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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 213 August 2009

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

A. U.S. Circuit Courts of Appeals[1]

***Christensen v. Dir., OWCP*, __ F.3d __, 2009 WL 2424798 (9th Cir. 2009).**

In a consolidated opinion, the Ninth Circuit rejected respondents' objections to petitioners' motions for appellate attorney's fees filed in three different cases.[2] The Court observed that, in a series of published opinions pertaining to these cases, it had held that the Board and other agency decision makers improperly determined the reasonable hourly rate for attorney's fees under the LHWCA by relying exclusively on past LHWCA fee awards and refusing to look at market evidence. Petitioners' applications for appellate attorney's fees were not premature, regardless of whether the agency would increase the reasonable hourly rate on remand, as they had prevailed on appeal with respect to their main argument, i.e. that the agency's methodology artificially depressed the reasonable hourly rate for the LHWCA bar. The Court then referred the determination of an appropriate amount of attorney's fees to the Court's special master.

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

[2] *See Dyer v. Cenex Harvest States Co-op.,* 563 F.3d 1044 (9th Cir.2009); *Christensen v. Stevedoring Servs. of Amer.,* 557 F.3d 1049 (9th Cir.2009); *Van Skike v. Dir., OWCP,* 557 F.3d 1041 (9th Cir.2009).

The Court also rejected respondents' assertion that 20 C.F.R. § 702.131(a)[3] compelled a denial of attorney's fees requested by counsel whose role consisted of presenting oral arguments in the underlying appeals because he had not submitted evidence demonstrating that petitioners authorized his representation. Counsel did represent petitioners' interests in these appeals, which is the only precondition that § 702.132(a) establishes for recovering attorney's fees. Even if entitlement to fees under § 702.132(a) was implicitly dependent on compliance with § 702.131(a), respondents waived any such objection as they had not raised it prior to the oral argument.

[Topic 28.6.1 Hourly Rate; Topic 28.1.2 Successful Prosecution; Topic 28.4 Application Process]

***Jackson v. Total E & P USA, Inc.*, 2009 WL 2474070 (5th Cir. 2009)(Unreported).**

Affirming the district court's grant of a summary judgment, the Fifth Circuit held that Jackson's negligence suit against Total was barred because he was a "borrowed employee" of Total at the time of his injury, and thus compensation under the LHWCA was his exclusive remedy, 33 U.S.C. § 905(a). This conclusion was compelled in light of the nine factors identified in *Brown v. Union Oil Co. of Cal.,* 984 F.2d 674, 676 (5th Cir. 1993) for the determination of "borrowed employee" status. PAC was essentially operating as a placement agency. PAC did not create Jackson's work environment, and it was not responsible for his working conditions. Jackson received his pay check from PAC, but all of his work was directed by and for the benefit of Total. Despite Jackson's attempt to rely on certain contractual provisions, parties cannot automatically prevent a legal status like "borrowed employee" from arising merely by saying in a provision in their contract that it cannot arise. While PAC did not relinquish all connection with Jackson, this was not required for the "borrowed employee" relationship with Total to arise; PAC's control over Jackson was nominal at most. Indeed, Total provided Jackson with work assignments through Total's computer system to be performed on Total's platform and equipment. Jackson clearly acquiesced in this arrangement. He was aware of his work conditions and chose to continue working in them. Jackson brought coveralls and some small tools, but Total provided many tools and ordered some specialized tools for him to use. Total also provided Jackson with food, sleeping quarters, bathing facilities, petty cash for shoe purchases, and a Total

[3] Section 702.131(a) provides that "[c]laimants, employers and insurance carriers may be represented in any proceeding under the Act by an attorney or other person previously authorized in writing by such claimant, employer or carrier to so act."

uniform. Finally, this work situation continued for eight months, which the Court considered to be a considerable length of time.

[Topic 2.2.16 Definitions—Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee doctrine; Topic 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability—Borrowed Employee Doctrine; Topic 5.1.1 Exclusive remedy]

***Becker v. Tidewater Inc.*, __ F.3d __, 2009 WL 2635458 (5th Cir. 2009).**[4]

Becker was injured while working as a summer intern for Baker as part of the crew of a boat owned by Tidewater. Baker's time-charter contract with Tidewater contained reciprocal indemnity provisions. Becker was injured aboard a jack-up oil rig owned by Falcon in the Gulf of Mexico. Becker was initially awarded damages under the Jones Act. However, in a prior decision, the Fifth Circuit held Becker to be a longshoreman, and remanded the case for further proceedings under the LHWCA.[5] Becker was ultimately awarded $37 million in damages against Baker and Tidewater under §905(b) of the LHWCA.

The Fifth Circuit held that the district court did not err in holding that the reciprocal indemnity agreement obligated Baker to indemnify Tidewater for the injury. Although §905(b) of the LHWCA provides that agreements for an employer to indemnify a vessel from injuries to a longshoreman are void, reciprocal-indemnity agreements between an employer and vessel are not void when a longshoreman is covered under the Outer Continental Shelf Lands Act ("OCSLA"). The Court concluded that Becker satisfied both the "situs" and "status" tests for the OCSLA. He satisfied the OCSLA situs test based on *Demette v. Falcon Drilling Co.,* 280 F.3d 492, 498 (5th Cir.2002)(holding that being injured on a jack-up oil rig satisfies the OCSLA situs test). Rejecting Baker's argument, the Court stated that prior Fifth Circuit precedent did not reject the site of the injury as the relevant situs under OCSLA, but rather held that when the injury does not occur on an OCSLA covered situs, the fact that a majority of work under the contract was performed on a situs covered by the OCSLA may be sufficient to satisfy the situs requirement. Further, Baker's argument that because the jack-up rig is a vessel, it cannot also be considered an OCSLA situs ran contrary to the

[4] Only some of several issues decided by the Court were selected for inclusion in this Digest.

[5] *Becker v. Tidewater, Inc.,* 335 F.3d 376 (5th Cir.2003) ("*Becker I* ").

Court's holding in *Demette* and found no support in *Stewart v. Dutra Construction Co.,* 543 U.S. 481 (2005).

The Court also rejected Baker's assertion that the indemnity agreement was invalid based on its allegation that Tidewater's actions were grossly negligent, upholding the district court's determination that Tidewater was not grossly negligent. Additionally, even if a breach by Tidewater of the time-charter contract could invalidate the indemnity agreement, the district court did not err in finding no such breach. The Court also rejected Baker's argument that the indemnity provision obligated it to indemnify Tidewater for "general damages only" and that Tidewater had to exhaust its liability insurance policies before turning to Baker for indemnity.

The Court found, however, that the district court erred in determining that some of Baker's acts were committed in its role as time-charter rather than employer, and remanded the matter for re-evaluating the apportionment of fault while considering only those acts of negligence that Baker committed as time-charter.

[Topic 60.3.2 OCSLA--Coverage (Situs, Status, "But for" Test); Topic 5.2.2 Indemnification; Topic 5.3 Indemnification in OCSLA claims]

***Alleman v. Omni Energy Servs. Corp.*, __ F.3d __, 2009 WL 2569794 (5th Cir. 2009)**.[6]

Following an accident in which a helicopter providing ferry services to oil platforms fell into the sea after landing on a platform, resulting in the death of one of its passengers and the injury of two others, civil actions were brought against the helicopter owner, and the owner of the helicopter thereafter sought indemnification from the platform operator.

The Fifth Circuit held that the Louisiana Oilfield Indemnity Act ("LOIA") applied to the helicopter owner's contract with the platform operator, making indemnity provisions of the contract void and unenforceable. OCSLA extends the laws and jurisdiction of the United States to the seabed and artificial islands on the outer Continental Shelf, including offshore platforms. 43 U.S.C. § 1333(a)(1). OCSLA also applies the laws of the adjacent state (here, Louisiana) as surrogate federal law on oil platforms. OCSLA, § 4, 43 U.S.C.A. § 1333. The Court initially concluded that OCSLA applied to the

[6] Withdrawing and superseding on rehearing *Alleman v. Omni Energy Servs. Corp*., 570 F.3d 680 (5th 2009).

contract, as determined by a three-part test:[7] (1) The controversy must arise on a situs covered by OCSLA; (2) federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with Federal law. Only the second prong was in dispute. Based on the nature and subject-matter of the contract (i.e., aviation services), the Court held that a contract to ferry workers to offshore oil platforms is not a maritime contract, and therefore the second prong was met. Consequently, OCSLA, and thus LOIA, applied, rendering the indemnity provision void.

Reversing the district court, the Fifth Circuit further held that OCSLA, rather than the Death on the High Seas Act ("DOHSA"),[8] governed tort claims arising out of the death of the helicopter passenger as a result of the accident in which the helicopter, after landing on the deck of an oil platform, fell off the platform and into the sea. OCSLA applies to accidents "actually occurring" on oil platforms. 43 U.S.C. § 1333. Since the helicopter had already landed when its pilot tried to reposition it, resulting in the accident, the accident "actually occurred" on the platform. The Court noted that its analysis was unaffected by the fact that the passenger fell into the sea after the accident occurred on the platform (after floating in the water for two hours, the passenger died of a heart attack while being rescued). *See Smith v. Pan Air* C*orp.*, 684 F.2d 1102, 1110 (5th Cir.1982) ("[W]e have applied OCSLA and, consequently, state law, to incidents in which platform workers who were the victims of torts originating on these artificial islands were not actually injured or killed until they fell, jumped, or were pushed into the surrounding seas."); *In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 273 (5th Cir.1974) ("Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform. The same concerns may be equally applicable to accidents fortuitously consummated in the surrounding sea.").

[Topic 5.3 Indemnification in OCSLA claims; Topic 60.3.2 OCSLA--Coverage (Situs, Status, "But for" Test); Topic 60.3.4 OCSLA v. Admiralty v. State Jurisdiction]

[7] The Court noted that the tests for maritime contract law and maritime tort law have long been different. Maritime jurisdiction covers torts that occur on the high seas and bear a significant relationship to traditional maritime activity. Conversely, maritime contract law applies based on the nature and character of the contract, rather than looking to where it occurred.

[8] DOHSA provides a right of action for any death occurring on the high seas beyond a marine league from the shore, or, in the case of a commercial aviation accident, more than 12 nautical miles from shore. 46 App.U.S.C.(1988 Ed.) § 761 et seq.

***Izaguirre v. C & C Marine and Repair*, No. 08-3551, 2009 WL 2488263 (USDC E.D.La. Aug. 11, 2009).**

In its summary judgment motion, C&C contended that it was immune from tort liability because Izaguirre was a longshoreman and a "borrowed servant" of C&C, and, therefore, C&C was immune from tort liability. Claimant asserted that he was an employee of SCS and thus could maintain a tort action against C&C. After discussing the nine factors identified in *Ruiz v. Shell,* 413 F.2d 310 (5th Cir.1969) for determining whether LHWCA tort immunity is extended in cases where an employer borrows the employee of another employer, the court denied C&C's motion for a summary judgment on this issue. The Court concluded that there was a disputed issue of material fact as to whether Izaguirre's supervisor was employed by C&C or by SCS at the time of the incident in view of conflicting testimony on this issue. If the supervisor was employed by SCS at the time of the incident, then many of the factors articulated in *Ruiz* to determine if Izaguirre was a "borrowed servant" of C&C would weigh in favor of a finding that he was not.

[Topic 2.2.16 Definitions—Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee doctrine; Topic 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability—Borrowed Employee Doctrine]

B. Benefits Review Board

***M.K. v. California United Terminals*, __ BRBS __, BRB No. 08-0392 (Aug. 28, 2009).[9]**

On reconsideration,[10] the Board affirmed its earlier holding that ILWU-PMA's Section 17 lien claim and Section 7 claim for reimbursement of medical benefits had to be resolved simultaneously with the Section 8(i) settlement agreements entered into by the claimants and their respective employers. The Board clarified this holding to reflect that only those parties with a financial interest in the claim must have their rights resolved simultaneously.

[9] For purposes of this decision, the Board consolidated this appeal with the appeals in two other cases, i.e., *M.K. v. Maersk Pacific/APM Terminals Pacific Ltd*., BRB No. 08-0450, and *R.B. v. Yusen Terminals, Inc*., BRB No. 08-0606.

[10] *M.K.. v. California United Terminals*, 43 BRBS 1 (2009).

The Board rejected the employers' argument that they could exclude ILWU-PMA from any settlement agreement regarding medical benefits since ILWU-PMA's Section 17 rights would not be impaired. The settlement applications in these cases were for "compensation and medical benefits combined." Since the settlement agreements would discharge employer's liability for all of claimants' past medical expenses, they would deprive ILWU-PMA of its medical reimbursement claims under the Act. Because ILWU-PMA's medical reimbursement claims were entirely derivative of claimants' claims for medical benefits, such claims had to be resolved simultaneously. It made no difference in this case that an 8(i) settlement may include only the compensation portion of a claim leaving the medical portion "open," and vice versa,[11] since this was not the case here. Thus, the settlements infringed on ILWU-PMA's derivative right to reimbursement and had to be vacated.

The Board clarified that only those parties with a financial interest in the claim must have their rights resolved simultaneously with the rights of the other parties whose financial interests are also at stake. Thus, the Director is not a required participant in a settlement unless he has a financial interest. Here, ILWU-PMU had, via its valid §17 liens, a financial interest in the disability aspect of the settlements. As for the medical benefits, ILWU-PMA's financial interests, premised on its §17(d)(3) reimbursement claims, arose because the settlement agreements included releases for both past and future medical benefits. By contrast, since ILWU-PMA in these cases did not have an interest in the issue of future medical benefits, settlement agreements limited to such claims would not require its participation. The Board noted that in cases involving medical insurers where §17 is not at issue, the parties may still settle claims for disability and future medicals where the insurer intervenes only to recover past payments for medical treatment.

[Topic 17.1 Lien against assets – Generally; Topic 8.10.1 Section 8(i) Settlements—Generally; Topic 8.10.2 Section 8(i) Settlements--Persons Authorized]

***F.S. v. Wellington Power Co.*, __ BRBS __, BRB No. 09-0125 (Aug. 7, 2009).**

The Board held that an injury sustained by the claimant while working as an electrician on the construction of the Woodrow Wilson Bridge, which was permanently affixed to land at the time of the injury, did not occur on

[11] *See* 20 C.F.R. §702.243(d).

navigable waters and thus failed to meet the situs requirement under the Act, pursuant to *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

As the bridge was not an enumerated site or "other adjoining area" under Section 3(a), claimant could recover only if his injury occurred on actual navigable waters and thus would have been covered prior to 1972. *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). In *Nacirema*, the Supreme Court, in addressing the scope of the pre-1972 version of Section 3(a), held that structures such as piers and wharves permanently affixed to land are extensions of land, and thus injuries occurring thereon were not compensable. *Id.* at 214-215. In *Perini*, the Supreme Court subsequently held that, post-1972, the Act's coverage was extended to those workers whose injuries would have been covered prior to 1972 because the injuries occurred on actual navigable waters in the course of employment on those waters. 459 U.S. at 324, 15 BRBS at 80(CRT).

Claimant's reliance on *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000) was misplaced, as that decision supported the legal conclusion that an injury occurring on a bridge permanently affixed to land did not occur on navigable waters such that coverage was conferred pursuant to *Perini*. Nor did *LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983) mandate a contrary result. That decision was limited to the consideration of Section 2(3) status as the parties had stipulated to situs, and held that a bridge worker on a project intended to improve navigation may meet the status requirement. Here, the Board rejected the claimant's assertion that the situs requirement was met because the Wilson Bridge project was uniquely maritime in that it was intended to increase navigability. The Board further noted that claimant *LeMelle* was injured while surrounded by water on a piling in the middle of the river. Here, by contrast, the claimant was injured on the maintenance level of the bridge span itself, which was permanently attached to land. Although the claimant arrived at his work site by crossing a series of barges, unlike in *LeMelle*, there was no evidence that he could reach his work site only by vessel, as the bridge was traversable.

As claimant's injury occurred on a non-enumerated site permanently attached to shore, *Nacirema* was controlling. Indeed, the Supreme Court in *Nacirema* analogized a pier to a bridge, stating that the Act does "not cover injuries on a pier even though a pier, like a bridge, extends over navigable waters." *Id.* at 215. The Supreme Court declined to interpret the 1927 Act as if "situs" coverage was based on the broader aspect of an employee's "status," i.e., his maritime employment contract. The Board has consistently applied *Nacirema* in holding that injuries on bridges or bridge-like structures

permanently affixed to land did not occur on navigable waters and thus were not covered by the Act (citations omitted). *Cf. Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972) (death on temporary causeway on Delaware River occurred on navigable waters because *Nacirema* applies only to structures permanently affixed to shore).

[Topic 1.6.1 Situs—"Over Water;" Topic 1.6.2 Situs—"Over land"]

***S.W. v. Atlantic Container Serv.*, __ BRBS __, BRB No. 09-0145 (Aug. 28, 2009).**

The Board held that the facility in which claimant was injured ("95 Fargo Street facility") satisfied the situs requirement under the Act, as it had both a geographic and a functional nexus to the same body of water and, therefore, constituted an "adjoining area" under Section 3(a). The Board noted that while the ALJ applied the "*Herron/Winchester* factors" for determining whether the site of an injury constitutes an "adjoining area," her conclusion that the facility was not an "adjoining area" was not supported by substantial evidence. *Brady-Hamilton Stevedore Co. v. Herron*, 586 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981).[12]

Contrary to the ALJ's finding, the geographic proximity requirement was met because the 95 Fargo Street facility was as close to the Reserved Channel and Boston Harbor as was feasible, the employer's relocation of its chassis repair work from the Conley Terminal to the facility was dictated by maritime concerns, and the facility was in the general geographic area of the Boston Harbor. The Reserved Channel, to which the Conley Terminal was adjacent, was approximately 200 yards away, behind the facility and across a street. The functional nexus under Section 3(a) was also established as the facility was used exclusively to repair chassis to be used in transporting shipping containers.

The Board noted that the facts in this case were akin to those in *Winchester*, *supra*, and *Stratton v. Weedon Engineering Co.*, 35 BRBS I (2001) (*en banc*), and distinguishable from those in *Cunningham v. Dir., OWCP*, 377 F.3d 98, 38 BRBS 42(CRT)(1st Cir. 2004). In *Winchester*, a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a functional nexus to maritime activity as it

[12] The Board noted that in *Cunningham v. Dir., OWCP*, 377 F.3d 98, 38 BRBS 42(CRT)(1st Cir. 2004), the First Circuit "tacitly approved" the use of the *Herron/Winchester* factors.

was used to store loading gear. Unlike two other gear rooms, the gear room where the injury occurred was not located on the docks due to a lack of space. Similarly, in this case, part of the chassis repair work was moved from the Conley Terminal to the 95 Fargo Street facility due to space limitations. Further, in *Stratton,* the Board held that employer's "clean shed" satisfied the geographic criterion of the situs test, as it was approximately 300-400 feet from the navigable St. John's River and adjacent to a canal which led to the river, and thus was "within the vicinity" of navigable water, notwithstanding the presence of non-maritime properties in the surrounding area.

Here, as in *Stratton* and in contrast to *Cunningham*, the 95 Fargo Street facility had both a functional and geographic relationship with the Conley Terminal, which was sufficient to establish that it was an "adjoining area" under Section 3(a). In contrast to the locations in *Cunningham*, while the 95 Fargo Street facility and the Conley Terminal were separate facilities, they existed in a common geographic area, and the 95 Fargo Street facility had both a functional and geographic nexus with the same bodies of water, i.e., the Reserved Channel and the Boston Harbor, as did the Conley Terminal. The facility was "encompassed within the perimeter of a general maritime area which [was] dominated by the Conley Terminal." Slip. op. at 7 (internal quotations omitted); it was located only one mile from the Conley Terminal and its docks on Boston Harbor. Additionally, citing recent case law, the Board observed that the courts and the Board have held that a facility used for the repair and maintenance of equipment employed in the loading/unloading process may be an "adjoining area."

[Topic 1.6.2 Situs—"Over land"]

A.P. (Widow of R.P.) v. Navy Exchange Serv. Command, L.L. (Widow of C.L.) v. Navy Exchange Serv., __ BRBS __, BRB No. 09-0208 (Aug. 26, 2009).

The Board affirmed an ALJ's dismissal of claimant's claims for death benefits asserted under the Nonappropriated Fund Instrumentalities Act ("NFIA"), the Defense Base Act ("DBA"), and Philippine Presidential Decree 626.

The ALJ properly found that, as the Republic of the Philippines is not a territory of the United States, 33 U.S.C. §902(9), the Longshore Act without

reference to its extensions did not apply to injuries or deaths occurring in the Philippines.[13]

The Board further held that the claims at issue were not covered by the provisions of Section 8171 of the NFIA,[14] but, rather, fell under the purview of Section 8172 because decedents were neither U.S. citizens nor permanent residents of the U.S. or a territory or possession of the U.S. and were employed by a nonappropriated fund instrumentality in the Philippines. 5 U.S.C. §8171(a), 8172. The Board also affirmed the ALJ's determination that he lacked jurisdiction to determine the claimants' entitlement to compensation under Section 8172 and that such jurisdiction lay with the Secretary of the Navy. 5 U.S.C. §8172; 32 C.F.R. §756.9(b)(2); *Ultria v. U.S. Marine Exchange*, 7 BRBS 387, 390 (1978).

The Board further concluded that the claims were not covered by the DBA, holding that the DBA does not apply to employees of nonappropriated fund instrumentalities. The Board adopted the D.C. Circuit Court's reasoning in *Army & Air Force Exchange Serv. v. Hanson*, 360 F.Supp. 258, 260 (D. Haw. 1970)(holding that the DBA was superseded by the NFIA with respect to nonappropriated fund employees, and, thus, there is no DBA coverage for that group of employees), noting that *Hanson* was "the sole judicial decision to address this issue." Based on *Hanson*,[15] the Board concluded that "as [the NFIA] is a later, more specific statute, the NFIA takes precedence over the DBA with respect to employees of nonappropriated fund instrumentalities." Slip. op. at 9. Thus, in view of the exclusive liability provision at Section 8173 of the NFIA, the claims were not covered under the DBA.

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[13] Citing, *inter alia*, the Board's recent decision in *J. T. v. Global Int'l Offshore, Ltd*., BRES , Nos. 08-0119/A (July 29, 2009).

[14] The Board noted that no party suggested that decedents were permanent residents of the Subic Bay Naval Station or that the naval station was a "possession" of the United States. As claimants' assertion of coverage under the NFIA was not premised on these grounds, the issue of coverage under Section 8171 on these grounds was not considered.

[15] The Board noted that the Court in *Hanson* also held, based on legislative history, that Section 1651(a)(6) of the DBA, pertaining to employees of an American employer providing "welfare or similar services" for the benefit of the Armed Forces, did not apply to nonappropriated fund instrumentality employees. 360 F.Supp. at 260-261. Accordingly, the Board held that Section 1651(a)(6) did not apply to decedents.

Lastly, the Board affirmed the ALJ's determination that he lacked jurisdiction to consider claims brought under Philippine Presidential Decree 626.

[Topic 2.9 Definitions – United States; Topic 60.4.1 Nonappropriated Fund Instrumentalities Act—Applicability of the LHWCA; Topic 60.4.5 Nonappropriated Fund Instrumentalities Act —Miscellaneous; Topic 60.4.4 Nonappropriated Fund Instrumentalities Act —Exclusivity of Remedy; Topic 60.2.1 Defense Base Act]

II. Black Lung Benefits Act

Benefits Review Board

By published *en banc* decision, *R.G.B. v. Southern Ohio Co.*, 24 B.L.R. 1-__, BRB No. 08-0491 BLA (Aug. 28, 2009) (en banc), the Board addressed the Administrative Law Judge's authority to remand a black lung claim for further evidentiary development. On appeal were five orders of remand issued by the Administrative Law Judge in five different claims on grounds that Department-sponsored pulmonary evaluations conducted pursuant to 20 C.F.R. § 725.406 were deficient.

Employer maintained that the Administrative Law Judge exceeded his authority under 20 C.F.R. § 725.456(e) in remanding the claims prior to admission of all of the evidence at the formal hearing and without notice to the parties. The Director, Office of Workers' Compensation Programs (Director), on the other hand, argued that the Administrative Law Judge has authority to remand a claim "at any time prior to the termination of the hearing" if s/he determines that the Department-sponsored examination is either incomplete or not credible. Notably, however, the Director asserted that, with regard to two out of the five claims at issue, the Administrative Law Judge erred in finding the pulmonary evaluations incomplete.

According deference to the Director's position, the Board held the following:

> [T]he administrative law judge has discretion to exercise his or her remand authority, pursuant to Section 725.456(e), at any time in the adjudicatory process, beginning when the administrative law judge assumes jurisdiction of the claim and ending with the termination of the hearing.

Slip op. at 10[16]. Moreover, the Board held that the Administrative Law Judge may review the "DOL-sponsored pulmonary evaluation *sua sponte*" and, without prior notice to the parties, s/he may remand the claim for supplementation of the evaluation.

In determining whether the Department-sponsored evaluations were sufficient under § 725.406, the Board concluded that the Administrative Law Judge correctly found deficiencies in examinations underlying three of the claims, whereas two other claims should not have been remanded.

In one claim, the physician failed to address an element of entitlement, *i.e.* whether the miner was totally disabled due to a respiratory condition. In a second claim, the physician failed to address "two requisite elements of entitlement in claimant's case, the existence of legal pneumoconiosis and total respiratory disability." In a third claim, the Department-sponsored physician offered "contradictory" statements in his report and deposition testimony regarding whether the miner suffered from legal pneumoconiosis. For these three claims, the Board agreed with the Director that the pulmonary evaluations did not satisfy the requirements of 20 C.F.R. § 725.406 and remand was proper.

In two other claims, however, the Board vacated the Administrative Law Judge's remand orders upon concluding that the requirements of 20 C.F.R. § 725.406 were met. In the first of these claims, the Administrative Law Judge found that the physician did not "provide any rationale for why he determined that tobacco smoking was the sole cause of Claimant's pulmonary emphysema." The Director maintained that the Administrative Law Judge's "desire for a more detailed explanation of the doctor's conclusion" does not constitute a valid basis to remand the claim. The Board agreed and concluded that, because the physician "performed all of the necessary tests and his report addressed the requisite elements of entitlement, the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation." For similar reasons, the Board vacated the Administrative Law Judge's remand order in a second claim.

[pulmonary evaluations under 20 C.F.R. § 725.406; authority of the Administrative Law Judge to remand a claim under 20 C.F.R. § 725.456(e)]

[16] The Board does not define "termination" of a hearing. Under the procedural history that it provides for these claims, the Board notes that the Administrative Law Judge remanded the claims "prior to a hearing."