

JUDGES' BENCHBOOK LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

**January 2005
SUPPLEMENT**



VOLUME II TOPICS 22 - 90

**Prepared by the U.S. Department of Labor
Office of Administrative Law Judges
Washington, DC**

EDITOR'S NOTE:

This supplement to the January 2002 edition of the Longshore Benchbook is a compilation of Digests and Errata, plus several re-workings of portions of original Benchbook subsections. It is current through January 3, 2005. (For the most recent case law that has developed since January 3, 2005, *see* the Significant Case Digests beginning with January--February 2005.) Periodically information contained in new Significant Case Digests will be added and citations will be updated as publishers provide volume and page numbers.

Topics 1 through 21 are contained in Supplement Volume 1. Topics 22 through 90 can be found within Volume 2.

TOPIC 22

Topic 22 Generally

Olsen v. Triple A Machine Shop, Inc., (No. C01-3354 BZ (ADR)) (N. Dist. of CA.) (Dec. 14, 2001)(Unpublished) (Order Granting Defendant Triple A Machine Shop's Motion To Dismiss)(Final Judgment entered December 17, 2001).

In *Olsen*, the Northern District of California ruled that it does not have jurisdiction over a LHWCA Modification Request. The district court, citing *Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (9th Cir. 1987), noted that it only has jurisdiction to enforce orders in relation to LHWCA matters.

Topic 22.1 Modification—Generally

Gulf Best Electric, Inc. v. Methe, ___ F.3d ___, (No. 03-60749) (5th Cir. Nov. 1, 2004). [ED. NOTE: This case was changed from Unpublished status to Published on December 27, 2004.]

The **Fifth Circuit** found that it lacked jurisdiction to consider the claimant's claim that the Board erred in excluding employer contributions to his retirement and health insurance funds when calculating his average weekly wage (AWW). It explained that the claimant had styled his petition a "Cross-Application to Enforce Benefits Review Board Order" but that, in substance, the petition was a simply a request that that the court reverse the Board's order, and thus allow inclusion of the employer's \$3.47 per hour contributions to retirement and health insurance funds in calculation of AWW. "Because the claimant raises this issue as an affirmative challenge to the BRB's decision rather than as a defense to his employer's appeal, his 'cross-application' is properly characterized as a petition for review and, thus is time-barred by Section 921©.

The **Fifth Circuit** further noted that the claimant contended that, because he has filed a petition for modification of the compensation award with DOL pursuant to Section 22, it would be a "waste of this court's time and resources" to dismiss his petition, only to have the claim eventually "work its way back through the system." The court noted that the claimant "cites no authority for the proposition that we may ignore the time requirements for appeal imposed by an agency's organic statute for the sake of equity or judicial efficiency" and therefore it dismissed the petition.

In this matter the court also affirmed the Board's decision that the date on which treatment actually ceased was the correct MMI date, noting that "[o]ne cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective." *Abbott v. La. Ins. Guaranty Assn.*, 40 F.3d at 126 (5th Cir. 1994).

Finally, the court upheld the Board's application of Section 10(a) rather than 10(c) as the ALJ had found. Noting that the claimant worked 47.4 weeks, or 237 days, or 91 percent of the workdays available in the year before his injury, the court stated that while it has not adopted a bright-line test for the applicability of Section 10(a) as the **Ninth Circuit** has (75 percent or more to be under Section 10(a)), "it is clear to us that [the claimant's] record of 91 percent satisfies the requirement of § 910(a) that the claimant have worked 'substantially the whole of the year immediately preceding the injury.'" The court addressed the ALJ's concerns of the "fairness" of possible overcompensation as his rationale for applying Section 10(c) by noting its prior position in *Ingalls Shipbuilding v. Wooley*, 204 F.3d 616 (**5th Cir.** 2000), that the calculation mandated by Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn... had he worked every available work day in the year. "Over-compensation alone does not usually justify applying § 910(c) when § 910(a) or (b) may be applied."

Topic 22.1 Modification-Generally

Seguro v. Universal Maritime Service Corp., 36 BRBS 28 (2002).

There is no provision under the LHWCA or the regulations for a "voluntary order" unless the parties agreement is embodied in a formal order issued by the district director or ALJ. Moreover, voluntary payments by an employer do not equate to a final order.

In the original claim in the instant case, the parties stipulated to all issues, including permanent disability, with the exception of Section 8(f) Trust Fund relief. In the original Decision and Order, the ALJ noted the parties stipulations, but did not incorporate an award of benefits to the claimant into his order. He stated that the only disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

Subsequently, the employer filed a Motion for Modification alleging that claimant had become capable of suitable alternate employment and the employer also filed a Motion for Partial Summary Decision, seeking a ruling that there was no final compensation award contained in the original Decision and Order. A second ALJ granted the partial Motion for Summary Decision, holding that there was no compensation award in place. The employer then stopped making payments. A third ALJ heard the employer's request for modification and found that there had been a "voluntary compensation order." Both the second and third ALJ decisions are the subject of this appeal.

On appeal, the Board found that the original Decision did not constitute a final compensation order and thus, Section 22 was not applicable as the initial claim for benefits had never been the subject of a final formal compensation order prior to the

adjudication by the third ALJ hearing the modification. Therefore, the claim before the third ALJ must be viewed as an initial claim for compensation.

Topic 22.1 Modification-Generally

Ravalli v. Pasha Maritime Services, 36 BRBS 47 (2002).

A modifying order terminating compensation based on a change in the claimant's physical and/or economic condition may be effective from the date of the change in condition. Having no **Ninth Circuit** precedent, the Board adopted the **Second Circuit's** position in *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001). The Board now finds it logical to hold that a termination of benefits is a "decrease" within the meaning of Section 22 in all circumstances, with the statutory caveat that a credit is available for a decrease where benefits are still owing. To the extent that the instant case is inconsistent with the Board's decision in *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993) ("the Act does not provide for retroactive termination."), it is overruled.

Topic 22.1 Modification—Generally

Alexander v. Avondale Industries, Inc., 36 BRBS 142 (2002).

At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

Topic 22.1 Modification—Generally

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

A modification request was properly raised and reviewed were the basis of the request was an allegedly mistaken finding as to the extent of disability. The claim was based on medical reports already in the record, as well as medical reports created after the initial decision. The court found that this claim of mistake was clearly factual in nature—there was disagreement as to the interpretation of the medical evidence.

Additionally, the employer contended that the Board's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings (that a doctor's opinion was inconsistent). However, the **Fourth Circuit** found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor's changing opinions reflected the progression of the claimant's condition.

Topic 22.3 Modification—Determining What Constitutes a Valid Request

Wheeler v. Newport News Shipbuilding and Dry Dock Co. [Wheeler IV], 37 BRBS 107 (2003).

In the original Decision and Order, the ALJ awarded permanent total disability after finding that the employer had failed to establish suitable alternate employment. On appeal, the Board affirmed the ALJ's finding that the positions identified by the employer were unsuitable due to either the claimant's poor verbal skills or lack of experience. However, the Board stated that the employer raised a legitimate argument that the claimant's refusal to meet with the employer's vocational expert in person may have prevented the employer from being aware of the claimant's verbal deficiencies and from forming an accurate picture of her verbal qualifications, and thus form considering this factor in conducting the labor market survey.

The Board in *Wheeler I* observed that the employer might elect to remedy this situation by submitting a new labor market survey by way of a petition for modification under Section 22. The Board explained that the claimant's refusal to meet with the vocational expert at the time of the initial proceeding should not preclude the employer's attempt to improve its evidence of suitable alternate employment upon its receipt of additional vocational information, as this would permit the claimant to benefit through her lack of cooperation.

Subsequently the ALJ granted the employer's motion for modification on the basis that a mistaken determination of fact was shown in his initial award of permanent total disability benefits. Citing to several cases, the Board in *Wheeler II* noted that the jurisprudence makes clear that the scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification.

That said, the Board in *Wheeler II* concluded that the ALJ properly exercised his discretion in granting modification in this case based on a mistake in fact. "In the instant case, on modification the [ALJ] rationally found that claimant deliberately frustrated employer's vocational rehabilitation efforts, and significantly exaggerated her symptoms... Claimant's failure to cooperate with employer's vocational efforts at the time of the initial proceeding denied employer a full opportunity to develop its evidence of

suitable alternate employment. As employer's new evidence of suitable alternate employment provides a basis for a mistake in fact in the initial finding of total disability, the [ALJ] acted within his discretionary authority in reopening the claim under Section 22."

The Board concluded, "Employer attempted to show that claimant is not totally disabled by producing evidence of suitable alternate employment at the initial hearing; employer's ability to meet this burden was affected by claimant's lack of cooperation with employer's vocational efforts. On modification employer presented evidence arguably providing a more accurate evaluation of claimant's capabilities. Under these circumstances, the [ALJ's] decision to reopen the case and reconsider whether claimant is totally disabled serves the interest of justice under the Act."

Topic 22.3 Modification—Determining what Constitutes a Valid Request

Jensen v. Weeks Marine, Inc., 346 F.3d 273 (2d Cir. 2003).

Here the **Second Circuit** clarified the proper legal standard for an ALJ to apply in Section 22 Modification Petitions. In the ALJ's Decision and Order, he found that the claimant had not injured his lower back, that he had injured his leg, that he had reached maximum medical improvement with a residual permanency of 4 percent, and that the employer's evidence of alternate employment was insufficient. Accordingly, the ALJ awarded permanent total disability benefits. Employer subsequently developed additional medical evidence about the claimant's condition as well as additional vocational evidence, with the claimant's cooperation. (Prior to the initial hearing, the claimant had refused to cooperate with the employer's assessment.)

The ALJ assigned the Petition for Modification denied the request, reasoning that the evidence presented by the employer could have been discovered by the initial hearing and that employer was merely attempting to re-litigate issues resolved by the first hearing. On appeal to the Board, the Board held that the employer had proffered evidence that, if credited, could establish an entitlement to modification. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999)(*Jensen I*).

The **Second Circuit**, however, stated, "[T]he Board's language in its first decision may be read to imply that a section 22 movant must make some 'threshold' proffer of new evidence before it is entitled to a review of the entire record...This impression would be error. As the **Supreme Court** has ruled, an ALJ may modify a prior order 'to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.' [Citing *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, at 256 (emphasis added by the court). Thus [Employer] was not required to show that the evidence it had developed was not available before the first hearing in order to secure a modification hearing."

The circuit court went on to state, "The Board's citation to *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982) may add to the confusion. Although *General Dynamics* contains some language about finality, *see id.* At 26 ("[p]arties should not be permitted to invoke 22 to correct errors or misjudgments of counsel"), the holding of the opinion is directed towards the moving party's failure to raise a Section 8(f) affirmative defense in the prior proceeding. *Id.*; *see also* 33 U.S.C. § 908(f)(3) ("Failure to present [a 8(f) request prior to ... consideration shall be an absolute defense to ... liability"). We believe that it is better to resist reading the *General Dynamics* dicta too broadly. *Cf. Old Ben Coal Co.*, 292 F.3d at 545 (nothing that finality language in *General Dynamics* is inconsistent with **Supreme Court** precedent and statutory language)."

Topic 22.3 Requesting Modification

[ED. NOTE: Since the Black Lung Act's Section 22 Modification statute was derived from the LHWCA Section 22 statute, the followings case law is noteworthy in a longshore context as well.]

Old Ben Coal Co. v. Director, OWCP [Hilliard], 292 F.3d 533 (7th Cir. 2002) (May 31, 2002) (J. Wood, dissenting).

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 22.3.1 Requesting Modification--Determining what constitutes a Valid Request

Norfolk Shipbuilding & Dry Dock Corp. v. Campbell, ___ U.S. ___, 124 S.Ct. 806 (Mem.)(*Cert. denied* December 1, 2003).

The **Supreme Court** let stand the **Fourth Circuit's** previous holding, *Norfolk Shipbuilding & Drydock Corp. v. Campbell*, (Unpublished)(No. 02-1701)(**4th Cir.** January 30, 2003), that a modification request was properly raised and reviewed where the basis of the request was an allegedly mistaken finding as to the extent of disability. The claim was based on medical reports already in the record, as well as medical reports created after the initial decision. The circuit court had found that this claim of mistake was clearly factual in nature--there was disagreement as to the interpretation of the medical evidence. Additionally, at the circuit level, the employer had contended that the Board's decision vacating the ALJ's order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ's findings (that a doctor's opinion was inconsistent). However, the **Fourth Circuit** found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor's changing opinions reflected the progression of the claimant's condition.

Topic 22.3.1 Requesting Modification--Determining What Constitutes a Valid Request

[**ED. NOTE:** The following June 2003 decision is included in this digest news letter because it was received in July.]

Gillus v. Newport News Shipbuilding & Dry Dock Company, 37 BRBS 93 (2003).

The Board found that when a claimant in temporary partial disability status filed a motion for modification seeking *de minimis* benefits, it was not, per se, invalid as an “anticipatory” claim. Specifically, here the claimant filed the motion after her doctor noted her increasing difficulty in performing her job and that she had progressive arthritis and probably would need knee replacement surgery in the future. Thus the claim was not “anticipatory” according to the Board.

Further more, the Board found that simply because the claimant’s injury was to her leg, a body part covered by the schedule, does not mean that the claimant cannot receive a *de minimis* award. The board noted that the claimant had not claimed or been compensated for any permanent disability to her leg, nor has her condition been termed “permanent” by her physician. Thus, her modification claim for *de minimis* benefits was appropriately viewed as based upon an award for temporary partial disability benefits pursuant to Section 8(e). A Section 8(e) award is not precluded to a claimant who sustains an injury to a member listed in the Schedule at Section 8(c), but whose injury has not yet been found permanent. A claimant is limited to the schedule only where the claimant is permanently partially disabled.

Topic 22.3.1 Requesting Modification—Determining what constitutes a Valid Request

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Additionally, the employer contended that the Board’s decision vacating the ALJ’s order denying the motion for modification improperly reweighed the evidence rather than giving proper deference to the ALJ’s findings (that a doctor’s opinion was inconsistent). However, the **Fourth Circuit** found that the Board had properly vacated the opinion of the ALJ since the Board found that the doctor’s changing opinions reflected the progression of the claimant’s condition.

Topic 22.3.2 Modification—Filing a Timely Request

Jones v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 105(2002).

At issue here is whether a timely Motion for Modification had been filed. More succinctly, at issue is whether a Motion for Modification may be based on a request for nominal benefits. In this case, the claimant was awarded benefits under the schedule for his work-related injury. Ten months after final payment of benefits under the schedule, but after the development of a hip condition (non-schedule), the claimant sent a letter to OWCP requesting nominal benefits. The ALJ found that this letter constituted a valid and timely motion for modification. Subsequently, the claimant filed a Motion for Modification over one year after the final payment of benefits.

Employer initially argued that the claimant's request for a *de minimis* award was not sufficient under Section 22 as an actual award is required in order to toll the statute of limitations and as the letter is a prohibited anticipatory filing which does not allege a change of condition or a mistake of fact.

However, the Board found that following the analysis of *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), if a nominal award is a present award under Section 8(c)(21)(h), then a claim for nominal benefits is a viable, present claim for benefits under Section 8(c)(21)(h). Since a compensation order may be reopened pursuant to Section 22 based on a claim of increased disability, the ability to reopen a case necessarily includes the filing of claims for nominal awards under Section 8(c)(21). "It would be irrational to hold, in accordance with employer's argument, that the

relief was appropriate in modification proceedings but a request for the appropriate relief was insufficient to initiate modification proceedings."

Thus, the Board rejected the employer's argument that a petition for a nominal award cannot hold open a claim. Furthermore, the Board found that a claim for a nominal award is a present claim which gives rise to a present ongoing award if the claimant ultimately proves his case, a claim for a nominal award is not a prohibited anticipatory claim. "Accordingly, a motion for modification requesting nominal benefits is not an invalid anticipatory filing as a matter of law."

The Board next examined the content and context of the letter/claim. The Board found that, on its face, the letter requested a specific type of compensation which the claimant would be immediately able to receive if he could prove entitlement. As to content, there must be a determination made as to whether the claimant had the intent to pursue an actual claim for benefits or it was filed solely with the purpose of attempting to keep the claimant's claim open. The Board, reasoned, "If the purpose of claimant's [letter] request was merely to hold open the claim until some future time when he became disabled, then the 1999 claim would not be a valid modification request." The Board upheld the ALJ's finding that the claimant had a legitimate non-frivolous, claim for benefits for a hip condition at the time he filed the letter.

Topic 22.3.2 Filing a Timely Request

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At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the Employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

Topic 22.3.3 Modification—*De Minimis* Awards

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Topic 22.3.3 Modification—*De Minimis* Awards

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Topic 22.3.2 Modification—Filing a Timely Request

Porter v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 105 (2002).

In contrast to the facts in *Jones v. Newport News Shipbuilding & Dry Dock Company*, 36 BRBS 109(2002), *supra*, the Board here notes that "[E]ven where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time."

Here, unlike in *Jones*, the Board found that the context of the filing established that the claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification. The Board noted that the claimant's August 12, 1999 letter was filed only 18 days after the last payment of benefits and that while "it is conceivable claimant's condition could have changed in that short period of time, providing a basis for her assertion that she anticipated future economic harm, there is no evidence of record to support such a conclusion." It went on to note that the 1999 letter was filed well in advance of the December 2000 evidence of any deterioration of her condition and, thus, constituted an anticipatory filing.

The Board found further evidence of an anticipatory filing in the claimant's actions. After receiving the 1999 letter, OWCP sought clarification of its purpose, asking the claimant whether the letter was to be considered "a request for an informal conference and/or Section 22 Modification so that we can [determine] what additional action needs to be taken by the office." The claimant responded stating that she did not want OWCP to schedule an informal conference, and, in so responding, she deliberately halted the administrative process.

The Board found that because the claimant intentionally acted in a manner contrary to the pursuit of her claim, her actions were merely an effort at keeping the option of seeking modification open until she had a loss to claim. "[S]he did not have the requisite intent to pursue a claim for nominal benefits, but rather was attempting to file a document which would hold her claim open indefinitely." The total circumstances surrounding the filing of the 1999 letter establish that the application did not manifest an actual intent to seek compensation for the loss alleged. Because the 1999 motion was thus an anticipatory filing, it was not a valid motion for modification.

While the Board found moot the claimant's argument that the ALJ erred in applying the doctrine of equitable estoppel, it nevertheless addressed it "for the sake of judicial efficiency." The Board found that, "Although, it was reasonable for employer to have relied on the statement that claimant did not wish to proceed to informal conference at that time, there was no detrimental reliance by employer. While employer may have thought the issue was abandoned or resolved in some manner it suffered no injury because of the letter: it took no action in reliance on the letter and it did not pay any benefits or place itself in a position of harm.

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Topic 22.3.5 Mistake of Fact

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Topic 22.5 Attorney Fees—Mistake of Fact

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maximum medical improvement with a residual permanency of 4 percent, and that the employer's evidence of alternate employment was insufficient. Accordingly, the ALJ awarded permanent total disability benefits. Employer subsequently developed additional medical evidence about the claimant's condition as well as additional vocational evidence, with the claimant's cooperation. (Prior to the initial hearing, the claimant had refused to cooperate with the employer's assessment.)

The ALJ assigned the Petition for Modification denied the request, reasoning that the evidence presented by the employer could have been discovered by the initial hearing and that employer was merely attempting to re-litigate issues resolved by the first hearing. On appeal to the Board, the Board held that the employer had proffered evidence that, if credited, could establish an entitlement to modification. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999)(*Jensen I*).

The **Second Circuit**, however, stated, "[T]he Board's language in its first decision may be read to imply that a section 22 movant must make some 'threshold' proffer of new evidence before it is entitled to a review of the entire record... This impression would be error. As the Supreme Court has ruled, an ALJ may modify a prior order 'to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.' [Citing *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, at 256 (emphasis added by the court). Thus [Employer] was not required to show that the evidence it had developed was not available before the first hearing in order to secure a modification hearing."

The circuit court went on to state, "The Board's citation to *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982) may add to the confusion. Although *General Dynamics* contains some language about finality, *see id.* At 26 ("[p]arties should not be permitted to invoke 22 to correct errors or misjudgments of counsel"), the holding of the opinion is directed towards the moving party's failure to raise a Section 8(f) affirmative defense in the prior proceeding. *Id.*; *see also* 33 U.S.C. § 908(f)(3) ("Failure to present [a 8(f) request prior to ... consideration shall be an absolute defense to ... liability"). We believe that it is better to resist reading the *General Dynamics* dicta too broadly. *Cf. Old Ben Coal Co.*, 292 F.3d at 545 (nothing that finality language in *General Dynamics* is inconsistent with **Supreme Court** precedent and statutory language)."

Topic 22.5 Attorney Fees—Mistake of Fact

Wheeler v. Newport News Shipbuilding and Dry Dock Co. [Wheeler IV], 37 BRBS 107 (2003).

In the original Decision and Order, the ALJ awarded permanent total disability after finding that the employer had failed to establish suitable alternate employment. On appeal, the Board affirmed the ALJ's finding that the positions identified by the employer were unsuitable due to either the claimant's poor verbal skills or lack of experience.

However, the Board stated that the employer raised a legitimate argument that the claimant's refusal to meet with the employer's vocational expert in person may have prevented the employer from being aware of the claimant's verbal deficiencies and from forming an accurate picture of her verbal qualifications, and thus from considering this factor in conducting the labor market survey.

The Board in *Wheeler I* observed that the employer might elect to remedy this situation by submitting a new labor market survey by way of a petition for modification under Section 22. The Board explained that the claimant's refusal to meet with the vocational expert at the time of the initial proceeding should not preclude the employer's attempt to improve its evidence of suitable alternate employment upon its receipt of additional vocational information, as this would permit the claimant to benefit through her lack of cooperation.

Subsequently the ALJ granted the employer's motion for modification on the basis that a mistaken determination of fact was shown in his initial award of permanent total disability benefits. Citing to several cases, the Board in *Wheeler II* noted that the jurisprudence makes clear that the scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification.

That said, the Board in *Wheeler II* concluded that the ALJ properly exercised his discretion in granting modification in this case based on a mistake in fact. "In the instant case, on modification the [ALJ] rationally found that claimant deliberately frustrated employer's vocational rehabilitation efforts, and significantly exaggerated her symptoms... Claimant's failure to cooperate with employer's vocational efforts at the time of the initial proceeding denied employer a full opportunity to develop its evidence of suitable alternate employment. As employer's new evidence of suitable alternate employment provides a basis for a mistake in fact in the initial finding of total disability, the [ALJ] acted within his discretionary authority in reopening the claim under Section 22."

The Board concluded, "Employer attempted to show that claimant is not totally disabled by producing evidence of suitable alternate employment at the initial hearing; employer's ability to meet this burden was affected by claimant's lack of cooperation with employer's vocational efforts. On modification employer presented evidence arguably providing a more accurate evaluation of claimant's capabilities. Under these circumstances, the [ALJ's] decision to reopen the case and reconsider whether claimant is totally disabled serves the interest of justice under the Act."

TOPIC 23

Topic 23.1 Evidence—APA—Generally

Mai v. Knight & Carver Marine, (Unpublished)(BRB No. 04-0183)(Oct. 15, 2004).

This case contains a discussion of the “adverse inference rule.” Here the Board rejected the claimant’s contention that an adverse inference should have been drawn based on the employer’s failure to produce the claimant’s time cards, which the claimant alleges would have shown maritime employment:

“Such an inference cannot substitute for claimant’s failure to establish an essential element of his claim, namely, that he engaged in maritime employment. Moreover, employer correctly contends that claimant could have obtained this evidence through discovery, but apparently made no attempt to do so.”

Topic 23.1 Evidence

Newport News Shipbuilding & Dry Dock Co. v. Harris-Smallwood, (Unpublished)(No. 02-1590) (4th Cir July 12, 2004).

In this unpublished matter involving Sections 12 and 13, the **Fourth Circuit** provides a good discussion dealing with crediting testimony of witnesses and weighing contradictory evidence and Section 8(f).

Topic 23.1 Evidence APA--Generally

Burley v. Tidewater Temps, Inc., 35 BRBS 185 (2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. § 702.338 (“...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

Moreover, given the importance of the excluded evidence in this case and the administrative law judge's use of permissive rather than mandatory language in his pre-hearing order, employer's pre-hearing submission of its labor market survey to claimant ...does not warrant the extreme sanction of exclusion.

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the permissive rather than mandatory language (“Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.”)

In ruling in favor of the employer on this issue, the Board distinguished this case from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to

exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros.*, 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that *Durham* did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished *Smith* as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in *Burley*, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

Topic 23.2 Admission of Evidence

Patterson v. Omniplex World Services, 36 BRBS 149 (2003).

This Defense Base Act case has issues concerning the admission of evidence and the scope of the relevant labor market for suitable employment purposes. Here, the claimant from Missouri was injured while employed as a security guard in Moscow as an embassy construction site. He had previously worked for this same employer for approximately six years before this injury in various locations.

After the close of the record in this matter, the employer requested that the record be reopened for the submission of "new and material" evidence which became available only after the close of the record. Specifically, the employer asserted that in a state court filing dated subsequent to the LHWCA record closing, the claimant stated that he had previously been offered and had accepted a security guard job in Tanzania.

The claimant argued that this evidence should not be admitted as it was outside the relevant Trenton, Missouri, labor market. The ALJ issued an Order Denying Motion to Reopen Record, stating that his decision would be based upon the existing record "due to the fact that the record was complete as of the date of the hearing together with the permitted post-hearing submissions, the complexity of the matters being raised post-hearing, the delays that would be encountered if further evidence is admitted, and the provisions of Section 22 of the Act which provide for modification of the award, if any."

In overturning the ALJ on this issue, the Board found the evidence to be relevant and material, and not readily available prior to the closing of the record. The evidence was found to be "properly admissible under Section 18.54(c) of the general rules of practice for the Office of Administrative Law Judges, as well as under the specific regulations applicable to proceedings under the Act. 20 C.F.R. §§ 702.338, 702.339. *See Generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

The Board further noted that Sections 18.54(a) of the Rules of Practice and 20 C.F.R. § 702.338 explicitly permit an ALJ to reopen the record, at any time prior to the filing of the compensation order in order to receive newly discovered relevant and material evidence.

While the Board affirmed the ALJ's conclusion that Missouri is the claimant's permanent residence, and thus his local labor market in the case, the Board opined that the ALJ should have considered the significance of the claimant's overseas employment in evaluating the relevant labor market. The Board concluded that, given the claimant's employment history, the labor market cannot be limited solely to the Trenton, Missouri, area. Additionally, the Board noted that, in fact, the claimant has continued to perform post-injury security guard work in the worldwide market.

Topic 23.2 Admission of Evidence

[ED. NOTE: Since the following Black Lung case involves the OALJ regulation, 29 C.F.R. § 18.20, it is mentioned here.]

Johnson v. Royal Coal Co., 326 F.3d 421 (**4th Cir.** 2003).

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

Topic 23.5 Evidence—ALJ Can Accept Or Reject Medical Testimony

Cooper/T. Smith, Inc. v. Veles, (Unreported)(No. 03-60809)(**5th Cir.** March 17, 2004); 2004 U.S. App. LEXIS 5077.

In this Section 20(a) presumption case, the employer faulted the ALJ for preferring the testimony of treating physicians over the respondent's expert witness and for crediting the claimant's testimony with respect to the difficulties caused by his knee and back. However, the **Fifth Circuit** found that the ALJ's findings were supported by substantial evidence, and that the Board acted properly in refusing to gainsay them. The court found that although the respondents pointed to the employer's physician's doubts that the back injury flowed from the claimant's limp, and also pointed to the claimant's "hypersensitivity" to pain, it was within the ALJ's purview to exercise his judgment in evaluating witnesses' credibility and in assembling the evidence presented to him.

"Merely because different determinations of credibility could have led to different conclusions, does not mean that the ALJ's fact finding was unsupported by substantial evidence."

Topic 23.5 Evidence—ALJ Can Accept Or Reject Medical Testimony

[ED. NOTE: The following Black Lung Benefits Act case is included because it may be applicable to Longshore cases. For a thorough discussion, please see the Black Lung portion of this Digest.]

Eastover Mining Co. v. Williams, 338 F.3d 501 (6th Cir. 2003).

In Black Lung cases, the **Sixth Circuit** has retreated from its earlier position that the treating physician's opinion is entitled to controlling weight. [The Longshore Bar has long called this concept of giving controlling weight to the treating physician, the "treating physician rule."] In its opinion, the **Sixth Circuit** notes the **Supreme Court's** position in *Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965 (2003)(Ginsburg, J.) wherein a unanimous Court criticizes the usefulness of automatically granting deference to the opinion of a treating physician.

Topic 23.5 Evidence—ALJ Can Accept or Reject Medical Evidence

[ED. NOTE: The following Social Security case is included since its holding may be applied in a Longshore context as well.]

Connett v. Jo Anne B. Barnhart, Commissioner, 340 F.3d 871 (9th Cir. 2003).

At issue here was the ALJ's acceptance/rejection of medical evidence. The **Ninth Circuit** noted that the ALJ who holds a hearing in the commissioner's stead, is responsible for determining credibility and resolving conflicts in medical testimony, and that when rejecting a claimant's testimony, the ALJ must be specific. An ALJ may reject pain testimony, but must justify his/her decision with specific findings. In the instant case, the court noted that the ALJ's rejection of certain claims regarding the claimant's limitations was based on clear and convincing reasons supported by specific facts in the record that demonstrated an objective basis for his finding. "The ALJ stated which testimony he found not credible and what evidence suggested that the particular testimony was not credible." Therefore, the decision was supported by substantial evidence.

As to other claims where the ALJ did not assert specific facts or reasons to reject the claimant's testimony, the matter was reversed. In addressing the treating physician's opinion, the **Ninth Circuit** noted that where a treating physician's opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. The ALJ can reject the opinion of a treating physician in favor of the conflicting opinion

of another examining physician “if the ALJ makes ‘findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record.’” In the instant case the **Ninth Circuit** found that the treating physician’s extensive conclusions were not supported by his own treatment notes.

The claimant also alleged that the “crediting as true” doctrine is mandatory in the **Ninth Circuit**. The “crediting as true” doctrine holds that an award of benefits is mandatory where the ALJ’s reasons for rejecting the claimant’s testimony are legally insufficient and it is clear from the record that the ALJ would be required to determine the claimant disabled if he had credited the claimant’s testimony. However, the **Ninth Circuit** specifically stated that it is not convinced that the doctrine is mandatory in that circuit. In finding that there is no other way to reconcile the case law of the circuit, the court stated, “Instead of being a mandatory rule, we have some flexibility in applying the ‘crediting as true’ theory.”

Topic 23.6 ALJ Determines Credibility of Witness

Newport News Shipbuilding & Dry Dock Co. v. Harris-Smallwood, (Unpublished)(No. 02-1590) (**4th Cir** July 12, 2004).

In this unpublished matter involving Sections 12 and 13, the **Fourth Circuit** provides a good discussion dealing with crediting testimony of witnesses and weighing contradictory evidence and Section 8(f).

Topic 23.6 Evidence—ALJ Determines Credibility of Witnesses

[ED. NOTE: The following Social Security case is included since its holding may be applied in a Longshore context as well.]

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Topic 23.6 ALJ Determines Credibility of Witnesses

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

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

Topic 23.7 Evidence—ALJ May Draw Inferences Based on Evidence Presented

Mai v. Knight & Carver Marine, (Unpublished)(BRB No. 04-0183)(Oct. 15, 2004).

This case contains a discussion of the “adverse inference rule.” Here the Board rejected the claimant’s contention that an adverse inference should have been drawn based on the employer’s failure to produce the claimant’s time cards, which the claimant alleges would have shown maritime employment:

“Such an inference cannot substitute for claimant’s failure to establish an essential element of his claim, namely, that he engaged in maritime employment. Moreover, employer correctly contends that claimant could have obtained this evidence through discovery, but apparently made no attempt to do so.”

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As to other claims where the ALJ did not assert specific facts or reasons to reject the claimant’s testimony, the matter was reversed. In addressing the treating physician’s opinion, the **Ninth Circuit** noted that where a treating physician’s opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. The ALJ can reject the opinion of a treating physician in favor of the conflicting opinion of another examining physician “if the ALJ makes ‘findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record.’” In the instant case the **Ninth Circuit** found that the treating physician’s extensive conclusions were not supported by his own treatment notes.

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circuit. In finding that there is no other way to reconcile the case law of the circuit, the court stated, “Instead of being a mandatory rule, we have some flexibility in applying the ‘crediting as true’ theory.”

Topic 23.7 ALJ May Draw Inferences Based On Evidence Presented

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

Topic 23.7 ALJ May Draw Inference Based on Evidence Presented

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TOPIC 24

Topic 24.1 Witnesses—Generally

Expert Witness Fees

In setting an expert witness fee, the LHWCA, at Section 25 provides that “Witnesses summoned in a proceeding before a deputy commissioner or whose deposition are taken shall receive the same fees and mileage as witnesses in courts of the United States.” Further, 20 C.F.R. § 702.342 provides “Witnesses summoned in a formal hearing before an administrative law judge or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States.”

The U.S. district courts set expert witnesses fees pursuant to the Federal Rules of Civil Procedure, Rule 26 (b)(4)(C)(i), which requires the deposing party to pay the responding party’s expert a reasonable hourly fee for time spent by the expert in deposition, time spent by the expert traveling to and from the deposition, and time spent in gathering documents responsive to the deposition subpoena. *In re Shell Oil Refinery, Robert Adams, Sr., v. Shell Oil Company*, 1992 WL 31867 (E.D. La. 1992) citing *United States v. City of Twin Falls, Idaho*, 806 F. 2d 862, 879 (9th Cir. 1986); *Goldwater v. Postmaster General of the United States*, 136 F.R.D. 37 (D. Conn. 1991). The deposing party is not responsible to pay the expert for time spent reviewing documents prior to deposition and in preparation for the deposition. The expert’s compensation shall be limited to a reasonable amount even if it is less than his customary fee.

In *Shell Oil*, the district court noted the following factors to be considered in determining the reasonableness of a fee:

- (1) the witness’s area of expertise; (2) the education and training that is required to provide the expert insight which is sought; the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area, and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Failure to comply with a deposition request may subject one to appropriate sanctions pursuant to Section 27 of the LHWCA. See Topics 27.1.2 ALJ Can Compel Attendance at Deposition; 27.1.3 ALJ Issues Subpoenas, Gives Oaths; and 27.3 Federal District Court Enforcement.

Topic 24.1 Witnesses—Generally

Newport News Shipbuilding & Dry Dock Co. v. Harris-Smallwood, (Unpublished)(No. 02-1590) (4th Cir. July 12, 2004).

In this unpublished matter involving Sections 12 and 13, the **Fourth Circuit** provides a good discussion dealing with crediting testimony of witnesses and weighing contradictory evidence and Section 8(f).

Topic 24.2 Expert Witness

[Ed. Note: The following Black Lung Benefits Act case is included because it may be applicable to Longshore cases. For a thorough discussion, please see the Black Lung portion of this Digest.]

Eastover Mining Co. v. Williams, 338 F.3d 501 (6th Cir. 2003).

In Black Lung cases, the **Sixth Circuit** has retreated from its earlier position that the treating physician's opinion is entitled to controlling weight. [The Longshore Bar has long called this concept of giving controlling weight to the treating physician, the "treating physician rule."] In its opinion, the **Sixth Circuit** notes the **Supreme Court's** position in *Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965 (2003)(Ginsburg, J.) wherein a unanimous Court criticizes the usefulness of automatically granting deference to the opinion of a treating physician.

TOPIC 26

TOPIC 27

[ED. NOTE: For information on expert witness fees, see Topics 24.1 Witnesses—Generally; and 19.3.6.2 Procedure—Adjudicatory Powers—Discovery.]

Topic 27.1 Powers of Administrative Law Judges--Procedural Powers Generally

Floyd v. Penn Terminals, Inc., 37 BRBS 141 (2003).

At issue here is the application of Section 8(j) forfeiture. The claimant has questioned the ALJ's authority to initiate consideration of forfeiture. The Board has previously held that an ALJ has the authority to adjudicate whether benefits should be suspended pursuant to Section 8(j). In the instant case the Board found that Section 8(j) itself provides no direction on the procedures for adjudicating forfeiture proceedings. The Board also noted that the legislative history is equally lacking any relevant information that might indicate whether Congress intended to make the district director the exclusive initial adjudicator of forfeitures.

After examining the regulations, the Board noted that Section 702.286(b) provides that an employer may initiate forfeiture proceedings by filing a charge with the district director, who shall then convene an informal conference and issue a decision on the merits. Nevertheless, if either party disagrees with the district director's decision, the

regulation authorizes an ALJ to consider "any issue" pertaining to the forfeiture. The Board explained that for this reason, despite the statutory reference to the deputy commissioner, the Board has previously held that an ALJ has the authority to adjudicate a forfeiture charge.

In holding that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the ALJ, the Board used the following logic:

Section 702.286(b) makes the subpart C rules for [ALJ] hearings (20 C.F.R. 702.331-702.351) applicable to forfeiture disputes. Section 702.336, in turn, authorizes an [ALJ] to consider "any" new issue at "any" time prior to the issuance of a compensation order. Thus, as the Director suggests, Sections 702.286 and 702.336 maybe construed harmoniously because section 702.286 does not qualify the authority conferred by Section 702.336. Consequently, the formal hearing procedures permit a party to raise the forfeiture issue for the first time at the hearing.

Further, the Board rejected the claimant's contention that his right to procedural due process would be abridged unless the district director initially considers all forfeiture charges and noted that ALJ hearings include protective procedural safeguards.

The Board declined to review the ALJ's certification of the facts of this case to the federal district court, pursuant to Section 27(b) regarding alleged misstatements on an LS-200 form and also regarding a pre-existing back condition. The Board cited *A-Z Int'l v. Phillips [Phillips I]*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

Topic 27.1 Powers of ALJs–Procedural Powers Generally

Macktal v. Chao, Secretary of Labor, 286 F.3d 822 (5th Cir. 2002).

[ED. NOTE: This whistle blower case is included for informational purposes only.]

The *de novo* issue here for the court was whether the (Administrative Review Board) ARB has inherent authority to reconsider its decisions when the Energy Reorganization Act does not mention reconsideration by the ARB of its orders. The court noted that while it has never expressly held so, it has generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions. It went on to note that the reasonableness of an agency's reconsideration implicates two opposing policies: "the desirability of finality on one hand and the public's interest in reaching what, ultimately, appears to be the right result on the other." After weighing these policies, the court found that in this instance, the ARB had the inherent authority to reconsider its decision.

Topic 27.1.1 Powers of the ALJ—ALJ Can Exclude Evidence Offered in Violation of Order

Dodd v. Crown Central Petroleum Corp., 36 BRBS 85 (2002).

This remand involved both a traumatic as well as psychological injury. Although finding the claimant to be entitled to total disability benefits, the ALJ ordered the benefits suspended pursuant to Section 7(d)(4), on the ground that the claimant unreasonably refused to submit to medical treatment, i.e., an examination which the ALJ ordered and the employer scheduled. The Board noted that Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that the claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to the claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant.

Here the Board supported the ALJ's finding that the claimant's refusal to undergo an evaluation was unreasonable and unjustified, citing the *pro se* claimant's erroneous belief that he has the right to determine the alleged independence and choice of any physician the employer chooses to conduct its examination or can refuse to undergo the examination because the employer did not present him with a list of doctors in a timely manner, and the claimant's abuse of the ALJ by yelling and insulting the integrity of other parties. (The Board described the telephone conference the ALJ had with the parties as "contentious.") The Board held that the ALJ did not abuse his discretion by finding that the claimant's refusal to undergo the employer's scheduled examination was unreasonable and unjustified given the circumstances of this case. However, the Board noted that compensation cannot be suspended retroactively and thus the ALJ was ordered to make a finding as to when the claimant refused to undergo the examination.

The Board further upheld the ALJ's denial of the claimant's request for reimbursement for expenses related to his treatment for pain management. The ALJ rejected the claimant's evidence in support of his request for reimbursement for pain management treatment pursuant to 29 C.F.R. § 18.6(d). That section provides that where a party fails to comply with an order of the ALJ, the ALJ, "for the purpose of permitting resolution of the relevant issues may take such action thereto as is just," including, (iii) Rule that the non-complying party may not introduce into evidence...documents or other evidence...in support of... any claim.... (v) Rule...that a decision of the proceeding be rendered against the non-complying party.

In a footnote, the Board noted that medical benefits cannot be denied under Section 7(d)(4) for any other reason than to undergo an examination. However, the Board went on to note, "The Act also provides for imposition of sanctions for failure to comply with an order. Under Section 27(b), the [ALJ] may certify the facts to a district court if a person resists any lawful order. 33 U.S.C. § 927(b). As these provisions are not

inconsistent with the regulation at 29 C.F.R. §18.6(d)(2), the [ALJ] did not err in applying it in this case."

Topic 27.2 Powers of ALJs—Discovery

[ED. NOTE: For information on expert witness fees, see Topics 24.1 Witnesses—Generally; and 19.3.6.2 Procedure—Adjudicatory Powers—Discovery.]

Topic 27.2 Powers of ALJs--Discovery

P & O Ports Louisiana, Inc. v. Newton, (Dismissal of Petition for Review)(No. 04-60403)(**5th Cir.** July 30, 2004).

The **Fifth Circuit** dismissed the employer's motion for lack of jurisdiction. Previously, while the matter was before OWCP the claimant had filed a Motion to Compel Discovery, seeking enforcement of an OALJ subpoena pursuant to *Maine v. Bray-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). The claimant had sought to discover information about potential employers identified by P & O's vocational expert regarding suitable alternate employment. P & O filed a Motion to Quash Subpoena Duceem Tuceum and a Motion for Protective Order. The ALJ denied P & O's motions, finding that its vocational evidence is discoverable, relevant and not privileged. P & O appealed to the Board and the claimant moved to dismiss the employer's appeal. The Board recognized that the employer was appealing a non-final order of an ALJ and noted that it "generally declines to review interlocutory discovery orders, as they fail to meet the third prong of the collateral order doctrine, that is, the discovery order is reviewable when a final decision is issued." The Board further found that the case did not involve due process considerations, that the employer did not contend the documents were privileged, and that the employer would not suffer undue hardship by complying with the ALJ's subpoena since the evidence was already in existence. Thus the Board dismissed the employer's appeal. The employer then petitioned the **Fifth Circuit**.

Topic 27.2 Powers of ALJs--Discovery

P&O Ports Louisiana, Inc. v. Newton, (**Fifth Circuit** No. 04-60403)(Petition for Review).

Recently P & O Ports filed a Petition for Review with the **Fifth Circuit**, asking that the court review the Board's interlocutory Order in this matter. *See Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004), reported in the March/April Digest. In response to the Petition for Review, the Director has filed a Motion in Opposition urging that the issues are not final. Interestingly, in a foot note in the motion, the Director questions the scope of *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986)(*en banc*) which limits the powers of district directors to issue subpoenas. In *Maine*, the

Board held that only ALJs have authority to issue subpoenas, even in cases pending before the Director.

Topic 27.2 Powers of Administrative Law Judges--Discovery

[ED. NOTE: The following is an Order to Compel Vocational Information Discovery issued by an ALJ in a matter still pending before OWCP. Pursuant to Maine v. Brady-Hamilton, 18 BRBS 129 (1986)(en banc), since the 1972 amendments, only OALJ has authority to issue subpoenas and process other discovery matters even though the claim is pending before the Director.)]

Newton v. P & O Ports, Inc., (OWCP No. 07-163948) (Oct. 7, 2003).

Here the claimant filed a Motion to Compel Discovery with OALJ seeking enforcement of a subpoena issued by OALJ for the names and addresses of the companies identified as suitable alternative employment by the employer's vocational expert. The employer resisted the subpoena on the grounds that, based on case law, an employer need not produce to a claimant the identity of suitable alternative jobs located by the employer. Maintaining that position the employer filed a Motion to Quash Subpoena Duces Tecum and a Motion for Protective Order.

In addressing this matter, the ALJ first noted that pursuant to *Maine*, it is manifest that OALJ possesses the authority in LHWCA cases not only to issue subpoenas, but also to decide matters arising from the subpoenas it has issued. Second, the ALJ found that the Employer "conflates the substantive standards for proving suitable alternative employment with the standards for discovery. He explained that the former involves a determination on the merits, while the latter is procedural in nature. The ALJ noted that the substantive standards for suitable alternative employment, as noted in *New Orleans (Gulfwide) Stevedores v. Turner [Turner]*, 661 F.2d 1031, 14 BRBS 156 (**5th Cir.** 1981), do not govern the discovery dispute before OALJ. The former involves a determination on the merits, while the latter is procedural in nature." *See also, P & M Crane Co. v. Hayes*, 930 F.2d 424, 430-31, 24 BRBS 116, 120-21 (CRT) (**5th Cir.** 1991). Similarly, an employer can prevail on the merits with respect to suitable alternative employment without producing to the claimant the jobs its vocational expert has identified. *See e.g. P & M Crane Co.*, 930 F.2d at 429 n. 9, 24 BRBS at 120 n. 9 (CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 7 (CRT) (**2d Cir.** 1991).

However, the ALJ went on to explain that the substantive correctness of the case law cited by *P & O*, namely *Turner* and its progeny, are not at issue in a discovery matter. Under discovery rules, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. 18 C.F.R. § 18.14.

The ALJ found that to grant the employer's motions would be to convert the substantive suitable alternative employment standards of *Turner* and its progeny into the standard for discovery. As the two standards are discrete, the ALJ refused to grant the motion. He reasoned that there is a distinction between the necessity of procuring certain evidence in the first place and the necessity of producing the evidence one has already procured. *Turner* and its progeny pertain to the former; the rules of discovery pertain to the latter.

The ALJ specifically noted, "Evidence that is not required to prevail on the merits may nonetheless be evidence that is admissible. Information that need not be divulged voluntarily to prevail on the merits may nonetheless be information that reasonably may lead to the discovery of admissible evidence. Handcuffing discovery with substantive standards would disqualify from discovery all information that is helpful yet substantively unnecessary."

Next, the ALJ addressed the employer's reliance on policy concerns to support its position and noted that such reliance is misplaced. Citing language from *Turner*, *P & M Crane*, and *Palombo*, the employer had asserted that employers are not meant under the LHWCA to be employment agencies for claimants and that requiring employers to identify specific employment openings would provide a disincentive for claimants to independently seek alternate employment. The ALJ reasoned, "Those policy concerns are important in the reasoning of *Turner* and its progeny. However, those policy concerns do not warrant heavy consideration here because the dispute before the Court is not about the employer's hardship in satisfying its burden for suitable alternate employment nor the quality of the claimant's job search. Rather, this dispute is about the claimant's ability to test the quality of the employer's vocational evidence."

The ALJ next determined that the information at issue was not privileged and that good cause existed to compel its production. The ALJ found that vocational information in dispute is still relevant for discovery purposes post-*Turner*. He explained that while the case law relied upon by the employer indicated that a showing of specific openings was not necessary to meet the employers' burden regarding suitable alternative employment, those cases did not indicate that specific job openings were irrelevant altogether.

The judge found that the information is relevant based on the claimant's right to challenge the employer's vocational evidence. The employer argued that the claimant's attorney was already familiar with its vocational expert through first-hand experience and therefore had no reason to question the expert's competency or credibility. The employer further argued that the claimant's attorney did not need the identity of the suitable alternate employers to challenge the expert's qualifications or methodology.

However, the ALJ found these arguments flawed. First, the claimant's right to challenge vocational evidence is not limited to the expert's credentials and methods. The claimant has a right to challenge the substance of the expert's findings. The findings in this case were based in part upon information from actual, specific employers. The ALJ explained, when a vocational report is formulated based on information from actual

employers, the claimant would be at a disadvantage to challenge the accuracy of the report if the claimant were deprived of the identities of those employers. The judge concluded that for each of the positions identified by the expert, the claimant should have the opportunity to verify from the source of the information that the job description, including the physical duties and wage information, was reported accurately by the expert.

In addition, the ALJ found that furnishing the claimant with the names and addresses of employers identified for suitable alternative employment would allow the claimant to fully exercise his right to challenge the suitability, not only of the type of work, but also of the specific employers and work locations referenced by the vocational expert. He specifically noted that, although the claimant's attorney has been familiar with the expert's methods in the past, the claimant is not limited under the law to presuming that the expert, in the present case, used the same methods and used those methods properly.

Finally the ALJ noted that there is a distinction between the needs of a claimant in discovery and the entitlement of a claimant in discovery. "Even if Claimant ultimately did not use the information in dispute to prepare his case, Claimant would nonetheless be entitled to obtain the information because the information is relevant."

Topic 27.3 Federal District Court Enforcement

[ED. NOTE: For information on expert witness fees, see Topics 24.1 Witnesses—Generally; and 19.3.6.2 Procedure—Adjudicatory Powers—Discovery.]

Topic 27.3 Federal District Court Enforcement

Floyd v. Penn Terminals, Inc., 37 BRBS 141 (2003).

At issue here is the application of Section 8(j) forfeiture. The claimant has questioned the ALJ's authority to initiate consideration of forfeiture. The Board has previously held that an ALJ has the authority to adjudicate whether benefits should be suspended pursuant to Section 8(j). In the instant case the Board found that Section 8(j) itself provides no direction on the procedures for adjudicating forfeiture proceedings. The Board also noted that the legislative history is equally lacking any relevant information that might indicate whether Congress intended to make the district director the exclusive initial adjudicator of forfeitures.

After examining the regulations, the Board noted that Section 702.286(b) provides that an employer may initiate forfeiture proceedings by filing a charge with the district director, who shall then convene an informal conference and issue a decision on the merits. Nevertheless, if either party disagrees with the district director's decision, the regulation authorizes an ALJ to consider "any issue" pertaining to the forfeiture. The

Board explained that for this reason, despite the statutory reference to the deputy commissioner, the Board has previously held that an ALJ has the authority to adjudicate a forfeiture charge.

In holding that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the ALJ, the Board used the following logic:

Section 702.286(b) makes the subpart C rules for [ALJ] hearings (20 C.F.R. 702.331-702.351) applicable to forfeiture disputes. Section 702.336, in turn, authorizes an [ALJ] to consider "any" new issue at "any" time prior to the issuance of a compensation order. Thus, as the Director suggests, Sections 702.286 and 702.336 maybe construed harmoniously because section 702.286 does not qualify the authority conferred by Section 702.336. Consequently, the formal hearing procedures permit a party to raise the forfeiture issue for the first time at the hearing.

Further, the Board rejected the claimant's contention that his right to procedural due process would be abridged unless the district director initially considers all forfeiture charges and noted that ALJ hearings include protective procedural safeguards.

The Board declined to review the ALJ's certification of the facts of this case to the federal district court, pursuant to Section 27(b) regarding alleged misstatements on an LS-200 form and also regarding a pre-existing back condition. The Board cited *A-Z Int'l v. Phillips [Phillips I]*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

Topic 27.3 Federal District Court Enforcement

Olsen v. Triple A Machine Shop, Inc., (Unreported) (BRB No. 02-0612) (June 4, 2003).

Here the Board held that a claimant is within his right to act on his own behalf and thus, the ALJ can not suspend a proceeding until such time as the claimant retains a licensed legal representative. The Board further held that if an ALJ believes the claimant should be sanctioned for his conduct, then sanctions must be issued in accordance with the statutory provisions of Section 27(b). OALJ Rules of Practice, such as 20 C.F.R. §§ 18.29(a) and 18.36, do not apply "[t]he extent that [they] may be inconsistent with a rule of special application as provided by statute. The Board found that a distinction can not be drawn between civil and criminal contempt: "We need not decide what type of 'contempt' Section 27(b) contemplates because ...the language of the section demonstrates that the nature of a party's offense, rather than the sanctions available, invokes the applicability of Section 27(b)..... We hold that Section 27(b) applies to this case because claimant disobeyed the lawful orders of the ALJ."

Topic 27.3 Federal District Court Enforcement

A-Z International v. Phillips, 323 F.3d 1141(9th Cir.2003).

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

Topic 27.3 Federal District Court Enforcement

Goicochea v. Wards Cove Packing Co., 37 BRBS 4 (2003).

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

Topic 27.3 Federal District Court Enforcement

Olsen v. Triple A Machine Shop, Inc., (Unreported) (BRB No. 02-0612) (June 4, 2003).

Here the Board held that a claimant is within his right to act on his own behalf and thus, the ALJ can not suspend a proceeding until such time as the claimant retains a licensed legal representative. The Board further held that if an ALJ believes the claimant should be sanctioned for his conduct, then sanctions must be issued in accordance with the statutory provisions of Section 27(b). OALJ Rules of Practice, such as 20 C.F.R. §§ 18.29(a) and 18.36, do not apply “[t]he extent that [they] may be inconsistent with a rule

of special application as provided by statute. The Board found that a distinction can not be drawn between civil and criminal contempt: “We need not decide what type of ‘contempt’ Section 27(b) contemplates because ...the language of the section demonstrates that the nature of a party’s offense, rather than the sanctions available, invokes the applicability of Section 27(b)....We hold that Section 27(b) applies to this case because claimant disobeyed the lawful orders of the ALJ.”

TOPIC 28

Topic 28.1 Attorney's Fees—Generally

Vercher v. Ceres Marine Terminals, (Unpublished)(BRB No. 03-0481)(March 17, 2004).

The employer’s objections to the fee petition were not invalid because they were written by the employer’s claims manager and not by an attorney. The employer’s claims manager has the authority to handle claims and did so throughout the course of the proceedings in accordance with 20 C.F.R. § 702.131 (parties may be represented in any proceeding by an attorney or other person previously authorized in writing by such party to so act). When presented with a fee petition, it was not unreasonable for employer’s claims manager to represent employer’s interest by filing objections. Nothing in the LHWCA requires the person writing objections to a fee petition to be an attorney. As the employer filed objections, and the ALJ acknowledged those objections, it cannot be said that employer waived its right to object to the fee awarded.

Topic 28.1 Attorney's Fees—Generally

Craig v. Avondale Industries, Inc., 36 BRBS 65(2002).

This is an Order on Reconsideration of the Board's Decision and Order on Reconsideration *En Banc*, *Craig 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 28.1.1 Attorney Fees—Generally

Newport News Shipbuilding & Dry Dock Co. v. Brown, 376 F.3d 245 (**4th Cir.** 2004).

An award under Section 14(f) for an employer's late payment of compensation is a successful prosecution of a claim for compensation for purposes of awarding attorney fees. The **Fourth Circuit** reasoned that the amount due for late payment satisfies the definition of "compensation" because it is a "money allowance payable" to the employee who is due the basic compensation award. "[W]hen the language of Sec. 14(f) is read together with the LHWCA's definition of compensation, and the Act's structural distinction between compensation and penalties is taken into account, it is plain that an award for late payment under Sec. 14(f) is compensation."

Topic 28.1.1 Attorney's Fees—Generally—Introduction

Kuhn v. Kenley Mining Co., (Unpublished) (No. 01-2255) (**4th Cir.** April 4, 2002).

This Black Lung Benefits Act fee case is noted here because the attorney fee section of the Black Lung Act and regulations are derived from the LHWCA. The **Fourth Circuit**, citing 33 U.S.C. § 928(a) and 20 C.F.R. § 725.367(a), held that "the statute does not permit the fees of a lay representative to be shifted to an employer."

Topic 28.1.2 Attorney's Fees—Successful Prosecution

Clark v. Chugach Alaska Corp., ___ BRBS ___ (BRB No. 04-0246)(Nov. 30, 2004).

The issue at hand is whether *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 523 U.S. 598 (2001), affects the Board's consistently held position that where an employer did not pay benefits within the 30-day period of receiving written notice of a claim, but ultimately did so at the district director level, a claimant's attorney is entitled to a fee Under Section 28(a).

The Board found that an employer's liability for a claimant's attorney fee is grounded in the plain language of Section 28 and the applicable administrative procedures under the LHWCA; not in whether or not a compensation order has been issued. There need not be a "prevailing party" in order for an attorney fee to be due; there simply has to be a "successful prosecution." Under the plain language of Section 28(a), an employer is liable for a fee if it declines to pay any benefits within 30 days after receiving written notice of the claim from the district director, and the claimant's attorney's services thereafter result in successful prosecution of the claim. The Board found that under the statutory framework, a "material alteration" of the parties' relationship occurred when the employer paid the benefits sought. Thus, when the claim was paid no order of approval or dismissal was necessary in the administrative forum to effect this result. The Board noted that even if *Buckhannon* principles did apply, this material alteration would be sufficient to satisfy the requirement of a "material change"

in the legal relationship between the parties as the claimant obtained a sanctioned result when the claim was resolved via the LHWCA's informal procedures.

The Board distinguished *Buckhannon*, which was filed in a judicial forum, in an Article III court, and then rendered moot by subsequent legislative action. Thus, in *Buckhannon*, there was no success in the judicial forum and no “judicially sanctioned” alteration of the parties’ relationship, and no prevailing party.

Topic 28.1.2 Attorney’s Fees—Successful Prosecution

[ED. NOTE: This case is provided for informational use only. For a case directly in point on the issue of attorney fees/successful prosecution, see Clark v. Chugach Alaska Corp., ___ BRBS ___ (BRB No. 04-0246)(Nov. 30, 2004), below.]

Alegria v. District of Columbia, ___ F.3d ___ (No. 02-7126)(D.C. Cir. Dec. 3, 2004).

In this Individuals with Disabilities Education Act (“IDEA”) case a denial of attorney fees was upheld. The court stated, “In the absence of clear evidence that Congress intended the IDEA’s fee eligibility to be treated differently than other fee shifting statutes, and specifically, to allow awards of attorneys’ fees for private settlements, we hold that appellants fail to overcome the presumption that *Buckhannon* [*Bd. & Care Home, Inc. v. W.Va. Dep’t of Health & Human Res.*, 523 U.S. 598 (2000)] applies.”

Topic 28.1.2 Attorney's Fees—Successful Prosecution

Singleton v. National Maintenance & Repair, (Unpublished) (BRB No. 03-0404)(March 10, 2004).

The Board reversed an attorney fee award where after the formal hearing the employer paid less compensation (for injuries to the left and right upper extremities) than it was voluntarily paying before the hearing. While acknowledging that the percentage for one extremity had been increased as a result of the formal hearing, the Board noted that the percentage for the other extremity had drastically decreased. Thus the claimant did not receive greater overall compensation after the hearing.

Topic 28.1.2 Attorney Fees--Successful Prosecution

Coleman v. Bollinger Shipyard, Inc. (Coleman I), 37 BRBS 606(ALJ) (2001 LHC 2882)(August 8, 2003) (Supplemental Decision and Order Denying Attorney's Fees), reconsidered at Coleman v. Bollinger Shipyard, Inc. (Coleman II), 37 BRBS 620(ALJ) (Sept. 19, 2003) (Reconsideration Denied).

This is a denial of attorney fees although the claimant was successful in the prosecution of his claim. In *Coleman I*, a Request for Production of Documents was served on the claimant's counsel in an attempt to verify which entries in the fee application were attributable to the attorney of record or to other persons. This Request for Production sought to inspect and copy "any and all records and documents, including but not limited to his time sheets and work sheets in support of this [fee application]... ." When the claimant's Counsel moved for a Protective Order, the employer filed an opposition, averring that the fee application showed "no effort was made to verify whether all of the time entries were made by [Counsel] or perhaps another attorney or support staff." The employer argued that its discovery request should be granted or in the alternative, the ALJ should conduct an *in camera* inspection of the requested documents.

Counsel for the claimant indicated that he had performed "virtually all work" on the claim but conceded that "a few items were performed by his former associate." *Coleman I*. The ALJ noted that the fee petition failed to identify the associate and subsequently ordered an *in camera* inspection in which Counsel was directed to provide a "privilege log detailing the documents supporting the fee application, e.g., any and all time sheets and work sheets, and any privilege precluding its production along with copies of all such documents for an *in camera* inspection...." Eventually the ALJ denied the Motion for Protective Order and directed Counsel to respond to the Request for Production, after Counsel failed to comply with the Order by submitting a box of paper without a privilege log.

The ALJ noted in his Order Denying Attorney's Fees (*Coleman I*), that Counsel's former associate had appeared with records, in response to the Order for Production and that the attorney "allegedly indicated he performed substantial work on Claimant's case. Moreover, [the attorney] allegedly reported there were never any time sheets nor any work sheets generated in support of Counsel's fee petition, which was prepared by [the attorney]." *Coleman I*.

Thereafter, the employer sought the depositions of both the associate and Counsel. In the ensuing litigation, the employer argued that without any supporting time sheets or work sheets, "the only other discovery device available to verify the accuracy of the fee petition [before the ALJ and the District Director] is by deposition." *See Coleman I*. In an Order Denying Motion to Quash Subpoena, the ALJ stated that Counsel "has failed to comply with the undersigned's order...to provide his time or work sheets and a privilege log of protected documents." *See Coleman I*. In *Coleman I*, the ALJ found that the former associate's "apparent assistance in the case and the fee application preparation was not established from the fee petitions in the instant matter. Accordingly, discovery by deposition was the only remaining discovery device useful to verify the accuracy of Counsel's fee petition."

At deposition, the former associate indicated that time sheets were "not really kept" and that occasionally notations would be written on a file. *Coleman I*. The former associate admitted that he could not say how much time was "actually spent on this file" because "there are no records." *See Coleman I*. According to the ALJ, although the

former associate prepared the fee petition, he had "no idea how much time [Counsel] actually spent on the file." *See Coleman I.*

In denying a fee, the ALJ noted that Counsel failed to comply with the Decision and Order or the Discovery Order and that "there are absolutely no billing records nor any time sheets or work sheets supporting the attorney's fee or his expenses." *Coleman I.* Quoting the longshore regulations, the ALJ stated that this failure to comply may result in a ruling "that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a **decision of the proceeding be rendered against the non-complying party**, or both. 29 C.F.R. § 18.6(b)(2)(v)(emphasis added by ALJ).

The ALJ concluded, "Discovery devices useful to determine the accuracy of Counsel's fee petition have been exhausted." He explained:

As noted above, discovery devices produced only testimony contrary to Counsel's contentions and a box of documents which is not useful in resolving this matter. The complete failure to meaningfully document legal services and expenses prevents a reasoned decision in this matter and constrains the undersigned from rendering extensive findings regarding a reasonable attorney's fee and expenses.

In light of the foregoing, I find Counsel has failed to carry his burden of establishing entitlement to an attorney fee award by documenting the appropriate hours expended and hourly rates charged. Accordingly, his request for an attorney's fee and expenses is DENIED.

Coleman I.

On reconsideration, after re-opening the record to receive additional exhibits, the attorney fee request was again denied. *Coleman II.*

Topic 28.1.2 Attorney Fees—Successful Prosecution

Hucks v. Newport News Shipbuilding & Dry Dock Company, (Unpublished)(BRB No. 03-0168)(Sept. 29, 2003).

In this attorney fee issue case, the Board refused to extend (to the **Fourth Circuit**) the **Fifth Circuit's** recent requirement that an informal conference must be held in order to recover attorney fees:

We reject employer's contention that it is not liable for claimant's attorney's fee under Section 28(b) due to the absence of an informal conference. Following the decision of the United States court of Appeals for the **Ninth Circuit** in *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (**9th Cir.** 1979), the Board has held that an informal conference

is not a prerequisite to employer's liability for a fee pursuant to Section 28(b). *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001)(**Fifth Circuit** holds that an informal conference is a prerequisite to fee liability under Section 28(b)).

Topic 28.1.2 Attorney Fees—Successful Prosecution

Richardson v. Continental Grain Company, 336 F.3d 1103 (9th Cir. 2003).

The **Ninth Circuit** denied attorney fees under both Sections 28(a) and 28(b) for a back and knee injury. For the back injury, the claimant did not successfully prosecute his claim, and therefore fees were not due under Section 28(a). The employer had voluntarily paid more compensation than the claimant was ultimately entitled to. As to the knee injury, the claimant was awarded \$932. However the employer had previously offered to pay \$5000 to settle both the back and knee claims. (This was after the employer had already voluntarily paid more than the claimant was entitled to for the back injury.) Claimant has argued that the \$932 recovery on his knee should not be compared with the total \$5,000, but rather with the portion of the \$5,000 that was tendered for the knee claim. However, the circuit court noted that the burden of proof is on the claimant to show he is entitled to an attorney fee and thus he has to demonstrate how much of the lump-sum offer was for each claim, “especially since he did not object to the nature of the lump-sum offer at the time.” Since the claimant could not do this, the court compared the total amount awarded with the amount offered. The court concluded that he was not entitled to fees under this option because \$932 (for his knee) plus \$0 (for his back) is less than \$5,000.

Topic 28.1.2 Attorney Fees—Successful Prosecution

Terrell v. Washington Metropolitan Area Transit Authority, 36 BRBS 133 (2002).

This is a Reconsideration of the Board's previous holding in this matter found at 36 BRBS 69 (2002). That Order held that the employer could not be held liable for the claimant's attorney's fee for the work counsel performed and that the claimant was liable for a reduced fee that was made a lien on his total disability compensation award. In a plurality decision on reconsideration, counsel successfully sought to hold the claimant liable for the entire fee he had requested.

This matter stems from a modification request brought by the Director. Previously the claimant contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. The Board rejected those contentions. In the appeal on the merits, the claimant opposed the Director's contention that the employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the ALJ's decision excluding the employer from the

proceedings. Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Board then held that counsel for the claimant was not entitled to a fee for the work performed on research, motions or briefs, as the claimant was unsuccessful in maintaining the status quo.

Now the Board holds that *Hensley* does not apply since *Hensley* is only applicable to fee shifting statutes such as Sections 28(a) and (b) and not to Section 28(c) where attorney's fee entitlement is determined by the necessary work performed in securing an award. Citing 20 C.F.R. § 802.203(e), the Board found the work counsel performed to be "necessary" in that he advocated a position protective of his client's interest. Noting that, on remand, the claimant had been awarded ongoing permanent total disability benefits and the entitlement to cost-of-living adjustments, the Board found that the claimant was financially able to pay the \$4,100.00 attorney fee.

In a concurring opinion, Judge McGranery agreed that the claimant should be responsible for the attorney fee under Section 28(c), but took issue with the plurality's interpretation of *Hensley* (that fee shifting does not apply to the instant case because fee liability had not shifted to the employer.). "I think that the *Hensley* analysis provides guidance whenever a judicial tribunal is responsible for directing an attorney's fee award." She went on to note; "The flaw in the majority's analysis is that it fails to distinguish between substantive and procedural issues. Although claimant was unsuccessful in opposing employer's participation in the modification proceeding, this was purely a procedural issue. The prohibition against compensating attorneys for work on unsuccessful issues concerns substantive issues, i.e., claims."

Topic 28.1.2 Attorney Fees—Successful Prosecution

Woods v. Director, OWCP, (Unpublished) 2003 U.S. App. LEXIS 3590 (**Ninth Cir.** No. 01-71920) (**9th Cir.** February 25, 2003).

Where an employer makes voluntary payments and a claimant does not receive greater compensation from an ALJ Decision and Order, the claimant is not entitled to an attorney fee. The **Ninth Circuit** found that, "The record contains no evidence that the employer's advance payment made before [the claimant] filed her claim was conditional or contingent in nature. Because the [ALJ's] award did not exceed the amount of the advance payment, [the claimant] is not entitled to attorney's fees under the LHWCA."

Topic 28.1.2 Attorney Fees—Successful Prosecution

Marks v. Trinity Marine Group, 37 BRBS 117 (2003).

This is the appeal of an Attorney Fee Award issued by a district director. At issue here is whether or not a guaranty association is liable for pre-insolvency attorney's fees under the LHWCA. The Board held that the state law regarding the scope of the guaranty association's responsibilities precludes the guaranty association's liability for the payment

of the claimant's pre-insolvency attorney's fees in this case, notwithstanding its liability for the claimant's compensation benefits. In reaching this opinion, the Board cited to *Frank v. Kent Guidry Farms*, 816 So.2d 969, 972 (La. Ct. App. 2002), writ denied, 847 So. 2d 1273 (La. 2003); La. R. S. 22:1379(3)(d); *Castille v. McDaniel*, 620 So. 2d 461 (La.Ct.App. 1993). In *Frank*, the state appellate court stated:

Louisiana law is clear that LIGA is not an "insurer" for purposes of applicable statutes imposing penalties, attorney fees and therefore cannot be assessed penalties and attorney fees under our jurisprudence. It is true that the penalties and attorney fees were imposed prior to [the carrier's] insolvency and cast in the judgment rendered in the trial court and now on appeal. Although LIGA is obliged to the extent of covered pre-insolvency claims, [La.R.S. 22:1382], pre-insolvency obligations for statutory penalties and attorney fees are not covered claims.

Topic 28.1.3 Attorney Fees--When Employer's Liability Accrues

Avondale Industries v. Craig, (Unpublished) (5th Cir. No. 02-60470) (5th Cir. Dec. 1, 2003); 2003 U.S. App. LEXIS 24187. **[ED. NOTE:** *However, since the Craig case has been removed on Dec. 29, 2003 (see below) from the trio of consolidated cases that the Fifth Circuit addressed in this litigation, the holdings noted below should be cited as Avondale Indus., Inc. v. Alario, 355 F.3d 848 (5th Cir. Dec. 29, 2003).]*

For attorney's fee purposes, a hearing loss case is to be treated like any other case. There is no requirement that there be presumptive evidence before a hearing loss claim can be considered filed under Section 28(a). "Section 28(a) makes it clear that the operative date for avoiding the potential shifting of attorney's fees is thirty days after the employer receives formal notice of the claim' section 28(a) makes no mention of the term 'evidence,' let alone require that certain evidence be provided when a claim is filed." "Although section 8(c)(13)(C) states that an audiogram accompanied by an interpretive report is 'presumptive evidence of the amount of hearing loss,' the Act nowhere states that such evidence is required for a claim to be considered filed for the purposes of section 28(a)." Thus, it is significant that the **Fifth Circuit** is holding that a hearing loss claim can be made without a presumptive audiogram.

[ED. NOTE: *On December 29, 2003, the Fifth Circuit issued Avondale Indus., Inc. v. Alario, 355 F.3d 848 (5th Cir. Dec. 29, 2003). In a footnote, the Fifth Circuit noted that Avondale also challenged the Board's decision awarding attorney's fees to Eugene Craig (see above). The Fifth Circuit notes that the instant opinion was originally issued referencing Craig's case along with the cases of Alario and Howard. "But the BRB's decision of these three consolidated cases actually remanded Craig's case to the district director for further proceedings. Thus, there was no final order of the Board with respect to Craig, and Craig was dismissed from this appeal on September 18, 2002. The Director of the office of Workers' compensation Programs filed a motion to amend the judgment requesting that the original opinion be revised to remove the references to Craig's case.*

The Director's motion is granted, and this opinion has been revised to reflect that only the cases of Alario and Howard are before this court."]

Topic 28.1.3 Attorney Fees—When Employer's Liability Accrues

Weaver v. Director, OWCP, 282 F.3d 357 (5th Cir. 2002).

This case interprets the fee-shifting provision of the LHWCA found at Section 28(a). Citing *Watkins v. Ingalls Shipbuilding, Inc.*, (No. 93-4367) (5th Cir. Dec. 9, 1993) (Unpublished), the court held that an attorney could recover only those fees incurred after the 30th day following the receipt of formal notice from the district director. [*Watkins* has precedential status because it was decided before the **Fifth Circuit** changed its rules.] The court further ruled that, as to fees accrued between the formal notice and controversion of the claim (the 30th day following receipt of notice), these fees may be assessed against the employer if the employer controverts a claim within the 30 day window and other triggers have been satisfied. These other triggers are: (1) there is formal notice, (2) there is a successful prosecution by the claimant, and the claimant uses an attorney to prosecute the claim.

Topic 28.2 Attorney Fees—Employer's Liability

Marks v. Trinity Marine Group, 37 BRBS 117 (2003).

This is the appeal of an Attorney Fee Award issued by a district director. At issue here is whether or not a guaranty association is liable for pre-insolvency attorney's fees under the LHWCA. The Board held that the state law regarding the scope of the guaranty association's responsibilities precludes the guaranty association's liability for the payment of the claimant's pre-insolvency attorney's fees in this case, notwithstanding its liability for the claimant's compensation benefits. In reaching this opinion, the Board cited to *Frank v. Kent Guidry Farms*, 816 So.2d 969, 972 (La. Ct. App. 2002), *writ denied*, 847 So. 2d 1273 (La. 2003); La. R. S. 22:1379(3)(d); *Castille v. McDaniel*, 620 So. 2d 461 (La.Ct.App. 1993). In *Frank*, the state appellate court stated:

Louisiana law is clear that LIGA is not an "insurer" for purposes of applicable statutes imposing penalties, attorney fees and therefore cannot be assessed penalties and attorney fees under our jurisprudence. It is true that the penalties and attorney fees were imposed prior to [the carrier's] insolvency and cast in the judgment rendered in the trial court and now on appeal. Although LIGA is obliged to the extent of covered pre-insolvency claims, [La.R.S. 22:1382], pre-insolvency obligations for statutory penalties and attorney fees are not covered claims.

Topic 28.2 Attorney Fees—Employer's Liability

Boatwright v. Logisitec of Connecticut, Inc., (Unpublished) (BRB No. 01-0804) (July 12, 2002).

In this attorney fee issue case which arose within the jurisdiction of the **Second Circuit**, the Board rejected the employer's contention that Section 28(b) is not applicable as no informal conference was held in this matter. The Board noted that the **Second Circuit** has not addressed the issue of whether the absence of an informal conference is an absolute bar to the imposition of fee liability under Section 28(b). Thus, the Board has not seen fit to apply the **Fifth Circuit** holding beyond that circuit. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (**5th Cir.** 2001) (**Fifth Circuit** holds that informal conference is prerequisite to fee liability under Section 28(b)). *See also, Stafftex Staffing v. Director, OWCP*, 237 F.3d 409, 34 BRBS 105 (CRT) (**5th Cir.** 2000), *modifying on reh'g* 237 F.3d 407, 34 BRBS 44 (CRT) (**5th Cir.** 2000).

Topic 28.2.2 Attorney Fees—Employer's Liability--Tender of Compensation

Jackson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0629)(December 20, 2004).

This is an Order on Motion for Reconsideration of 38 BRBS 39 (2004)(In order for a “tender” to be valid pursuant to Section 28(b), such that employer can avoid fee liability, it must be “an offer to pay, expressed in writing, without any conditions attached thereto.” As employer’s purported tenders were conditioned on claimant’s accepting a stipulation, the Board held that employer did not tender compensation within the meaning of Section 28(b). In the Motion for Reconsideration, the employer contended that the Board’s decision was contrary to its unpublished decisions in *Boyd v. Newport News Shipbuilding & Dry Dock Co.*, (BRB No . 02-0607)(May 22, 2003), and *Jenkins v. Newport News Shipbuilding & Dry Dock Co.* (BRB No. 01-0870)(Aug. 8, 2002).

The Board rejected this contention, finding that the just cited cases were factually distinguishable from the case now before it. Citing to *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990), the Board noted at *Boyd* and *Jenkins* demonstrate the soundness of the principle that unpublished Board decisions generally should not be cited or relied upon by the parties in presenting their cases. “[A]s the Board’s decisions therein are based on specific facts, whereas the decision in *Jackson* resolved an issue of law. That unpublished cases are more readily available does not lessen the validity of the Board’s statement in *Lopez*.”

Topic 28.2.2 Attorney's Fees—Tender of Compensation

Jackson v. Newport News Shipbuilding & Dry Dock Co., 38 BRBS 39 (2004).

At issue in these consolidated cases is whether an employer validly "tendered" compensation within the meaning of Section 28(b). In both cases the Employer sent letters to each counsel for claimants stating that they were "unconditionally tendering" compensation. The employer enclosed proposed stipulations, which included the following statement: "That the parties are aware of no other outstanding issues as of the date of the execution of these stipulations." Counsel refused to agree. In one case [Jackson] counsel explained why the offending language was to his client's detriment and the ALJ awarded an attorney fee in that case. In the other case [Atkins] the claimant's counsel stated that the only reason he objected to the proposed stipulation was that his attorney's fee remained at stake. The ALJ found that this was an improper attempt to shift fee liability, and denied an attorney fee.

The Board noted that "tender" was not used in the statute and therefore looked to the jurisprudence as well as to Black's Law Dictionary. The Board noted *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*)(*Held*, an offer to settle a claim may constitute a valid tender if the offer demonstrates a 'readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make... a payment to the claimant.'). In *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80 (CRT) (9th Cir. 2003), the **Ninth Circuit** quoted Black's and stated that a "tender" is "'an unconditional offer of money or performance to satisfy a debt or obligation.'" The Board additionally noted that the Fifth Edition of Black's defined "tender" as "an offer of money... in satisfaction of [a] claim or demand, without any stipulation or condition." The Board stated that "Pursuant to these definitions and in conjunction with the Board's decision in *Armor*, we hold that a 'tender' under Section 28(b) must be an offer to pay, expressed in writing without any conditions attached thereto."

The Board found that whether a "tender" is unconditional should not be decided on a case-by-case basis because to do so would shift to claimants the burden of justifying their refusals to accept the stipulations that accompanied offers of compensation when the burden is properly on the employer to establish that it tendered compensation within the meaning of the LHWCA in order to avoid fee liability. In the Board's words, "As a tender must be 'unconditional' it cannot be dependent on the validity of the claimant's reasons for rejecting a condition or stipulation imposed by employer."

Topic 28.2.2 Employer's Liability—Tender of Compensation

Singleton v. National Maintenance & Repair, (Unpublished) (BRB No. 03-0404)(March 10, 2004).

The Board reversed an attorney fee award where after the formal hearing the employer paid less compensation (for injuries to the left and right upper extremities) than it was voluntarily paying before the hearing. While acknowledging that the percentage for one extremity had been increased as a result of the formal hearing, the Board noted

that the percentage for the other extremity had drastically decreased. Thus the claimant did not receive greater overall compensation after the hearing.

Topic 28.2.2 Attorney Fees—Tender of Compensation

Richardson v. Continental Grain Company, 336 F.3d 1103 (9th Cir. 2003).

The **Ninth Circuit** denied attorney fees under both Sections 28(a) and 28(b) for a back and knee injury. For the back injury, the claimant did not successfully prosecute his claim, and therefore fees were not due under Section 28(a). The employer had voluntarily paid more compensation than the claimant was ultimately entitled to. As to the knee injury, the claimant was awarded \$932. However the employer had previously offered to pay \$5000 to settle both the back and knee claims. (This was after the employer had already voluntarily paid more than the claimant was entitled to for the back injury.) Claimant has argued that the \$932 recovery on his knee should not be compared with the total \$5,000, but rather with the portion of the \$5,000 that was tendered for the knee claim. However, the circuit court noted that the burden of proof is on the claimant to show he is entitled to an attorney fee and thus he has to demonstrate how much of the lump-sum offer was for each claim, “especially since he did not object to the nature of the lump-sum offer at the time.” Since the claimant could not do this, the court compared the total amount awarded with the amount offered. The court concluded that he was not entitled to fees under this option because \$932 (for his knee) plus \$0 (for his back) is less than \$5,000.

Topic 28.2.2 Attorney Fees—Tender of Compensation

Woods v. Director, OWCP, (Unpublished) 2003 U.S. App. LEXIS 3590 (**Ninth Cir.** No. 01-71920) (9th Cir. February 25, 2003).

Where an employer makes voluntary payments and a claimant does not receive greater compensation from an ALJ Decision and Order, the claimant is not entitled to an attorney fee. The **Ninth Circuit** found that, "The record contains no evidence that the employer's advance payment made before [the claimant] filed her claim was conditional or contingent in nature. Because the [ALJ's] award did not exceed the amount of the advance payment, [the claimant] is not entitled to attorney's fees under the LHWCA."

Topic 28.2.4 Attorney fees—Additional Compensation

Davis v. Avondale Industries, Inc., (1996-LHC-2209)(July 19, 2004).

In this Decision and Order on Remand Awarding Attorney's Fees the **Fifth Circuit** remanded the matter for the ALJ to further analyze and quantify to what extent the claimant's attorney had secured something of value for his client in winning her right

to future medical benefits. Claimant's counsel asserted that the value of the award should be measured based on the claimant's psychiatric prognosis and course of treatment at the time of the hearing. The employer contended that the claimant's actual psychiatric care after the award was made should control. (Claimant never claimed any medical expenses for psychiatric care after her award.)

The ALJ found that holding that the amount of an attorney's fee is contingent on post-award actions and events would lead to absurd and chaotic results. "The livelihood of a claimant's attorney would be fixed to the fortune and decisions of his or her claimant. For instance, the premature death of a claimant, due to an event unrelated to his or her claim, surely should not affect how much the claimant's attorney is paid for securing a prior award of future medical care. Likewise, attorney's earnings should not be affected by how regularly their claimants keep doctors' appointments after the hearing. Instead, the proper evaluation for determining the value of an award for future medical care is consideration of the treatment that will be required by the claimant in the future and the cost of such treatment."

Citing *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982)(Deputy Commissioner does not have the power to modify an attorney's fee award where the deputy commissioner determined pursuant to Section 22 that the compensation award must be increased, decreased, or terminated. The Board reasoned that attorney's fee for an original compensation award rationally could not be reduced some years later merely because the claimant's physical condition became improved.), the ALJ found that the quantification of the claimant's future psychiatric care award must be made based on her psychiatric prognosis and course of treatment at the time of the hearing.

Topic 28.2.4 Employer's Liability—Additional Compensation

Singleton v. National Maintenance & Repair, (Unpublished) (BRB No. 03-0404)(March 10, 2004).

The Board reversed an attorney fee award where after the formal hearing the employer paid less compensation (for injuries to the left and right upper extremities) than it was voluntarily paying before the hearing. While acknowledging that the percentage for one extremity had been increased as a result of the formal hearing, the Board noted that the percentage for the other extremity had drastically decreased. Thus the claimant did not receive greater overall compensation after the hearing.

Topic 28.2.5 Amount of Award (See also **Toic 28.5, 28.6, infra.**)

ERRATA

The first paragraph of this subsection should read as follows:

Section 28(b) provides that an attorney's fee awarded under this subsection is to be based solely on the difference between the amount awarded and the amount tendered or paid. The Board has held, however, that there is no requirement that the amount of the attorney's fee award be commensurate with claimant's award of benefits. *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *sub nom. Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

Topic 28.3 Attorney's Fees–Claimant's Liability

Terrell v. Washington Metropolitan Area Transit Authority, 36 BRBS 133 (2002). [*See next entry.*]

This is a Reconsideration of the Board's previous holding in this matter found at 36 BRBS 69 (2002). That Order held that the employer could not be held liable for the claimant's attorney's fee for the work counsel performed and that the claimant was liable for a reduced fee that was made a lien on his total disability compensation award. In a plurality decision on reconsideration, counsel successfully sought to hold the claimant liable for the entire fee he had requested.

This matters stems from a modification request brought by the director. Previously the claimant contended that the Director had no standing to appeal to the Board, and that the appeal was untimely. The Board rejected those contentions. In the appeal on the merits, the claimant opposed the Director's contention that the employer retained standing to oppose a modification request under the pre-1984 Amendment Act, and was unsuccessful in defending the ALJ's decision excluding the employer from the proceedings. Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Board then held that counsel for the claimant was not entitled to a fee for the work performed on research, motions or briefs, as the claimant was unsuccessful in maintaining the status quo.

Now the Board holds that *Hensley* does not apply since *Hensley* is only applicable to fee shifting statutes such as Sections 28(a) and (b) and not to Section 28(c) where attorney's fee entitlement is determined by the necessary work performed in securing an award. Citing 20 C.F.R. § 802.203(e), the Board found the work counsel performed to be "necessary" in that he advocated a position protective of his client's interest. Noting that, on remand, the claimant had been awarded ongoing permanent total disability benefits and the entitlement to cost-of-living adjustments, the Board found that the claimant was financially able to pay the \$4,100.00 attorney fee.

In a concurring opinion, Judge McGranery agreed that the claimant should be responsible for the attorney fee under Section 28(c), but took issue with the plurality's interpretation of *Hensley* (that fee shifting does not apply to the instant case because fee liability had not shifted to the employer.). "I think that the *Hensley* analysis provides guidance whenever a judicial tribunal is responsible for directing an attorney's fee award." She went on to note; "The flaw in the majority's analysis is that it fails to

distinguish between substantive and procedural issues. Although claimant was unsuccessful in opposing employer's participation in the modification proceeding, this was purely a procedural issue. The prohibition against compensating attorneys for work on unsuccessful issues concerns substantive issues, i.e., claims."

Topic 28.3 Attorney's Fees–Claimant's Liability

Terrell v. Washington Metropolitan Area Transit Authority (WMATA), 36 BRBS 69 (2002). [See Above.]

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.

Topic 28.3.1 Liability of Special Fund

Terrell v. Washington Metropolitan Area Transit Authority (WMATA), 36 BRBS 133 (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.

Topic 28.4 Attorney Fees Application Process

Ferguson v. Newport News Shipbuilding and Dry Dock Co., 36 BRBS 17 (2002).

In this matter, claimant's prior counsel filed a fee petition documenting services rendered on claimant's behalf. The district director refused to impose liability for a fee on the claimant, stating that he was unable to determine if the claimant understood his counsel's representation, including its necessity and reasonableness, whether or not there had been a successful prosecution, and claimant's ability to pay the fee. The Board found that the district director erred in declining to consider his fee petition listing services allegedly rendered while the case was before the district director. Citing 20 C.F.R. § 702.132, the Board found that counsel was in conformance with the regulations. Furthermore, the Board stated, "[W]hile the district director chastises Mr. Donaldson for his failure to create a record before an administrative law judge supportive of his position regarding the payment of a fee, the applicable regulations implementing the Act provide for the compilation of an administrative file which give the district director the requisite information needed for the consideration of counsel's fee petition.... Thus, the administrative file in the district director's possession should contain all of the information needed for that official to adequately consider the fee proposed by claimant's former counsel."

Topic 28.4.1 Attorney Fees--Application Process—Content Requirements

Coleman v. Bollinger Shipyard, Inc. (Coleman I), 37 BRBS 606(ALJ) (2001 LHC 2882)(August 8, 2003) (Supplemental Decision and Order Denying Attorney's Fees), reconsidered at *Coleman v. Bollinger Shipyard, Inc. (Coleman II)*, 37 BRBS 620(ALJ) (Sept. 19, 2003) (Reconsideration Denied).

This is a denial of attorney fees although the claimant was successful in the prosecution of his claim. In *Coleman I*, a Request for Production of Documents was served on the claimant's counsel in an attempt to verify which entries in the fee application were attributable to the attorney of record or to other persons. This Request for Production sought to inspect and copy "any and all records and documents, including but not limited to his time sheets and work sheets in support of this [fee application]... ." When the claimant's Counsel moved for a Protective Order, the employer filed an opposition, averring that the fee application showed "no effort was made to verify whether all of the time entries were made by [Counsel] or perhaps another attorney or support staff." The employer argued that its discovery request should be granted or in the alternative, the ALJ should conduct an *in camera* inspection of the requested documents.

Counsel for the claimant indicated that he had performed "virtually all work" on the claim but conceded that "a few items were performed by his former associate." *Coleman I*. The ALJ noted that the fee petition failed to identify the associate and subsequently ordered an *in camera* inspection in which Counsel was directed to provide a

"privilege log detailing the documents supporting the fee application, e.g., any and all time sheets and work sheets, and any privilege precluding its production along with copies of all such documents for an *in camera* inspection...." Eventually the ALJ denied the Motion for Protective Order and directed Counsel to respond to the Request for Production, after Counsel failed to comply with the Order by submitting a box of paper without a privilege log.

The ALJ noted in his Order Denying Attorney's Fees (*Coleman I*), that Counsel's former associate had appeared with records, in response to the Order for Production and that the attorney "allegedly indicated he performed substantial work on Claimant's case. Moreover, [the attorney] allegedly reported there were never any time sheets nor any work sheets generated in support of Counsel's fee petition, which was prepared by [the attorney]." *Coleman I*.

Thereafter, the employer sought the depositions of both the associate and Counsel. In the ensuing litigation, the employer argued that without any supporting time sheets or work sheets, "the only other discovery device available to verify the accuracy of the fee petition [before the ALJ and the District Director] is by deposition." *See Coleman I*. In an Order Denying Motion to Quash Subpoena, the ALJ stated that Counsel "has failed to comply with the undersigned's order...to provide his time or work sheets and a privilege log of protected documents." *See Coleman I*. In *Coleman I*, the ALJ found that the former associate's "apparent assistance in the case and the fee application preparation was not established from the fee petitions in the instant matter. Accordingly, discovery by deposition was the only remaining discovery device useful to verify the accuracy of Counsel's fee petition."

At deposition, the former associate indicated that time sheets were "not really kept" and that occasionally notations would be written on a file. *Coleman I*. The former associate admitted that he could not say how much time was "actually spent on this file" because "there are no records." *See Coleman I*. According to the ALJ, although the former associate prepared the fee petition, he had "no idea how much time [Counsel] actually spent on the file." *See Coleman I*.

In denying a fee, the ALJ noted that Counsel failed to comply with the Decision and Order or the Discovery Order and that "there are absolutely no billing records nor any time sheets or work sheets supporting the attorney's fee or his expenses." *Coleman I*. Quoting the longshore regulations, the ALJ stated that this failure to comply may result in a ruling "that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a **decision of the proceeding be rendered against the non-complying party**, or both. 29 C.F.R. § 18.6(b)(2)(v)(emphasis added by ALJ).

The ALJ concluded, "Discovery devices useful to determine the accuracy of Counsel's fee petition have been exhausted." He explained:

As noted above, discovery devices produced only testimony contrary to Counsel's contentions and a box of documents which is not useful in resolving this matter. The complete failure to meaningfully document legal services and expenses prevents a reasoned decision in this matter and constrains the undersigned from rendering extensive findings regarding a reasonable attorney's fee and expenses.

In light of the foregoing, I find Counsel has failed to carry his burden of establishing entitlement to an attorney fee award by documenting the appropriate hours expended and hourly rates charged. Accordingly, his request for an attorney's fee and expenses is DENIED.

Coleman I.

On reconsideration, after re-opening the record to receive additional exhibits, the attorney fee request was again denied. *Coleman II.*

Topic 28.4.2 Attorney Fees--Application Process—Due Process Hearing Requirements

Vercher v. Ceres Marine Terminals, (Unpublished)(BRB No. 03-0481)(March 17, 2004).

The Board rejected the claimant's argument that the employer had waived its right to object to an attorney fee because the objections were written by the employer's claims manager and not by an attorney. "employer's claims manager has the authority to handle claims and did so throughout the course of these proceedings in accordance with 20 C.F.R. § 702.131 (parties may be represented in any proceeding by an attorney or other person previously authorized in writing by such party to act). When presented with a fee petition, it was not unreasonable for employer's claims manager to represent employer's interests by filing objections. Indeed, nothing in the Act requires the person writing objections to a fee petition to be an attorney."

Topic 28.5 Attorney Fees—Amount of Award

Avondale Industries, Inc. v. Davis, 348 F.3d 487 (5th Cir. 2003).

Once again, the circuit court applies *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The **Fifth Circuit** noted the two step process applicable to an award of attorney's fees: (1) The ALJ should confine the fee award only to work done on the successful claims. (2) The success obtained on the remaining claims should be proportional to the efforts expended by counsel. The court acknowledged that when a party achieves only partial or limited success, then compensation for all of the hours reasonably expended on the litigation as a whole may be an excessive amount. Here, after determining that counsel's work was "intimately related" to the claims on which the claimant was successful, the ALJ reduced the entire fee by one third in light of the fact that the attorney was only

successful on four of six claims. However, the **Fifth Circuit** found that the ALJ failed to take into account the fact that the claimant recovered a limited amount in penalties and interest, plus future medical costs when reducing the fees in light of the success obtained. The court noted that the ALJ failed to quantify the claimant's award and take that into consideration when determining the amount of the attorney's fee award.

Topic 28.5 Amount of Award—Sufficient Explanation

Davis v. Avondale Industries, Inc., (1996-LHC-2209)(July 19, 2004).

In this Decision and Order on Remand Awarding Attorney's Fees the **Fifth Circuit** remanded the matter for the ALJ to further analyze and quantify to what extent the claimant's attorney had secured something of value for his client in winning her right to future medical benefits. Claimant's counsel asserted that the value of the award should be measured based on the claimant's psychiatric prognosis and course of treatment at the time of the hearing. The employer contended that that the claimant's actual psychiatric care after the award was made should control. (Claimant never claimed any medical expenses for psychiatric care after her award.)

The ALJ found that holding that the amount of an attorney's fee is contingent on post-award actions and events would lead to absurd and chaotic results. "The livelihood of a claimant's attorney would be fixed to the fortune and decisions of his or her claimant. For instance, the premature death of a claimant, due to an event unrelated to his or her claim, surely should not affect how much the claimant's attorney is paid for securing a prior award of future medical care. Likewise, attorney's earnings should not be affected by how regularly their claimants keep doctors' appointments after the hearing. Instead, the proper evaluation for determining the value of an award for future medical care is consideration of the treatment that will be required by the claimant in the future and the cost of such treatment."

Citing *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982)(Deputy commissioner does not have the power to modify an attorney's fee award where the deputy commissioner determined pursuant to Section 22 that the compensation award must be increased, decreased, or terminated. Board reasoned that attorney's fee for an original compensation award rationally could not be reduced some years later merely because the claimant's physical condition became improved.), the ALJ found that the quantification of the claimant's future psychiatric care award must be made based on her psychiatric prognosis and course of treatment at the time of the hearing.

Topic 28.6 Factors Considered in Award

ERRATA

“*Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *sub nom. Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986)” is the correct cite for this case.

Topic 28.6 Factors Considered in Award

Davis v. Avondale Industries, Inc., (1996-LHC-2209)(July 19, 2004).

In this Decision and Order on Remand Awarding Attorney's Fees the **Fifth Circuit** remanded the matter for the ALJ to further analyze and quantify to what extent the claimant's attorney had secured something of value for his client in winning her right to future medical benefits. Claimant's counsel asserted that the value of the award should be measured based on the claimant's psychiatric prognosis and course of treatment at the time of the hearing. The employer contended that that the claimant's actual psychiatric care after the award was made should control. (Claimant never claimed any medical expenses for psychiatric care after her award.)

The ALJ found that holding that the amount of an attorney's fee is contingent on post-award actions and events would lead to absurd and chaotic results. "The livelihood of a claimant's attorney would be fixed to the fortune and decisions of his or her claimant. For instance, the premature death of a claimant, due to an event unrelated to his or her claim, surely should not affect how much the claimant's attorney is paid for securing a prior award of future medical care. Likewise, attorney's earnings should not be affected by how regularly their claimants keep doctors' appointments after the hearing. Instead, the proper evaluation for determining the value of an award for future medical care is consideration of the treatment that will be required by the claimant in the future and the cost of such treatment."

Citing *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982)(Deputy commissioner does not have the power to modify an attorney's fee award where the deputy commissioner determined pursuant to Section 22 that the compensation award must be increased, decreased, or terminated. Board reasoned that attorney's fee for an original compensation award rationally could not be reduced some years later merely because the claimant's physical condition became improved.), the ALJ found that the quantification of the claimant's future psychiatric care award must be made based on her psychiatric prognosis and course of treatment at the time of the hearing.

Topic 28.6.3 Attorney Fees-Fee Petition

ERRATA

The bold faced statement found under this subsection should be changed to read as follows:

...Compare this rational to the holding in Sproull where the Board sitting *en banc* held that the “activity” was not necessary to the protection of the claimant’s entitlement, and hence it is a clerical function....

Topic 28.6.3 Attorney Fees-Fee Petition

Coleman v. Bollinger Shipyard, Inc. (Coleman I), 37 BRBS 606(ALJ) (2001 LHC 2882)(August 8, 2003) (Supplemental Decision and Order Denying Attorney's Fees), reconsidered at *Coleman v. Bollinger Shipyard, Inc. (Coleman II)*, 37 BRBS 620(ALJ) (Sept. 19, 2003) (Reconsideration Denied).

This is a denial of attorney fees although the claimant was successful in the prosecution of his claim. In *Coleman I*, a Request for Production of Documents was served on the claimant's counsel in an attempt to verify which entries in the fee application were attributable to the attorney of record or to other persons. This Request for Production sought to inspect and copy "any and all records and documents, including but not limited to his time sheets and work sheets in support of this [fee application]... ." When the claimant's Counsel moved for a Protective Order, the employer filed an opposition, averring that the fee application showed "no effort was made to verify whether all of the time entries were made by [Counsel] or perhaps another attorney or support staff." The employer argued that its discovery request should be granted or in the alternative, the ALJ should conduct an *in camera* inspection of the requested documents.

Counsel for the claimant indicated that he had performed "virtually all work" on the claim but conceded that "a few items were performed by his former associate." *Coleman I*. The ALJ noted that the fee petition failed to identify the associate and subsequently ordered an *in camera* inspection in which Counsel was directed to provide a "privilege log detailing the documents supporting the fee application, e.g., any and all time sheets and work sheets, and any privilege precluding its production along with copies of all such documents for an *in camera* inspection...." Eventually the ALJ denied the Motion for Protective Order and directed Counsel to respond to the Request for Production, after Counsel failed to comply with the Order by submitting a box of paper without a privilege log.

The ALJ noted in his Order Denying Attorney's Fees (*Coleman I*), that Counsel's former associate had appeared with records, in response to the Order for Production and that the attorney "allegedly indicated he performed substantial work on Claimant's case. Moreover, [the attorney] allegedly reported there were never any time sheets nor any work sheets generated in support of Counsel's fee petition, which was prepared by [the attorney]." *Coleman I*.

Thereafter, the employer sought the depositions of both the associate and Counsel. In the ensuing litigation, the employer argued that without any supporting time sheets or work sheets, "the only other discovery device available to verify the accuracy of the fee petition [before the ALJ and the District Director] is by deposition." *See Coleman*

I. In an Order Denying Motion to Quash Subpoena, the ALJ stated that Counsel "has failed to comply with the undersigned's order...to provide his time or work sheets and a privilege log of protected documents." *See Coleman I.* In *Coleman I*, the ALJ found that the former associate's "apparent assistance in the case and the fee application preparation was not established from the fee petitions in the instant matter. Accordingly, discovery by deposition was the only remaining discovery device useful to verify the accuracy of Counsel's fee petition."

At deposition, the former associate indicated that time sheets were "not really kept" and that occasionally notations would be written on a file. *Coleman I.* The former associate admitted that he could not say how much time was "actually spent on this file" because "there are no records." *See Coleman I.* According to the ALJ, although the former associate prepared the fee petition, he had "no idea how much time [Counsel] actually spent on the file." *See Coleman I.*

In denying a fee, the ALJ noted that Counsel failed to comply with the Decision and Order or the Discovery Order and that "there are absolutely no billing records nor any time sheets or work sheets supporting the attorney's fee or his expenses." *Coleman I.* Quoting the longshore regulations, the ALJ stated that this failure to comply may result in a ruling "that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a **decision of the proceeding be rendered against the non-complying party**, or both. 29 C.F.R. § 18.6(b)(2)(v)(emphasis added by ALJ).

The ALJ concluded, "Discovery devices useful to determine the accuracy of Counsel's fee petition have been exhausted." He explained:

As noted above, discovery devices produced only testimony contrary to Counsel's contentions and a box of documents which is not useful in resolving this matter. The complete failure to meaningfully document legal services and expenses prevents a reasoned decision in this matter and constrains the undersigned from rendering extensive findings regarding a reasonable attorney's fee and expenses.

In light of the foregoing, I find Counsel has failed to carry his burden of establishing entitlement to an attorney fee award by documenting the appropriate hours expended and hourly rates charged. Accordingly, his request for an attorney's fee and expenses is DENIED.

Coleman I.

On reconsideration, after re-opening the record to receive additional exhibits, the attorney fee request was again denied. *Coleman II.*

Topic 28.6.3 Fee Petition

Whether attorney fees are recoverable for time spent doing a fee petition is in controversy. The Board's *en banc* position is at variance from the **Ninth Circuit's** position, as well as from two Board three judge panel positions.

In *Sproull v. Stevedoring Services of America*, 28 BRBS 271(1994) (Decision on Recon.) (*en banc*), the Board held that this was an activity that was not reasonably necessary to protect claimant's interests. *See also*, *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984). The Board felt that each attorney should keep a running, accurate, total of the hours expended on the case so that the preparation of the fee request "should be, for the most part, a clerical function included in overhead expenses." *Sproull*, 28 BRBS 271, 277; *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 383 (1979).

The Board distinguished its position from that taken in the two non-longshore cases of *Hensley v. Eckerhart*, 461 U.S. 424 (1988) and *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (**5th Cir.** 1980). *Hensley*, a civil rights case, involved significantly more hours and people that needed to be accounted for in the fee motion than in most LHWCA claims. The *Rose Pass Mines, Inc.* case was a bankruptcy proceeding which by statute demands exhaustive detail in the fee petition.

In the **Ninth Circuit** it is acceptable to award fees for the time spent preparing the attorney's fee application. *Anderson v. Director, OWCP*, 91F.3d 1322 (**9th Cir.** 1996). *In re Nucorp Energy, Inc.*, 764 F.2d 655 (**9th Cir.** 1985), like the **Rose Pass Mines, Inc.** case, was a bankruptcy case and the **Ninth Circuit** eventually followed the holding of the **Fifth Circuit** in awarding attorney's fees including the time it took to prepare the motion. However, before following the *Rose Pass Mines, Inc.* holding, the **Ninth Circuit** in *In re Nucorp Energy, Inc.* exhaustingly discussed how other statutory fee cases have dealt with the issue. In looking mainly to section 1988 civil rights cases, the **Ninth Circuit** finds the support for their position in bankruptcy proceedings.

Another application of the **Ninth Circuit's** rule, granting compensation for the time needed to prepare the fee application, is seen in *Clark v. City of Los Angeles*, 803 F.2d 987 (**9th Cir.** 1986). *Clark* is a civil rights case which follows the rationale of *In re Nucorp Energy, Inc.* without providing any expansion on the line of reasoning. *Anderson*, which applies the fee application rule to LHWCA cases in the **Ninth Circuit**, relies rigidly on the wording of 42 U.S.C. § 1988.487 and *Clark*. *Anderson v. Director, OWCP*, 91 F.3d 1322,1325 (**9th Cir.** 1996). After citing these two items the *Anderson* court uses the holding in *City of Burlington v. Dague*, 505 U.S. 557 (1992)(A "reasonable" fee should mean the same thing under all federal fee-shifting statutes.) saying that "a reasonable fee applies uniformly to all federal fee-shifting statutes," to extend the civil rights holdings on the issue to LHWCA. *Id.* Compare this rationale to the holding in *Sproull* where the Board sitting *en banc* held that the "activity" was not necessary to the protection of the claimant's entitlement, and hence it is a clerical function. *Sproull*, 28 BRBS 271, 277 (*en banc*).

In *Sproull*, the Board noted that in most longshore cases, unlike other fee-shifting statutes, the fee request is “quite small in comparison” to cases where the litigation is often complex and lengthy. “Thus, the fee petitions will necessarily be shorter and less complex.” *Sproull*, at 278. The *en banc* Board saw no reason to depart from its longstanding position that time spent preparing a fee petition is not compensable. See e.g., *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981); *Keith v. General Dynamics Corp.*, 13 BRBS 404 (1981); *Staffile v. International Terminal Operating Co., Inc.*, 12 BRBS 895 (1980).

In *Sproull*, the Board noted that the Black Lung regulations provide that no fee approval shall include payment for time spent in preparation of a fee application. 20 C.F.R. § 725.366(b). However, it should be noted that the regulations pertaining to longshore fees are silent on the issue. 20 C.F.R. § 702.132. It should also be noted that three judge panels of the Board have followed the *Anderson* decision in *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996) (**Ninth Circuit**) and *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998) (**Fifth Circuit**).

The claimant’s attorney may be awarded fees for time spent defending the fee petition. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *Jarrell v. Newport News Shipbuilding & Dry Dock Cco.*, 14 BRBS 833 (1982); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

Topic 28.6.4 Attorney Fees—Losing On An Issue

Avondale Industries, Inc. v. Davis, 348 F.3d 487 (**5th Cir.** 2003).

Once again, the circuit court applies *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The **Fifth Circuit** noted the two step process applicable to an award of attorney’s fees: (1) The ALJ should confine the fee award only to work done on the successful claims. (2) The success obtained on the remaining claims should be proportional to the efforts expended by counsel. The court acknowledged that when a party achieves only partial or limited success, then compensation for all of the hours reasonably expended on the litigation as a whole may be an excessive amount. Here, after determining that counsel’s work was “intimately related” to the claims on which the claimant was successful, the ALJ reduced the entire fee by one third in light of the fact that the attorney was only successful on four of six claims. However, the **Fifth Circuit** found that the ALJ failed to take into account the fact that the claimant recovered a limited amount in penalties and interest, plus future medical costs when reducing the fees in light of the success obtained. The court noted that the ALJ failed to quantify the claimant’s award and take that into consideration when determining the amount of the attorney’s fee award.

Topic 28.6.7.2 Attorney’s Fees—Claimant’s Costs—Medical Reports and Testimony

Zeigler Coal Co. v. Director, OWCP., 326 F.3d 894 (7th Cir. 2003).

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

Topic 28.9 Attorney Fees--Settlements

Jenkins v. Puerto Rico Marine, Inc., 36 BRBS 1 (2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the **Eleventh Circuit** and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. § 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

Topic 28.10.2 Attorney Fees–Timely Appeal/Finality

Millet v. Avondale Industries, (Unreported)(E.D. La. 2003),2003 WL 548879 (Feb. 24,2003).

The federal district court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the compensation order. The district court judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences. That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If Millet must bear the cost of enforcement of that final fee award then he cannot receive "the full value of the fees to which [he is] entitled under the Act."

TOPIC 30

TOPIC 31

Topic 31 Generally

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

St. Bernard Parish Police Jury and Travelers Property Casualty Corp. v. Duplessis, 831 So. 2d 955 (La. Supreme Ct. 2002).

The Louisiana State Supreme Court held that a claimant's willful misrepresentation of mileage reimbursement subjected him to the forfeiture of his workers' compensation benefits, pursuant to LSA-R.S. 23:1208. The statute, in pertinent parts, states that it is unlawful for any person, for the purpose of obtaining or defeating any workers' compensation benefit or payment, to willfully make a false statement or representation. "Any employee violating this Section shall, upon determination by workers' compensation judge, forfeit any right to compensation benefits under this Chapter." Claimant had submitted a request for reimbursement for 4,354 miles when he was only entitled to 1,114.2 miles for doctors' visits.

Although noting that the claimant was "not a workers' compensation neophyte," the hearing officer, found that the forfeiture of all benefits was "too harsh" and ordered the forfeiture of the requested mileage and referral of the matter to the Fraud Section. On appeal the court affirmed the ruling. Noting the intent of the state legislature, the

Louisiana State Supreme Court has now overturned the prior rulings and denied all future benefits.

Topic 31.2 Penalty For Misrepresentation--Prosecution of Claims--Claimant's Conduct

[ED. Note: The following case is included for informational value only.]

United States of America v. Somsamouth, __ F.3d __ (Nos. 02-50453 and 02-50461)(**9th Cir.** Dec. 18, 2003).

This is an unsuccessful appeal of a husband and wife's convictions for making false representations of material facts to the Social Security Administration for the purpose of retaining Supplemental Security Income benefits. The couple challenged the convictions on the grounds that the term "work" was not defined for the jury in the jury instructions. They also argue that their statements about working were not materially false.

The **Ninth Circuit** found that the "simple word" "work" needed no jury instruction definition: "We start with the obvious, almost banal proposition that the district court cannot be expected to define the common words of everyday life for the jury." "[W]ork is not an arcane concept in this context, and there was no need for the district court to define it further. If the court had defined it and done so correctly, that would not have been helpful to [the couple]." They had argued that the average person might believe that "work" does not necessarily require substantial gainful activity of the sort that generates wages or other economic benefits." The **Ninth Circuit** found that if the average person believed this, the average person was correct. The court noted that during the interview process, the couple was asked if they did any work, including volunteer work.

Next the couple argued that their falsehoods about work cannot have been material because it has not been shown that their working was also substantial gainful activity. The **Ninth Circuit** stated that "In so arguing, they ask us to take an overly crabbed view of materiality." The court noted that it has previously addressed the meaning of the general statute covering false statements of 'material fact' to government agencies and have defined the concept as follows-- "A statement is considered material if it has the propensity to influence agency action; actual influence on agency action is not an element of the crime."

The **Ninth Circuit** explained that the issue was not whether the couple was performing substantial gainful activity; it was whether their false statements had a propensity to influence agency action. "Even if the extensive work activities in which the [couple] were engaged were not actually generating income for them, it is pellucid that truthful answers to the SSA's questions about their activities would have led to further investigation at least. [Their] lies were designed to influence the agency into not

investigating them or giving further consideration to whether they were, in fact, engaging in substantial gainful activities." Importantly, the court noted that had the agency known they were doing some work, even if not "gainful," the agency would have inquired into their capabilities to do further work, rendering them not disabled.

Topic 31.2 Penalty For Misrepresentation–Prosecution of Claims–Claimant’s Conduct

A-Z International v. Phillips, 323 F.3d 1141 (9th Cir. 2003).

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

TOPIC 33

Topic 33 Generally

[ED. NOTE: The following federal district court cases are included for informational purposes only.]

Ayers v. C&D General Contractors, 2002 WL 31761235, 237 F. Supp 2d 764 (W.D. Ky. Dec. 6, 2002).

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "water craft exclusion" excluded this claim since the worker had been working underneath a barge. The court concluded that the claim should not be excluded since the barge was not used for transportation but merely aided the work under the dock.

Topic 33.2 Compensation for Injuries Where Third Persons Are Liable-- Assignment of Rights

Mabile v. Swiftships, Inc., 38 BRBS 19 (2004).

The Board affirmed the ALJ's finding that Section 33(g) does not bar a widow's claim for death benefits although she entered into a third-party settlement after the death of her husband where she was only settling the decedent's tort action for his pain and suffering and economic loss, which remained pending at the time of his death. The Louisiana court had dismissed all of the claims that the widow filed in her own right, specifically holding that only the claims for the decedent's lost wages and pain and suffering could go forward. Thus, the widow obtained the proceeds of the third-party settlement with the employer's officers only because she was substituted for her husband as a representative of his estate and not because she surrendered any of her own rights. Therefore she was not a "person entitled to compensation" for the decedent's pain and economic loss.

The Board explained that in this case, although the decedent's disability claim and the widow's death benefits are based on the same occupational exposure, they are separate claims for distinct types of benefits. As the widow's claim is for death benefits under the LHWCA, and the settlement is solely based on the decedent's lost wages and pain and suffering during his life, the third party was not liable for the same disability or death for which the widow sought benefits under the LHWCA. "Where, as here, the claimant does not have the right to seek damages from the third party for her own benefits, then employer does not have the right, under Section 33(b), to seek damages on the death claim from that third party."

Topic 33.6 Employer Credit For Net Recovery By "Person Entitled To Compensation"

New Orleans v. Ibos, ___ U.S. ___, 124 S.Ct. 1038 (Mem.)(*Cert. denied* January 12, 2004). [*See next entry.*]

Here the **U.S. Supreme Court** declined to consider this *Cardillo* rule related case. The **Fifth Circuit** had previously held that the amounts that a widow received from LHWCA settlements with longshore employers who were not the last responsible employer were not relevant to the amount owed by the last responsible maritime employer and should not have reduced liability for the last responsible maritime employer. Thus, the **Fifth Circuit's** opinion stands.

Topic 33.6 Employer Credit For Net Recovery By "Person Entitled To Compensation"

New Orleans Stevedores v. Ibos, 317 F.3d 480 (**5th Cir.** 2003). [*See Above.*]

In this matter, where the worker had mesothelioma, the **Fifth Circuit** followed the **Second Circuit's** rule announced in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (**2d Cir.** 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure.

Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the **Fifth Circuit** found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The **Fifth Circuit** has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (**5th Cir.** 1992).

The **Fifth Circuit** also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

Topic 33.6.1 Compensation For Injuries Where Third Persons Are Liable-- "Person Entitled to Compensation" Pursuant to Section 33(f)

Richardson v. Newport News Shipbuilding & Dry Dock Co., 38 BRBS 6(2004).

There are two significant issues in this matter, both involving Section 33. First, at issue is whether Section 33(g) can bar a claim for COPD disability when a claimant suffers from both a non-asbestos related COPD condition, plus an asbestos related condition and the claimant accepted third party settlements in relation to his asbestos related lung disease. Second, at issue is the classification of a claimant who is only undergoing medical monitoring (as opposed to receiving benefits/compensation) when it comes to whether that person is a "person entitled to compensation." While this case was ultimately remanded, it is nevertheless significant for its illustration of the Board's views.

The claimant originally alleged that he contracted an asbestos-related lung disease as a result of exposure to asbestos dust and fibers, and chronic obstructive pulmonary disease (COPD) from exposure to welding smoke and paint fumes, during the course of his approximately 30 years of work for the employer. The claimant had filed a claim for asbestosis in 1995 and for COPD in 1999, which were eventually consolidated. At the OALJ hearing, the claimant averred that he did not presently have asbestosis and thus he sought to amend his asbestos claim to seek only an award for medical monitoring under Section 7 of the LHWCA. While his longshore claims were pending, the claimant became involved in third party litigation and entered into two third party settlements. The employer argued that Section 33(g) should apply and bar the claimant's recovery since he had entered into the settlements without the employer's prior written approval.

The Board first addressed the issue of whether a claimant recovering only medical monitoring for an asbestos-related condition is a "person entitled to compensation." In resolving this issue, the Board found that the ALJ rationally looked to the evidence in

existence as of the date of the settlements in order to determine if the claimant satisfied the prerequisites to the right to recover. The evidence at that point in time supported the ALJ's finding that as of the date the claimant stopped working, the claimant was aware of the relationship between his work-related asbestosis and his inability to work. At that point in time, there was medical evidence noting the existence of a condition "consistent with asbestos."

The claimant withdrew his claim for disability benefits for asbestosis, ostensibly on the ground that the later medical evidence could not support a finding of either asbestosis or disability due to asbestosis. Nonetheless, the Board noted that the ALJ addressed the medical evidence as a whole and concluded that the claimant had asbestosis, asbestos-related pleural plaques, and both a restrictive and an obstructive lung impairment due to simultaneous work exposure to asbestos, smoke, dust, and welding fumes, and which combined with the claimant's pre-existing asthma to render him totally disabled. Further more, the Board noted that the ALJ concluded that the claimant's disability due to his lung condition was the same disability for which he settled his third party claims and therefore found the disability claim under the LHWCA barred, because of the third party settlements.

The Board explained that it could not affirm this finding. The Board remanded with instructions to make findings consistent with *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992) (Claimant developed asbestosis and hypertension. **Ninth Circuit:** An employee who is totally disabled based on either injury alone could recover from the employer under either injury. Therefore to allow an employer set-off for third party proceeds received under one injury would result in a windfall for the employer because the employee could have sought recovery under the other injury for which no third party proceeds are awardable. Such an interpretation in effect would reward the employer for causing two work-related disabilities instead of one.); *on remand, Charvez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting), *aff'd on recon. En banc*, 28 BRBS 185 (1994) (Brown and McGranery, J.J. dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F. 3d 1309, 32 BRBS 67 (CRT) (9th Cir. 1998).

The Board further instructed the ALJ to then determine the applicability of Section 33(g) based on these findings. "Only if asbestosis is claimant's only work-related disability can Section 33(g) be invoked to bar claimant's claim." The Board further noted that, "Although claimant withdrew his claim for disability benefits due to asbestosis, employer nevertheless may attempt to establish, in support of its claim, that Section 33(g) applies, that claimant's disability is due to asbestosis alone."

The Board went on to state, "If after reviewing the medical evidence in light of *Chavez*, the [ALJ] again finds that claimant is disabled by both asbestosis and COPD, Section 33(g) cannot bar the claim because, under the aggravation rule, COPD is considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third party claims." Thus, the Board vacated the

ALJ's finding that Section 33(g) bars the claimant's COPD and remanded the case for consideration of the entire record to discern the cause of the claimant's disability.

The Board also found that, under the circumstances, the claimant's claim for medical monitoring for any asbestos-related condition cannot be barred by Section 33(g) because, ultimately, the claimant is not entitled to disability compensation for asbestosis; a person entitled only to medical benefits is not a "person entitled to compensation" for purposes of Section 33(g).

**Topic 33.7 Compensation for Injuries Where Third Persons are Liable--
Ensuring Employer's Rights—Written Approval of Settlement**

Marmillion v. A.M.E. Temporary Services, (Unpublished)(BRB No. 04-0272)(Dec. 13, 2004).

This is a Section 33(g) case wherein the claimant alleges on appeal that the strict guidelines of Section 33(g) should not bar his claim. Claimant worked for a temporary service company who had contracted his services to a company that loaded and unloaded grain barges. Following an injury, claimant's immediate employer paid some benefits and a LHWCA claim was filed. Subsequently benefits ceased and employer's counsel informed claimant's counsel that the carrier had gone out of business and that the employer did not have reserves in place to make further payments to the claimant: "I wish I could be of more help, but I am afraid that your clients have little recourse of recovery, particularly if they are asserting maritime claims which are not covered by the Louisiana Insurance Guaranty Association statute."

Subsequently claimant filed a Jones Act, general maritime law action and 905(b) action. Included as a defendant was the owner of a tug who had chartered the tug to the employer and barge loading company for use in maneuvering grain barges. The tug company settled for \$1,500. The maritime suit resulted in a dismissal of claimant's case. Prior to the settlement against the tug company, claimant's attorney and employer's attorney had discussed settling the LHWCA matter. Claimant contends that at some point he was notified that there was still LHWCA insurance coverage for this claim.

The ALJ dismissed the claim on Section 33(g) grounds. The Board has now remanded the matter stating that the ALJ must first explicitly determine whether the tug company was potentially liable to both the claimant and the employer for the injury in accordance with Section 33(a). The Board noted that the employer bears the burden of producing evidence on this issue as Section 33(g) is an affirmative defense.

The Board rejected the claimant's specific contention that the employer's alleged "bad faith" in advising him that the carrier was out of business and that the employer could not pay compensation due to a lack of reserves should preclude the employer's reliance on Section 33(g). Additionally the Board noted that the doctrine of equitable estoppel did not apply. This doctrine prevents one party from taking a position

inconsistent with that which it took in an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. To apply this doctrine to claims under the LHWCA, the Board noted that four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 29(CRT) (9th Cir. 1996), *vacated and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The Board found that although the claimant contended that he filed his lawsuits in response to his inability to obtain compensation from his employer and/or carrier, the employer's correspondence with the claimant was insufficient to establish that the employer intended that the claimant take this action.

The Board also did not accept the claimant's contention that it would have been pointless to attempt to obtain the carrier's written approval of the settlement with the tug company because he had been advised that the company was out of business. The Board noted that when an carrier is out of business, the employer stands responsible. The Board further noted that even though the employer's attorney had stated that the employer did not have the reserves to pay benefits, at some point after the claimant filed suit against the tug company, it appears that the claimant was informed that there was insurance coverage for his claim and the parties discussed a settlement of the LHWCA claim.

Finally, the Board rejected the claimant's contention that Section 7(h) preserves his entitlement to medical benefits that accrued prior to the settlement with the tug company. *See Esposito v. Sea-Land Services, Inc.*, 36 BRBS 10 (2002) (§ 7(h) does not preclude the applicability of the § 33(g)(1) bar to both compensation and medical benefits.); *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998)(Smith, J., dissenting.)(§ 7(h) does not support a conclusion that this holding is inapplicable to medical benefits.).

**Topic 33.7 Compensation For Injuries Where Third-Persons Are Liable--
Ensuring Employer's Rights—Written Approval of Settlement**

Dilts v. Todd Shipyards Corp., (Unpublished)(No. 03-71622)(9th Cir. 7, 2004).

In this case, the shipbuilder's widow argued that the statutory requirement of approval contained in Section 33(g) is unconstitutional because it permits an employer to withhold approval of settlements which forces a claimant to obtain the benefits of a settlement at the cost of forfeiting the right to compensation. In its summary affirmation of the widow's denial, the court noted that her position was not consistent with the U.S.

Supreme Court's holding in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589 (1992).

**Topic 33.7 Compensation for Injuries Where Third Persons Are Liable—
Ensuring Employer's Rights—Written Approval of Settlement**

Mapp v. Transocean Offshore USA, Inc., 38 BRBS 43 (2004).

Here the Board held that when obtaining prior written approval of a third-party settlement under Section 33(g), employer and carrier are separate and distinct entities and that the separate approval of each is required. In the instant case, the claimant sued the employer in state court under the Jones Act, as well as under the general maritime law as a third-party defendant. The claimant then turned around and sued the employer under the LHWCA. The employer had different insurance carriers for each claim. The employer, by virtue of its active participation in the negotiation of the settlement and the fact that it was an actual signatory to that agreement, received adequate notice and provided satisfactory approval of the agreement in compliance with Section 33(g)(1). However, the Claimant's claim is barred pursuant to Section 33(g) because he did not obtain the prior written approval of the carrier.

Additionally, the Board noted that in this particular case, the claimant was aware that the employer had contracted with separate carriers and that the claimant was fully aware of his obligations under Section 33(g)(1) and its accompanying regulations as to the need to obtain approval before executing the third-party settlement.

**Topic 33.7 Ensuring Employer's Rights—Written Approval of Settlement—
Qualifying for Benefits (Person Entitled to Compensation)**

Mabile v. Swiftships, Inc., 38 BRBS 19 (2004).

The Board affirmed the ALJ's finding that Section 33(g) does not bar a widow's claim for death benefits although she entered into a third-party settlement after the death of her husband where she was only settling the decedent's tort action for his pain and suffering and economic loss, which remained pending at the time of his death. The Louisiana court had dismissed all of the claims that the widow filed in her own right, specifically holding that only the claims for the decedent's lost wages and pain and suffering could go forward. Thus, the widow obtained the proceeds of the third-party settlement with the employer's officers only because she was substituted for her husband as a representative of his estate and not because she surrendered any of her own rights. Therefore she was not a "person entitled to compensation" for the decedent's pain and economic loss.

The Board explained that in this case, although the decedent's disability claim and the widow's death benefits are based on the same occupational exposure, they are

separate claims for distinct types of benefits. As the widow's claim is for death benefits under the LHWCA, and the settlement is solely based on the decedent's lost wages and pain and suffering during his life, the third party was not liable for the same disability or death for which the widow sought benefits under the LHWCA. "Where, as here, the claimant does not have the right to seek damages from the third party for her own benefits, then employer does not have the right, under Section 33(b), to seek damages on the death claim from that third party."

Topic 33.7 Insuring Employer's Rights-Written Approval of Settlement

Richardson v. Newport News Shipbuilding & Dry Dock Co., 38 BRBS 6 (2004).

There are two significant issues in this matter, both involving Section 33. First, at issue is whether Section 33(g) can bar a claim for COPD disability when a claimant suffers from both a non-asbestos related COPD condition, plus an asbestos related condition and the claimant accepted third party settlements in relation to his asbestos related lung disease. Second, at issue is the classification of a claimant who is only undergoing medical monitoring (as opposed to receiving benefits/compensation) when it comes to whether that person is a "person entitled to compensation." While this case was ultimately remanded, it is nevertheless significant for its illustration of the Board's views.

The claimant originally alleged that he contacted an asbestos-related lung disease as a result of exposure to asbestos dust and fibers, and chronic obstructive pulmonary disease (COPD) from exposure to welding smoke and paint fumes, during the course of his approximately 30 years of work for the employer. The claimant had filed a claim for asbestosis in 1995 and for COPD in 1999, which were eventually consolidated. At the OALJ hearing, the claimant averred that he did not presently have asbestosis and thus he sought to amend his asbestos claim to seek only an award for medical monitoring under Section 7 of the LHWCA. While his longshore claims were pending, the claimant became involved in third party litigation and entered into two third party settlements. The employer argued that Section 33(g) should apply and bar the claimant's recovery since he had entered into the settlements without the employer's prior written approval.

The Board first addressed the issue of whether a claimant recovering only medical monitoring for an asbestos-related condition is a "person entitled to compensation." In resolving this issue, the Board found that the ALJ rationally looked to the evidence in existence as of the date of the settlements in order to determine if the claimant satisfied the prerequisites to the right to recover. The evidence at that point in time supported the ALJ's finding that as of the date the claimant stopped working, the claimant was aware of the relationship between his work-related asbestosis and his inability to work. At that point in time, there was medical evidence noting the existence of a condition "consistent with asbestos."

The claimant withdrew his claim for disability benefits for asbestosis, ostensibly on the ground that the later medical evidence could not support a finding of either

asbestosis or disability due to asbestosis. Nonetheless, the Board noted that the ALJ addressed the medical evidence as a whole and concluded that the claimant had asbestosis, asbestos-related pleural plaques, and both a restrictive and an obstructive lung impairment due to simultaneous work exposure to asbestos, smoke, dust, and welding fumes, and which combined with the claimant's pre-existing asthma to render him totally disabled. Further more, the Board noted that the ALJ concluded that the claimant's disability due to his lung condition was the same disability for which he settled his third party claims and therefore found the disability claim under the LHWCA barred, because of the third party settlements.

The Board explained that it could not affirm this finding. The Board remanded with instructions to make findings consistent with *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992) (Claimant developed asbestosis and hypertension. **Ninth Circuit:** An employee who is totally disabled based on either injury alone could recover from the employer under either injury. Therefore to allow an employer set-off for third party proceeds received under one injury would result in a windfall for the employer because the employee could have sought recovery under the other injury for which no third party proceeds are awardable. Such an interpretation in effect would reward the employer for causing two work-related disabilities instead of one.); *on remand, Charvez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting), *aff'd on recon. En banc*, 28 BRBS 185 (1994) (Brown and McGranery, J.J. dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F. 3d 1309, 32 BRBS 67 (CRT) (9th Cir. 1998).

The Board further instructed the ALJ to then determine the applicability of Section 33(g) based on these findings. "Only if asbestosis is claimant's only work-related disability can Section 33(g) be invoked to bar claimant's claim." The Board further noted that, "Although claimant withdrew his claim for disability benefits due to asbestosis, employer nevertheless may attempt to establish, in support of its claim, that Section 33(g) applies, that claimant's disability is due to asbestosis alone."

The Board went on to state, "If after reviewing the medical evidence in light of *Chavez*, the [ALJ] again finds that claimant is disabled by both asbestosis and COPD, Section 33(g) cannot bar the claim because, under the aggravation rule, COPD is considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third party claims." Thus, the Board vacated the ALJ's finding that Section 33(g) bars the claimant's COPD and remanded the case for consideration of the entire record to discern the cause of the claimant's disability.

The Board also found that, under the circumstances, the claimant's claim for medical monitoring for any asbestos-related condition cannot be barred by Section 33(g)

because, ultimately, the claimant is not entitled to disability compensation for asbestosis; a person entitled only to medical benefits is not a “person entitled to compensation for purposes of Section 33(g).

Topic 33.7 Ensuring Employer’s Rights–Written Approval of Settlement

Cheremie v. Superior Shipyard and Fabrication, Inc., (Unpublished) (Civ. A 02-3099)(E.D. La. July 7, 2003).

Here the claimant was injured while working in a ship repair facility. He settled with the owner of the boat on which he was working and filed a 905 action against his employer. His employer filed a motion for summary judgment noting that the claimant had not sought the employer’s written permission prior to entering into the settlement with the boat owner. The claimant alleges that he was entitled to file the 905 action because his employer failed to secure LHWCA insurance. In denying the motion for summary judgment, the federal district judge found that “Section 933(g) is inapplicable because [claimant] is suing [his employer] for damages, not compensation or benefits under the LHWCA.” The judge went on to state, “[T]he Court does not consider whether Plaintiff’s action is permissible under Section 905(a), or whether [the employer] has failed to secure payment of compensation because the record is devoid of any reference as to whether [the claimant] has either sought or received compensation from [the employer].”

Topic 33.7 Third-Party Settlements Ensuring Employer's Rights Written Approval of Settlement

Esposito v. Sea-Land Service, Inc., 36 BRBS 10 (2002).

Here the Board rejected the claimant's assertions that the employer's actions amounted to a constructive approval of a third-party settlement. The Board found that the employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. The Board noted the very limited participation of the employer and found that it was less than in some other cases where the Board had previously held that Section 33(g)(1) applied. Employer here was a named defendant in the tort suit; thus, it did not appear in the case on the claimant's side. Second, the employer was dismissed from the case nearly one and one-half years before the trial and settlement, and the employer's attorney remained active only for discovery purposes. The Board further noted that "While there is conflicting evidence as to whether [employer's attorney] was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the ...settlement, the [ALJ] found that [employer's attorney] was not involved in the negotiations themselves, and he did not sign or consent to the general release." The Board found that employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement and render Section 33(g)(1) inapplicable.

Next the Board addressed an issue of first impression, namely whether Section 33(g)(2) provides claimants with a means for retaining their entitlement to medical benefits despite having lost their entitlement to compensation. Referencing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992); the language of Section 33(g) itself; and the implementing regulation, 20 C.F.R. § 702.281, the Board concluded that a claimant must obtain the prior written approval of a settlement for an amount less than his entitlement under the LHWCA.

Topic 33.7 Ensuring Employer’s Rights–Written Approval of Settlements

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

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

Topic 33.7.3 Involvement of the Employer in Third-Party Settlements

Marmillion v. A.M.E. Temporary Services, (Unpublished)(BRB No. 04-0272)(Dec. 13, 2004).

This is a Section 33(g) case wherein the claimant alleges on appeal that the strict guidelines of 33(g) should not bar his claim. Claimant worked for a temporary service company who had contracted his services to a company that loaded and unloaded grain barges. Following an injury, claimant’s immediate employer paid some benefits and a LHWCA claim was filed. Subsequently benefits ceased and employer’s counsel informed claimant’s counsel that the carrier had gone out of business and that the employer did not have reserves in place to make further payments to the claimant: “I wish I could be of more help, but I am afraid that your clients have little recourse of recovery, particularly if they are asserting maritime claims which are not covered by the Louisiana Insurance Guaranty Association statute.”

Subsequently claimant filed a Jones Act, general maritime law action and 905(b) action. Included as a defendant was the owner of a tug who had chartered the tug to the employer and barge loading company for use in maneuvering grain barges. The tug company settled for \$1,500. The maritime suit resulted in a dismissal of claimant’s case. Prior to the settlement against the tug company, claimant’s attorney and employer’s attorney had discussed settling the LHWCA matter. Claimant contends that at some point he was notified that there was still LHWCA insurance coverage for this claim.

The ALJ dismissed the claim on Section 33(g) grounds. The Board has now remanded the matter stating that the ALJ must first explicitly determine whether the tug company was potentially liable to both the claimant and the employer for the injury in

accordance with Section 33(a). The Board noted that the employer bears the burden of producing evidence on this issue as Section 33(g) is an affirmative defense.

The Board rejected the claimant's specific contention that the employer's alleged "bad faith" in advising him that the carrier was out of business and that the employer could not pay compensation due to a lack of reserves should preclude the employer's reliance on Section 33(g). Additionally the Board noted that the doctrine of equitable estoppel did not apply. This doctrine prevents one party from taking a position inconsistent with that which it took in an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. To apply this doctrine to claims under the LHWCA, the Board noted that four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 29(CRT) (9th Cir. 1996), *vacated and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The Board found that although the claimant contended that he filed his lawsuits in response to his inability to obtain compensation from his employer and/or carrier, the employer's correspondence with the claimant was insufficient to establish that the employer intended that the claimant take this action.

The Board also did not accept the claimant's contention that it would have been pointless to attempt to obtain the carrier's written approval of the settlement with the tug company because he had been advised that the company was out of business. The Board noted that when an carrier is out of business, the employer stands responsible. The Board further noted that even though the employer's attorney had stated that the employer did not have the reserves to pay benefits, at some point after the claimant filed suit against the tug company, it appears that the claimant was informed that there was insurance coverage for his claim and the parties discussed a settlement of the LHWCA claim.

Finally, the Board rejected the claimant's contention that Section 7(h) preserves his entitlement to medical benefits that accrued prior to the settlement with the tug company. *See Esposito v. Sea-Land Services, Inc.*, 36 BRBS 10 (2002) (§ 7(h) does not preclude the applicability of the § 33(g)(1) bar to both compensation and medical benefits.); *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998)(Smith, J., dissenting.)(§ 7(h) does not support a conclusion that this holding is inapplicable to medical benefits.).

Topic 33.7.3 Involvement of the Employer in Third-Party Settlements

Mapp v. Transocean Offshore USA, Inc., 38 BRBS 43 (2004).

Here the Board held that when obtaining prior written approval of a third-party settlement under Section 33(g), employer and carrier are separate and distinct entities and that the separate approval of each is required. In the instant case, the claimant sued the employer in state court under the Jones Act, as well as under the general maritime law as a third-party defendant. The claimant then turned around and sued the employer under the LHWCA. The employer had different insurance carriers for each claim. The employer, by virtue of its active participation in the negotiation of the settlement and the fact that it was an actual signatory to that agreement, received adequate notice and provided satisfactory approval of the agreement in compliance with Section 33(g)(1). However, the Claimant's claim is barred pursuant to Section 33(g) because he did not obtain the prior written approval of the carrier.

Additionally, the Board noted that in this particular case, the claimant was aware that the employer had contracted with separate carriers and that the claimant was fully aware of his obligations under Section 33(g)(1) and its accompanying regulations as to the need to obtain approval before executing the third-party settlement.

Topic 33.7.4 Medical Benefits

Marmillion v. A.M.E. Temporary Services, (Unpublished)(BRB No. 04-0272)(Dec. 13, 2004).

This is a Section 33(g) case wherein the claimant alleges on appeal that the strict guidelines of Section 33(g) should not bar his claim. Claimant worked for a temporary service company who had contracted his services to a company that loaded and unloaded grain barges. Following an injury, claimant's immediate employer paid some benefits and a LHWCA claim was filed. Subsequently benefits ceased and employer's counsel informed claimant's counsel that the carrier had gone out of business and that the employer did not have reserves in place to make further payments to the claimant: "I wish I could be of more help, but I am afraid that your clients have little recourse of recovery, particularly if they are asserting maritime claims which are not covered by the Louisiana Insurance Guaranty Association statute."

Subsequently claimant filed a Jones Act, general maritime law action and 905(b) action. Included as a defendant was the owner of a tug who had chartered the tug to the employer and barge loading company for use in maneuvering grain barges. The tug company settled for \$1,500. The maritime suit resulted in a dismissal of claimant's case. Prior to the settlement against the tug company, claimant's attorney and employer's attorney had discussed settling the LHWCA matter. Claimant contends that at some point he was notified that there was still LHWCA insurance coverage for this claim.

The ALJ dismissed the claim on Section 33(g) grounds. The Board has now remanded the matter stating that the ALJ must first explicitly determine whether the tug company was potentially liable to both the claimant and the employer for the injury in

accordance with Section 33(a). The Board noted that the employer bears the burden of producing evidence on this issue as Section 33(g) is an affirmative defense.

The Board rejected the claimant's specific contention that the employer's alleged "bad faith" in advising him that the carrier was out of business and that the employer could not pay compensation due to a lack of reserves should preclude the employer's reliance on Section 33(g). Additionally the Board noted that the doctrine of equitable estoppel did not apply. This doctrine prevents one party from taking a position inconsistent with that which it took in an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. To apply this doctrine to claims under the LHWCA, the Board noted that four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 29(CRT) (9th Cir. 1996), *vacated and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The Board found that although the claimant contended that he filed his lawsuits in response to his inability to obtain compensation from his employer and/or carrier, the employer's correspondence with the claimant was insufficient to establish that the employer intended that the claimant take this action.

The Board also did not accept the claimant's contention that it would have been pointless to attempt to obtain the carrier's written approval of the settlement with the tug company because he had been advised that the company was out of business. The Board noted that when an carrier is out of business, the employer stands responsible. The Board further noted that even though the employer's attorney had stated that the employer did not have the reserves to pay benefits, at some point after the claimant filed suit against the tug company, it appears that the claimant was informed that there was insurance coverage for his claim and the parties discussed a settlement of the LHWCA claim.

Finally, the Board rejected the claimant's contention that Section 7(h) preserves his entitlement to medical benefits that accrued prior to the settlement with the tug company. *See Esposito v. Sea-Land Services, Inc.*, 36 BRBS 10 (2002) (§ 7(h) does not preclude the applicability of the § 33(g)(1) bar to both compensation and medical benefits.); *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998)(Smith, J., dissenting.)(§ 7(h) does not support a conclusion that this holding is inapplicable to medical benefits.).

Topic 33.7.4 Third-Party Settlements--Medical Benefits

Esposito v. Sea-Land Service, Inc., 36 BRBS 10 (2002).

Here the Board rejected the claimant's assertions that the employer's actions amounted to a constructive approval of a third-party settlement. The Board found that the employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. The Board noted the very limited participation of the employer and found that it was less than in some other cases where the Board had previously held that Section 33(g)(1) applied. Employer here was a named defendant in the tort suit; thus, it did not appear in the case on the claimant's side. Second, the employer was dismissed from the case nearly one and one-half years before the trial and settlement, and the employer's attorney remained active only for discovery purposes. The Board further noted that "While there is conflicting evidence as to whether [employer's attorney] was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the ...settlement, the [ALJ] found that [employer's attorney] was not involved in the negotiations themselves, and he did not sign or consent to the general release." The Board found that employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement and render Section 33(g)(1) inapplicable.

Next the Board addressed an issue of first impression, namely whether Section 33(g)(2) provides claimants with a means for retaining their entitlement to medical benefits despite having lost their entitlement to compensation. Referencing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 , 26 BRBS 49 (CRT) (1992); the language of Section 33(g) itself; and the implementing regulation, 20 C.F.R. § 702.281, the Board concluded that a claimant must obtain the prior written approval of a settlement for an amount less than his entitlement under the LHWCA.

Topic 33.9 Exclusive Remedy Against Officers Or Fellow Servants Of Employers

Hymel v. McDermott, Inc., 37 BRBS 160 (2003).

Here the claimant sued his employer under the LHWCA as well as in state court against his employer and others, for negligence and intentional exposure to toxic substances in the work place. Executive officers of the employer during the claimant's employment (who were named as defendants in the state court suit) moved to intervene in the LHWCA claim. The ALJ denied the motion to intervene, finding that the issue raised by the interveners was not "in respect of " a compensation claim pursuant to Section 19(a) of the LHWCA. In a subsequent Decision and Order, the ALJ granted the claimant's motion to dismiss the claimant's claim with prejudice, pursuant to Section 33(g), as he settled a part of his state tort claim for less than his compensation entitlement without employer's prior written approval. The interveners filed an appeal with the Board. The Board dismissed the appeal, on the ground that as claimant's claim was no longer pending, the interveners were not adversely or aggrieved by the denial of their motion to intervene. Intervenors then filed a motion for reconsideration of the Board's dismissal.

The Board granted the motion for reconsideration, finding that the interveners are adversely affected or aggrieved by the ALJ's denial of their petition. The Board noted that Section 21(b)(3) of the LHWCA states that the Board is authorized to hear and determine appeals that raise a "substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the LHWCA. However, turning to the merits of the appeal, the Board found that the ALJ's decision was legally correct. The Board noted **Fifth Circuit** case law to support the ALJ's determination that he was without jurisdiction to rule on interveners' entitlement to tort immunity in a state court suit, as that issue was not essential to resolving issues related to the claimant's claim for compensation under the LHWCA. The Board went on to note that even if the claimant's claim had still been pending, the interveners' claim, while based on Section 33(i) of the LHWCA, is independent of any issue concerning the claimant's entitlement to compensation and/or medical benefits and the party liable for such. Section 33(i) does not provide the right of intervention.

Topic 33.10 Miscellaneous Areas Within Section 33

[ED. 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, 289 F.3d 1315 (**11th Cir.** 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 39

Topic 39.1 Administration and Vocational Rehabilitation--Generally

Meinert v. Fraser, 37 BRBS 164 (2003).

Here the employer appeals to the Board (to review under its abuse of discretion standard) the Vocational Rehabilitation Plan approved by the District Director. The employer contended that vocational rehabilitation is unnecessary because the claimant retains a wage-earning capacity on the open market and that upon completion of the plan, the claimant will have a lower earning capacity in motorcycle repair than that demonstrated by employer's labor market survey. The Employer averred that the evidence it developed after the implementation of the plan demonstrates the validity of its contentions. The employer also contends that motorcycle repair was merely an interest of the claimant's and that is why retraining in this area was pursued.

After reviewing the pertinent regulations (20 C.F.R. §§ 702.501-702.508) and the statute (Section 39(c)(2), the Board noted that neither the LHWCA nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan. The Board held that the employer has not shown that the district director had abused her discretion in implementing the plan, as it failed to demonstrate that the district director did not comply with the regulatory criteria. The Board found that the counselor had adequately documented the wages that the claimant would earn upon completion of the program, as the claimant had no earnings at the time the plan was documented. It further noted that the counselor had documented his placement efforts prior to recommending retraining courses, and he demonstrated how the claimant's vocational background and aptitude testing fit well with the new skills claimant will obtain at the technical college. Further, the Board noted that "[I]t is self-evident that a claimant is more likely to succeed at a plan if, in addition to its being suitable for him, it involves a vocation in which he is interested."

Employer sought to enter into evidence information which it alleges would establish that the claimant had a current wage-earning capacity without the retraining program that was at least equal to what the claimant would earn upon his completion of

the plan. The Board declined to allow the information to be entered into evidence stating that "Assuming *arguendo*, the validity of employer's contention, employer cannot demonstrate an abuse of the district director's discretion where the plan is otherwise fully documented according to the regulatory criteria."

The Board also declined to address the employer's contentions regarding its potential liability for disability benefits during the retraining period. It stated that, "This issue is one that is properly presented to an [ALJ] in the first instance, and employer is entitled to a full evidentiary hearing on this issue."

Topic 39.3 Administration and Vocational Rehabilitation—Secretary's Authority to Direct Vocational Rehabilitation

Opiopio v. United States Marine Corps, (Unpublished) (BRB No. 04-0340)(December 7, 2004).

In this suitable alternate employment case, the Board found that the ALJ exceeded her authority by ordering the employer to provide the claimant with a job that complies with the doctor's work restrictions and to enforce the restrictions. Additionally, the Board held that, contrary to the ALJ's suggestion that the employer provide the claimant with vocational rehabilitation assistance if it was unable to provide a suitable light duty position, the employer is not obligated under the LHWCA to offer the claimant vocational rehabilitation. Since Section 39©(1)-(2) and the implementing regulations, 20 C.F.R. § 702.501 *et seq.*, authorize the Secretary of Labor to provide for the vocational rehabilitation of permanently disabled employees in certain circumstances, ALJs do not have the authority to provide vocational rehabilitation.

Topic 39.3 Secretary's Authority to Direct Vocational Rehabilitation

Castro v. General Construction Company, 37 BRBS 65 (2003).

In this total disability award case geographically in the **Ninth Circuit**, the employer argued that the Board should not have awarded total disability benefits during the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied *Abbott* both inside and outside the **Fifth Circuit** and that the **Fourth Circuit** recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002)(ALJ was entitled to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

In the instant case, the employer challenged the application of *Abbott* on the grounds that there is no specific provision in the LHWCA allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. The Board found that *Abbott* rest, not on any novel legal concept, but on the well-established principle that, once a claimant established a prima facie case of total disability, the employer bears the burden of demonstrating the availability of suitable alternate employment. If the employer makes this showing, the claimant may nevertheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. "The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment." Additionally the Board noted that while Congress enacted a statute that dealt with "total" and "partial" disability, it was left to the courts to develop criteria for demonstrating these concepts, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition.

The Employer here also argued that its due process rights were violated when it was not given a hearing on the question of whether the claimant was entitled to vocational rehabilitation and whether it was liable for total disability benefits for that period. The Board found that "Because Section 39(c)(2) and its implementing regulation grant authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. ...Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits."

The board also rejected the employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. "Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits."

Topic 39.3 Secretary's Authority to Direct Vocational Rehabilitation

Castro v. General Construction Company, 37 BRBS 65 (2003).

In this total disability award case geographically in the **Ninth Circuit**, the employer argued that the Board should not have awarded total disability benefits during the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied

Abbott both inside and outside the **Fifth Circuit** and that the **Fourth Circuit** recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002)(ALJ was entitled to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

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The Board also rejected the employer’s contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. “Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits.”

TOPIC 48a

Applicability of the Civil Rights Tax Relief provision of the American Jobs Creation Act to cases arising under Section 48 of the Longshore Act

On October 22, 2004, the President signed the American Jobs Creation Act of 2004. Section 703 of this Act establishes a deduction from gross income for attorneys' fees and court costs incurred by, or on behalf of, individuals who prevail in employment discrimination and other cases. This eliminates a burdensome tax effect on plaintiffs in employment discrimination cases which was often a barrier to overcome in settlement negotiations. Under prior law, the IRS required such plaintiffs to pay taxes on the attorneys' fees recovered in litigation or settlements, even though the money went straight to the attorney who also paid taxes on the amount as income.

The provision covers a number of laws administered by the Department of Labor, and may include discrimination claims filed under Section 48(a) of the LHWCA adjudicated by this office. The text of section 703 is posted on the OALJ web site at http://www.oalj.dol.gov/public/part18/refrnc/hr_4520_703.htm .

The longshore practitioner should specifically note Sub-Sections 703(e)(17) and (18) of this legislation. Sub-part (17) references “any provision of Federal law (popularly known as whistleblower protection provisions) and specifically notes “reprisal against an employee for asserting rights or taking other actions permitted under Federal law.” Sub-part (18) includes in tax relief coverage the following:

“(18) Any provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law—

“ii) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.”

Section 48(a) of the LHWCA (Amended 1984), formerly Section 49, addresses discrimination against employees who bring proceedings for filing compensation claims or testifying in longshore proceedings. The employer alone and not his/her carrier is liable for penalties and payments under Section 48(a). The LHWCA specifically states, “Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void.” A claimant who succeeds in a Section 48(a) discrimination claim is entitled to attorney fees for that claim. While Section 48(a) has never officially been referred to as a whistleblower provision, it certainly falls within general whistleblower criteria as well as the criteria listed in Sub-sections (17) and (18) of the Civil Rights Tax Relief legislation.

Topic 48(a) Discrimination Against Employees Who Bring Proceedings

[Ed. Note: The following case is included for informational value only.]

Carter v. Tennant Co., ___ F.3d ___ (No. 03-2791)(7th Cir. September 13, 2004).

Here the plaintiff's suit for wrongful discharge in retaliation for making a workers' compensation claim was found to have been properly dismissed by the district court since the plaintiff was found to have given dishonest answers to a health history questionnaire. He had not told the present employer about his previous injury or ongoing medical care and benefits. The Plaintiff had also argued that his Privacy Act rights were violated and that, therefore, his discharge based on incorrect answers should be voided. However, the circuit court noted that the employer had asked if he had "ever had any occupational injuries, accidents, or illnesses;" "lost time from work for a work-related injury or illness;" or saw "a medical doctor for any work-related injury/illness." The court found that such questions were not in violation of the statute which specifically barred employers from inquiring "whether that prospective employee has ever filed a claim for benefits under the state workers' compensation act or Workers' Occupational Diseases Act or received benefits under these Acts."

TOPIC 60

Topic 60.2 Longshore Act Extensions--Defense Base Act

Announcement--Possible Gulf War Fire/Lung Cancer Link

According to the Associated Press, a committee of the Institute of Medicine [a branch of the National Academy of Science, an independent group chartered by Congress to advise the government on scientific matters], states that Gulf War personnel exposed to pollution from the well fires, exhaust and other sources may face an increased lung cancer risk. More than 600 oil well fires were ignited by Iraqi troops during their retreat from Kuwait in 1991.

Topic 60.2 Longshore Act Extensions--Defense Base Act

Kalama Servs., Inc. v. Director, OWCP., ___ U.S. ___, ___ S.Ct. ___, (S.Ct. No. 03-1440), (**Cert. denied** Oct. 4, 2004).

Let stand a **Second Circuit** decision which had found that the Board and ALJ's award of benefits under the "zone of special danger" doctrine. Previously it had been determined that injuries to an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a zone of special danger created by the isolation of the island and the limited recreational opportunities available there. Misconduct by the employee during the horseplay was not sufficiently egregious to sever the relationship between his employment and the injury under the zone of special danger doctrine.

Topic 60.2 Longshore Act Extensions--Defense Base Act

Ilaszczat v. Kalama Services, 36 BRBS 78 (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 60.2.1 Extension Acts--Defense Base Act--Applicability of the LHWCA

Morrissey v. Kiewit-Atkinson-Kenny, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient

to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

Finally the Board rejected coverage directly under the LHWCA. The rock where the tunnel was being drilled rose above the surface of the water at the point where the claimant was injured. The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway. Thus, the Board found that the injury did not occur on navigable water. As to the claimant's contention that he was injured on a "marine railway," the Board rejected this allegation after examining the definition of "marine railway" and noting that the claimant did not contend that the railway used in the tunnel played any part in removing ships from the water for repair.

Topic 60.2.2 Extension Acts--Defense Base Act--Claim Must Stem From a "Contract" For "Public Work" Overseas

Morrissey v. Kiewit-Atkinson-Kenny, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

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Topic 60.2.4 Substantive Rights Determined Under Provisions of LHWCA as Incorporated into the DBA

The third paragraph of this subsection should read as follows:

In *Lee v. The Boeing Co., Inc.*, 123 F.3d 801 (4th Cir. 1997), the issue arose as to whether the DBA incorporated Section 3(e) of the LHWCA. The claimant had suffered major injuries in a car crash while working for Boeing in Saudi Arabia. Boeing wanted a credit for payments that the claimant was receiving from the Occupational Hazards Branch of the Social Insurance Laws of Saudi Arabia. The ALJ found that such a credit was appropriate. *Lee v. The Boeing Co.*, 27 BRBS 597 (ALJ)(1994). The Board tacitly affirmed by taking no action on the appeal within a year. The claimant then appealed the holding to the **Fourth Circuit** which found that it did not have jurisdiction to hear the case and transferred it to the **District Court** for the District of Maryland. *See Lee v. The Boeing Co.*, 7 F. Supp. 2d 617 (D. Md. 1998).

Topic 60.2.7 Defense Base Act--Course and Scope of Employment, "Zone of Special Danger"

Kalama Servs., Inc. v. Director, OWCP., ___ U.S. ___, ___ S.Ct. ___, (S.Ct. No. 03-1440), (**Cert. denied** Oct. 4, 2004).

Let stand a **Second Circuit** decision which had found that the Board and ALJ's award of benefits under the "zone of special danger" doctrine. Previously it had been determined that injuries to an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a zone of special danger created by the isolation of the island and the limited recreational opportunities available there. Misconduct by the employee during the horseplay was not sufficiently egregious to sever the relationship between his employment and the injury under the zone of special danger doctrine.

Topic 60.2.7 Extension Acts-Defense Base Act, Course and Scope of Employment, "Zone of Special Danger"

Edmonds v. Al Salam Aircraft Co., Ltd., (Unpublished)(BRB No. 01-0602) (April 5, 2002).

In this Defense Base Act case the issue was the extent of the "zone of special danger" concept. Claimant was hit by a car while attempting to cross a highway in order to go to the supermarket Saudi Arabia. The ALJ found that claimant, although not injured while performing the duties of his employment, was nevertheless in the "zone of special danger" created by his overseas job. The employer here appealed, arguing first, that driving in Saudi Arabia is no more dangerous than driving in the United States. Second, the employer urged the Board to reconsider the "zone of special danger" doctrine "in light of the 21st Century, since applicability of this doctrine, as exemplified by past case precedent, is premised on an antiquated view of the world outside of the United States."

After noting **Supreme Court** jurisprudence on the "zone of special danger" doctrine, the Board declined to address the employer's invitation to reconsider the doctrine "in light of the 21st Century, since the Board's use and application of the 'zone of special danger' doctrine stems directly from the binding precedent of the **Supreme Court's** decisions... ." Next the Board noted that the instant case was no one in which the claimant was "so thoroughly disconnected" from work for the employer that it is unreasonable for his injuries to be covered, as the ALJ found that claimant's injuries were related to his living and working conditions in Saudi Arabia. The Board noted that the ALJ had determined that the employer did not provided the claimant with on-base housing, convenient transportation to and from the base, or fresh food at the commissary on the housing compound, and it was reasonable for him to buy food off-base. The ALJ had also found that the claimant was always on call and his hours of work were not consistent; thus it was reasonable for him to drive his own car. Lastly, the ALJ

determined, based in part on the claimant's credible testimony and a pamphlet distributed by the employer's predecessor that driving in Saudi Arabia presented hazards not found in the United States.

Topic 60.2.7 Defense Base Act--Course and Scope of Employment, "Zone of Special Danger"

Ilaszczat v. Kalama Services, 36 BRBS 78 (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 60.3.1 Longshore Act Extensions--Outer Continental Shelf Lands Act—
Applicability of the LHWCA**

Announcement--Offshore Drilling Workers cannot be required to take mandatory periodic medical exams under the ADA

BNA (Daily Labor Report No 228, Nov. 29, 2004) reports that offshore drilling rig workers cannot be required to take mandatory period medical examinations to screen for threatening illnesses, according to a September 10, 2004 EEOC informal advisory letter. The letter, addressed to an inquiring offshore drilling company, states that EEOC does not believe that workers on remote drilling rigs fall within the "public safety exception" of the EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (2000). According to BNA, the EEOC stated alternatives available to such an employer: 1) completely voluntary medical screenings; 2) a medical exam before being allowed to work on a platform, provided there is a "reasonable belief that a particular offshore worker has a medical condition that may affect his or her ability to perform job functions or may pose a direct threat; 3) requiring all offshore workers to answer a medical history questionnaire and undergo a medical exam after making a conditional job offer, with follow-ups where appropriate.

**Topic 60.3.1 Longshore Act Extensions--Outer Continental Shelf Lands Act—
Applicability of the LHWCA**

Nase v. Teco Energy, Inc., (Unpublished)(Civ. Act. No: 04-0838 Sec. "R"(5))(E.D. La Dec. 8, 2004).

This is the consolidated case of two off-shore workers for the alleged exposure to hazardous, toxic and carcinogenic materials (phosphate and drilling muds/chemicals)

allegedly resulting in diagnoses of “bronchitis obliterans organizing pneumonia” (BOOP) and non-Hodgkin’s lymphoma. The workers sued in state court. One made claims under the general maritime law and the Jones Act, and alternatively, under the LHWCA. The other alleged that he was a maritime worker entitled to compensation under the LHWCA. The defendants removed the action to federal court alleging OCSLA jurisdiction, and the plaintiffs are now moving the court to remand the action to state court.

The district court found that some of the events giving rise to the suit occurred on the outer Continental Shelf. While acknowledging that district courts have original jurisdiction over actions governed by OCSLA, the court stated that it must determine whether the claims “arise under” federal law. The court stated that in the absence of a clear statement of law by the **Fifth Circuit**, it finds that removal under the OCSLA is not proper when maritime law governs the plaintiff’s claim and one of the defendants is from the state of suit, as here. As to the defendant from the state of suit, the defendants argued that that defendant is immune from the intentional tort claim (that is a part of the litigation) under the LHWCA. While finding that the defendants are correct with regard to the LHWCA (LCHWA bars recovery for the intentional tort of another person in the same employ.), the court noted that the claimant argued only in the alternative that he had LHWCA coverage. The primary allegations were under the maritime law, Jones Act and state law. Because there is a possible cause of action in intentional tort against the in-state defendant that is not barred by either state worker’s compensation, the court found that there was not fraudulent joinder. Under the rules of joinder, the court allowed the second worker’s claim to remain joined and thus both cases were remanded to state court.

Topic 60.3.1 OCSLA—Applicability of the LHWCA

Lively v. Diamond Offshore Drilling, Inc., (Unpublished)(No. Civ. A. 03-1989)(E.D. La. August 3, 2004).

At issue here was whether, under the OCSLA, general maritime law or Louisiana law would apply. (Louisiana law prohibits enforcement of an indemnity provision pursuant to the Louisiana Oilfield Anti-Indemnity Act (“LOAIA”). In addressing whether state law would apply as surrogate law, the court reviewed the law of the **Fifth Circuit** to determine if federal maritime law applied of its own force in this case. Noting that circuit law indicates that a contract to furnish labor to work on special purpose vessels to service oil wells is a maritime contract, the district court concluded that the worker’s duties were in furtherance of the vessel’s primary purpose and that the agreement was maritime. Thus federal law and not Louisiana law governed.

The court next held that Section 905(c) and not 905(b) governed since the worker was a non-seaman engaged in drilling operations on the OCS. (As a non-seaman engaged in drilling operations on the OCS, the worker is subject to the exclusive remedy of the LHWCA by virtue of 43 U.S.C. § 1333(b) of the OCSLA, rather than 33 U.S.C. § 901, *et seq.* When the LHWCA is applicable by virtue of Section 1333(b), the third-party remedy

against the vessel owner is governed by Section 905(c).) Under Section 905(c) "any reciprocal indemnity provision" between the vessel and the employer is enforceable.

Topic 60.3.1 Outer Continental Shelf Lands Act—Applicability of the LHWCA

Desoto v. Pride International, Inc., (Unpublished) (No. Civ. A 03-1868)(E.D. La. March 3, 2004).

Here a Motion for Summary Judgment was granted to the defendants because the claimant was injured on a fixed platform located within the territorial waters of Mexico, within the Gulf of Mexico. The plaintiff was injured by a falling crate while employed as a crane operator and motorman mechanic aboard a drilling rig. The plaintiff alleged federal question jurisdiction and in an amended complaint relied upon the general maritime law of the United States ("GML") and the OCSLA. The fact that the accident occurred on a fixed platform in Mexican territorial waters was uncontested. Since the **Fifth Circuit** has previously held that an injury on a fixed platform does not fall within the admiralty and maritime jurisdiction, the district court found that the GML does not support federal question jurisdiction. The court further found that the OCSLA was inapplicable since the OCSLA provides that "the soil and seabed of the outer continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition." Thus, the claim was outside the scope of the OSCLA. (*Cf. Weber v. S.C.Loveland Co. (Weber II)*, 35 BRBS 75 (2001)(Claimant injured in the port of Kingston, Jamaica, while walking on employer's catwalk on barge, was covered under the LHWCA.)

Topic 60.3.1 Outer Continental Shelf Lands Act—Applicability of the LHWCA

Hebert v. Pride International, (Unpublished) (Civ. No. 03-0804)(E. D. La. March 5, 2004); 2004 U.S. Dist. LEXIS 3436.

This OCS summary judgment matter dealt with whether a worker was a borrowed employee making his exclusive remedy workers' compensation benefits under the LHWCA. Noting **Fifth Circuit** case law, the federal district court listed the nine factors a court must consider in making a borrowed employee determination.

Topic 60.3.1 Extension Acts--Outer Continental Shelf Lands Act Applicability

Morrissey v. Kiewit-Atkinson-Kenny, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor

Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

Finally the Board rejected coverage directly under the LHWCA. The rock where the tunnel was being drilled rose above the surface of the water at the point where the claimant was injured. The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway. Thus, the Board found that the injury did not occur on navigable water. As to the claimant's contention that he was injured on a "marine railway," the Board rejected this allegation after examining the definition of "marine railway" and noting that the claimant did not contend that the railway used in the tunnel played any part in removing ships from the water for repair.

Topic 60.3.1 Outer Continental Shelf Lands Act–Applicability of the LHWCA

Demette v. Falcon Drilling Co., Inc., 280 F.3d 492 (5th Cir. Jan. 16, 2002); *en banc pet.denied*, 37 Fed. Appx 93 (table)(5th Cir. March 5, 2002); 2002 WL 1022097.

[*ED. NOTE: This opinion was substituted for a previous one styled the same and reported at 253 F.3d 840 (5th Cir. 2001).*]

In determining that an OCSLA case was covered by the LHWCA and that the LHWCA did not invalidate an indemnity agreement, the **Fifth Circuit**, for the first time, specified the "exact contours of the situs test" established by Section 1333 of the OCSLA.

The **Fifth Circuit** formulated a specific rule:

The OCSLA applies to all of the following locations:

- (1) the subsoil and seabed of the OCS;
- (2) any artificial island, installation, or other device if
 - (a) it is permanently or temporarily attached to the seabed of the OCS, and
 - (b) it has been erected on the seabed of the OCS, and
 - (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
- (3) any artificial island, installation, or other device if
 - (a) it is permanently or temporarily attached to the seabed of the OCS, and
 - (b) it is not a ship or vessel, and
 - (c) its presence on the OCS is to transport resources from the OCS.

Topic 60.3.1 OCSLA–Applicability of the LHWCA

Diamond Offshore Co. v. A & B Builders, Inc., 302 F.3d 531 (5th Cir. 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OCSLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

**Topic 60.3.2 Longshore Act Extensions--Outer Continental Shelf Lands Act—
Coverage—(Situs, Status, “But for” Test)**

Nase v. Teco Energy, Inc., (Unpublished)(Civ. Act. No: 04-0838 Sec. “R”(5))(E.D. La Dec. 8, 2004).

This is the consolidated case of two off-shore workers for the alleged exposure to hazardous, toxic and carcinogenic materials (phosphate and drilling muds/chemicals) allegedly resulting in diagnoses of “bronchitis obliterans organizing pneumonia” (BOOP) and non-Hodgkin’s lymphoma. The workers sued in state court. One made claims under the general maritime law and the Jones Act, and alternatively, under the LHWCA. The other alleged that he was a maritime worker entitled to compensation under the LHWCA. The defendants removed the action to federal court alleging OCSLA jurisdiction, and the plaintiffs are now moving the court to remand the action to state court.

The district court found that some of the events giving rise to the suit occurred on the outer Continental Shelf. While acknowledging that district courts have original jurisdiction over actions governed by OCSLA, the court stated that it must determine whether the claims “arise under” federal law. The court stated that in the absence of a clear statement of law by the **Fifth Circuit**, it finds that removal under the OCSLA is not proper when maritime law governs the plaintiff’s claim and one of the defendants is from the state of suit, as here. As to the defendant from the state of suit, the defendants argued that that defendant is immune from the intentional tort claim (that is a part of the litigation) under the LHWCA. While finding that the defendants are correct with regard to the LHWCA (LCHWA bars recovery for the intentional tort of another person in the same employ.), the court noted that the claimant argued only in the alternative that he had LHWCA coverage. The primary allegations were under the maritime law, Jones Act and state law. Because there is a possible cause of action in intentional tort against the in-state defendant that is not barred by either state worker’s compensation, the court found that there was not fraudulent joinder. Under the rules of joinder, the court allowed the second worker’s claim to remain joined and thus both cases were remanded to state court.

**Topic 60.3.2 Longshore Extension Acts—Outer Continental Shelf Lands Act—
Coverage**

Kirkpatrick v. B.B.I, Inc., 38 BRBS 27 (2004).

The Board affirmed the ALJ’s finding that the claimant was covered by the OCSLA although the claimant was not directly involved in the physical construction of an offshore platform. The parties had stipulated that the worker’s “primary job function was supervising the ordering and transportation of materials necessary to the construction of the Conoco platform complex, upon which he was injured.” As the claimant’s purpose for being on the platform was to procure supplies necessary to construct the platform, and

his injury occurred during the course of his duties, his work satisfies the OCSLA status test.

The Board also found that Sections 12 and 13 apply to a claimant's notice of injury and claim for compensation due to his injury; these sections do not apply to a carrier seeking a determination that another carrier is responsible for claimant's benefits. The Board stated, "There is, in fact, no statutory provision requiring a carrier seeking reimbursement from another carrier to do so within a specified period."

Here INA claimed that it relied on Houston General's 12 year acceptance of this claim and, to its detriment, "is now facing a claim for reimbursement approaching three-quarters of a million dollars, without the opportunity to investigate contemporaneously, manage medical treatment, engage in vocational rehabilitation, monitor disability status, etc." The Board rejected this argument "as there was no representation or action of any detrimental reliance, there can be no application of the doctrine of equitable estoppel."

Further, the Board noted that the doctrine of laches precludes the prosecution of stale claims if the party bringing the action lacks diligence in pursuing the claim and the party asserting the defense has been prejudiced by the same lack of diligence. Additionally the Board noted that because the LHWCA contains specific statutory periods of limitation, the doctrine of laches is not available to defend against the filing of claims there under. "As the claim for reimbursement is related to claimant's claim under the Act by extension of OCSLA, and as the Supreme Court has stated that the doctrine of laches does not apply under the OCSLA, the doctrine of laches does not apply to this case.

The Board found that neither judicial estoppel or equitable estoppel applied and noted that "jurisdictional estoppel" is a fictitious doctrine.

The Board vacated the ALJ's ruling that he did not have jurisdiction to address the issue of reimbursement between the two insurance carriers. "Because INA's liability evolved from claimant's active claim for continuing benefits, and because its responsibility for those benefits is based entirely on the provisions of the Act, as extended by the OCSLA, we vacate the [ALJ's] determination that he does not have jurisdiction to address the reimbursement issue, and we remand the case to him...."

Topic 60.3.2 Extension Acts—Outer Continental Shelf Lands Act--Coverage

Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC., 373 F.3d 183 (1st Cir. 2004).

Here the **First Circuit** notes that windmills to be erected in Nantucket Sound would be subject to the jurisdiction, control, and power of the United States government, according to the OCSLA and would be a natural resource reserve held by the Federal Government for the public. News reports from New Orleans indicate that there is

growing consideration to develop new rigs, as well as abandoned oil rigs, as alternative energy source wind turbines in the Gulf of Mexico.

Topic 60.3.2 OCSLA–Coverage

Diamond Offshore Co. v. A & B Builders, Inc., 302 F.3d 531 (**5th Cir.** 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OCSLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

Topic 60.3.4 OCSLA v. Admiralty v. State Jurisdiction

Lively v. Diamond Offshore Drilling, Inc., (Unpublished)(No. Civ. A. 03-1989)(E.D. La. August 3, 2004).

At issue here was whether, under the OCSLA, general maritime law or Louisiana law would apply. (Louisiana law prohibits enforcement of an indemnity provision pursuant to the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). In addressing whether state law would apply as surrogate law, the court reviewed the law of the **Fifth Circuit** to determine if federal maritime law applied of its own force in this case. Noting that circuit law indicates that a contract to furnish labor to work on special purpose vessels to service oil wells is a maritime contract, the district court concluded that the worker's duties were in furtherance of the vessel's primary purpose and that the agreement was maritime. Thus federal law and not Louisiana law governed.

The court next held that Section 905(c) and not 905(b) governed since the worker was a non-seaman engaged in drilling operations on the OCS. (As a non-seaman engaged in drilling operations on the OCS, the worker is subject to the exclusive remedy of the LHWCA by virtue of 43 U.S.C. § 1333(b) of the OCSLA, rather than 33 U.S.C. § 901, *et seq.* When the LHWCA is applicable by virtue of Section 1333(b), the third-party remedy against the vessel owner is governed by Section 905(c).) Under Section 905(c) "any reciprocal indemnity provision" between the vessel and the employer is enforceable.

Topic 60.4.1 Nonappropriated Fund Instrumentalities Act–Applicability of the LHWCA

Hargrove v. Coast Guard Exchange System, 37 BRBS 21 (2003).

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

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

TOPIC 65

Topic 65.8.3 Interest–Applicable Rate of Interest

Calculation of Interest

In 1984 the Benefits Review Board adopted the Treasury Bill yield immediately prior to the date of judgment (date the decision and order is filed at OWCP; cf. *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966 (9th Cir. 1993)(Comp order is deemed filed in Ninth Circuit when the parties received the order.)). *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), recon'd 17 BRBS 20 (1985). Upon reconsideration of *Grant* in 1985 the Board clarified the method used to calculate interest rates pursuant to 28 U.S.C. § Section 1961. *Grant v. Portland Stevedoring Co.*, 17 BRBS 20 (1985). This meant that when interest was awarded, the rate had to reflect the rate on the 52-week U.S. Treasury Bill yield immediately prior to the date of judgment. However, the last auction of 52 week Treasury bills was on February 27, 2001. OWCP is currently using the weekly average one year constant maturity Treasury yield as published by the Federal Reserve System for the week preceding the date of judgment.

Accordingly Decisions and Orders in longshore cases are no longer referencing that rate in awards of interest. Likewise, the reference to such rates in connection with settlements in 20 C.F.R. § 702.243(g) is no longer applicable. Interest calculations now are the same as that used by the United States District Courts in money judgments in civil cases—which is based on the weekly average 1-year constant maturity Treasury yield for the calendar week preceding the date of the order awarding benefits (In LHC cases, this will be the date of service by the District Director).

Additional information on interest rates may be found at DOL's web site:
<http://www.dol.gov/esa/owcp/dlhwc/linterest.htm>.

TOPIC 70

Topic 70.1 Responsible Employer—Generally

New Haven Terminal Corp. v. Lake, 337 F.3d 261 (2d Cir. 2003).

The **Second Circuit** reversed an ALJ's termination of permanent partial disability benefits for a 1993 injury and remanded to determine whether a settlement for a 1997 injury overcompensated the worker in order to bypass the last employer rule. The court noted that it was concerned that a last employer, such as the one here, may offer an inflated award that overcompensates a claimant for the damages due proportionately to the last injury, so that the claimant will not take advantage of the last employer rule for the earlier injury and instead seek the rest of the compensation from an earlier employer. The court explained that "Because the aggravation rule must be defended against such manipulation an ALJ should inquire whether the claimant's explanation for the settlement is credible, and if not, should reject the claim against the earlier employer." Additionally, the court noted that on remand, the ALJ should address specifically whether, and estimate to what extent, the first injury contributed to the second. "When a claimant cannot recover from the last employer because of a settlement, we will permit recovery from an earlier employer where the claimant has acted in good faith and has not manipulated the aggravation rule." The court further noted that there is no statutory authority for a previous employer to use the aggravation rule as a shield from liability. "Permitting the prior employer to use the aggravation rule as a defense to limit full recovery would frustrate the statute's goal of complete recovery for injuries."

Topic 70.2 Responsible Employer—Occupational Disease and the Cardillo Rule

New Orleans v. Ibos, ___ U.S. ___, 124 S.Ct. 1038 (Mem.)(*Cert. denied* January 12, 2004). [*See next entry.*]

Here the **U.S. Supreme Court** declined to consider this *Cardillo* rule related case. The **Fifth Circuit** had previously held that the amounts that a widow received from LHWCA settlements with longshore employers who were not the last responsible

employer were not relevant to the amount owed by the last responsible maritime employer and should not have reduced liability for the last responsible maritime employer. Thus, the **Fifth Circuit's** opinion stands.

Topic 70.2 Responsible Employer–Occupational Disease and the Cardillo Rule

New Orleans Stevedores v. Ibos, 317 F.3d 480 (5th Cir. 2003). [See Above.]

In this matter, where the worker had mesothelioma, the **Fifth Circuit** followed the **Second Circuit's** rule announced in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure. Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the **Fifth Circuit** found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The **Fifth Circuit** has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (5th Cir. 1992).

The **Fifth Circuit** also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

Topic 70.7 Responsible Employer--Credit for Prior Awards

Carpenter v. California United Terminals, 38 BRBS 56 (2004), *grant'g and partly deny'g recon of* 37 BRBS 149 (2003).

This matter involves whether a second employer is entitled to a credit when a claimant first sustains a permanent partial disability while working for a first employer and then sustains a permanent total disability while working for the second employer. In this case, within the jurisdiction of the **Ninth Circuit**, the Board cited to *Stevedoring Services of Americ v. Price*, 366 F.3d 1045, 38 BRBS ____ (CRT)(9th Cir. 2004), *rev'g in part.* 36 BRBS 56 (2002) as being dispositive. In *Price*, the **Ninth Circuit** held that when an increase in an employee's average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability is not caused by a change in his wage-earning capacity, permitting him to retain the full amount of both awards does not result in any "double dipping."

In the instant case, the ALJ had determined, as recognized by the Board, "that there was no increase, but rather a decrease, in claimant's income between the first and second injuries, and that the combination of the amounts between the first and second injuries, and that the combination of the amounts awarded in permanent partial and total disability benefits did not exceed two-thirds of claimant's average weekly wage at the time of [the second injury]. The Board affirmed the ALJ's finding that the instant case presented no danger of "double dipping," and his consequent determination that the claimant was entitled to receive concurrent awards of permanent partial and total disability benefits for purposes of Section 8(a).

The Board further noted that the **Ninth Circuit** additionally held in *Price* that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, rather than from all awards combined. In this regard, the **Ninth Circuit** reversed the Board's holding that the combined amount of the awards could not exceed the maximum compensation rate under Section 6(b)(1) is consistent with the plain language of the LHWCA. The **Ninth Circuit's** decision in *Price* thus rejects the Board's interpretation of Section 6(b)(1). The Board concluded that as the present case arises in the **Ninth Circuit**, the court's opinion was controlling.

In the Board's first opinion in this matter, the Board reversed the ALJ's finding that the statutory maximum of Section 6(b)(1) is inapplicable and held that claimant's total award of benefits was limited to this applicable maximum. The Board then held, based on the reversal of the ALJ's aforementioned determination, that "[s]ince claimant is limited to the maximum award permissible under Section 6(b)(1), [the second employer] is entitled to a credit for permanent partial disability benefits paid by [the first employer.]" Now the Board finds that, pursuant to *Price*, "we vacate our prior decision regarding Section 6(b)(1) and reinstate the ALJ's holding that Section 6(b)(1) is inapplicable to the combined concurrent awards, there can be no credit due to [the first employer] for any payments made by [the second employer]."

Topic 70.12 Responsible Employer—Responsible Carrier

Kirkpatrick v. B.B.I, Inc., 38 BRBS 27 (2004).

The Board affirmed the ALJ's finding that the claimant was covered by the OCSLA although the claimant was not directly involved in the physical construction of an offshore platform. The parties had stipulated that the worker's "primary job function was supervising the ordering and transportation of materials necessary to the construction of the Conoco platform complex, upon which he was injured." As the claimant's purpose for being on the platform was to procure supplies necessary to construct the platform, and his injury occurred during the course of his duties, his work satisfies the OCSLA status test.

The Board also found that Sections 12 and 13 apply to a claimant's notice of injury and claim for compensation due to his injury; these sections do not apply to a carrier seeking a determination that another carrier is responsible for claimant's benefits. The Board stated, "There is, in fact, no statutory provision requiring a carrier seeking reimbursement from another carrier to do so within a specified period."

Here INA claimed that it relied on Houston General's 12 year acceptance of this claim and, to its detriment, "is now facing a claim for reimbursement approaching three-quarters of a million dollars, without the opportunity to investigate contemporaneously, manage medical treatment, engage in vocational rehabilitation, monitor disability status, etc." The Board rejected this argument "as there was no representation or action of any detrimental reliance, there can be no application of the doctrine of equitable estoppel."

Further, the Board noted that the doctrine of laches precludes the prosecution of stale claims if the party bringing the action lacks diligence in pursuing the claim and the party asserting the defense has been prejudiced by the same lack of diligence. Additionally the Board noted that because the LHWCA contains specific statutory periods of limitation, the doctrine of laches is not available to defend against the filing of claims there under. "As the claim for reimbursement is related to claimant's claim under the Act by extension of OCSLA, and as the Supreme Court has stated that the doctrine of laches does not apply under the OCSLA, the doctrine of laches does not apply to this case.

The Board found that neither judicial estoppel or equitable estoppel applied and noted that "jurisdictional estoppel" is a fictitious doctrine.

The Board vacated the ALJ's ruling that he did not have jurisdiction to address the issue of reimbursement between the two insurance carriers. "Because INA's liability evolved from claimant's active claim for continuing benefits, and because its responsibility for those benefits is based entirely on the provisions of the Act, as extended by the OCSLA, we vacate the [ALJ's] determination that he does not have jurisdiction to address the reimbursement issue, and we remand the case to him...."

TOPIC 75

TOPIC 80

TOPIC 85

Topic 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies—Introduction and General Concepts

Kirkpatrick v. B.B.I, Inc., 38 BRBS 27 (2004).

The Board affirmed the ALJ's finding that the claimant was covered by the OCSLA although the claimant was not directly involved in the physical construction of an offshore platform. The parties had stipulated that the worker's "primary job function was supervising the ordering and transportation of materials necessary to the construction of the Conoco platform complex, upon which he was injured." As the claimant's purpose for being on the platform was to procure supplies necessary to construct the platform, and his injury occurred during the course of his duties, his work satisfies the OCSLA status test.

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Topic 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies

Porter v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 113 (2002).

In contrast to the facts in *Jones v. Newport News Shipbuilding & Dry Dock Company*, 36 BRBS 109 (2002), *supra*, the Board here notes that "[E]ven where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time."

Here, unlike in *Jones*, the Board found that the context of the filing established that the claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification. The Board noted that the claimant's August 12, 1999 letter was filed only 18 days after the last payment of benefits and that while "it is conceivable claimant's condition could have changed in that short period of time, providing a basis for her assertion that she anticipated future economic harm, there is no evidence of record to support such a conclusion." It went on to note that the 1999 letter was filed well in advance of the December 2000 evidence of any deterioration of her condition and, thus, constituted an anticipatory filing.

The Board found further evidence of an anticipatory filing in the claimant's actions. After receiving the 1999 letter, OWCP sought clarification of its purpose, asking the claimant whether the letter was to be considered "a request for an informal conference and/or Section 22 Modification so that we can [determine] what additional action needs to be taken by the office." The claimant responded stating that she did not want OWCP to schedule an informal conference, and, in so responding, she deliberately halted the administrative process.

The Board found that because the claimant intentionally acted in a manner contrary to the pursuit of her claim, her actions were merely an effort at keeping the option of seeking modification open until she had a loss to claim. "[S]he did not have the requisite intent to pursue a claim for nominal benefits, but rather was attempting to file a document which would hold her claim open indefinitely." The total circumstances surrounding the filing of the 1999 letter establish that the application did not manifest an actual intent to seek compensation for the loss alleged. Because the 1999 motion was thus an anticipatory filing, it was not a valid motion for modification.

While the Board found moot the claimant's argument that the ALJ erred in applying the doctrine of equitable estoppel, it nevertheless addressed it "for the sake of judicial efficiency." The Board found that, "Although, it was reasonable for employer to have relied on the statement that claimant did not wish to proceed to informal conference at that time, there was no detrimental reliance by employer. While employer may have thought the issue was abandoned or resolved in some manner it suffered no injury because of the letter: it took no action in reliance on the letter and it did not pay any benefits or place itself in a position of harm."

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

Holmes v. Shell Offshore, Inc., 37 BRBS 27 (2003).

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

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

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

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

Topic 85.2 Effect of Prior State Proceeding on a Subsequent Federal Claim

Hennessey v. Bath Iron Works Corp., (Unpublished) (BRB No. 01-0872) (Aug. 7, 2002).

Here the worker filed claims under both the LHWCA and the Maine Workers' Compensation Act. The Board affirmed the ALJ's determination that the doctrine of collateral estoppel does not bar his reaching the merits of the case since the state board's decision regarding the extent of disability was not final at the time the ALJ issued his decision. (The state board decision had been appealed and thus was not a final decision.)

Topic 85.3 Election of Remedies—Federal/State Conflicts

Gorman v. Garlock, Inc., __ Wash. App. __ (No. 52188-8-I (consolidated w/52329-5-I) (May 3, 2004).

Noting that Washington State law precluded a claim under the Washington Industrial Insurance Act, when a worker qualifies for compensation under the LHWCA, the appealant court upheld the trial court's dismissal of actions brought against maritime employers as a result of asbestos-related injuries. While the court found that the LHWCA does not preempt Revised Code of Washington (RCW) claims, the RCW itself preempts them. "Because they have the right to compensation under federal law, they cannot state a claim under the Washington statute."

Topic 85.5 "Law of the Case" Doctrine

Ravalli v. Pasha Maritime Services, 36 BRBS 91 (2002).

This is a denial of a Motion for Reconsideration. Previously the Board adopted the construction of Section 22 given by the **Second Circuit** in *Spitalieri v. Universal Maritime Services*, 226 F.3d 167 (**2d Cir.** 2000), *cert. denied*, 532 U.S. 1007 (2001) (Termination of benefits is a "decrease" of benefits; held, effective date of termination could be date of change in condition.). The Board found Motion for Reconsideration of several issues not properly before it as these issues had not been addressed at most recent appeal and there was settled "law of the case."

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