U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 174
November - December 2004

John M. Vittone
Chief Judge

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

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

APPROPRIATIONS ACT LIMITS FUNDING FOR PARTICIPATION BY SOLICITOR IN CIRCUIT COURT APPEALS IN LONGSHORE CASES

The Consolidated Appropriations Act, 2005 (H.R. 4818) has been signed into law by President Bush and again contains language limiting the Solicitor's participation in circuit court appeals to situations involving defense of the special fund per *Director, OWCP v. Newport News Shipbuilding*, 115 S.Ct. 1278 (1995). The legislation also continues the one-year mandate for the Board to decide Longshore decisions.

Settlement Judge Notice

OALJ continues to experience a high success rate (75%) of cases settling through the Settlement Judge process in Longshore cases. Requests for Settlement Judge Appointments in Longshore cases should be addressed to the Associate Chief Judge for Longshore or to the appropriate district Chief Judge. While reasonable efforts will be made to accommodate requests for specific dates, there can be no guarantee that requests for specific judges will be granted.

Possible Gulf War Fire/Lung Cancer Link

According to the Associated Press, a committee of the Institute of Medicine [a branch of the National Academy of Science, an independent group chartered by Congress to advise the government on scientific matters], states that Gulf War personnel exposed to pollution from the well fires, exhaust and other sources may face an increased lung cancer risk. More than 600 oil well fires were ignited by Iraqi troops during their retreat from Kuwait in 1991.

Offshore Drilling Workers cannot be required to take mandatory periodic medical exams under the ADA

BNA (Daily Labor Report No 228, Nov. 29, 2004) reports that offshore drilling rig workers cannot be required to take mandatory period medical examinations to screen for threatening illnesses, according to a September 10, 2004 EEOC informal advisory letter. The letter, addressed to an inquiring offshore drilling company, states that EEOC does not believe that workers on remote drilling rigs fall within the "public safety exception" of the EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (2000). According to BNA, the EEOC stated alternatives available to such an employer: 1) completely voluntary medical screenings; 2) a medical exam before being allowed to work on a platform, provided there is a "reasonable belief that a particular offshore worker has a medical condition that may affect his or her ability to perform job functions or may pose a direct threat; 3) requiring all offshore workers to answer a medical history questionnaire and undergo a medical exam after making a conditional job offer, with follow-ups where appropriate.

A. United States Supreme Court

B. Circuit Court Cases

Boh Brothers Construction Co. v. Booker (Unpublished) (No. 04-60464 Summary Calendar)(**5th Cir.** Nov. 10, 2004).

In determining that the ALJ's factual conclusions were supported by substantial evidence, the **Fifth Circuit** noted that Employer's Counsel "does not make the distinction between findings of fact and conclusions of law." The court explained that in Section 20(a) cases the relevant legal standard assesses the admissibility of expert opinion for purposes of assisting the factfinder. The employer had argued that although the ALJ and Board appeared to conduct the requisite burden-shifting regime, "the practical effect of their decision in the case" was to presume coverage for the claimant. The court found that "This approach aims to reframe the ALJ's factual findings as mistaken conclusions of law subject to *de novo* review and, as such, has no merit.

[Topic 20.3.1 Presumptions—Failure to Rebut]

Volks Constructors v. Melancon, (Unpublished) No. 04-60443 Summary Calendar)(**5th Cir.** Nov. 24, 2004).

In this Section 10 case, the employer objected not to the standard [Section 10(c)] applied, but rather to the particular historical earnings figures and sectors of the economy that the ALJ chose to use in his calculation. The **Fifth Circuit** found that, "When viewed in the perspective of the policy of the lHWCA and the plethora of discrete facts in evidence here, we agree with the BRB's characterization of the ALJ's handling of this

case. We cannot credit respondents' charge of bias; there is more than substantial evidence to support the facts found and law applied by the ALJ; in the context of § 910(c), the weekly wage calculations are reasonable—not unreasonable—estimates of Melacon's earning capacity when he was injured; and, candidly, petitioners' contention that this pile driver operator cum auto mechanic should have his annual earning capacity calculated solely on the basis of his own, subjective profit during a two-season entrepreneurial deviation into crawfish farming, with all of its variables, vicissitudes, and vagaries, borders on the ludicrous."

[Topic 10.4.4 Determination of Pay--Calculation of Annual Earning Capacity Under Section 10(c)]

Gulf Best Electric, Inc. v. Methe, (Unpublished)(No. 03-60749) (**5th Cir.** Nov. 1, 2004).

The **Fifth Circuit** found that it lacked jurisdiction to consider the claimant's claim that the Board erred in excluding employer contributions to his retirement and health insurance funds when calculating his average weekly wage (AWW). It explained that the claimant had styled his petition a "Cross-Application to Enforce Benefits Review Board Order" but that, in substance, the petition was a simply a request that that the court reverse the Board's order, and thus allow inclusion of the employer's $3.47 per hour contributions to retirement and health insurance funds in calculation of AWW. "Because the claimant raises this issue as an affirmative challenge to the BRB's decision rather than as a defense to his employer's appeal, his 'cross-application' is properly characterized as a petition for review and, thus is time-barred by § 921(c).

The **Fifth Circuit** further noted that the claimant contended that, because he has filed a petition for modification of the compensation award with DOL pursuant to Section 22, it would be a "waste of this court's time and resources" to dismiss his petition, only to have the claim eventually "work its way back through the system." The court noted that the claimant "cites no authority for the proposition that we may ignore the time requirements for appeal imposed by an agency's organic statute for the sake of equity or judicial efficiency" and therefore it dismissed the petition.

In this matter the court also affirmed the Board's decision that the date on which treatment actually ceased was the correct MMI date, noting that "[o]ne cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective." *Abbott v. La. Ins. Guaranty Assn.*, 40 F.3d at 126 (**5th Cir.** 1994).

Finally, the court upheld the Board's application of Section 10(a) rather than 10(c) as the ALJ had found. Noting that the claimant worked 47.4 weeks, or 237 days, or 91 percent of the workdays available in the year before his injury, the court stated that while it has not adopted a bright-line test for the applicability of Section 10(a) as the **Ninth Circuit** has (75 % or more to be under Section 10(a)), "it is clear to us that [the claimant's] record of 91 percent satisfies the requirement of § 910(a) that the claimant

have worked 'substantially the whole of the year immediately preceding the injury.'" The court addressed the ALJ's concerns of the "fairness" of possible overcompensation as his rationale for applying Section 10(c) by noting its prior position in *Ingalls Shipbuilding v. Wooley*, 204 F.3d 616 (**5th Cir.** 2000), that the calculation mandated by Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn… had he worked every available work day in the year. "Over-compensation alone does not usually justify applying § 910(c) when § 910(a) or (b) may be applied."

[Topics 8.1.1 Disability--Nature of Disability (Permanent v. Temporary)—Generally; 21.3.2 Review of Compensation Order—Review By U.S. Courts of Appeals—Process of Appeals; 22.1 Modification—Generally; 10.2.1 Determination of Pay—Average Weekly Wage in General—Section 10(a); 10.2.4 Determination of Pay—Average Weekly Wage in General—"Substantially the Whole of the Year"]

Dilts v. Todd Shipyards Corp., (Unpublished)(No. 03-71622)(**9th Cir.** 7, 2004).

In this case, the shipbuilder's widow argued that the statutory requirement of approval contained in Section 33(g) is unconstitutional because it permits an employer to withhold approval of settlements which forces a claimant to obtain the benefits of a settlement at the cost of forfeiting the right to compensation. In its summary affirmation of the widow's denial, the court noted that her position was not consistent with the **U.S. Supreme Court's** holding in *Estate of Cowart v. Nicklos Drilling Co.*, 505 **U.S.** 469, 112 S.Ct. 2589 (1992).

[Topic 33.7 Compensation For Injuries Where Third-Persons Are Liable--Ensuring Employer's Rights—Written Approval of Settlement]

[ED. NOTE: *This case is provided for informational use only. For a case directly in point on the issue of attorney fees/successful prosecution, see Clark v. Chugach Alaska Corp., ___ BRBS ___ (BRB No. 04-0246)(Nov. 30, 2004), below.**]***

Alegria v. District of Columbia, ___ F.3d ___ (No. 02-7126)(**D.C. Cir.** Dec. 3, 2004).

In this Individuals with Disabilities Education Act ("IDEA") case a denial of attorney fees was upheld. The court stated, "In the absence of clear evidence that Congress intended the IDEA's fee eligibility to be treated differently than other fee shifting statutes, and specifically, to allow awards of attorneys' fees for private settlements, we hold that appellants fail to overcome the presumption that *Buckhannon [Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 523 U.S. 598 (2000)] applies."

[Topic 28.1.2 Attorney's Fees—Successful Prosecution]

Stevedoring Services of America v. Guthrie, (Unpublished)(No. 03-72204)(**9th Cir.** Dec. 16, 2004).

In a memorandum opinion the court found that the ALJ and the Board had correctly applied Section 10(a) to calculate the claimant's AWW. There was no evidence of record that the claimant's employment was seasonal or intermittent. It was undisputed that the claimant had worked 228 days in the 53 weeks preceding his injury, or 87.7% of the total working days.

[Topic 10.2.4 Determination of Pay--"Substantially the Whole of the Year"]

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." See Metropolitan Stevedore Co v. Rambo, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de minimis* award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal,* 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

[Topics 8.2.1 Extent of Disability—No Loss of Wage-Earning Capacity; 8.2.2 Extent of Disability—*De Minimis* Awards; 8.3.1 Permanent Partial Disability—Scheduled Awards—Some General Concepts; 8.3.3 Permanent Partial Disability—Section 8(c)(1) Loss of Use of Arm; 8.4.1 Conflicts Between Applicable Sections—Unscheduled Injuries and Total Disability; 8.9.2 Wage-Earning Capacity—Factors for Calculation; 8.9.3.1 Wage-Earning Capacity--What constitute "actual wages"]

C. Federal District Court Decisions

Radut v.State Street Bank & Trust Co., ___ F.Supp 2d ___ (03 Civ. 7663 (SAS))(S. D. N.Y. Nov. 4, 2004).

Here the court found, as a matter of law, that a marine corrosion and coatings specialist retained as an independent contractor to perform a "steel and coating survey" on a vessel and who worked while the ship was at sea, was a "Sieracki seaman." This case has a good historical discussion of "Sieracki seaman" doctrine.

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

Clayton Williams Energy, Inc. v. National Union Fire Ins. Co. of Louisiana, ___ F.Supp. 2d ___ (Civ. Action No. 03-2980)(E.D. of La. Nov. 2, 2004)

This 905(b) claim addresses choice of law clauses and indemnity issues as they relate to the Texas Oilfield Anti-Indemnity Act (TOIA), Tex. Civ. Prac. & Rem. Code § 127.005. The district court found that "Because the TOIA conflicts with section 905(b) on the particular facts present in this case, the choice of law clause will not be enforced and Texas law does not govern the enforceability of the indemnity agreement."

[Topics 5.2.2 Exclusiveness of Remedy and Third Party Liability—Indemnification; 5.3 Exclusiveness of Remedy and Third Party Liability Indemnification in OCSLA Claims]

Nase v. Teco Energy, Inc., (Unpublished)(Civ. Act. No: 04-0838 Sec. "R"(5))(E.D. La Dec. 8, 2004).

This is the consolidated case of two off-shore workers for the alleged exposure to hazardous, toxic and carcinogenic materials (phosphate and drilling muds/chemicals) allegedly resulting in diagnoses of "bronchitis obliterans organizing pneumonia" (BOOP) and non-Hodgkin's lymphoma. The workers sued in state court. One made claims under the general maritime law and the Jones Act, and alternatively, under the LHWCA. The other alleged that he was a maritime worker entitled to compensation under the LHWCA.

The defendants removed the action to federal court alleging OCSLA jurisdiction, and the plaintiffs are now moving the court to remand the action to state court.

The district court found that some of the events giving rise to the suit occurred on the outer Continental Shelf. While acknowledging that district courts have original jurisdiction over actions governed by OCSLA, the court stated that it must determine whether the claims "arise under" federal law. The court stated that in the absence of a clear statement of law by the **Fifth Circuit**, it finds that removal under the OCSLA is not proper when maritime law governs the plaintiff's claim and one of the defendants is from the state of suit, as here. As to the defendant from the state of suit, the defendants argued that that defendant is immune from the intentional tort claim (that is a part of the litigation) under the LHWCA. While finding that the defendants are correct with regard to the LHWCA (LCHWA bars recovery for the intentional tort of another person in the same employ.), the court noted that the claimant argued only in the alternative that he had LHWCA coverage. The primary allegations were under the maritime law, Jones Act and state law. Because there is a possible cause of action in intentional tort against the in-state defendant that is not barred by either state worker's compensation, the court found that there was not fraudulent joinder. Under the rules of joinder, the court allowed the second worker's claim to remain joined and thus both cases were remanded to state court.

[Topics 60.3.1 Longshore Act Extensions--Outer Continental Shelf Lands Act—Applicability of the LHWCA; 60.3.2 Longshore Act Extensions--Outer Continental Shelf Lands Act—Coverage—(Situs, Status, "But for" Test)]

D. Benefits Review Board Decisions

Baker v. Mason Construction Co., (Unpublished)(BRB No. 04-0220)(Nov. 18, 2004).

The Board vacated the ALJ's finding that the claimant was a member of a crew and therefore not entitled to coverage under the LHWCA. The Board noted that the ALJ had found that the claimant performed deckhand duties and was subject to perils of the sea and the wind and the waves in his employment as a journeyman pile driver working on a mooring dolphin (free-standing set of pilings driven into the harbor bottom to support a mooring bollard.) The parties had stipulated that the claimant was employed and ultimately injured upon actual navigable waters. The Board observed that "While the [ALJ] appropriately noted the deckhand duties claimant performed, he did not discuss the nature of the project on which claimant worked, which was a pile driving project to salvage and rebuild a wharf's downstream 'mooring dolphin.' **Ninth Circuit** precedent interpreting *Chandris* [, *Inc. v. Latsis*, 515 **U.S.** 347 (1995)] requires an injury into whether claimant's work in support of this project was 'inherently vessel-related' or 'primarily sea-based.'" The Board further noted that the ALJ did not discuss whether the moored nature of the work barge affected the inquiry into crew member status.

[Topic 1.4 Jurisdiction/Coverage—LHWCA v. Jones Act]

Clark v. Chugach Alaska Corp., ___ BRBS ___ (BRB No. 04-0246)(Nov. 30, 2004).

The issue at hand is whether *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 523 **U.S.** 598 (2001), affects the Board's consistently held position that where an employer did not pay benefits within the 30-day period of receiving written notice of a claim, but ultimately did so at the district director level, a claimant's attorney is entitled to a fee Under Section 28(a).

The Board found that an employer's liability for a claimant's attorney fee is grounded in the plain language of Section 28 and the applicable administrative procedures under the LHWCA; not in whether or not a compensation order has been issued. There need not be a "prevailing party" in order for an attorney fee to be due; there simply has to be a "successful prosecution." Under the plain language of Section 28(a), an employer is liable for a fee if it declines to pay any benefits within 30 days after receiving written notice of the claim from the district director, and the claimant's attorney's services thereafter result in successful prosecution of the claim. The Board found that under the statutory framework, a "material alteration" of the parties' relationship occurred when the employer paid the benefits sought. Thus, when the claim was paid no order of approval or dismissal was necessary in the administrative forum to effect this result. The Board noted that even if *Buckhannon* principles did apply, this material alteration would be sufficient to satisfy the requirement of a "material change" in the legal relationship between the parties as the claimant obtained a sanctioned result when the claim was resolved via the LHWCA's informal procedures.

The Board distinguished *Buckhannon*, which was filed in a judicial forum, in an Article III court, and then rendered moot by subsequent legislative action. Thus, in *Buckhannon*, there was no success in the judicial forum and no "judicially sanctioned" alteration of the parties' relationship, and no prevailing party.

[Topic 28.1.2 Attorney's Fees—Successful Prosecution]

Opiopio v. United States Marine Corps, (Unpublished) (BRB No. 04-0340)(December 7, 2004).

In this suitable alternate employment case, the Board found that the ALJ exceeded her authority by ordering the employer to provide the claimant with a job that complies with the doctor's work restrictions and to enforce the restrictions. Additionally, the Board held that, contrary to the ALJ's suggestion that the employer provide the claimant with vocational rehabilitation assistance if it was unable to provide a suitable light duty position, the employer is not obligated under the LHWCA to offer the claimant

vocational rehabilitation. Since Section 39(c)(1)-(2) and the implementing regulations, 20 C.F.R. §702.501 et seq., authorize the Secretary of Labor to provide for the vocational rehabilitation of permanently disabled employees in certain circumstances, ALJs do not have the authority to provide vocational rehabilitation.

[Topics 8.2.4.--Extent of Disability—Partial Disability/Suitable Alternate Employment; 19.3 Procedure—Adjudicatory Powers; 39.3 Administration and Vocational Rehabilitation—Secretary's Authority to Direct Vocational Rehabilitation]

Hallman v. CSX Transportation, Inc., (Unpublished Order)(BRB No. 04-0731)(November 23, 2004).

This bifurcated coverage issue claim involves the employer's appeal of an ALJ's finding that there was situs and status, and that there would be a subsequent decision and order on other issues. The Board first noted the Supreme Court's three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 **U.S.** 271 (1988) ('collateral order doctrine"). The Board then granted the claimant's motion to dismiss the employer's appeal, noting that the issues of status and situs were not collateral to the merits of the action and could be addressed once a final decision and order granting or denying benefits was issued. Additionally the Board was not persuaded by the employer's argument that the issues presented are important and should be decided now, because the ALJ's decisions have created uncertainty for its risk management procedures, i.e. liability under the LHWCA versus under the FELA. Finally, the Board rejected the employer's contention that it should decide this appeal because the Board has previously decided interlocutory appeals of coverage issues. "The fact that the Board has the authority to decide interlocutory appeals does not require that we do so as it is desirable to avoid piecemeal review."

[Topics 19.3.6.1 Procedure—Adjudicatory Powers—Issues at Hearing; 21.2.5 Review of Compensation Order—Interlocutory Appeals]

Fortier v. Electric Boat Corp., ___ BRBS ___ (BRB No. 04-0351)(Dec. 14, 2004).

In this suitable alternate employment case, the ALJ determined that only the security guard positions listed in the employer's labor market survey might constitute suitable alternate employment. Nevertheless, he determined that as the claimant, despite the exercise of due diligence, has been unsuccessful in obtaining any form of suitable alternate employment, she was totally disabled. The Board upheld the ALJ's determinations, finding that although he did not mention *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(**2nd Cir.** 1991) by name, he had adhered to the

appropriate standards in addressing the issue of suitable alternate employment set down by the **Second Circuit** for this claim which was within that circuit. The ALJ had noted that there was evidence not only that the claimant had sought employment at some of the places noted on the employer's job market survey, but that she had also sought employment on her own, including on two occasions, obtaining employment through a temporary agency only to find in each instance that after one day, the work was too physically demanding for her post-injury condition.

[Topic 8.2.4.1 Extent of Disability—Burdens of Proof; 8.2.4.9 Extent of Disability—Diligent search and willingness to work]

Marmillion v. A,M.E. Temporary Services, (Unpublished)(BRB No. 04-0272)(Dec. 13, 2004).

This is a Section 33(g) case wherein the claimant alleges on appeal that the strict guidelines of 33(g) should not bar his claim. Claimant worked for a temporary service company who had contracted his services to a company that loaded and unloaded grain barges. Following an injury, claimant's immediate employer paid some benefits and a LHWCA claim was filed. Subsequently benefits ceased and employer's counsel informed claimant's counsel that the carrier had gone out of business and that the employer did not have reserves in place to make further payments to the claimant: "I wish I could be of more help, but I am afraid that your clients have little recourse of recovery, particularly if they are asserting maritime claims which are not covered by the Louisiana Insurance Guaranty Association statute."

Subsequently claimant filed a Jones Act, general maritime law action and 905(b) action. Included as a defendant was the owner of a tug who had chartered the tug to the employer and barge loading company for use in maneuvering grain barges. The tug company settled for $1,500. The maritime suit resulted in a dismissal of claimant's case. Prior to the settlement against the tug company, claimant's attorney and employer's attorney had discussed settling the LHWCA matter. Claimant contends that at some point he was notified that there was still LHWCA insurance coverage for this claim.

The ALJ dismissed the claim on Section 33(g) grounds. The Board has now remanded the matter stating that the ALJ must first explicitly determine whether the tug company was potentially liable to both the claimant and the employer for the injury in accordance with Section 33(a). The Board noted that the employer bears the burden of producing evidence on this issue as Section 33(g) is an affirmative defense.

The Board rejected the claimant's specific contention that the employer's alleged "bad faith" in advising him that the carrier was out of business and that the employer could not pay compensation due to a lack of reserves should preclude the employer's reliance on Section 33(g). Additionally the Board noted that the doctrine of equitable estoppel did not apply. This doctrine prevents one party from taking a position

inconsistent with that which it took in an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. To apply this doctrine to claims under the LHWCA, the Board noted that four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended: (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 29(CRT) (9th Cir. 1996), *vacated and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 **U.S.** 121, 31 BRBS 54(CRT) (1997).

The Board found that although the claimant contended that he filed his lawsuits in response to his inability to obtain compensation from his employer and/or carrier, the employer's correspondence with the claimant was insufficient to establish that the employer intended that the claimant take this action.

The Board also did not accept the claimant's contention that it would have been pointless to attempt to obtain the carrier's written approval of the settlement with the tug company because he had been advised that the company was out of business. The Board noted that when an carrier is out of business, the employer stands responsible. The Board further noted that even though the employer's attorney had stated that the employer did not have the reserves to pay benefits, at some point after the claimant filed suit against the tug company, it appears that the claimant was informed that there was insurance coverage for his claim and the parties discussed a settlement of the LHWCA claim.

Finally, the Board rejected the claimant's contention that Section 7(h) preserves his entitlement to medical benefits that accrued prior to the settlement with the tug company. *See Esposito v. Sea-Land Services, Inc*., 36 BRBS 10 (2002) (§ 7(h) does not preclude the applicability of the § 33(g)(1) bar to both compensation and medical benefits.); *Wyknenko v. Todd Pacific Shipyards Corp*., 32 BRBS 16 (1998)(Smith, J., dissenting.)(§ 7(h) does not support a conclusion that this holding is inapplicable to medical benefits.).

[Topic 33.7 Compensation for Injuries Where Third Persons are Liable--Ensuring Employer's Rights—Written Approval of Settlement; 33.7.3 Involvement of the Employer in Third-Party Settlements; 33.7.4 Medical Benefits]

Darling v. Bath Iron Works Corp., (Unpublished)(BRB No. 04-0285)(Dec. 17, 2004).

In this psychological injury case the Board made it clear that without Congressional action, it has no plans to deviate from using the general causation standard ["arises out of and in the course of employment"] for psychological injury cases as well as for physical injury cases. The employer had suggested that the Board adopt the "clear and convincing" standard codified by the Maine legislature. In rejecting this suggestion

the Board noted that the general standard for establishing a prima facie case of causation pursuant to Section 20(a) is longstanding and well recognized.

[Topic 20.5.1 Presumptions—Application of Section 20(a)—Causal Relationship of Injury to Employment]

Cheetham v. Bath Iron Works Corp., ___ BRBS ___ (BRB No. 04-0338)(Dec. 20, 2004).

The Board found that the ALJ acted properly in finding that the employer's failure to request earnings information on the specified form precluded application of Section 8(j) although the ALJ also found that the claimant intentionally and willfully misrepresented his earnings. In this case the employer had used a State of Maine form, which a state workers compensation claimant is required to fill out every 90 days. The Board compared the LS-200 form prescribed by the Director with the State of Maine form and found them dissimilar in material respects. The LS-200 requires separate reporting of earnings from employment and self-employment; it requires specific information about each type of earnings, and defines earnings to include revenue received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested. The Maine form is silent as to the definition of "pay or other benefit." More importantly, the Maine form states that the claimant's benefits may be "discontinued," whereas the longshore form states that benefits may be forfeited." Finally, the longshore form warns of criminal penalties for fraudulent representations concerning earnings, and the Maine form does not contain any similar provisions. The Board found it significant that the Maine form did not warn the claimant that his longshore benefits were at risk for failure to comply with the reporting requirement, the result which the employer sought .

[Topic 8.12.1 Obligation To Report Work—Generally]
Jackson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0629)(December 20, 2004).

This is an Order on Motion for Reconsideration of 38 BRBS 39 (2004)(In order for a "tender" to be valid pursuant to § 28(b), such that employer can avoid fee liability, it must be "an offer to pay, expressed in writing, without any conditions attached thereto." As employer's purported tenders were conditioned on claimant's accepting a stipulation, the Board held that employer did not tender compensation within the meaning of § 28(b). In the Motion for Reconsideration, the employer contended that the Board's decision was contrary to its unpublished decisions in *Boyd v. Newport News Shipbuilding & Dry Dock Co*., (BRB No . 02-0607)(May 22, 2003), and *Jenkins v. Newport News Shipbuilding & Dry Dock Co.* (BRB No. 01-0870)(Aug. 8, 2002).

The Board rejected this contention, finding that the just cited cases were factually distinguishable from the case now before it. Citing to *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990), the Board noted at *Boyd* and *Jenkins* demonstrate the soundness of the principle that unpublished Board decisions generally should not be cited

or relied upon by the parties in presenting their cases. "[A]s the Board's decisions therein are based on specific facts, whereas the decision in Jackson resolved an issue of law. That unpublished cases are more readily available does not lessen the validity of the Board's statement in *Lopez*."

[Topic 21.1.2 Review of Compensation Order—Composition and Authority of BRB—Grant of Authority; 21.2.1 Board Appellate Procedure—Advisory Opinions Not Permissible; 28.2.2 Attorney Fees—Employer's Liability--Tender of Compensation]

E. ALJ Decisions and Orders

F. Other Jurisdictions

Love v. AAA Temporaries, Inc. ___ So.3d ___ (No. 2003 CA 2735)(La. App. 1 Cir. Nov. 10, 2004).

In this procedural matter, a plaintiff temporary worker filed suit against the agency assigning the worker and the company employing the worker, for injuries sustained while working as a deckhand on a barge. A finding of the company's tort liability was contingent upon a determination of whether it possessed LHWCA coverage under Section 4 at the time of the accident. The appellate court found that although tort liability was contingent on whether there was coverage at the time of the accident and that this determination was pending on appeal, the trial court still retained jurisdiction to determine the issue of liability.

[Topic4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability]

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

Amerault v. Intelcom Support Services, Inc, (S. Ct. of Guam Case No. CVA03-007)(2004 Guam LEXIS 27 (Supreme Court of Guam Dec, 20, 2004).

In this worker's compensation case the court noted that it would consider as persuasive case law interpreting provisions of the LHWCA that are similar to provisions of Guam's worker's compensation law. It's rationale was that the LHWCA was modeled after the New York statutory scheme regarding workers' compensation. *Spencer-Kellogg &Ssons, Inc. v. Willard*, 190 F.2d 830, 832 n.1 (**3rd Cir.** 1951). Thus, it looked to LHWCA case law to interpret "compensation" and "medical benefits."

[Topic 1.1 Jurisdiction/Coverage—Generally]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Mining Energy, Inc. v. Director, OWCP [Powers]*, ___ F.3d ___, Case No. 02-2259 (4th Cir. Dec. 16, 2004), the court dismissed Employer's appeal as untimely where Employer filed a petition for review with the court on October 28, 2002, which was 151 days after the Benefits Review Board (Board) denied relief requested by Employer on reconsideration by order dated May 30, 2002.

The court noted that, under 33 U.S.C. § 921(c), a petition for review must be filed within 60 days of the date the Board issues its decision. Employer maintained that it did not have *actual* notice of the May 2002 order until September 23, 2002, "when it received notification from the Department of Labor . . . regarding payment of benefits." Indeed, the court noted that Employer was not properly served with the Board's May 2002 order. Employer argued that a Board decision is not properly served under Section 921(c) "until and unless it has been both filed with the Board *and* properly served on the parties via certified mail, or until the party has received actual notice." (italics in original).

Citing to the plain language of the regulations at 20 C.F.R. § 802.410(a), the court held that the 60 day period for filing a petition for review commences to run "when a Board decision is *filed* with the Clerk of the Board," without regard to whether the parties receive *actual* notice of the decision. As a result, the appeal was dismissed as untimely. In so holding, the court stated that "[o]ur conclusion on this point does not negate the seriousness of the Board's failure to properly conduct its affairs, nor our disapproval of it."

[**actual receipt of Board decision not required to commence appeal period**]

In *Westmoreland Coal Co. v. Amick*, Case No. 04-1147 (4th Cir. Dec. 6, 2004) (unpub.), the court rejected the Board's holding that the three year limitations period set forth at 20 U.S.C. § 932(f) and 20 C.F.R. § 725.308(a) does not apply to subsequent claims filed under 20 C.F.R. § 725.309. In so holding, the court noted that "[n]either the statute nor the regulation . . . makes any distinction between initial and duplicate claims."

The court noted that the duplicate claim was filed in March 2000 such that Employer would have to establish that a diagnosis of total disability due to pneumoconiosis was communicated to the miner before March 1997 in order for the claim to be time-barred. The court then reviewed the miner's testimony and concluded that no communication triggering the three year limitations period had been demonstrated.

[**three-year statute of limitations applies to multiple claims**]

B. Benefits Review Board

In *Tucker v. Director, OWCP*, 23 B.L.R. 1-__ (Nov. 23, 2004), the Board vacated an award of benefits and denied a multiple divorced survivor's claim under 20 C.F.R. § 725.309(d) (2001) where "Claimant's prior claim was denied solely because the evidence did not show that she was dependent on the miner at the time of the miner's death." The Board noted that "dependency" is determined based on the "factual situation prior to the miner's death" such that "there is no opportunity for the dependency relationship to change after the miner dies." As a result, the Board concluded that the survivor's multiple claim must be denied.

[**multiple survivor's claim under 20 C.F.R. § 725.309**]