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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 164
March - April 2003

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

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I. Longshore

A. United States Supreme Court Opinions

Norfolk & Western Railway Co. v. Ayers, ___ U.S.___ (March 10, 2003)(No. 01-963).

The Court held that former employees can recover damages for mental anguish caused by the "genuine and serious" fear of developing cancer where they had already been diagnosed with asbestosis caused by work-related exposure to asbestos. This adheres to the line of cases previously set in motion by the Court. *See Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997)(When the fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear.) The Court noted that the railroad's expert acknowledged that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the claimants' expert that some ten percent of asbestosis suffers have died of mesothelioma. Thus, the Court found that claimants such as these would have good cause for increased apprehension about their vulnerability. The Court further noted that the claimants must still prove that their asserted cancer fears are genuine and serious.

[ED. NOTE: Mesothelioma is not necessarily preceded by asbestosis.**]**

[Topics 2.2.13 Occupational Disease: General Concepts; 13.1.2 Section 13(b) Occupational Diseases]

B. United States Courts of Appeal

A-Z International v. Phillips, ___ F.3d ___ (No. 01-56689) (9th Cir. March 21, 2003).

Section 27(b) of the LHWCA does not authorize a federal district court to sanction a claimant for contempt for filing a false claim for benefits under the LHWCA. The term "lawful process" is not broad enough to include the filing of a complaint that misrepresents the jurisdictional facts. The Ninth Circuit found that in enacting the LHWCA, Congress expressly provided mechanisms other than contempt sanctions to deal with fraudulent claims before an ALJ. "In interpreting a statute, courts must consider Congress's words in context "with a view to their place in the overall statutory scheme." *Citing Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit went on to note, "The LHWCA has specific provisions that deal with fraud before the ALJ, such as 33 U.S.C. 931(a) and 948.

[Topics 27.3 Federal District Court Enforcement; 31.2 Penalty For Misrepresentation–Prosecution of Claims–Claimant's Conduct]

Norfolk Shipbuilding & Drydock Corp. v. Campbell, (Unpublished)(4th Cir. No. 02-1701)(March 11, 2002).

A modification request was properly raised and reviewed were 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 court found that this claim of mistake was clearly factual in nature–there was disagreement as to the interpretation of the medical evidence.

Additionally, the employer 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.

[Topics 22.1 Modification–Generally; 22.3.1 Requesting Modification–Determining what constitutes a Valid Request;22.3.5 Mistake of Fact]

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

Daniel v. Department of Corr., Mich.(No. 120460)(Mich. Supreme Court)(March 26, 2003).

The Michigan Supreme Court ruled that a worker disciplined for sexual harassment is not eligible for depression-related compensation benefits since the injury was caused by intentional and willful action. The court distinguished intentional and willful misconduct of a quasi-criminal nature from that of gross negligence where a worker can recover despite his responsibility for an injury.

Here a probation officer had propositioned several female attorneys and later alleged that he had felt "harassed." by his accusers as well as by his supervisor who had suspended him.

[ED. NOTE: Since the following Black Lung case involves the OALJ regulation, 29 C.F.R. 18.20, it is mentioned here. For a thorough discussion of this case, see the Black Lung Act portion of this Digest.**]**

Johnson v. Royal Coal Co., ___ F.3d ___ (No. 02-1400)(4th Cir. April 8, 2003).

In this matter, the Fourth Circuit found that the Board incorrectly upheld the ALJ's failure to address admissions and erred in finding that 29 C.F.R. 18.20 (Failure to respond appropriately to an outstanding admission request constitutes admissions) does not apply to the Black Lung Act. The Fourth Circuit further found that, based on a consideration of the analogous Fed. R.Civ. P. 36, an opposing party's introduction of evidence on a matter admitted [via failure to respond to requests for admissions] does not constitute either a waiver by the party possessing the admissions, nor as a constructive motion for withdrawal or amendment of admissions.

[Topics 19.3.6.2 Discovery; 23.2 Admission of Evidence; 23.7 ALJ May Draw Inferences Based On Evidence Presented]

[ED. NOTE: The following Social Security Disability offset case is included for informational value.**]**

Sanfilippo v. Jo Anne B. Barnhart, Commissioner of Social Security, ___ F.3d ___ (No. 02-2170)(3rd Cir. April 10, 2003).

At issue here is how a lump sum workers' compensation settlement will offset the worker's social security disability payments. Here the claimant's Social Security disability insurance benefit was reduced by his workers' compensation benefit. Subsequently the worker settled his workers' compensation claim for a lump sum. The Social Security Administration chose to offset this lump sum by continuing to make the same monthly setoffs until the lump sum amount is reached (a period of 4.3 years). The worker argued that the setoff of the lump sum award should have been prorated over his life expectancy (1,487 weeks). The Third Circuit noted that when an individual's workers' compensation benefits are paid in a lump sum, the Social Security Act requires the Commissioner to prorate the lump sum payment and "approximate as nearly as practicable" the rate at which the award would have been paid on a monthly basis. "In sum, we find nothing irrational about applying a periodic rate received prior to a lump-sum settlement to determine the offset rate that will approximate as nearly as practicable the hypothetical, future period rate of the lump-sum settlement."

Zeigler Coal co. v. Director, OWCP., ___ F.3d ___ (No. 01-3211/3998) (7th Cir. April 18, 2003).

The Seventh circuit found that Section 28(d) of the LHWCA could be used to award fees for medical experts who submitted reports but did not testify. "[T]he text of section 28(d) of the Longshoremen's Act addresses 'the reasonableness of the fees of the *expert* witness' within the context of assessing 'as costs, fees and mileage for necessary witnesses' to an employer against whom attorneys' fees also were assessed." The court rejected the employer's argument that the claimant should only be able to recover the fees of his medical experts if they appear at the ALJ hearing. The court held that, if the medical reports are submitted as evidence before the ALJ, they are recoverable as costs.

[Topic 28.6.7.2 Attorney's Fees–Claimant's Costs–Medical Reports and Testimony]

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

Moe v. United States of America, ___ F.3d ___ (No. 02-35198) (Ninth Circuit April 18, 2003).

Here the Ninth circuit held that psychological injury accompanied by physical injury, regardless of the order in which they occur, is within the scope of the Federal Employee's compensation Act (FECA). In the instant case, the federal employee suffered from Post=Traumatic Stress Disorder (PTSD) after someone went on a shooting rampage at a medical facility. The employee's PTSD aggravated her preexisting ulcerative colitis, requiring the removal of her colon. The Ninth Circuit saw no reason for the chronological order of physical and psychological injuries to impact FECA's scope.

[Topic 2.2.4 Definitions–Physical Harm as an Injury]

Newport News Shipbuilding & Dry Dock Co. v. Ward, ___ F.3d ___ (No. 00-1978) (4th cir. April 14, 2003).

Newport News Shipbuilding & Dry Dock Co. v. Winn, ___ F.3d ___ (No. 00-1815) (4th Cir. April 14, 2003).

Newport News Shipbuilding & Dry Dock Co. v. Pounders, ___ F.3d ___ (No. 00-1321) (4th Cir. April 14, 2003).

Newport News Shipbuilding & Dry Dock Co. v. Cherry, ___ F.3d ___ (No. 00-1279) (4th Cir. April 14, 2003).

In these Section 8(f) claims, the employer failed to satisfy the contribution element and, therefore, the employer was not entitled to Section 8(f) relief.

In *Ward*, the Fourth Circuit defined the "contribution element" of Section 8(f) criteria as follows:

> "...Third, [the employer must affirmatively establish] that the ultimate permanent partial disability materially and substantially exceeded the disability that would have resulted from the work-related injury alone in the absence of the pre-existing condition."

The Fourth Circuit noted that an employer can satisfy the contribution element only if it can quantify the type and extent of disability the employee would have suffered absent the pre-existing disability. (In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury.) "The quantification aspect of the contribution element provides an ALJ with 'a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater' than the disability the employee would have suffered from the second injury alone. *Citing Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Harcum)* 8 F.3d 175 at 185-86 (4th Cir. 1993), aff'd on other grounds, 514 U.S. 122 (1995)..

The court noted, "Importantly, in assessing whether the contribution element has been met, an ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Citing Direcotr, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Carmines)* 138 F.3d 134 at 140 (4th Cir. 1998).

In Ward, the doctor's assertions were generalized and his overall conclusions lacked any supporting explanation. The court found that in particular, his statement that the claimant would have been able to "return to light duty Shipyard work" if he had suffered only one of his back injuries, "is conclusory and lacks evidentiary support." Simply noting that an earlier injury rates a minimum 5% permanent disability rating under the AMA Guides, fails to assess the level of the claimant's disability that would have resulted from the later injury alone.

In *Winn*, the Fourth Circuit again found that merely subtracting the extent of disability from the extent of the current disability is "legally insufficient under *Carmines* to establish that a claimant's preexisting disability is materially and substantially greater than the disability due to the final injury alone. (The Fourth Circuit took a similar tact in *Cherry*.) Also, the Fourth Circuit noted that another medical opinion which merely states that if the claimant had not been a smoker, his disability would have been "much less" is also legally insufficient since this opinion does not attempt to quantify the level of impairment that would result from the work-related injury alone, as is required by *Harcum*.

In *Ponders*, the Fourth Circuit noted that the competing policy goals problem of Section 8(f) "is exacerbated by the fact that the adversarial system breaks down to a degree with regard to Section 8(f) claims." The court noted that, "The evidentiary hearing in such cases may involve only the employer and the claimant...It is only after the initial hearing is concluded that the Director,...--the person with the interest in protecting the integrity of the special fund–enters the picture. The record made at the original hearing may as a consequence be tilted in favor of Section 8(f) relief." In

Ponders, the court acknowledged the difficulty which confronts a doctor called upon to make the assessment required by *Carmines* in a case involving successive lung diseases."The difficulty of making the assessment in isolated cases, however, does not compel us to adopt a different rule." n. 2.

[Topic 8.7.6 Special Fund Relief–In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone]

C. Benefits Review Board Decisions

Boone v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB Nos. 02-0414 and 02-0414A) (March 5, 2003).

In this coverage case, the employer alleges that the ALJ used an overly narrow definition of the term "office" to determine that the claimant was not excluded from coverage pursuant to Section 2(3)(A) of the LHWCA. The Board noted that in Williams v. Newport News Shipbuilding & Dry Dock co., 47 F.3d 1166, 29 BRBS 75(CRT)(4th Cir. 1995)(table), vacating 28 BRBS 42 (1994), the Fourth Circuit held that the ALJ failed to consider "the ultimate questions whether Petitioner's duties were exclusively clerical and performed exclusively in a business office." In its previous decision on reconsideration in the present case, the Board agreed with the Director's position that the legislative history regarding Section 2(3)(A) indicated that the term "office" modified the term "clerical," and that only clerical work performed exclusively in a business office was intended to be excluded. On remand, the ALJ had found that while the term "business office" was not defined by statute or pertinent case law, it was generally understood to be an enclosed or semi-enclosed area which was likely to be characterized by the presence of desks, chairs, telephones, computer terminals, copy machines, and perhaps book shelves. The ALJ found that this contrasted with a warehouse, which is a large open area where supplies are received, stored and dispensed. In the instant case, the Board found that these determinations by the ALJ were rational.

The ALJ next found that the claimant's main work area in the instant case was in a warehouse and that computer work, telephoning, copying and other traditional business office functions would not have been performed in that area. Thus, the ALJ concluded that the claimant did not work exclusively in a business office. The ALJ based this finding on the photographs submitted by employer, claimant's affidavit, and claimant's testimony at the hearing, all of which he found were uncontradicted. The employer contended that the claimant's work area should be characterized as a "rolling business office." However, the Board further noted that the legislative history of Section 2(3)(a) reveals the intent to exclude employees who are "confined physically and by function to the administrative areas of the employer's operations." See 1984 U.S.C.C.A.N. 2734, 2737. The Board noted that the ALJ considered the function of the claimant's work area and concluded that it was a warehouse floor and not a "business office," and found that this finding was rational and supported by substantial evidence.

[Topic 1.11.7 Jurisdiction–Exclusions to Coverage: Clerical/secretarial/security/data processing employees]

Dilts v. Todd Shipyard Corp., (Unpublished)(BRB No. 02-0434)(March 12, 2003).

The Board found that a claimant can not dodge the Section 33(g) requirement of written approval from the employer by alleging that the third-party settlements were de minimis and therefore could not prejudice the employer.

[Topic 33.7 Ensuring Employer's Rights–Written approval of Settlements]

Goicochea v. Wards cove Packing Co., ___ BRBS ___ (BRB No. 02-0439)(March 13, 2003).

The Board held that an ALJ cannot rely upon the Federal Rules of Civil Procedure to dismiss a claim based upon the claimant's failure to comply with the multiple orders issued by an ALJ. The ALJ must consider the applicability of Section 27(b) to the facts before him/her. "As claimant's failure to execute and deliver an authorization releasing his INS records to employer was in direct noncompliance with [the judge's] orders, it constitutes conduct which should be addressed under the procedural mechanism of Section 27(b). Rather than dismissing claimant's claim, the [ALJ] must follow the procedures provided for in Section 27(b) of the Act." The employer had cited Section 18.29(a)(8) of the OALJ regulations, 29 C.F.R. § 18.29(a)(8), as a source of authority for the ALJ's decision to dismiss the claimant's claim. An ALJ's authority in general to dismiss a claim with prejudice stems from 29 C.F.R. § 18.29(a), which affords the ALJ all necessary powers to conduct fair and impartial hearings and to take appropriate action authorized by the Federal Rules of Civil Procedure. See Taylor v. B. Frank Joy Co., 22 BRBS 408 (1989). "As Section 27(b) of the Act is a 'rule of special application' which addresses the issue presented on appeal, however, the OALJ regulations do not apply." 29 C.F.R. §18.1(a).

[Topics 27.3 Federal District Court Enforcement; 19.3.3 Procedure–Adjudicatory Powers–Dismissal of Claim]

Ezell v. Diret Labor Inc., ___ BRBS ___ (BRB No. 00-0478)(March 17, 2003).

In this status issue case, the Board held that a claimant's travel by boat to and from his worksites on 53 percent of his days prior to his injury is sufficient to establish that his presence on navigable waters was not transient or fortuitous.

Here, the claimant, by virtue of his employment, was transported by boat for 18 of the 34 days (53 percent) he worked pre-injury and performed more than eight percent of his total work from

barges located on navigable water. Most of his work was performed on a fixed platform replacing creosote boards and in pipe threading. The claimant was required to regularly travel by boat, 45 minutes each way, to specific jobs assignments during the course of his day and as part of his overall work The claimant maintained that the Fifth Circuit in *Bienvenu v. Texaco*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*), did not intend to exclude from coverage a worker, like himself, who was routinely transported to a worksite over water and was injured during such transport.

In reaching its holding the Board distinguished this case from *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), where that claimant was using water transportation to commute to his job. In contrast, the claimant in the instant case was already at work when required by his employer to travel by water to his work assignment. He was given this assignment on a regular basis, and thus his presence on the water was not merely incidental to his employment. Rather, claimant's presence on the boat involved a significant portion of his day and was a necessary part of his overall employment. Unlike *Brockington*, claimant was not merely commuting to work. In addressing *Bienvenu*, the Board relied on its opinion in *Ezell v. Direct Labor Inc*., 33 BRBS 19 (1999)("While *Bienvenu* rules out coverage for employees who are transiently and fortuitously on navigable water at the time of injury, it does not hold that a worker injured on navigable water during the course of his employment should be denied coverage under the Act if he is regularly required by his employment to travel by boat over navigable water, as well as where he performs some work on a vessel.").

[Topic 1.6.1 Jurisdiction–Situs–"Over Water"]

Hargrove v. Coast Guard Exchange System, ___ BRBS ___ (BRB No. 02-0757) (March 28, 2003).

Here the Board held that active duty military personnel are excluded from coverage under the Nonappropriated Fund Instrumentalities Act (NFIA). The claimant, while on active duty in the United States Coast Guard, sustained a low back injury during the course of his part time, off-duty, employment as a sales clerk at the Coast Guard Exchange Mini Mart.

The claimant had argued that nowhere in the statute are active military personnel in their off-duty hours excluded from the definition of "employee" under the NFIA. Further, the claimant also argued that the dropping of the word "civilian" from 5 U.S.C. §8171(a) is indicative of Congressional intent to include military personnel who work for nonappropriated fund instrumentalities in their off-duty hours. However, the Board found that the deletion of the word "civilian" was not intended to include military personnel within the coverage of NFIA. Rather, the annotation to Section 8171 states that the word "civilian" was dropped from Section 8171(a) as it was determined to be unnecessary, since "the definition of 'employee' in Section 2105 includes only civilians." See Annotation to 5 U.S.C.A. §8171 (West 1986); see also 5 U.S.C. §2105(a). The Board also noted that "the implementing regulations of the various branches of the military, as well as the lone-standing position of DOL, explicitly speak to this issue and cannot be ignored."

[Topic 60.4.1 Nonappropriated Fund Instrumentalities Act–Applicability of the LHWCA]

Holmes v. Shell Offshore, Inc., ___ BRBS ___ (BRB No.02-0499) (March 31, 2003).

The Board held that a claimant was not in privity with her stepmother and was not bound by the prior finding that her father's death was not compensable. Although the two claims arose out of the same death, raising the same question of compensability, and the same attorney prosecuted both claims, under the law of the circuit, the claimant was not adequately or virtually represented in the prior claim and was free to bring her own claim.

Here, a widow's claim for benefits after the apparent suicide of her husband was summarily dismissed when the ALJ found that the decedent did not suffer any work-related injury or illness prior to taking his own life. The ALJ had found that the widow had failed to invoke the Section 20(a) presumption and that the decedent had willfully intended to take his own life, and therefore Section 3(c) barred the claim for compensation. The widow had failed to respond to the employer's motion for summary decision and to the ALJ's motion to show cause. Thus, the ALJ deemed such failure as a waiver of rights and denied the widow's motion for reconsideration. One year later the decedent's daughter by his first marriage filed a claim for death benefits and the employer filed a motion to dismiss based on the principle of collateral estoppel. Finding the now adult child to stand in privity with her stepmother, the same ALJ dismissed the claim.

On appeal, the Board noted that, in order to determine whether collateral estoppel and res judicata applied, the Board had to determine whether the claimant stood in privity with her stepmother, the decedent worker's widow. The Board found that according to the Fifth Circuit and Louisiana law (case arises within Louisiana), "privity," exists only in three narrowly-defined circumstances. The Board found that of the three concepts of privity, only "virtual representation" would be applicable in the instant case. The Board noted the, according to the jurisprudence, to be "closely aligned," so as to be one's virtual representative, it is not enough to merely show that the party and the nonparty have common or parallel interests in the factual and legal issues presented in the respective actions. It further noted that both the state courts and the Fifth Circuit have narrowly interpreted virtual representation, and that even close familial relationships, without something more, are insufficient to invoke virtual representation.

The Board stated that the concept of privity attempts to define how one party stands, legally, with respect to another. As the concept of virtual representation in the Fifth Circuit requires either express or implied consent to legal representation, and as there was no evidence of either in the instant case, the Board found that virtual representation could not apply, and thus, the claimant could not be held to be in privity with her stepmother.

[Topic 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies–Generally Concepts]

Charles v. Universal Ogden Services, ___ BRBS ___ (BRB No. 02-0511) (April 17, 2003).

Whether a warehouse could be considered an "adjoining area" was the primary issue in this situs determination case. Here a claimant would load boxes of groceries onto a truck at his employer's warehouse adjacent to the Mississippi river in Harahan, Louisiana, then truck the groceries to the Mississippi Gulf Coast some 70 miles away where he would then unload the boxes into containers so that they could be taken to offshore locations. While on the Gulf Coast, he would empty containers of "spoiled" groceries, from containers, back onto his truck and drive the 70 miles back to his employer's warehouse location. While unloading the returns at his employer's warehouse, the claimant injured his back. In denying coverage, the Board found that there was no coverage since the claimant lacked "situs." The Board found that the employer's warehouse was not an "adjoining area" since its location had no functional relationship to the Mississippi River and was too far away from the Gulf coast docks to be considered part of that general area. "The facility functioned as a warehouse from which trucks, not vessels, were loaded. Although near navigable waters, neither employer's business nor surrounding properties had facilities on the water for loading, unloading, building or repairing vessels." In reaching its decision, the Board cited both *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th cir. 2002)(Whether a site is an "adjoining area" is determined not only by geographic proximity to navigable waters, but also by the nature of the work performed there at the time of the injury.) and *Bennett v. Matson Terminals, Inc*., 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982) (Facility was not a covered situs as it was not particularly suited to maritime uses, the site was not as close as feasible to employer's terminal and it was chosen on the basis of economic factors considered by businesses generally.).

[Topic 1.6.2 Situs–"Over land"]

Hansen v. Matson Terminals, Inc., ___ BRBS ___ (BRB No. 02-0606) (April 17, 2003).

This is the "Appeal of the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement." Prior to the submission of the settlement agreement to the claimant and his counsel, the employer received a "rumor" that the claimant was being considered for longshore employment. The employer subsequently contacted the claimant's counsel who, after consulting with the claimant, informed the employer that the claimant might return to longshore employment upon a release from his physician. (The claimant did return to longshore employment on March 25, 2002 as a wharf gang member.) The settlement agreement was thereafter faxed to the claimant's counsel, was signed and returned to employer. The employer's Human Resources Department was unable to verify the claimant's employment status. Subsequently, the employer's two carriers executed the settlement agreement and forwarded it along with the appropriate attachments to the ALJ who issued an Order approving the executed settlement agreement on April 23, 2002..

Later the employer asserted that it became aware, on April 25, 2002, of the claimant's re-

employment and on April 26, 2002, filed a "Motion to Disapprove Settlement Agreement and/or to Reconsider Approval of Settlement." The ALJ denied relief. On appeal, the employer challenged the ALJ's approval of the parties' executed settlement agreement, asserting that the settlement should be set aside as the claimant returned to longshore employment in violation of a term of the agreement.

However, as the Board pointed out, the parties' settlement agreement addresses only the remedy available to the employer should the claimant "return to work as a laborer in the longshore industry after the settlement is approved," and the remedy it provides is not rescission of the agreement but a credit to be applied to any future claim for benefits. The Board noted that "Contrary to employer's position on appeal, the presence of an express right of rescission in a settlement agreement is required in order for employer to protect its interest should a specific contingency arise....The settlement agreement in this case, however, does not specifically provide employer with a right of rescission should some specific event occur prior to approval by the [ALJ]." *Citing Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987). The Board further stated, "Accordingly, as the executed settlement agreement sets forth no express right of rescission for employer and contains no express provision allowing employer to escape from its agreement to pay if claimant were to return to work, we reject employer's contention that the [ALJ] erred in not setting aside the agreement." However, the reader is cautioned that this last statement by the Board may be somewhat misleading. *Nordahl*, which the Board repeatedly cited as authority in this area of the law, specifically addressed an employer's ability to include a provision allowing its escape from an agreement during the *pre-approval period*, not post approval. The Board even notes this distinction in its footnote 6. There is no case law which holds that the parties can contract to rescind a settlement agreement if an event occurs after the settlement has become effective.

Employer also argued that the claimant's return to work was a material breach of the agreement since he represented that he could not return to work as a laborer. However, the Board noted that the agreement provided additional reasons for settlement. Furthermore, the Board noted that the claimant returned to work as a member of a wharf gang, not as a laborer and the employer knew of the claimant's intention to return to work prior to its execution of the agreement. "Finally, employer's argument that claimant's return to work denied it the benefit of the bargain is misplaced since, as noted by the Fifth Circuit in *Nordahl*, settlements are essentially a gamble: claimants gamble, *inter alia*, that the injury will not be as debilitating as the carrier expects, while the carrier gambles, *inter alia*, that claimant will have less earning capacity on the open labor market than they expect or that claimant has applied an overly optimistic discount rate in evaluating his future rights."

[Topics 8.10.6 Withdrawal of Claim/Settlement Agreement; 8.10.8.2 Setting Aside Settlements]

Uzdavines v. Weeks Marine, Inc., ___ BRBS ___ (BRB No. 02-0512) (April 18, 2003).

In determining whether the worker had status under the LHWCA or was covered under the

Jones Act, the Board deferred to the ALJ's rational, factual interpretation that a barge used to dredge navigational channels (either pulled by a tug or moving on spuds) was a "vessel in navigation." Thus the worker was a member of the crew covered by the Jones Act. In determining that the barge was a vessel, the ALJ had relied upon *Bernard v. Binnings Constr. Co., Inc*, 741 F.2d 824 (5th Cir. 1984) and *Tonnesen v. Yonkers Contracting Co., Inc*., 82 F.3d 30 (2d Cir. 1996). In *Bernard*, the Fifth Circuit had considered three factors in determining whether a floating work platform is a vessel: 1) if the structure involved was constructed and used primarily as a work platform; 2) if the structure was moored or otherwise secured at the time of the accident; and 3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. In *Tonnesen*, the Second Circuit applied the second and third *Bernard* factors but disagreed with regard to the first factor (focus on the original purpose for the structure). Instead, the Second Circuit concluded that the inquiry should look to whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident.

The Board also noted the Tonnesen court's conclusion that "[c]ourts considering the question of whether a particular structure is a 'vessel in navigation' typically find that the term is incapable of precise definition," and that except in rare cases, only the trier of facts can determine its application in the circumstances of a particular case.

[Topics 1.4.1 LHWCA v. Jones Act–Generally; 1.4.3 Vessel]

Rogers v. Hawaii Stevedores, Inc., ___ BRBS ___ (BRB No. 02-0816) (April 10, 2003).

In an issue of first impression, the Board held that a claimant may withdraw from a settlement agreement prior to its approval. Citing *Oceanic Butler, Inc., v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), the Board noted that while the LHWCA and the regulations do not explicitly state that the claimant may rescind a settlement agreement prior to its approval, the reasoning of the Fifth Circuit in *Nordahl* that a claimant has such a right is compelling. "The holding that a claimant's agreement to waive his compensation is not binding upon him unless it is administratively approved, either through the settlement process or pursuant to a withdrawal under Section 702.225, is supported by the structure of the Act. Consistent with Sections 15(b) and 16, no agreement by a claimant to waive or compromise his right to compensation is valid until it is administratively approved pursuant to Section 8(i). Thus, claimant may withdraw his agreement at any time prior to approval of the agreement by the [ALJ]."

[Topic 8.10.6 Withdrawal of Claim/Settlement Agreement]

Buck v. General Dynamics Corp/Electric Boat Corp., ___ BRBS ___ (BRB No. 02-0534) (April 24, 2003); *Rondeau v. General Dynamics Corp/Electric Boat Corp.*, ___ BRBS ___ (BRB No. 02-0535)

(April 24, 2003).

At issue in these companion cases was whether the employer was entitled to summary decision as a matter of law where the ALJs concluded that the claimants' work was not integral to the shipbuilding and repair process. The relvant facts concerning the claimants' job duties, as alleged by the employer and accepted by the ALJs are: 1) the only relationship between the claimants' duties and the shipbuilding process was to administer workers' compensation claims for all Electric Boat employees; and 2) the responsibilities of a workers' compensation adjuster at Electric Boat include adjusting workers' compensation claims, using a new computer system, setting up payment schedules, organizing files, and reporting to supervisors. Further, the motions for summary decision averred that claimant Buck did not enter the shipyard to fulfill his job duties, and that Claimant Rondeau entered the shipyard four times to interview supervisors in connection with weekly safety meetings with department and yard supervisors and superintendents.

The claimants contend that their responsibilities resulted in injured employees' being returned to the work force as soon as possible, and thus that their work was integral to the shipbuilding process. The Board noted pertinent case law. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988), *rev'g* 20 BRBS 104 (1987)(*Held*, labor relations assistant was covered under § 2(3)); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT)(1989)(Held, it has been clearly decided that, aside from the specidfied occupations [in Section 2(3)], land-based activity...will be deemed maritime only if it is an integral or essential part of loading or unloading [or building or repairing] a vessel." Coverage "is not limited to employees who are denominated 'longshore' or who physically handle the cargo."); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), *aff'g* 34 BRBS 112 (2000)(Union shop steward covered.). [However, subsequently the Eleventh Circuit observed that the "significant relationship" test for coverage used in Sanders was rejected by the Supreme Court in *Schwalb*.]

The Board found that the claimants' attempt to establish that they interacted with employees and supervisors to the extent the claimants did in *Sanders* and *Marinelli* was not borne out by the portion of their depositions attached to the employer's motions for summary decision. Based on the evidence, the Board found that the ALJs had rationally concluded that they could not infer that the claimants' failure to perform their jobs would eventually lead to work stoppages or otherwise interrupt the shipbuilding and repair activities at the employer's shipyard.

[Topic 1.7.1 STATUS–"Maritime Worker"]

Dickerson v. Mississippi Phosphates Corp., ___ BRBS ___ (BRB No. 02-0547) (April 29, 2003).

In this case involving situs and status, the claimant fell off of a ladder while welding in employer's phosphoric acid plant located about 100 feet from the water's edge. Employer's chemical plant manufactures fertilizer and is on a navigable waterway. The plant takes in phosphoric rock by vessel, converts it into sulfuric acid and then phosphoric acid, and the phosphoric acid is made into

a fertilizer. The fertilizer leaves the plant by rail, truck or barge. The claimant described his job as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. His supervisor stated that the claimant's work required him to perform a lot of steel fabrication work, some expansion work in the plant, some pipefitting, and foundation work for machinery. The claimant conceded that he never loaded or unloaded vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. For two weeks during his employment, the claimant did remove wood pilings from the water's edge.

The Board affirmed the ALJ's finding that the piling removal work was not covered employment as there was no evidence establishing that the removing of the pilings from the water's edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a harbor facility used for such activity. Moreover, the Board found that this case was distinguishable from other cases involving "covered" employees working in loading operations at fertilizer plants, as the claimant's work herein was not integral to the loading and unloading. Thus, the Board upheld the ALJ's determination that the claimant was not an employee covered under the LHWCA.

Turning to situs, the Board determined that the ALJ had correctly found that there was not a covered situs. The Board noted that for coverage, one must look to the nature of the place of work at the moment of injury and that to be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. The Board noted that an "adjoining area" must therefore have a maritime use. It upheld the ALJ's determination that this phosphoric acid plant was solely used in the fertilizer manufacturing process and had no relation to any customary maritime activity. The Board further rejected the claimant's contention that his injury occurred on a covered situs merely because employer's entire facility abuts navigable waters and has a dock area on the property.
The Board noted prior case law distinguishing a plant from its docks when a worker worked solely in the plant.

[Topics 1.6.2 Situs–"Over land;" 1.7.1 Status–"Maritime Worker"]

Stevens v. General Container Services, (Unpublished) (BRB No. 01-0677A)(April 30, 2003).

Here the ALJ's authority to obtain answers to his own interrogatories and thereby discredit the claimant was upheld by the Board. At the hearing, the ALJ had observed that the claimant's demeanor while testifying on direct for an hour indicated severe back pain. However, after a 30 minute break and upon resuming the witness stand, the claimant acted as though he were free of pain. The ALJ later sent the claimant interogatories to elicit whether he had taken pain medication during the break. The claimant answered that he had taken pain medication six hours earlier. From this response the ALJ concluded, in part because of the changed demeanor on the stand that the claimant was not credible about having severe back pain. The ALJ had concluded that the claimant had "simply forgot to resume the demeanor he had earlier employed for the purpose of conveying that he

was in severe back pain." The Board found that the claimant's disagreement with the ALJ's weighing of the evidence is not sufficient reason for the Board to overturn it.

[Topics 23.6 ALJ Determines Credibility of Witnesses; 23.7 ALJ May Draw Inference Based on Evidence Presented;19.3 Procedure–Adjudicatory Powers]

D. Miscellaneous State Court Cases

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

Stavenjord v. Montana State Fund, Mont., ___ Mont. ___ (Mont. S. Ct. No. 01-630)(April 1, 2003).

Citing equal protection arguments, the Montana Supreme Court ruled that it is unconstitutional for workers' compensation rules to treat occupational diseases differently from other job related injuries.

[Topic 2.2.13 Occupational Diseases: General Concepts]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Zeigler Coal Co. v. Director, OWCP [Hawker]*, ___ F.3d ___, Case Nos. 01-3211 and 01-3998 (7th Cir. Apr. 18, 2003), the circuit court upheld the ALJ's finding of complicated pneumoconiosis based on a preponderance of the chest x-ray interpretations by dually-qualified physicians (B-readers and Board-certified radiologists). The ALJ further noted that the biopsy slides revealed progressive massive fibrosis and that there was CT-scan evidence of large opacities.

Moreover, the court held that the expert fees charged by Claimant's physicians were properly assessed against Employer pursuant to 30 U.S.C. § 932(a), which incorporates the cost-shifting provisions at Section 28(d) of the LHWCA. In this vein, the court held that fees of a medical expert may be shifted to Employer, even though the experts submitted medical reports and did not testify.

Finally, the court upheld that ALJ's award of attorneys' fees. Employer maintained that such an award was inappropriate because one of Claimant's counsel stated that he charged higher rates in black lung claims. The court noted, however, that "counsel indicated that he charged this higher rate because of his experience with black lung cases" and the ALJ found this to be "reasonable." The court also upheld the ALJ's award of "overhead costs" for postage and photocopying as "necessary to successfully prosecute this case as the physicians needed a complete copy of the record to provide a written report on Hawker's behalf." In addition, the court held that the ALJ properly awarded fees for time spent defending the fee application and answering interrogatories.

[**complicated pneumoconiosis; attorneys' fees and costs**]

In *Johnson v. Royal Coal Co.*, ___ F.3d ___, Case No. 02-1400 (4th Cir. Apr. 8, 2003), the Fourth Circuit concluded that the Board erred in holding that the regulatory provisions at 29 C.F.R. § 18.20, which address requests for admissions, did not apply to black lung proceedings.[1] Under the facts of the case, Claimant served interrogatories, document production requests, and a request for admissions on Employer. Employer responded and admitted certain issues. However, Employer failed to respond to the following requests for admissions: (1) Claimant had 15 years of coal mine employment; (2) Claimant suffered from pneumoconiosis; (3) the pneumoconiosis arose out of his coal mine employment; (4) Claimant suffered from a totally disabling pulmonary or respiratory impairment; and (5) the impairment was due, at least in part, to his coal workers' pneumoconiosis.

Employer and the Board argued that § 18.20 should not apply to black lung proceedings because it is in conflict with the regulatory provisions at 20 C.F.R. §§ 725.413(a), 725.417(a), 725.421(b)(7) (1999) as well as 20 C.F.R. § 725.463(a) (2002). Employer and the Board further

[1] The ALJ analyzed the claim on the merits and denied benefits without referring to any admissions made by Employer.

maintained that the provisions at 20 C.F.R. §§ 725.450 and 725.455 (2002) are in conflict with § 18.20. The court disagreed and stated the following:

> Having identified no black lung regulations that conflict with OALJ Rule 20, 29 C.F.R. § 18.1(a) mandates that OALJ Rule 20 apply in black lung proceedings. Since OALJ Rule 20 applies in black lung proceedings, and since Royal failed to deny or otherwise respond to petitioner's request for admissions, Royal has admitted that petitioner is entitled to benefits. Only if it could be established that petitioner somehow waived his right to rely on Royal's admissions, or that Royal withdrew or amended them, could Royal avoid liability for the payment of benefits.

Employer and the Board maintained that Claimant waived his right to rely on the admissions because he did not object to Employer contesting the issues of pneumoconiosis or disability causation at the hearing. The Board further noted that Claimant presented evidence on these issues at the hearing. The court, however, declined to find that Claimant waived his reliance on the admissions:

> Although the BRB accurately records petitioner's conduct at the hearing, we reject the BRB's inference that petitioner hereby waived any right to use of the admissions against Royal. First, the bulk of the conduct the BRB cites as demonstrative of waiver occurred *before* petitioner introduced the admissions into evidence. For example, petitioner's 'failure' to object to Royal's contest of the existence of pneumoconiosis or disability causation . . . occurred before the admissions were entered. But thereafter petitioner *did* enter the admissions, thus making them effective. (citation omitted).
>
> The BRB notes as well that petitioner did not object when Royal later introduced evidence on matters 'resolved' by the non-entered admissions, and that petitioner himself presented evidence on matters allegedly admitted. But, based on a consideration of the analogous Fed. R. Civ. P. 36, an opposing party's introduction of evidence on a matter admitted does not constitute either a waiver by the party possessing the admissions, or as a constructive motion for withdrawal or amendment of admissions. (citations omitted). Nor does a party's introduction of evidence on issues overlapping matters admitted by the opposing party constitute a waiver of their right to rely on the admissions. (citation omitted).

As a result, the court reversed the judgment of the Board and remanded the case to the ALJ with instructions to award benefits.

[**admissions under 20 C.F.R. § 18.20**]

In *Clinchfield Coal Co. v. Fultz*, Case No. 02-1107 (4th Cir. Apr. 2, 2003) (unpub.) (J. Motz, dissenting), the court clarified its holding in *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 254 (4th Cir. 2000) by stating that in *Eastern Associated* it "did not find that autopsy evidence of lesions of 1.7 centimeters supported invocation of the irrebutable presumption" of

complicated pneumoconiosis; rather, the court "held that where doctors read the x-ray evidence as showing lesions greater than one centimeter in diameter, autopsy evidence of lesions of 1.7 centimeters did not undermine the x-ray evidence." On the other hand, in *Fultz*, the ALJ found that none of the x-ray studies yielded evidence of complicated pneumoconiosis such that his "equivalency determination" that the 1.2 centimeter lesions on autopsy would equate to a finding of complicated pneumoconiosis by chest x-ray was not supported by the record. In this vein, the court noted that "[t]here was no testimony or medical report or evidence indicating that the lesions discovered on autopsy would be expected on x-ray to yield one or more opacities of greater than one centimeter or that the size of a lesion on autopsy was equivalent or less than the expected size on x-ray." The court further noted that, "[w]hile there may be lesions so large that it is self-evidence that they would have shown as opacities greater than one centimeter on x-ray, we cannot presume that lesions of 1.2 centimeters are so large that there need be no further testimony or evidence as to whether they would have shown on x-ray as opacities of greater than one centimeter."

[**complicated pneumoconiosis**]

B. Benefits Review Board

In *Bateman v. Eastern Associated Coal Corp.*, ___ B.L.R. ___, BRB No. 02-0443 BLA (Mar. 31, 2003), the ALJ found the presence of pneumoconiosis based four positive B-reader interpretations of the studies of record which outweighed the two negative B-reader interpretations. As a result, the Board rejected "employer's assertion that the administrative law judge erred by only relying on the B-reader status of physicians who provided x-ray readings rather than relying on the other qualifications of the physicians who provided x-ray readings."

The Board further upheld the ALJ's reliance on the opinions of Drs. Rasmussen and Bembalkar in finding the presence of pneumoconiosis, where the physicians relied on positive x-ray interpretations, length of coal mine employment, and clinical findings. Moreover, Employer challenged Dr. Rasmussen's finding that coal dust exposure and smoking contributed to Claimant's totally disabling respiratory impairment because Dr. Rasmussen considered general studies on the issue. The Board held that it was proper to accord weight to Dr. Rasmussen's opinion, where the physician noted general studies with regard to the effects of smoking and coal dust inhalation but also considered the specific facts of Claimant's case, including underlying objective medical evidence, in light of the general studies.

On the other hand, the Board held that the ALJ erred in discrediting the opinion of Dr. Renn solely because he was a non-examining physician.

With regard to etiology of the miner's disability, the Board disagreed with Employer's argument that the Fourth Circuit's decisions in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189 (4th Cir. 1995) require that "a claimant cannot satisfy his burden of establishing total disability due to pneumoconiosis if he is totally disabled from a pre-existing nonrespiratory disability." Rather, the Board found that the court in *Hicks* and *Ballard* sought to ensure that "substantial evidence supports a finding that pneumoconiosis, rather than other

health ailments, actually contribute[d] to a claimant's total disability." In this vein, the Board noted that the revised regulation at 20 C.F.R. § 718.204(a) was impermissibly retroactive and did not apply to this case, which was pending on January 19, 2001. *See National Mining Assoc. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

The Board further held that Dr. Bembalkar's opinion regarding the etiology of the miner's total disability was well-reasoned and well-documented. In particular, Dr. Bembalkar opined that "someone who has worked mostly underground in the coal mines for about 40 years, has chest x-ray findings of [c]oal [w]orkers' pneumoconiosis and also has hypoxia requiring supplemental oxygen, has had significant impairment of his respiratory system because of coal mine work."

[**existence of pneumoconiosis; etiology of total disability**]

In *Ramey v. Director, OWCP*, ___ F.3d ___, Case No. 02-1630 (4th Cir. Apr. 14, 2003), the Fourth Circuit upheld the Board's decision to invalidate a settlement agreement between the parties "because the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, in plain and unmistakable terms, forbids the settlement of claims for black lung benefits." The miner's black lung claim had been pending for nearly 22 years and he had received four ALJ decisions during this time. The third ALJ awarded benefits to the miner and, before the Board vacated this award, a total of $100,771 in benefits were paid to the miner by the Black Lung Disability Trust Fund. While on remand to a fourth ALJ, benefits were denied and the miner appealed. While an appeal was pending with the Board, the parties executed a settlement agreement which provided the following:

The settlement required Triple R Coal Company ("Triple R") to pay Ramey $12,000 in exchange for Ramey's agreement (1) to dismiss his claim with prejudice, (2) not to seek modification of his claim, (3) not to file a new claim, and (4) not to authorize anyone else to file a claim on his behalf. In addition, the settlement provided that any attempt by the Department of Labor to recover the $100,771 in benefits that it had earlier paid to Ramey would void the settlement, restoring the parties to the *status quo ante*.

The court found the fact that the Act did not incorporate the settlement provisions at Section 8 of the LHWCA and this finding "on its face, prohibits settlement."

[**settlements prohibited**]