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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 181
May 2006 – June 2006

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Chief Judge for Longshore

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I. Longshore

ANNOUNCEMENTS

The latest edition of the Tulane Maritime Law Journal, Vol. 30, 2006, contains an interesting article entitled, "The Elusive Vessel of Maritime Jurisprudence and Navigation Through the Jones Act and Longshore and Harbor Worker's Compensation Act in Light of *Stewart v. Dutra Construction.*"

COURTS

A. United States Supreme Court

Lockheed Martin Corp. v. Morganti, ___ **U.S.** ___ (No. 05-907)(*Cert. denied*, May 30, 2006).

Supreme Court let stand the Second Circuit's holding that: 1) a lake was navigable for purposes of the LHWCA because it could physically support commercial shipping, and 2) as a matter of law, a floating object cannot be a fixed platform or artificial island. In this case a test engineer drowned while leaving a moored barge where sonar equipment components were tested. The Second Circuit found that he was a covered employee under the LHWCA. The court refused to address the issue of whether to adopt the "transient and fortuitous" exception to the general rule that a person injured on actual navigable waters is engaged in maritime employment. Here the Second Circuit found that the claimant spent a substantial amount of his time in maritime employment. He spent 1.5 to 2 days a week testing sonar equipment transducers on the barge. The barge was moored in the lake and unable to move on its own; therefore it was analogous to a floating platform. He reached the barge by shuttle boat.

[Topics 1.4.3 Jurisdiction/Coverage—Vessel; 1.5.2 Jurisdiction/Coverage—Navigable waters]

B. Circuit Court Cases

Tagliere v. Harrah's Illinois Corp., (Unreported)(No. 05-2637)(**7th Cir.** May 3, 2006).

The **7th Circuit** reversed the dismissal of a personal injury suit filed under admiralty law and involving a riverboat gambling "vessel." The district court had dismissed the matter for lack of admiralty jurisdiction. However, the circuit court found that no determination had been made as to whether the riverboat gambling ship was indefinitely moored, and thus retained its status as a "vessel." In an interesting explanation, the court concluded:

> We conclude that the district court erred in dismissing the suit, though it is open to the defendant to show on remand, it can, that its boat was permanently rather than merely indefinitely moored when the accident occurred and was therefore no longer a "vessel" for purposes of admiralty jurisdiction. The difference between "permanently" and "indefinitely" in this context is vague and has not been explored by the parties. The *Stewart [v. Dutra Construction Co., 543* ***U.S.*** *481, 494 (2005)]* case suggests that he boat must be permanently incapacitated from sailing. Yet maybe—by analogy to the difference between domicile and residence—a boat also is "permanently moored when its owner intends that the boat will never again sail, while if he has not yet decided its ultimate destiny it is only "indefinitely" moored. These are matters for exploration on remand.

[Topics 1.4.3 Jurisdiction/Coverage—Vessel; 1.4.3.1 Jurisdiction/Coverage—Floating Dockside Casinos]

Laird v. Sause Brothers, Inc., (Unpublished) (No. 04-76164)(**9th Cir.** June 9, 2006).

The Board affirmed the attorney fee awards issued by the ALJ and the District Director where both awarded a lower rate than that requested. The court found that the applicable regulations had been properly applied and that, under the particular circumstances of the case, a rationale determination had been made and there had not been an abuse of discretion.

[Topic 28.5.1 Attorney Fees—Amount of Award—Sufficient Explanation]

Centennial Stevedoring Services v. Director, OWCP, 2006U.S. App. LEXIS 15938, (Unpublished)(No. 04-72224)(**9th Cir.** June 22, 2006).

At issue here was whether Centennial was the last responsible employer. Both the ALJ and the Board found that it was the last responsible employer. Centennial had moved to reopen the record. The **Ninth Circuit** found that there was no abuse of discretion in denying Centennial's Motion to Reopen the Evidentiary Record. The court found that the new evidence of "collusion" on which the motion was based, did not

undermine the validity of the documentary and testimonial evidence on which the ALJ relied. *Cf. E.P. Paup Co. v. Director*, 999 F.2d 1341, 1347 n.1 (**9th Cir.** 1993)(recognizing the ALJ's broad discretion to correct mistakes in the record.). The court also found that the new evidence did not establish that the claimant contravened the goals of the LHWCA. *See Keenan v. Director*, 392 F.3d 1041, 1043-44 (**9th Cir.** 2004).

[Topics 2.2.16 Definitions—Responsible Employer; 23.1 Evidence—APA Generally; 23.2 Evidence—Admission of Evidence;]

National Steel and Shipbuilding co. v. Avant, Southwest Marine, and OWCP, 2006 U.S. App. LEXIS 13709, (Unpublished) (No. 04-72238)(**9th Cir.** May 31, 2006).

This is a "run of the mill" aggravation/ last responsible employer case where the treating physician subsequently changed his opinion at trial. The court found that the ALJ provided a rational basis for crediting the physician's pretrial reports and rejecting his subsequent contrary testimony.

[Topics 2.2.6 Definitions—Aggravation/Combination; 23.5 Evidence—ALJ Can Accept or Reject Medical Testimony; 70.1 Responsible Employer--Generally]

Universal Maritime Services Corp v. Ricker, (Unpublished), 2006 U.S. App. LEXIS 14978, (No. 05-3100)(**3rd Cir.** June 16, 2006).

The court upheld the ALJ in this aggravation case. The claimant had filed a claim for disability maintaining that his disability was caused by the exacerbation of his chronic obstructive pulmonary disease (COPD) and cor pulmonale as a result of his exposure to industrial irritants such as dusts and diesel fumes at the docks. The employer had denied responsibility contending that the worker's disability was caused by smoking.

[Topics 2.2.6 Definitions—Aggravation/Combination; 2.2.8 Definitions—Intervening Event/Causation vis-à-vis Natural Progression; 2.2.13 Definitions—Occupational Diseases: General concepts]

McBride v. Halter Marine, Inc., 2006 U.S. App. LEXIS 14367, ___ F.3d ___ (**5th Cir.** June 6, 2006).

The court upheld the Board and ALJ in this psychological injury issue case. This matter had been to the ALJ four times. The ALJ found that the alleged psychological condition was not causally related to on-the-job injuries sustained by the claimant. The claimant first alleged that he suffered psychological injuries more than two and a half years after his accident.

[Topic 20.2.1 Presumptions—*Prima Facie Case*]

Texaco Exploration and Production, Inc., v. Amclyde Engineered Products Co., Inc., 448 F.3d 760 (**5th Cir.** May 5, 2006).

In this OCSLA case federal subject matter jurisdiction was extended to a tort action of lessees of an offshore federal lease in a suit that resulted from the loss of a platform deck section. The court found that admiralty jurisdiction and maritime law did not apply so as to oust the substantive law of the adjacent state. Therefore, the plaintiff was entitled to a jury trial.

[Topic 60.3.4 Longshore Act Extensions--OCSLA--OCSLA v. Admiralty v. State Jurisdiction]

C. Federal District Court Decisions/Bankruptcy Court

Phillips v. Tidewater Barge Lines, Inc., 2006 U.S. Dist. LEXIS 40442, ___ F. Supp. 2d ___ (No. CV 05-1157-ST).

In a confusing conclusionary statement in this Summary Judgment Motion Order, the federal district court judge stated:

> Defendants moved for summary judgment on this claim arguing it is preempted by the LHWCA. The magistrate, working on the assumption that the LHWCA as opposed to the Jones Act applies in this case, found the issue was premature for resolution and recommended denying summary judgment. In light of this opinion, it is no longer clear whether the LHWCA or the Jones Act applies. Thus, I agree that whether or not this claim is preempted by the LHWCA is premature.

[Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act]

Abt v. Dickson Equipment Company, (Unpublished) 2006 U.S. Dist. LEXIS 42062 (SD. of Texas June 22, 2006).

In this negligence claim, the district court judge granted a Motion to Dismiss for Lack of Subject Matter Jurisdiction on the grounds that a longshore crane operator, who fell into the Houston Ship Channel when his crane broke, did not come within admiralty/maritime jurisdiction. The judge noted that when the crane broke, it was hanging over water, but was not working in connection with a vessel, but rather was being moved from one end of the dock to the other end of the dock. Therefore, the judge concluded, there was not a substantial relationship to maritime activity even though the incident was of the type that could disrupt maritime commerce.

[Topic 5.1 Exclusiveness of Remedy and Third Party Liability]

D. Benefits Review Board Decisions

Durham v. Embassy Dairy, ___ BRBS ___ (BRB No. 05-0778)(May 24, 2006).

Although, this case arises under the D.C. Workmen's Compensation Act, since it existed prior to the 1984 Amendments, the claimant is entitled to the rights afforded her under the LHWCA. The Board found that since there was no indication that the parties agreed to the issuance of a compensation order, the district director was without authority to issue an order awarding death benefits to the claimant. Furthermore, the board noted, "Because factual issues exist, such as when employer received notice of decedent's death, whether employer failed to file a Section 30(a) report, whether the time for filing a claim was tolled, when claimant filed her claim and whether it was timely filed, disputed issues must be resolved by an [ALJ]."

[Topic 60.1.1 Longshore Act Extensions—DCWCA—Applicability of the D.C. Act v. the LHWCA]

Stallings v. DYNCORP, ___ BRBS ___ (BRB No. 05-0673)(May 5, 2006).

The issue here was whether a claimant was employed in maritime employment. The claimant was a welder who worked for his employer at the Norfolk Naval shipyard. He worked in a building in which employees service ground-support equipment (GSE) belonging to ships docked at the shipyard. Specifically, the claimant repaired hydraulic "jennies," gas turbines, fire trucks, tow tractors, and bomb lifts. This equipment was necessary to the operation of aircraft onboard the aircraft carriers and some of the equipment also could be used on land. The equipment was brought to the building and returned to the ships by naval personnel. The claimant testified that he went on board the vessels very infrequently to see how a piece of equipment needed to be refitted for use on the ship. When pressed, the claimant could recall only one instance when he went on board a vessel to make a template for a bomb hook. The claimant was injured in the building while repairing a "jenny."

The Board upheld the ALJ's findings that the claimant did not repair a vessel, components of a vessel, ort equipment used to load or unload vessels. Rather the ALJ found that the claimant's job duties furthered the non-maritime purpose of maintaining equipment used for aircraft. The ALJ stated that although the claimant repaired equipment essential to the mission of the naval vessels, the claimant did not repair equipment essential to the operation of the naval vessels. Thus the ALJ concluded that the claimant was not engaged in covered employment.

[Topic 1.7.1 Jurisdiction/Coverage—STATUS—"Maritime Worker" ("Maritime Employment")]

Ambo v. Friede Goldman Halter, (Unpublished)(BRB Nos. 05-0665 and 05-0666)(May 8, 2006),

This case provides another example of the Board's allowing post-insolvency attorney's fees to be imposed on a state guaranty association under the LHWCA: "We hold that the provisions of the Longshore Act governing the securing of compensation with an 'association' are sufficiently broad so as to encompass this entity as a 'carrier' for purposes of shifting fee liability to [the association] in appropriate cases."

[Topic 28.2 Attorney Fees—Employer's Liability]

II. Black Lung Benefits Act

A. Circuit courts of appeals

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, ___ F.3d ___, Case No. 05-2108 (4th Cir. July 13, 2006), the court held that a miner's subsequent claim was not barred by the three year statute of limitations at 20 C.F.R. § 725.308 based on a medical opinion finding total disability due to pneumoconiosis submitted in conjunction with his prior denied claim. Citing to *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), the court reiterated that "the legal conclusion attendant with a prior denial—*i.e.*, that the miner was not eligible for benefits at the time of that decision—must be accepted as correct . . .." As a result, a physician's diagnosis of total disability due to pneumoconiosis in the first claim must be treated "as a misdiagnosis in light of the denial of [the] first claim" and the court held that it "must similarly conclude that the (mis)diagnosis had no effect on the statute of limitations for his second claim."

The court noted that pneumoconiosis is latent and progressive and, consequently, it concludes that "nothing bars or should bar claimants from filing claims *seriatim* . . .." The court stressed that, under § 725.309, "only new evidence *following* the denial of the previous claim, rather than evidence predating the denial, can sustain a subsequent claim." The court noted:

> In light of the standard articulated in *Lisa Lee Mines*, we note that Dr. Lebovitz's diagnosis, which related solely to Williams' condition in 1995, could not have sustained a subsequent claim that his condition had materially worsened since the initial denial of benefits in 1996. It would be illogical and inequitable to hold that a diagnosis that could not sustain a subsequent claim could nevertheless trigger the statute of limitations for such a claim.

Next, the court affirmed the Administrative Law Judge's decision declining to recuse himself. Employer argued that the Judge's comments at the hearing, and in a discovery order, demonstrated bias against coal companies. The court reasoned that "the tone and tenor of frustration expressed in the ALJ's comments do not, in and of themselves, establish bias against Consolidation" and, "given counsel's behavior, it is not surprising that the ALJ became annoyed." The court further denied Employer's challenge to a discovery order as indicative of bias, reasoning that "judicial rulings alone almost never constitute a valid basis for a bias or partiality ruling."

The court also held that the Administrative Law Judge properly applied an adverse inference of bias to the reports of Employer's medical experts because of Employer's refusal to comply with the ALJ's discovery orders. Specifically, Employer refused to respond to interrogatories, including how often its medical expert diagnosed pneumoconiosis. Because Employer failed to comply with the Judge's discovery order, the court found that the Administrative Law Judge properly treated Employer's expert

medical reports "as if Consolidation had complied with discovery and as if its responses to that discovery had demonstrated significant bias by both witnesses toward employers as a class and [it's law firm's clients as a class]."

Turning to evidentiary issues, the court held that the Administrative Law Judge properly permitted Claimant to designate two medical reports (out of three reports filed) in support of his claim as permitted by 20 C.F.R. § 725.414. In this vein, the court cited to the Board's decision in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) with approval.

Finally, the court held that the Administrative Law Judge properly credited a physician's opinion that the miner's airflow obstruction was caused by cigarette smoking as well as coal dust exposure. Employer had argued that the opinion was flawed because the physician did not "apportion [Claimant's] lung impairment between cigarette smoke and coal mine dust exposure . . .." The court disagreed and held that physicians need not make "such particularized findings."

[**three year statute of limitations; expert bias; recusal; limitations at § 725.414**]

B. Benefits Review Board

By published decision in a case arising in the Sixth Circuit, *Sturgill v. Bell County Coal Corp.*, 23 B.L.R. 1-___, BRB No. 05-0343 BLA (May 30, 2006) (en banc) (J. McGranery, dissenting), the Board held that the district director's preliminary finding of eligibility in conjunction with the miner's 1981 claim did not trigger the three year statute of limitations at § 725.308 to bar the miner's 2001 subsequent claim.[1]

Claimant and the Director maintained that a district director's finding of entitlement did not constitute a medical determination of total disability due to pneumoconiosis as contemplated by § 725.308 of the regulations. On the other hand, Employer maintained that the district director's finding of entitlement in the first claim implicitly meant that the medical elements of entitlement were satisfied. Further, Employer argued that there were medical opinions in the record, pre-dating the miner's 2001 claim by more than three years, which contained findings of total disability due to pneumoconiosis.

The Board agreed with the Claimant's and Director's position and concluded that, under § 725.308, Claimant is entitled to a rebuttable presumption that his or her claim is timely filed and, under *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of a claim. The Board specifically emphasized

[1] The miner continued working in "comparable and gainful employment" after the 1981 award such that he was ultimately found not entitled to benefits under the Act.

that *Kirk* requires a "trigger of the reasoned opinion of a medical professional" to commence the limitations period.[2]

[**three year statute of limitations**]

In another case arising in the Sixth Circuit, *Brigance v. Peabody Coal Co.*, 23 B.LR. 1-__, BRB No. 05-0722 BLA (June 29, 2006) (en banc), the Board upheld the Administrative Law Judge's finding that a miner's testimony, that two physicians advised him that he was totally disabled due to black lung disease, was insufficient to trigger the three year statute of limitations for filing his claim under *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In particular, the *Kirk* court held that the statute relies on the "trigger of the reasoned opinion of a medical professional." From this, the Board reasoned that the physicians' opinions referred to by the miner during his testimony were not in the record and the miner's testimony, standing alone, did not meet the *Kirk* standard for triggering the statute of limitation period.

Further, the Board upheld the Administrative Law Judge's finding that the miner established that he suffered from a totally disabling respiratory impairment based on the medical opinion evidence despite the fact that the ventilatory and blood gas testing was in equipoise. In this regard, the Board noted that the physicians who opined that the miner was totally disabled "had knowledge of claimant's usual coal mine employment." The Board did not state what other factors the physicians considered in finding the miner totally disabled.

[**three year statute of limitations; establishing total disability through medical opinion evidence**]

In *Weis v. Marfork Coal Co.*, 23 B.L.R. 1-__, BRB No. 05-0822 BLA (June 30, 2006) (en banc) (JJ. McGranery and Boggs, dissenting), it was undisputed that Claimant suffered from complicated pneumoconiosis and was entitled to benefits under the Act. Employer, however, challenged its designation as the operator responsible for the payment of benefits by submitting x-ray evidence demonstrating that Claimant suffered from complicated pneumoconiosis prior to the time of his employment with Employer.

A majority of the Board agreed with the Administrative Law Judge's finding that Employer waived its right to contest liability by not doing so in a timely fashion before the district director as required at 20 C.F.R. § 725.412(a)(2). Moreover, the Board upheld exclusion of the x-ray evidence at the formal hearing as the Judge concluded that Employer failed to demonstrate "extraordinary circumstances" pursuant to 20 C.F.R. § 725.456(b)(1), which provides, in part, that "[d]ocumentary evidence pertaining to the

[2] The Board noted that the medical opinion underlying the district director's 1981 award of benefits did not, on its face, support a finding of total disability due to pneumoconiosis. However, because Claimant was entitled to certain presumptions under 20 C.F.R. Part 727 at the time of filing the 1981 claim, the medical opinion constituted a sufficient basis upon which to award benefits.

liability of a potentially liable operator . . . which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." Citing to this regulation, and the Department's comments underlying its promulgation, a majority of the Board held that § 725.456(b)(1) applies to the x-ray evidence offered by Employer to the Administrative Law Judge. The majority agreed that the comments to the regulation, at 65 Fed. Reg. 79999 to 80000 (Dec. 20, 2000), do not "explicitly address the submission of 'medical records' as a means of escaping liability for the payment of benefits," but "the comments reveal the Department's intent that operators be required to submit 'any evidence' relevant to the liability of another party while the case is before the district director." As a result, the majority held that "x-ray interpretations and other medical records are included in the term 'documentary evidence' referenced in 20 C.F.R. § 725.456(b)(1)."[3]

[**designation of responsible operator**]

By unpublished decision in *McCoy v. Holly Beth Coal Co.*, BRB No. 05-0818 BLA (May 25, 2006) (unpub.), the Board has taken a decidedly different approach to the issue of establishing complicated pneumoconiosis by chest x-ray evidence. In particular, a physician must check a box indicating the presence of an A, B, or C opacity in order for a diagnosis of complicated pneumoconiosis to be made via chest x-ray evidence. Thus, where certain physicians did not check a box indicating the presence of an A, B, or C opacity, but commented that there was a "1.5 centimeter mass," "scattered masses as large as two centimeters," or a "1.5 centimeter nodule," the Board concluded that their comments did not constitute findings of complicated pneumoconiosis under the regulations.

The Board reasoned that "'opacity' is a term of art used to classify pneumoconiosis" and is not based on the "size of any finding." Thus, where a physician finds a large "mass" or "nodule," but does not specifically check a box that it is a size A, B, or C "opacity," then the x-ray interpretation does not support a finding of complicated pneumoconiosis.

[**complicated pneumoconiosis**]

By unpublished decision in *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006), the Board held that where the district director dismisses a responsible operator in a claim that is subject to the amended regulations, then any medical evidence submitted by the dismissed operator must be excluded unless a party specifically designates the evidence as part of its case under § 725.414 of the regulations.

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[3] The Board held that, <u>if evidence is excluded under 20 C.F.R. § 725.456(b)(1)</u> (requiring that documentary evidence pertaining to designation of an operator not be admitted at the formal hearing in the absence of "extraordinary circumstances"), <u>then it cannot be admitted under 20 C.F.R. § 725.456(b)(2)</u> (providing that, subject to the limitations at § 725.456(b)(1), evidence not submitted to the district director may be received at the hearing if it is exchanged with all parties at least 20 days prior to the hearing).

In addition, the Board held that the provisions at § 725.414 do not allow for the rebuttal of treatment records. As a result, the Board vacated the administrative law judge's ruling that Employer could submit a rebuttal interpretation of a chest x-ray reading contained in the miner's treatment records.

[**application of § 725.414 to dismissed operator's evidence; no provisions allowing for rebuttal of treatment records**]