**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 # 220 April 2010*

*Stephen L. Purcell*
*Acting Chief Judge*

*Daniel Sutton*
*Acting Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*
*Senior Attorney*

*William S. Colwell*
*Associate Chief Judge for Black Lung*

*Seena Foster*
*Senior Attorney*

## I. Longshore and Harbor Workers' Compensation Act and Related Acts

### A. U.S. Supreme Court[1]

***Perdue v. Kenny A., et al.*, 130 S.Ct. 1662 (2010).**

Claimants brought suit under 42 U.S.C. § 1983, alleging that foster child services in two Georgia counties were inadequate. Following entry of consent decree, claimants sought attorney fees and costs under that statute's fee-shifting provision. The district court calculated "lodestar" fee, and awarded a 75% ($4.5 million) enhancement to "lodestar" based, *inter alia*, on quality of representation and results obtained. The Eleventh Circuit affirmed. The Supreme Court reversed and remanded.

The Supreme Court held that the calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in "rare" and "exceptional" circumstances where attorney performance is not adequately taken into account in the lodestar calculation, and specific evidence is provided that the lodestar fee would not have been adequate to attract competent counsel. Pp. 1671-1675.

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

The lodestar approach to determining "reasonable" fee has achieved dominance in the federal courts. Although imperfect, the lodestar method has several important virtues. First, it looks to "the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886 (1984); it produces an award that roughly approximates the fee the attorney would have received from a paying client in a comparable case. Second, the lodestar method is readily administrable; and unlike the *Johnson* approach,[2] the lodestar calculation is "objective," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

The Court's prior decisions concerning federal fee-shifting statutes have established six important rules. First, a "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)(*Delaware Valley I*); *Blum*, *supra*, at 897. Second, there is a "strong" presumption that the lodestar fee is sufficient to achieve this objective. *Burlington v. Dague*, 505 U.S. 557, 562; *Delaware Valley I*, *supra*, at 565. Third, although the Court has never sustained an enhancement of a lodestar amount for performance, it has repeatedly said that an enhancement may be awarded in "rare" and "exceptional" circumstances. *Delaware Valley I, supra*, at 565; *Blum, supra*, at 897; *Hensley*, *supra*, at 435. Fourth, "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee," *Delaware Valley I, supra*, at 566, and an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation, *see Dague, supra*, at 562-563; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 726-727 (1987) (*Delaware Valley II*); *Blum, supra*, at 898. Thus, the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors "presumably [are] fully reflected in the number of billable hours recorded by counsel." *Ibid*. Also, the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]]ecause considerations concerning the quality of prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." *Delaware Valley I*, *supra*, at 566. Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. *Dague, supra*, at 561; *Blum, supra*, at 901-902. Sixth, a fee applicant seeking an enhancement must produce "specific evidence" that supports the award, id., at 899, 901, to ensure that the calculation is objective and capable of being reviewed on appeal. Pp. 1672-73.

[2] Notably, the Court contrasted the lodestar method with an "alternative" approach set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which it criticized as lacking objectivity. *Id.* at 1672.

The Court rejected any contention that a fee determined by the lodestar method may not be enhanced in any situation. The "strong presumption" that the lodestar figure is reasonable "may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Pp. 1673-74. The Court treats the quality of an attorney's performance and the results obtained as one factor, since superior results are relevant only to the extent it can be shown that they are attributable to superior attorney performance.

There are "a few" circumstances in which attorney performance is not adequately taken into account in the lodestar calculation, but "these circumstances are indeed 'rare' and 'exceptional,' and require specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'" P. 1674, quoting *Blum, supra*, at 897 (internal quotation marks omitted). First, an enhancement may be appropriate where the method used to determine the hourly rate does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. This may occur if the hourly rate formula takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors. In such a case, the trial judge should adjust the hourly rate based on specific proof linking the attorney's ability to a prevailing market rate. While sometimes attorney's brilliant insights and critical maneuvers matter more than hours worked or years of experience, "[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." P. 1674, n.5, *quoting Blum, supra*, at 898. Second, an enhancement may be appropriate if the attorney's performance includes "an extraordinary outlay of expenses and the litigation is exceptionally protracted." P. 1674. Such an enhancement "must be reserved for unusual cases," since an attorney agreeing to represent a civil rights plaintiff who cannot afford to pay the fees presumably understands that reimbursement is unlikely until the successful resolution of the case. *Id.* In such cases, the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses. Third, an enhancement may be appropriate where an attorney's performance involves exceptional delay in the payment of fees. Compensation for this delay is generally made "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." P. 1675, *citing Missouri v. Jenkins*, 491 U.S. 274, 282 (1989) (internal quotation marks omitted). However, an enhancement may be appropriate where there is an unanticipated delay, particularly if it is unjustifiably caused by the defense. In such a case, the enhancement

should be calculated by applying a method similar to that used for an exceptional delay in expense reimbursement. Enhancements are not appropriate on the ground that departures from hourly billing are becoming more common. Nor can they be based on a flawed analogy to the increasingly popular practice of paying attorneys a reduced hourly rate with a bonus for obtaining specified results. Pp. 1673 - 1675.

In this case, the district court did not provide proper justification for the fee enhancement. It commented that the enhancement was necessary to compensate counsel at the appropriate hourly rate, but the effect was to raise the top rate from $495 to more than $866 per hour, absent any evidence that this rate is appropriate for the relevant market.[3] The court also relied on counsel's extraordinary expense outlays, but did not calculate the amount of the enhancement attributable to this factor. Similarly, the court noted that counsel did not receive fees on an ongoing basis during the case, but did not sufficiently link this to proof that the delay was outside the normal range expected by attorneys who rely on § 1988 for fees, or quantify the disparity. Nor did the court calculate the cost to counsel of any extraordinary and unwarranted delay. Further, the court's reliance on the contingency of the outcome contravenes *Dague, supra*, at 565. Finally, insofar as the court relied on a comparison of counsel's performance in this case with that of counsel in unnamed prior cases, it did not employ a methodology that permitted meaningful appellate review. While determining a "reasonable attorney's fee" is within the trial judge's sound discretion under § 1988, that discretion is not unlimited. The judge must provide a reasonably specific explanation for all aspects of a fee determination, including any enhancement. Pp. 1675 - 1677.

Justices Breyer, Stevens, Ginsburg and Sotomayor concurred in part and dissented in part. Based on a review of the record, they opine that the district court correctly concluded that "the evidence establishes that the quality of service rendered by class counsel … was far superior to what consumers of legal services in the legal marketplace … could reasonably expect to receive for the rates used in the lodestar calculation." The majority's opinion invites a question: "[i]f this is not an exceptional case, what is?" The applicable principles, "including the applicability of abuse-of-discretion review to a District Court's fee determination – require us to affirm the judgment bellow."

[3] Counsel submitted affidavits asserting that the lodestar amount would be insufficient to induce lawyers of comparable skill, judgment, professional representation and experience to litigate this case.

**[Topic 28.6 ATTORNEY'S FEES - FACTORS CONSIDERED IN AWARD (Improper Considerations); Topic 28.6.1 Hourly Rate; Topic 28.6.7 Claimant's Costs]**

## B. U.S. Circuit Courts of Appeals

***Craven v. Dir., OWCP*, __ F.3d __, 2010 WL 1660241 (5th Cir. 2010).**

The Fifth Circuit dismissed for lack of subject matter jurisdiction a longshoreman's appeal of the Board's determination that it lacked jurisdiction to consider his direct appeal of a district director's denial of benefits that bypassed the ALJ.

Craven and his employer disagreed as to the extent of his permanent disability (partial vs. total); after an informal conferences, the district director recommended payment of permanent partial disability benefits. Employer accepted this recommendation, but Craven disagreed. Bypassing the ALJ, Craven filed his appeal directly with the Board, in an attempt to have the Board order the district director to issue a recommendation in his favor.

The court reasoned that by failing to appeal the district director's recommendation to the ALJ, Craven failed to comply with the LHWCA and exhaust his administrative remedies, such that there was no ALJ decision for the Board to review. Craven's attempt to bypass the ALJ was particularly problematic because the LHWCA grants the ALJ the exclusive authority to create an evidentiary record upon which an appeal must be based. Thus, the Board correctly determined that it lacked jurisdiction over his appeal. With no final order from the Board, his present appeal was solely predicated on the director's recommendation letter and informal hearing memoranda, matters over which the Court of Appeals lacked jurisdiction. 33 U.S.C.A. § 921(c); 20 C.F.R. § 802.301(a).

Craven argued that he should be permitted to appeal the issue of attorney's fees directly to the Board as a result of the Fifth Circuit's decision in *Andrepont v. Murphy Exploration and Prod. Co.*, 566 F.3d 415 (5th Cir.2009)(holding that an unfavorable recommendation from the district director on the issue of additional compensation, even if the claimant was later successful on that issue before the ALJ, would preclude recovery of attorney's fees under § 28(b)). On appeal, Craven asserted that the district director erred in issuing an informal memoranda that recommended partial, rather than total, disability. He also argued that the *Andrepont*'s interpretation of § 28(b) violated the Administrative Procedures Act and his constitutional right to due process. Because the court lacked jurisdiction to

hear this appeal, it did not reach the merits of these arguments. The court noted, however, with respect to Craven's challenges to *Andrepont* that one panel of the court cannot overrule the decision of another panel. Finally, even if Craven's argument that *Andrepont* effectively denied him some sort of right to attorney's fees had some merit, his constitutional arguments would not cure the jurisdictional defects caused by his attempt to circumvent the LHWCA's administrative scheme.

**[Topic 21.2.8 Direct Appeals from District Director to Board; Topic 21.3.3 REVIEW BY U.S. COURTS OF APPEALS – Jurisdiction; Topic 28.2.3 28(b) Employer's Liability – District Director's Recommendation]**

***Bollinger Shipyards, Inc. v. Dir., OWCP [Rodriguez]*, __ F.3d __, 2010 WL 1614594 (5th Cir. 2010).**

Agreeing with the Director, OWCP, and the Board, the Fifth Circuit held that an undocumented immigrant who sustained an injury while working as a pipefitter for employer is entitled to benefits under the LHWCA despite his illegal status.

The ALJ concluded that claimant was entitled to benefits pursuant to *Hernandez v. M/V Rajaan*, 841 F.2d 582, amended on rehearing, 848 F.2d 498 (5th Cir. 1988), largely because Bollinger had failed to present any evidence that he was "about to be deported or would surely be deported." The ALJ also did not consider claimant's legal status as a factor in computing compensation, citing *Rivera v. United Masonry*, 948 F.2d 774, 775 (D.C.Cir. 1991). The Board affirmed.[4]

The court rejected Bollinger's assertion that undocumented immigrants are per se ineligible to receive indemnity benefits under the LHWCA, as any such benefits would be based on illegally obtained wages. The court reasoned that the Act broadly defines the term "employee," 33 U.S.C. § 902(3), and specifies that nonresident "aliens" are entitled to benefits in the same amount as other claimants, 33 U.S.C. § 909(g). Further, in reviewing similar federal labor and employment laws, both the Supreme Court and this court have concluded that they provide coverage to undocumented immigrants. The court's interpretation of the LHWCA is also consistent with *Hernandez*, *supra* (undocumented immigrant eligible to bring a §5(b) claim). The court rejected Bollinger's contention that *Hernandez* was distinguishable because it considered whether the claimant's "continuous residency" in the

[4] *See J.R. v. Bollinger Shipyard, Inc.*, 42 BRBS 95, BRB No. 08-0508 (2008), summarized in the December 2008 Recent Significant Decisions Monthly Digest.

U.S. qualified him for LHWCA benefits; the court stated that this argument is based on a portion of *Hernandez* that was later withdrawn on rehearing and that this issue is "immaterial to our holding." Slip. op. at *13, n.26.

The fact that the pipefitter had violated the Immigration Reform and Control Act of 1986 ("IRCA") when he proffered a false Social Security number to obtain employment did not preclude his eligibility for benefits under the LHWCA. In enacting IRCA, Congress forcefully made combating the employment of illegal aliens central to the policy of immigration law. The court's present holding, however, does not in any way undermine the congressional policies embedded in the IRCA. Applying the framework of *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 149 (2002)(concluding that the NLRB's award of backpay to an illegal alien ran counter to policies underlying the IRCA), the Fifth Circuit distinguished the *Hoffman* line of cases on the grounds that: (1) Unlike discretionary backpay under the NLRA, workers' compensation under the LHWCA is a non-discretionary, statutory remedy; (2) unlike the NLRA, the LHWCA is a substitute for tort law, abrogating fault of either the employer or the employee; and (3) awarding death or disability benefits post hoc to an undocumented immigrant under the LHWCA does not "unduly trench upon" the IRCA, as Congress chose to include a provision in the LHWCA expressly authorizing the award of benefits "in the same amount" to nonresident aliens.

Finally, the ALJ's factual findings regarding the worker's entitlement to benefits as a result of his back injury sustained while performing a welding job for employer on a ship were supported by substantial evidence.

Circuit Judge Garwood concurred only in the result, stating that the court was "bound by *Hernandez*" because "[t]he record contains no evidence that Rodriguez is, or was when he was injured in October 2003, or has been at any time since then, 'about to be deported' or 'would surely be deported,' and Bollinger makes no meaningful contention otherwise." Slip. op. at *13, citing *Hernandez*, supra at 500.

**[Topic 2.3 Section 2(3) EMPLOYEE; Topic 8.2.4.7 Partial disability/suitable alternate employment – Factors affecting/not affecting employer's burden – Status as an illegal alien]**

***Nasser v. Dir., OWCP*, No. 09-70706, 2010 WL 1646064 (9th Cir. 2010)(unpub.)**

The Ninth Circuit held that the Board erred by affirming the ALJ's use of an improper methodology for calculating fees, rejected in the Ninth Court's intervening decisions in *Van Skike v. Dir., OWCP,* 557 F.3d 1041 (9th

Cir.2009); *Christensen v. Stevedoring Servs. of Am.,* 557 F.3d 1049 (9th Cir.2009).

"Reasonable fees" under the LHWCA are to be calculated "according to the prevailing market rates in the relevant community." *Blum*, *supra,* at 895. Both *Chrstensen* and *Van Skike* held that*,* because there is no private competitive market for LHWCA attorney's fees, the "relevant community" must be defined more broadly than the LHWCA bar, and a "prevailing market rate" cannot be determined by looking solely at previous LHWCA rate-settings that, in turn, were based on previous LHWCA rate-settings and not on any evidence of prevailing market rates in the relevant community. Here, the ALJ used this invalidated methodology when he rejected attorney's (Eric A. Dupree) evidence of market rates for similarly-experienced attorneys doing work of comparable complexity (consisting of rate surveys and attorney affidavits) and relied instead on past LHWCA awards that were based entirely on prior LHWCA rate-settings. Additionally, in selecting a rate within the range of prior awards, the ALJ improperly considered complexity of the case; complexity does not factor into the selection of a market rate, but is reflected instead in the number of billable hours recorded by counsel (citing *Blum,* 465 U.S. at 898-99; *Van Skike,* 557 F.3d at 1048). Thus, on remand, the ALJ was directed to make appropriate findings regarding the relevant community and the prevailing market rate in accordance with *Van Skike* and *Christensen*. Additionally, the ALJ's reduction of hours expended by Dupree in defending his fee petition was no longer justified, as he has now prevailed on the issue of the Board's hourly-rate methodology.

**[Topic 28.6.1 Hourly Rate]**

***SSA Marine v. Lopez*, No. 08-72267, 2010 WL 1635023 (9th Cir. 2010)(unpub.)**

Claimant filed four claims for compensation alleging industrial injuries to the bilateral shoulders, knees, and elbows. In a short opinion, the Ninth Circuit upheld the Board's affirmance of the ALJ's determinations that SSA was the last responsible employer, that the claim was timely filed, and that the award of attorney's fees was correct. Applying *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co. (Price),* 339 F.3d 1102, 1104-05 (9th Cir.2003), the ALJ found that claimant's work activities with SSA contributed to and aggravated his orthopedic condition sufficiently that SSA was the "last responsible employer." The ALJ also found that claimant did not become aware of the relationship between his disability and his work at SSA until the day he filed his claim. *See* 33 U.S.C. § 912(a). The Board also affirmed the ALJ's alternative finding that, even if the claim were filed untimely, SSA had not shown any prejudice. *See* 33 U.S.C. § 912(d).

**[Topic 2.2.6 INJURY - Aggravation/Combination; Topic 70.3 RESPONSIBLE EMPLOYER - SUCCESSIVE INJURIES AND THE AGGRAVATION RULE; Topic 12.3 NOTICE OF INJURY OR DEATH – AWARENESS – Traumatic Injury; Topic 12.4.3 SECTION 12(d) DECENSES – Employer Not Prejudiced]**

***C & D Prod. Servs. v. Dir., OWCP [Campbell]*, No. 09-60485, 2010 WL 1655320 (5th Cir. 2010)(unpub.)**

The Fifth Circuit upheld the Board's affirmance of the ALJ's decision awarding death benefits based on the worker's death from a heart attack while employed as an offshore mechanic. A heart attack suffered in the course and scope of employment is compensable even though the employee may have suffered from a related preexisting condition. In the case of a heart attack, the injury or accident arises out of the employment when the required exertion producing the injury is too great for the man undertaking the work; and the source of the force producing the injury need not be external. Here, there was substantial evidence that decedent's work on the platform the day of his injury precipitated the heart attack, including evidence showing that he traveled up and down hundreds of feet of stairs and expert medical testimony establishing the requisite causation between that activity and his heart attack. The court distinguished *Ortco Contractors, Inc. v. Charptentier*, 332 F.3d 283 (5th Cir.2003), as in that case the heart attack began the night before, and, unlike Ortco, the Board's decision was supported by expert medical opinion that the strenuous work activities were a precipitating cause of the heart attack. This evidence supports the finding that Campbell's injury occurred in the course of his employment or was caused, aggravated, or accelerated by work conditions.

The Fifth Circuit further upheld the Board's attorney's fee award. In support of its assertion that the awarded hourly rate of $250 is excessive for the geographic area, employer/carrier offered only their own unsupported statements and two administrative decisions awarding $175/hour. These arguments do not demonstrate that the Board abused its discretion in awarding fees considering "the necessary work done," as well as "the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded" in this case. *See* 20 C.F.R. § 702.132. Further, although this court has disfavored the use of quarter-hour minimum billing periods, employer has not shown that the time billed was not actually expended. The court also rejected employer's challenge to counsel's use of "block billing," i.e., describing multiple activities in only one time entry, stating that the Board did not abuse its discretion in finding the entries sufficiently specific to satisfy § 702.132.

**[Topic 2.2.18 Representative Injuries/Diseases – Heart Attack; Topic 28.6.1 Hourly Rate; Topic 28.4.1 ATTORNEY'S FEES – APPLICATION PROCESS - Content Requirements]**

## C. U.S. District Courts

***Fisher v. Halliburton*, __ F. Supp.2d __, 2010 WL 1268097 (S.D.Tex 2010).**

Three plaintiffs who were injured while working as truck drivers in Iraq when their convoys were attacked by insurgents brought various tort claims against government contractors supplying civilian support for the U.S. Army in Iraq. Defendants sought a summary judgment, arguing that the Defense Base Act ("DBA") bars all the claims. The court determined that the reach of the DBA's and the LHWCA's exclusivity provisions vis-a-vis properly alleged intentional torts and fraud claims is a novel issue, which calls for a two-step inquiry: first, whether the plaintiffs' injuries fall within the scope of the Act; and second, whether and to what extent the exclusivity provision of the DBA, 42 U.S.C. § 1651(c), bars all tort suits.

Under step one of its analysis, the court noted that in order for plaintiffs' claims to fall within the scope of the LHWCA, and thus the DBA, they must be accidents or the willful acts of third parties as defined by the statute. 33 U.S.C. § 902(2). The court concluded that "in light of the plain language that Congress specifically chose based on the understanding of the term accident from common usage and as defined by case law-both historical and modern, the court finds that in order to fall within the scope of the DBA, an injury must be an accident-an undesired *and* unexpected event." Slip. op. at *12. Thus, the court concluded tahat:

> "… in order to be an injury covered by the DBA, the harm must result from one of the following: (1) an accidental injury or death-both undesired and unforeseen-arising out of and in the course of employment, or (2) an injury caused by the willful act of a third person directed against an employee caused by the employee's trade or occupation. Under the plain language route, injuries not falling within one of the categories are not covered by the DBA and may be pursued in court through whatever common law torts are available."

*Id.* at *14. (Internal footnote omitted).

The court further held, rejecting the view advocated in a statement of interest filed by the United States, that there is no intentional tort exception to the DBA's exclusivity provision, stating:

> "If courts require that claims meet all of the prerequisites expressly listed in the statute in order for those claims to fall within the scope of the act, then intentional torts by employers against employees would almost never fall within the definition of an 'injury' compensable under the act because they are not accidental. …. And, despite the defendants' and the United States' forecasts of surges in litigation, slippery slopes in defining an accident, and slowdowns in defense contracting, the administration of claims under the Longshore Act and the DBA would not change in any real respect. Claims must qualify for compensation-as they have been required to do over the eighty years since the passage of the Longshore Act-regardless of whether the act is being used as a shield or a sword. Once a claim qualifies for compensation, the act 'completely obliterates the rights at common, civil or maritime law against Employer and fellow employee.' Accordingly, the court holds that there is no exception to the exclusivity."

*Id.* at *16 (internal citation omitted). The court concluded that an interlocutory appeal to the Fifth Circuit was merited with respect to the questions of law raised by this case, i.e. "[w]hether the DBA covers only accidents, how to define an accident under the act, [and] whether the willful act of a third party should be narrowly or broadly construed, or if all the foregoing inquiries should be subsumed in an intentional tort exception, the scope of which must also be determined …." *Id.* at *24.

The court next applied the two-prong "accident" inquiry to the facts of each plaintiff's injury. All claims met the first prong, as there was no indication in the record that defendants desired that any of the drivers be injured or killed in an attack by Iraqi insurgents. As to the "unexpected" prong, the court elaborated that:

> "[F]or the event to be expected, the defendants must have had grounds or reasons to believe that the event was likely to occur. Mere anticipation of or uncertain apprehension regarding the event will not suffice. Therefore, a generalized apprehension or anticipation that driving fuels convoys was dangerous because Iraq was a war zone actively engaged in guerilla-style warfare will not make a specific event expected. In order for the plaintiffs to demonstrate that their damages were not accidental under

> the DBA, they must show that the actual event giving rise to their claims was specifically expected."

Slip. op. at *17.

As to plaintiff Smith-Idol, "[a]t best, the record demonstrate[d] that the defendants may have had a heightened apprehension that convoys … might be attacked …." *Id.* at *18. Thus, the court concluded that this plaintiff's damages occurred as the result of an accidental injury as defined by the LHWCA, and, consequently, the DBA's exclusivity precluded all of his claims, including his claim for fraudulent inducement; granting a summary judgment for defendants as to all such claims.

As to plaintiffs Fisher and Lane, there was a genuine issue of material fact as to whether defendants had grounds to believe it was likely that their convoys would come under attack, and thus defendants have not shown that these events were accidents, such as to constitute compensable injuries under the DBA. The court also rejected defendants' alternative argument that these events qualify as injuries under the DBA because they were willful acts of third parties against plaintiffs because of their employment, reasoning that plaintiffs "were attacked on April 9th, not because they were driving trucks for the defendants, but because they were Americans." *Id.* at *21.

Finally, the court held that all named defendants (Halliburton, KBRI, KBRSI, Brown & Root Services, and SEII) are employers within the meaning of the DBA for the purposes of this case, as plaintiffs have adduced no evidence in response to defendants' motion for summary judgment on this issue to show that defendants are not employers under the Fifth Circuit's relative nature of the work test as articulated in *Oilfield Safety & Machine Specs., Inc. v. Harman Unlimited, Inc.,* 625 F.2d 1248, 1256 (5th Cir.1980) (individual companies deemed "dual employers" based on the nature of claimant's work and its relation to the alleged employer's regular business). Because in this case defendants argued that they *are* employers under the act, "[t]his role reversal has the odd effect of placing the burden on the plaintiffs to demonstrate that the defendants are *not* employers under the act." *Id.* at 23.

**[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 2.2.3 Injury (fact of); Topic 75.1 DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP]**

## D. Benefits Review Board

### *Irby v. Blackwater Security Consulting*, __ BRBS __ (2010).

The instant claim for death benefits under the DBA stems from an ambush in Fallujah, Iraq that killed four men, including the decedent herein. Employer, had accepted liability under the DBA and sough the entry of a compensation order, which claimant resisted, asserting that decedent was not subject to the DBA and thus employer was not entitled to tort immunity. On remand from an earlier Board decision,[5] the ALJ granted employer's motion for summary decision, finding that decedent was covered under Section 1651(a)(4) of the DBA;[6] and thus the Act was claimant's exclusive remedy.

The Board initially determined that the ALJ rationally limited discovery to issues not covered by employer's admissions; on remand, however, claimant could renew her request for discovery on remaining issues.

The Board held, agreeing with the Director, OWCP, that the ALJ erred in grating employer's motion for summary decision on the issue of the existence of a contract with the United States for purposes of coverage under §1651(a)(4). The ALJ erroneously drew an inference in employer's favor regarding the existence of such a contract and the fact of decedent's work under such a contract, contrary to the rules of summary decision which require that all inferences be drawn in favor of the non-moving party. Furthermore, claimant's evidence raised an issue of fact which was both material and genuine as to the contract's existence. The Board noted that the ALJ's decision after a full evidentiary hearing may be based on reasonable inferences.

Next, agreeing with the Director, OWCP, the Board rejected the ALJ's conclusion that the DBA should be read expansively to apply regardless of whether decedent was an "employee" or an "independent contractor." The Board also rejected the ALJ's alternative determination that employer was entitled to a summary judgment on the issue of employee status based on employer's control over decedent's work, even though his contract indicated

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[5] The Board's earlier decision in this case, *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007)(affirming ALJ's denial of claimant's motion to withdraw her claim), is summarized in the April 2007 issue of Recent Significant Decisions Monthly Digest.

[6] Section 1651(a)(4) provides that an employee is covered if he is engaged in employment "under a contract entered into with the Unites States or any executive department, … or agency thereof…, or any subcontract, or subordinate contract with respect to such contract, … for the purpose of engaging in public work."

independent contractor status. The Board concluded that a genuine issue of material fact existed on this issue, noting various tests for employee status and stating that the ALJ "may use whichever test is best suited to the facts of a particular case." Slip. op. at 17.

At the same time, assuming that decedent was an employee of employer working on a contract subordinate to one with the United States, the Board affirmed the ALJ's finding that decedent, who was providing security to convoys under a service contract in connection with war activities, was engaged in "public work" for purposes of §1651(a)(4). The Board rejected claimant's assertion that only construction projects are covered as public works, citing case law which held that a covered contract must be connected either with a construction project or with a national defense activity. Finally, the Board affirmed the ALJ's rejection of claimant's contention that a compensation remedy was precluded due to employer's intent to injure decedent, as claimant failed to establish the existence of a material issue of fact in this regard. It is well settled that wanton and reckless misconduct of an employer is not the equivalent of an intentional tort.

**[Topic 60.2.2 Defense Base Act - Claim Must Stem from a "Contract" for "Public Work" Overseas; Topic 60.2 Defense Base Act (Employer-Employee Relationship); Topic 75 REQUISITE EMPLOYER-EMPLOYEE RELATIONSHIP; Topic 75.1 DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP; Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 27.2 POWERS OF ADMINISTRATIVE LAW JUDGES - DISCOVERY 19.3.6.2 PROCEDURE - Discovery]**

***Tisdale v. American Logistics Servs.*, __ BRBS __ (2010).**

Agreeing with the Director, OWCP, the Board held that the Coalition Provisional Authority ("CPA") is an agency of the U.S. for purposes of conferring coverage under Section 1651(a)(4) of the DBA.[7] Accordingly, the Board reversed the ALJ's denial of benefits that was based on failure to establish coverage, and remanded the case for consideration of the merits.

The Board initially agreed with the Director that the contract at issue was between employer and the CPA, rather than with the U.S.; the contract stated that Major Hirtle signed the contract in his capacity as the contracting officer for the CPA, and there was no evidence that he was acting on behalf

[7] The Board noted that § 20(a) presumption does not apply to the legal interpretation of coverage issues, such as the question of the CPA's status as an agency of the U.S. Slip. op. at 6, n.5.

of, or had the authority to bind, the U.S. Thus, the remaining issues were whether Section 1(a)(4) confers coverage because the CPA is an agency of the U.S. or whether the contract was approved and financed by the U.S. Government or an agency thereof pursuant to Section 1(a)(5).[8]

The Board discussed the facts regarding CPA's creation and operation gleaned from various sources, including a Congressional Report on the CPA and the case law; and noted lack of definitive evidence on record in this case. The Board noted "the varying statements regarding the CPA," and the Congressional Report's conclusion that the CPA's agency status was unclear. *See* slip. op. at 13. The Ninth Circuit, in whose jurisdiction this case arose, holds that the authority to act with the sanction of government behind it determines whether an agency exists. In this context, the Board applied the "degree of control" test espoused by the Second Circuit in *Payne v. United States*, 980 F.2d 148 (2nd Cir. 1992), which considers the following factors: (1) power of the U.S. to initiate and terminate; (2) effectuation of government purposes by the entity; (3) exclusion of private profit; and (4) limitation of employment to government connected persons. Having considered all four factors, the Board concluded that the CPA is an agency of the U.S. for purposes of Section 1(a)(4), as it "clearly possessed the 'authority to act with the sanction of [the U.S.] government behind it." Slip. op. at 17 (citation omitted). The Board further agreed with the Director that treating the CPA as an agency of the U.S. in this case serves the purposes of the DBA,[9] stating that:

> "As the Director argues, Congress provided for broad coverage under the DBA for the purpose of providing uniform workers' compensation coverage to employees working on overseas defense- and public works-related contracts. Such coverage ensures that these employees are properly compensated for work-related injuries without relying on the uncertainties of foreign laws, and it ensures that employers are not exposed to tort liability. Holding that employees working under a contract with the CPA are not entitled to coverage would create a gap in this scheme of coverage for the 13 months of the CPA's existence. The claimant in this case is an American citizen employed under a public workers contract involved in the rebuilding of Iraq after occupation by the American-led coalition

[8] As the Board found coverage under § 1(a)(4), it did not reach the issue of coverage under § 1(a)(5).

[9] The Board cited various cases discussing the DBA's purpose, as well as two secondary sources: 32B Am. Jur. 2d Federal Employers' Liability, Etc. §133; 86 U. Det. Mercy L. Rev. 407, 416-17 (2009).

> forces. Further, the coalition forces created a temporary government of Iraq, the CPA, and the U.S. maintained a significant degree of control over the CPA, which was the contracting agency in this case. Based on the totality of the circumstances here, we hold that claimant was employed under a contract with the agency of the U.S. and is covered under Section 1(a)(4)."

(Footnote omitted).

**[Topic 60.2.2 Defense Base Act - Claim Must Stem from a "Contract" for "Public Work" Overseas; Topic 20.6.2 SECTION 20(a) DOES NOT APPLY- Jurisdiction]**

***Sparks v. Service Employees Int'l, Inc.*, __ BRBS __ (2010).**

Reversing the ALJ's grant of a summary decision, the Board held that the ALJ erred in finding that claimant was judicially estopped from pursuing her DBA claim as a result of her failure to disclose her pending DBA claim in bankruptcy proceedings.

The Eleventh Circuit, within whose jurisdiction this case arose, considers two factors when determining whether to apply this doctrine: (1) that allegedly inconsistent positions were made under oath in a prior proceeding, and (2) such inconsistencies must be shown to have been calculated to make a mockery of the judicial system. The latter inquiry entails consideration of the debtor's intent and, in particular, whether the debtor had a motive for concealment. In looking at motive, the Eleventh Circuit considers whether the debtor would gain an advantage by concealing the claims from the bankruptcy court; and case precedent supports the conclusion that judicial estoppel does not apply where claimant gains no financial advantage over creditors from concealing a claim.

The Board stated that, pursuant to Section 16, compensation paid under the Act is exempt from all claims of creditors and cannot be attached for the collection of a debt. The Board noted case law applying § 16, as well as cases that found it inapplicable. The Board reasoned that "[i]n view of Section 16, claimant's creditors have no right to attach the proceeds of her claim, and she therefore could not gain an advantage by concealing it." Slip. op. at 6. (The Board also noted exceptions to Section 16, not applicable in this case). Accordingly, the Board concluded that:

> "Under the plain language of Section 16, claimant's claim is not an asset which can be attached by creditors, and the

> administrative law judge erred as a matter of law in relying on a discretionary doctrine as a basis for denying benefits while ignoring an applicable statutory provision. Moreover, there is no basis for finding Section 16 inapplicable in this case. As any DBA benefits claimant may potentially receive are not an asset to which the bankruptcy creditors are entitled, claimant gained no advantage over them by withholding information about the DBA case from the bankruptcy court. This fact was confirmed by the bankruptcy trustee's letter wherein he relinquished any claim to her benefits. Consequently, as one element of the criteria for applying judicial estoppel is absent, the administrative law judge erred in applying this discretionary doctrine to bar claimant from proceeding with her claim under the Act."

Slip. op. at 8-9 (Internal footnote and citations omitted).

**[Topic 85 RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, ELECTION OF REMEDIES; Topic 16.3 COMPENSATION IS EXEMPT FROM CREDITOR CLAIMS]**

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

In *Gunderson v. U.S. Dep't. of Labor*, ___ F.3d ___, Case No. 08-9537 (10th Cir. Apr. 8, 2010)(J. O'Brien, dissenting), the panel majority concluded that, where "equally qualified experts give conflicting testimony" regarding the presence of legal coal workers' pneumoconiosis under 20 C.F.R. § 718.202(a)(4), the Administrative Law Judge cannot "avoid the scientific controversy by declaring a tie." The court explained:

> This is a task that is routinely assigned to judges and to juries and that may be accomplished by careful consideration of many factors, including 'the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments and the sophistication and bases of their diagnosis.

Moreover, the court noted that, with regard "to disputes concerning the existence and causes of pneumoconiosis, an ALJ has the benefit of a substantial inquiry by the Department of Labor." The court noted that the Administrative Law Judge may rely on regulations, which provide that pneumoconiosis is progressive, irreversible, and may be latent, in assessing

scientific testimony. As a result, the court remanded the claim for re-evaluation of conflicting medical opinions under § 718.202(a)(4).

[ **weighing medical opinions, legal coal workers' pneumoconiosis** ]

In *Westmoreland Coal Co. v. Director, OWCP [Cox]*, ___ F.3d ___, Case No. 09-1240 (4th Cir. Apr. 8, 2010), the court affirmed the Administrative Law Judge's award of benefits based on a finding of complicated coal workers' pneumoconiosis. The court found that the Administrative Law Judge properly considered of all of the medical evidence:

> [T]here was no dispute that the x-rays showed at least one mass measuring more than three centimeters in the upper part of Cox's right lung. This finding was also supported by several CT scans and other medical tests. Westmoreland's experts did not dispute the existence of a large mass. Instead, they asserted that the mass was likely due to one of a number of other possible diseases. The ALJ rejected their conclusions as equivocal and speculative, and found that they did not constitute affirmative evidence sufficient to show that the opacities were not due to pneumoconiosis.
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> . . .
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> The ALJ also reasoned that because the 2005 biopsy showed signs of pneumoconiosis . . ., and cancer had since been ruled out, the record strongly indicated that pneumoconiosis was what caused the opacities found in Cox's tests. Finally, the ALJ noted that none of Westmoreland's experts had reviewed the 2005 biopsy or questioned its results.

As Claimant demonstrated 30 years of coal mine employment, the Administrative Law Judge properly found that he was entitled to invocation of the § 718.203 presumption that his disease arose from coal mine employment.

The court rejected Employer's argument that the Administrative Law Judge erred in rejecting expert opinions that the opacities were likely due to tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis. The court noted that Drs. Wheeler, Scott, Scatarige, and Hippensteel offered "speculative alternative diagnoses that were not based on evidence that Cox suffered from any of the diseases suggested." The court found that "[n]one of the doctors discussed whether any of the diseases could occur in

conjunction with pneumoconiosis" and "none of them pointed to evidence that Cox was suffering from any of the alternative diseases mentioned or discussed" or "whether the tests showed any signs inconsistent with those diseases." Further, the court stated that "none of the doctors reviewed or opined upon the results of the 2005 biopsy." In the end, the court agreed with the Administrative Law Judge "that the experts' opinions did not constitute affirmative evidence sufficient to weaken the claimant's x-ray evidence showing large opacities that satisfied the statutory definition of complicated pneumoconiosis."

Turning to the Administrative Law Judge's award of attorney's fees, the court held that it was permissible for the judge to find that the Altman Weil Survey of Law Firm Economics (2006) was not an "accurate indicator" of counsel's prevailing hourly rate. However, the hourly rate awarded was vacated because the Administrative Law Judge took into consideration risk of loss and the contingent nature of attorney fee awards in black lung cases. The court held that such considerations are not proper, but noted that there are a variety of "sources" from which to determine a prevailing hourly rate, including evidence of fees received by the attorney in the past, affidavits of other lawyers, and fees awarded in "other administrative proceedings of similar complexity may "also yield instructive information."

[ **complicated pneumoconiosis; prevailing hourly rate for attorney's fees** ]

### B. Benefits Review Board

In companion published decisions, *Bowman v. Bowman Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0320 BLA (Apr. 15, 2010) (governed by Fourth Circuit case law) and *Maggard v. International Coal Group, Knott County, LLC*, 24 B.L.R. 1-__, BRB No. 09-0271 BLA (Apr. 15, 2010) (governed by Sixth Circuit case law), the Board allowed Claimant's counsel 30 days in which to submit amended fee petitions. Notably, it concluded that counsel did not present evidence sufficient to support a finding that his hourly rate was the "market rate". The Board noted:

> Although claimant's counsel identifies the hourly rates that he seeks in this case, claimant's counsel has failed to make any declaration regarding the normal hourly rates that its lawyers seek for cases similar to this one. At a minimum, this defect must be cured before the Board addresses counsel's fee petition.

*Bowman*, slip op. at 4; *Maggard*, slip op. at 4. Further, in *Maggard*, the Board held that, if work is performed by a "legal assistant", then the "normal billing rate" of the legal assistant must be set forth in a declaration.

Further, the Board concluded that counsel had not "provided sufficient information relevant to the market rate for services in the geographic jurisdiction of the litigation." *Bowman*, slip op. at 5; *Maggard*, slip op. at 4. Here, the Board found that counsel relied "exclusively upon a 2006 Altman Weil 'Survey of Law Firm Economics' to justify his requested hourly rates." *Bowman*, slip op. at 5; *Maggard*, slip op. at 4. However, in both cases, the Board stated:

> [B]ecause the survey alone does not provide sufficient information for the Board to determine that the listed rates are for similar services as those provided by claimant's counsel's firm, it is of little assistance in determining the prevailing market rate. (citations omitted).
>
> In addressing the difficulty of determining a reasonable hourly rate, claimant's counsel states that he knows of 'no other firms in Virginia and very few across the nation taking new [federal black lung] cases. (citation omitted).

*Bowman*, slip op. at 5; *Maggard*, slip op. at 5. In both cases, the Board suggested that "[h]ourly rates charged by similarly situated attorneys in Kentucky may assist in establishing a market rate." *Bowman*, slip op. at 5; *Maggard*, slip op. at 5.

The Board stated that "the goal is to establish a market rate paid by paying clients in the requesting attorneys' geographic area." *Bowman*, slip op. at 5-6; *Maggard*, slip op. at 5. It determined:

> [I]n order to be entitled to a rate claimed, it is claimant's counsel's burden to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. (citation omitted).

*Bowman*, slip op. at 6; *Maggard*, slip op. at 6.

[ **establishing an hourly rate for attorney's fees; use of Altman and Weil "Survey of Law Firm Economics"** ]

By unpublished decision of *Fox v. Elk Run Coal Co.*, BRB No. 09-0438 BLA (Apr. 16, 2010)(unpub.), the Board addressed an Administrative Law Judge's authority to order discovery as well as the Judge's finding that Employer "committed fraud on the court." Under the facts of the case, the Administrative Law Judge ordered that Employer produce certain pathology reports to Claimant and, on review of evidence produced, he concluded that Employer "committed fraud on the court by concealing pathology reports diagnosing claimant with complicated pneumoconiosis" in a prior claim. As a result, the Administrative Law Judge concluded that the denial of benefits in the prior claim was "ineffective."

On appeal, Employer argued that the Administrative Law Judge erred in ordering production of pathology reports by Drs. Naeye and Caffrey on grounds that the reports are protected by the "work product" rule. The Board disagreed and held the following:

> In this case, claimant sought the actual medical reports prepared by employer's non-testifying experts. The administrative law judge reasonably found that the information sought by claimant is not protected work product because it is 'the work product of physicians, not attorneys.'

*Slip op.* at 4. The Board further noted:

> The administrative law judge found that claimant had a substantial need to know whether employer had withheld pertinent x-ray and pathology reports during the adjudication of claimant's prior 1999 claim. The Director accurately notes that, in order to prove that employer provided false information to its reviewing physicians in the 1999 claim, it was necessary for claimant to discover what information employer actually possessed. (citation omitted). Moreover, the Director accurately notes that there was no way for claimant to obtain this information without asking employer to provide it. Consequently, we reject employer's argument that the administrative law judge abused his discretion in granting claimant's motion to compel discovery of the pathology reports of Drs. Naeye and Caffrey.

*Slip op.* at 4-5.

However, the Administrative Law Judge's finding that Employer committed "fraud upon the court" was vacated and the claim was remanded for further consideration of this issue. The Board concluded that the

Administrative Law Judge "failed to assemble a proper evidentiary record" in support of his finding of fraud. Specifically, the Board found:

> [T]he administrative law judge reviewed and discussed numerous documents in reaching his determination that employer committed fraud on the court by producing misleading evidence in the prior claim. (citation omitted). However, none of these documents is in the record before the Board.
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> . . .
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> In this case, the parties did not submit, and the administrative law judge did not admit, any medical reports, documents, or exhibits into evidence.
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> . . .
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> Due to the lack of an evidentiary record before us, we are constrained to vacate the administrative law judge's determinations regarding fraud on the court and the onset date of claimant's entitlement to benefits, and remand the case for further proceedings. (citations omitted).

*Slip op.* at 5.

[ **discovery of medical reports and "work product" doctrine; determination of "fraud on the court"** ]

By unpublished decision in *McKnight v. Island Creek Coal Co.*, BRB No. 09-0449 BLA (Mar. 24, 2010)(unpub.), the Board held the following with regard to applying collateral estoppel in a survivor's claim:

> A fact established by stipulation or concession may not be given collateral estoppel effect in a subsequent proceeding because the issue was not actually litigated. *Justice v. Newport News Shipbuilding and Dry Dock Co.*, 34 B.R.B.S. 97, 98 (2000). Because the miner's award of benefits was based on employer's withdrawal of controversion, the issues of existence of pneumoconiosis and causation were not actually litigated in the miner's claim and, thus, a required element of collateral estoppel is not established.

The Board further concluded that it was improper to apply "equitable" estoppel barring re-litigation of the existence and cause of pneumoconiosis. Here, the Administrative Law Judge stated that "the Miner was in pay status for fifteen years as a result of Employer's acquiescence" such that Employer was barred from re-litigating the issue of pneumoconiosis. The Board stated:

> The 'traditional elements required to invoke equitable estoppel are a definite misrepresentation by one party, intended to induce some action in reliance, and which does reasonably induce action in reliance by another party to his detriment.' (citations omitted). In this case, the administrative law judge found that employer's request to remand the miner's claim to the district director was a 'representation' upon which claimant 'justifiably relied.' (citation omitted). The administrative law judge, however, nowhere found, or identified evidence, that employer made a 'definite misrepresentation' that, by its misleading nature, was 'intended to induce some action in reliance by claimant.' (citation omitted). Moreover, the administrative law judge did not specify the manner in which claimant detrimentally relied upon any such representation. (citations omitted). Therefore, we reverse the administrative law judge's finding that equitable estoppel barred relitigation of the issues of the existence of pneumoconiosis and disease causation in the survivor's claim.

*Slip op.* at p. 5.

[ **collateral estoppel inapplicable to stipulation or concession; equitable estoppel not established** ]