**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

***RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 268***
***February 2015 – August 2015***

*Stephen R. Henley*
*Acting Chief Judge*

*Stephen R. Henley*
*Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*
*Senior Attorney*

*William S. Colwell*
*Associate Chief Judge for Black Lung*

*Alexander Smith*
*Senior Attorney*

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

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

***Brink v. Cont'l Ins. Co*., 787 F.3d 1120 (D.C. Cir. 2015).**

Pertinent to this review, the D.C. Circuit held that all tort claims, including intentional tort claims, brought by government contractors' employees who were injured while working in Iraq and Afghanistan were barred by the exclusive statutory scheme set forth in the Defense Base Act (DBA) and the LHWCA, 42 U.S.C.S. § 1651 and 33 U.S.C.S. § 905(a), as all of the claims directly related to the employees' claims for DBA benefits.

A class of approximately 10,000 workers brought a class action lawsuit stemming from the benefits owed to them under the DBA for injuries suffered while working for United States government contractors in Iraq and Afghanistan.[2] Plaintiffs alleged that several government contractors, insurance companies, and third parties (collectively "contractors") committed torts and violated the LHWCA, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the Americans with Disabilities Act ("ADA"). Appellants alleged the contractors failed, delayed or refused to provide medical benefits owed to them under the DBA; made false statements; failed to comply with orders to pay benefits; threatened or discouraged workers from making DBA claims; and terminated plaintiffs' employment after they were disabled by their DBA-covered injuries. The D.C. Circuit affirmed the district court's dismissal of the class-wide tort claims as well their RICO and LHWCA claims.[3]

---

[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 refer to the Lexis identifier.

[2] The lawsuit sought $2 billion in damages as well as declaratory and injunctive relief to require the contractors to comply with their legal obligations.

[3] The court noted that the dismissal does not preclude any appellants from bringing independent claims outside of the DBA scheme.

In affirming dismissal of the tort claims, the D.C. Circuit rejected plaintiffs' contention that the DBA and LHWCA do not extend tort immunity to intentional torts of the employer, insurance carrier, or third parties. Plaintiffs also asserted that their injuries, caused by the contractors' intentional post-employment acts, are not covered by the LHWCA because they are not "accidental" under § 2(2). The court reasoned that the statutory scheme under the DBA and LHWCA represents a "legislated compromise between the interests of employees and the concerns of employers." *Wash. Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 931 (1984). "In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries," while the employers gain "immunity from employee tort suits." *Id.* This statutory text codifies this legislative compromise by making statutory remedies exclusive, *see* 33 U.S.C. § 905(a); 42 U.S.C. §§ 1651(a) and 1651(c). *Hall v. C&P Telephone Co.*, 809 F.2d 924 (D.C. Cir. 1987) (per curiam), constitutes binding precedent.[4] In *Hall*, the court rejected plaintiff's assertion that employees should be permitted to bring tort claims when the employer refuses to make timely compensation payments with an intent to injure, and held that all the tort claims—including intentional tort claims—fall within the exclusivity provisions. Thus, in this case, because plaintiffs' class-wide tort claims directly relate to their claims for DBA benefits, they are barred by the exclusive statutory scheme set forth in the DBA and LHWCA. The court also rejected plaintiffs' assertion that *Martin v. Travelers Ins. Co.*, 497 F.2d 329 (1st Cir. 1974), created an exception to exclusivity for intentional tort claims. The First Circuit permitted a "narrow exception" to the LHWCA's exclusivity because of insurer's callous stopping of payment without warning when it should have realized that acute harm might follow; and furthermore, whatever the scope of the *Martin* decision, *Hall* clearly precludes the plaintiffs' intentional tort claims.[5]

Contrary to plaintiffs' contention, the statutory scheme provides remedies for the tortious injuries caused by the contractors' intentional actions. The DBA penalizes employers for failing to pay (or timely pay) benefits. *See* 33 U.S.C. § 914(e), (f). If an employer fails to comply with a Department of Labor compensation order, federal courts have jurisdiction to enforce the compensation order, *id.* § 921(d), and assess criminal penalties, *id.* § 938. Additionally, the employer is criminally liable for knowingly making false statements to reduce, deny, or terminate benefits. *Id.* § 931(c). While it may be that the penalty provisions are inadequate to fully compensate a worker who has been harmed by an employer's refusal to pay when due, the problem requires a political solution. Similarly, because the statutory scheme of the DBA and LHWCA contained exclusive remedies for alleged fraud and delays in payments, it left no room for the employees' RICO claims (in any event, plaintiffs failed to sufficiently plead these claims).[6]

Further, the district court properly dismissed LWCA discrimination claims arising under § 48a of the Act, as the employees failed to exhaust administrative remedies.

**[Topic 5.5.1 Exclusive remedy]**

***Wilcox v. Wild Well Control, Inc.*, __ F.3d.__, 2015 U.S. App. LEXIS 12878 (5th Cir. 2015).**

---

[4] Thus, plaintiffs must petition for rehearing *en banc* in order to make the case for narrowing or overruling *Hall*.

[5] The court noted that other Circuits declined to follow *Martin*, including the First Circuit.

[6] The ADA claims brought by three of the appellants were remanded to the district court to reconsider its denial of leave to amend the complaint.

Relevant to this review, the Fifth Circuit affirmed the district court's grant of a summary judgement in favor of plaintiff's borrowing employer (Wild Well) on a Jones Act claim, holding that, on the facts of this case, it was appropriate to consider plaintiff's entire employment with his nominal employer rather than solely his employment with the borrowing employer to determine seaman status.

Plaintiff was employed by Max Welders as a welder. During his employment with Max Welders, he spent less than thirty percent of his time in service of any one vessel or group of vessels. Wild Well contracted with Max Welders to provide welders to decommission a well. This project was expected to last for two months, and it required plaintiff to live on Wild Well's barge. He was injured while working on this project.

For an employee to establish seaman status under the Jones Act: 1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission,' and 2) a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). Here, the second prong was at issue. Following *Barrett v. Chevron U.S.A., Inc*., 781 F.2d 1067 (5th Cir. 1986) (en banc), this court has generally declined to find seaman status where the employee spent less than 30 percent of his time aboard ship. *Chandris*, 515 U.S. at 367. Generally, the status of an employee is determined in the context of his entire employment with his current employer. However, under *Barrett*'s reassignment exception, if the employee receives a new work assignment before his accident in which either his essential duties or his work location is permanently changed, substantiality of his vessel-related work is assessed on the basis of his new job.

Contrary to plaintiff's contention, the district court did not err in refusing to determine his status by reference to his period of employment with the borrowed employer, rather than his entire employment with the nominal employer. As conceded by claimant, the *Barrett* reassignment exception did not apply, as there was no fundamental change in status: he was not permanently reassigned to work on Wild Well's vessel, nor did his essential duties (welding) change. Instead, plaintiff asserted that he started a new job with a new employer when he began work as Wild Well's borrowed employee, making Wild Well his "current employer" under *Chandris*. The court noted the lack of direct support for this conclusion in case law, and declined to adopt such a rule. On the fact of this case, there was good reason to distinguish plaintiff from Wild Well's permanent employees.[7] While employed by Max Welders, plaintiff worked for 34 different customers on 191 different jobs, both offshore and onshore. He was assigned to work for Wild Well on its vessel for one specific project, which had a clear end date only two months after it began. Moreover, although the crew would usually stay on a vessel for an entire job, they could request relief and leave the vessel before the job was complete. The court added that "[w]e do not here adopt a bright-line rule that courts performing the seaman-status inquiry must always look to an employee's entire employment with his nominal employer rather than his borrowing employer. Nevertheless, we also decline to adopt a rule that borrowed-employee status automatically requires courts look only to his period of employment with the borrowing employer." *Id.* at *12 (footnotes omitted).

**[Topic 1.4.2 LHWCA vs. JONES ACT -- Master/member of the Crew (seaman)]**

[7] The court distinguished *Roberts v. Williams—McWilliams Co.*, 648 F.2d 255 (5th Cir. 1981)(borrowed employee was a seaman with regard to his borrowing employer).

***Battelle Mem. Inst. v. Dicecca*, 792 F.3d 214, 2015 U.S. App. LEXIS 11587 (1st Cir. 2015), *aff'g DiCecca v. Battelle Mem'l Inst.*, 48 BRBS 19 (2014).**[8]

In this DBA case, the First Circuit affirmed the ALJ/BRB's determination that employee's death was compensable under the doctrine of the "zone of special danger." While working for employer in Tbilisi, Georgia, the employee was involved in a fatal accident while being transported via taxi to a grocery store. Employer provided taxi vouchers to its employees to be used with essentially no restrictions within a certain radius.

The LHWCA provides compensation for injuries or death "arising out of and in the course of employment." 33 U.S.C. § 902(2). In the sub-class of cases subject to the DBA, however, this scope-of-employment provision is modified by the "zone of special danger" doctrine set forth in *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951)(during an outing, employee drowned while attempting a rescue in a dangerous channel), and subsequently applied in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965) (per curiam)(death arising from a boating mishap during recreation covered), and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam)(death arising from a car accident returning from a night club covered).[9] After discussing these and other decisions, the First Circuit formulated three general principles governing the application of the "zone of special danger" doctrine:

> "From these and the few recent appellate and administrative cases on point, we can extract some general principles creating a legal texture, though not a precise rule. First, the zone-of-special-danger doctrine under the DBA works an expansion of traditional employer liability to include coverage for injuries without any direct causal connection to an employee's particular job or to any immediate service for the employer. They must simply fall within foreseeable risks occasioned by or associated with the employment abroad. Although the requisite 'special danger' covers risks peculiar to the foreign location or risks of greater magnitude than those encountered domestically, the zone also includes risks that might occur anywhere but in fact occur where the employee is injured. 'Special' is best understood as 'particular' but not necessarily 'enhanced.' There is a pale of cognizability, however, which stops short of astonishing risks 'unreasonabl[y]' removed from employment. Thus administrative determinations have denied benefits, for example, for damages from cosmetic skin peels, and asphyxiation from auto-erotic practices.
>
> Second, the determination of foreseeable risk is necessarily specific to context and thus turns on the totality of circumstances.
>
> Third, and relatedly, in this corner of the law, the agency is given deference in applying the apposite doctrine to the particular case at hand. Accordingly, the agency's rational determination is treated as far as possible as a finding of fact, for which a reviewing court considers only whether the agency had a substantial basis in the record. And when agency action extends beyond even *O'Leary*'s rather catholic understanding of fact-finding, its legal determination is entitled to deference under the rule in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1994) (reasonable agency interpretations have persuasive force, even if 'lacking power to control')."

---

[8] The opinion was written by Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

[9] In all three cases, the award of benefits was initially reversed by respective Circuit Courts. In *O'Leary* and *O'Keeffe*, the Supreme Court observed that it may not have reached the same conclusion as the agency, but affirmed the awards.

*Id.* at *12-13 (additional citations omitted).

The Court agreed with the Board's statement that the proper inquiry under *O'Leary* focuses on the foreseeability of the injury given the conditions and obligations of employment in a dangerous locale. The Board affirmed the ALJ's award of benefits where decedent lived and worked in a dangerous locale (where the dangers of automobile travel were anticipated by employer), the conditions of decedent's employment made grocery shopping a necessity, and it was foreseeable that employees would use the employer-paid taxi service to travel to a grocery store. The court concluded that the Board's findings are supported by substantial evidence, stating that "BMI assigned DiCecca to a foreign workplace, where he was always subject to call, and assumed provision of transportation there by taxi service limited as to geography but for any purpose, within the scope of which food buying was foreseeable travel with risks that were realized in this fatal accident." *Id.* at *14-15. While these findings would suffice for liability, the Board mentioned another relevant condition: BMI provided hazardous duty pay, indicating that reasonably foreseeable risks extend beyond the conditions of American grocery shopping. The case did not present any circumstances that could warrant the legal conclusion that the decedent's activity was not rooted in the conditions of his employment or was "thoroughly disconnected" from the service of employer.

The Board rejected employer's argument that a nexus between employment and injury may only be found: (1) when the injury occurred during a reasonable recreational activity in an isolated place with limited social opportunities,[10] or (2) where the site of work presented conditions enhancing the risk of injury to some appreciable degree beyond the domestic norm (and that pursuit of necessity should not). In particular, while employer asserted that recreational activity is considered within the scope of employment because it benefits the employer, the case law cannot be reduced to a single controlling factor (e.g., as many as ten considerations may be discerned in *O'Keeffe*) and, even if they could, it would not be employer benefit, which was rejected in *O'Leary*. Of course, there must be a nexus between the employment and injury: the injury must arise out of foreseeable risks associated with employment abroad.

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

***Munn v. Kerry*, 782 F.3d 402 (9th Cir. 2015).**

Family members and a former co-worker of three security contractors who were kidnapped and tragically killed in Iraq. The plaintiffs brought suit against U.S. government officials to challenge policies governing the supervision of private contractors and the response to kidnappings of American citizens in Iraq ("policy claims"). They also claimed the government is withholding back pay, life insurance proceeds and government benefits owed to the families of the deceased contractors ("monetary claims").

With regard to the policy claims, the court held that, because the plaintiffs have not shown they are likely to be harmed in the future by the challenged policies, they lack standing to seek prospective declaratory and injunctive relief regarding those policies. With respect to the monetary claims, the plaintiffs have failed to allege a governmental waiver of sovereign immunity that would confer jurisdiction in the district court. Finally, the court vacated dismissal of the due process and takings claims for withheld back pay and insurance proceeds, and directed their transfer to the U.S. Court of Federal Claims.

[10] The BRB noted there was no need to reach the OWCP Director's contention that reasonable and foreseeable recreational activities are always covered by the DBA.

Relevant to this review, the Ninth Circuit rejected the plaintiffs' argument that the district court has jurisdiction over their federal benefits claims because the United States has waived its sovereign immunity under the LHWCA, the DBA, and the War Hazards Compensation Act (WHCA). The district courts do not have jurisdiction over claims under the LHWCA, which must first be heard by the Department of Labor, whose determinations may later be appealed to the federal courts of appeals. *See* 33 U.S.C. §§ 913(a), 921(c); *Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 519 U.S. 248, 262 (1997). The DBA incorporates this procedure. Claims under the WHCA may be heard only through the Department of Labor's administrative process and are "not subject to review . . . by any court by mandamus or otherwise." 42 U.S.C. § 1715. Although this court does not have jurisdiction over the federal benefit program claims, nothing in this opinion precludes the family member plaintiffs from seeking relief under these federal statutes through the proper administrative procedures.

**[Topic 19.01 PRACTICE AND PROCEDURE]**

***Huntington Ingalls Indus. v. Eason*, 788 F.3d 118 (4th Cir. 2015).**

Claimant who was paid permanent partial disability (PPD) benefits under the schedule for his knee injury, sought benefits for a subsequent period of partial disability due to a flare up of his knee condition. Agreeing with the OWCP Director, the Fourth Circuit reversed the Board and held that, once the PPD compensation was set under the schedule, claimant was not entitled to receive additional disability compensation for the same scheduled injury unless the circumstances warranted a reclassification of that disability to permanent total or temporary total. The employee's temporary *partial* disability (TPD) claim was subsumed by the compensation he received under the schedule. Because the employee did not allege that a flare up rendered him permanently or temporarily *totally* disabled (and conceded that employer established SAE during the period in question), he was not entitled to any additional disability compensation for his knee injury.

Claimant sustained a right knee injury in 2008 while working for employer as a pipe fitter, and received TTD benefits while he was out of work. He returned to work full-time in June 2009. In October 2009, claimant was assessed to have reached MMI and employer paid scheduled PPD benefits based on a 14-percent lower-extremity permanent impairment rating. He continued to work full-time. On 5/18/2010, he saw a doctor reporting pain in both knees and was placed on light duty. He returned to full duty on 8/10/2010. Claimant sought benefits for temporary total disability (TTD) or, alternatively, temporary partial disability (TPD) for the period from 5/19/2010 through 8/9/2010, due to the flare up of his injury. He asserted that he was not at MMI, but was undergoing treatment and under temporary work restrictions.

The first ALJ concluded that claimant reached MMI in October 2009 and that he was limited to the amount required by the schedule. The Board affirmed the MMI finding, but ruled that this finding did not preclude the recovery of TPD compensation for the knee injury. Relying on *Potomac Electric Power Co. [PEPCO] v. Dir., OWCP*, 449 U.S. 268 (1980), the Board stated that the fact that scheduled PPD benefits were fully paid is not determinative of a claimant's entitlement thereafter to permanent total, temporary total, or temporary partial disability benefits.

On remand, a second ALJ found that claimant was unable to return to his usual work from 5/19/2010 through 8/9/2010, but that employer established the availability of SAE during this period; and he awarded TPD benefits. The BRB affirmed.

In his present appeal, claimant asserted that he is entitled to TPD because his knee injury flared up preventing him from working as a pipe fitter during the period in question. Employer argued that the LHWCA and *PEPCO* preclude claimant with a scheduled injury from receiving any additional temporary disability compensation – either total or partial – for the same injury.

Agreeing with the OWCP Director's "middle course" position,[11] the Fourth Circuit held that "[o]nce [claimant's] permanent partial disability compensation is set under the schedule, he is not entitled to receive additional disability compensation for the same scheduled injury unless the circumstances warrant a reclassification of that disability to permanent total or temporary total." *Id.* at *20 (collecting cases). Scheduled PPD compensation is presumed to cover claimant's actual partial loss of wage-earning capacity (WEC) due to that partial disability. Thus, "in the case of a scheduled [PPD] that allegedly changes to a temporary partial disability because the claimant's injury flared up, there is no additional loss of wage-earning capacity." *Id*. at *22. The loss of WEC already is accounted for under the schedule and subsumed by scheduled benefits. An award of TPD would result in impermissible double recovery. Further, allowing TPD recovery would defeat the intent of the schedule – *i.e.*, to provide quick compensation and fix employer's liability exposure, as employer's liability exposure would be subject to increase any time a scheduled claimant is placed on temporary work restrictions.

By contrast, "an increase in the disability compensation for the change from permanent partial to either permanent total or temporary total is warranted to account for the additional actual loss in wage-earning capacity." *Id.* at *21. The Director understandably rejects employer's contention that a claimant who receives scheduled PPD compensation is precluded from receiving temporary total disability compensation for the same injury, as it is inconsistent with prior case law (citing decisions by the Ninth and Fourth Circuits) and thwarts the purpose of the LHWCA.

While the schedule allows for overcompensation in some instances and undercompensation in others, the courts are not at liberty to disturb the system created by Congress. Further, *PEPCO* does not support claimant's contention that he is entitled to TPD compensation, nor does it support the employer's contention that scheduled compensation forecloses temporary (total or partial) disability compensation for the same injury. Rather *PEPCO* addressed a discrete issue and held that a PPD claimant could not choose between the schedule and § 8(c)(21) compensation for his actual loss of WEC.

**[Topic 8.3.1 PERMANENT PARTIAL DISABILITY -- Scheduled Awards; Topic 8.1 NATURE OF DISABILTY – PERMANENT V. TEMPORARY]**

### B. Benefits Review Board

***Stoval v. Total Terminals Int'l, LLC*, __ BRBS __ (2015).**

The Board held that, where several potentially liable employers are joined to the case, any potentially liable employer may opt to settle separately with claimant, and signatures of other potentially liable employers need not be included on the settlement application.

Claimant sought benefits for back injuries, including a cumulative injury. Multiple employers were joined to this case. Claimant and one of the employers, Total Terminals International (TTI), presented the ALJ with a § 8(i) settlement agreement. The ALJ found that, based on 20 C.F.R. §702.242(a) and *M.K. [Kellstrom] v. California United Terminals*,

[11] The Director's reasonable interpretation of the LHWCA is entitled to some deference.

43 BRBS 1, *aff'd on recon.*, 43 BRBS 115 (2009), the agreement was deficient in that it did not include the signatures of all the potentially liable employers.

Agreeing with the OWCP Director, the Board vacated the ALJ's order rejecting the settlement, holding that, as the proposed settlement agreement involved only claimant's claim against TTI, and did not affect the rights or obligations of any other potentially liable employer, claimant and TTI were the only parties required to sign the application. Any potentially liable employer may opt to settle separately with claimant. Although Section 702.242(a) requires that a "complete" settlement application "be in the form of a stipulation signed by all parties," the "parties" to which this section refers are those to the individual claim addressed in the settlement application. The ALJ's reliance on *Kellstrom* was therefore misplaced, as that case held only that a § 17 lienholder, who timely intervened to protect its lien against claimant's recovery, is a party to a § 8(i) settlement between the claimant and the employer, and therefore must sign the agreement. In this case, there was no intervenor or other entity seeking reimbursement of medical expenses, nor was the Special Fund's liability at issue. Thus, there were no financial interests other than those of claimant and TTI at stake. The case was remanded for consideration of the settlement.

**[Topic 8 SECTION 8(i) SETTLEMENTS; TOPIC 70 RESPONSIBLE EMPLOYER]**

***Roush v. Bath Iron Works*, __ BRBS __ (2015).**

The Board vacated the ALJ's award of Special Fund relief to employer under § 8(f). At the same time, it affirmed the ALJ's determination that, if employer is entitled to § 8(f) relief, then the Special Fund is entitled to credit under 3(e) for benefits previously paid by employer under the State of Maine Workers' Compensation Act (the Maine Act).

Claimant sustained a traumatic head injury while for employer in 1988, and Employer paid benefits under the Maine Act. Claimant filed a "protective" claim for benefits under the LHWCA, but did not pursue it until 2012. Claimant later sought benefits under the LHWCA. Employer sought § 8(f) relief, alleging that claimant suffered from pre-existing diabetes that contributed to his total disability.

Agreeing with the OWCP Director, the Board vacated the ALJ's award of § 8(f) relief on the ground that the ALJ did not address whether claimant's total disability is due solely to his work injury. In concluding that the contribution requirement under § 8(f) was met, the ALJ relied on his finding that claimant's diabetes is the primary reason for his permanent total disability (PTD) since 1988. The Board stated that while the evidence cited by ALJ establishes that claimant's diabetic condition likely plays some role in disabling him, it does not establish that claimant is not totally disabled by the work injury alone, irrespective of the diabetic condition. *See generally Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990) (rejecting a "common sense test" for the contribution element). Moreover, the ALJ did not support with specific evidence his finding that claimant's diabetes is the primary reasons for his PTD since 1988, as he summarily referenced medical opinions. The Board also noted evidence that claimant's seizure disorder and psychological instability due to the head injury are the bases for his total disability. On remand, the ALJ must first determine whether employer established that claimant's work injuries alone are not the cause of his total disability; if they are not, the relevant inquiry then is whether the diabetes contributes to his total disability.[12]

[12] The BRB rejected the OWCP Director's assertion that the contribution element was not satisfied as a matter of law, stating that it was not a foregone conclusion that employer's evidence is legally insufficient to establish this element.

The Board next affirmed the ALJ's finding that employer is entitled to a § 3(e) credit for the first 104 weeks of PTD compensation payments commencing in 1988, and that the Special Fund is entitled to a credit thereafter for payments made by employer pursuant to the Maine Act. Thus, the Board reaffirmed its holding in *Stewart v. Bath Iron Works*, 25 BRBS 151 (1991), that the Special Fund is entitled to credit employer's state payments pursuant to § 3(e) against the Fund's liability to claimant pursuant to § 8(f). Employer argued that *Stewart* was altered by *Reich v. Bath Iron Works*, 42 F.3d 74 (1st Cir. 1994)(employer's § 44(c)(2) assessment to the Special Fund is to take into account payments made to a claimant under state law in concurrent jurisdiction states): since employer has to pay an assessment to the Special Fund, even though it was paying claimant under the Maine Act, it should be reimbursed by the Special Fund for the amount of the § 3(e) credit. The Board disagreed, stating that its interpretation of § 3(e) in *Stewart* accurately reflects the plain language of the statute and its legislative history. Under § 3(e), amounts paid by an employer under the state act ("any amounts paid") are to be credited against the liability of both the employer and the Special Fund under the LHWCA ("any liability imposed"). While the Board's additional rationale for its interpretation of § 3(e) in *Stewart*, i.e., that every state has a second injury fund such that the financial burden on the employer "may not be as great as" it fears, is no longer a reality,[13] this fact alone does not mandate a change in the interpretation of § 3(e). Moreover, the First Circuit in *Reich* stated that its interpretation of § 44(c)(2) was not inconsistent with *Stewart*, and that, at worst, *Stewart* "produces an apparent possible inequity of a kind that is not unknown in complex statutory arrangements." Slip op. at 7-8 (citation omitted). Thus, employer's assertion that the Special Fund's entitlement to a credit is "unfair" in view of *Reich* was "insufficient to carry the day." *Id.* at 8.

**[Topic 8.7 SPECIAL FUND RELIEF; Topic 3.4.1 § 3(e) CREDIT FOR PRIOR AWARDS (State Compensation)]**

***Babick v. Todd Pacific Shipyards Corp.*, __ BRBS __ (2015).**

In vacating the ALJ's finding that employer violated Section 49 of the Act, 33 U.S.C. §948a, the Board overruled (except in cases arising under the 1973 D.C. Act) the prior standard for analyzing claims under § 49, which placed the ultimate burden of proof on employer. The Board delineated the shifting-burden standard for analyzing § 49 claims, which places on the claimant the burden of proving discrimination by preponderance of the evidence.

Claimant has worked intermittently for employer as a carpenter and welder since 2005. He was injured for the seventh time on 2/6/2010 when he took a misstep off a ladder. An accident report prepared by Mr. Seavey concluded that the ladder was not properly built. Claimant was off work until 2/18/10, and employer voluntarily paid him benefits for three days. Claimant returned to work, but was laid off within two weeks due to a seniority layoff. In March 2010, he filed a claim for benefits. Employer controverted the claim, but then paid benefits for one additional day. Claimant returned to work after the layoff. Employer's Accident Review Committee met on 5/5/10, concluding that claimant's work was not performed in a safe manner, and that he should understand his physical limitations due to prior injuries, communicate with his supervisor and seek accommodations. All members of the committee, including Mr. Seavey, agreed on this report. On 5/18/10, claimant received an "Unsatisfactory Performance Report," in which two of employer's managers, Mr. Samples and Mr. Olson, stated that he had violated safety rules and should be disciplined. In May 2010, claimant was suspended for three days, and

[13] The Board noted that second injury funds have been abolished by 19 states, including Maine.

he returned to work thereafter. Claimant asserted that employer violated § 49, and the ALJ awarded him back wages for the days he was suspended, and assessed a penalty of $4,000 against employer.

Section 49 prohibits an employer from discharging or discriminating against an employee because the employee has claimed compensation under the Act. The essence of discrimination is in treating like individuals differently. Pursuant to *Geddes v. Benefits Review Board* [*Geddes I*], 735 F.2d 1412 (D.C. Cir. 1984), the Board has applied the following burden-shifting analysis in §49 claims: if claimant established a *prima facie* case of discrimination, the burden shifted to employer to prove that it was not motivated, even in part, by the claimant's exercise of his rights under the Act (the court in *Geddes I* stated that this standard promoted the Act's humanitarian purposes because, in all likelihood, the employer has greater access to the evidence than does the claimant).

Presently, the Board concluded that the shifting-burden analysis of *Geddes I* is not in compliance with *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), and Section 7(c) of the Administrative Procedure Act (APA).[14] Therefore, the Board overruled this prior standard in all cases except those arising under the 1973 D.C. Act. The Board held that, henceforth, the proper standard for analyzing claims under §49 of the Act is as follows:

> "1. A claimant's initial burden is to make out a prima facie case of discrimination under Section 49. That is, he must produce enough evidence to permit the trier of fact to infer that employer committed a discriminatory act motivated by discriminatory animus. If the claimant makes out a prima facie case, he is entitled to a rebuttable presumption that his employer violated Section 49 of the Act.
>
> 2. An employer's burden on rebuttal is one of production only, that is, it must produce substantial evidence that it acted for non-discriminatory reasons. If the employer produces such substantial evidence, the presumption falls from the case.
>
> 3. The claimant, who bears the ultimate burden of persuasion, then must prove by a preponderance of the evidence that his employer committed a discriminatory act against him motivated by his claim for compensation under the Act, i.e., that the action was taken because of the claimant's protected activity."

Slip op. at 7 (internal quotes, citations, and footnoted omitted). The Board also noted the holding in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), that in cases arising under the Age Discrimination in Employment Act, the burden of persuasion in a mixed-motives claim is the same as in any other disparate treatment action under that statute: the burden of persuasion remains with the plaintiff.

In this case, the Board initially affirmed the ALJ's finding that claimant established a *prima facie* case of discrimination. While the ALJ cited multiple grounds, the BRB affirmed this finding solely on the grounds that claimant was suspended (the act), and that the

---

[14] In *Greenwich Collieries*, the Supreme Court addressed §7(c) of the APA ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof"), which is incorporated into the LHWCA by §19(d). It held that the "burden of proof" means that the proponent bears the burden of persuasion by a preponderance of the evidence, and thus the "true doubt" rule violates §7(c) of the APA by shifting the burden to the party opposing the claim.

suspension occurred after he filed a claim for his seventh work-related injury. From this evidence, the ALJ could infer that the suspension was motivated by discriminatory animus.

Next, reversing the ALJ, the Board found that employer rebutted claimant's *prima facie* case with substantial evidence that its action was not due to his filing of the claim. Employer voluntarily paid claimant some benefits for his injury and paid an additional day of compensation shortly after the claim was filed. The ALJ's finding that Mr. Olson knew that claimant had filed a compensation claim was not supported by any evidence. Further, because Mr. Samples stated he was unaware of the claim, employer has produced substantial evidence rebutting the *prima facie* case.

Thus, the burden shifted back to claimant to persuade the ALJ by a preponderance of the evidence that employer discriminated against him due to his filing a compensation claim. The circumstances of the action taken against the employee may be examined to determine whether the employer's reason for the action is the actual motive or is a mere pretext, and the ALJ may infer animus from the circumstances. The manner in which the claimant is treated in relation to the employer's customary employment practices may support an inference that the employer's true motive was retaliation for the filing of the compensation claim. In this case, the ALJ drew improper inferences, leading him to conclude that claimant's suspension was pretextual. Specifically, the ALJ's finding of discriminatory motive was improperly premised on the "facts" that employer did not establish that claimant had violated any specific safety rule, that claimant should not have been disciplined, and that employer cannot "blame" its employees for injuries that occur without an obvious environmental cause. The Board stated that these findings reflect a fundamental misunderstanding of the scope of the §49 inquiry. Rather, "[c]ontrary to the [ALJ's] conclusions, the issue under Section 49 is not whether an employer may discipline its employee for the occurrence of work accidents or whether such discipline is objectively reasonable; the issue is whether the discipline imposed was due to the employee's filing of a compensation claim." Slip op. at 10 (collecting cases). The Board quoted the Fourth Circuit's statement that the court's task is not to pass judgment on the wisdom of employer's rules, but to determine if the rules are designed to or do in practice discriminate. As the ALJ's error in assessing the "reasonableness" of employer's discipline permeated the decision, the Board vacated the ALJ's finding that employer suspended claimant in violation of § 49, and remanded for the ALJ to reconsider the evidence as a whole, with claimant bearing the burden of proving that employer suspended him because he filed a compensation claim.

**[Topic 48a DISCRIMINATION AGAINST EMPLOYEES WHO BRING PROCEEDINGS (Procedure and Burden of Proof; Topic 19.01 PRATICE AND PROCEDURE]**

***Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, __ BRBS __ (2015).**

This is the second published Board decision in this matter. *See Newton-Sealey v. ArmorGroup* (*Jersey*) *Services, Ltd.*, 47 BRBS 21 (2013).[15] The overarching issue in this case is whether claimant's DBA claim is barred under § 33(g).

Pursuant to § 33(a), a claimant may proceed in tort against a third party for damages related to his work-related injuries. In certain circumstances, before claimant settles a third-party claim for less than the amount for which the employer is liable under the Act, § 33(g)(1) requires claimant to obtain prior written approval of the settlement from

[15] *See Recent Significant Decisions Monthly Digest* #252 (May 2013), available at: www.dol.gov/brb/decisions/lngshore/published/12-0446.htm

employer and carrier. Failure to do so results in the forfeiture of disability and medical benefits under the Act. 33 U.S.C. §933(g)(2); 20 C.F.R. §702.281.

In this case, claimant was hired to provide security for engineers working for Bechtel Corporation in Iraq, and was seriously injured in 2004. AG Jersey and its DBA carrier (CNA) provided benefits to claimant under the Defense Base Act (DBA). In 2007, claimant, a British citizen, filed negligence and breach of contract lawsuits in the United Kingdom (UK) against three defendants: AG Jersey, AG UK, and AG PLC. AG PLC was the parent/holding company and sole shareholder of all AG subsidiaries; AG Jersey and AG UK were indirect wholly-owned subsidiaries of AG PLC. In 2008, a British court issued a decision finding that claimant did not establish an employment contract with AG UK or AG PLC, and dismissing both AG UK and AG PLC from the breach of contract claim. However, the court did not dismiss AG UK and AG PLC from the duty of care claim, as it found that there was a "special relationship" among claimant and these companies, such that they could have foreseen the dangers and therefore had a "special responsibility" to claimant. In 2009, claimant and the three defendants entered into a confidential settlement agreement for the amount less than claimant would have received under the Act, and claimant did not obtain prior written approval from CNA. CNA ceased benefits, asserting that the DBA claim was barred under §33, because AG UK and AG PLC were not claimant's employers and, thus, were "third parties."

The parties stipulated as to the compensability of the injuries. The sole issue was the applicability of the §33 bar, which turned on whether any of the AG entities involved in the settlement was a "third party" within the meaning of the Act or whether they could all be considered claimant's "employers." In his initial decision, the ALJ found that: AG Jersey was claimant's employer by virtue of the actual employment contract; AG UK was a borrowing employer by virtue of claimant's having been recruited, hired, and assigned duties by AG UK; and AG PLC was a distinct entity and, therefore, a third party to the settlement by virtue of the UK court decision. Thus, the ALJ applied the §33(g) bar.

In a published decision in *Newton-Sealey v. ArmorGroup* (*Jersey*) *Services, Ltd.*, 47 BRBS 21 (2013), the Board vacated the ALJ's findings that AG UK and AG PLC are not claimant's employers, as he did not address which of the borrowed employee tests is best suited to the facts of this case, and did not apply the test factors.[16] The BRB instructed that, if the ALJ found on remand that AG UK and/or AG PLC were not employers under the chosen test, then he must address whether the three companies acted as a single entity such that the corporate structure should be disregarded and all three should be considered claimant's employer.

On remand, after considering all the borrowed employee tests, the ALJ found that neither AG UK nor AG PLC was claimant's borrowing employer. He then addressed whether the three companies could be considered as a single entity such that all were claimant's employer and none was a third party. The ALJ found that "AG UK and AG Jersey were at the very least engaged in a joint venture to provide security for Bechtel." The ALJ found that AG PLC did not act as a single entity with the others, and thus §33(g) bar applied.[17]

[16] The Board held that, in concluding that AG PLC was not claimant's employer, the ALJ erred in relying on the UK court's determination that there was no contract between claimant and AG PLC. The BRB determined that neither *res judicata* nor collateral estoppel can be applied to the relationship between claimant and AG PLC.

[17] As noted by the BRB, while the ALJ found that this result was compelled by the clear language of the statute and controlling case law, the ALJ stated that "[i]t is unlikely that Congress intended Section 33(g) to protect employers from employees' settlements with companies within the same corporate family."

In its present decision, the Board reversed the ALJ's application of the §33(g) bar. It further held that claimant's recovery under the DBA is not precluded by the doctrines of election or exclusivity of remedies, and that his recovery under the DBA is not to be diminished by any credit for his recovery in tort. The BRB's reasoning is detailed below.

Borrowing Employer

The Board affirmed the ALJ's determination that the "relative nature of the work" test is most appropriate for AG UK. As AG UK's work involved contracting, risk management, recruiting and hiring for AG Jersey, and AG Jersey's work involved the actual supply of the security personnel, such as claimant, the ALJ rationally found that AG UK was not claimant's borrowing employer.

The BRB next affirmed the ALJ's application of the *Ruiz* test to determine that AG PLC is not claimant's borrowing employer. The ALJ found that AG PLC was a holding company which: was not involved in the Bechtel contract; did not exert operational control over claimant in Iraq; did not provide claimant tools and equipment; did not pay claimant his wages; and could not fire claimant. The BRB observed that "[b]ecause no fixed test is required, and because no one element is determinative, it is for the [ALJ] to decide which borrowed employee test works best with the facts of a case and to weigh those factors." Slip op. at 8.

Single Entity

The Board rejected AG Jersey's contention that claimant has the burden of proving that the three companies should be treated as a single entity. As §33(g) is an affirmative defense, the employer bears the burden of proving that the claimant entered into a: 1) fully-executed settlement; 2) with a third person (at issue here); 3) without obtaining prior written approval of the employer and its carrier. As AG Jersey is the proponent of this defense, it must establish that the elements are met. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Next, the Board reversed the ALJ's finding that AG PLC was a "third person" with which claimant settled his tort suit, and, consequently, also reversed the ALJ's application of § 33(g) bar.[18] The Board summarized the case law setting forth the "single-entity test,"[19] but ultimately found that it did not have to address the propriety of the ALJ's single-entity analysis because employer has failed to establish that, at the time of the settlement, one of the entities was a "third party."

Under various types of laws, there may be situations where the corporate status of a group of companies may be disregarded such that they are considered to have worked or behaved as a single entity. Although the tests may be fashioned to cater to the specific laws at issue, they are effectively a "single-entity test," and the issue requires consideration

[18] In light of its decision, the BRB did not address AG Jersey's argument that it is not in a joint venture with AG UK.

[19] The BRB also summarized the ALJ's analysis of the "single entity" issue and claimant's challenges thereto. The ALJ relied on *Claudio v. United States*, 907 F. Supp. 581 (E.D.N.Y. 1995). Claimant contended that, under *Claudio*, the ALJ should have found the AG companies acted as a single entity because they worked together for a common goal, there was more than "minor sharing" of employees in light of the extensive intermingling and common management, everyone regularly used the term "ArmorGroup" to represent the entire company, and the distinction among the companies was only for tax purposes.

of the realities of the entities' substances, and not their forms. With the burden on employer, the presumption is that the named companies are all "employers" until proven otherwise.[20] Under § 33(g), the determination of the status of a party to a settlement is to be made at the time of the settlement.

Here, AG Jersey has not put forth substantial evidence to establish that at least one of its related companies was a "third party" as of the settlement date. All AG entities had been bought by G4S, G4S has embarked upon a corporate restructuring, and the record shed little light on the relationship among the G4S companies. Thus, it was impossible to ascertain the relationships among the G4S entities. Separate signature lines on the settlement agreement are not sufficient to establish the existence of a third party.

Exclusivity

The Board also rejected AG Jersey's alternative argument that the doctrine of "exclusivity" forecloses claimant's entitlement to benefits under the DBA because he elected to pursue a remedy in tort in the UK first. Generally, the Act is an employer's exclusive liability for a covered injury, 33 U.S.C. §905(a), 42 U.S.C. §1651(c), and thus a claimant may not sue his employer in tort for damages for his work injuries (collecting cases). The BRB further stated: "[h]owever, the facts here are distinguishable from the above cases on two very critical points: claimant is not an American citizen, and he is not seeking enforcement of a foreign law in a U.S. court. Rather, claimant, a British citizen, has certain rights granted by his home country, and the question is whether, having availed himself of those rights, he is now precluded from seeking his rights under the American law which covered his employment. We think not." Slip op. at 14-15. The Board reasoned that claimant is allowed to pursue both a local workers' compensation claim and a tort remedy against his employer under the laws of the UK; that it is questionable whether the UK court was required to enforce the DBA's exclusivity provision; and that, in any event, it was the employer's responsibility to raise this defense before the court in the foreign claims. A foreign court's decision cannot negate a claimant's right to compensation under the DBA. Thus, the Board held that "claimant's pursuit of his rights under the UK injured-worker laws in his home country, and his resultant tort settlement, cannot preclude him from pursuing his claim under the Act and obtaining benefits if the claim is otherwise compensable." *Id.* at 15.

Credit

The Board rejected AG Jersey's assertion that it should be granted a credit for payments to claimant under the tort settlement because they were for the same injuries covered by the Act. The party claiming the credit bears the burden of proof on the allocation of the settlement/payments. Here, while the parties stipulated that the settlement proceeds from the UK tort suit were paid to claimant for the same injuries for which he is claiming benefits under the Act, AG Jersey has not established the applicability of any credit doctrine in this case: it has not shown that there was a workers' compensation or Jones Act payment (§3(e)); that there was a reduction in benefits due to modification (§22)); that there was a third-party payment (§33(f)); or that there was an injury under the schedule for which prior payments were made (*Nash* credit doctrine). AG Jersey also

[20] *Slip op.* at 11 (*citing Fisher v. Halliburton*, 703 F.Supp.2d 639, 664 (S.D. Texas 2010), *vacated on other grounds*, 667 F.3d 602 (5th Cir.), *cert. denied*, 133 S.Ct. 427 (2012) ("Because the act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results,' the court presumes that all named defendants are employers under the act." (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953))).

has not shown that the settlement payment was an advanced payment of compensation (§14(j)), as the details of the settlement have not been divulged.

The Board further stated that "[a]s none of the existing credit provisions has been shown to apply, a suggestion has been made to create another extra-statutory credit in order to prevent claimant from receiving double recovery for his injuries. Despite these unique circumstances, we decline the suggestion. Although double recovery is generally to be avoided, it is not prohibited under the Act." Slip op. at 16 (citations omitted). The Board quoted, *inter alia*, *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 261 (1997), for the proposition that the possibility of double recovery does not warrant a departure from the plain language of the statute, unless it is "absurd or glaringly unjust." Here, claimant's double recovery is not "absurd" as two remedies are available to him: one under the UK law and another under the DBA. The BRB concluded that "[b]ecause double recovery is not such an absurd result that we should look beyond the statute, we decline to create another extra-statutory credit provision." Slip op. at 18 (citation omitted).

The case was remanded to the ALJ for consideration of any other remaining issues.

**[Topic 33.7 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE – Section 33(g) ENSURING EMPLOYER'S RIGHTS -- WRITTEN APPROVAL OF SETTLEMENT; Topic 4.1.1 Compensation Liability—Employer Liability—Borrowed Employee Doctrine; Topic 5.1.1 Exclusive remedy; Topic 33.6 EMPLOYER CREDIT FOR NET RECOVERY BY "PERSON ENTITLED TO COMPENSATION;" Topic 85 *Res Judicata*, Collateral Estoppel, Full Faith & Credit, Election of Remedies]**

***Grierson v. Marine Terminals Corp.*, __ BRBS __ (2015).**

The Board affirmed the ALJ's award of employer-paid attorney's fees under § 28(a) to the ILWU-PMA Welfare Plan (the Plan).[21] The BRB held that an employer may be held liable under § 28(a) for reasonable and necessary attorney fees incurred by an insurance provider in successfully pursuing reimbursement of medical expenses under § 7(d)(3). While, generally, employer cannot be held liable for fees incurred by a trust fund in pursuit of its § 17 lien on claimant's disability benefits, the ALJ rationally found that, in this case, the time spent in pursuing § 7 medical benefits and § 17 lien was intertwined and could not be severed.

The Board initially rejected employer's assertion that the Plan does not have standing to recover attorney's fees for time spent pursuing reimbursement of medical expenses. An insurance provider's right to intervene and its derivative right to reimbursement for claimant's covered medical benefits entitles it, as a "party in interest" under § 7(d)(3), to seek benefits on behalf of the employee. Consequently, the Plan may be a "person seeking benefits" under § 28(a), and employer may be held liable for its reasonable and necessary attorney fees for time spent to recover the injured employee's medical benefits to the extent that the benefits are owed to the insurer as reimbursement of covered medical expenses. Slip op. at 5 (*citing Hunt v. Director, OWCP*, 999 F.2d 419 (9th Cir. 1993)(holding an employer liable for the attorney's fees of health care providers seeking reimbursement of medical benefits provided to a claimant).

The Board further held that, generally, employer cannot be held liable for fees incurred by a trust fund in pursuit of its § 17 lien against the claimant's disability benefits. Unlike § 7(d)(3), Section 17 does not allow for direct award to an intervenor-lienholder; rather, the claimant is responsible for paying the lien. As a § 17 lienholder does

[21] The Plan provided medical and disability benefits to claimant while his entitlement was being adjudicated.

not pursue disability benefits on behalf of a claimant, it is not a "person seeking benefits" under § 28(a), and the employer cannot be held liable for the attorney's fees incurred in validating the lien.

However, in this case, the ALJ rationally found that the time spent by the Plan in pursuing its reimbursement of medical expenses could not be severed from the time spent pursuing its § 17 lien, as both turned on establishing the compensability of the claim. The ALJ found that separating the efforts to show employer was liable for the medical care from the efforts to create the fund on which the Plan had its lien would be difficult and disproportionate to the result.

However, the Board vacated the ALJ's award of attorney's fees for services after 12/5/2011, when the parties stipulated to the Plan's entitlement to a lien on compensation and reimbursement for medical benefits, if claimant's disability and medical benefits claim were found to be compensable. Slip op. at 6-7, citing *Tahara v. Matson Terminals, Inc.*, 511 F.3d 95 (9th Cir. 2007) (duplicative fees may be deducted as unnecessary). Employer may be held liable only for a "reasonable attorney's fee" for "necessary work done." 33 U.S.C. §928(a); 20 C.F.R. §702.132(a). In rejecting employer's objection to post-12/5/2011 fees, the ALJ stated that it was prudent for the Plan's attorney to remain at the hearing until the last potentially liable employer asserted to the stipulation, and that the Plan should be reimbursed for the time to write a post-hearing brief, to review what other parties filed, and for the cost of the hearing transcript. The issue of causation remained viable after the parties' stipulation, and thus the Plan had an interest in proving causation. However, the ALJ did not address whether the Plan's attorney's post-stipulation services were necessary to establishing the Plan's entitlement to reimbursement of medical benefits given that they may have been duplicative of those provided by claimant's counsel. On remand, employer can be held liable for the Plan's post-stipulation attorney services only to the extent they protected an entitlement interest belonging to the claimant that was not otherwise protected.

**[Topic 28 ATTORNEY'S FEES; Topic 17 LIEN ON CLAIMANT'S COMPENSATION; Topic 7 MEDICAL BENEFITS (§7(d)(3))]**

***Malta v. Wood Group Production Services*, __ BRBS __ (2015).**

Reversing the ALJ's determination, the Board held that claimant's injury on a fixed production platform in Louisiana state territorial waters occurred on a covered §3(a) situs, as the platform was customarily used for loading and unloading vessels. Contrary to the ALJ's reasoning, the fact that the cargo consisted of supplies and equipment used for oil and gas production did not divest the platform of a maritime purpose, *i.e.*, the loading and unloading of vessels.

Claimant was injured on the Black Bay Central Facility used by employer to provide support for satellite oil and gas production platforms. Supplies and equipment for oil production were delivered from the shore and unloaded at the facility, and were subsequently loaded onto vessels to be shipped to the satellite platforms. Un/loading of vessels was a large part of claimant's job as an offshore warehouseman.

To obtain benefits under the Act, a claimant must establish that his injury occurred on a covered situs. Here, claimant's injury occurred on a fixed platform, which, for purposes of the Act, is considered to be an artificial island. Slip op. at 3 *(citing Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985)(additional citations omitted). As claimant was not injured on navigable waters or on one of the sites specifically enumerated in §3(a), the situs requirement is satisfied only if his injury occurred in an "other adjoining area customarily used by an employer" in loading or unloading a vessel. The Fifth Circuit, within

whose jurisdiction this case arose, holds that an "other adjoining area" must satisfy two components: (1) a geographic component (the area must adjoin navigable waters)[22] and (2) a functional component (it must be customarily used by an employer in un/loading a vessel).

Here, the ALJ found that the functional component was not met because the un/loading of supplies and equipment used in oil and gas production did not qualify as maritime commerce. Rather, the ALJ found that the purpose of the facility is "to further drilling for oil and gas, which is not a maritime purpose," quoting *Thibodeaux v. Grasso Prod. Management Inc.*, 370 F.3d 486, 494 (5th Cir. 2004)). The ALJ further distinguished this case, in which the oil itself was neither stored on nor shipped from the facility, from the fixed platform in *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 432 n.17, *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), which facilitated the shipping of oil ashore by barge.

In finding that the platform satisfied the functional component, the Board reasoned:

> "First and foremost, we agree with claimant and the [OWCP] Director that the [ALJ's] analysis is inconsistent with the plain language of Section 3(a), which requires only that the other adjoining area be 'customarily used by an employer in loading [or] unloading…a vessel.' As recognized by claimant and the Director, the Central Facility on which claimant was injured was customarily used for loading and unloading vessels, and three cranes were located on the platform for that purpose. We agree with claimant and the Director that the uncontroverted evidence in this case reflects that the Central Facility, in essence, functioned as an offshore dock and a collection and distribution facility used to unload and store supplies and equipment delivered from the mainland by vessels and to load materials onto other vessels for delivery to the satellite oil and gas production platforms. Thus, based on the plain language of Section 3(a), the Central Facility, which was customarily used by an employer in loading and unloading vessels, qualifies as a covered situs.
>
> While the [ALJ] found the Fifth Circuit's decision in *Thibodeaux* […], to be controlling, we do not agree that *Thibodeaux* compels a finding in this case that the Central Facility is not a covered situs. Rather, we agree with claimant and the Director that the Central Facility, which was regularly used to load and unload vessels, is significantly different in function from the docking areas of the oil production platform in the *Thibodeaux* case, which were used only for the unloading of the oil production workers' personal gear and for the *occasional* unloading of equipment used for oil and gas production. Significantly, the *Thibodeaux* court held that the production platform in that case did not qualify as an 'other adjoining area' as the record did not establish that it was '*customarily* used for significant maritime activity.' Thus, based on the plain language of Section 3(a), the platform involved in *Thibodeaux*, which was not *customarily* used for loading and unloading vessels, did not satisfy the functional component of the situs inquiry. As distinguished from the production platform in *Thibodeaux*, the Central Facility in this case was customarily used for loading and unloading vessels, as is required by the plain language of the statute.
>
> Contrary to the [ALJ's] analysis, the fact that the cargo loaded and unloaded at the Central Facility platform consisted of supplies and equipment used for oil and gas drilling does not divest the platform of a maritime purpose. The Fifth Circuit has stated in this regard that the 'maritime nature' of loading and unloading is established when 'they are undertaken with respect to a ship or vessel.' In this case, where the site of claimant's injury was customarily used for loading and unloading

[22] It was undisputed that the platform satisfies this component.

> vessels, the nature of the cargo that was loaded and unloaded is not determinative of the situs inquiry. The [ALJ's] apparent supposition that, in order to be a covered situs, the Central Facility had to have a 'maritime purpose' or an 'independent connection to maritime commerce,' in addition to being customarily used for loading and unloading vessels, is supported neither by the plain language of Section 3(a) nor by Fifth Circuit precedent. As argued by the Director, loading and unloading vessels are traditional maritime activities, and therefore those activities are necessarily related to maritime commerce. In a case like this one in which claimant is injured in an area that is *customarily* used for loading and unloading vessels, it follows that the requisite relationship with maritime commerce is established for purposes of the functional component of the situs test, and any further inquiry into whether there is an "independent connection to maritime commerce" is superfluous."

Slip op. at 6-9 (citations and footnotes omitted; italics in original).

The case was remanded for consideration of the remaining issues.

**[Topic 1.6.2 SITUS – "Over land" (Other Adjoining Area)]**

***Cutietta v. National Steel and Shipbuilding Co*., __ BRBS __ (2015).**

The Board affirmed the ALJ's award of disability benefits for claimant's cumulative back injury. The Board vacated the ALJ's finding of forfeiture under § 8(j) and denial of §8(f) relief. It further rreversed the ALJ's finding that employer is entitled to a § 3(e) credit for short-term disability payments made by the California Employment Development Department (EDD) and repaid to the EDD by employer.

Timeliness of Claimant's Cross-Appeal

The BRB rejected employer's contention that claimant's cross-appeal was timely. The applicable time period for filing an appeal set forth in § 802.205(b) was extended in this case under both §802.207(b)(date of mailing rule) and § 802.221(a)(weekend/holiday rule). As § 802.221(a) applies to "any period of time," it thus operates in conjunction with §§802.205 and 802.207 to extend the designated filing period by the weekend/holiday rule, as well as, when appropriate, the date of mailing rule.

The Extent of Claimant's Disability from 3/1/2005

The BRB affirmed the ALJ's finding that employer established the availability of suitable alternate employment (SAE). The ALJ rationally identified claimant's physical restrictions as no heavy work, no repetitive bending or stooping, and no lifting over 25 pounds. He rejected additional restrictions (e.g., regarding the need to change positions and take frequent breaks) as they are inconsistent with the surveillance footage, are excessively based on claimant's self-described limits, and appear contrary to claimant's demonstrated capacity to successfully complete vocational training and home study. The ALJ then found that the positions of merchant patroller, telephone solicitor, general clerk, and cashier II are appropriate for claimant given his age, education, work experience and restrictions. The ALJ did not err by crediting employer's vocational expert over claimant's vocational expert, who opined that claimant was likely unemployable.

Section 8(j)

The Board vacated the ALJ's determination that claimant forfeited his right to disability payments under § 8(j) for the period of 10/13/2010 through 4/27/ 2013. Section 8(j) permits an employer to request that a disabled claimant report his post-injury

earnings. If a claimant fails to report earnings from employment or self-employment, or knowingly and willfully omits or understates his earnings, he forfeits his disability benefits for the period of noncompliance.

The Board affirmed the ALJ's finding that claimant's rental income constituted earnings from self-employment. § 8(j) contemplates a claimant's reporting "all monies" from "any employment" and "all revenue" from "self-employment," as well as "fees for services." In addition, the regulation specifically states that the earnings are "not limited to" the list given. 20 C.F.R. §702.285(b). The ALJ rejected claimant's contention that no part of his rental income should be considered "earnings" because he performed only limited services for his rental property. Based on surveillance footage and claimant's testimony, the ALJ reasonably inferred that claimant plays a significant role in managing the property such that he engaged in self-employment and should have reported the rental payments as self-employment earnings.[23]

However, the ALJ erred in applying § 8(j)(2)(A). Claimant filed seven LS-200 reports, stating that he had no earnings. Pursuant to 20 C.F.R. §702.286(a), the Board held that § 8(j)(2)(A) applies when the claimant "fails to submit the report on earnings" when requested to do so, whereas § 8(j)(2)(B) applies when claimant files the report but "knowingly and willfully omits or understates any part of such earnings" in that filing. On remand, the ALJ must address whether, pursuant to § 8(j)(2)(B), claimant's omission of his earnings was knowing and willful for each period, thereby subjecting him to forfeiture of his right to compensation during the periods in question.

Section 3(e)

Agreeing with the OWCP Director, the Board held that the ALJ erred in finding that employer is entitled to a credit pursuant to § 3(e) for EDD benefits paid to claimant and then repaid to the EDD by employer. Section 3(e) provides an employer with a credit against amounts paid to the claimant under another workers' compensation scheme for the same injury. Here, employer has not satisfied its burden of showing that the EDD short-term disability payment and corresponding reimbursement were paid pursuant to a workers' compensation law. The ALJ erred in finding that this payment constituted an indirect payment under the state workers' compensation laws, when there is no evidence that claimant filed any claim for state workers' compensation benefits. In addition, employer has not shown that the EDD payments themselves were made pursuant to a workers' compensation law. Under California's disability insurance program, an individual is not eligible for benefits for any day of disability for which he is entitled to receive disability benefits under any workers' compensation law. While double recovery is to be avoided, it is not absolutely prohibited under the Act.

Section 8(f)

Employer sought §8(f) relief based on claimant's preexisting congenital spine condition as well as his prior back injuries with employer.

---

[23] The BRB noted that the amount of rental income deemed "earnings" under §8(j) is arguably limited to that portion attributable to claimant's "personal management or endeavor" in that business, as opposed to any portion which merely represents claimant's ownership interest in the property. *See generally Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). Nonetheless, a claimant who "knowingly and willfully omits or understates *any part of such earnings*," is subject to forfeiture under §8(j); the penalty is the same regardless of the amount of the omission or understatement.

In a claim for PPD benefits, §8(f) limits employer's liability to 104 weeks if employer establishes that the claimant suffers from a manifest pre-existing permanent partial disability, and shows, by medical evidence or otherwise, that the claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the work injury alone did not cause the claimant's permanent partial disability.

The Board affirmed the ALJ's denial of employer's claim for §8(f) relief based on claimant's congenital spinal condition, as employer did not establish that claimant's current disability is not due solely to the work-related injury. The BRB affirmed the ALJ's decision to credit the "well-reasoned and well-documented" opinion of Dr. Cleary that 100 percent of claimant's current disability is related to the work stresses and zero percent to the congenital condition, over the opinion of Dr. Adsit that 74 percent of claimant's present condition stems from genetic and hereditary factors, while 26 percent stems from the occupational harm to his back. The ALJ found Dr. Cleary "grounded his opinion in specific and objective medical findings," whereas Dr. Adsit "excessively relied" on general principles elicited from a scholarly article and failed to analyze it in conjunction with claimant's specific medical and occupational situation. While Dr. Cleary explicitly addressed what claimant's condition would be like if he had the congenital issue without the work experience, Dr. Adsit instead relied upon a scholarly article by Dr. Battie, which attributes 74 percent of the development of degenerative changes in the lumbar spine to hereditary and genetic factors and the normal stresses of upright posture in life, without explaining how that information relates to the facts of claimant's case. Consequently, based on the "well-reasoned and well-documented" opinion of Dr. Cleary, the ALJ found that employer did not establish the contribution element.

However, the ALJ did not address employer's contention that claimant's last work injury aggravated a manifest disability resulting from claimant's prior work injuries, and this issue is to be addressed on remand.

**[Topic 21 REVIEW OF COMPENSATION ORDERS; Topic 8.2 EXTENT OF DISABILTY (Partial Disability/Suitable Alternate Employment; Topic 8.12 OBLIGATION TO REPORT EARNINGS; § 3(e) CREDIT FOR PRIOR AWARDS (State Compensation); Topic 8.7.6 SPECIAL FUND RELIEF -- In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone]**

***Baker v. Gulf Island Marine Fabricators, LLC*, __ BRBS __ (2015).**

The Board affirmed the ALJ's finding that claimant, who allegedly sustained an injury while fabricating living quarters to be incorporated onto a tension leg platform, *Big Foot*, did not satisfy the § 2(3) status requirement as a "shipbuilder," because the platform was not a "vessel." It further affirmed the ALJ's finding that the injury was not covered under the Outer Continental Shelf Lands Act (the OCSLA).

Claimant worked as a marine carpenter at employer's land-based Houma, Louisiana, facility. His work fabricating the living quarters occurred on land, approximately 100 yards from a navigable canal. He sought benefits under the LHWCA or, alternatively, under the OCSLA.

Longshore Act Coverage

The BRB affirmed the ALJ's conclusion that claimant did not satisfy the §2(3) status requirement, as *Big Foot* was not a "vessel" and thus claimant was not a "shipbuilder." A

claimant satisfies the § 2(3) "status" requirement if he spends at least some of his time performing work which is integral to the loading, unloading, constructing, or repairing of vessels. The Act's definition of the term "vessel" in § 2(21) is "circular;" thus, courts have held that the definition of "vessel" at 1 U.S.C. § 3[24] applies to the Act because §2(21) does not define the type of craft to be included in the term "vessel."

The Board discussed decisions by the Supreme Court, the Fifth Circuit (within whose jurisdiction this case arose), and the BRB[25] addressing whether various structures are "vessels." In *Stewart v. Dutra Constr. Co., Inc.,* 543 U.S. 481 (2005), the Supreme Court held that the *Super Scoop* dredge was a "vessel" as it was "practically capable" of transporting people and cargo over water.[26] More recently, the Court addressed the definition of "vessel" at 1 U.S.C. §3 in *Lozman v. City of Riviera Beach, Florida*, __ U.S. __, 133 S.Ct. 735 (2013) (houseboat was not a "vessel" for the purpose of maritime trespass and liens, because it was not designed to transport people or things over water). It held that, although many unconventional craft may be "vessels," the consideration, especially in "borderline cases where 'capacity' to transport over water is in doubt," must be whether "a reasonable observer, looking to the [craft's] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." *Lozman*, 133 S.Ct. at 741. As the Supreme Court held that not every floating structure is a vessel, and as it concluded that the term "contrivance" in the definition refers to the fact that a craft must have been created ("contrived") for a particular purpose, the Court explained that transportation must, to some degree, be part of the purpose of the watercraft in question. *Id.*, 133 S.Ct. at 740-742. Because the houseboat in *Lozman* was not designed to transport people or things over water, it was not a "vessel."[27]

Here, in light of *Lozman* and *Stewart*, and as a potential "borderline case" where the "capacity to transport is in doubt," it was necessary to consider whether *Big Foot* is "practically capable" of transporting people or cargo based on the purpose for which it was created and its physical characteristics. Claimant conceded that, in its planned final state, *Big Foot* will not be a "vessel." It will be a tension leg platform secured to the sea bed, and claimant's job was to construct living quarters to place on that structure. If the living quarters were to be placed on a naval ship, the finished product, a ship, would be a

---

[24] It provides: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

[25] *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989)(jack-up rig under construction on land was a vessel under 1 U.S.C. §3, and thus claimant was a "shipbuilder" under §2(3)).

[26] The BRB discussed *Holmes v. Atlantic Sounding Co., Inc.*, 429 F.3d 174 (5th Cir. 2005), *superseded by* 437 F.3d 441 (5th Cir. 2006), *abrogated by Lozman v. City of Riviera Beach, Florida*, __ U.S. __, 133 S.Ct. 735 (2013). The Fifth Circuit initially held that quarterbarge BT-213 was not a vessel, as it was engaged exclusively in housing and thus did not serve a transportation function. The court later withdrew this decision. It held that *Stewart* significantly broadened the set of unconventional watercraft that must be deemed vessels; in light of *Stewart* and because "vessel" is defined as "any watercraft practically capable of maritime transportation," it concluded that the BT-213 is a vessel. In *Lozman*, *infra*, the Supreme Court abrogated the "anything that floats" approach applied in, e.g., *Holmes*.

[27] Because the houseboat in *Lozman* was not designed to transport people or things over water, it had no rudder or steering mechanism, it had an unraked hull, and it had no capacity to generate or store electricity, the Court, as a reasonable observer considering the houseboat's use, characteristics, and purpose, determined it was not a vessel. *Lozman*, 133 S.Ct. at 744-745.

"vessel." If the living quarters were to be placed on a fixed oil platform, there is no doubt the fixed platform is not a vessel. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). The Board concluded:

> "We hold that the [ALJ] rationally found that *Big Foot* was not a 'vessel' under 1 U.S.C. §3. *Big Foot*'s undisputed end-purpose is to be a tension leg platform for oil extraction on the OCS. The parties stipulated that *Big Foot*: was not being built to regularly transport goods or people (although they agreed a small crew would ensure its safe transport); will be towed to its final offshore location where it will be anchored in place with tension cables; is capable of floating; and, is not capable of self-propulsion (it has no steering mechanism, no raked bow, and no thrusters for positioning). That *Big Foot* will be able to float and travel with a small crew on board does not render it a 'vessel' within the meaning of the definition. *Lozman*, 133 S.Ct. at 743, 46 BRBS at 96-97(CRT). Not every floating structure is a vessel. *Id.*, 133 S.Ct. at 740, 46 BRBS at 94(CRT). *Big Foot* cannot self-propel; it must be towed, and it will carry only those items that are part of the rig itself, much like the houseboat in *Lozman*. A reasonable person looking at the characteristics of *Big Foot* could rationally conclude *Big Foot* was not 'designed to a practical degree for carrying people or things over water;' it was designed to extract oil from the OCS and to house the offshore workers. *Lozman*, 133 S.Ct. at 741, 46 BRBS at 95(CRT)."

Slip op. at 8-9 (additional case citations, citations to record, and footnotes omitted).

OCSLA Coverage

The Board also affirmed the ALJ's denial of benefits under OCSLA, which covers injuries occurring "as the result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the [OCS.]" 43 U.S.C. §1333(b). The Supreme Court has held that an employee's activities are the "result of" these operations if they have a substantial nexus to OCS operations; that is, there must be "a significant causal link between the injury that [a claimant] suffered and his employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS." *Pacific Operators Offshore, LLP v. Valladolid*, __ U.S. __, 132 S.Ct. 680, 691 (2012)(off-shore OCS worker killed while working on-shore at his employer's oil processing plant; denial of benefits reversed; case remanded to apply the substantial nexus test).

The BRB affirmed the ALJ's finding that claimant's injury did not have a significant causal link to on-OCS operations, as the living quarters being constructed were not unique to OCS operations, there was no completed or operating rig, and employer would have no role in the installation or operation of the rig on the OCS. The OWCP Director properly quoted *Valladolid*, 132 S.Ct. at 691, for the proposition that "[claimant's] activities were geographically, temporally and functionally distant from 'operations conducted for the purpose of extracting natural resources from the' outer continental shelf."

**[Topic 2.21 DEFINITIONS - VESSEL; TOPIC 1.7 STATUS; Topic 60.3.2 EXTENSION ACTS – OCSLA (Coverage)]**

***Montoya v. Navy Exchange Service Command*, __ BRBS __ (2015).**

The Board affirmed the ALJ's finding that claimant is entitled to the minimum compensation rate of Section 6(b)(2) for the fiscal year 2007 in effect when claimant's disability commenced in November 2006, rather than the minimum compensation rate for 2006 in effect when claimant was injured in September 2006.

This case involved a claim arising under the LHWCA, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). Claimant injured her back during the course of her employment as a sales clerk for employer on 9/22/2006. She intermittently missed several days of work due to her injury; she stopped working on 11/5/2006. The ALJ awarded claimant compensation benefits for TTD from 11/5/2006 to 4/22/2009, PTD from 4/23/2009 to 8/9/2012, and ongoing PPD from 8/10/2012.

The Board initially addressed the issue of the extent of claimant's disability. Board affirmed the ALJ's finding that employer established the availability of suitable alternate employment (SAE) as a parking lot attendant. The ALJ's finding that claimant had the vocational skills and physical ability to work in a booth as a parking lot attendant was rational and supported by substantial evidence. Employer's vocational expert testified that these positions met claimant's work restrictions, including the need to alternate sitting and standing. Claimant's vocational expert, Mr. Remas, conceded that claimant could physically perform this type of work, and that her cash handling and customer service experience and her bilingual ability (English and Spanish) would make her a strong candidate for these positions in the San Diego area. The ALJ did not err in rejecting Mr. Remas's opinion that claimant would not be able to meet the "productivity standards" for these positions due to the side effects of her pain medication, as credible medical evidence established that she can work eight hours a day so long as she can avoid extended standing and sitting, and none of the credited physicians imposed any work restrictions related to alleged side effects from pain medication.

The Board further affirmed the ALJ's finding that claimant was not diligent in seeking SAE, because she did not attempt to seek work of the type he found suitable nor did she attempt to obtain any other employment. Claimant testified that she did not look for work as she did not believe she was physically capable of working; she only inquired once regarding part-time work at a mall kiosk and was told by the attendant that she may not be physically capable of the work.

The Board, however, vacated the ALJ's finding that employer established the availability of SAE on 8/10/2012, as the ALJ did not address the testimony of employer's vocational expert that positions identified in his 8/9/2012 labor market survey (LMS) had been available as of 1/14/2012, which is the date Dr. London opined that claimant was capable of working with restrictions.

Next, the Board affirmed the ALJ's finding that claimant is entitled to the minimum compensation rate of § 6(b)(2) for FY 2007 in effect when her disability commenced in November 2006, rather than the minimum compensation rate for 2006 in effect when she was injured in September 2006. The ALJ found, pursuant to § 6(b)(2), that claimant is entitled to the statutory minimum compensation rate for TTD and PTD. The Board rejected employer's contention that the 2006 minimum rate should apply because claimant was injured on 9/22/2006, and the ALJ "found" she missed eight days of work in September 2006 due to her work injury. In *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350 (2012), the Supreme Court held that an employee is "newly awarded compensation" within the meaning of § 6(c) when she first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether or when a compensation order is issued (addressing § 6(c) in the context of the maximum compensation rate of § 6(b)(1)). Consequently, the applicable minimum compensation rate is the one in effect when the claimant becomes disabled. The Court also noted that if the "time of injury" and the "time of onset of disability" differ, the applicable national average weekly wage is that in effect at the latter date. The Board further noted that, although claimant missed time from work prior to November 2006,

neither party alleged on appeal that the ALJ's finding that the onset of disability was 11/5/2006, is, itself, in error.[28]

**[Topic 6.2 COMPENSATION - MINIMUM AND MAXIMUM LIMITS; Topic 8.2 EXTENT OF DISABILTY (Partial Disability/Suitable Alternate Employment; Topic 8.2.4.9 Diligent search and willingness to work]**

***Jetnil v. Chugach Management Services*, __ BRBS __ (2015).**

In upholding the ALJ's award of benefits under the Defense Base Act (DBA), the Board affirmed the ALJ's application of the "zone of special danger" doctrine to find that claimant, a citizen and resident of the Republic of the Marshall Islands (RMI), sustained a compensable injury. Claimant, who had been sent by employer along with two co-workers to work for a four-day period on an uninhabited, restricted access island, Gagan Island, lacerated his foot while engaged in fishing on a coral reef after work hours.

In cases arising under the DBA, the Supreme Court has held that an employee may be within the course of employment, even if the injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" create a "zone of special danger" out of which the injury arose. Slip op. at 4-5 (*quoting O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951))(additional citations omitted). Thus, an injury is covered by the statute where it results from "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen." *Id.* (citations omitted). Further, the First Circuit recently stated that "the determination of foreseeable risk is necessarily specific to context and thus turns on the totality of circumstances." *Battelle Mem'l Inst. v. DiCecca*, __ F.3d __, 2015 WL 4072072, at *5 (1st Cir. July 6, 2015), *aff'd* 48 BRBS 19 (2014).

Agreeing with the OWCP Director, the Board rejected employer's primary argument that, as a matter of law, the zone of special danger doctrine may never apply to determine the compensability of an injury sustained by a non-U.S. citizen/resident working in his home country (a local national). The Board rejected employer's contentions that application of the doctrine to local nationals contravenes the legislative intent underlying the DBA and is foreclosed by *O'Leary* and its progeny. Rather, the Board held that, as is generally true for DBA cases involving the application of the zone of special danger doctrine, the question of whether the doctrine is applicable to a claim filed by a local national involves a factual determination and is dependent on the specific circumstances presented by the individual case. The ALJ's findings are subject to review based on the substantial evidence standard.

In this case, the Board affirmed, as supported by substantial evidence, the ALJ's finding that claimant's off-duty reef fishing injury occurred within the zone of special danger created by the obligations and conditions of his employment, specifically, his four-day assignment to Gagan Island. Claimant's presence on the isolated island where he was injured was due solely to the obligations and conditions of his employment, and the ALJ rationally found that it was foreseeable that he would engage in reef fishing during his four-day stay on the island. Thus, the fact that claimant was working in his home country was not dispositive of the zone of special danger injury in this case as his presence at the particular place of injury, Gagan Island, was due solely to the obligations and conditions of

[28] The BRB noted that while claimant identified 11/5/2006 (the day she stopped working for employer) as the date of onset of her total disability, claimed also requested temporary partial disability benefits for the period between the 9/22/2006 injury and 11/5/2006. However, as neither party challenged on appeal the ALJ's finding that the onset of disability was 11/5/2006, the Board did not address this issue *sua sponte*.

his employment. Further, the ALJ rationally found that claimant's pre-existing diabetes and associated dietary recommendations, coupled with the limited food selections provided by employer on the island, were factors that made reef fishing foreseeable during his off-duty hours. The Board rejected employer's contention that the zone of special danger doctrine did not apply because reef fishing is a customary practice in the RMI and thus employer did not increase the risk of injury. As the First Circuit stated in *DiCecca*:

> "Although the requisite 'special danger' covers risks peculiar to the foreign location or risks of greater magnitude than those encountered domestically, the zone also includes risks that might occur anywhere but in fact occur where the employee is injured. 'Special' is best understood as 'particular' but not necessarily "enhanced."

Slip op. at 8 (*quoting* 2015 WL4072072, at *4). Whether or not claimant might also have faced a risk of sustaining a reef fishing injury on his home island is immaterial.

**[Topic 60.2.7 Defense Base Act -- Course and Scope of Employment, "Zone of Special Danger;" Topic 21 REVIEW OF COMPENSATION ORDERS]**

***Raiford v. Huntington Ingalls Industries, Inc.*, __ BRBS __ (2015).**

Claimant, who alleged that he suffered anxiety, depression, and a stroke as a result of a shift change, did not establish the "working conditions" element of a *prima facie* case, as the shift change was a legitimate personnel action.

Claimant worked for employer for nearly 30 years, working the first shift in the sign shop. When the sign shop closed in 2008, claimant was reassigned and moved to the second shift. On 5/4/2010, claimant filed a claim for benefits alleging that he suffered from anxiety, depression, and a stroke as a result of the shift change. The ALJ found that claimant's notice of injury and claim for disability compensation were untimely.[29] The ALJ denied the claim for medical benefits, as claimant did not established a compensable injury.

The Board affirmed the ALJ's finding that, even if the shift change at work caused claimant' anxiety and led to the strokes and depression, the ALJ correctly determined that the shift change was a legitimate personnel action, and thus cannot result in a compensable injury. A legitimate personnel action does not constitute a "working condition" to which the § 20(a) presumption applies. Prior decisions have held that a psychological injury resulting from a "legitimate personnel action" is not compensable under the Act, *i.e.*, *Marino v. Navy Exchange*, 20 BRBS 166 (1988); *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting); and *Pedroza v. Benefits Review Board*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010).

The Board rejected claimant's contention that the *Marino-Selwell* doctrine does not preclude recovery because he endured an ongoing change of his employment conditions whereas claimant in *Marino* was terminated and had no continuing "working conditions." The doctrine is not limited to personnel actions culminating in job loss. Here, employer's personnel decision permitted it to continue claimant's employment after the sign shop closed by switching his job location and duties and, finally, shift. Thus, it was reasonable for the ALJ to include the change of shifts among the types of personnel decisions designated as "legitimate personnel actions."

Relying on *Sewell*, claimant also asserted that cumulative stress from his general working conditions is compensable. The Board stated that, although this is a generally true

[29] The Board did not reach these issues.

statement of the law, the claimant in *Sewell* alleged stress from her termination as well as from general working conditions. In this case, since the only cause of disability alleged by claimant was the shift change itself, which was a legitimate personnel action, claimant has not established the "working conditions" element of a *prima facie* case. Thus, his medical and psychological conditions are not compensable.

**[Topic 20.2.3 20(a) CLAIM COMES WITHIN PROVISIONS OF THE ACT – Prima Facie Case -- Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident; Topic 2.2.18 INJURY -- Representative Injuries and Diseases -- Psychological Problems]**

***Johnson v. BAE Systems Southeast Shipyard*, __ BRBS __ (2015).**

Agreeing with the OWCP Director, the Board held that employer's claim for § 8(f) relief was barred by § 8(i)(4) where the OWCP Director did not respond to employer's request for § 8(f) relief until after the private parties' settlement application had been approved by the ALJ.

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from employer to the Special Fund, when the disability or death is not due solely to the injury which is the subject of the claim. Section 8(i)(4) provides that the Special Fund is not liable for any benefits paid before or pursuant to a § 8(i) settlement.

In this case, employer filed a petition for § 8(f) relief. Thereafter, claimant and employer executed an application for approval of a § 8(i) settlement. Along with the settlement agreement, employer filed with the ALJ its amended petition for § 8(f) relief. The OWCP Director did not participate in the settlement or otherwise respond to employer's request for § 8(f) relief. The ALJ issued a decision approving the § 8(i) settlement, noting that the settlement agreement stated that employer had reserved the right to seek § 8(f) relief. In a subsequent decision, the ALJ found that § 8(i)(4) precludes § 8(f) relief as the OWCP Director was not a participant to the settlement agreement; and further rejected employer's contention that the Director should be equitably estopped from opposing the § 8(f) petition.

On appeal, employer challenged the ALJ's finding that § 8(i)(4) bars its claim for § 8(f) relief. Employer noted that it filed its initial application for § 8(f) relief in accordance with the ALJ's prehearing order, with service on the Director. Employer contended that the parties' subsequent settlement agreement contained a provision permitting any party to withdraw from the settlement for any reason prior to its approval. Thus, employer averred that had the Director objected timely to employer's § 8(f) petition, employer could have withdrawn from the settlement until the § 8(f) issue was resolved. Because the Director failed to respond until after the settlement was approved, employer contended the Director is estopped from objecting, pursuant to § 8(i)(4), to its § 8(f) petition.

The Board concluded that:

> "We reject employer's contention that Section 8(i)(4) is not applicable in this case. Section 8(i)(4) unambiguously prevents the Special Fund from being held liable for any benefits paid before or pursuant to a Section 8(i) settlement. In *Strike*,[30] the Board held that, 'Section 8(i)(4) does not impose a duty on the Director to raise objectionable settlement terms . . . [the section]

[30] *Strike v. S.J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd mem. sub nom. S.J. Groves & Sons v. Director, OWCP*, 166 F.3d 1206 (3d Cir. 1998) (table).

> requires no action on the Director's part.' *Strike*, 31 BRBS at 186. The Director simply had no obligation to respond to employer's request for 8(f) relief prior to approval of the settlement. *Id.* The Board has held that Section 8(i)(4) may not be invoked where the Director previously agreed to the application of Section 8(f). *Nelson,* 35 BRBS at 58.[31] Where the Director has affirmatively acknowledged the legitimacy of employer's claim for relief under Section 8(f) prior to or at the time a settlement is entered into, it is understandable that employer would rely on that acknowledgment and presume that Section 8(f) will apply to the settlement. However, mere silence, when the Director has no obligation to respond prior to approval of the settlement, does not justify comparable reliance. Thus, although employer reserved the right to withdraw from the settlement for any reason, it could not have relied to its detriment on the Director's silence as to employer's claim for Section 8(f) relief. *Strike*, 31 BRBS at 186*; see generally Petit v. Electric Boat Corp.,* 41 BRBS 7 (2007)."

Slip op. at 5 (footnote omitted). That the settlement here arguably was executory is of no legal significance as the ALJ's approval of the parties' settlement precludes the Special Fund liability.

**[Topic 8.7.9.6 SPECIAL FUND RELIEF -- The Effect of Settlements and Stipulations; Topic 8.10.9 SECTION 8(i) SETTLEMENTS – Section 8(f) Relief]**

[31] *Nelson v. Stevedoring Services of America*, 34 BRBS 91 (2000), *aff'd on recon.,* 35 BRBS 55 (2001).

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

In *West Virginia CWP Fund v. Bender*, 782 F.3d 129, ___ B.L.R. ___ (4th Cir. 2015), the Fourth Circuit affirmed the award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). Because Claimant had worked for more than 15 years in qualifying coal mine employment (CME) and had a totally disabling respiratory impairment, the Administrative Law Judge (ALJ) found that Claimant had properly invoked the amended Section 411(c)(4) rebuttable presumption that he was totally disabled due to pneumoconiosis. Because each of Employer's three doctors diagnosed simple clinical pneumoconiosis, Employer was unable to rebut the presumption by establishing that Claimant did not suffer from pneumoconiosis. Therefore, Employer sought to rebut the presumption by establishing that Claimant's totally disabling respiratory impairment was not due to pneumoconiosis. After weighing the medical opinion evidence on the issue of disability causation, the ALJ concluded that Employer "had failed to rebut the presumption by showing that [Claimant's] pneumoconiosis did not in any way contribute to his disability." The ALJ therefore awarded Claimant benefits, and the Benefits Review Board affirmed the ALJ's award.

On appeal before the Fourth Circuit, Employer challenged the "rule out" evidentiary standard applied by the ALJ. In essence, Employer argued that a lesser standard of rebuttal should be applied to employers, as amended Section 411(c)(4) is unambiguous and applies only to "the Secretary." Therefore, Employer posited that it should be entitled to rebut the second prong of the amended Section 411(c)(4) presumption by having to establish only that Claimant's pneumoconiosis was not a substantially contributing cause of his total disability.

The court rejected Employer's argument. First the court noted that the statute is not unambiguous, but is in fact silent as to the evidentiary standard applicable to employers; therefore, this gap may properly be filled by an agency by way of regulation. The court further noted that the Supreme Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35-37 (1976) does not affect this conclusion.

Next, the court concluded that the regulation[32] promulgated by the Department was "a reasonable choice within [the] gap left open by Congress," in accordance with the dictates of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In addressing the reasonableness of the regulation, the court noted the following: (1) "the rule-out standard was made a part of the Act's regulatory scheme in 1980, in the original version of 20 C.F.R. § 718.305," (2) "the rule-out standard unquestionably advances Congress' purpose in enacting the statutory presumption" in the first place, (3) "in practice, operators will be required to satisfy the rule-out standard only in a clearly defined class of black lung claims," and (4) "the intent of Congress in enacting the presumption would be thwarted if the operator's proposed 'alternative' rebuttal standard were applied." As to this last point, the court noted the following:

> [Employer's] 'alternative' rebuttal standard . . . effectively would nullify the statutory presumption for coal miners [like Claimant] whom Congress intended to assist. Instead of shifting the burden of proof to the operator to

[32] Specifically, 20 C.F.R. §718.305(d)(1) states that, in a miner's claim, an employer may rebut the presumption by (i) establishing that the miner does not, or did not, have legal pneumoconiosis and clinical pneumoconiosis arising out of CME, "or (ii) [e]stablishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis . . . ."

> rule out pneumoconiosis as a cause of the miner's disability, the operator's proposed rebuttal standard would track, in the negative, the evidentiary burden placed on a miner who has not qualified for the statutory presumption, namely, to show that pneumoconiosis is a 'substantially contributing cause' of his total disability. [citations omitted] . Thus, to counter an operator's evidence that pneumoconiosis was not 'a substantially contributing cause' of the miner's disability, a miner entitled to the statutory presumption nevertheless would be placed back at 'square one,' forced to prove the 'substantial' impact of pneumoconiosis on his disability, which is the very situation that Congress intended to eliminate in enacting the presumption.

The court went on to note that the Sixth Circuit, in *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013), recently considered whether the "rule-out" standard is applicable to employers and reached the same conclusion. The court concluded by clarifying the evidentiary standard that employers must meet in rebutting the Section 411(c)(4) presumption:

> To rebut the presumption of disability due to pneumoconiosis, an operator must establish that 'no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.' 20 C.F.R. § 718.305(d). Therefore, the rule-out standard is not satisfied by showing that pneumoconiosis was one of several causes of a miner's disability, or that pneumoconiosis was a minor or even an incidental cause of the miner's respiratory or pulmonary impairment.
> . . .
> Instead, an operator opposing an award of black lung benefits affirmatively must establish that the miner's disability is attributable exclusively to a cause or causes other than pneumoconiosis. [citation omitted] . Thus, to make the required showing when a miner has qualified for the statutory presumption, a medical expert testifying in opposition to an award of benefits must consider pneumoconiosis together with all other possible causes, and adequately explain why pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability.

The court then upheld, as supported by substantial evidence, the ALJ's weighing of the credibility and persuasiveness of the medical expert opinions in determining that Employer did not rebut the amended Section 411(c)(4) presumption. Therefore, the court affirmed the ALJ's award of benefits.

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]**

In *Hobet Mining, LLC v. Epling*, 783 F.3d 498, ___ B.L.R. ___ (4th Cir. 2015), the Fourth Circuit affirmed the ALJ's award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). The court echoed its decision in *Bender*, noting that an employer has two options in rebutting the amended Section 411(c)(4) presumption:

> First, an operator may establish that the miner does not have pneumoconiosis arising from [CME]. 20 C.F.R. § 718.305(d)(1)(i). Second, the operator may establish that 'no part' of the miner's disability was caused by such a disease, *id.* § 718.305(d)(1)(ii), a standard under which it must 'rule out' the mining-related disease as a cause of the miner's disability.

Before the Fourth Circuit, Employer conceded that Claimant had properly invoked the rebuttable presumption, and further conceded that Claimant had established the existence

of pneumoconiosis arising out of his CME; therefore, the only issue before the court was whether the ALJ's finding – that Employer had failed to establish the second prong of rebuttal – could be affirmed.

Employer relied solely on the opinion of Dr. Hippensteel in attempting to establish the second prong of rebuttal. In documents submitted from 2008 to 2011, Dr. Hippensteel opined that Claimant did not have pneumoconiosis, and instead attributed Claimant's respiratory impairments entirely to obesity and sleep apnea. Dr. Hippensteel elaborated that it would be "unusual" for Claimant to have developed pneumoconiosis, as Claimant had been out of the mines for over 10 years. Furthermore, Dr. Hippensteel opined that, even if Claimant did have pneumoconiosis arising out of his CME, he was not totally disabled due to the disease. In reaching this conclusion, Dr. Hippensteel referenced the opinion of Dr. Crisalli, whose opinion was properly discredited by the ALJ.

In 2012, after he reviewed additional CT scans, Dr. Hippensteel changed his opinion and concluded that Claimant in fact did suffer from pneumoconiosis arising out of his CME. However, he did not revisit his analysis pertaining to his conclusion that Claimant was not totally disabled due to pneumoconiosis.

In reviewing this evidence, the ALJ determined that Dr. Hippensteel's opinion on the disability causation issue was entitled to "little weight." In support of this finding, the ALJ noted (1) that Dr. Hippensteel "failed to diagnose pneumoconiosis, in direct contradiction to [my] own finding," and (2) that Dr. Hippensteel's position, "that it would be unusual for [Claimant] to have pneumoconiosis ten years after he ended his [CME]," was "not in accord with the accepted view that [coal workers' pneumoconiosis] is both latent and progressive." After discounting Dr. Hippensteel's opinion, the ALJ found that Employer had failed to rebut the presumption that Claimant's total disability was due to pneumoconiosis, and awarded benefits. The Board subsequently affirmed the award.

In addressing Employer's argument on appeal, the court concluded that the ALJ did not err in discrediting Dr. Hippensteel's causation analysis on the basis that he failed to diagnose pneumoconiosis arising from CME. The court agreed that Dr. Hippensteel's opinion as to disability causation "was entitled to no more than the 'little weight' assigned it by the ALJ." In support, the court noted that Dr. Hippensteel did not diagnose pneumoconiosis, contrary to the ALJ's finding. Furthermore, the court pointed out that "this is not a case in which there are 'specific and persuasive reasons' for thinking that a doctor's view of disability causation is independent from any misdiagnosis." Instead, the court stated that "substantial evidence supports the conclusion that [Dr.] Hippensteel's disability-causation opinion was closely tied to his belief that [Claimant] did not suffer from pneumoconiosis arising from [CME]." Furthermore, the court disagreed with Employer's argument that Dr. Hippensteel "salvaged the credibility of his causation opinion when he asserted that he would have reached the same conclusion," assuming that Claimant did suffer from pneumoconiosis:

> [A]s we have held, it is not enough for the expert simply to recite, without more, that his causation opinion would not change if the claimant had pneumoconiosis. [citation omitted] . Rather, such an alternative causation analysis, like any causation opinion, must be accompanied by some reasoned explanation — in this context, an explanation of why the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present.

The court also noted that Dr. Hippensteel's disability causation opinion was not saved by his conclusion, in 2012, that Claimant did in fact have pneumoconiosis arising out of his CME. Importantly, "the entirety of Hippensteel's causation reasoning predate[d] his

ultimate diagnosis of pneumoconiosis and . . . rest[ed] primarily on the absence of that disease." In addition, Dr. Hippensteel never revisited his disability causation opinion after determining, in 2012, that Claimant suffered from coal worker's pneumoconiosis." Therefore, as Dr. Hippensteel provided no explanation as to how he might reach the same conclusion at disability causation in light of his changed opinion on the existence of pneumoconiosis, the court concluded that "[Dr.] Hippensteel's 2012 restatement of his causation opinion was no more credible than its earlier iterations, and the ALJ permissibly discounted it."

In light of the above, the court concluded that substantial evidence supported the ALJ's determination that Employer did not rebut the fifteen-year presumption, and therefore affirmed the ALJ's award of benefits.

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]**

In *Quarto Mining Co. v. Marcum*, 604 Fed. Appx. 477 (6th Cir. Mar. 24, 2015) (unpub.), the Sixth Circuit affirmed the ALJ's award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4).

Initially, the court concluded that substantial evidence supported the ALJ's determination that Claimant worked for 25 years in qualifying CME. As Employer conceded that Claimant suffered from a totally disabling respiratory or pulmonary impairment, the court concluded that Claimant had properly invoked the rebuttable presumption that he was totally disabled due to pneumoconiosis.

Next, the court addressed the ALJ's analysis concerning whether Employer had rebutted the presumption. The crux of Employer's appeal concerned the ALJ's decision to discredit the opinion of Dr. Rosenberg, who, in opining that Claimant's impairment was related to his smoking history and not his CME, "summarized how various epidemiological studies have made it possible to distinguish between COPD caused by smoking versus that caused by coal dust." Therefore, in Dr. Rosenberg's view, Claimant's impairment was not characteristic of an obstruction due to coal mine dust exposure and instead was related to his smoking history.

In affirming the ALJ's decision to discredit Dr. Rosenberg's opinion as being inconsistent with the preamble, the court quoted from its recent decision in *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 25 BLR 2-633 (6th Cir. 2014), in which Dr. Rosenberg offered the same reasons for concluding that the claimant did not suffer from an impairment related to coal mine dust exposure:

> The ALJ appropriately declined to credit Dr. Rosenberg's medical opinion because it was inconsistent with the DOL's position that 'coal mine dust exposure may cause COPD, with associated decrements in FEV1/FVC.' Dr. Rosenberg's medical opinion discusses at great length the effects of both cigarette smoking and coal-dust exposure on the FEV1/FVC ratio. He explains that both DOL and the Global Initiative for Chronic Obstructive Lung Disease overbroadly define COPD as a reduction in the FEV1/FVC ratio, whereas 'recent literature (including literature published after DOL's revisions to the black lung regulations) establishes the limitation of defining COPD as simply a reduction in FEV1 or FEV1% values.' In short, Dr. Rosenberg suggests that, contrary to DOL's purportedly oversimplistic definition, there may be forms of COPD that are not correlated with a reduced FEV1/FVC ratio, and those forms of COPD are much more likely to be associated with coal-dust exposure. Dr. Rosenberg may be right as a matter of scientific fact, but his analysis plainly contradicts the DOL's position that COPD caused by coal-dust exposure

> may be associated with decrements in the FEV1/FVC ratio. The ALJ was entitled to consider the DOL's position and to discredit Dr. Rosenberg's testimony because it was inconsistent with the DOL position set forth in the preamble to the applicable regulation. [citation omitted] . Central Ohio does not challenge the substance of the DOL's position as articulated in the regulation's preamble—that is, Central Ohio does not argue that COPD resulting from coal-dust exposure is not correlated with a reduced FEV1/FVC ratio. Were Central Ohio to make that argument, this court would need to engage the substance of that scientific dispute. *See Harman Mining Co. v. Dir. of Office of Workers Comp. Programs,* 678 F.3d 305, 314 n.3 (4th Cir. 2012). But this court could do that only after Central Ohio submitted 'the type and quality of medical evidence that would invalidate' the DOL's position in that scientific dispute. *Midland Coal Co. v. Dir. of Office of Workers' Comp. Programs*, 358 F.3d 486, 490 (7th Cir. 2004). Central Ohio has presented no such evidence, and it asks this court to make no such determination. *The sole issue presented here is whether the ALJ was entitled to discredit Dr. Rosenberg's medical opinion because it was inconsistent with the DOL position set forth in the preamble, and the answer to that question is unequivocally yes.*

In light of the above, the court rejected Employer's argument that "the ALJ erred in not assessing the post-preamble studies alluded to in Dr. Rosenberg's report because the [Act] prescribes that all relevant evidence related to black lung claims be considered." The court concluded that, while *Sterling* "leaves open the possibility that a mining company could muster medical evidence that would invalidate the position taken by the [DOL] in the preamble," the court could "find nothing to distinguish [Dr. Rosenberg's] evidence from the evidence that he relied upon, and that we rejected, in [*Sterling*]." Therefore, the court concluded that the ALJ appropriately discounted Dr. Rosenberg's opinion as being at odds with the DOL's position in the preamble "without establishing the invalidity of that position." Accordingly, the court affirmed the award of benefits.

**[The preamble to the amended regulations: Sixth Circuit]**

In *Island Creek Coal Co. v. Dykes*, ___ Fed. Appx. ___, 2015 WL 2405213 (4th Cir. May 21, 2015) (unpub.), the Fourth Circuit affirmed the award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). The Administrative Law Judge (ALJ) found that Claimant worked for at least 15 years in underground coal mine employment (CME), and that he suffered from a totally disabling respiratory impairment. Therefore, the ALJ found that Claimant invoked the amended Section 411(c)(4) rebuttable presumption that he was totally disabled due to pneumoconiosis. The ALJ further found that Employer did not disprove the existence of legal pneumoconiosis, and that it failed to rule out pneumoconiosis as a cause of Claimant's totally disabling respiratory impairment. Therefore, the ALJ found that Employer did not rebut the presumption. The Benefits Review Board affirmed the award.

On appeal before the Fourth Circuit, Employer contended that it was improperly limited to only two methods of rebuttal: disproving the existence of pneumoconiosis, or ruling out pneumoconiosis as a cause of Claimant's totally disabling respiratory impairment. Employer further alleged that the ALJ erred in applying the "rule out" standard. The court disagreed, noting that it had considered and rejected identical arguments in *West Virginia CWP Fund v. Bender*, 782 F.3d 129, ___ B.L.R. ___ (4th Cir. 2015). In that case, the court held that the Department of Labor (DOL) possessed the authority to promulgate regulations setting out the rebuttal standard for employers, and that the "rule-out" standard set forth at 20 C.F.R. § 718.305(d) is a reasonable exercise of DOL's authority.

Employer next alleged that the ALJ erred in using the preamble to the 2001 regulations to discredit the opinion of Dr. Fino on rebuttal. In analyzing Dr. Fino's opinion, the ALJ noted Dr. Fino's statement that Claimant had only a minimal, non-disabling respiratory obstruction upon leaving the mines in 1994. The ALJ found that, "[t]o the extent that Dr. Fino may be suggesting that, because Claimant was not disabled after leaving the coal mines, his present disability is unrelated to [CME], his opinion is at odds with [DOL's] findings that pneumoconiosis is a progressive disease that can worsen after cessation of coal mine dust exposure." In addition, the ALJ pointed out that DOL, in the preamble, "specifically rejected Dr. Fino's position that pneumoconiosis was not progressive." The court rejected Employer's contention of error:

> The ALJ did not explicitly discredit Dr. Fino's opinion based on this conflict with the Preamble. Moreover, in the Preamble, [DOL] clearly rejected Dr. Fino's opinion that pneumoconiosis is not latent or progressive, and cited medical studies supporting its position. Although the Preamble does not state that pneumoconiosis is always progressive, [DOL] retained its regulatory provisions specifying that pneumoconiosis is latent and progressive. In his deposition, Dr. Fino explained that he believed pneumoconiosis can be progressive, but only in a small portion of miners, 'maybe 10 to 15 percent at most, but it clearly can be progressive.' [citation omitted]. The ALJ properly evaluated Dr. Fino's opinion.

Finally, the court rejected Employer's argument that the ALJ applied a more demanding standard of review to Employer's physicians' opinions than she applied to Claimant's physicians. The court noted that, as the burden shifted to Employer to rebut the amended Section 411(c)(4) presumption, "the ALJ's focus on the opinions of Doctors Fino and Castle was appropriate," and the ALJ permissibly found "that their opinions fell short of establishing that [Claimant's] coal dust exposure was not a contributing factor in his disabling respiratory impairment because both doctors acknowledged that [Claimant] could suffer from pneumoconiosis and asthma."

In light of the above, the court affirmed the ALJ's award of benefits.

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)] [Preamble to the amended regulations]**

In *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657 (6th Cir. 2015), the Sixth Circuit affirmed the award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). The Administrative Law Judge (ALJ) found that Claimant worked for at least 15 years in working conditions at an aboveground mine that were substantially similar to those in an underground mine, and that he suffered from a totally disabling respiratory impairment. Therefore, the ALJ found that Claimant invoked the amended Section 411(c)(4) rebuttable presumption that he was totally disabled due to pneumoconiosis. The ALJ further found that Employer did not disprove the existence of legal pneumoconiosis, and that it failed to rule out pneumoconiosis as a cause of Claimant's totally disabling respiratory impairment. Therefore, the ALJ found that Employer did not rebut the presumption and awarded benefits. The Benefits Review Board affirmed the award.

On appeal before the Sixth Circuit, Employer initially contended that the revised regulation, 20 C.F.R. § 718.305(d)(1), which contains the amended Section 411(c)(4) presumption, is invalid. The court noted that Employer failed to present any argument on this issue before the Board. Furthermore, the court rejected Employer's argument that the court should nonetheless consider its argument, as (1) the Board has the authority to

review DOL regulations for consistency with the Black Lung Benefits Act, and (2) Employer had notice of the new regulation and its applicability to the instant case.

Employer next challenged the ALJ's finding that the conditions of Claimant's aboveground coal mine employment (CME) were substantially similar to those at an underground mine, and that Claimant was therefore entitled to invoke the amended Section 411(c)(4) presumption. Specifically, Employer contended that the ALJ failed to consider that Claimant "did not spend every day blasting at coal mines"; therefore, Employer posited that Claimant's work was "dissimilar to the work of an underground miner." The court disagreed, concluding that the ALJ treated Claimant "as he would have treated a miner who spent the same number of days in an underground mine, with the remaining days spent doing non-mining work." Employer also argued that the ALJ miscalculated the length of Claimant's CME because he was exposed primarily to rock and dirt dust, as opposed to coal dust. The court found no merit to Employer's "proposed distinction," noting that (1) "the definition of clinical pneumoconiosis includes silicosis, a disease caused by rock dust," and (2) "[r]ock dust is part of the respiratory hazard faced by underground coal miners . . . ." Accordingly, the court affirmed the ALJ's finding that Claimant's working conditions were substantially similar to those in an underground mine.

The court next addressed Employer's challenge to the ALJ's findings on rebuttal. At the outset, the court rejected Employer's argument that the ALJ erred in limiting its ability to rebut the presumption and requiring it to establish that Claimant's legal pneumoconiosis "played no part" in his totally disabling respiratory impairment. The court noted that it rejected these same arguments in *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013), and held that the ALJ appropriately articulated the rebuttal standard.

Next, the court addressed Employer's contention that the ALJ erred in finding that it did not disprove the existence of legal pneumoconiosis at the first prong of rebuttal. On the issue of the existence of legal pneumoconiosis, all three physicians – Dr. Alam, Dr. Broudy, and Dr. Dahhan – diagnosed COPD; however, they disagreed as to the cause of Claimant's COPD. Dr. Alam "equivocally diagnosed" legal pneumoconiosis based on Claimant's COPD, while Drs. Broudy and Dahhan each believed that Claimant's COPD was unrelated to coal mine dust exposure. The ALJ found none of these opinions to be persuasive, and therefore concluded that Employer failed to rebut the presumption of legal pneumoconiosis. The court concluded that substantial evidence supported the ALJ's credibility determinations regarding Employer's physicians' opinions:

> Dr. Dahhan's opinions contained a number of leaps of logic, including ignoring the possibility that [Claimant's] COPD could have multiple causes – smoking and dust exposure. Dr. Dahhan's opinion also relied on his belief that the COPD was responsive to bronchodilators, but there was no evidence before the ALJ that the disease did not respond to bronchodilators. As for Dr. Broudy, his opinion relied only on the lack of a finding of clinical pneumoconiosis, providing no explanation for why he did not believe dust exposure played a role in the COPD.

The court also rejected Employer's contention that Dr. Alam's "equivocal opinion" should be sufficient to rebut the presumption of legal pneumoconiosis, as Employer failed to point to any "affirmative proof of the absence of pneumoconiosis, in Dr. Alam's opinion evidence or elsewhere." *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 n.5, 25 BLR 2-1, 2-12 n.5 (6th Cir. 2011). Therefore, the court held that "[s]ubstantial evidence supports the ALJ's finding that [Employer] failed to rebut the presumption of legal pneumoconiosis."

Finally, the court rejected Employer's argument that the ALJ erred in finding that Employer failed to establish that no part of Claimant's totally disabling respiratory impairment was caused by his legal pneumoconiosis. The court held that the ALJ appropriately considered this issue and "did not err in finding that [Employer] failed to rebut the 15-year presumption of eligibility." Accordingly, the court denied Employer's petition for review.

**[Underground mine versus surface mine, an important distinction: Generally] [Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]**

In *Premium Coal Co., Inc. v. Director, OWCP* [*Byrge*], ___ Fed. Appx. ___, 2015 WL 4393899 (6th Cir. July 20, 2015) (unpub.), the Sixth Circuit affirmed the award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). In addressing the miner's subsequent claim, which was filed in 2010, the Administrative Law Judge (ALJ) found that the miner suffered from a totally disabling respiratory impairment and that he worked for 15 years aboveground in conditions that were substantially similar to those in an underground mine. Therefore, the ALJ found that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The ALJ further found that Employer failed to rebut the presumption. The Benefits Review Board (the Board) affirmed the award.

On appeal before the Sixth Circuit, Employer initially challenged the validity of 20 C.F.R. § 718.305(b)(2), which provides that the test for determining whether conditions at an aboveground mine are "substantially similar" to those in an underground mine is "if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." Employer argued that this regulation is invalid "because it is not supported by medical or scientific literature and is inconsistent with Congressional intent behind 30 U.S.C. § 921(c)(4)." However, the court noted that Employer failed to raise this issue before the Board and rejected Employer's arguments for why it did not do so, as the court had recently rejected these very same arguments. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], ___ F.3d ___, 2015 WL 3649540, at *1 (6th Cir. June 15, 2015). As Employer did not challenge the validity of Section 718.305(b) before the Board, the court concluded that Employer waived such argument on appeal.

Employer next challenged the miner's ability to file a subsequent claim under Section 725.309(c). First, the court rejected Employer's general challenge to Section 725.309, noting that the consideration of a subsequent claim does not violate Supreme Court precedent or violate the principle of res judicata. *See Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759-60 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 898 (2014). Second, the court addressed Employer's argument that a change in law – namely, application of the 15-year presumption at amended Section 411(c)(4) – should not constitute a change in an applicable condition of entitlement under Section 725.309. The court noted that it has "not directly addressed whether the application of the 15-year presumption in 30 U.S.C. § 921(c)(4) constitutes a 'change in condition' sufficient to trigger application of § 725.309." However, it concluded that it need not address the issue in the present case, as the ALJ below found that the miner had established the existence of pneumoconiosis arising out of his coal mine employment (CME), a fact he was unable to prove in his prior 2007 claim. Therefore, the court concluded that the miner had established "a change in condition sufficient to bring a subsequent claim under § 725.309."

Finally, the court addressed Employer's argument that it should have been allowed to rebut the 15-year presumption by establishing that the miner's "pneumoconiosis did not 'substantially contribute' to his total disability." The court concluded that the ALJ (1) did not err in requiring Employer "to 'rule out' that [the miner's CME] aggravated his disability," (2)

allowed Employer to present evidence that a disease other than pneumoconiosis caused the miner's totally disabling respiratory impairment, and (3) reasonably "ruled that such evidence did not rebut the 15-year presumption . . . ." Accordingly, the court denied Employer's petition.

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]**

In *PBS Coals, Inc. v. Director, OWCP* [*Davis*], 607 Fed. Appx. 159 (3rd Cir. July 20, 2015) (unpub.), the Third Circuit affirmed the award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). In addressing Claimant's subsequent claim, which was filed in April 2010, the ALJ found that the new medical opinion evidence established the existence of a totally disabling respiratory or pulmonary impairment. The ALJ further credited Claimant with at least 15 years of qualifying CME; therefore, the ALJ found that Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). After concluding that Employer failed to rebut the presumption, the ALJ awarded benefits. The Board affirmed the award on appeal.

Employer made only one argument before the Third Circuit: "that the ALJ should have found that [Employer] established that [Claimant's] impairment did not arise from his [CME]." The court noted that, "in order to rebut a presumption of pneumoconiosis [in the Third Circuit] . . . the party opposing the award of benefits must `rule out a possible causal connection between a miner's disability and his coal mine employment.'" *Plesh v. Dir., OWCP*, 71 F.3d 103, 113 (3rd Cir. 1995) (*quoting Kline v. Dir., OWCP*, 877 F.2d 1175, 1179 (3rd Cir. 1989)).[33] Furthermore, the court rejected Employer's argument that its experts' testimony ruled out coal mine dust exposure as a cause of Claimant's disability, as (1) "Dr. Fino testified that the effect of coal mine dust was 'not clinically significant' but that it 'may be contributing [to] a numerical reduction in FEV1,'" and (2) "Dr. Kaplan testified that coal dust contributed to 'ten percent' of [Claimant's] disability." The court therefore denied Employer's petition.

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]**

### B. Benefits Review Board

In *Minich v. Keystone Coal Mining Corp.*, ___ B.L.R. ___, BRB No. 13-0544 BLA (Apr. 21, 2015) (J. Boggs, dissenting), which involved a subsequent claim arising out of the Third Circuit, the Board addressed "the correct interpretation and application of the recently enacted statutory amendment at 30 U.S.C. §921(c)(4) and its implementing regulation at 20 C.F.R. § 718.305, particularly subsection 718.305(d)(ii), which sets forth the disability causation standard on rebuttal."

The ALJ in *Minich* credited Claimant with 29 years of underground CME. Furthermore, the ALJ found that the newly submitted evidence established the existence of clinical pneumoconiosis, and thereby established a change in an applicable condition of entitlement. The ALJ then found that Claimant established the existence of a totally disabling respiratory impairment and thereby invoked the rebuttable presumption at

[33] In citing to *Plesh*, the court noted that the language of the regulation, 20 C.F.R. § 718.305(d)(1), applicable to the instant case "requires a showing that 'no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.'" The court concluded that "[t]his language is effectively identical to the regulatory language at issue in *Plesh*; as such the 'rule out' standard applies." *See W.Va. CWP Fund v. Bender*, 782 F.3d 129, 133-35 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1337 (10th Cir. 2014).

amended Section 411(c)(4). After finding that Employer failed to rebut the presumption, the ALJ awarded benefits.

On appeal, Employer argued that the ALJ applied an incorrect legal standard in finding that it had failed to rebut the presumed fact that Claimant was totally disabled due to pneumoconiosis.[34] Specifically, Employer maintained that, at the second prong of rebuttal, its physicians' opinions "need not rule out any minimal contribution from either coal dust exposure or pneumoconiosis to the miner's disability." The Board rejected Employer's argument. Noting that amended Section 411(c)(4) is silent as to the methods of rebuttal available to employers, the Board agreed with the Director that DOL "promulgated the current regulations in order to fill the statutory gap, to clarify ambiguous phraseology, and to effectuate the purpose of the Act . . . ." Furthermore, the Board concluded that, pursuant to "Section 718.305(d)(1)(ii), an employer must establish that no part of the miner's respiratory or pulmonary disability is due to pneumoconiosis," and that this determination by the Department was appropriate in light of Congress's intent in reviving the 15 year rebuttable presumption. *See* 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013).

Employer further argued that the second prong rebuttal standard – which requires proof that no part of a miner's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis – is not consistent with the Act. In support, Employer contended that the application of such a standard "would permit an award of benefits to a miner whose pneumoconiosis was an insignificant contributor to his totally disabling respiratory impairment." Employer posited that it should be entitled to rebut the presumption by establishing that pneumoconiosis was merely an insignificant or *de minimis* contributor to the miner's impairment. Again, the Board disagreed, and referenced the Fourth Circuit's recent decision in *Bender*:

> To counter an employer's medical opinions, that pneumoconiosis was a *de minimis* factor, or did not materially worsen the miner's disability, a miner entitled to the statutory presumption nevertheless would be forced to obtain medical opinions at least as persuasive as those paid for by employer, to prove that his pneumoconiosis made a greater contribution to his disability. The burden thereby imposed on disabled, long-term miners to obtain black lung benefits is, in significant respects, the same as that which Congress sought to eliminate when it enacted the presumption to benefit those miners. The conclusion is inescapable: application of the rebuttal standard advocated here by employer and our dissenting colleague would defeat the purpose of the presumption Congress enacted. In contrast, application of the regulatory rebuttal standard removes those obstacles which Congress perceived prevented long-term, disabled coal miners from receiving the black lung disability compensation owed them. We agree with the Fourth Circuit that the Director's position is consistent with the statute, standing alone and when viewed as part of the complete statutory and regulatory framework of the Act, and we will defer to his reasonable construction and interpretation of the implementing regulation at Section 718.305.

The Board agreed with the Director, however, that the ALJ applied the incorrect rebuttal standard, as he required that Employer rule out *coal dust exposure*, and not *pneumoconiosis*, as a contributing cause of Claimant's totally disabling respiratory impairment. Therefore, the Board vacated the ALJ's finding that Employer failed to rebut the presumption, and remanded the case for further consideration. The Board also clarified that, even if Employer fails to disprove the existence of legal pneumoconiosis at the first prong of rebuttal, the ALJ must also determine whether Employer disproved the existence of

[34] For the rebuttal standard as described in the amended regulations, *see* n. 1, *supra*.

clinical pneumoconiosis arising out of CME, "as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal prong."

In dissent, Judge Boggs disagreed with the majority that Employer, in order to rebut the presumption at amended Section 411(c)(4), must establish that not even a *de minimis* or insignificant part of a miner's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Instead, Judge Boggs would hold that an employer can rebut the presumption at prong two if it "establishes that pneumoconiosis is merely a *de minimis* factor, and has no material adverse effect on the miner's respiratory or pulmonary condition or does not materially worsen the miner's totally disabling respiratory or pulmonary impairment."

**[Applicability of rebuttal to employer]**

In *Tobin v. Cumberland Cyprus Resources*, BRB No. 14-0299 BLA (May 29, 2015) (unpub.), which involved a survivor's claim arising out of the Third Circuit, the Board addressed the ALJ's finding that Employer had rebutted the presumption, at amended Section 411(c)(4), that the miner's death was due to pneumoconiosis.

The ALJ in *Tobin* found that the miner worked in underground CME for 28 years. In addition, the ALJ found that Claimant established that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b); therefore, the ALJ found that Claimant invoked the rebuttal presumption at amended Section 411(c)(4) that the miner's death was due to pneumoconiosis. On rebuttal, the ALJ specifically found that the existence of legal pneumoconiosis was established by presumption. In addition, he found that Employer's experts, Drs. Rosenberg and Zaldivar, "successfully demonstrate how the deceased miner's long history of smoking and not his exposure to coal mine dust caused his pulmonary impairments." In contrast, the ALJ gave little weight to Claimant's expert, Dr. Begley, as the ALJ found that Dr. Begley "gave no rationale, basis, or support for his opinion that both tobacco smoke and coal dust inhalation caused the pulmonary impairments in this particular coal miner." The ALJ concluded by noting that "Employer has successfully rebutted the presumption as provided for by 20 C.F.R § 718.305(D)(ii) [sic], and Claimant has therefore failed to prove by a preponderance of the evidence that the deceased miner's death was contributed to or hastened by his coal workers' pneumoconiosis."[35] Accordingly, the ALJ denied benefits.

On appeal, Claimant argued that the ALJ inappropriately shifted the burden to her to establish that the miner's death was due to pneumoconiosis. The Board agreed and noted the following:

> Rather than assess whether the opinions of employer's experts were sufficient to rebut the amended Section 411(c)(4) presumption, the [ALJ] weighed Dr. Begley's opinion against the opinions of Drs. Rosenberg and Zaldivar, and found it insufficient to establish a causal connection between coal dust exposure and the miner's totally disabling respiratory impairment. [citations omitted]. In so doing, the [ALJ] improperly placed the burden of proof on claimant to establish that the miner had legal pneumoconiosis and that the miner's death was due to legal pneumoconiosis. Because the [ALJ's] rebuttal

[35] Specifically, 20 C.F.R. §718.305(d)(2) states that, in a survivor's claim, an employer may rebut the presumption by (i) establishing that the miner did not have legal pneumoconiosis and clinical pneumoconiosis arising out of CME, "or (ii) [e]stablishing that no part of the miner's death was caused by pneumoconiosis . . . ."

> analysis does not conform to 20 C.F.R. §718.305(d)(2), we must vacate his finding that employer successfully rebutted the amended Section 411(c)(4) presumption.

The Board also addressed whether the ALJ erred in crediting the opinions of Drs. Rosenberg and Zaldivar. Specifically, Claimant argued that Employer's physicians relied on premises that were contrary to the medical science relied upon by DOL in the preamble to the 2001 regulations, while the Director asserted that the ALJ did not adequately consider whether the physicians' opinions were well-reasoned and documented. The Board agreed that the ALJ did not fully consider Dr. Rosenberg's opinion, including aspects of his opinion that appeared to detract from his belief that smoking was the sole cause of the miner's respiratory impairment. For example, the Board noted that Dr. Rosenberg acknowledged the following: (1) a miner who smokes can have COPD related to smoking and coal dust exposure; (2) the effects of smoking and coal dust exposure may be additive in causing COPD; (3) the effect of coal dust exposure on the development of a pulmonary impairment is not canceled out by smoking; (4) no pulmonary function studies he relied on were validated, and (5) only one showed a bronchodilator response consistent with smoking, and this response may have been erroneous, as the study was not validated. In light of the above, the Board vacated the ALJ's decision to credit Dr. Rosenberg's opinion.

Furthermore, the Board agreed with the Director that the ALJ "did not fully assess the documentation underlying Dr. Zaldivar's exclusion of coal dust exposure as a contributing cause of the miner's emphysema." The Board noted that, while the ALJ pointed out that Dr. Zaldivar's reference to medical literature post-dating the preamble made his opinion more persuasive, the ALJ "did not determine whether this literature actually pertained to differentiating between the effects of smoking and coal dust exposure on the lungs, or solely to the effects of smoking." In addition, in citing to the Fourth Circuit's decision in *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013), the Board reiterated that "an expert's reliance on medical science set forth in medical literature more recent than the preamble to the 2001 revised regulations is significant only if the expert 'testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble.'"[36] Therefore, the Board vacated the ALJ's crediting of Dr. Zaldivar's opinion that neither coal dust exposure nor pneumoconiosis played any role in the miner's death.

In light of the above, the Board vacated the ALJ's finding that the opinions of Drs. Rosenberg and Zaldivar established that no part of the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(2)(ii). The Board directed that, on remand, the ALJ initially should consider whether Employer has proven the absence of both

---

[36] The Board noted the following in a footnote:

> The Director also asserts that Dr. Zaldivar's statement, that no new literature has been published "regarding black lung or silica since the Federal Register stated that smoking and coal dust produced damage in the same fashion in the lungs," is incorrect. [citation omitted]. In support of this argument, the Director states that NIOSH published an Intelligence Bulletin in 2011 in which it reported that "new findings strengthen [the] conclusions and recommendations" set forth in the 1995 NIOSH publication that the DOL cited in the preamble to the 2001 revised regulations. Director's Letter Brief at 5 n.6, *quoting Current Outcomes, A Review of Information Published Since 1995*, NIOSH Intelligence Bulletin 64 (2011) (available at www.cdc.gov/niosh/docs/2011-172).

Slip op. at 8, n.9.

clinical and legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A), (B); *Minich v. Keystone Mining Coal Mining Corp.*, ___ BLR ___, BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting). The Board noted that this approach is consistent with the requirement that the ALJ consider all relevant evidence, and will assist the ALJ in considering the medical opinion evidence at the second prong of rebuttal. Finally, the Board stated that, "when weighing the opinions of Drs. Rosenberg and Zaldivar on remand, the [ALJ] may consider whether the physicians have relied on premises inconsistent with the preamble."

Accordingly, the Board vacated, in part, the ALJ's decision denying benefits and remanded the case to the ALJ for further consideration.

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)] [Preamble to the amended regulations]**

In *Morgan v. Consolidation Coal Co.*, BRB Nos. 14-0256 BLA and 14-0273 (July 30, 2015) (unpub.) (Boggs, J., concurring and dissenting), the Board addressed Employer's appeal of a Decision and Order on Remand, Order Denying Reconsideration, and Decision and Order on Modification. The case concerned a subsequent claim arising out of the Third Circuit, and was before the Board for the second time.

In the original decision, Judge Lesniak found that the miner established that he was totally disabled due to legal pneumoconiosis, and that he therefore established a change in an applicable condition of entitlement. Accordingly, Judge Lesniak awarded benefits.

On appeal, the Board held that, while Judge Lesniak permissibly accorded less weight to Employer's doctors on the issue of legal pneumoconiosis, "Judge Lesniak failed to consider the evidence contained in the miner's first black lung claim, did not properly consider the length of the miner's smoking history, and did not specifically address whether the opinions [he credited in finding the existence of legal pneumoconiosis] were reasoned and documented." Therefore, the Board vacated Judge Lesniak's finding that the miner established the existence of legal pneumoconiosis and total disability due to pneumoconiosis, and remanded the matter for further consideration.

On remand, Employer filed a modification request, and Judge Lesniak accordingly remanded the matter to the District Director. Before the District Director, the parties submitted additional evidence, and the District Director thereafter denied Employer's modification request. The case was then referred to the OALJ.

The case was reassigned to the present ALJ, who noted that the Employer's request for modification, as well as the Board's remand of Judge Lesniak's Decision and Order, was pending before him. On March 7, 2014, in a Decision and Order on Remand, the ALJ concluded that "consideration of . . . Employer's modification request prior to the issuance of a Decision and Order on Remand would be premature." Therefore, he "limited his consideration to the issues that the Board had instructed Judge Lesniak to reconsider because of the errors in the initial decision awarding benefits." The ALJ awarded benefits, as he found that the miner established total disability due to pneumoconiosis.

Upon issuance of the ALJ's Decision and Order on Remand, Claimant sought to dismiss Employer's pending modification request, and Employer moved for reconsideration of the Decision and Order on Remand. The ALJ denied Claimant's motion to dismiss and Employer's motion for reconsideration.

Employer thereafter appealed the ALJ's Decision and Order on Remand and his Order Denying Reconsideration. While this appeal was pending at the Board, the ALJ issued a

Decision and Order on Modification on June 2, 2014, in which he addressed Employer's modification request. After performing a de novo review of the record, the ALJ found that the miner was totally disabled due to pneumoconiosis, denied Employer's modification request, and awarded benefits once again. Employer appealed the ALJ's Decision and Order on Modification, and the Board consolidated the appeal with the pending appeal related to the ALJ's Decision and Order on Remand and Order Denying Reconsideration.

Initially, a majority of the three-member panel addressed Employer's argument that the ALJ "erred by issuing a Decision and Order on Remand that did not address [E]mployer's modification request." The Board agreed, noting that, "once [E]mployer requested modification and the case was referred to the [ALJ] for a modification hearing, the posture of the case for decision was primarily a request for modification." Because the Decision and Order on Remand "did not address all [of] the issues in the case before him," it was improper for the ALJ to issue only that decision. The Board therefore vacated that decision and the Order Denying Reconsideration, as the ALJ "failed to address [E]mployer's request for modification in his Decision and Order on Remand . . . ."

The Board also agreed "with [E]mployer that once it appealed the [ALJ's] Decision and Order on Remand and Order Denying Reconsideration to the Board, the [ALJ] lacked jurisdiction to issue his Decision and Order on Modification." In reaching this conclusion, the Board noted that, "[o]nce a party appeals an [ALJ's] decision to the Board, jurisdiction of the case is transferred to the Board, thereby depriving the [ALJ] of the authority to issue additional orders or decisions in that case." The Board indicated that "[t]he reason for this rule is self-evident," as the Board and an ALJ "may not exercise simultaneous jurisdiction over a case." Accordingly, because the ALJ did not have jurisdiction to issue his Decision and Order on Modification, the Board vacated that decision as void.

In light of the above, the Board remanded the matter to the ALJ for further consideration, and instructed the ALJ "to issue a single decision in which he considers [E]mployer's request for modification, while bearing in mind the Board's remand instructions set forth in its previous Decision and Order . . . ."

Judge Boggs concurred in the majority's conclusion that the ALJ, once Employer appealed his Decision and Order on Remand and Order Denying Reconsideration, lacked jurisdiction to issue his Decision and Order on Modification. However, Judge Boggs disagreed with the majority's determination that Employer, by filing its modification request on remand prior to the ALJ's issuance of a decision, "transformed the case to a modification proceeding that displaced the need to issue a Decision and Order on Remand." Instead, Judge Boggs stated that Employer's modification request should be considered premature, as the ALJ had yet to issue a decision on remand awarding or denying benefits in the miner's claim. As the modification request was premature, Judge Boggs "would focus on whether the [ALJ's] Decision and Order on Remand, standing alone, is supported by substantial evidence and in accordance with law."

**[Modification available to any party; Generally]**

In *Keene v. Davis & Whited Coal Co., Inc.*, BRB No. 14-0368 BLA (Aug. 25, 2015) (unpub.), which involved a living miner's claim arising out of the Fourth Circuit, the ALJ found that Claimant worked in qualifying coal mine employment (CME) for 14 years and 6.4 months; therefore, the ALJ determined that Claimant was not entitled to invoke the 15-year rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). In addition, the ALJ found that Claimant established the existence of legal pneumoconiosis and a totally disabling respiratory impairment. However, the ALJ further found that Claimant failed to establish that his legal pneumoconiosis caused his totally

disabling respiratory impairment pursuant to Section 718.204(c). Therefore, the ALJ denied benefits.

The Director appealed, contending that the ALJ erred in finding that Claimant failed to establish disability causation. Employer responded in support of the denial of benefits, and alternatively contested the ALJ's finding that Claimant established the presence of legal pneumoconiosis.

In finding legal pneumoconiosis established, the ALJ considered the medical opinions of Drs. Splan, Fino, and McSharry. Dr. Splan diagnosed chronic bronchitis and COPD, attributed both of these conditions to Claimant's CME and smoking history, and opined "that claimant's severe disabling ventilatory impairment was 'entirely related to his COPD' . . . ." While Dr. Fino also diagnosed chronic bronchitis and COPD, he concluded that these conditions were solely the result of Claimant's smoking history. Finally, Dr. McSharry determined that Claimant's severe obstruction was "'most consistent' with cigarette smoking-induced emphysema rather than pneumoconiosis."

The Board initially addressed the ALJ's legal pneumoconiosis finding. In so doing, it concluded that the ALJ permissibly discounted Dr. Fino's opinion, to the extent that the physician believed Claimant had been credited with only 7 years of CME, as opposed to the nearly 15 years of CME as found by the ALJ. Furthermore, the Board affirmed the ALJ's decision to give "low probative weight" to Dr. Fino's opinion because "the physician failed to 'point to any objective evidence or explain why he ruled out the possibility that the coal mine dust exposure may have contributed to [c]laimant's lung disease." The Board also determined that the ALJ permissibly gave less weight to Dr. McSharry's opinion, as the ALJ found that the physician's reasoning was inconsistent with scientific studies referenced in the preamble to the regulations. Finally, the Board affirmed the ALJ's "finding that Dr. Splan's opinion was well-reasoned and sufficient to support a finding of legal pneumoconiosis." Accordingly, the Board concluded that the ALJ's credibility determinations were supported by substantial evidence and affirmed his finding that the evidence established the existence of legal pneumoconiosis.

The Board next addressed the Director's contention that the ALJ erred in finding that Dr. Splan's opinion was insufficient to establish disability causation at Section 718.204(c).[37] In addressing the Director's argument, the Board quoted the following passage from the ALJ's Decision and Order:

> Dr. Splan offered a documented and reasoned opinion that [c]laimant's respiratory impairment was entirely attributable to COPD arising out of both cigarette and coal mine dust inhalation. This necessarily implies that the impairment was partly attributable to legal pneumoconiosis (because COPD arising out of coal mine dust inhalation constitutes legal pneumoconiosis).

The Board noted that, despite this finding, the ALJ found that Claimant failed to meet his burden of demonstrating disability causation "because Dr. Splan 'did not discuss to what extent [c]laimant's respiratory impairment was attributable to coal mine dust exposure as opposed to tobacco smoke inhalation, and did not opine that [c]laimant's history of coal mine dust exposure substantially or materially contributed to his [disabling] respiratory impairment.'" Accordingly, the ALJ found that Dr. Splan's opinion was insufficient to

[37] The Board concluded that the ALJ permissibly discounted the opinions of Drs. Fino and McSharry at disability causation, as neither physician diagnosed the existence of legal pneumoconiosis.

establish that Claimant's legal pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment.

The Board agreed with the Director that the ALJ applied the incorrect standard in addressing Dr. Splan's opinion at disability causation. The Board noted that, in addressing the issue of disability causation, the ALJ erred in revisiting "the question of the extent to which claimant's respiratory impairment is attributable to *coal mine dust exposure*, which is the relevant inquiry in establishing the existence of legal pneumoconiosis . . . " (emphasis included) (footnote omitted). Instead, the Board noted that the ALJ should have focused on the contribution that *pneumoconiosis* made to Claimant's totally disabling respiratory impairment.[38]

Despite this error, the Board determined that remand was unnecessary. Of significance was the ALJ's finding "that Dr. Splan's opinion, that claimant's total respiratory disability was entirely attributable to COPD arising out of a combination of coal mine dust inhalation and tobacco use, was reasoned and documented, as it comported with the underlying [medical evidence of record]." The Board noted that it was "undisputed that claimant is disabled by COPD; the [ALJ] determined that Dr. Splan's attribution of claimant's COPD to both smoking and coal dust exposure constituted legal pneumoconiosis and was fully creditable; and the [ALJ] discredited all opinions to the contrary and there is no other contrary evidence." Therefore, according to the Board, Dr. Splan's opinion was sufficient to establish disability causation at Section 718.204(c).

In light of the above, the Board affirmed in part, and reversed in part, the ALJ's Decision and Order, and remanded the case for entry of an award of benefits.

**[Etiology of the pneumoconiosis: Differential diagnosis or apportionment; causation] [Etiology of total disability: For claims filed after January 19, 2001]**

[38] The Board further agreed with the Director's contention "that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke versus coal dust exposure in order to establish the existence of legal pneumoconiosis," though it noted that an ALJ "must find from the evidence that the chronic lung disease is 'significantly related to, or substantially aggravated by, dust exposure in [CME].'"