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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 159
May - June 2002

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

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. United States Supreme Court

Chevron U.S.A. Inc. v. Echazabel, ___ U.S. ___ (No. 00-1406) (June 10, 2002).

[NOTE: While this ADA disability case is not a longshore case, it is included in the materials for general information.**]**

In a 9-0 ruling, the Court held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the Supreme Court stated that on remand the Ninth Circuit could consider whether the employer engaged in the type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

[Topics 8.2..3.1 Extent of Disability–Total disability while working; 8.2.4 Extent of Disability–Partial Disability/Suitable Alternate Employment; 8.9 Wage-Earning Capacity]

B. Circuit Courts of Appeals

Cooper/T. Smith Stevedoring Co. v. Liuzza, ___ F.3d ___ (5th Cir. 2002) (Cir. No. 01-60643) (June 5, 2002).

The Fifth Circuit held that in view of the language of Section 14 and Congressional intent, the court's precedent addressing similar issues, and the deference owed the Director's interpretation, Section 14(j) does not provide a basis for an employer to be reimbursed for its overpayment of a deceased employee's disability payments by collecting out of unpaid

installments of the widow's death benefits. In reaching this holding, the court referenced *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773 (5th Cir. 1988) (An employer and insurer were not entitled to offset the disability settlement amount against liability to the employee's widow for death benefits.)

[Topics 9.3 Death Benefits–Survivors; 14.5 Employer Credit for Prior Payments]

Sestich v. Long Beach Container Terminal, ___ F.3d ___ (9th Cir. 2002) (Cir. No. 00-70978) (May 20, 2002).

Where a longshoreman's post-injury "wage-earning capacity" exceeds his pre-injury "average weekly wages," he is not entitled to benefits under the LHWCA. Specifically, the court held that an employee is not entitled to a loss of earnings capacity benefits where his actual post-injury earnings adjusted for inflation exceeded his pre-injury wages, absent evidence that the employee's actual post-injury earnings did not fairly represent employee's earnings capacity in his injured condition.

Here the employee contended that he had lost "wage-earning capacity," within the meaning of the LHWCA, to the extent that he could not earn what he would have been able to earn absent his injury, and that he should have been awarded benefits equal to two-thirds of that loss. His contention is that, but for, his industrial accident, he would be earning about $134,000 annually as a crane operator, about $25,000 more than his current annual earnings of about $109,000 as a marine clerk. This contention rests in part on the factual assumption that, absent his back injury, he would be able to obtain certification as a crane operator and to find sufficient work in that job to earn about $134,000. The court also noted that his contention additionally rests in part on a legal assumption that compensation under the LHWCA is based on the method of calculation employed for ordinary torts.

Assuming that claimant's factual contentions were correct, the court found his legal conclusions to be wrong:

> Benefits under the Act are not calculated in the same way as compensation under the tort system. The Act provides benefits based on "disability," which is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.... That is, disability is not defined, as it would be under the tort system, as the inability to earn hypothetical future wages that the worker could have earned if he had not been injured. Rather, disability is defined under the Act as the difference between the employee's pre-injury "average weekly wages" and his post-injury "wage-earning capacity."

The claimant additionally argued that the proviso of Section 8(h) instructs the ALJ to

allow benefits equal to the difference between his actual earnings and the wage-earning capacity he would have had if he had not been injured. However, the Ninth Circuit found that this argument is based on a misreading of Section 8(h) and that the section, including its proviso, is designed only to specify the method by which to determine post-injury "wage-earning capacity" within the meaning of the LHWCA. Once "wage-earning capacity" is determined, § 908(c)(21) instructs the ALJ to compare "wage-earning capacity" with pre-injury "average weekly wages" to determine the level of benefits, according to the court.

[Topic 8.9 Wage-Earning Capacity]

United States of America v. Angell, ___ F.3d ___ (2nd Cir. 2002) (No. 01-6141) (May 16, 2002).

This non-LHWCA case addresses the issue of navigability. Here the Army Corps of Engineers upheld an injunction issued in federal district court requiring the defendant to remove floats attached to his pier in a tidal canal. The court found that the defendant had violated the Rivers and Harbors Appropriation Act. 33 U.S.C. § 403 (2000). The circuit court noted that Army Corps regulations define "navigable waters" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2001).

[Topic 1.5.2 Development of Jurisdiction/Coverage–Navigable Waters]

[NOTE: While not a LHWCA case, the following may be noteworthy in a Section 33 context for its discussion of "prevailing parties" and "consent decree."**]**

American Disability Association, Inc. v. Chmielarz, ___ F.3d ___ (11th Cir. 2002) (No . 00-72810 CIV-WJZ) (May 1, 2002).

In this ADA case, prior to trial, the parties entered into a settlement which was "approved, adopted and ratified" by the district court in a final order of dismissal, and over which the district court expressly retained jurisdiction to enforce its terms. Subsequently, the Association sought attorneys' fees and costs but the district court found that it was not a "prevailing party" as that term was defined in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 523 U.S. 598, 121 S.Ct. 1835 (2001) (Court specifically invalidated the "catalyst theory."). However, the circuit court found that the Association plainly was a "prevailing party" because the district court's approval of the terms of the settlement coupled with its explicit retention of jurisdiction are the functional equivalent of a consent decree.

The circuit court noted that in *Buckhannon*, the Supreme Court had invalidated the catalyst theory because "[i]t allows an award where there is no judicially sanctioned change in

the legal relationship of the parties." The Court said that a plaintiff could be a "prevailing party" only if it was "awarded some relief" by the court and achieved an "alteration in the legal relationship of the parties." *Buckhannon*, 523 U.S. at 603-605. While the Court had stated specifically that a plaintiff achieved such prevailing party status if it (1) received at least some relief–including nominal damages–on the merits, or (2) signed a settlement agreement "enforced through a consent decree,." the circuit court found that this did not mean that these were the only two resolutions to form a sufficient basis upon which a plaintiff could be found to be a prevailing party.

The circuit court stated: "Thus, it is clear that, even absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties" agreement. Its authority to do so clearly establishes a 'judicially sanctioned change in the legal relationship of the parties,' as required by *Buckhannon*, because the plaintiff thereafter may return to court to have the settlement enforced. A formal consent decree is unnecessary in these circumstances because the explicit retention of jurisdiction or the court's order specifically approving the terms of the settlement are, for these purposes, the functional equivalent of the entry of a consent decree."

[Topic 33.10 Miscellaneous Areas Within Section 33]

Old Ben Coal co. v. Director, OWCP [Hilliard], ___ F.3d ___ (7th Cir. 2002) (No. 00-3222) (May 31, 2002) (J. Wood, dissenting).

[NOTE: For more on this Black Lung Act case addressing Section 22 modifications, *see* the Black Lung Section of this Digest, *infra*. Since the Black Lung Act's Section 22 Modification statute was derived from the LHWCA Section 22 statute, this case law is noteworthy in a longshore context as well.**]**

Here the Seventh Circuit held that, "given the unique command of [the Black Lung Act]; a modification request cannot be denied solely because it contains argument or evidence that could have been presented at any earlier stage in the proceedings; such a concern for finality simply cannot be given the same weight that it would be given in a regular civil proceeding in a federal district court."

In a strongly worded dissent, Judge Wood framed the question at issue as one about the standard the DOL must use in drawing the balance between accuracy (which at the extreme would call for reopening any time someone had new evidence or arguments) and finality (which at the extreme would forbid modification for any reason whatsoever). While noting the majority's acceptance of a standard where accuracy trumps unless the party seeking modification has intentionally abused the process, Judge Wood prefers a more flexible "interest of justice" determination to be made. "The 'interest of justice' standard would certainly permit consideration of intentional misuse, but it would also allow the responsible official to take into

account factors such as the diligence of the party seeking modification, the number of times modification has been sought, and the quality of the new evidence or new arguments the party seeking modification wishes to present. A reviewing court would then decide whether a decision to reconsider, or a decision not to reconsider, an earlier award represented an abuse of discretion under familiar principles of administrative law."

[Topic 22.3 Requesting Modification]

Newport News Shipbuilding & Dry Dock Co. v. Vinson, (Unpublished) (4th Cir. No. 00-1204) (June 20, 2002).

Here the employer challenged the ALJ's finding that the claimant was entitled to disability benefits for the period during which he returned to his employment as a welder despite his injury. In upholding the ALJ and the Board, the Fourth Circuit noted that the claimant's return to work after his injury did not preclude a disability award as a matter of law. The statutory standard for disability "turns on the claimant's capacity for work, not actual employment. Thus, when a claimant, as here, continues employment after an injury only through "extraordinary effort to keep working" and despite the attendant "excruciating pain" and substantial risk of further injury, he may nevertheless qualify for a disability award. The court noted that a disability award under the LHWCA is predicated on an employee's diminished capacity for work due to injury rather than actual wage-loss.

[Topic 8.2.3.1 Extent of Disability–Total disability while working–Extraordinary Effort]

C. Benefits Review Board

Craig v. Avondale Industries, Inc., __ BRBS ___ (BRB No. 00-0716) (May 23, 2002).

This is an Order on Reconsideration of the Board's *Decision and Order on Reconsideration En Banc, Craig, et al. V. Avondale Industries, Inc.*, 35 BRBS 164 (2001). Once again the Board has upheld its prior decision in this matter holding that initial claim forms filed by claimants, standing alone, trigger the 30-day time period (following notice of a claim from the district director) in which employer is required to pay benefits or decline to pay for purposes of attorney's fee liability under Section 28(a). Neither the LHWCA nor the regulations require that a claimant submit evidence with his claim before the requirements of Section 28(a) are triggered. A claimant need not establish a *prima facie* case under Section 20(a) before the requirements of Section 28(a) are triggered. In these consolidated hearing loss claims, the Board specifically found that "there is no reason to treat hearing loss claims differently, merely because a hearing loss must be ratable under the [AMA] Guides to the Evaluation of Permanent Impairment in order to be compensable."

[Topic 28.1 Attorney's Fees–Generally]

Ward v. Holt Cargo Systems, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

[Topics 8.2.3.1 Extent of Disability–Total disability while working-Beneficent employer/sheltered employment and extraordinary effort; 8.2.4 Extent of Disability–Partial disability/Suitable Alternate Employment; 8.9.2 Wage-Earning Capacity–Factors for Calculation]

Terrell v. Washington Metropolitan Area Transit Authority (WMATA), ___ BRBS ___ (BRB No. 99-0509) (June 11, 2002).

The issue here is whether an employer who is granted Section 8(f) relief, is dismissed from a subsequent modification proceeding by the ALJ on the claimant's motion, and who did not participate in the appeal of the modification before the Board, is responsible for the claimant's attorney fee at the Board level. (The employer did not participate in the Director's appeal before the Board, and the claimant argued in response to the Director's appeal for the employer's continued exclusion from the case.) The Board found that such an employer is not liable for an attorney fee. Furthermore, the Board found that, "The fact that employer had an economic interest in the outcome (due to the increased assessment under Section 44... .), is not sufficient for employer to be held for claimant's
attorney's fee for work performed before the Board under the facts of this case." Thus, the Board found that since the claimant's attorney obtained an award of permanent total disability, an attorney's fee for his counsel can be made a lien on the claimant's compensation.

[Topics 8.7.9.1 Section 8(f)–Procedural Issues–Standing; 28.3 Attorney's Fees–Claimant's Liability; 28.3.1 Liability of Special Fund]

Haynes v. Vinnell Corporation, (Unreported) (BRB No. 01-0741) (June 17, 2002).

In this Gulf War Illness case (Defense Base Act) the ALJ referenced the causation burden/scheme of the Persian Gulf War Veterans' Act of 1998, 38 U.S.C. § 1117 et seq., Public Law 105-277, which provides a legal presumption for veterans of the United States military that they were exposed to various toxic substances. While the ALJ acknowledged that statute was not applicable to the instant claimant, who was a civilian employee, the ALJ found that the statute

could be considered persuasive in establishing a claimant's prima facie case. The ALJ summarily concluded that the evidence (article submitted stated detrimental effects from exposure were dependent on frequency and level of exposure) was not sufficient to invoke the public law presumption. However, the Board noted that the issue for purposes of the LHWCA is whether the claimant established exposure which could potentially cause the harm alleged. The Board noted that both the claimant and employer were in agreement that the claimant was employed by the employer during the period of time that the employer's base camp experienced both the effects of the oil well fires which burned in Kuwait and the application of pesticides throughout the camp.

[Topics 20.2.1 Presumptions–Prima Facie Case; 20.2.3 Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident; 60.2 Defense Base Act]

Hodges v. Caliper, Inc., (Unpublished) (BRB No. 01-0742) (June 17, 2002).

At issue here was whether the claimant timely filed his claim under Section 13(a) in lieu of *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997). In 1995 the claimant's right eye was injured by a welding spark. Upon medical examination the claimant exhibited mild inflamation of the eye with an area of superficial corneal scar tissue of unknown etiology and was diagnosed with post-traumatic iritis. Subsequently a few months later the claimant's vision tested at 20/20. He continued working and in 1999 noticed a cloud in his field of vision while welding. Upon examination the doctor attributed the claimant's vision problem to a corneal scar that could be removed or reduced by laser surgery and this procedure was authorized by the employer.

The Board upheld the ALJ's finding that the claimant had not been aware that his eye injury would affect his wage-earning capacity until the onset of his vision clouding in 1999 and therefore, the claim was timely filed. At the OALJ hearing, the employer had also contended that *Rambo II* required that the claimant file a claim for a de minimis award within one year from the 1995 date of the claimant's eye accident. The ALJ had found it to be unclear whether *Rambo II* imposes such a requirement and that, in any case, the claimant had no reason to believe before 1999 that his eye injury had a significant potential to diminish his future wage-earning capacity.

The Board noted that in *Rambo II*, the Court had declined to determine how high the potential for disability needed to be to qualify as "nominal," since that issue was not addressed by the parties and that instead, the Court had adopted the standard of the circuit courts which had addressed this issue by requiring the claimant to establish a "significant possibility" of a future loss of wage-earning capacity in order to be entitled to a de minimis award. The Board further noted that pertinent to the employer's argument in the instant case, the Court in *Rambo II* relied in part on the limitations period for traumatic injuries in Section 13(a) as grounds for its approving de minimis awards. The Court had stated that Section 13(a) "bars an injured worker from waiting for adverse economic effects to occur in the future before bringing his disability

claim, which generally must be filed within a year of injury." *Rambo II*, 521 U.S. at 129, 31 BRBS at 57 (CRT). However, the Board found that "statements by the *Rambo II* Court regarding Section 13(a) were not directly material to the actual Section 22 issue before the Court and, consequently are dicta. Accordingly, the [ALJ] was not required to apply *Rambo II* to determine whether the claim herein was time-barred.

[Topics 13.1 Time for Filing of Claims–Starting the Statute of Limitations; Modification–De Minimis Awards]

Ilaszczat v. Kalama Services, ___ BRBS ___ (BRB No. 01-0774) (June 19, 2002).

Whether the "zone of special danger" applied to this Defense Base Act case was the main issue here. The claimant was injured during the time he worked as the manager of the "Self-Help Store" on the Johnston Atoll, a two mile long island located in the South Pacific. The claimant initially sustained a work-related injury to his left leg. Subsequently he sustained an injury to his left hip while engaging in post-work recreational activity. The "recreational" injury is the focus of this litigation. After work, the claimant went for drinks to the "Tiki Bar," where he remained until closing and then went on to the AMVETS where he bought drinks for a group of soldiers. He entered into a $100 wager with a military police officer wherein the claimant bet the officer that the officer could not, in a karate demonstration, "put [his] leg over [the claimant's] head without touching [claimant]." At this point there are two versions as to how the claimant actually injured his hip, but he was taken to the clinic where he stayed for two days, after which he was transferred to Hawaii for hip surgery. While recovering, the claimant received notice from the base military commander that he was expelled from the atoll and was precluded from ever returning. The employer thereafter discharged the claimant based on the fact that the debarment order prohibited his return to Johnston Atoll.

The ALJ found that the claimant did fall within the "zone of special danger" and that his conduct, although perhaps unauthorized and/or prohibited, was not so egregious as to sever the relationship between his employment and the injury under the doctrine. The employer on appeal challenges this finding and further argues that the ALJ ignored the legal "reasonable recreation" standard, wherein only those incidents in which the claimant's conduct was reasonable are accepted as falling within the "zone of special danger" doctrine.

The Board found that the ALJ properly applied the "zone of special danger" doctrine here. The Board noted that the ALJ had found that the claimant and the other employees on the atoll had limited choices and opportunities for recreation, and that this is, presumably, the reason why the military authorized the operation of "social clubs" on the atoll. The ALJ had further found that with the existence of clubs serving alcohol to employees, in combination with the employees' lengthy periods of isolation in the middle of the Pacific Ocean, it was clearly foreseeable by both the military authority and the employer that "risky horseplay" or scuffles such as that which occurred, would occur from time to time. As such, he determined that the

claimant's conduct was not "so far from his employment" and was not "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that the injuries suffered by him arose out of and in the course of his employment."

The ALJ also found, assuming arguendo, that while the claimant was engaged in "unauthorized" or prohibited behavior (i.e., assuming that the employer's characterization is accurate and the incident involved wagering and fighting), this fact alone does not necessarily establish that the claimant's behavior was unforeseeable. Specifically, the ALJ found that the incident was "foreseeable, if not foreseen" by the employer and thus the mere fact that fighting was prohibited does not necessarily preclude the claimant's recovery even if fighting constituted grounds for expulsion from the atoll.

The Board found that the issue as to whether the claimant should be barred of benefits because he was discharge and could not return to pot-injury work due to his own misfeasance became moot since the claimant was never offered any position by the employer post-injury, nor did the employer establish that suitable alternate employment would have been available to the claimant at pre-injury wages, but for, his discharge.

[Topic 60.2 Longshore Act Extensions–Defense Base Act; 60.2.7 Defense Base Act--Course and Scope of Employment, "Zone of Special Danger"]

D. Miscellaneous Courts

In Re Kellog Brown & Root, Tex. Ct. App., No. 01-01-01177-CV (April 25, 2002).

[NOTE: While not a LHWCA case, this matter is nevertheless of interest due to its wrongful discharge issue.**]**

The Texas Court of Appeals held that a pipefitter helper must arbitrate his claim that he was wrongfully discharge by Kellogg, Brown & Root for filing a workers' compensation claim. Here the worker had signed two documents acknowledging "in consideration of my employment" that he was an at-will employee and that he was bound by the terms of the "Halliburton Dispute Resolution Program." That program required binding arbitration of all employment claims, including workers compensation retaliation claims. The Federal Arbitration Act applied to arbitrations held under the program. When the worker brought suit for wrongful discharge, the trial court denied employer's motion to compel arbitration, finding that there was no consideration and thus, no contract to arbitrate. However, the appellant court found that both sides to the agreement were bound to perform certain requirements, and thus the agreement to arbitrate was binding and enforceable.

[Topic 15.2 Agreement to Waive Compensation Invalid]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

The Department's amended black lung regulations challenged by the National Mining Association were upheld by the D.C. Circuit Court of Appeals in *National Mining Ass'n., et al. v. Dep't. of Labor*, ___ F.3d ___, Case No. 01-5278 (D.C. Cir. June 14, 2002) with the exception of a few provisions found to be impermissibly retroactive and a cost-shifting provision found to be invalid.

1. RETROACTIVITY

[a] AFFIRMED

Upon review of the challenged regulations, the court held that the following provisions were not impermissibly retroactive:

- the "treating physician rule" at 20 C.F.R. § 718.104(d) "is not retroactive because it codifies judicial precedent and does not work a substantive change in the law";
- the amended definition of pneumoconiosis at 20 C.F.R. § 718.201(a)(2), which provides that legal pneumoconiosis may include "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment," is not impermissibly retroactive because it does not create any presumption that an obstructive impairment is coal dust related; rather, it is the claimant's burden to establish that his/her restrictive or obstructive lung disease arose out of coal mine employment;
- the amended provisions at 20 C.F.R. § 718.201(c), which provide that pneumoconiosis is "recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," are not impermissibly retroactive. The court noted that both parties agreed that, in rare cases, pneumoconiosis is latent and progressive. As a result, the court found that the amended regulation "simply prevents operators from claiming that pneumoconiosis is never latent and progressive";
- the provisions at 20 C.F.R. § 725.309(d), related to filing multiple claims, are not improperly retroactive; and
- the provisions at 20 C.F.R. § 725.101(a)(6), wherein the definition of "benefits" includes expenses related to the Department-sponsored medical examination and testing of the miner under § 725.406, is not impermissibly retroactive. Under the amended provisions, as with the prior version of the regulations, the Trust Fund is reimbursed by the employer for the costs of the Department-sponsored examination in the event that the claimant is successful.

[b] NOT AFFIRMED

The court did, however, remand the case for further proceedings regarding certain provisions which were impermissibly retroactive. The court defined an impermissibly retroactive regulation as applied to pending claims where "the new rule reflects a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability . . .." With this criteria in mind, the court concluded that the following regulations are improperly retroactive:

- the "total disability rule" at 20 C.F.R. § 718.204(a) is impermissibly retroactive because the amendments provide that "an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis" contrary to the Seventh Circuit's holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) (holding that a non-respiratory or non-pulmonary disability, such as a stroke, will preclude entitlement to black lung benefits);
- the provisions at 20 C.F.R. § 725.101(a)(31), which provide that "[a] payment funded wholly out of general revenues shall not be considered a payment under a workers' compensation law," are impermissibly retroactive. The court cited to a contrary decision from the Third Circuit in *Director, OWCP v. Eastern Associated Coal Corp.*, 54 F.3d 141 (3d Cir. 1995), wherein the court declined to adopt the Director's policy of not reducing a miner's black lung benefits by any amount s/he received from general revenues under a state occupational disease compensation act;
- the medical treatment dispute provisions at 20 C.F.R. § 725.701 are impermissibly retroactive as they create a rebuttable presumption that medical treatment for a pulmonary disorder is related to coal dust exposure contrary to the Sixth Circuit's holding in *Glen Coal Co. v. Seals*, 147 F.3d 502 (6th Cir. 1998); and
- the amended provisions at 20 C.F.R. §§ 725.204, 725.212(b), 725.213(c), 725.214(d), and 725.219(c) and (d) are impermissibly retroactive "because they expand the scope of coverage by making more dependents and survivors eligible for benefits."

2. ARBITRARY AND CAPRICIOUS, NOT FOUND

In addition to reviewing the regulatory amendments to determine whether they could be retroactively applied, the court also analyzed substantive changes in the following regulations and determined that they were not "arbitrary and capricious":

- the definition of pneumoconiosis at 20 C.F.R. § 718.201(a), to include "legal" and "medical" pneumoconiosis, is proper as it "merely adopts a distinction embraced by all six circuits to have considered the issue";
- the provisions at 20 C.F.R. § 718.201(c), which state that pneumoconiosis is recognized as a "latent and progressive disease which may first become detectable only after

cessation of coal mine dust exposure," is not arbitrary and capricious given the government's narrow construction of the regulation during oral argument that pneumoconiosis "may" be latent and progressive as well as a study cited at 62 Fed. Reg. 3,338, 3,344 (Jan. 22, 1997), which supports a finding that pneumoconiosis is latent and progressive "as much as 24% of the time";

- the "change in condition" rule at 20 C.F.R. § 725.309 is not arbitrary and capricious because the burden of proof continues to rest with the claimant to demonstrate that one of the applicable conditions of entitlement has changed;
- the "treating physician rule" at 20 C.F.R. § 718.104(d) provides that a treating physician's opinion "may" be accorded controlling weight, but the rule is not "mandatory." As a result, the court concluded that it did not arbitrary and capricious nor does it improperly shift the burden of proof from the claimant to the employer;
- the 'hastening death" rule at 20 C.F.R. § 718.205(c)(5) is not arbitrary and capricious because the regulation "nowhere mandates the conclusion that pneumoconiosis be regarded as a hastening cause of death, but only describes circumstances under which a hastening-cause conclusion may be made";
- the responsible operator designation provisions at 20 C.F.R. § 725.495(c) are not arbitrary and capricious "[w]here, as here, the Secretary affords a mine operator liable for a claimant's black lung disease the opportunity to shift liability to another party, it is hardly irrational to require the operator to bear the burden of proving that the other party is in fact liable";
- the medical treatment dispute regulation at 20 C.F.R. § 725.701(e) is not arbitrary and capricious; and
- the total disability rule at 20 C.F.R. § 718.204 is not arbitrary and capricious merely because it abrogates the Seventh Circuit's decision in *Peabody Coal Co. v. Vigna*.

3. BURDEN OF PROOF NOT IMPROPERLY SHIFTED

The court also upheld the following regulations on grounds that they did not improperly shift the burden of proof:

- the regulation at 20 C.F.R. § 725.408, which sets a deadline for an operator to submit evidence if it disagrees with its designation as the potentially liable operator, does not improperly shift the burden of proof from the Director to the employer to identify the proper responsible operator; rather, the court found that the regulation "shifts the burden of production, not the burden of proof; it requires nothing more than that operators must submit evidence rebutting an assertion of liability within a given period of time"; and
- the medical treatment dispute regulation at 20 C.F.R. § 725.701(e) does not improperly shift the burden of proof to the employer to "disprove medical coverage"; rather, "the Secretary explains that it shifts only the burden of production to operators to produce evidence that the treated disease was unrelated to the miner's pneumoconiosis; the ultimate burden of proof remains on claimants at all times."

4. LIMITATION OF EVIDENCE UPHELD

The court also upheld the evidence limitation rules on grounds that the Administrative Procedure Act at 5 U.S.C. § 556(d), as well as the Black Lung Benefits Act, permit the agency to exclude "irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." Moreover, the circuit court noted that the amended regulations afford ALJs the discretion to hear additional evidence for "good cause." *See* 20 C.F.R. § 725.456(b)(1). The court also determined that the evidentiary limitations were not arbitrary and capricious.

5. COST SHIFTING NOT UPHELD WHERE CLAIMANT UNSUCCESSFUL

Finally, the court found that the cost-shifting regulation at 20 C.F.R. § 725.459 "invalid on its face" because it improperly permits ALJs, in their discretion, to shift costs incurred by a claimant's production of witnesses to an employer, regardless of whether the claimant prevails. The court noted that the Secretary is authorized to shift attorney's fees under 33 U.S.C. § 928(d) only in the event that the claimant prevails.

[**review of black lung regulatory amendments**]

The Seventh Circuit Court of Appeals, in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, ___ F.3d ___, Case No. 00-3222 (7th Cir. May 31, 2002)(J. Wood, dissenting), discussed the criteria an ALJ should consider on modification.

Employer' petition for Section 22 modification was its second. It petitioned for modification of an award of survivor's benefits based, in part, on evidence which could have been submitted at the original hearing or during an earlier modification proceeding. The ALJ denied Employer's petition for modification as not in the interest of justice under the Act. She reasoned that all of the evidence that Old Ben proffered or attempted to obtain in the second modification proceeding had been available during the first modification proceeding, and that a modification proceeding is not intended to allow a party to simply retry its case when it thinks it can make a better showing by presenting evidence that it could have, but did not present earlier. "[t]o do so would allow the Employer, under the guise of an allegation of mistake, to retry its case simply because it feels that it can make a better showing the next time around."

Old Ben appealed to the Benefits Review Board, who affirmed the ALJ decision. The Board held that the ALJ acted within her discretion by finding that reopening the case would not render justice under the Act. The Board reasoned that Old Ben is bound by the actions of its original counsel, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum.

Old Ben appealed to the Seventh Circuit. The Director, Office of Workers' Compensation Programs filed a brief in support of the position of Old Ben, arguing that the ALJ and the Board

applied the incorrect legal standard; that the ALJ should be required to reopen the matter and reevaluate the award of benefits. The Director argued to the Court that a timely requested modification of a mistaken decision should be denied only if the moving party has engaged in such contemptible conduct, or conduct that renders its opponent so defenseless, that it could be said that correcting the decision would not render justice under the Act.

The Seventh Circuit accepted the position of Old Ben and the Director. It found that it owed the usual deference to the Director given by Courts to agencies that interpret its own statutes and regulations. The Court cited the Supreme Court decisions in *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968) and *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972), for the employment of "a broad reading of Section 22" to permit reconsideration of the ultimate question of fact without submitting any new evidence. The Court determined that the language, structure and case law interpreting Section 22 articulates a preference for accuracy over finality in the substantive award.

The Court held that "whether requested by a miner or an employer, a modification request cannot be denied out of hand based solely on the number of times modification has been requested or on the basis that the evidence may have been available at an earlier stage in the proceeding."

The Court discussed the factors to be considered in determining whether granting modification serves justice under the Act:

> ...we do not believe that only sanctionable conduct constitutes the universe of actions that overcomes the preference for accuracy. For example, just as the remedial purpose of the Act would be thwarted if an ALJ were required to brook sanctionable conduct, the purpose also would be thwarted if an ALJ were required to reopen proceedings if it were clear from the moving party's submissions that reopening could not alter the substantive award. So too, an ALJ would be entitled to determine that an employer was employing the reopening mechanism in an unreasonable effort to delay payment.
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> In making that determination, the ALJ will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit. These and other factors deemed relevant by the ALJ in a particular case ought to be weighed not under an amorphous "interest of justice" standard, but under the frequently articulated 'justice under the Act' standard, *O'Keefe*, 404 U.S. at 255. This distinction is not simply one of semantics. The latter formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given

great weight in all determinations under the Act.

The Court reiterated that "finality simply is not a paramount concern of the Act" and a remand of the case is required because "the ALJ gave no credence to the statute's preference for accuracy over finality . . .."

[**modification–preference for accuracy over finality**]

In *Consolidation Coal Co. v. Director, OWCP [Stein]*, ___ F.3d ___, Case No. 01-3315 (7th Cir. June 25, 2002), the Seventh Circuit upheld the ALJ's award of benefits. In reaching this determination, the court rejected Employer's argument that "[d]espite the fact that two qualified B-readers (including a board certified radiologist) determined that Stein's x-rays were positive, . . . Dr. Bruce's negative reading of Stein's CT scan (is) conclusive because it ostensibly is the most 'sophisticated and sensitive diagnostic test' available." Citing to comments underlying the amended regulations, the court noted that the Department has rejected the view that a CT-scan, by itself, "is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." 65 Fed. Reg. 79, 920, 79, 945 (Dec. 20, 2000). The court concluded that the ALJ reasonably accorded less weight to the negative CT-scan interpretation by a physician without any radiological qualifications as compared to the positive chest x-ray interpretations by physicians who are B-readers, and one physician who is also a board-certified radiologist.

[**existence of pneumoconiosis–weighing chest x-ray and CT-scan evidence**]

B. Benefits Review Board

Oral arguments will be heard by the Board in *Clevenger v. Mary Helen Coal Co.,* BRB No. 01-0884 BLA and *Lester v. Peabody Coal Co.*, BRB No. 02-0193 on June 27, 2002. The issues presented are as follows: (1) whether the employer has standing to appeal to the Board the administrative law judge's order allowing claimant to withdraw his or her claim; (2) whether the administrative law judge properly interpreted the provisions at 20 C.F.R. § 725.306 to authorize the withdrawal of a claim which has been previously adjudicated on the merits; and (3) if the administrative law judge's interpretation of 20 C.F.R. § 725.306 was proper, whether the regulation is valid.

[**oral argument before the Board–withdrawal of claims**]