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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 161
September - October 2002

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Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

Martinez v. Signature Seafoods Inc; Lucky Buck F/V, Official #567411, her machinery, appurtenances, equipment and cargo, in rem, ___ F.3d ___ (9th Cir. September 11, 2002)(No. 01-35768, D.C. No. CV-00-o1293-MJP).

The Ninth Circuit held that a seaworthy fish processing barge that is towed across navigable waters twice a year can qualify as a "vessel in navigation" for certain purposes of the Jones Act. This barge is a documented vessel with the United States Coast Guard and has no means of self-propulsion The Lucky Buck has a shaped raked bow, a flat main deck, a flat bottom, flat sides, a square raised stern, and is equipped with a bilge pump. It also has living quarters used by fish processors and administrators while it is moored in Alaska. Pursuant to coast Guard requirements for vessels, the Lucky Buck is equipped with navigational lights. Other that these lights, however, it has no navigational equipment–specifically, the Lucky Buck has no rudder, keel or propeller. Nor is it equipped with lift rafts. In Alaska, it is moored by four anchors and a cable affixed to shore. It floats 200 feet off shore and is accessible to land via a floating walkway. It receives water from a pipe connected to the shore.

The court distinguished this case from *Kathriner v. Unisea*, 975 F.2d 657 (9th Cir. 1992) (Floating fish processing plant permanently anchored to a dock and which had not moved for 7 years and had a large opening cut into its hull to allow for dock traffic, was not a "vessel in navigation" since floating structures should not be classified as vessels in navigation if they are "incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate.") The court noted that the Lucky Buck is actually sea-worthy and has a transportation function (carrying the fish processing plant, crew quarters, and incidental supplies between Seattle and Alaska twice each year. "Even if the transportation function of the Lucky Buck is incidental to its primary purpose of serving as a floating fish processing factory, that fact does not preclude a finding that it was a vessel in navigation." Additionally the court noted that the fact that it was designed to be transported among various fish processing sites raises a substantial factual issue about its status.

The court refused to adopt a test established by the Fifth Circuit to determine whether a work platform qualifies as a vessel in navigation. *See Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 831 (5th Cir. 1984).

[Topic 1.4.3 "Vessel"]

Hanson v. Marine Terminals Corporation, ___ F.3d ___ (9th Cir. 2002) (No. 00-35871; D.C. No. CV-99-01070-OMP) (Oct. 9 2002).

The Ninth Circuit reversed federal district court decision which had denied Section 14(f) relief for overdue compensation on "equitable grounds." (Claimant had provided incorrect addresses on two occasions–at time of filing claim and when he submitted settlement for approval.) Agreeing with other circuits, the Ninth concluded that equitable factors have no place in the district court's consideration of a Section 14(f) penalty. The court noted that it need not decide whether fraud or physical impossibility would constitute a defense to a Section 14(f) penalty because neither fraud nor physical impossibility were at issue. The court simply stated that the statute limits the district court's inquiry solely to the question of whether the order was in accordance with law.

[Topic 14.4 Compensation Paid Under Award]

B. Benefits Review Board

Haire v. Destiny Drilling (USA.) Inc., ___ BRBS ___ (BRB No. 02-0106) (Sept. 25, 2002).

Board affirmed ALJ's finding that the marshy area upon which an air boat "got stuck" was not "navigable in fact." The ALJ noted that only air boats could navigate the area, and even such boats got stuck. (Claimant injured his back while attempting to free the air boat.) The Board noted that the ALJ, based on the limited evidence in the record, determined that only air boats could navigate the shallow bayou where claimant was injured and that the floating vegetation rendered the navigational capability of even such boats doubtful. The ALJ found that this hindrance to navigation was evident from the fact that the boats were equipped with lubricants to free the vessels from the vegetation.

It should be noted that the Board stated, "Although the fact of navigational capability by air boats alone may, in a given case, render a waterway navigable in fact within the meaning of admiralty jurisdiction, the evidence in the instant case regarding the vegetation's impediment to navigation and the lack of any other evidence of navigable capability support the [ALJ's] finding that claimant was not injured on navigable waters pursuant to Section 3(a) of the Act.." Furthermore, it should be noted that the marsh was separated from the main waterway by a levee.

[Topics 1.4.3 "Vessel;" 1.5.2 "Navigable waters"]

Ravalli v. Pasha Maritime Services, ___ BRBS ___ (2002) (BRB No. 01-0572) (September 12, 2002).

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

[Topics 21.2.2 Review of Compensation Order–New Issue Raised on Appeal; 21.2.12 Review of Compensation Order–Law of the Case; 85.5 "Law of the Case" Doctrine]

Sumler v. Newport News Shipbuilding & Dry Dock Company, ___ BRBS ___ (2002) (BRB No. 02-0318) (Oct. 9, 2002).

Here the Board affirmed the ALJ's finding that the Section 2(3) status requirement was satisfied as the uncontroverted evidence of record supported his conclusion that the claimant's work, changing air conditioning filters in the fabrication shops in the employer's shipyard, was integral to the operation of those shops. In the course of the claimant's work in the employer's air conditioning department, the claimant cut, delivered, and helped to change air conditioning filters used in the employer's buildings throughout the shipyard. The Board found it significant that the claimant delivered filters to buildings where ship construction work was being performed. The air conditioning filters with which the claimant worked were used for the ventilation of the employer's shipyard buildings which were all inside the shipyard and where the ships were actually constructed. Filters needed to be changed more frequently in buildings in which actual ship construction activity was performed than in other shipyard buildings.

The employer argued that there was no evidence to suggest that ventilation in its fabrication facilities would be impeded without the claimant to occasionally change the filters and that air conditioning itself was merely a comfort measure, incidental to the shipbuilding process. However, the Board noted evidence that claimant's duties included the continuous changing of filters in the shipyard buildings where ship fabrication and construction was performed, and that those filters where fabrication occurred were changed on a frequent basis. The Board reasoned that the evidence supported the ALJ's conclusion that the claimant's work was integral.

As to the argument that air conditioning is "merely a comfort measure" the Board stated, "[I]t defies

common sense to suggest that employer would have incurred the considerable expense of installing and maintaining an air-conditioning system for the past fifty years if such a system were not required in order for employer to operate a competitive shipbuilding operation in the Commonwealth of Virginia.

Employer also argued that the claimant's duties have no traditional maritime characteristics, but rather, are typical of "support services" performed in any industrial setting. However, the Board noted that reliance on this reasoning regarding support services is misplaced, as this rationale has previously been rejected as a test for coverage. Moreover, the Board, in its earlier decision in this case, expressly stated that the standard for coverage does not concern whether the claimant's duties were more maritime specific than those conducted in non-maritime settings.

Next, the Board rejected the employer's contention that the evidence does not establish that ventilation in the fabrication shop would be impeded without the claimant's work changing the filters in those areas. "It would be inconsistent with the Supreme Court's decision in *Schwalb* [*Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989)] to require claimant to demonstrate with specific evidence, such as the level of particulates in the air in the shipyard fabrication shops or the frequency with which air conditioning filters require changing, the effects of claimant's failure to perform her job....Moreover, claimant is not required to demonstrate that the effect on the air conditioning system would be immediate were she not to replace the filter rather, her work is considered essential if her failure to replace the filters would eventually impede the operation of the air conditioning system."

As the only evidence of record supports the conclusion that the claimant's work was essential to the continued functioning of the employer's shipyard's air conditioning system, and that this system was integral to the employer's shipyard operations, the [ALJ's] finding of Section 2(3) coverage was affirmed.

[Topic 1.7.1 Status–"Maritime Worker" ("Maritime Employment")]

Jones v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 02-0227) (Oct. 18. 2002).

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

Employer initially argued that the claimant's request for a de minimis award was not sufficient under

Section 22 as an actual award is required in order to toll the statute of limitations and as the letter is a prohibited anticipatory filing which does not allege a change of condition or a mistake of fact.

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

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

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

[Topic 22.3.2 Modification–Filing a Timely Request; 22.3.3 Modification–De Minimis Awards]

Porter v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB Nos. 02-0287 and 02-0287A)(Oct. 18, 2002).

In contrast to the facts in Jones v. Newport News Shipbuilding & Dry Dock Company, ___ BRBS ___ (BRB No. 02-0227)(Oct. 18, 2002), supra, the Board here notes that "[E]ven where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time."

Here, unlike in Jones, the Board found that the context of the filing established that the claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification. The Board noted that the claimant's August 12, 1999 letter was filed only 18 days after the last payment of benefits and that while "it is conceivable claimant's condition could have changed in that

short period of time, providing a basis for her assertion that she anticipated future economic harm, there is no evidence of record to support such a conclusion." It went on to note that the 1999 letter was filed well in advance of the December 2000 evidence of any deterioration of her condition and, thus, constituted an anticipatory filing.

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

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

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

[Topic 22.3.2 Modification–Filing a Timely Request; 22.3.3 Modification–De Minimus Awards; 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies]

Duck v. Fluid Crane & Construction, ___ BRBS ___ (BRB No. 02-0335)(Oct. 22, 2002).

Here the Board upheld the ALJ's finding that Sections 2(14) and 9 of the LHWCA provide that a legitimate or adopted child is eligible for benefits without requiring proof of dependency but that an illegitimate child is eligible for death benefits only if she is acknowledged and dependent on the decedent.

The Board first noted that it has held that it possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its

jurisdiction. *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984).

The Board found that the instant case was akin to *Mathews v. Lucas*, 427 U.S. 495 (1976). In *Lucas*, the Supreme court sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. Although the Social Security Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court held that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Lucas*, 427 U.S. at 513. The presumption of dependency, observed the Court, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the Court relied predominantly on the Congressional purpose in adopting the statutory presumptions of dependency, i.e., to serve administrative convenience.

Applying the court's holding in *Lucas*, Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but rather is "carefully tuned to alternative considerations" by withholding a presumption of dependency to illegitimate children "only in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 U.S. at 513. The Board found that the LHWCA's distinction between legitimate and illegitimate children is reasonable, for as the Court stated in *Lucas*, "[i]t is clearly rational to presume [that] the overwhelming number of legitimate children are actually dependent upon their parents for support, "*Lucas*, 427 U.S. at 513, while, in contrast, illegitimate children are not generally expected to be actually dependent on their fathers for support.

[Topics 2.14 "Child;" 9.3 Survivors–Spouse and Child]

C. State courts

CIGNA Property & Casualty v. Ruiz, ___ So. 2d ___ (Fla. App. 3 Dist. 2002), 2002 WL 31373875 (Fla. App. 3rd Cir. October 23, 2002).
[ED. NOTE: As of October 30, 2002 this opinion had not yet been released for publication in the permanent law reports and until released, it is subject to revision or withdrawal.**]**

Here the Florida State Appeals Court upheld a state district court which held that an ex-wife's claim for on-going child support was neither a claim of a creditor nor an attachment or execution for the collection of a debt; and thus, the anti-alienation provision of the LHWCA [33 U.S.C. 916] did not apply so as to preclude the longshore insurer from withholding certain sums from the ex-husband's benefits and paying this for on-going child support. In reaching this conclusion, the Florida Court of Appeals noted prior state case law. Previous case law in Florida had found that a claim for child support is not the claim of a

creditor. *Department of Revenue v. Springer*, 800 So. 2d 700 (Fla. 5th DCA 2001). The exemption of worker's compensation claims from claims of creditors does not extend to a claim based on an award of child support. *Bryant v. Bryant*, 621 So. 2d 574 (Fla.2d DCA 1993). Moreover, a child support obligation is not a debt. *Gibson v. Bennett*, 561 So. 2d 565 (Fla. 1990). The Florida Court of Appeals also acknowledged the 1996 amendment to the non-alienation provisions of the Social Security Act (*see* 42 U.S.C. 659) which, it noted, had been held to have impliedly repealed the non-alienation provision of the LHWCA with regard to delinquent support obligations. *See Moyle v. Director, OWCP*, 147 F.3d 1116 (9th Cir. 1998), 32 BRBS 107(CRT).

[Topic 16.1 Assignment and Exemption from Claims of Creditors–Generally; 16.2 Compensation Cannot be Assigned; 16.3 Compensation is Exempt from Creditor Claims; 16.4 Garnishment]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Consolidation Coal Co. v. Director, OWCP [Kramer]*, ___ F.3d ___, Case No. 01-4398 (3d Cir. Sept. 24, 2002)[1], the court upheld the ALJ's award of benefits based on a preponderance of the autopsy evidence. Employer maintained that the ALJ improperly considered an autopsy report which did not contain a microscopic description of the lungs in violation of the quality standards at 20 C.F.R. § 718.106(a). Citing to the Board's decision in *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113, 1-114 and 1-115 (1988), the court concluded that, "[a]lthough the regulations require that the report include a microscopic description of the lungs, they contain no express requirements in the form or nature thereof." The court noted that the autopsy report "stated that the microscopic findings were 'consistent with', *i.e.*, confirmed, the gross autopsy findings, and incorporated by reference the detailed findings contained elsewhere in the report." As a result, the court concluded that the autopsy report was in compliance with § 718.106 of the regulations.

Employer further challenged that pneumoconiosis was progressive in this case because the miner's pulmonary function and blood gas studies, up to two and one-half years preceding his death, were within normal limits such that pneumoconiosis could not have hastened the miner's death. Employer noted that the miner was diagnosed with colon cancer, which had metastasized to his liver and lungs and which caused

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[1] The court noted that the parties stipulated in briefs before the ALJ that the miner was last employed in the coal mines in West Virginia, which falls within the jurisdiction of the Fourth Circuit. However, Employer appealed in the Third Circuit based on Claimant's previous coal mine employment in Pennsylvania. The Third Circuit considered the appeal on the merits, but cited to Fourth Circuit, as well as its own, case law.

the miner's death. The court stated that "the tenet that pneumoconiosis is non-progressive is simply inconsistent with the 'assumption of [disease] progressivity that underlies much of the statutory regime.'" Moreover, the court stated that, even assuming that the disease was not progressive, the absence of a "clinically significant" pulmonary impairment two and one-half years prior to the miner's death "certainly does not establish that Kramer had incurred no damage to his lung tissue and no pulmonary burden of any degree whatsoever as a result of his occupational exposure." The court further noted that "nothing in the evidence that Consolidation points to would negate the conclusion that a preexisting pulmonary burden, albeit insufficient standing alone to result in measurable loss of lung function, could nonetheless in combination with a further affront to the pulmonary system through advancing cancer have decreased to some degree the lungs' ability to continue to compensate."

[**weighing autopsy evidence; progressivity of pneumoconiosis**]

By unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(unpub.)[2], the Sixth Circuit held that a subsequent claim filed by a miner under 20 C.F.R. § 725.309 is not barred by the three-year statute of limitations at § 725.308(a) because denial of the miner's first claim on grounds that he did not suffer from pneumoconiosis "necessarily renders any prior medical opinion to the contrary invalid . . .." The court reaffirmed its holding in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), that the three year statute of limitations does apply to subsequent claims. However, *Kirk* court also stated that prior medical opinions in the miner's favor, but which were found "premature" because the weight of the evidence did not support entitlement in an earlier claim, were "effective to begin the statutory period." The *Dukes* court concluded that this was *dicta* and held otherwise. Specifically, the *Dukes* court adopted the Tenth Circuit's holding in *Wyoming Fuel Co. v. Director, OWCP [Bandolino]*, 90 F.3d 1502, 1507 (10th Cir. 1996) and concluded the following:

> We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a mis-diagnosis does not equate to a 'medical determination' under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a *proper* medical determination.

Slip op. at 5.

[**three year statute of limitations as applied to subsequent claims under § 725.309**]

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[2] On October 21, 2002, the Director filed a *Motion for Publication of Unpublished Opinion* with the Sixth Circuit and requested that the court's decision in *Dukes* be published.

B. Benefits Review Board

In *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-__, BRB No. 01-0728 BLA (Sept. 24, 2002)(en banc)[3], a case arising in the Sixth Circuit, the Board remanded the case for a determination of whether the statute of limitations applied to the miner's subsequent claim which was filed under 20 C.F.R. § 725.309. Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), which was issued after the ALJ issued his decision and order, Employer argued that the miner's claim was time-barred pursuant to 20 C.F.R. § 725.308 because it was not filed within three years of the date that Dr. Kabani's medical determination of total disability due to pneumoconiosis was communicated to the miner. The Board initially noted that there is a presumption that every claim for benefits is timely filed, but Employer has the opportunity to rebut that presumption. It concluded that the ALJ must determine: (1) whether Dr. Kabani's opinion meets the requirements of 20 C.F.R. § 725.308(a); and (2) whether a medical opinion with meets the requirements of § 725.308, but like Dr. Kabani's opinion is rejected as unpersuasive in a prior claim proceeding, would prevent the statute of limitations from running. The Board concluded that, if the ALJ determines that the subsequent claim is untimely filed, then "he must give claimant the opportunity to prove that extraordinary circumstances exist that may preclude the dismissal of the claim. 20 C.F.R. § 725.308(c)."

With regard to weighing the medical evidence, the Board held that the ALJ "did not reconcile (a) physician's diagnosis of pneumoconiosis, based upon the positive x-ray and the miner's significant duration of coal dust exposure, with the fact that Dr. Baker's positive interpretation was reread as negative by a physician with superior qualifications." As a result, the Board directed that the ALJ "address whether this rereading impacts the physician's opinion and his diagnosis of pneumoconiosis."

Finally, the Board declined to apply the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), which required that a determination of the presence of pneumoconiosis be based on weighing all types of evidence under 20 C.F.R. § 718.202 together. Rather, the Board noted that "the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis."

The Board issued a related decision in *Abshire v. D&L Coal Co.*, 22 B.L.R. 1-__, BRB No. 01-0827 BLA (Sept. 30, 2002)(en banc), a case also arising in the Sixth Circuit.

[three year statute of limitations as applied to subsequent claims under § 725.309; weighing medical evidence–existence of pneumoconiosis]

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[3] On October 24, 2002, the Director filed a *Motion for Reconsideration* of the Board's decision in *Furgerson* and cited to the Sixth Circuit's unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) (unpub.) to argue that the Board's reliance on *Kirk* was error. On October 21, 2002, the Director also filed a *Motion for Publication of Unpublished Opinion* with the Sixth Circuit and requested that the court's decision in *Dukes* be published.