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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 308
July - August 2020

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

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

***Jordan v. SSA Terminals, LLC*, 973 F.3d 930 (9th Cir. 2020).**

In a matter of first impression, the Ninth Circuit held that credible complaints of severe, persistent, and prolonged pain can establish a *prima facie* case of disability, even if claimant can literally perform his past work. The court set forth the standards for evaluating pain under the LHWCA.

Claimant worked as a longshoreman, with 85% of his time spent driving a heavy truck. He also had a landscaping business. In 2014, the tractor claimant was driving was lifted and dropped by a crane, causing extensive damage to his lower back, including herniated discs, stenosis, and nerve impingement. Despite conservative treatments, claimant continued to complain of back pain and spasms, as well as pain and numbness in his legs. Claimant saw Dr. Reynolds, a spine surgeon, who recommended spinal fusion; it was successfully performed in March of 2018.

The parties agreed to some periods of disability, but disputed whether claimant was disabled for a period of two years preceding the surgery. Employer relied on surveillance videos obtained in 2015 and 2016, which showed claimant lifting and carrying objects, bending, and doing push-ups; as well as attending sporting events where he appeared to sit and stand for long periods without difficulty. Claimant testified, "There's nothing I can't do, but it all either is painful, elevates the pain, or I can't do it for the amount of time that would

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at __) pertain to the cases being summarized and, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *__).

be considered a job." Claimant testified that he continued to do landscaping, but more in a supervisory capacity. Dr. Reynolds corroborated claimant's complaints of pain, and opined that he could not work as a longshoreman, mainly because he couldn't work an eight-hour day and would need breaks. He did not view the surveillance videos. Three physicians retained to perform independent medical examinations ("IME") opined that claimant could return to his regular duties after they reviewed the surveillance videos; prior to viewing the videos, two of them had reached the contrary conclusion.

The ALJ found that claimant's testimony was "ambiguous," but did not clearly discredit claimant, describing his complaints of pain as not wildly improbable and stating that a lazier person might well have stayed at home. The ALJ rejected Dr. Reynolds' opinion because he did not see the surveillance videos. He noted a striking difference between claimant's self-described limitations and the activities shown in the videos, and the effect that the videos had on the examining physicians. The ALJ stated that, if claimant "can" work, the Act presumes that he will. He denied the claim, and the Board affirmed.

Section 2(10) of the LHWCA defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." The employee has the initial burden of proving that his injury prevented him from performing his former job. The central issue in this case was whether claimant's complaints of pain described a covered disability.

The court observed that several circuits and the Board have held that pain can be disabling, but the cases have not clearly identified the quantum of pain that is sufficient to create a disability under the LHWCA. Noting that this was a matter of first impression, the court held that "credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his or her past work." *Id.* at 936. This holding "should not be taken to mean that any amount of pain is per se disabling." *Id.* at 937. "On the other hand, a claimant need not experience excruciating pain to be considered disabled." *Id.* Torture should not be the benchmark for disability under the LHWCA, a statute which is to be liberally construed in favor of injured employees.

The court discussed the holding in *La. Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294 (5th 2000), that a claimant who is able to work but only with "extraordinary effort" and in "excruciating pain" may be found to be totally disabled. The court noted that the Board has adopted an almost identical formulation and has referred to employer's "beneficence." The Ninth Circuit concluded that these decisions did not suggest that "excruciating" is the threshold for disabling pain. "Between the poles of 'any' pain (which is not sufficient), and 'excruciating' pain (which is not necessary to show), lies a considerable range. There is, in other words, a vast middle ground between occasional discomfort and torture." *Id.* at 937 (citations omitted).

The court instructed that:

> We leave it to ALJs to determine, based on consideration of all the facts and circumstances of a particular case, whether a claimant's complaints of pain are (1) credible and (2) if so, whether the level of pain described is so severe, persistent, and prolonged that it significantly interferes with the claimant's ability to do his or her past work.

Id. at 937-938. Noting that it was not attempting an across-the-board definition of disabling pain, the court offered the following guideposts. First, the pain must relate to an injury "arising out of and in the course of employment." 33 U.S.C. § 902(2). In addition, "the pain must be sufficiently severe, persistent, and prolonged to adversely impact the claimant's ability to do his or her job in some significant way." *Id.* at 938. This includes pain that

renders an activity impossible, as well as extreme or "excruciating" pain. "But it might also impact the employee's ability to perform the activity over a full workday. Or it might simply cause the severe, persistent, and prolonged pain that would make a reasonable employee stop doing the activity. In other words, whatever the level of pain, the employee need not make an 'extraordinary effort' to overcome it and should not be penalized if he or she does so." *Id.* at 938 (citations omitted). Relatedly, "an employee need not perform work that, according to the medical evidence, will exacerbate his or her injury to a degree that significantly impedes the claimant's ability to perform his or her past work." *Id.* (collecting cases).

In this case, the ALJ applied an improperly high standard to claimant's disability claim. The ALJ incorrectly described claimant's testimony as "ambiguous" and did not sufficiently analyze his credibility. Despite the ALJ's apparent reliance on the medical opinions and surveillance videos, the ALJ's opinion as a whole suggested that the ALJ believed claimant had to establish that it was literally impossible for him to do his past work. On remand, the ALJ must first determine whether claimant's complaints of pain were credible, and if so, decide whether the pain described significantly affected his ability to do his past work.

Claimant additionally asserted that the ALJ erred in crediting the opinions of the non-treating physicians over those of Dr. Reynolds, and that the surveillance videos alone are not substantial evidence of his ability to work. The court stated that those issues are potentially relevant to claimant's credibility. In addition to their independent evidentiary weight, the surveillance videos provided a basis from which the medical experts could draw inferences regarding his ability to work, and the ALJ can determine the weight to be given to these inferences.

The court also addressed, in a footnote, claimant's argument regarding the ALJ's weighing of medical opinions. It stated that "[a]s in Social Security cases, the opinions of treating physicians in LHWCA cases are 'entitled to special weight.'" *Id.* at 939, n.2 (quoting *Amos v. Dir., OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998)). However, as explained in *Amos*, that deference is given because a treating physician "has a greater opportunity to know and observe the patient as an individual." *Id.* (quoting *Amos*, 153 F. 3d at 1054). Here, Dr. Reynolds saw claimant on only three occasions, while one of the IME physicians saw him four times. Claimant did not argue that Dr. Reynolds's status as a treating physician entitled his opinion to any particular deference.

[Section 2(10) Disability; Administrative Law Judge Adjudication – Authority of the Administrative Law Judge in General]

***Mays v. Chevron Pipe Line Co.*, 968 F.3d 442 (5th Cir. 2020).**

James Mays was killed in an explosion on an offshore platform owned by Chevron Pipe Line Company ("Chevron"). Mays was directly employed by a Chevron subcontractor, Furmanite American ("Furmanite"), which serviced valves on Chevron's platforms. Mays' widow and children sued Chevron for state-law wrongful death, and Chevron claimed immunity from tort liability under the state workers' compensation scheme.

The parties agreed that state immunity does not protect Chevron if Mays' accident was covered by the LHWCA, as extended by the OCSLA. The OCSLA extends the LHWCA to injuries "occurring as the result of" natural-resource extraction on the OCS. 43 U.S.C. § 1333(b). It applies where (1) an employee's injury "result[s] from" OCS extractive operations, and (2) his employer is an "employer" under OCSLA. An injury "result[s] from" OCS extractive operations if it has a "substantial nexus" to those operations. *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012). The question of the LHWCA coverage was submitted to the jury, which found that Mays' death was caused by Chevron's OCS activities. The jury

found Chevron 70% at fault for Mays' death and awarded his widow $2 million for her loss of Mays' affection. The district court denied Chevron's motion for judgment as matter of law or new trial, and granted in part and denied in part its motion for remittitur of damages awarded. Chevron appealed.

On appeal, Chevron asserted that the jury instructions violated *Valladolid* by asking to determine whether there was a substantial nexus between Mays' death and Chevron's—as opposed to Furmanite's—OCS operations. The Fifth Circuit rejected this argument. It held that when a case involves a subcontractor (a direct employer) and a contractor (an indirect employer), the substantial nexus test is not limited to the direct employer's OCS operations, but, rather, also includes the indirect employer's OCS operations. Consistent with the language of § 1333(b), *Valladolid* requires only a link between the injury and extractive operations on the shelf. It does not specify which employer's OCS operations are relevant in a case where a subcontractor's employee does work for a contractor with OCS operations. Further, the LHWCA expressly provides that an "employer" includes a "contractor" who may sometimes be liable for benefits to a "subcontractor['s]" employee. 33 U.S.C. § 904(a) (contractor liable for benefits if subcontractor fails to secure the payment of compensation). OCSLA's nexus requirement is separate from its "employer" requirement. Here, Chevron did not raise a separate argument about its status as an "employer" under the LHWCA, and the court expressed no view on this issue. Chevron also improperly relied on past decisions which held that a contractor was not an LHWCA "employer" of a subcontractor's employee—and was thus suable in tort—because the subcontractor paid the employee LHWCA benefits. Chevron did not raise the issue of "employer" status and furthermore it disputed that Mays' survivors actually received LHWCA benefits from his direct employer.

The court also rejected Chevron's alternative arguments that the evidence linking its OCS operations to Mays' death failed to meet the substantial nexus test as a matter of law because the link was indirect and tenuous. Although Chevron framed this as a legal challenge, this was actually an attack on the jury's factual finding. As such, to prevail, Chevron would have to show that no reasonable jury could have ruled as this one did. Chevron failed to show that the jury's finding was so contrary to the overwhelming weight of the evidence as to be irrational. For example, the jury was presented with evidence that the platform on which Mays was injured, even though located in Louisiana waters, was connected to Chevron's OCS platforms; that the fatal explosion was caused by gas flowing from those platforms; that those platforms had to be shut down due to the accident; and that Chevron had also contacted with Furmanite to maintain its OCS platforms. The court is not authorized to reweigh the evidence.

The court also rejected Chevron's reliance on *Herb's Welding v. Gray*, 766 F.2d 898 (5th Cir. 1985). In *Gray*, a welder was similarly injured while working on a fixed rig in Louisiana waters connected indirectly to an OCS platform. However, his injury was not linked in any way to gas produced on the OCS, nor did the incident cause the shut-down of OCS platforms. Furthermore, in *Herb's Welding*, this court applied an embryonic version of a "situs-of-injury" test that extended OCLSA coverage only to injuries occurring on an OCS platform or on waters above the OCS, which was eventually rejected by the Supreme Court in *Valladolid*. Chevron's reliance on *Baker v. Gulf Island Marine Fabricators, L.L.C.*, 834 F.3d 542 (5th Cir. 2016), was also misplaced, as Baker's injury had a wafer-thin connection to OCS extraction. Finally, both *Herb's Welding* and *Baker* involved *de novo* review of Board decisions, as opposed to especially deferential review of a jury verdict.

Lastly, the Fifth Circuit rejected Chevron's assertion that the district court abused its discretion by refusing to reduce the damages awarded to Mrs. Mays.

The district court's judgment was affirmed.

***Sanchez v. Smart Fabricators of Texas*, 970 F.3d 550 (5th Cir. 2020).**

The Fifth Circuit held that a welder was a Jones Act "seaman" because his connection to jacked-up offshore drilling rigs was substantial in nature, even though he only worked on the rigs while they were jacked up on the sea floor, as he was still exposed to the perils of the sea.

Gilbert Sanchez was injured while working for Defendant Smart Fabricators of Texas ("SmartFab") when he tripped on a pipe welded to the deck of a jacked-up offshore drilling rig. Pertinent to this case, Sanchez spent 48 days (72% of his total employment with SmartFab) on a rig that was a step away from and adjacent to a shoreside pier, and 13 days (19% of his total employment) on another rig on the OCS. Sanchez filed a state court action for negligence against SmartFab under the Jones Act. The action was removed to a federal district court, which denied Sanchez' motion to remand and granted employer's motion for a summary decision based on a finding that Sanchez was not a Jones Act seaman. Sanches appealed.

In *Chandris, Inc. v. Latsis*, the Supreme Court set forth a two-prong test for determining seaman status: (1) the employee's duties "must contribute to the function of the vessel or to the accomplishment of its mission," and (2) the employee "must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." 515 U.S. 347, 368 (1995). In this case, it was undisputed that Sanchez meets the first prong—he was "doing the ship's work" as a welder and fitter.

The Fifth Circuit reversed the district court's finding that Sanchez failed the second prong of the test. As the Supreme Court explained in *Chandris*, the substantial-connection prong was designed to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation. The total circumstances of an individual's employment must be considered. *Chandris* requires consideration of both the quantity (duration) and quality (nature) of the worker's duties aboard a vessel during his employment with his current employer. As to duration, *Chandris* held that, as a rule of thumb, a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman. And as to nature, the Court emphasized that the focus is on the nature of the claimant's connection with the vessel. In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 560 (1997), the Court reiterated that the Jones Act should only extend to those workers who face regular exposure to the perils of the sea. It further stated that the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea.

In this case, the Fifth Circuit affirmed the district court's finding that Sanchez satisfied the duration requirement of the *Chandris* test based on the high percentage of time he spent on the two rigs while working for SmartFab. The court rejected SmartFab's argument that only time spent on vessels on the OCS could be considered. Jack-up drilling platforms are considered vessels under maritime law, and SmartFab did not show that the docked jack-up drilling rigs had lost their vessel status, either because they were withdrawn from the water for extended periods, or being transformed through major overhauls or renovations.

The remaining issue was whether the circumstances of Sanchez' employment met the nature test. In concluding that Sanchez' work on the rigs did not expose him to the perils of the sea, the district court construed the substantial-in-nature requirement too narrowly. In *In re Endeavor Marine*, 744 F.3d 927 (5th Cir. 2014), this circuit held that a crane operator, who worked on a moored derrick barge on the Mississippi River qualified as a seaman because he was exposed to the perils of the sea, regardless of whether he actually went to sea. Further, in *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927 (5th Cir. 2014), the court held that working on a vessel docked or at anchor in navigable water satisfied the substantial in nature requirement. These decisions are indistinguishable from the present case. While near-shore workers may face fewer risks, they still remain exposed to the perils of a maritime work environment. While the drilling rigs on which Sanchez worked were jacked up above the water, the same was true for some of the liftboats in *Naquin*. And, while Sanchez was a land-based welder who went home every evening, *Naquin* held that such work aboard vessels was not disqualifying. Thus, the district court erred in holding that Sanchez was not a Jones Act seaman. Its judgment was reversed and the case remanded.

Three judges concurred in the court's judgment. While acknowledging that the panel was bound by the Fifth Circuit precedent, the concurring judges opined that the circuit's case law, including *In re Endeavor Marine* and *Naquin*, is inconsistent with the teaching of the Supreme Court. Rather, the correct application of the Supreme Court precedent would have led to the conclusion that Sanchez was a land-based fitter and welder whose duties did not take him to sea, and, consequently, he did not qualify as a seaman. Thus, the court should take this case en banc to bring its jurisprudence in line with Supreme Court case law.

[Exclusions from Coverage – § 2(3)(G) – Member of a Crew – Connection to a Vessel]

B. Benefits Review Board

***Sheren v. Lakeshore Engineering Services, Inc.*, __ BRBS __ (2020).**

The Board reversed the ALJ's finding that claimant was not a covered employee under Section 1(a)(4) of the Defense Base Act ("DBA").

Claimant sustained work-related physical and psychological injuries when she was stabbed while working in Afghanistan. The following facts were undisputed on appeal. The U.S. Air Force contracted with Lakeshore Engineering Services ("Lakeshore") for the construction of an Afghan armed forces recruitment center in Mazar-e-Sharif, Afghanistan. Lakeshore subcontracted with Select Construction ("Select"), owned and operated by Mike Omar and Charles (Yusef) Brown, to work on the project. Claimant, an Afghan citizen living in the U.S., joined Brown in Afghanistan and began working for Select as the project manager and linguist. Claimant and Brown became dissatisfied with Select's operations. In October 2012, while still employees of Select, they formed their own corporation, Y&S, with the goal of taking over the Lakeshore subcontract from Select. In November 2012, Lakeshore's project manager, Ken Ronsisvalle, ordered Select to stop construction. With his agreement, construction was later continued under the Select subcontract using Y&S employees. Claimant continued to perform administrative services for Select, but, with the approval of Brown -- still Select's on-site manager -- she diverted the Lakeshore payments to Y&S. In December 2012, Omar objected to this change, and a meeting was held to discuss terminating Select's subcontract and awarding it to Y&S. No agreement was reached. As only Lakeshore's Procurement Department, and not Ronsisvalle, could authorize any official change, Select remained the subcontractor. Between December 2012 and mid-January 2013, Claimant continued to send and receive emails concerning the project from her Select email account. She also worked to procure the next phase of the Lakeshore contract for Y&S. In January

2013, claimant was attacked by a Lakeshore employee, resulting in physical and psychological injuries. She filed a claim for benefits under the DBA.

Lakeshore's DBA carrier, Allied, filed a motion for summary decision with the ALJ, asserting it is not liable for claimant's compensation because she was not working for Select, the subcontractor, or Lakeshore, the general contractor, at the time of the attack. *See generally* 33 U.S.C. § 904(a). The ALJ granted the motion. He determined that Allied established that no contract existed between Lakeshore and Y&S or claimant. The ALJ found that claimant was not a Lakeshore employee based on three borrowed-employee tests: The "right to control," the "nature of the work," and the Restatement (Third) of Agency. The ALJ further found that claimant was not an employee of Select based solely on her response to a request for admission that she did not consider herself a Select employee. He concluded that claimant had to be an employee of Y&S, and that she was not a covered employee because Y&S had no contract.

On appeal, claimant asserted that overseas public works projects require multi-level subcontracting, and that Select subcontracted work to Y&S. She further asserted that Lakeshore would be responsible for either Y&S or Select as uninsured subcontractors under 33 U.S.C. § 904(a) of the LHWCA.

Under Section 1(a)(4) of the DBA, a claimant must be "an employee engaged in any employment . . . under a contract . . . or any subcontract, or subordinate contract with respect to such contract . . . for the purpose of engaging in public work . . . ." 42 U.S.C. §1651(a)(4). The term "employee" is not defined in the DBA; its meaning must come from the conventional master-servant relationship as understood by common-law agency doctrine. Therefore, one must be an "employee" under a common law "master-servant" test in order to be covered under the DBA as "an employee engaged in any employment."

The Board held that the ALJ erred in addressing whether claimant was an employee of Select. The OALJ's rule of procedure governing admissions, 29 C.F.R. § 18.63, is based on Rule 36 of the Federal Rules of Civil Procedure ('FRCP"). Precedent analyzing FRCP 36 establishes that requests for admissions cannot be used to compel an admission of a conclusion of law. Claimant's "admission" she was not Select's employee after October 2012 was merely a statement of her perception, and the ALJ erred in treating it as determinative of the legal question of her employment status. Accordingly, the Board vacated the ALJ's decision granting Allied's motion for summary decision.

The Board further concluded that a remand on this issue was not needed because the application of any master-servant test to the facts of this cases supported one conclusion: Claimant was Select's employee at the time of the attack. First, the ALJ's findings establish: 1) Lakeshore contracted with the Air Force and with Select to complete a public work in Afghanistan; 2) Select hired claimant, she arrived in Afghanistan as its employee, and thereafter worked for Select; 3) once the Select construction workers were prohibited from the premises, claimant's company, Y&S, supplied the workforce to satisfy Select's contractual obligation; and 4) Select remained Lakeshore's subcontractor up to and beyond the time claimant was injured. None of these findings supported the conclusion that Select had terminated claimant's employment.

Although claimant subjectively believed she no longer worked for Select after Y&S began performing Select's contractual duties, her objective behavior was consistent with her Select employment. She continued to perform her work under the Select contract, and Lakeshore continued to pay Select even though the funds were then diverted to Y&S. She also continued to communicate with Lakeshore from her Select email account.

Second, the undisputed facts conclusively established an employer/employee relationship under the master-servant tests. Under the "right to control" test, Select had the right as the subcontractor to control the details of claimant's work which supported its contract with Lakeshore even after Y&S employees took over Select's work. It also controlled the method of making payments to her because Y&S did not receive any payments except those Brown, as Select's manager, approved and funneled through Select. Because Select directly hired claimant, it retained the right to fire her.

Under the "nature of the work" test, claimant's job, even if under the guise of a "subcontract" with Y&S, was a regular part of Select's business related to its contract with Lakeshore and was not a separate or highly-skilled calling. Also, she was paid from funds originating with Lakeshore, and because Select was uninsured, she typifies the employee intended to be covered. Under the Restatement test, which includes the factors above, the Board reached a similar result.

Aside from claimant's subjective opinion contradicted by objective evidence, nothing in the record establishes that she ceased working for Select at any time prior to her injury. Although her work "developing business" for Y&S is not covered employment, it is irrelevant because it does not negate her simultaneous work for Select.

The case was remanded to address any remaining issues. If claimant prevails on the merits, the DBA covers her injury and Allied, as Lakeshore's carrier, is liable for any benefits awarded. 33 U.S.C. § 904 (a); 42 U.S.C. § 1651(a)(4).

[Employer-Employee Relationship; Extensions – Defense Base Act – Coverage]

***Hernandez v. National Steel and Shipbuilding*, __ BRBS __ (2020).**

Employer appealed, and claimant cross-appealed, the ALJ's award of attorney's fees.

Agreeing with claimant, the Board held that the ALJ erred in reducing the hourly rate requested by counsel claimant, Jeffrey M. Winter, from $515 to $410. In support of his requested rate, Attorney Winter submitted: his own declaration addressing his current hourly rate as well as certificates addressing his law practice; a declaration from Attorney Paul Herman from Florida that longshore law and consumer law are similar; a declaration from Attorney Ronald Burdge with attachments stating longshore law is similar to consumer law and Winter's rate should be in the $575 to $596 range based on data from his Consumer Law Survey; a declaration from Attorney Timothy Brictson that Winter's rate should be "at least" $425 per hour; the Laffey and United States Attorney's Office for the District of Columbia fee matrices; and cases arising under the Act in which he was awarded hourly rates between $460 and $515. The ALJ concluded that claimant's counsel failed to substantiate the requested hourly rate, and he relied instead on prior awards under the Act.

The burden is on claimant's counsel to produce satisfactory evidence – in addition to his own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. The Board stated that the ALJ appears to have reverted to the "tautological, self-referential enterprise" condemned in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8(CRT) (9th Cir. 2009), by dismissing without adequate reasoning all of the evidence offered by claimant's counsel and adopting rates awarded by other ALJs. In view of the inherently difficult nature of establishing a market rate in a market in which there are no paying clients, the rates charged in private representations may afford relevant comparisons. Here, claimant's counsel attempted to provide such evidence in the form of the Burdge documents, which speak to what private attorneys charge in San Diego for work alleged to be similar. In rejecting this evidence, the ALJ stated that he was not persuaded

Burdge has "real day-to-day knowledge of the San Diego legal market." Contrary to the ALJ's finding, the Burdge documents provide his opinion that Consumer Law and Longshore Law are similar, the basis for Burdge's knowledge of the San Diego market, and federal cases citing his Consumer Law Survey as a basis for fee awards. The ALJ's summary conclusion that Burdge lacked "real day-to-day knowledge of the San Diego legal market" was therefore arbitrary, as the Board was unable to perceive a basis for that finding. Nor has the ALJ explained why such knowledge is necessary for Burdge to demonstrate an adequate understanding of fees in the relevant the legal market.

Additionally, the ALJ erred in summarily dismissing a fee award by a district court on the grounds that it involved a different attorney, claim, and forum. The point of the market rate inquiry is to determine what counsel could earn for similar work, not the same work. On remand, the ALJ must consider whether this fee award represents hourly rates prevalent in the San Diego community for similar services by lawyers of comparable skill, experience, and reputation.

Finally, while an ALJ may advert to prior fee awards under the Act if a claimant has failed to meet his burden of establishing a market rate, the ALJ summarily relied on three awards presented by employer without discussing if these were market-based awards. The ALJ also erred in dismissing a prior fee award to Attorney Winter by the Ninth Circuit in a different case on the basis that this case was comparatively less complex. The Ninth Circuit has held that a case's complexity relates to the number of compensable hours and not to the hourly rate.

Turning next to employer's appeal, the Board agreed that the ALJ did not adequately address employer's argument that the fee had to be reduced because claimant was only partially successful before the ALJ. In *Hensley v. Eckerhart*, 461 U.S. 421 (1983), the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. The Court created a two-prong test:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. The Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. This analysis applies to claims arising under the Act, see, *e.g.*, 20 C.F.R. § 702.132(a) (amount of benefits is relevant factor in fee award). In this case, employer argued before the ALJ that, pursuant to *Hensley*, the fee had to be reduced by sixty percent based on claimant's degree of success. The ALJ did not explain his rejection of this argument and did not adequately address the degree of claimant's success as required by *Hensley.*

The fee award was vacated and the case remanded.

[Section 28 Attorney's Fees – Amount of Award – Hourly Rate, Hensley--Partial Success]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

There were no published or unpublished black lung decisions in July - August.

B. Benefits Review Board

There were no published BRB black lung decisions in July - August. Brief summaries of some of the unpublished decisions are below:

Weighing PFT Evidence

Clevinger v. South Akers Mining Company, LLC, BRB No. 19-0045 BLA (July 2020) (unpub.): Employer argued that neither the Director nor the ALJ were properly appointed under the Appointments Clause. The Board found that since Employer did not raise the issue as it pertains to the Director before the ALJ, it forfeited the argument. In addition, at the ALJ level, Employer failed to request reassignment in response to the ALJ's order asking if the parties wanted the claim to be reassigned. The Board therefore found that Employer waived the issue and could not bring it on appeal. On the merits, the Board went on to find that the ALJ was not required to apply the Knudson formula to determine whether the PFT values were qualifying in a miner who was over age 71. However, it found that the ALJ should have considered the validity of the PFTs in his opinion.

Commencement Date

Hatfield v. Rhino Eastern, LLC, BRB No. 19-0329 BLA (July 2020) (unpub.): Miner was diagnosed with complicated pneumoconiosis after his claim was filed. There was no previous medical evidence of total disability. The Board upheld the ALJ's finding that the onset date for the commencement of benefits was the date of claim filing. The Board also affirmed the ALJ's finding that the parties did not timely file their briefs. However, it vacated the ALJ's determination that Employer was the RO because he did not adequately explain his decision on this issue.

Length of CME

In *Heffron v. Reading Anthracite Company,* BRB No. 19-0464 BLA (July 2020) (unpub.), the Board found that the ALJ did not err in not making a determination as to the length of coal mine employment. The ALJ made an initial determination that the miner was not totally disabled. As such, she denied benefits without addressing his length of CME. The miner appealed. Although he did not dispute her finding that he was not entitled to benefits, he argued that the ALJ's omission as to the length of his CME could prejudice him in future claims/modification requests "as courts may be inclined to apply collateral estoppel." The Board stated that length of CME was not a necessary determination to the outcome of the miner's claim. It further found that, as the ALJ did not make a determination on this issue, collateral estoppel could not apply.

Treatment Record as Medical Opinion Evidence

In *Jackson v. Jim Walters Resources, Inc.*, BRB No. 19-0325 BLA (July 2020) (unpub.), the Board found that the ALJ erred in not considering a treating physician's opinion. The Board found that the opinion was in the record and did not exceed evidentiary limitations. The Board vacated the ALJ's finding that the miner did not establish total disability and directed him to consider the treating physician's opinion on remand.

Weighing CT Scan Evidence

Kiser v. Dickenson-Russell Coal Company, LLC, BRB No. 19-0061 BLA (July 2020) (unpub.): The ALJ found that a finding of complicated pneumoconiosis was not supported by CT scan evidence as the reviewing physicians did not make a finding that the lesion seen on the CT scan was equivalent to 1cm or greater on x-ray. The Board stated that an "equivalency determination" need not be made by a physician. Rather, it held that under Fourth Circuit case law, the ALJ should make the determination.

Timeliness of Claim

The Board affirmed the ALJ's finding that the miner's claim was not barred by the SOL in 30 USC §932(f) and 20 CFR §725.308(a) in *Walden v. Peabody Bear Run Services, LLC*, BRB No. 19-0324 BLA (July 2020) (unpub.). Employer argued that the miner received a diagnosis of total disability due to pneumoconiosis more than 3 years before he filed his claim. The miner testified that the physician advised him that he had a "hard metal lung disease" and should not return to work. The physician also wrote 2 letters addressed "To Whom It May Concern" indicating a diagnosis that he related to the miner's occupational exposure and advice that the miner should not to return to work. The ALJ found that these letters were not sufficient to trigger the SOL as they were not addressed to the miner and did not specify that he was totally disabled due to pneumoconiosis. The ALJ further found that the miner's testimony indicated that although he knew that his physician advised him to leave the mining industry due to lung disease, he did not know it was pneumoconiosis.

Biopsy Evidence

In *Wireman v. HBK Corporation*, BRB No. 19-0391 BLA (July 2020) (unpub.), the Board affirmed the ALJ's finding on remand that the biopsy evidence in the record did not establish pneumoconiosis. A biopsy was performed of the miner's lymph node. As the biopsy material was not lung tissue, the ALJ correctly found that it did not comply with the regulations.

OWCP Examination

Huffman v. Pammlidd Coal Co., BRB No. 19-0387 BLA (August 2020): The field exam was originally performed by Dr. Rasmussen. The Director sent a request for supplemental report to Dr. Forehand due to Dr. Rasmussen's fatal illness. At the hearing, the employer objected to the admission of the supplemental report. The ALJ found that the supplemental report was admissible. Employer appealed, arguing that the report was a second affirmative medical report and exceeded evidentiary limitations. The Board held that the supplemental report did not exceed evidentiary limitations. It also stated even if it had been entered in error, it was harmless. N.B.: §725.414(a)(2)(ii) specifically states that the additional statement should be from the *same* physician who conducted the original exam.

Admissibility of RO Liability Evidence

Beverly v Redhawk Coal Corporation, BRB Nos. 19-0396 BLA; 19-0523 BLA (August 2020): Employer was named as the potential RO by the District Director in the Notice of Claim. It contested its designation. The SSAE was issued designating the Employer as the RO. It again contested its designation. However, Employer did not submit any evidence to support its position. The PDO was issued naming the Employer as the RO. Employer appealed. Claimant provided testimony on the RO issue. Employer argued that it was not the RO. The Board found that the ALJ did not abuse his discretion in finding that the Claimant's testimony on the RO issue was inadmissible as the regulations require all liability evidence be submitted to the district director.

Nelson v. Heritage Coal Company, Inc., BRB No. 19-0434 BLA (August 2020): Employer did not submit any evidence to refute its liability until one day prior to the hearing. The ALJ found that the evidence was inadmissible because it was not filed before the District Director and no extraordinary circumstances existed to allow for its delay. The Board held that there was no abuse of discretion.

Weighing PFT Evidence

Martin v. Dayco Coal Co., BRB Nos. 19-0404 BLA and 19-0405 BLA: Employer appealed the ALJ's finding of total disability based on pulmonary function testing. Employer argued that the testing was invalid and could not support the award of benefits based on the opinion of its expert. The Board found that the ALJ did not err in crediting the opinion of the administering physician and technician as well as that of a second physician over the opinion of employer's witness. Conversely, in *Collins v. A & G Coal Corporation*, BRB No. 19-0430 BLA, the Board held that the ALJ erred in finding that the pulmonary function testing was valid because she gave more weight to the opinion of the technician than the opinions of employer's medical experts.