; actual influence on agency action is not an element of the crime."

The Ninth Circuit explained that the issue was not whether the couple was performing substantial gainful activity; it was whether their false statements had a propensity to influence agency action. "Even if the extensive work activities in which the [couple] were engaged were not actually generating income for them, it is pellucid that truthful answers to the SSA's questions about their activities would have led to further

investigation at least. [Their] lies were designed to influence the agency into not investigating them or giving further consideration to whether they were, in fact, engaging in substantial gainful activities." Importantly, the court noted that had the agency known they were doing some work, even if not "gainful," the agency would have inquired into their capabilities to do further work, rendering them not disabled.

[Topic 31.2 **Penalty For Misrepresentation—Prosecution of Claims—Claimant's Conduct]**

Boone v. Barnhart, Commisioner of Social Security, ___ F.3d ___ (No. 02-3256) (3rd Cir. Dec. 18, 2003).

Here the Third Circuit found that substantial evidence needed to show that the claimant could perform a significant number of jobs existing in the economy was lacking Therefore there was no support for the proposition that the claimant was not disabled and thus not entitled to supplemental Security Income disability benefits. The court, while not making a general ruling, specifically found here that an unexplained conflict between a vocational expert's testimony and the Dictionary of Occupational Titles necessarily requires reversal. The court further found that the vocational expert's testimony in this case was not substantial evidence.

[Topic 20.3 **Presumptions—Employer Has Burden of Rebuttal With Substantial Evidence]**

Moore v. ANGELA MV, ___ F.3d ___ (No. 02-30441)(5th Cir. Dec. 9, 2003).

In this 905(b) action, the Fifth Circuit found that the nonpecuniary award (for loss of love and affection totaling $750,000) given to the surviving widow was excessive. (The couple, both approximately 50 years old, had been married for six months after having been together for seven years. They had no children.) It further held that the district court exceeded its authority in increasing the security posted in lieu of the vessel.

[Topic 5.2.1 **Third Party Liability--Generally]**

Lincoln v. Reksten Mgmt., ___ F.3d ___ (No. 99-1681) (4th Cir. Dec. 29, 2003).

At the federal district court level, a motion for summary judgment was issued in this 905(b) claim wherein the court found that the longshoreman had not provided sufficient evidence that the turnover duty (the duty to use reasonable care when turning over the ship for stevedoring activities) to the longshoreman had been breeched. The

Fourth Circuit found that Reksten may have breached its duty by failing to inspect or warn. The vessel might have been negligent in the maintenance, upkeep, and especially the inspection of the deck where the longshoreman was injured so that, in the exercise of reasonable care, it might have discovered the defect or hole in the decking into which he fell, enabling it to warn the stevedore of the defect. Therefore the circuit court vacated the district court's grant of summary motion.

[Topic 5.2.1 **Third Party Liability--Generally]**

C. Benefits Review Board

Hymel v. McDermott, Inc., ___ BRBS ___ (BRB No. 03-0643)(Nov. 25, 2003).

Here the claimant sued his employer under the LHWCA as well as in state court against his employer and others, for negligence and intentional exposure to toxic substances in the work place. Executive officers of the employer during the claimant's employment (who were named as defendants in the state court suit) moved to intervene in the LHWCA claim. The ALJ denied the motion to intervene, finding that the issue raised by the interveners was not "in respect of "a compensation claim pursuant to Section 19(a) of the LHWCA. In a subsequent Decision and Order, the ALJ granted the claimant's motion to dismiss the claimant's claim with prejudice, pursuant to Section 33(g), as he settled a part of his state tort claim for less than his compensation entitlement without employer's prior written approval. The interveners filed an appeal with the Board. The Board dismissed the appeal, on the ground that as claimant's claim was no longer pending, the interveners were not adversely or aggrieved by the denial of their motion to intervene. Interveners then filed a motion for reconsideration of the Board's dismissal.

The Board granted the motion for reconsideration, finding that the interveners are adversely affected or aggrieved by the ALJ's denial of their petition. The Board noted that Section 21(b)(3) of the LHWCA states that the Board is authorized to hear and determine appeals that raise a "substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the LHWCA. However, turning to the merits of the appeal, the Board found that the ALJ's decision was legally correct. The Board noted Fifth Circuit case law to support the ALJ's determination that he was without jurisdiction to rule on interveners' entitlement to tort immunity in a state court suit, as that issue was not essential to resolving issues related to the claimant's claim for compensation under the LHWCA. The Board went on to note that even if the claimant's claim had still been pending, the interveners' claim, while

based on Section 33(i) of the LHWCA, is independent of any issue concerning the claimant's entitlement to compensation and/or medical benefits and the party liable for such. Section 33(i) does not provide the right of intervention.

[Topics 1.1.1 **Jurisdiction/Coverage—Standing to File a Claim**; 19.1 **Procedure—The Claim: Generally**; 21.1.2 **Review of Compensation Order—Grant of Authority**; 33.9 **Exclusive Remedy Against Officers Or Fellow Servants Of Employers]**

Meinert v. Fraser, ___ BRBS ___ (BRB No. 03-0377)(Nov. 25, 2003).

Here the employer appeals to the Board (to review under its abuse of discretion standard) the Vocational Rehabilitation Plan approved by the District Director. The employer contended that vocational rehabilitation is unnecessary because the claimant retains a wage-earning capacity on the open market and that upon completion of the plan, the claimant will have a lower earning capacity in motorcycle repair than that demonstrated by employer's labor market survey. The Employer averred that the evidence it developed after the implementation of the plan demonstrates the validity of its contentions. The employer also contends that motorcycle repair was merely an interest of the claimant's and that is why retraining in this area was pursued.

After reviewing the pertinent regulations (20 C.F.R. 702.501-702.508) and the statute (Section 39(c)(2), the Board noted that neither the LHWCA nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan. The Board held that the employer has not shown that the district director had abused her discretion in implementing the plan, as it failed to demonstrate that the district director did not comply with the regulatory criteria. The Board found that the counselor had adequately documented the wages that the claimant would earn upon completion of the program, as the claimant had no earnings at the time the plan was documented. It further noted that the counselor had documented his placement efforts prior to recommending retraining courses, and he demonstrated how the claimant's vocational background and aptitude testing fit well with the new skills claimant will obtain at the technical college. Further, the Board noted that "[I]t is self-evident that a claimant is more likely to succeed at a plan if, in addition to its being suitable for him, it involves a vocation in which he is interested."

Employer sought to enter into evidence information which it alleges would establish that the claimant had a current wage-earning capacity without the retraining program that was at least equal to what the claimant would earn upon his completion of the plan. The Board declined to allow the information to be entered into evidence stating that "Assuming *arguendo*, the validity of employer's contention, employer cannot demonstrate an abuse of the district director's discretion where the plan is otherwise fully documented according to the regulatory criteria."

The Board also declined to address the employer's contentions regarding its potential liability for disability benefits during the retraining period. It stated that, "This issue is one that is properly presented to an [ALJ] in the first instance, and employer is entitled to a full evidentiary hearing on this issue."

[Topics 21.1.2 **Review Of Compensation Order—Grant of Authority**; 21.2.8 **Review Of Compensation Order—Direct Appeals from District Director to Board**; 39.1 **Administration and Vocational Rehabilitation--Generally]**

Carpenter v. California United Terminals, ___ BRBS ___ (BRB Nos. 03-0213 and 03-0213A)(November 25, 2003).

In a case involving concurrent awards for permanent partial and permanent total disability, the Board found that the Section 6(b)(1) statutory maximum compensation rate was applicable to concurrent awards rather than accepting the Director's position that Section 6(b)(1) should be considered in terms of each separate award of benefits. The Board found that the term "disability" must be construed in section 6(b)(1) such that, in instances of concurrent awards, it means the overall disability resulting from both injuries.

The Board noted that the Director's position, i.e., that the Section 6(b) limit is applicable only on a single award basis would allow for a twice-injured worker to receive compensation in excess of the single injury person, despite the fact that their overall loss in wage-earning capacities are the same. "In contrast, the Board's approach, based on the plain language of Section 6(b) limiting compensation for 'disability,' precludes this would-be inequity since both workers are subject to the same limit. The statute should not be interpreted in a way that results in claimant's receiving from two employers more than he could receive from one employer, pursuant to an explicit statutory provision."

As to how offsets may be taken, the Board once more cites *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980) as outlining a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case, rather than setting forth a mechanical rule.

[Topics 6.2.1 **Commencement of Compensation—Maximum Compensation for Disability and Death Benefits**; 8.3.1 **Scheduled Awards—Some General Concepts**; 8.3.4 **Sections 8(c)(1) and 8.4 Conflicts Between Applicable Sections]**

Southcombe v. A Mark, B Mark, C Mark Corp., ___ BRBS ___ (BRB No. 03-0261)(Dec. 12, 2003).

In this status issue case, the Board upheld the ALJ's determination that the claimant was not engaged in maritime employment pursuant to Section 2(3) of the LHWCA. The claimant had been employed by a subcontractor as an ironworker. The general contractor was constructing a marina on a river. The marina was to include an 80-foot high "mega yacht" service facility. At the time of the claimant's injury he was unloading steel beams from a flat-bed trailer which were intended for use as the frame of the yacht service facility. The Board first noted that the seminal issue in this matter was whether the claimant's work on the project was maritime employment which is a legal issue to which the Section 20(a) presumption does not attach.

Next the Board noted that within the jurisdiction of the Fourth Circuit, within whose jurisdiction this case arises, the jurisprudence has drawn a distinction between workers engaged to repair or replace existing harbor or shipyard facilities and those engaged in the construction of new land-based facilities. The Board cited the lead Fourth Circuit case of *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT)(4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995)(*Held*, a pipe fitter employed to construct a power plant on the premises of the Norfolk Naval Shipyard was not a covered employee; court declined to expand coverage to include this worker merely because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations.).

The Board noted that the ALJ found that 1) the claimant was on the premises solely to construct a building, and not to maintain or repair shipyard facilities; 2) pursuant to Prevetire, a finding of coverage cannot rest on the future use of the facility; and 3) the claimant's work was not integral to the loading, unloading, repair or building of vessels. The Board then affirmed the ALJ's finding that the claimant was not engaged in maritime employment. In so doing, the Board distinguished the claimants in *Stewart v. Brown & Root, Inc*., 7 BRBS 356 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980) who had been engaged in the construction of a pier or dry dock or other "uniquely maritime" structure such that coverage could be conferred on this basis. The Board also specifically noted that in the instant case, the claimant's relationship to this facility was merely temporary as he was on the premises solely under a subcontract to build the facility.

[Topics 1.4.1 **LHWCA v. Jones Act—Generally**; 1.4.2 **Master/member of the Crew (seaman)**; 1.7.1 **Status—"Maritime Worker"]**

Floyd v. Penn Terminals, Inc., ___ BRBS ___ (BRB No. 03-0342) (Nov. 6, 2003).

At issue here is the application of Section 8(j) forfeiture. The claimant has questioned the ALJ's authority to initiate consideration of forfeiture. The Board has previously held that an ALJ has the authority to adjudicate whether benefits should be suspended pursuant to Section 8(j). In the instant case the Board found that Section 8(j) itself provides no direction on the procedures for adjudicating forfeiture proceedings.

The Board also noted that the legislative history is equally lacking any relevant information that might indicate whether Congress intended to make the district director the exclusive initial adjudicator of forfeitures.

After examining the regulations, the Board noted that Section 702.286(b) provides that an employer may initiate forfeiture proceedings by filing a charge with the district director, who shall then convene an informal conference and issue a decision on the merits. Nevertheless, if either party disagrees with the district director's decision, the regulation authorizes an ALJ to consider "any issue" pertaining to the forfeiture. The Board explained that for this reason, despite the statutory reference to the deputy commissioner, the Board has previously held that an ALJ has the authority to adjudicate a forfeiture charge.

In holding that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the ALJ, the Board used the following logic:

> Section 702.286(b) makes the subpart C rules for [ALJ] hearings (20 C.F.R 702.331-702.351) applicable to forfeiture disputes. Section 702.336, in turn, authorizes an [ALJ] to consider "any" new issue at "any" time prior to the issuance of a compensation order. Thus, as the Director suggests, Sections 702.286 and 702.336 maybe construed harmoniously because section 702.286 does not qualify the authority conferred by Section 702.336. Consequently, the formal hearing procedures permit a party to raise the forfeiture issue for the first time at the hearing.

Further, the Board rejected the claimant's contention that his right to procedural due process would be abridged unless the district director initially considers all forfeiture charges and noted that ALJ hearings include protective procedural safeguards.

The Board declined to review the ALJ's certification of the facts of this case to the federal district court, pursuant to Section 27(b) regarding alleged misstatements on an LS-200 form and also regarding a pre-existing back condition. The Board cited *A-Z Int'l v. Phillips [Phillips I*], 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

[Topics 8.12.1 **Obligation To Report Work—Generally**; 19.1 **Procedure—The Claim: Generally**; 19.3 **Procedure—Adjudicatory Powers**; 27.1 **Powers of Administrative Law Judges—Procedural Powers Generally**; 27.**3 Federal District Court Enforcement]**

D. ALJ Opinions

Coleman v. Bollinger Shipyard, Inc. (Coleman I), 37 BRBS 606(ALJ) (2001 LHC 2882)(August 8, 2003) (Supplemental Decision and Order Denying Attorney's Fees),

reconsidered at *Coleman v. Bollinger Shipyard, Inc. (Coleman II)*, 37 BRBS 620(ALJ) (Sept. 19, 2003) (Reconsideration Denied).

This is a denial of attorney fees although the claimant was successful in the prosecution of his claim. In *Coleman I*, a Request for Production of Documents was served on the claimant's counsel in an attempt to verify which entries in the fee application were attributable to the attorney of record or to other persons. This Request for Production sought to inspect and copy "any and all records and documents, including but not limited to his time sheets and work sheets in support of this [fee application]… ." When the claimant's Counsel moved for a Protective Order, the employer filed an opposition, averring that the fee application showed "no effort was made to verify whether all of the time entries were made by [Counsel] or perhaps another attorney or support staff." The employer argued that its discovery request should be granted or in the alternative, the ALJ should conduct an *in camera* inspection of the requested documents.

Counsel for the claimant indicated that he had performed "virtually all work" on the claim but conceded that "a few items were performed by his former associate." *Coleman I*. The ALJ noted that the fee petition failed to identify the associate and subsequently ordered an *in camera* inspection in which Counsel was directed to provide a "privilege log detailing the documents supporting the fee application, e.g., any and all time sheets and work sheets, and any privilege precluding its production along with copies of all such documents for an *in camera* inspection…." Eventually the ALJ denied the Motion for Protective Order and directed Counsel to respond to the Request for Production, after Counsel failed to comply with the Order by submitting a box of paper without a privilege log.

The ALJ noted in his Order Denying Attorney's Fees (*Coleman I*), that Counsel's former associate had appeared with records, in response to the Order for Production and that the attorney "allegedly indicated he performed substantial work on Claimant's case. Moreover, [the attorney] allegedly reported there were never any time sheets nor any work sheets generated in support of Counsel's fee petition, which was prepared by [the attorney]." *Coleman I*.

Thereafter, the employer sought the depositions of both the associate and Counsel. In the ensuing litigation, the employer argued that without any supporting time sheets or work sheets, "the only other discovery device available to verify the accuracy of the fee petition [before the ALJ and the District Director] is by deposition." *See Coleman I*. In an Order Denying Motion to Quash Subpoena, the ALJ stated that Counsel "has failed to comply with the undersigned's order…to provide his time or work sheets and a privilege log of protected documents." *See Coleman I*. In *Coleman I*, the ALJ found that the former associate's "apparent assistance in the case and the fee application preparation was not established from the fee petitions in the instant matter. Accordingly, discovery by deposition was the only remaining discovery device useful to verify the accuracy of Counsel's fee petition."

At deposition, the former associate indicated that time sheets were "not really kept" and that occasionally notations would be written on a file. *Coleman I*. The former associate admitted that he could not say how much time was "actually spent on this file" because "there are no records." *See Coleman I*. According to the ALJ, although the former associate prepared the fee petition, he had "no idea how much time [Counsel] actually spent on the file." *See Coleman I*.

In denying a fee, the ALJ noted that Counsel failed to comply with the Decision and Order or the Discovery Order and that "there are absolutely no billing records nor any time sheets or work sheets supporting the attorney's fee or his expenses." *Coleman I*. Quoting the longshore regulations, the ALJ stated that this failure to comply may result in a ruling "that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a **decision of the proceeding be rendered against the non-complying party**, or both. 29 C.F.R. § 18.6(b)(2)(v)(emphasis added by ALJ).

The ALJ concluded, "Discovery devices useful to determine the accuracy of Counsel's fee petition have been exhausted." He explained:

> As noted above, discovery devices produced only testimony contrary to Counsel's contentions and a box of documents which is not useful in resolving this matter. The complete failure to meaningfully document legal services and expenses prevents a reasoned decision in this matter and constrains the undersigned from rendering extensive findings regarding a reasonable attorney's fee and expenses.
>
> In light of the foregoing, I find Counsel has failed to carry his burden of establishing entitlement to an attorney fee award by documenting the appropriate hours expended and hourly rates charged. Accordingly, his request for an attorney's fee and expenses is DENIED.

Coleman I.

On reconsideration, after re-opening the record to receive additional exhibits, the attorney fee request was again denied. *Coleman II*.

[Topics 28.1.2 **Attorney Fees—Successful Prosecution**; 28.4.1 **Attorney Fees--Application Process**; 28.6.3 **Attorney Fees-Fee Petition**]

[ED. Note: The following is an Order to Compel Vocational Information Discovery issued by an ALJ in a matter still pending before OWCP. Pursuant to*Maine v. Brady-Hamilton*, 18 BRBS 129 (1986)(*en banc*), since the 1972 amendments, only OALJ has authority to issue subpoenas and process other discovery matters even though the claim is pending before the Director.)**]**

Newton v. P & O Ports, Inc., (OWCP No. 07-163948) (Oct. 7, 2003)

Here the claimant filed a Motion to Compel Discovery with OALJ seeking enforcement of a subpoena issued by OALJ for the names and addresses of the companies identified as suitable alternative employment by the employer's vocational expert. The employer resisted the subpoena on the grounds that, based on case law, an employer need not produce to a claimant the identity of suitable alternative jobs located by the employer. Maintaining that position the employer filed a Motion to Quash Subpoena Duces Tecum and a Motion for Protective Order.

In addressing this matter, the ALJ first noted that pursuant to *Maine*, it is manifest that OALJ possesses the authority in LHWCA cases not only to issue subpoenas, but also to decide matters arising from the subpoenas it has issued. Second, the ALJ found that the Employer "conflates the substantive standards for proving suitable alternative employment with the standards for discovery. The former involves a determination on the merits, while the latter is procedural in nature."

The ALJ noted that as to the substantive standards of suitable alternative employment, an employer does not need to identify actual, specific employment openings to prove that a claimant has a work capacity. *See e.g., New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041-43, 14 BRBS 156, 163-65 (5th Cir. 1981); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430-31, 24 BRBS 116, 120-21 (CRT) (5th Cir. 1991). Similarly, an employer can prevail on the merits with respect to suitable alternative employment without producing to the claimant the jobs its vocational expert has identified. *See e.g. P & M Crane Co.*, 930 F.2d at 429 n. 9, 24 BRBS at 120 n. 9 (CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 7 (CRT) (2nd Cir. 1991).

However, the ALJ went on to explain that the substantive correctness of the case law cited by *P & O*, namely *Turner* and its progeny, are not at issue in a discovery matter. Under discovery rules, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. 18 C.F.R. § 18.14.

The ALJ found that to grant the employer's motions would be to convert the substantive suitable alternative employment standards of *Turner* and its progeny into the standard for discovery. As the two standards are discrete, the ALJ refused to grant the motion. He reasoned that there is a distinction between the necessity of procuring certain evidence in the first place and the necessity of producing the evidence one has already procured. *Turner* and its progeny pertain to the former; the rules of discovery pertain to the latter.

The ALJ specifically noted, "Evidence that is not required to prevail on the merits may nonetheless be evidence that is admissible. Information that need not be divulged

voluntarily to prevail on the merits may nonetheless be information that reasonably may lead to the discovery of admissible evidence. Handcuffing discovery with substantive standards would disqualify from discovery all information that is helpful yet substantively unnecessary."

Next, the ALJ addressed the employer's reliance on policy concerns to support its position and noted that such reliance is misplaced. Citing language from *Turner*, *P & M Crane*, and *Palombo*, the employer had asserted that employers are not meant under the LHWCA to be employment agencies for claimants and that requiring employers to identify specific employment openings would provide a disincentive for claimants to independently seek alternate employment. The ALJ reasoned, "Those policy concerns are important in the reasoning of *Turner* and its progeny. However, those policy concerns do not warrant heavy consideration here because the dispute before the Court is not about the employer's hardship in satisfying its burden for suitable alternate employment nor the quality of the claimant's job search. Rather, this dispute is about the claimant's ability to test the quality of the employer's vocational evidence."

The ALJ next determined that the information at issue was not privileged and that good cause existed to compel its production. The ALJ found that vocational information in dispute is still relevant for discovery purposes post-*Turner*. He explained that while the case law relied upon by the employer indicated that a showing of specific openings was not necessary to meet the employers' burden regarding suitable alternative employment, those cases did not indicate that specific job openings were irrelevant altogether.

The judge found that the information is relevant based on the claimant's right to challenge the employer's vocational evidence. The employer argued that the claimant's attorney was already familiar with its vocational expert through first-hand experience and therefore had no reason to question the expert's competency or credibility. The employer further argued that the claimant's attorney did not need the identity of the suitable alternate employers to challenge the expert's qualifications or methodology.

However, the ALJ found these arguments flawed. First, the claimant's right to challenge vocational evidence is not limited to the expert's credentials and methods. The claimant has a right to challenge the substance of the expert's findings. The findings in this case were based in part upon information from actual, specific employers. The ALJ explained, when a vocational report is formulated based on information from actual employers, the claimant would be at a disadvantage to challenge the accuracy of the report if the claimant were deprived of the identities of those employers. The judge concluded that for each of the positions identified by the expert, the claimant should have the opportunity to verify from the source of the information that the job description, including the physical duties and wage information, was reported accurately by the expert.

In addition, the ALJ found that furnishing the claimant with the names and addresses of employers identified for suitable alternative employment would allow the

claimant to fully exercise his right to challenge the suitability, not only of the type of work, but also of the specific employers and work locations referenced by the vocational expert. He specifically noted that, although the claimant's attorney has been familiar with the expert's methods in the past, the claimant is not limited under the law to presuming that the expert, in the present case, used the same methods and used those methods properly.

Finally the ALJ noted that there is a distinction between the needs of a claimant in discovery and the entitlement of a claimant in discovery. "Even if Claimant ultimately did not use the information in dispute to prepare his case, Claimant would nonetheless be entitled to obtain the information because the information is relevant."

[Topic 19.3.6.2 **Procedure—Formal Hearing--Discovery;** 27.2 **Powers of Administrative Law Judges--Discovery]**

E. Other Jurisdictions

[ED. Note: All cases in this subsection are provided for informational purposes only.**]**

Gros v. Settoon, Inc., ___ So. 3rd ___ (03-461) (La. App. 3 Cir Dec. 23, 2003), 2003 La. App. LEXIS 3602).

In this jurisdictional (Jones Act versus LHWCA) case, the Third Circuit Court of appeals for the State of Louisiana made the extraordinary finding that, despite Fifth Circuit jurisprudence to the contrary; it would follow the Ninth Circuit and hold that a formal award of LHWCA benefits would not preclude the filing of a Jones Act claim. It found that Congress envisioned pursuing both LHWCA and Jones Act claims, despite the real possibility that an employer may be forced to engage in repetitious litigation.

While this matter was before an ALJ, the employer argued that the worker was a shore based worker only entitled to Louisiana state workers compensation. The ALJ found that the worker's injury upon navigable waters was sufficient to qualify him for LHWCA benefits. The worker then alleged his status as a seaman making claims for negligence, unseaworthiness and maintenance and cure under the Jones Act and also filing a claim for vessel negligence under 905(b). **[Ed. Note:** Using the Saving to Suitors clause of the U.S. Constitution, this matter was filed in state court rather than in federal district court where most similar cases are normally filed.**]**

The Louisiana Third Circuit noted the competing federal circuit positions as well as the Fifth Circuit's limitation on *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81 (1991) wherein a worker sought and received voluntarily paid benefits. However, the state circuit court stated, "We are satisfied, during the administrative hearing to determine [the worker's] entitlement to LHWCA benefits, seaman status was not at issue. The Louisiana Third Circuit also states that, "The Administrative Law Judge found [the

worker's] injury upon navigable waters was sufficient to qualify him for benefits under the LHWCA."

However, a reading of the ALJ's Decision and Order indicates that the issue of coverage was not glossed over. *Gros v. Fred Settoon, Inc*. (Unpublished) (Case No. 2000-LHC-2179)(April 9, 2001). The ALJ not only specifically listed "jurisdiction" as an issue, he specifically addressed both situs as well as status and found coverage under the LHWCA.

[Topics 1.4.1 **LHWCA v. Jones Act—Generally**; 1.4.2 **Master/member of the Crew (seaman)]**

Songui v. City of New York, 2003 N.Y. App. Div. LEXIS 13890 (Index No. 10780/99)(Dec. 22, 2003).

This is a summary judgment order wherein the private contractor, Reynolds Shipyard Corporation, successfully argued that a Jones Act claim should be dismissed since the barge repairman was a land-based worker with only a transitory connection to a vessel in navigation and was hired on a temporary basis to weld a metal plate onto a garbage barge owned by the City of New York. The court found that the worker was more properly covered under the LHWCA. The City of New York also moved for summary judgment claiming that federal maritime law should preempt state labor law. In denying the city's motion, the court noted that the New York Court of Appeals has previously held that the LHWCA does not preempt New York labor law and that an action may proceed to determine if there is any fault on the part of the city.

[Topics 1.4.1 **LHWCA v. Jones Act—Generally**; 1.4.2 **Master/member of the Crew (seaman)**; 3.4.1 **LHWCA, Jones Act, and State Compensation]**

Somerson v. Mail Contractors of America, DOL ARB Nos. 02-057, 03-055 (Nov. 25, 2003).

The U.S. Department of Labor's Administrative Review Board has upheld the dismissal of two complaints brought by a party who engaged in egregious conduct (obstructing hearings and intimidating witnesses). The Board found that ALJs have "inherent power" to dismiss such complaints wherein the complainant engages in misconduct. While neither the pertinent statute (Surface Transportation Assistance Act) nor its regulations specifically authorize dismissal, the Board held that the ALJ has the same inherent power as federal judges to take necessary steps to deter abuse of the judicial process.

Before the complainant's cases were assigned to an ALJ he made abusive calls to OALJ. Later he made repeated outbursts during the hearing resulting in the ALJ ordering his removal from the room. Subsequently he left a message with the judge's law clerk calling the ALJ an "asshole." At that point the ALJ referred the case to the U.S. District Court. The court, in turn, issued a consent order stipulating that he "shall conduct himself within the bounds of appropriate respect and decorum albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matter related thereto, held under the authority of the [OALJ]." After the company received anonymous e-mails insulting and threatening its counsel and management witnesses, the company sought a protective order from the ALJ. The ALJ issued a show cause order. The complainant then "conspicuously" ignored concerns about the implicitly threatening nature of the e-mails.

[Topic 19.3.3 **Procedure—Adjudicatory Powers—Dismissal of Claim]**

Stroka v. United Airlines, (Unpublished) N.J. Super. Ct. App. Div. (No. a4274-01)(Nov. 26, 2003).

A New Jersey court of appeals found that a flight attendant who was originally scheduled to work (but was not actually working) on a plane that crashed on September 11, 2001 was not eligible for workers' compensation since her post-traumatic stress syndrome was not triggered while working.

[Topic 20.2.1 **Presumptions--Prima Facie Case**; 20.2.3 **Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident]**

II. Black Lung Benefits Act

[NOTE: On December 15, 2003, the Department published amendments to the black lung regulations at 20 C.F.R. Parts 718 and 725. *See* 68 Fed. Reg. 69,930 – 69,935 (Dec. 15, 2003). These amendments were made to reflect holdings in *National Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). The regulations may be found on-line in the Black Lung Library at www.oalj.dol.gov.]

Circuit Court of Appeals

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, ___ F.3d ___, Case No. 01-3111 (6th Cir. Dec. 23, 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) required that the ALJ resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." Once a "material change" is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

In *Flynn*, the ALJ properly held that the miner demonstrated a "material change in conditions" based on a comparison of the restrictions listed in Dr. Martin Fitzhand's 1980 and 1984 medical reports. In the 1980 report, which was submitted with the first claim, Dr. Fitzhand determined that the miner could perform "mild activity at best"; whereas by 1984, in the second claim, Dr. Fitzhand opined that the miner could do "no more than sedentary activity." The ALJ reasonably noted that the miner's last coal mining job, although light-duty work, required more than sedentary activity. The court stated that this "downgraded assessment" was further supported by underlying objective testing, including physical examinations, pulmonary function studies, and blood gas studies underlying his two reports. As a result, it upheld the ALJ's finding of "material change."

The court then upheld the ALJ's finding that the miner was totally disabled due to coal workers' pneumoconiosis on the merits. In this vein, the court noted the following standard:

> The claimant bears the burden of proving total disability due to pneumoconiosis and . . . this causal link must be more then *de minimus*. (citation omitted). To satisfy the 'due to' requirement of the BLBA and its implementing regulations, a claimant must demonstrate by a preponderance of the evidence that pneumoconiosis is 'more than merely a speculative cause of his disability,' but instead 'is a contributing cause of

> some discernible consequence to his totally disabling respiratory impairment.' (citation omitted). To the extent that the claimant relies on a physician's opinion to make this showing, such statements cannot be vague or conclusory, but instead must reflect reasoned medical judgment. (citation omitted).

[multiple claim in the Sixth Circuit and *Sharondale Corporation*; etiology of total disability]